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J. Gordon Hylton

Marquette University Law School, [joseph.hylton@marquette.edu](mailto:joseph.hylton@marquette.edu)

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# THE BAR ASSOCIATION MOVEMENT IN NINETEENTH CENTURY WISCONSIN

J. GORDON HYLTON\*

For American lawyers, the creation of formally organized bar associations was the most important professional development of the final third of the nineteenth century. These organizations played an integral role in the transformation of the American bar from a largely unregulated occupational group with minimal entry requirements to a modern profession characterized by rigorous licensing requirements, mandatory codes of professional conduct, and lawyer-staffed disciplinary boards. The new associations also gave the bar a corporate voice which could be raised on behalf of issues important to reform-minded lawyers.<sup>1</sup>

The modern bar association movement began as an effort on the part of well-established but relatively youthful urban lawyers to reassert control over as legal profession that they perceived to be in disarray. The first of these associations was organized in February 1870, when a band of reform-minded New York City lawyers organized the Bar Association of the City of New York. The New York association had a formal constitution and by-laws, an extensive set of committees, regularly scheduled meetings, published proceedings, and a selective membership policy. From its inception, it campaigned for higher bar admission standards, an end to judicial corruption, and a more efficient system of legal procedures.<sup>2</sup>

Within the next six years, associations had been organized along the New York model in Cincinnati (1872), Cleveland (1873), Chicago

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\* Associate Professor of Law, Marquette University.

1. The best account of the bar association movement in the late nineteenth century remains ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953). There is a substantial literature devoted to the "anxieties" of the turn-of-the-century American bar, the most significant examples of which are still RICHARD HOFSTADTER, *THE AGE OF REFORM* 151-63 (1955); ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877-1920* 13-17, 116-20, 127-32 (1967); and JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 62-65 (1976).

2. See MICHAEL POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988); GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK* (1970).

(1874), Washington, D.C. (1874), St. Louis (1874), and Boston (1876).<sup>3</sup> All were committed to higher standards for admission to the bar, more effective regulation of "unethical" lawyer's conduct, and reform of the judiciary and other aspects of the court system. It was widely believed that by organizing into selective, professional societies, respectable lawyers could more effectively lobby state legislatures which had the power to implement many of the desired reforms. Moreover, many established lawyers believed that a selective bar association could raise the standard of law practice. Once it was generally known that the most ethically sound lawyers were members of an association, non-member lawyers would strive to emulate the standards of the association so as to guarantee their own future admission, not just into the association but also into the ranks of lawyers sought out by the most desirable clients.

When it became apparent that city bar associations could exert only limited influence on state legislatures, members of the city associations joined with other lawyers from other parts of their states to form state-wide bar associations. The first was organized in New Hampshire in 1873 and was quickly followed in Iowa (1874), New York (1876), Illinois (1877), Alabama (1878), Vermont (1878), and Wisconsin (1878). By 1880, state bar associations had been organized in eleven states and the District of Columbia: by 1890, the number of states had risen to 32.<sup>4</sup> Moreover, in 1878, the first national lawyers organization, the American Bar Association, was organized in a special meeting at Saratoga Springs, New York.<sup>5</sup>

### I. THE MILWAUKEE BAR ASSOCIATION

Milwaukee lawyers appeared well-positioned to take part in the bar association movement. In 1870, the Bar Association of the City of Milwaukee was already twelve years old, and while it did not have the organizational structure of the new New York City association, its existence was evidence of the local bar's sympathy for the idea of collective action. Initially known as the Milwaukee Law Institute, the Milwaukee association had been organized in 1858 as part of an effort to establish a law library and a law school in the city. The new association's constitu-

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3. For a comprehensive list of the founding dates of state and city bar associations, see POUND, *supra* note 1, at 253-81.

4. *Id.* at 273-75.

5. *Id.* at 270. See also John A. Matzko, "The Best Men of the Bar": The Founding of the American Bar Association, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerald W. Gawalt ed., 1984).

tion stated that its purpose was to "establish and maintain a higher standard of professional acquirement and deportment, and to promote proper degree of harmony among ourselves."<sup>6</sup> In May of 1858, members of the association attempted to secure from the Wisconsin legislature an act authorizing the formation of corporations for the purpose of establishing a law library and law school.<sup>7</sup> Although the proposed institutions never materialized as stock subscriptions fell short of the needed amount, the association was able to establish a law library which was large enough to require its own quarters by November 1861. When fire destroyed the Albany Building which housed the Association in 1862, the Association opened a new office in another building and resolved to reconstruct its library.<sup>8</sup> In 1858, its members also showed that they were aware of other advantages of collective action by adopting a "formal fee bill" (*i.e.*, fee schedule) designed to prevent undesirable cost cutting in the competition for clients.<sup>9</sup>

In addition to signally the beginning of modern professional activity among lawyers, the year 1870 had the makings of a red letter year for the lawyers of Milwaukee. In September of that year, the city's bar turned out in mass to witness the laying of the cornerstone for the new Milwaukee Court House. The new structure, built of Lake Superior sandstone for the princely sum of \$650,000, replaced the old wooden court house that had served as the city's legal center since well before the Civil War.<sup>10</sup> The dedication of the new structure not only marked the general progress of the city, but it also implicitly acknowledged the importance of the city's bench and bar. Moreover, by 1870, a generational shift in the leadership of the Milwaukee bar was also well underway. A vibrant legal community had been present in Milwaukee even before it was incorporated as a city in 1846—in 1845, a correspondent for an Albany, New York, newspaper visiting the new Wisconsin me-

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6. Quoted in POUND, *supra* note 1, at 343-44.

