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TOWARD A HISTORY OF THE LEGALIZATION OF AMERICAN LEGAL ETHICS—I. ORIGINS

CHARLES W. WOLFRAM†

Looking across the realm of American legal ethics at the beginning of the twenty-first century, we take it for granted that the sheer force of law strictly constrains lawyers in many ways in their role as such. A lawyer can readily be held personally accountable in a formal legal action and forced to provide monetary relief or undergo other remedies for a long list of lawyer wrongs committed against a client and for many committed against a non-client. To catalogue all the bases of relief and remedies available would be tedious, but unless the task were done with something approaching tediousness, it would be substantially incomplete. Remedies that are today routinely made available by statute and common law against lawyers range widely across the law of remedies: forfeiture of the lawyer's claim for a fee; recovery of damages for legal malpractice (bolstered by supplementary claims made on fiduciary breach or contract theories); injunctive relief; orders compelling the lawyer's disqualification; and other damage actions or recoveries allowed under a significant number of statutory arrangements.1 Moreover, it is now well established in many American jurisdictions that claimants in any and all such litigation can invoke a theory of breach of duty that rests at least in some important way on a provision of a lawyer code.2

The lawyer codes themselves, of course, were designed primarily, and indeed are most frequently used, to measure the propriety of a lawyer's conduct

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1. See generally Restatement of the Law Governing Lawyers § 6 (2000) ("Restatement") (cataloging the most important "judicial remedies available to a client or nonclient for lawyer wrongs").

2. See id at § 52(2) and cmt f.
for the purposes of state sanctioned professional discipline.³ That type of legal enforcement takes place in almost all American jurisdictions through a governmental administrative agency that dispenses professional discipline subject to court review.⁴ Professional discipline itself is a process that in most jurisdictions is now under only the indirect control of lawyers and their bar associations. While lawyer discipline was once scandalously under enforced⁵ and is still criticized by many as lax, there is no doubt that its incidence has increased significantly in the past thirty years. More than civil sanctions are involved; in recent years, lawyers have been increasingly subject to criminal prosecution often for violating criminal restrictions on certain activities occurring in the course of law practice itself.⁶ Without a doubt, lawyers today are heavily regulated by law.

Such a level of legal regulation of lawyers was hardly inevitable at the outset of the grand American experiment in constitutional self-government in 1787,⁷ indeed it was hardly imaginable. During colonial times and for almost two hundred years after the American revolution, lawyers practiced relatively free of anything like the intricate constraints of law that now hold lawyers fast. Indeed, we can rest assured that if the foregoing snapshot of thorough going legal regulation of lawyers were presented to a knowledgeable lawyer-Founder in 1787⁸ as a reliable glimpse into the future, he⁹ would have recoiled in disbelief, and very likely in horror, at the extent to which regulation several generations later would grip the supposedly independent practice of law. Again, if the same picture were presented near the middle of the nineteenth century to Alexis de Tocqueville—the French advocate, magistrate, statesman, and traveler—he too would have balked at the accuracy of a description that saw the aristocrats of American soci-

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³. On the discipline of lawyers generally, see Restatement, topic c, introd note (cited in note 1) ( canvassing the system of professional discipline of lawyers); Charles W. Wolfram, Modern Legal Ethics § 3.1 (West 1986).


⁵. Elements of the legal profession have occasionally organized “wake-up calls” for vastly improved and more effective lawyer discipline. Perhaps the most well known was the so-called “Clark Report” named after its chairman Tom Clark, a then sitting justice of the United States Supreme Court. ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations (1970) (“Clark Report”).


⁸. More than half of the Founders were lawyers. See Lawrence M. Friedman, A History of American Law 303 (Simon & Schuster 2d ed 1985).

⁹. All the Founders were male, and I hence refer to the mythical Founder as “he.” The maleness of Revolutionary lawyers was hardly inevitable. An historian has recently shown that many women were lawyers in early colonial times. Many of them were fully credentialed and pursued careers as successful practitioners. See Karen B. Morello, The Invisible Bar: The Woman Lawyer in America, 1638 to the Present 3-38 (Random House 1986).
and politics so bound by the constraints of the legal system, a system that de Tocqueville knew the legal profession had largely molded and which they exploited for financial reward. The same would generally hold true at the end of the nineteenth century and indeed until well into the twentieth century.

My effort here will primarily describe the almost perfunctory legal regulation of American lawyers' professional work in times now past. In a future article, I attempt to explain the origins and immediate causes of the quite recent move to stringent regulation. I do so primarily by outlining the limited state of professional regulation in the United States prior to a somewhat arbitrarily chosen and quite recent year, 1970.

Lawyers practicing in the parts of the British North American colonies that became the United States were hardly subject to regulation by law in the same way and to the same extent that modern American lawyers are regulated. However, there are scant indications that they were not entirely immune from the law's reach. The examples that have survived suggest that legal regulation was episodic, almost entirely disorganized and reactive, sometimes heavy handedly political, and perhaps readily evaded. There were, to be sure, spikes of anti-lawyer legislation and ordinances in the American colonies; but those were probably merely examples of the periodic (and often opportunistic) anti-lawyer sentiment that has beset the Anglo-American legal profession since its origins in thirteenth-century England. In short, there was little in the pre-Constitutional period to suggest that lawyers would one day be under meaningful and constant legal scrutiny.

Those conclusions about pre-revolutionary law practice are supportable despite the lack of high quality general history of lawyer regulation in America. The history of lawyer regulation, even when compared to the rarely successful attempts to write good general histories of American law practice, remains rela-
tively unexplored by professional historians. The best existing general account of the history of American lawyers, that of Professor J. Willard Hurst in The Growth of American Law, devotes over a quarter of its pages to a history of American lawyers and their work but mentions the history of lawyer discipline and regulation only in passing. Professor Lawrence M. Friedman devotes two chapters to American lawyers in his monumental general history of American law and another chapter to the organized bar, but again without more than occasional and passing reference to the regulation of lawyers by law. To date, historians of the legal profession have dipped into only some of what I suspect is a rich lode of historical materials reflecting the ways in which the practice of lawyers was regulated.

