First of two addresses delivered at the 1984 Annual Meeting of the Maine State Bar Association, January 20, 1984, by United States Circuit Judge Frank M. Coffin, Holiday Inn, Portland, Maine

Reflections on the Future as a Tool

Let me begin as I shall end: I consider the undertaking of this Consortium on a Study of the Future of the Maine Legal Profession to be one of the most significant enterprises in the 93 year history of this Association. The necessity of the most deliberate and sophisticated look to the future has never been greater. The timeliness is perfect; this is not a moment too soon. And the thoroughness, sensitivity, breadth of view, and deep reservoir of patience of your Committee give me a confidence that the Maine Bar Association can render a unique contribution to both its members and the citizens of Maine, which is no less than to help make it possible for the Maine lawyer of the future to take pride in the practice of law, to better serve his fellow citizens, and to retain his serenity as a human being.

I consider it a privilege to be associated with this enterprise, even on the edges. I have been part of many changes in the past four decades in law, politics, government, and, most of all, in the work of the federal courts. But in no arena did we ever attempt to ask today's question, "Where Are We Going?" And perhaps because we lacked any handle to deal with basic societal forces, it would have been futile to have done so. Today, however, though the forces to be dealt with are perhaps more awesome in their immensity and momentum than ever, we do have access to a tool. I borrow from Alvin Toffler, who, in beginning his book "Future Shock", stated his conviction that "a coherent image of the future can also shower us with valuable insights into today" and his purpose to "mak[e] use of the future as an intellectual tool".[1]

In what has come to be a two part presentation to this Association, I propose to try to do two things. First, I shall endeavor this afternoon to dramatize the importance of this Consortium by a look into the past, presenting a series of snapshots showing how, after a century and a half of relative stability, our traditionalist profession has, in several short decades, undergone dramatic changes, both cosmetic and underlying, promising in the very near future to fulfill the adage "You ain't seen nothing yet." My second venture, this evening, will be to make a foray into the future and foreshadow, in an impressionistic way, the kind of imaginative experimentation that may well some day result from the work of the Consortium.

Let us begin our album in the closing years of the 18th century. Before that time, before the Revolution, the American lawyer did not exist as we know him. His office was his house, he "read law" in an office, practiced part time, spending most of his time farming or in some other occupation, and, when arguing a case, quoted scripture, events from history, sermons. Then he went back to his plow or forge, pondering what he had learned at term of court.[2] As often as not the clergy took care of legal matters. But in the late 1700's, both the practice of law and the bar became more professional, influential, and cohesive. The pervasive animosity to lawyers had subsided a bit, although young John Quincy Adams could write his mother in 1787:

> "The popular odium which has been excited against the practitioners . . . prevails to so great a degree that the most innocent and irreproachable life cannot guard a lawyer against the

[1] Toffler, Future Shock (N.Y.: Bantam Books, 20th printing, 1972), p.4.

[2] Catherine Fennelly, The Country Lawyer in New England, 1790-1840, Old Sturbridge Village, 1968, p.12.

> hatred of his fellow citizens . . . . Yet notwithstanding all this the profession is increasing rapidly in numbers, and the little business to be done is divided into so many shares that they are in danger of starving one another."[3]

In Maine the lawyer population had risen from 16 in 1790 to 54 in 1800.[4] In those days the routine of a Connecticut lawyer, a 1791 Yale graduate, is described as "attending trials, advising clients or assisting other lawyers in advising theirs, investigating shop contracts, drawing leases, deeds, and bonds for deeds, attending arbitrations, examining claims, making out partnership agreements, taking depositions, writing wills or searching for wills".[5] Criminal cases involved chiefly petty crimes -- desertion, petty theft, destruction of property, assault and battery, abuse of an apprentice or other minor. Court came to the county twice a year and was a festive occasion. In Paris Hill a fifer and drummer would escort the justices from tavern to courthouse. In York justices and lawyers would share beds as well as rooms and hilarious mock courts were lubricated by bowls of punch.[6] One Connecticut lawyer owned 110 books, including Coke, Blackstone, Bacon, and Grotius. (It was John Quincy Adams who, after a laborious ten weeks ploughing through Coke, then delved into Blackstone and rhapsodized: "In the afternoon I read a few pages in Blackstone, and the contrast was like descending from a rugged, dangerous and almost inaccessible mountain into a beautiful plain, where the unbounded prospect on every side presents the appearance of fertility."[7])