7. Although some nineteenth century sources report that such a bill was passed, the published Wisconsin statutes for 1858 contain no such act. See, e.g., JOHN R. BERRYMAN, *BENCH AND BAR OF WISCONSIN* 1:341 (1898). For the activities of the Milwaukee Bar Association in its early years, see Milwaukee Bar Association File, Records of the Circuit Court, 1858-1860, Milwaukee County Historical Society, Milwaukee, Wisconsin.

8. On the association's library in the 1860's, see ELLEN D. LANGILL, FOLEY & LARDNER, *ATTORNEYS AT LAW, 1842-1992* 62-63 (1992). In the 1880's, the Milwaukee Law Library was described as "large and valuable." BERRYMAN, *supra* note 7, at 1:222.

9. BERRYMAN, *supra* note 7, at 1:341. See also LANGILL, *supra* note 8, at 69-70 (reproducing a copy of this fee schedule).

10. On the construction of the new courthouse, see A. T. ANDREAS, ED., *HISTORY OF MILWAUKEE, WISCONSIN* 271 (1881).

tropolis, had noted that "law flourishes here as, strange to say, it does in most newly settled towns."<sup>11</sup> Twenty-five years later, many of those who had risen to prominence in the legal profession in the antebellum period were beginning to leave the scene. The previous year, for example, had witnessed both the death of Jonathan E. Arnold, the city's most distinguished lawyer of the pre-Civil War era and a stalwart member of the Milwaukee Bar Association, and the departure (to New York) of Edward Salomon, the city's most prominent lawyer of German ancestry.<sup>12</sup> In 1870, only 10 of the 108 Milwaukee lawyers recorded by the United States Census were 60 or older, and a significant number were still in their 20s and 30s.<sup>13</sup>

In some respects the promise of 1870 was realized over the next two decades as lawyers continued to play a central role in the development of Milwaukee. Not only did the bar help facilitate the city's economic growth, but much of the city's political leadership was drawn from its ranks. As one local observer noted in the early 1880s, "Whatever can be said of the legal fraternity, it cannot be denied that members of the bar have been more prominent actors in public affairs than any other class of the community."<sup>14</sup>

However, if one examines the history of the Milwaukee Bar Association between 1870 and 1890, one finds not an enervated legal professional organization committed to reform but one whose record consisted largely of inactivity and indifference. Just as the new courthouse failed to fulfill its initial promise—it took almost three years to complete and when done it featured "heating and ventilating arrangements" that left much to be desired—the Milwaukee Bar Association survived, and thus maintained its claim as the nation's oldest city bar association, but it did so with few accomplishments to show for its longevity.<sup>15</sup> It published no annual report or record of its proceedings; it engaged in no formal lobbying of the legislature; and when it did meet, it was usually only for a social event or to memorialize one of its members. Historian Ellen

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11. ALBANY EVENING JOURNAL, June 30, 1845, *quoted in* BAYARD STILL, MILWAUKEE: THE HISTORY OF A CITY 94 (1948).

12. For sketches of the prominent Milwaukee lawyers of the 1870's, see ANDREAS, *supra* note 10, at 663-74; PARKER MCCOBB REED, THE BENCH AND BAR OF WISCONSIN 463-79 (1882).

13. NINTH CENSUS: THE STATISTICS OF POPULATION OF THE UNITED STATES 764-65; 789 (1872).

14. REED, *supra* note 12, at 3. The best modern account of the Milwaukee legal community in the late nineteenth century is contained in chapters 7-10 of Ellen Langill's *Foley & Lardner* book. See Langill, *supra* note 8, at 70-119.?

15. ANDREAS, *supra* note 10, at 271.

Langill counted only six meetings in the post-Civil War era.<sup>16</sup> Its officers routinely served for a decade or more, a fact attributable more to the infrequency of association meetings than to the popularity of the office holders. Further evidence of its inactivity came in 1886, when the Association failed to respond to a letter from the Georgia State Bar Association inquiring as to whether it was an active organization.<sup>17</sup>

Except for a brief period in the late 1870s, when meetings were held to discuss reform of the state's system of civil procedure, to debate the ethical conduct of a member, and to draft a new constitution, the Milwaukee Bar Association appears to have done very little in the decades after the Civil War. The one episode involving a debate over the ethical conduct of one of its members illustrates the ineffectiveness of the association. In 1881, John J. Orton, a prominent, but controversial, Milwaukee lawyer, was ordered disbarred by a Milwaukee circuit court judge for statements made in an answer in a lawsuit in which he was the defendant. Orton had been sued by a former client named Russell Wheeler whom Orton had previously represented in a case in which Wheeler had been accused of murder. In his answer to Wheeler's complaint, Orton had referred to his furnishing Wheeler with money for gambling and his efforts to assist Wheeler in placing his property beyond the reach of creditors. In an amended answer, served directly on Wheeler's attorneys who presented it to the court, Orton also made references to his own past conduct which the circuit court judge interpreted as Orton suborning perjury and advising Wheeler how to kill someone without running the risk of criminal conviction.<sup>18</sup>

Establishing disciplinary boards to address the problem of unethical conduct was a standard feature of the new bar associations of the 1870s and 1880s, but what prompted the Milwaukee Association into action was not the concern that Orton had behaved in an unethical manner, but the concern that he had been punished too harshly. The association membership apparently was divided over the propriety of Orton's punishment, and after considerable debate, no action was taken.<sup>19</sup> The matter reached the Wisconsin Supreme Court without any formal involvement of the Milwaukee Bar Association. Although the Court found

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16. LANGILL, *supra* note 8, at 103.