From existing historical evidence, for the most part it appears that colonial lawyers in their roles as such were not the object of significant regulation outside of the process of admission to practice and the occasional regulation of their

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17. Id at ch 8.
fees.\textsuperscript{20} Instead, with the exception of the early Puritan colonies whose laws were explicitly designed to be operated without the intermeddling of lawyers,\textsuperscript{21} colonial lawyers seem to have functioned much as did the Roman jurist consults,\textsuperscript{22} if often with mud on their boots, ruder manners, and legal matters that were much more likely to be minor in nature.\textsuperscript{23} Particularly in the late colonial period, American lawyers were relatively few in number (something on the order of one lawyer to every thousand persons)\textsuperscript{24} and primarily of the gentry class.\textsuperscript{25} They were largely independent of the government,\textsuperscript{26} particularly as the incipient nation headed toward revolution,\textsuperscript{27} and certainly were not state employees. Unlike the alleged practice of Roman jurists, they did take fees. Also quite unlike at least the fabled high-minded operating style of Roman jurists, they were workaday lawyers dealing with the often trivial and untidy messes left by clients and with some transactional work primarily involving real estate and collection (mainly on behalf of English merchants, but increasingly on behalf of community members).

In the British American colonies there was, of course, a recognized institution of professional discipline that in some of its features resembles modern disbarment and suspension, except that the process by which it was imposed was significantly different from modern disciplinary procedures. While no statistics exist, discipline seems to have been employed only rarely. That process and

\begin{footnotesize}
\begin{enumerate}
\item[20.] See Leubsdorf, \textit{47 Law & Contemp Probs} 9 (cited in note 18).
\item[21.] See Botein, \textit{The Legal Profession in Colonial North America} at 130-33 (cited in note 19) (tracing seventeenth-century history of anti-lawyer politics in Massachusetts and colonies influenced by its model of clergy-run government).
\item[22.] See Alan Watson and Khaled Abou E. Fadl, \textit{Fox Hunting, Pheasant Shooting, and Comparative Law}, 48 Am J Comp L 1, 3-4 (2000) (describing the nongovernmental posture of the "law" created by the Roman jurists). See also Alan Watson, \textit{The Spirit of Roman Law} 206 et seq (Georgia 1995). On the attractiveness to early western lawyers generally of the model of the Roman lawyer, see, for example, Wilfrid Prest, \textit{Introduction, in Lawyers in Early Modern Europe and America} at 12 (cited in note 19). Roman lawyers such as Cicero were endlessly quoted and much admired by colonial and post-revolutionary American lawyers. The same was true in England at least as early as the sixteenth century. See Wilfrid R. Prest, \textit{The Rise of the Barristers} 315 (Clarendon 1986).
\item[24.] See Lawrence M. Friedman, \textit{American Law: An Introduction} 267-68 (W.W. Norton rev ed 1998) (citing data indicating that the per capita population of American lawyers at the time of the American revolution was far lower than it would become by 1840 and that both figures were far lower than the present ratio).
\item[25.] Early colonial lawyers apparently had less social status and occupational prestige. See generally Friedman, \textit{A History of American Law} at 94-96 (cited in note 8); Botein, \textit{The Legal Profession in Colonial North America} at 135-37 (cited in note 19).
\item[26.] Among other things, the colonial courts and other possible sources of British imperial influence were generally unable or unwilling to generate sufficient legal business to keep lawyers fully occupied, well paid, and hence of a favorable political mind. This led many lawyers, such as John Adams, to think in explicitly calculating ways about the possibility of attracting a colonialist-based clientele by "cut[ting] a flash" (Adams' youthful phrase to his diary) in elective politics by challenging prerogative power. See Botein, \textit{The Legal Profession in Colonial North America} at 139 (cited in note 19).
\item[27.] See Lemmings, \textit{Professors of the Law} at 243-47 (cited in note 23).
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its relative disuse continued after the American revolution with little variation until well into the latter part of the twentieth century.

Not surprisingly, the method of dealing with miscreant lawyers in the colonies was borrowed by colonial courts directly from England where it was already centuries old. English common law courts had regularly used the concept of disbarment and imposed the sanction.\(^{28}\) The colonial disbarment procedure was to continue through the 1960s with hardly any significant alteration other than the introduction of bar associations as the complainant in the late nineteenth century and greater attention to the requirements of due process. Aside from those innovations, however, one viewing a disbarment proceeding in the fifth decade of the twentieth century could have followed the proceedings rather closely if aided by only a copy of a similar proceeding in England or British North America from two or three centuries earlier. So close and self-conscious was the modeling on England that one can find sprinkled throughout American disciplinary decisions of the nineteenth century citations to decisions of English courts, cited as if they were as authoritative as the decisions of another American jurisdiction.

A typical disbarment proceeding began with charges of misconduct contained in an order to show cause issued to the lawyer\(^{29}\) complaining of more or less specified conduct and calling on the lawyer to show cause why that conduct should not result in the lawyer’s disbarment.\(^{30}\) This process was carried directly from England where it had long been in use. The petition seeking the order usually was required to be made under oath or at least accompanied by sworn affidavits or similar evidence.\(^{31}\) The proceeding was generally conducted as an

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28. See, for example, Paul Brand, *The Origins of the English Legal Profession* ch 8 (Blackwell 1992) (recounting the system of lawyer discipline during the reign of Edward I); J.H. Baker, *The English Legal Profession, 1450-1550*, in Wilfrid Prest, ed, *Lawyers in Early Modern Europe and America* 24 (Croom Helm 1981). Professor Baker here recites the common tale, which might be myth, that “an attorney guilty of gross misconduct could be put from the roll [of admitted attorneys maintained by the law courts] and physically ‘cast over the bar.’” Baker cites a statute from the fourth year of the reign of Henry IV but gives no citation supporting the assertion that disbarment involved both corporeal and symbolic elements.