Perhaps a paradigm of the accomplished lawyer at the beginning of the 19th century was Peter Thacher, who settled in Biddeford in 1782. His office was a hut opposite his house, twelve feet square, overhanging a dip in the road. Do not, however, picture only a rude hovel. For the Due de la Rochefoucault-Liancourt has described what was inside: "He [Thacher] has about two thousand volumes, books of law, history, morality, and general literature. He adds to it all new American publications, and procures from England every other new work . . . ."[8] Thacher became Maine's first representative in Congress and soon a member of the Supreme Court of Massachusetts. His wit and instinct for survival are amply documented. Piscataquis attorney John F. Sprague, at the 1921 meeting of this Association, celebrating the profession's first century in this state, told this story:

> ". . . [W]hen he was in Congress a firey Southern member fancied that in a speech by Mr. Thacher he or his state had been insulted. He immediately sent a challenge. Mr. Thacher told the bearer that he had no right to hazard his life on such a chance, but would write to his wife, and if she consented, he would accept the challenge; but, as a compromise, he proposed that his figure might be marked on a barn door and if the challenger, standing at a proper distance, hit it, he would acknowledge himself shot."[9]

This kind of wit and sense unhappily seems in short supply today.

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[3] Id., at 19.
[4] Id., at 37.
[5] Id., at 29.
[6] Id., at 32-33.
[7] Id., at 20-21.
[8] Id., at 36.
[9] John F. Sprague, A Century of the Bar of Maine, Vol. 22, Report of the Maine State Bar Association, 1921, pp. 24-25.

As the 19th century ripened, Maine's lawyer population grew from 54 in 1800 to 207 in 1820 and 437 in 1840.[10] During this time the profession saw fundamental changes in the subject matter of practice. As Catherine Fennelly has written in her monograph, The Country Lawyer in New England 1790-1840,

> "The cases of trespass, land title, debt, and foreclosure began to make way for cases involving water rights, turnpike tolls, articles of association and the like soon after 1800, and these cases along with others of their kind increased after the War of 1812. The rise of both small enterprises and large-scale industries, the development of roads, canals, and railroads, insurance companies and banks, the increased tempo and enlargement of commercial transactions all meant changes and developments in the law and a different practice on the part of the lawyers. Less frequently were they appearing in the justice court in cases of assault and battery or small claims; more frequently were they counsellors for banks, industries, commercial firms, and insurance companies. Corporation and patent law, unknown in the colonies, became increasingly important branches, and lawyers skilled in these seldom need to enter the courtroom. Specialization was to take over the legal profession as it did many another, and the break with English law would be almost complete by the time of the outbreak of the Civil War."[11]

Although the subject matter was expanding, the manner and style remained stable. Our historian lawyer of 63 years ago, John F. Sprague, looked back nearly a century and wrote of practice in the first half of the 19th century:

> "It was before the day of elaborately organized law offices and necessarily high charges. The typewriting machines, dictations, stenographers and telephone service which abound in all offices today would surely have amazed and bewildered James Sullivan or Simon Greenleaf, who was one of Maine's leading lawyers in 1820, famous as an eminent author of legal text books and our first reporter of court decisions.
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> "The old-fashioned lawyer worked without frills, show or publicity and abhorred any methods susceptible of a design to solicit patronage. None of his successors have maintained the ancient dignity of the high office of counsellor and attorney at law with more faithfulness than did he."[12]

Thus, even in 1920 lawyers looked back longingly on simpler, nobler days.

An example of this mixture of new, sophisticated subject matter and ancient ways is provided by an able Bangor and Portland lawyer aptly named John Alfred Poor. This man in 1844-45 was counsel for the old Atlantic and St. Lawrence Railroad. The burning issue, with the highest of stakes for Maine, was whether Portland or Boston should be its terminal point. The

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[10] The Country Lawyer at p. 37

[11] Id. at p.46.