17. Walter B. Hill, *Bar Associations*, 5 REP. GEORGIA BAR ASSO. 51, 55-60, 89-90 (1887). The Association did show up on an American Bar Association list of American bar associations published the same year. POUND, *supra* note 1, at 343.

18. The facts recounted here are taken from *In re Orton*, 54 Wis. 379 (1882).

19. For an account of the Milwaukee Bar Association debates over the Orton matter, see REED, *supra* note 12, at 479.

Orton's formal answers "absolutely indefensible" and describing conduct that was "outrageously indecent and scandalous," it overturned his disbarment on the grounds that he had not been given adequate notice of the nature of the charges against him before the entry of the disbarment order.

The inactivity of the bar association was not lost on contemporary observers. In 1882, Parker McCobb Reed observed, somewhat graciously, that "the meetings of the association have been somewhat irregular and chiefly confined to memorial occasions."<sup>20</sup> Thirteen years later, the situation had hardly changed. In 1895, long time Association president Joshua Stark admitted that his group had from the very beginning been only a "social organization." According to Stark, "[t]he activity of the association has hitherto been confined mainly to an occasional banquet, and placing on record the testimony of its members to the personal and professional worth of those who have from time to time been taken from their ranks by death, or, after years of residence in Milwaukee, have removed to other fields of labor."<sup>21</sup>

When lawyer Cornelius I. Haring wrote a short history of the lawyers of Milwaukee three years later, the only post-1860 action of the Milwaukee Bar Association that he felt warranted mention was a special meeting convened on April 16, 1865 to memorialize the recently assassinated Abraham Lincoln.<sup>22</sup> Haring, who had come to Milwaukee in 1884 from New York, was disappointed at his colleagues' lack of interest in collective activity, writing that "[i]n the earlier days a much more fraternal and social spirit obtained among the lawyers of Milwaukee and a much more public spirit was shown by them than appears to exist at the present time."<sup>23</sup> Not only were Milwaukee lawyers largely indifferent to the need for a city bar association, they proved unwilling to support a local legal journal as well. The *Wisconsin Legal News*, founded by Milwaukeean Samuel Howard in October 1878, struggled to stay afloat for more than five years before finally folding in July of 1884.<sup>24</sup>

## II. THE WISCONSIN STATE BAR ASSOCIATION

The Milwaukee lawyer's lack of enthusiasm for the city bar associa-

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20. *Id.* at 479.

21. Joshua Stark, *The Bar as It Was and Is*, in *HISTORY OF MILWAUKEE COUNTY* 1:222 (Howard Louis Conrad ed., 1895).

22. Haring's history was printed in BERRYMAN, *supra* note 7, at 1:337-43.

23. *Id.* at 1:337.

24. On the *Wisconsin Legal News*, see *id.* at 1:305-06.

tion was exceeded only by his lack of enthusiasm for the state bar association. Although city lawyers played an instrumental role in the organization of state-wide bar associations in many states, this was not the case in Wisconsin. The call to organize the Wisconsin State Bar Association in 1877 came, not from members of the Milwaukee bar, but from lawyers in the state's western judicial district. While Milwaukee lawyers were present at the organizational meeting held in Madison in January, 1878, they hardly dominated the proceedings.<sup>25</sup> Only one of the 20 officers of the new association was from Milwaukee, as were only four of 28 committee members.<sup>26</sup> Of the 265 names on the roll of members as of February 1878, only 50 were residents of Milwaukee, as were only 5 of 61 new members admitted over the next three years.

In fact, lawyers from *outside* Milwaukee also showed little enthusiasm for the state bar association in the final quarter of the nineteenth century. The organization of a state bar association in 1878 appears to have been a product of happenstance. In addition to Milwaukee, local bar associations had been organized before the Civil War in Brown County in northeastern Wisconsin and in Dane County which included Madison, the state capital, in 1857 and 1858, respectively, but neither appears to have been very active.<sup>27</sup> In 1869, after years of apparent inactivity, the Dane County association was reorganized as the Dane County Lawyers Association.<sup>28</sup>

In September 1877, a meeting of the bar of the western judicial district of Wisconsin was convened in Madison to discuss a recently created vacancy on the bench.<sup>29</sup> There is no evidence that the organization of a statewide bar association was on the meeting's agenda, but lawyer A. A. Jackson of Janesville suggested that the group discuss such an organization, and the proposal was well-received. A committee was appointed in the morning and that afternoon recommended that a statewide (rather than a regional) bar association be established. To facilitate the organization of the new association the ad hoc committee recommended the creation of a new committee chaired by Chief Justice Edward Ryan of

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25. For the organization of the Wisconsin Bar Association, see 1 REPORTS OF THE WISCONSIN STATE BAR ASSOCIATION 1-3 (1905) (hereafter, WSBA REPORTS).

26. 1 WSBA REPORTS 27-28 (1905).

27. REED, *supra* note 12, at 478-79.

28. REMINISCENCES OF THE BENCH AND BAR OF DANE COUNTY 39 (n.d.), cited in WILLIAM R. JOHNSON, SCHOoled LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES 39 (1978).

29. This account of the founding of the Wisconsin Bar Association is based upon 1 WSBA REPORTS 1-3 (1905).



the state supreme court and including one lawyer from each of the state's thirteen judicial districts. This suggestion was accepted.