29. However, in *Walker v Commonwealth*, 71 Ky 86, 1871 WL 6595 (Ky 1871), the court reversed and remanded the judgment of a city court disbarring a lawyer in a proceeding initiated by a rule to show cause on the ground that the proper method of proceeding when the lawyer’s conduct did not occur in the presence of the court was by “complaint or information.” Id at *6.

30. See, for example, *In re Perry*, 36 NY 651 (NY 1867) (stating that proceeding to strike lawyer from roll of attorneys and counselors of court was properly begun by order to show cause founded on papers presenting charges); *Secton v Stowell*, 11 Paige Ch 526 (NY Ch 1845) (describing show-cause procedures required by statute). See generally Edward Weeks, *Attorneys and Counsellors at Law* § 83 at 155 (S. Whitney 1878) (stating that the show-cause order for lawyer discipline was common law procedure used in both American and British courts). The ancient common law show-cause order system remains in use in federal courts as a means of initiating discipline of lawyers. See, for example, *In re Lightfoot*, 217 F3d 914, 915 (7th Cir 2000) (noting how disciplinary proceedings, here unusually against a federal prosecutor, had been initiated by such an order).

31. See, for example, *Ex parte Burr*, 22 US (9 Wheat) 529, 530 (1824) (memorandum op) (holding that while “the charges, in a regular complaint against an attorney, ought not to be received and acted on, unless made on oath[,]” the requirement of an oath here was waived).
equity suit or more specifically as a contempt proceeding. Most importantly, that meant that the court invariably tried charges without a jury. Despite the suggestion in the writ, the lawyer was required to respond to the charges in the usual way of a civil litigant and the petitioning party was required to prove its case with evidence. The proceeding sometimes entailed appointment of a committee of lawyers or a referee instructed to conduct an investigation and file a report. The disbarment proceedings would then end with an order entered by a judge or sometimes all the judges of a multiple-judge court. Once charges were established, the customary sanction was disbarment with some decisions imposing a period of suspension for offenses perceived as less egregious. Lesser sanctions were quite rare with some courts denying that they possessed the power to impose any sanction less than suspension. The severity of the sanction itself would suggest that many courts would be reluctant to impose it except in extreme situations.

A variation on the typical show-cause disbarment proceeding was a summary proceeding to disbar in contempt, the distinguishing hallmark being the absence of a formal notice of charges or much of an opportunity to defend on the part of the lawyer. Contempt disbarment was available when the lawyer's wrongful acts were committed in the presence of the court, a somewhat elastic concept. The contempt disbarment procedure was apparently rarely used, to the lament of at least one court. In some states, nonetheless, summary disbarment without notice or hearing would follow after a criminal conviction of a lawyer.37

32. That was not invariably true. Texas has historically provided for jury trial in all civil matters, including disbarment and other lawyer-disciplinary proceedings. See Hanners v State Bar, 860 SW2d 903, 911 (Tex Civ App 1993) (noting Texas statutory bar on abolition of jury trial in lawyer-disciplinary proceedings). The same is true in Georgia by court rule. See Georgia Bar Rule 4-214.

33. The lawyers would be appointed as court functionaries, “commissioners,” or the like. See, for example, In re Kirby, 73 NW 92, 93 (SD 1897) (describing statute setting up such a referral to a “committee of three reputable attorneys and counselors” with judgment to be entered on their report).

34. See, for example, Ex parte Mason, 43 P 651, 653 (Or 1896) (distinguishing British authority and holding that lawyer convicted of misdemeanor of criminal libel could not be issued mere admonition but must be either suspended or disbarred).

35. See, for example, Ex parte Burr, 4 F Cas 791, 794 (CCD DC 1823), aff'd on other grounds, 22 US (9 Wheat) 529 (1824) (stating that court will provide summary attachment for contempt of an opposing lawyer at the request of a party injured “for . . . gross and palpable abuses” “except only in his way of business as attorney; but will leave the party to his ordinary remedy by action [otherwise]”).

36. Rice v Commonwealth, 57 Ky 472, 482, 1857 WL 4418 at *8 (Ky 1857) (stating, in course of affirming summary disbarment of lawyer who had stood by while a document that he knew to be forged was offered into evidence by co-counsel, that courts have the duty to make summary charges against lawyer committing official misconduct; “it is much to be regretted that this duty, which the law devolves upon the courts of the country, is so little regarded, and that the obligations which it imposes are so frequently overlooked or neglected.”).

37. See, for example, In re Bloor, 52 P 779 (Mont 1898) (per curiam) (“We believe no complaint or accusation in writing is necessary where an attorney and counselor has been convicted of a felony, or a misdemeanor involving moral turpitude, and where the record of conviction has been duly certified to this court. . . .”).
In the more typical procedure, the papers seeking an order to show cause were filed by a lawyer or group of lawyers or a judge before whom allegedly offensive conduct had occurred. Bar associations as known in the late nineteenth and twentieth century did not exist in colonial times. At most, early lawyer organizations were mainly social clubs; involvement of bar associations or standing bar committees in professional discipline became common only near the end of the nineteenth century and in some states not until well into the twentieth. Those later proceedings were brought by bar associations as the recognized and authoritative prosecutorial body. The individual lawyers and informal “bars” that filed disbarment proceedings in the eighteenth and nineteenth centuries were more likely volunteers, perhaps serving at the behest of a judge or following a complaint from a disgruntled client or adversary.

Disbarment had a severe drawback in colonial America. Despite the absence of jury trials, centering the discipline of lawyers in colonial courts incurred a built in regulatory limitation because of the local politics of colonialism. The royal courts in all colonies were widely viewed in local communities as the willing instruments of an oppressive, distant and oblivious set of royal ministers. Thus, in all but clear cases of lawyer skullduggery attempts to discipline lawyers—as with other attempts to impose legal constraints on the restless colonists—must have had at best a mixed professional and popular reception. Indeed, in their chronically heavy handed way, the Crown’s colonial representatives seem to have resorted to disbarment more than occasionally to punish or neutralize lawyers who were perceived as politically out-of-step or otherwise uncooperative. Such was the fate, for example, of John Adams’ good friend and fellow patriot Joseph Hawley, a leader of the patriot party in western Massachusetts who was disbarred (but as it turned out only temporarily) for publishing newspaper attacks on the royal judges. Such attempts to discipline lawyers must have aroused at least as much colonist sympathy as they did political approbation for colonial administrators. Thus, throughout most of the colonial period, able administrators and judges would have appreciated that a disbarment proceeding brought in any but a clear case of lawyer misconduct and of a kind

38. Early disbarment proceedings were sometimes initiated by a petition filed by an impromptu meeting of members of the bar of a court preferring charges against a colleague. See, for example, Beene v Slate, 22 Ark 149, 157 (Ark 1860) (describing such a process).

39. In some states, there was resistance by courts to apparently volunteer efforts by nascent bar associations to become involved in lawyer discipline matters. See, for example, In re McCarthy, 51 NW 963 (Mich 1879) (suggesting that a disciplinary proceeding involving a lawyer convicted of a felony “had nothing to do with” the bar association of respondent’s city, a committee of which had brought the disbarment proceeding).

40. L. Kinvin Wroth and Hiller B. Zobel, eds, 1 Legal Papers of John Adams ci (1965), citing E. Francis Brown and Joseph Hawley, Colonial Radical (NY 1931). According to the charges against him, Hawley was disbarred for newspaper publications during the late 1760s that “contain[ed] divers injurious and scandalous Reflections on several of the Justices of this Court, for what they did in Court, and as Justices thereof.” Id. Hawley was readmitted to practice after promising future good behavior.
likely to be condemned by all shades of political opinion would incur an unacceptable risk of further estranging the colonials. Probably for that reason, professional discipline seems to have been generally reserved for cases of thorough going lawyer scoundrels.\footnote{1}{See Botein, The Legal Profession in Colonial North America at 129 (cited in note 19).}

That limitation was removed with the independence gained through the American revolution. However, there was no detectable increase in the discipline of lawyers in the new post-revolutionary states,\footnote{2}{It goes without saying in the text, but it was fundamental to the ensuing scheme of lawyer regulation that disciplinary jurisdiction was universally assumed in post-revolutionary times to be the business of the states and not the federal government.} despite the fact that the number of lawyers increased dramatically in the first half of the nineteenth century.\footnote{3}{See Friedman, American Law at 268 (cited in note 24).} In fact, rapid growth in the number of lawyers suggests that the informal controls lawyers formerly exerted over their colleagues (and hence over such matters as admission to practice) were substantially weakened. There were no activist bar associations or similar prosecutorial agencies that stood ready to sustain a disciplinary charge through to an order of disbarment. Prosecution thus required a highly motivated volunteer lawyer or judge to press the charges \textit{pro bono publico}, although several decisions suggest that courts in some states were able to invoke the aid of a public prosecuting attorney.\footnote{4}{See, for example, \textit{In re Paakiki}, 8 Haw 518 (Hawaii 1892) (indicating that the deputy attorney general had served as the lawyer on motion to show cause).}

In addition to the show-cause type of disbarment, which was by far the most common, at least two other types of disbarment proceedings were known, at least in some jurisdictions during some periods of time. First, in apparently rare instances, a court would impose disbarment as a sanction for \textit{contempt} following only summary proceedings, which would not always provide the lawyer an opportunity to be heard prior to imposition of the disbarment order.\footnote{5}{See, for example, \textit{Randall v Brigham}, 74 US (7 Wall) 523, 540 (1868) (Field in dictum) (disbarment "proceedings against attorneys for malpractice, or any unprofessional conduct" may be taken without notice and opportunity to be heard "for matters occurring in open court, in the presence of the judges"); \textit{In re Campbell}, 2 Haw 27 (Hawaii 1857) (denying motion to vacate summary order disbarring lawyer held in contempt for writing libelous letter to judge in a pending proceeding).} There are indications that such contempt disbarments were regarded more as punishment for a specific offensive act rather than as a long-term matter, which might have made it equivalent to disbarment after the customarily more elaborate procedures were provided.\footnote{6}{Compare, for example, \textit{Ex Parte Tillinghast}, 29 US 108 (1830) (memorandum op) (admitting lawyer to practice before United States Supreme Court despite disbarment for contempt in federal court in the Northern District of New York, on ground that Supreme Court should not "punish" lawyer again for single offense).} One may also speculate that other courts might have hesitated to take such disbarments at face value because of the possible hotblooded reaction of the sanction-imposing judge as a human consequence of having witnessed—or worse having been the object of—the lawyer's outrageous
Some nineteenth-century courts refused to permit such summary disciplinary proceedings at all. Today, of course, summary proceedings of the kind found in many of those earlier decisions would undoubtedly be set aside because they lacked due process in the absence of constitutionally mandatory notice and an opportunity to be heard. The second type of disbarment was private litigant disbarment. That was found, apparently, only in Kentucky under a nineteenth-century statute empowering a client that sued a lawyer for return of the client's funds to have the trial court enter an order that the lawyer be suspended from law practice until he repaid the adjudicated debt. Today, of course, summary proceedings of the kind found in many of those earlier decisions would undoubtedly be set aside because they lacked due process in the absence of constitutionally mandatory notice and an opportunity to be heard. The second type of disbarment was private litigant disbarment. That was found, apparently, only in Kentucky under a nineteenth-century statute empowering a client that sued a lawyer for return of the client's funds to have the trial court enter an order that the lawyer be suspended from law practice until he repaid the adjudicated debt.