Ryan and the members of the proposed committee accepted the invitation and met in Madison on November 12, 1877, at which time they issued a call for an organizational meeting for the Wisconsin State Bar Association to be held in Madison on January 9, 1878. More than 100 lawyers attended the inaugural meeting, which concluded with a vote to hold another meeting the following month, and to distribute copies of the organization's constitution and the proceedings of the first meeting to every lawyer in the state.<sup>30</sup> By the time of the February meeting, 265 lawyers had joined the new association.<sup>31</sup>

In spite of the apparent enthusiasm that accompanied the founding of the state association, interest waned almost immediately. The proceedings of the 1878 meeting were not published for almost thirty years, and scheduled meetings for 1879 and 1880 were never held. The 1881 meeting was held, but no meetings were held in 1882, 1883, or 1884. When the Association did meet in 1885, the gathering attracted only 37 members.<sup>32</sup> Enthusiasm for the association appeared to be on the rise in 1886, when the scheduled annual meeting was held in Madison in February. To enervate the association, a second 1886 meeting was agreed upon, and in June the association held its first Milwaukee meeting, at which time 29 Milwaukee attorneys joined the association.<sup>33</sup> At the latter meeting, the decision was made to hold the 1887 annual meeting in Milwaukee as well, but when the time arrived, no meeting was convened in Milwaukee or anywhere else. In fact, no further meetings of the Wisconsin State Bar Association were held until 1893. The track record of the 1890s proved to be no better than the 1880s, as annual meetings were also canceled for 1894, 1896, and 1897. Not until 1898 did the annual meeting began to be held on a truly annual basis.<sup>34</sup>

In 1886, Moses Strong of Mineral Point, who served as President of the Wisconsin State Bar Association from its founding until 1893, admitted that many doubted "the stability and permanency of the Associa-

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30. While the report of the first annual meeting does not list the names of those in attendance, 112 votes were cast for Moses Strong who ran unopposed for the organization's presidency. *Id.* at 13.

31. For the names of the 265 members, see *id.* at 29-31.

32. *Id.* at 300.

33. 2 WSBA REPORTS 12-13 (1900).

34. For a synopsis of the early history of the Wisconsin State Bar Association, see 9 WSBA REPORTS 281-290 (1911).

tion.”<sup>35</sup> A decade later, Strong’s successor, W. H. Seamen, acknowledged with a sense of understatement that “[t]he meetings of the Association have not been held with the regularity intended by its constitution.”<sup>36</sup> Not surprisingly, Milwaukee and other Wisconsin lawyers showed even less interest in the American Bar Association than in their own local associations. In 1880, only six Milwaukee lawyers were members of the American Bar Association; a decade later, the number was only 18.<sup>37</sup> More lawyers began to join in the 1890s, particularly after it was announced that the 1893 annual meeting of the ABA would be held in Milwaukee. By August of 1893, a total of 77 Wisconsin lawyers (including 41 from Milwaukee) had joined the association; however, only ten Milwaukee lawyers actually registered for the 1893 annual meeting (along with 13 lawyers from the rest of the state).<sup>38</sup> Not only were Milwaukee and Wisconsin lawyers not in the front rank of the American bar in terms of the development of bar associations, but at times it appeared that they were not even following along.

Why were Wisconsin lawyers so indifferent to the bar association movement in the 1870s and 1880s when their counterparts in other major states formed strong, reform-minded associations? First of all, the experience in Wisconsin was hardly without precedent. Many state bar associations found it to be rough going in the early years of their existence. Of the 22 state bar associations organized between 1873 and 1884, 11 folded at some point in the nineteenth century, only to be reorganized at a later date.<sup>39</sup> The Wisconsin Bar Association avoided inclusion in this group only because it never technically reorganized when it resumed operations. The Milwaukee Bar Association’s experience is not quite so typical; most major city bar associations remained intact and continued to meet on a regular basis throughout the remainder of the century. However, as the above indicated, the Milwaukee Bar Association was not of the type of the Bar Association of New York and its imitators. What makes the Wisconsin experience appear different is the early appearance of both local and state associations and the fortuitous survival of the Milwaukee and Wisconsin State associations in the face of general indifference.

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35. 2 WSBA REPORTS 91-92 (1900).

36. *Id.* at 117.

37. 3 REPORTS OF THE AMERICAN BAR ASSOCIATION 78 (1880) (hereinafter ABA REPORTS); 13 ABA REPORTS 142-43 (1890).

38. The totals in this paragraph are calculated from information published in 16 ABA REPORTS 67-69, 75, 152-54 (1893).

39. For a list of these associations, see POUND, *supra* note 1, at 273-74.

As to the question of lawyer indifference, it appears that the traditional, informal mechanisms of professional control within the legal profession continued to work satisfactorily in Milwaukee and Wisconsin even though these mechanisms were breaking down in other cities and states. Consequently, most Wisconsin lawyers saw no need for an activist association committed to their interests. Twenty years ago, historian William Johnson, commenting on the failure of Wisconsin bar associations to attract the attention of the state's lawyers, wrote: "[l]awyers did not flock to join bar associations or to press for more stringent and formal standards of admission to the bar because their professional lives were not characterized by serious and sustained professional disputes."<sup>40</sup> However, to point to the lack of "sustained professional disputes" does not explain why no such disputes existed.

Certainly, it was not because the Wisconsin courts exercised strict disciplinary control over the state's lawyers or because there were no unethical lawyers in the state. In 1878, Chief Justice Edward Ryan admitted that as a lawyer and judge in Wisconsin, he had seen "conduct even amongst able lawyers, calling loudly for scrutiny or censure; ignorance so great as to be almost guilt, and malpractice so audacious as to be almost folly."<sup>41</sup> Although the state's courts had the authority to suspend or disbar unethical lawyers, that authority was rarely exercised. In the most publicized disbarment action of the era, the Orton matter discussed above, the Wisconsin Supreme Court overturned the lower court's disbarment order, supposedly because of a failure of the disbarring judge to give the accused lawyer an adequate opportunity to defend himself of the charges against him.<sup>42</sup> Ryan insisted that the power of the courts "to weed the profession of its unworthy members" was "limited and inadequate," and that the responsibility must rest with the bar itself.<sup>43</sup> However, Wisconsin lawyers were not quick to file allegations against their fellow lawyers, and this was just as true after the creation of the Wisconsin State Bar Association as it had been before. The constitution of the Wisconsin State Bar Association established a judicial committee which was to investigate written complaints regarding an attorney's conduct (whether a member of the association or not) and to report its findings to the association. If the association concluded that disciplinary action was warranted, another committee was to be ap-

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40. JOHNSON, *supra* note 28, at 39-40.

41. 1 WSBA REPORTS 8-9 (1905).

42. *In re Orton*, 54 Wis. 379 (1882).

43. 1 WSBA REPORTS 9 (1905).

pointed to prosecute the case on behalf of the association before the state supreme court or the appropriate circuit court.<sup>44</sup> However, by the end of the 1890s only a handful of complaints had been filed with the association, and none had been acted upon.<sup>45</sup> As John Berryman noted in 1898, "there seems to be a profound reluctance on the part of members of the bar to take action looking towards disbarment of unworthy members, even though it reaches a point at which further tolerance would seem almost paramount to complicity."<sup>46</sup>

Nor can the lack of the sense of professional crisis be attributed to the fact that bar admissions standards were so high that only superbly qualified individuals secured admission to the Wisconsin bar. Prior to 1885, it was quite easy to obtain admission to the Wisconsin bar. Candidates had only to be residents of the state, at least 21 years of age, and of good moral character. There were no educational prerequisites, and the bar examination consisted of questioning in open court by any one of the state's circuit court judges or by lawyer examiners appointed by the judge.<sup>47</sup>

The statutory standard for passing the bar examination was proof of "sufficient legal knowledge and ability to entitle him to practice."<sup>48</sup> While the vagueness of this standard obviously gave the examiner great discretion, there is no reason to believe that these examinations were particularly rigorous. In 1878, Wisconsin Bar Association president Moses Strong bemoaned what he viewed as the decline in standards for admission to the bar in his lifetime. Where prospective lawyers had once spent seven years preparing for the bar, there were, in Wisconsin in the 1870s, "practically no prerequisites of either knowledge of law or knowledge of anything else, as conditions of admission to the bar."<sup>49</sup> At the same meeting in which Strong offered his remarks, Wisconsin Supreme Court Chief Justice Edward Ryan also noted, "[T]he rule of admission is unfortunately lax. The doors are not ajar, but wide open."<sup>50</sup> Many lawyers blamed the state's judges for this laxity. In his 1883 memoir of law practice, Baraboo attorney Nelson Wheeler included a twelve page lampoon on the laxity of bar admission practices in his

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44. *Id.* at 22-24.

45. BERRYMAN, *supra* note 7, at 1:30.

46. *Id.* at 1:29.

47. WIS. STAT. P. 1343-45 (1871).

48. *Id.*

49. 1 WSBA REPORTS 14 (1905).

50. *Id.* at 8.

home state.<sup>51</sup> The laxity of the Wisconsin bar examination (although hardly unique to the Badger state) was recognized outside the state's boundaries. In 1881, a survey of bar admissions requirements in the United States published in the *American Law Review* described the Wisconsin bar examinations as "held in open court, and are generally easy."<sup>52</sup>

For many would be lawyers, the bar examination requirement was dispensed with altogether. After 1870, graduates from the law department of the University of Wisconsin were able to obtain immediate admission to the Wisconsin bar upon presentation of their diploma, and lawyers admitted to practice in other states were also admitted without examination.<sup>53</sup> The lax standards for admission to the bar clearly affected the law program at the University of Wisconsin. In the late 1890s, University of Wisconsin law professor Edwin E. Bryant acknowledged that his institution's admission standards were low because "admission to the bar from study in law offices has hitherto been so easy and independent of general scholarship."<sup>54</sup> Enrollment also grew slowly at the Madison school for the same reason. After beginning with 11 students in 1868 and peaking at 64 students during the 1881-82 academic year, enrollment had dropped to 38 in 1884-85.<sup>55</sup>

When it did meet, the Wisconsin State Bar Association clearly was concerned about this situation. At the February 1878 meeting the first matter presented to the association was a resolution calling on the circuit judges to "strictly enforce the laws of this state now in force relating to the admission of attorneys."<sup>56</sup> Although the resolution was replaced by one less explicitly critical of the circuit judges, the proposal was adopted, apparently without opposition.<sup>57</sup> In 1881, the Committee on Legal Education of the Wisconsin State Bar Association presented a report on bar admissions in the state. The Committee report endorsed the view "that a higher standard of qualifications than now prevails should be required," but at the same time acknowledged that there were those who were willing "to open the doors to all without regard to character

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51. NELSON WHEELER, OLD THUNDERBOLT IN JUSTICE COURT 27-39 (1883).

52. Francis Wellman, *Admission to the Bar*, 15 AM. L. REV. 303 (1881).

53. WIS. STAT. P. 135 (1870).

54. 2 WSBA REPORTS 152-53 (1900).