The major restraint, the show-cause disbarment proceeding, was subject to the ever present problem of geographical limitations on the powers of courts. Given the possibilities for (westward) migration, a scoundrel lawyer could evade a serious threat of discipline by quickly moving beyond the jurisdiction of the court in which the lawyer was admitted before the proceeding was started. Initiating the order to show cause proceeding, as with any civil proceeding, required serving process on the subject lawyer locally. Flight after such service could lead to a default judgment of disbarment, but flight ahead of the process server would frustrate the proceeding. Flight would successfully foil discipline because of a peculiarity that survives, although in altered form, in most states to this day. Admission in one state was, and is, limited to that state and only that state. In fact, in some states admission was on a county-by-county basis. The entire (and only) point of a disbarment proceeding was to strip away that status as an admitted lawyer. Thus, successful evasion on the part of an accused lawyer might entail nothing more than removing to an adjoining county or state, or farther away depending on local rules on service of process. Unlike debts left behind, which could be forwarded for collection to any place where the migratory debtor could be found, in some states charges of professional misconduct were not similarly portable "chooses in action." The states bore such limitations, and the solution was to employ substitute means of notification. Under procedural rules used in modern lawyer discipline, a failure to serve a lawyer admitted locally can be supplemented by other forms of notification, such as mailing notice to the lawyer's last known place of business or residence. Such substituted service suffices to initiate modern discipline.

47. See, for example, Beene, 22 Ark at 157 (insisting that whether discipline is sought for violations under disbarment statute or for acts committed in the presence of the court usual procedures of show-cause order and opportunity to respond must be followed).
48. See Wilson v Popham, 15 SW 859 (Ky 1891).
49. That much has now changed. Under procedural rules used in modern lawyer discipline, a failure to serve a lawyer admitted locally can be supplemented by other forms of notification, such as mailing notice to the lawyer's last known place of business or residence. Such substituted service suffices to initiate modern discipline. See generally ABA Model Rules of Lawyer Disciplinary Enforcement Rule 13(A) (cited in note 4).
51. See Clark Report at 157 (cited in note 5) (reporting ability of lawyer disbarred in one county to practice in neighboring county).
52. Collection of such forwarded debts was a significant part of the work of frontier lawyers. See Friedman, A History of American Law at 642 (cited in note 8).
53. See Clark Report at 106-09 (cited in note 5) (reporting problem in several states as late as the 1960s of disciplinary systems without power to initiate disciplinary proceedings against a lawyer without
on their power over lawyers for a very long time. The concerned jurisdiction was apparently content with the thought that any repetition of the outrage by the same miscreant lawyer on the lam would at least not occur locally.

The substantive grounds on which post-revolutionary lawyers might be disciplined remained much as they had prior to independence. Reliance was placed primarily upon what the courts uniformly projected as a community-wide sense of decorum and good character, instead of the modern emphasis upon a codal formulation of all grounds for lawyer discipline. In the first place it was important that before and for over a hundred years after the revolution there were no "codes" of prohibited and permitted conduct. Courts would occasionally refer to the oath required of lawyers on admission to the bar, but those oaths were invariably quite general in form and could hardly have provided either guidance to a questioning lawyer or restraint on a court inclined otherwise to impose discipline.

The first lawyer code with any possible disciplinary relevance was the 1908 ABA Canons of Ethics. In some post-revolutionary states, a lawyer who looked might find a statute proscribing certain conduct. However, invariably the statute provided only a very general warning, such as the proscription in a New York statute against "any deceit, malpractice, crime or misdemeanor" or the condemnation in a 1715 Maryland statute of "any indecent liberties to the lessening of the grandeur and authority of the [magistrate's] respective courts." Courts refused to read a statutory specification of grounds as an implied limitation on what they conceived to be their broad and ample common law powers to impose discipline on lawyers. Jurisdictions seem to have contented them-

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54. See, for example, Leigb's Case, 15 Va 468, 1810 WL 547 (Va 1810).
55. See, for example, Bank of New York v Stryker, 1 Wheeler Ct Cas 330, 333 (NY Sup Ct 1816) ("every lawyer takes the oath of office, which is, that he will truly and honestly demean himself in the practice of an attorney, solicitor, or counsel, as the case may be. If he acts otherwise, he falsifies his oath, and ought to be struck from the rolls. He cannot afterwards be believed.").
56. See p. 484 below.
57. In re Perry, 36 NY at 653 (describing grounds stated in NY Code of Civil Procedure for disbarment or suspension of lawyer). See also, for example, Bar Assn of Boston v Greenwood, 46 NE 568, 574 (Mass 1897) (quoting Massachusetts statute empowering court to discipline lawyer for "any deceit, malpractice, or other gross misconduct.").
58. See Laws of the Colony of Maryland ch 48 § 12 (1715), cited and quoted in Ex parte Burr, 4 F Cas at 793. See also, for example, Pa Act of April 14, 1834, cited and quoted in Ex parte Steinman, 95 Pa 220, 237 (1880) (Chief Justice Sharwood's opinion quoting a statute providing for disbarment or suspension of a lawyer who "shall misbehave himself in his office of attorney").
59. See, for example, Ex parte Wall, 107 US 265 (1883); Been, 22 Ark at 157 (citing authority) (stating that apparently "in the exercise of its inherent power" "where a statute enumerates certain offences for which an attorney may be disbarred, it does not exclude the power of the court to strike them from the roll
selves with the position that no more precise specification of prohibited wrongs was necessary because a lawyer of suitable learning and character would be well aware of what was permitted and prohibited. Proper professional deportment was something that was thought to accompany virtue, or at least something to be learned during apprenticeship to a reputable lawyer. Such a period of “reading law” was the method by which the great majority of lawyers prepared for admission until after the Civil War, when most of the oldest law schools were founded. Procedurally, however, courts usually required greater specificity in the charges filed in individual cases, obviously to provide the accused lawyer adequate notice of the nature of the evidence that would be brought forward.60

With respect to the grounds for discipline that actually produced sanctions, well into the twentieth century most court decisions on professional discipline of lawyers sort into two short stacks. In one stack are disbarment proceedings brought after the lawyer was convicted in the criminal courts of a serious offense.61 Disbarment would be sought because of the conviction, presumably based on the underlying conduct but with some apparent confusion over whether the fact of conviction alone (and hence regardless of the underlying conduct) was not the chief wrong because of the embarrassment caused to the bench and bar by the conviction itself. That view is supported by the many decisions refusing to consider a petition to disbar a lawyer for criminal acts until the lawyer was indicted and convicted of the crime.62 As with the modern view,63 the lawyer-defendant would not be permitted in the disciplinary proceeding to controvert facts of the offense that had been found against the lawyer in the criminal proceeding.64 In fact, disciplinary materials from colonial times until

60. An obviously problematical test case was In re Mills, 1 Mich at 398. The Michigan Supreme Court first held that a charge against a lawyer that he was “of notoriously bad character” was too general: “Specific acts should be charged, so as to give the respondent an opportunity of answering them.” Id. But the court went on to hold that the charging papers contained a sufficiently specific charge that the “reputation of [the lawyer] for truth and veracity is so notoriously bad that he is not to be believed under oath.” Id.