55. University of Wisconsin enrollment statistics for the period 1877-1895 can be found in JOHNSON, *supra* note 28, at 55. For the 1868 enrollment, see 2 WSBA REPORTS 153 (1900).

56. 1 WSBA REPORTS 33 (1905).

57. *Id.*

or learning, applying the doctrine of the 'survival of the fittest.'"<sup>58</sup>

In spite of its infrequent meetings, the concern over lax admissions on the part of the Wisconsin State Bar Association did appear to influence state policy. At its 1881 meeting, the association's Committee on Legal Education recommended to the membership a proposal for a stricter system of bar admissions. The proposals, which were largely borrowed from those presented in the *American Law Review* by Boston University law professor Francis Wellman, required that a law student either possess a college degree or pass a preliminary examination in English, mathematics, history, geography, political economy, and book-keeping before studying law; that prospective lawyers study law for three years in a law school or law office; and that law students register with the clerk of the court in the county in which they were studying. In addition, the bar examination was to be managed by a state board of six examiners who were to administer written examinations four times each year. Under the proposal, the examiners were authorized to accept a law degree in lieu of examination and to admit without examination lawyers who had been engaged in the actual practice of law in another jurisdiction for at least two years.

The only immediate response of the Wisconsin legislature was to require future applicants to be residents of the judicial circuit in which they applied for admission to the bar.<sup>59</sup> (Prior to this, an applicant for admission could present himself for examination anywhere in the state, and if unsuccessful with one judge, could simply move on to another.) However, in 1885, important parts of the association's 1881 proposal were adopted; specifically, a centralized board of bar examiners and a requirement of proof of two years of prior law study on the part of applicants. The latter requirement was not as onerous as it sounded, because the statute did not define "law study," and thereby, may have included undirected study as an acceptable form of preparation, so long as the applicant had devoted two years to it.<sup>60</sup>

Ironically, it may very well have been that this one, qualified success (other parts of the 1881 proposal were not adopted) may have undermined rather than strengthened the appeal of the Wisconsin and Milwaukee Bar Associations. If the purpose of the new system of examination was to prevent unqualified individuals from securing admission to the bar, evidence of its initial operation suggests that it had this effect.

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58. *Id.* at 80.

59. WIS. STAT. P. 152 (1881).

60. WIS. STAT. P. 50-52 (1885).

In its first year of operation, 15 of the first 39 applicants failed the new bar examination.<sup>61</sup> Not only was the failure rate fairly high (38.5%), but the number of applicants who took the bar examination seems to be quite low. In the face of an apparently much more difficult bar examination, enrollment at the University of Wisconsin law department jumped dramatically, rising from 38 students in the spring of 1885 to 113 in the fall of 1887.<sup>62</sup> Having seen that the problem of incompetent individuals being admitted to the bar had been addressed, many lawyers who might otherwise have been attracted to the bar associations now failed to see the need to join one. Not until 1898 would the issue of higher bar admission standards again be raised by the Association.<sup>63</sup>

But the reason Milwaukee and other Wisconsin lawyers were so unconcerned about strengthening the formal regulatory mechanisms at a time when other state bar associations—even those in “unprogressive” states like Virginia, Alabama, and Missouri—lobbied aggressively for higher bar admissions standards, a code of ethics, and formal disciplinary machinery probably had more to do with the size and ethnic composition of the bar than any other factor. For reasons that are not at all obvious, the number of lawyers, per capita, was less in Wisconsin than in most states during the final third of the nineteenth century. According to the 1870 United States Census, there were 74 lawyers per 100,000 persons compared to 105 per 100,000 for the United States as a whole.<sup>64</sup> Based upon the Census figures, in only five states—Connecticut, Delaware, Georgia, North Carolina, and South Carolina—were lawyers in shorter supply proportionate to the population.<sup>65</sup> The per capita figure for Wisconsin was well below that of the neighboring midwestern states of Iowa (122 lawyers per 100,000), Illinois (106 per 100,000), Minnesota (102), and Michigan (99). Although the number of lawyers in Wisconsin grew during the next decades, the state continued to rank near the bottom of the list in terms of lawyers per capita. With 91 lawyers per 100,000 in 1880, Wisconsin trailed all but eight states, again falling well

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61. 2 WSBA REPORTS 16 (1900).

62. JOHNSON, *supra* note 28, at 55.

63. 2 WSBA REPORTS 35 (1900).

64. The calculations in this paragraph are based on statistics that appear in NINTH CENSUS: THE STATISTICS OF POPULATION OF THE UNITED STATES 292, 299, 324-25, 380, 764-65, 775-804 (1872).

65. If one relies exclusively on the totals published in the 1870 Census, Vermont would have a lower ratio as well. However, the total of 72 lawyers listed for that state is almost certainly a misprint. In 1860, there were 416 lawyers in Vermont; in 1880, the number was 424. There seems to be no possible explanation for this disparity other than error.

behind its midwestern neighbors, Iowa (161), Illinois (131), Michigan (128), and Minnesota (116).<sup>66</sup> In 1890, it again ranked ninth from the bottom, and in 1900, its ratio of 109 per 100,000 was seventh from the bottom.<sup>67</sup>

Although lawyers were more prevalent in Milwaukee than anywhere else in the state, that city also ranked well below most of the nation's major cities in the number of lawyers per capita. With 108 lawyers and 71,440 residents (a ratio of 151 lawyers per 100,000), Milwaukee ranked only 17th among the nation's thirty largest cities. Washington, D.C. had the largest concentration of lawyers with 339 per 100,000. As with the state, the per capita number of lawyers in Milwaukee was significantly less than other major midwestern cities. For example, the comparable number for Indianapolis was 315; for St. Louis, 284; for Chicago, 210; and for Detroit, 171. Thirty years later, the ratio of lawyers in Milwaukee had actually declined relative to other large cities. In 1900, Milwaukee, with a ratio of 159 per 100,000 now ranked only 26th among the nation's thirty largest cities in terms of per capita lawyer population.<sup>68</sup> All five cities with a lower ratio (Allegheny and Pittsburgh, Pennsylvania; Jersey City, New Jersey; Providence, Rhode Island; and Worcester, Massachusetts) were in the northeast and most were only a few miles from another major city. Milwaukee was even far behind other large cities in the midwest than it had been in 1870, trailing Minneapolis (348 per 100,000), St. Paul (294), Chicago (254), and Detroit (240).

In fact, for much of this period, the growth of the Milwaukee bar was not just slow relative to the bar of other cities, but even compared to the growth of the city's general population. The lawyer population in the United States grew at a rate roughly 1.9 times that of the general population between 1870 and 1890. The state of Wisconsin as a whole paralleled this increase (1.75 times). However, in Milwaukee, the rate of increase for the population and the bar were essentially the same. The number of lawyers in the city increased by 150% (from 108 to 274) during those two decades, but the Milwaukee population grew by 186% (from 71,440 to 204,468) during the same period. In other words, in

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66. STATISTICS OF THE POPULATION OF THE UNITED STATES AT THE TENTH CENSUS (1883).

67. REPORT ON THE POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, PART II (1897); REPORT ON THE POPULATION OF THE UNITED STATES AT THE TWELFTH CENSUS: 1900, PART II (1902); TWELFTH CENSUS: 1900, SPECIAL REPORTS: OCCUPATIONS (1904).

68. REPORT ON THE POPULATION OF THE UNITED STATES AT THE TWELFTH CENSUS: 1900, PART II 380, 775-804 (1902).



dramatic contrast to the national pattern, the number of lawyers per capita in the Milwaukee population actually declined (albeit slightly) between 1870 and 1890.

Why the Milwaukee bar grew so slowly in this era is a difficult question to answer. Whether this was a product of the nature of the Milwaukee economy, the composition of its population, the relative proximity of large legal community in Chicago, or some other factor, the simple fact is that lawyers were less numerous in Milwaukee than in any comparable midwestern city. Whether this was the result of fewer lawyers entering practice or more leaving is a difficult question to answer. The relatively early institution of the written bar examination probably did work to control the total number of lawyers. On the other hand, there is evidence of a fairly high rate of attrition from the ranks of the Milwaukee Bar. A survey conducted by Wisconsin State Bar Association president Moses Strong in 1881 revealed that there were 200 lawyers in Milwaukee County, 186 of whom were in active practice. At the same time, Strong identified the names of 342 lawyers who had once practiced in Milwaukee, but no longer resided in the state (but who were thought to be still alive). In other words, the latter category exceeded the former (including inactive attorneys) by 72%. In contrast, for the rest of the state, Strong identified the names of 1150 lawyers still residing in Wisconsin compared to 805 names of those who had relocated to other jurisdictions.<sup>69</sup> Unfortunately, given the paucity of statistics on lawyer attrition, it is difficult to say if this rate of attrition was particularly high by nineteenth century standards.

Moreover, the *total* number of lawyers in Milwaukee remained reasonably small until the 1890s. According to the 1870 United States Census, there were only 108 lawyers in Milwaukee and from the city directories of that era, we know that most had their offices near the intersection of Wisconsin Avenue and Water Street in downtown Milwaukee.<sup>70</sup> In 1880, the number was still only 154, and in 1890, it was 274. It was probably not until the end of the century when the number of lawyers reached 455 that the size of the bar made the continuation of old professional arrangements impossible.<sup>71</sup> The experience of Milwau-

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69. 1 WSBA REPORTS 279-84, 298 (1905).

70. See, e.g., MILWAUKEE CITY DIRECTORY FOR 1869-70 368-69 (1869); MILWAUKEE CITY DIRECTORY FOR 1871-72 346 (1871).

71. The number of lawyers actually engaged in the full time practice of law was probably always smaller than the Census numbers suggest. Directories published in 1869, 1871, 1881, 1882, and 1887 list the names of 84, 76, 185, 158, and 178 lawyers, respectively. MILWAUKEE CITY DIRECTORY FOR 1869-70 369 (1869); MILWAUKEE CITY DIRECTORY FOR 1871-72 346

kee stands in sharp contrast to that of Chicago and St. Louis, two mid-western cities with flourishing city bar associations from 1870 onward. In both cities, the number of lawyers approached or exceeded 600 in 1870 (629 in Chicago and 594 in St. Louis). By 1900, there were more than twice as many lawyers in St. Louis (1045) as in Milwaukee and more than four times as many in Chicago (4307).

Concerns over the consequences of "overcrowding" and the fear that the traditional informal mechanisms of enforcing professional norms were breaking down under the weight of a mushrooming number of lawyers inspired much of the bar association activity in late nineteenth century. Because of its comparatively small size and comparatively slow rate of growth, the Milwaukee bar likely did not experience the dislocating effects of rapid growth nearly as intensely as lawyers in other jurisdictions. Without the leadership of the metropolitan bar, it is not surprising that the statewide association nearly died for a lack of support. Very few state bar associations flourished in the 1880s and 90s in states lacking a major metropolitan bar association. The bar associations of New Hampshire, Iowa, New Jersey, Nebraska, Indiana, Maine, Arkansas, Colorado, Kentucky, Minnesota, California, Florida, Mississippi, and Nevada all ceased operating in the 1880s or 1890s as a result of a lack of interest on the part of lawyers in their states.<sup>72</sup> (All of course were subsequently reorganized.) Although the Wisconsin State Bar Association never technically went out of existence, for all practical purposes, it failed at least five times (1879, 1882, 1887, 1894, and 1896).