61. See, for example, In re Kirby, 73 NW 92 (SD 1897) (disbarment of lawyer following conviction for felony of receiving property of the United States with intent to convert it for his own use).

62. See, for example, Ex parte Wall, 107 US 265 (1883) (based on extensive review of American and British authorities stating that absent unusual circumstances requiring earlier disposition, the court will not entertain discipline charges amounting to allegation of a serious crime before the lawyer is criminally prosecuted); In re Wellcome, 58 P 45, 47 (Mont 1899) (same); In re Anonymous, 7 NJL 162 (NJ 1824) (refusing to entertain application for disbarment on that ground although suggesting a different approach if the allegedly criminal acts (here larceny) constituted contempt of court or “malpractice”).

63. Restatement at § 5, cmt 9 (cited in note 1).

64. See generally Edward P. Weeks, Attorney and Counsellors at Law 162, 166 (2d ed 1892).
1970 seem to reveal that cases of conviction-then-disbarment constituted a large percentage of all disciplinary proceedings. The crimes, naturally, ranged widely from murder, robbery, and similarly outrageous offenses—with many of the offenses stemming from fraud and theft—to occasional but controversial allegations involving either politics or personal beliefs. As with the modern view, a lawyer’s acquittal, satisfaction of a sentence, or pardon did not prevent the maintenance of a disbarment proceeding involving conduct that also constituted a criminal offense.

The second and apparently less common type of disciplinary offense involved not a prior criminal conviction but grounds that, in most instances, both contemporaries and moderns would agree constituted plainly outrageous behavior of a similarly repugnant nature, notwithstanding that no conviction had (at least yet) been obtained. Bear in mind that for most of this period and in most places, there were no limitations on lawyer advertising or solicitation. Fixation on those matters of business competition came only in the twentieth century with the arrival of lawyer codes. Thus, the non-conviction offenses involved more clearly outrageous lawyer conduct, including much conduct that could (and perhaps later did) lead to the lawyer’s criminal conviction. Illustrative examples include the 1672 disbarment of a Maryland lawyer for falsifying a court’s writ; the 1832 disbarment of a New York lawyer for forging a court order; the 1879 disbarment of a Michigan lawyer for obtaining money under false pretenses; the 1898 disbarment of a New York lawyer for following conviction for felony of larceny by bailee; and the 1880 disbarment of a New York lawyer for falsifying a court’s writ.
enabled a husband to convince his wife that they were legally divorced; the 1889 suspension of a Wisconsin lawyer for two years for, among other things, instigating a suit seeking his former client’s land after the latter had rebuffed the lawyer’s demand for additional fees for securing the title to the same land; and the 1898 disbarment of a Minnesota lawyer for altering tax records in order to further litigation on behalf of his clients. A recurring non-criminal complaint of judges was that a cited lawyer repeatedly filed unfounded litigation.

Again there were disciplinary attempts that would strike many moderns as problematical if not outrageous, such as the 1639 disbarment of Thomas Lechford in the rigidly Puritan colony of Massachusetts Bay for attempting to plead according to the common law rather than the Ten Commandments. In fact, lawyer discipline opened a highly symbolic melodrama of resistance to British colonial authorities that was almost as celebrated as the Boston Tea Party. In 1735, New York City judge James DeLancey disbarred lawyers William Smith and James Alexander, who were defending the printer John Peter Zenger in one of the most notorious political trials of colonial North America.

Lawyers could also, of course, be held liable for damages or other types of civil relief in a suit by a client or (rarely) by a non-client. Again, with the excep-

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70. In re Peterson, 3 Paige Ch 510, 512 (NY Ch 1832). See also, for example, In re Anonymous, 2 Cow 589 (NY Sup Ct 1824) (lawyer subjected to body attachment and ordered suspended from practice unless he paid all costs of action that he commenced without having been retained to do so).

71. In re O, 42 NW 221, 226 (Wis 1889) (disbarment by trial court on conflict and other grounds reduced to suspension in view of youth of accused lawyer, small sums involved and “the confidence entertained of his reformation”).

72. In re Nunn, 76 NW 38 (Minn 1898) (disbarment on noted facts after taking of evidence by referee appointed by Supreme Court).

73. For example, during the late nineteenth century it was apparently a practice among some Nebraska lawyers for debtors to remove mortgage foreclosure actions from state to federal courts on the assertion that “on account of prejudice and local influence” a fair hearing could not be had in state courts, where the unfairness alleged was the refusal of the state courts to enforce a then repealed state statute that formerly had provided for an award of attorney fees to a prevailing mortgagor. See, for example, In re Breckenridge, 48 NW 142, 143 (Neb 1891) (on application for disbarment, imposing lesser sanction of admonition on finding that “several other attorneys seem to have done the same thing” and observing that this was a case of first impression).

74. Among other examples, see 1 Chroust, The Rise of the Legal Profession in America at 199 (cited in note 14) (suspension of Thomas Gordon in Province of New Jersey by Governor Cornbury in 1707 for opposition to governor, with reinstatement the following year under the successor governor).

75. Warren, A History of the American Bar at 68-69 (cited in note 14) (describing how Lechford was “debarred” “for going to the Jewry [jury] and pleading with them out of court,” with Lechford being readmitted after he “acknowledged he had overshot himself, and was sorry for it, promised to attend to his calling, and not to meddle with controversies.”).

tion of clear lawyer wrongdoing, such litigation seems to have been sparse until 1970. The general outline of a legal malpractice remedy was recognized rather early; the first reported decision employing a relatively modern doctrine to define the tort of legal malpractice came in a 1796 decision of the Virginia Supreme Court.\(^7\) Nonetheless, it appears that the law of legal malpractice and other bases of possible lawyer liability developed largely within the broader context of tort and contract law. In justifying legal malpractice awards, many courts in the latter part of the nineteenth century employed vocabulary that resonates more with notions of contract than with notions of relationship, unreasonable risk, or similar tort concepts.\(^7\) During this period, explanations of lawyer duties or liability generally contained limited judicial discussion of "fiduciary duties" and similarly lofty concepts, in contrast to more general talk in lawyer-liability opinions earlier in the century.\(^8\) That probably reflects a lack of the same kind of intense self-consciousness and pervasive "professional" awareness that now permeates not only bar associations but also much judicial conversation about the legal implications of lawyering.

In general, tort and contract remedies against lawyers remained comparatively dormant well past the middle of the twentieth century, at least when measured by today's statistics. The strategic situation confronting a client considering litigation against a former lawyer would have been daunting. Some commentators assert that a pervasive and well observed "conspiracy of silence" among lawyers allowed them to refuse to serve as either plaintiff's counsel or as

\(^7\) Stephens v White, 2 Va 203 (Va 1796) (affirming judgment for plaintiff against defendant lawyer who had caused client's lawsuit to be thrown out for failure to file a proper paper). See also, for example, Gilbert v Williams, 8 Mass 51, 1811 WL 1671 at *5 (Mass 1811) (ordering judgment for client against his former counsel for "unreasonable neglect, and a consequent loss, for which the defendant is accountable" for lawyer's failure to follow client's instructions on how to collect a debt).

\(^8\) Courts acknowledged as much. See, for example, Holmes v Peck, 1 RI 242, 245 (RI 1849) ("We recognize the principle, which subjects an Attorney for the want of ordinary skill and care in the management of the business entrusted to him, as any one else, who professes any other art or mystery.").
an expert witness for the client. Even if no such conspiracy existed, it is doubtful whether many additional malpractice cases would have been brought. Even if a plaintiff's lawyer and expert could have been found to testify for the plaintiff, because few states officially adopted the 1908 ABA Canons as a mandatory lawyer code until jurisdictions began to adopt lawyer codes modeled on the 1969 ABA Model Code of Professional Conduct, most possible malpractice claims would have devolved into open-ended swearing matches between experts. Further, the money was not there in most cases. Lawyers were not economically motivated to sue one another. To be sure, the contingent fee was sufficiently well accepted in many states by the beginning of the twentieth century to have given rise to a significant plaintiffs' bar. However, the prospect of significant reward to a lawyer suing another lawyer was absent. In addition to possible loss of referrals from other lawyers, a lawyer contemplating suing another must have appreciated that most lawyers were hardly "deep pocket" defendants. Until recent decades, the vast majority of lawyers practiced without legal malpractice insurance, and few lawyers had either professional or personal assets of a magnitude that would have warranted strenuous and expensive effort to recover a substantial judgment.

No very significant change occurred in lawyer regulation with the adoption of the first lawyer code, the ABA Canons of Ethics, in 1908. About the same time, some local bars were also adopting codes of professional ethics. Henry S. Drinker, in his Legal Ethics (1953), lists eleven states that had adopted such codes prior to the ABA's adoption of its Canons of Ethics in 1908 and several more in which such codes were then under active consideration. Those codes, including the 1908 Canons, were closely modeled on the Alabama code adopted in 1887. Drinker lists a number of additional states as also having enacted "codes of ethics," but the sources to which he refers bore little resemblance to at least

81. While impossible to document statistically, commentators have assumed the existence of such a "conspiracy." See, for example, Modern Legal Ethics at 207 (cited in note 3); Joseph C. Goulden, The Million Dollar Lawyers 243-44 (1981).
82. The two could not have been the same. A rule that has been enforced with rigor for all of the twentieth century is the "advocate-witness" prohibition against a lawyer testifying in an action in which the lawyer (or formerly a member of the lawyer's firm) appeared as advocate. See generally Restatement at § 99 (cited in note 1).
83. See Modern Legal Ethics § 2.6.2 at 55-56 (cited in note 3) (noting lack of official force of 1908 Canons except in the few states where court rule or, more rarely, decision made them binding on lawyers).
84. Acceptance of the contingent fee in the United States was fairly general by the end of the nineteenth century. See, for example, Edward Weeks, A Treatise on Attorneys and Counsellors at Law 717 (2d ed 1892). Maine, the last state to prohibit contingent fees, repealed its prohibitory statute only in 1965. See Modern Legal Ethics at 527 (cited in note 3).
85. See Modern Legal Ethics at 240 (cited in note 3) (stating that except for a few firms that obtained legal malpractice insurance through Lloyds of London such insurance was unknown in the United States prior to the Second World War).
86. Id at 23.
87. Id at 24.
88. Id.
the specificity of the Canons (to the limited extent to which the Canons can be so described). Those other "codes" were nothing more than a perfunctory and non-specific list of lawyer duties contained in the oath of admission prescribed by statute. Many of the oaths Drinker lists were based on the lawyer's oath set out in § 511 of the so-called Field Code of procedure, first recommended (but not adopted by the state legislature) in New York in 1850.89 The New York commission report indicates that the drafters translated the oath from the prescribed oath for advocates in the Canton of Geneva, lineage that Drinker acknowledges although he does not mention its more proximate source in the Field Code. The Field Code was widely influential and copied in the middle of the nineteenth century, particularly in California90 and other western states that based their procedural law on that of California.