In addition to being less numerous than their counterparts in other states, Wisconsin lawyers also remained a relatively homogenous group during the same period, at least in comparison to the Wisconsin population as a whole. In 1870, 86.9% of Wisconsin lawyers (682/785) were native-born, in contrast to 65.4% of the state's population as a whole.<sup>73</sup> Moreover, almost half (47.6%) of foreign-born lawyers hailed from English-speaking countries (Great Britain, Ireland, and Canada) compared to less than a third (31.8%) for the state. Three decades later, the

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(1871); 1 WSBA REPORTS 279-84 (1900) (listing of attorneys in 1881); THE MILWAUKEE DIRECTORY FOR 1882 684 (1882); WRIGHT'S MILWAUKEE CITY DIRECTORY, 1887 922-23 (1887).

72. POUND, *supra* note 1, at 273-75, contains a list of all state bar associations organized between 1873 and 1915, along with dates of reorganization for those which failed to operate continuously.

73. Statistics on country of birth in 1870 are found at NINTH CENSUS: THE STATISTICS OF POPULATION OF THE UNITED STATES 299, 324-25, 336-42, 376-77, 386-91, 706-07, 764, 789 (1872).

percentage of employed, male Wisconsinites who were born in the United States was only 59.9% while the percentage of native-born lawyers was essentially what it was in 1870 (86.4%).<sup>74</sup> Among those who were born in the United States, 34.8% of all employed males were the offspring of two native-born parents; for lawyers, the figure was 58.2%.

The contrast between the Milwaukee bar and the city's population was even more dramatic. In 1870, 95 of 108 (88.0%) of Milwaukee lawyers were born in the United States compared to just over half (52.7%) of the population as a whole.<sup>75</sup> Of the 13 who had been born abroad, six were from the British Isles, five were from Germany, and one each were classified as "other northern Europe" and "other or unknown."<sup>76</sup> As late as 1890, only 5 of 274 lawyers in the city were born outside of the United States or northern Europe.<sup>77</sup> In contrast, in 1870, foreign-born attorneys accounted for 43.4% of the bar in Detroit; 26.7% of the bar in New York; 18.5% in San Francisco; 17.9% in Rochester; and 16.0% in Brooklyn (then a separate city).<sup>78</sup> While the percentages in Chicago (12.9%) and St. Louis (12.1%) were virtually identical to that of Milwaukee, the much larger size of those bars meant a much more significant foreign-born presence in the profession.

Again, the contrast between the bar and the general population was even sharper in Milwaukee in 1900 than in 1870. That year only 52.3% of the city's male work force was native-born, in contrast to 90.0% of the bar.<sup>79</sup> Moreover, only 11.5% of the city's male workers had two native-born parents; for the bar, the figure was 42.9%.

Historians of the legal profession have linked the movement for structural reforms within the organized bar to an anxiety born of concern over the growing number of individuals of southern and central

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74. The statistics for 1900 are from TWELFTH CENSUS: 1900, SPECIAL REPORTS: OCCUPATIONS 414-17, 608-09 (1904).

75. See *supra* note 73 and accompanying text.

76. There are inconsistencies in the 1870 census in the totals reported for Milwaukee and the state of Wisconsin. The census identifies 107 of 108 Milwaukee attorneys as male, but the state totals reported elsewhere identify all 785 Wisconsin lawyers as male. Similarly, while one Milwaukee lawyer is identified as born in "other or unknown," the state totals, using precisely the same categories, list no lawyers in this category. NINTH CENSUS: THE STATISTICS OF POPULATION OF THE UNITED STATES 764-65; 789 (1872).

77. REPORT ON THE POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, PART II, 692-93 (1897).

78. NINTH CENSUS: THE STATISTICS OF POPULATION OF THE UNITED STATES 775-804 (1872).

79. See *supra* note 72 and accompanying text.

European background into the legal profession.<sup>80</sup> Regardless of how important this may have been in other cities and states, it was not a matter of great concern in Milwaukee in the final decades of the nineteenth century. In fact, the relative homogeneity of the Milwaukee bar probably combined with its comparatively small size to frustrate the efforts of those who believed in activist bar associations.

The bar association would become a prominent feature of professional life in Wisconsin in the twentieth century. However, in final thirty years of the nineteenth century, the informal model of regulation prevailed over the wishes of those who campaigned for new forms of professional regulation. A relatively small, ethnically homogenous, and after 1886, relatively selective profession apparently saw no need for additional reforms or for organizations which sought to alter the status quo. As the experience of the Milwaukee and Wisconsin bar associations demonstrated, simply organizing a bar association was guarantee of its success.

The experiences of Wisconsin lawyers between 1870 and 1890 offer an important reminder to historians that the development of the legal profession in the United States is a complex story and that changes in the structure of the legal profession do not occur in lock step. More specifically, the experiences of lawyers in Gilded Age New York, Chicago, Boston, and St. Louis were not those of Milwaukee lawyers, let alone those of lawyers from other parts of Wisconsin. Until this variable pattern is taken into account, we can have no comprehensive history of the American bar.

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80. This is a principal theme of Jerold Auerbach's *Unequal Justice*. See generally AUERBACH, *supra* note 2.