The chief motivation for the ABA's adoption of the 1908 Canons was probably status seeking by the elite lawyers who constituted the minuscule membership of the ABA. There are indications that the ABA also intended the Canons to have an influence (if not direct application) in lawyer disciplinary actions.91 Only slowly did the Canons gain much currency as an enforceable specification of explicit grounds for discipline.92 It was rare for the Canons to be invoked in other kinds of litigation against lawyers, even in the rare instance of a disqualification motion. The American Bar Association itself was founded only in 1878, and then only as part (and hardly the first example) of a national and uniquely American phenomenon in which many occupational groups organized national associations to advance their interests, particularly, it seems, their social prestige.93 Much like the few bar organizations that existed in colonial and post-revolutionary times (and then died out),94 the ABA until well into the twentieth century functioned mainly as an exclusive social fraternal organization of high-status lawyers rather than as a broadly representative and unofficial regulatory body. Local bar associations such as the Association of the Bar of the City of

91. See Simeon E. Baldwin, The New American Code of Legal Ethics, 8 Col L Rev 541, 546 (1908) (article by former ABA president stating that "[t]he courts will hesitate less in enforcing the discipline of the bar, since professional misconduct will be, more than ever before, a sinning against the light."). For some decades after the ABA promulgated the Canons, most decisions held that a charge of failure to abide by one of the Canons was not a sufficient ground for disbarment. See, for example, In re Clifton, 196 P 670 (Idaho 1921) (refusing to enforce ABA Canons); Ringen v Ranes, 104 NE 1023, 1025 (Ill 1914). Compare Hunter v Troup, 146 NE 321, 324 (Ill 1925) (lawyer may be disciplined for not observing Canons).
92. See Modern Legal Ethics at 55-56 (cited in note 3).
94. Id.
New York, which predated the ABA by several years, supported and even participated as prosecutor in certain disbarment proceedings, but that activity seems to have produced, at most, episodic spikes of disciplinary activity by local bar associations that died down as a particular "crisis" perceived by the local bar had passed or was superseded on the bar's agenda by what was perceived to be more pressing business. For the most part, discipline of lawyers remained relatively rare, as it had been for a very long time in the United States and as was also the case during comparable periods in England.

CONCLUSION

Ultimately, a judgment whether lawyer regulation through professional discipline and civil remedies was extensive in pre-1970 America seems discernible. Lawyers in general were at small risk of discipline or civil litigation with respect to their professional work. While forms of relief (or, as they would have been called prior to the 1930s, causes of action) were established and even fairly well developed, institutional and legal-cultural barriers prevented their ready implementation.

A different question is whether this low level of legal regulation of lawyers was socially undesirable. At least one theoretically competing hypothesis would be that lawyers rarely transcended legal limits and thus rarely gave occasion for disbarment proceedings or lawsuits against them. Against such a possible hypothesis, however, stand two significant arguments: one from data and the other from a solemn judgment of the bar itself. The first is a tabulation of the number of reported American decisions dealing with legal malpractice in decades beginning in the 1790s prepared by the authors of the standard American treatise on legal malpractice, Ronald Mallen and Jeffrey Smith. Their graph reflects that the number of malpractice cases apparently remained quite flat and even fell on a per lawyer basis until the 1960s when it began to rise sharply. Unless the underlying claims can be dismissed as consisting mainly of nuisance suits of little substantive worth or one can hypothesize plausible reasons why lawyers in the last four decades of the twentieth century have been careless at a rate greatly in

96. Involvement of organized bar associations in pressing professional discipline charges appears only late in the nineteenth century. See, for example, Ex rel Colorado Bar Assn, 57 Pac 1079 (Colo 1899) (involving state bar association in prosecution); Bar Assn of Boston 46 NE 568 (Mass 1897) (city bar association); In re Nunn, 76 NW 38 (Minn 1898) (disbarment on information filed in the state's supreme court by discipline committee of county bar association).
97. See Chroust, The Rise of the Legal Profession in America at 157 n 65 (cited in note 14) ("Disbarments, like suspensions, were rather infrequent [in early eighteenth-century New York]").
98. See Richard L. Abel, The Legal Profession in England and Wales 133-34 (Blackwell 1988) (describing laxity in nineteenth-century discipline of barristers); id at 248-49 (similar history of lax discipline of solicitors); Henry Kirk, Portrait of a Profession ch 4 (Oyez 1976) (struggle of solicitor organizations to effect significant discipline through nineteenth century).
99. See Ronald E. Mallen and Jeffrey M. Smith, Legal Malpractice § 1.6 at 19 (4th ed 1996).
excess of their predecessors, one must draw the conclusion that the law and its application have changed profoundly. Second, a formal ABA report in 1970—the well known “Clark Report” named after its chair, then Justice Tom Clark of the United States Supreme Court—found that the state of lawyer discipline in the United States was a “scandalous situation.” That assessment was widely shared.

At important points, however, during the 1960s and 1970s, forces were at work that have led to a steep ramping-up of the levels of professional discipline and legal malpractice. Those factors, which will be considered in a separate article, have coalesced during a time when the American legal profession has been under significant stress, primarily from a vastly increasing population of lawyers that has produced a very different demographic profile of the American legal profession. Those and other forces, combined with significant changes in the ideology of the legal profession, have reshaped the regulatory situation of American lawyers.

100. ABA Special Committee on the Evaluation of Disciplinary Enforcement, Problems and Recommendations at 1 (cited in note 5). A successor ABA study of the state of lawyer discipline in the United States indicated that progress had been made, but admitted to many deficiencies in several states. See Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century 89-129 (1992) (appendix providing commission’s assessment of how state and national bars had responded to specific recommendations of the earlier Clark Committee).

101. See, for example, F. Raymond Marks and Darlene Cathcart, Discipline Within the Legal Profession: Is It Self-Regulation?, 1974 U Ill L Forum, 193, 228 (when disciplinary process is considered as a whole, it appears that the legal profession is creating the appearance of self-regulation rather than engaging in self-regulation in fact). Justice Clark reportedly believed that the bar’s response to his report had been tepid at best. See Eric H. Steel and Raymond T. Nimmer, Lawyers, Clients, and Professional Regulation, 1976 Am Found Research J 919, 942 n 38 (reporting Justice Clark’s assessment four years after his committee’s report that “no progress has been made to amount to anything”). See also, for example, Bayless Manning, If Lawyers Were Angels: A Sermon on One Canon, 60 ABA J 821, 822 (1974) (impact of Clark Report has been “that of a feather dropped into a well”).