[12] Report of Maine State Bar Ass'n, Vol. 22, p.28.

decision was up to the Canadian government. Lawyer Poor's adversaries included the entire city of Boston, Vermont's future governor, Erastus Fairbanks, and the eminent Bostonians Harrison Gray Otis and Abbot Lawrence. Poor finally won. He presented his bill for services. As was reported by the author of "The First International Railway",

> "Several Portland men raised the sum of one hundred and fifty dollars for his expenses. Every generous heart will throb with indignation to know that the Atlantic and St. Lawrence Railway Company considered five dollars a day sufficient pay for six weeks time for Mr. Poor's services."[13]

As for the material apparatus necessary for the practice of the law, two young lawyers in New Hampshire opened shop in the 1830's with a room at $3.00 a month, a long table, half a dozen chairs, Blackstone, Oliver's Precedents, a few practical manuals, and 12 volumes of state reports. They added a ream of paper, ink stands, goose quills and a sand box, some wafers, a quire of blank deeds, and two dollars' worth of blank writs -- and they were in business.[14]

By the end of the 19th century, the modus operandi had not changed too noticeably. My grandfather, who was admitted to the Maine bar in 1891, did have a secretary and a clackety typewriter that beat out uncertain letters on a garish blue ribbon. But his standard procedure was to end a first interview with a client by reaching into one of the pigeon holes of his cavernous rolltop desk, pulling out a blank writ, and filling it in by pen -- whether goose quill or not I do not know. By coincidence my own most senior partner, Harry M. Verrill, began practice the same year as my grandfather. In the history of the Verrill Dana firm, this account appears:

> "In September, 1891 H.M. Verrill hired a stenographer, the first in the office, and paid her [$5 a week of his own $10 salary] . . . . She came from up-state and she brought her own typewriter. Prior to that time everything had been written in longhand. At the end of the second year, [he] bought a roll top desk and his first bicycle . . . . The office was lighted by gas . . . and a few months later, the first telephone was installed."[15]

At the same time my predecessor on the U.S. Court of Appeals, William LeBaron Putnam, was practicing law. Of him Judge Clarence Hale once said, "I know of no one who ever had the power of labor in a higher degree than Judge Putnam. It was colossal. He never lost a minute."[16] Some evidence of his orderliness and diligence can be gleaned from a look at one of his correspondence ledgers where, by some process antedating carbon paper, he preserved in now fading brown characters a copy of his voluminous correspondence.

Aside from the intrinsic antiquarian interest in taking a peek at the practice of law in the 1800's, I have had an ulterior motive -- which is to demonstrate that as of the time when my generation began the practice of law, even conceding the impact of the automobile, telephone, the electric light, ant the typewriter, our life and work were closer to those of these nineteenth century forebears than they are to the structures, ground rules, and workways of today's practitioner.

Consider first the numbers. From 1840 to 1920 the number of lawyers in Maine increased

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[13] Id., at p.29
[14] Id., at p.34.
[15] Story of the firm of Verrill Dana Walker Philbrick & Whitehouse, 1862-1962, pp. 20-21.
[16] Vol.22, Report of Maine Bar Ass'n., p. 102.

from 437 to 736,[17] hardly an explosive growth. But an even more astounding statistic is that in the three decades following 1920, our bar grew by a paltry 44 . . . a net increase of 1.4 lawyers a year! For by 1951 we were only 780 strong.

My source for this statistic is myself, writing in the Harvard Law School Bulletin for April, 1951, an article entitled "Maine Lawyer". Here, if you can believe it, is how the legal landscape looked to me 33 years ago:

> First, how the numbers break down --
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> "Of these 780 lawyers, some 604 conduct one-man[18] law offices, while 176 lawyers practice in close association or partnership. More often than not the legal fledgling begins his career by the modern equivalent of hanging out his shingle, i.e., having his window lettered . . . . The largest firm consists of ten lawyers. This is followed, in terms of personnel, by two seven-lawyer firms, one six-man firm, one five-man firm, eight four-man firms, five three-man firms, thirty-eight two-man firms, and eighteen lawyers working in association in groups of two or three. Many firms have developed by something akin to the biological process of mitosis, by son joining father. The process has reached its practical ultimate in one fine old firm where grandfather, father, and son are all today vigorously engaged in the general practice of law. An occasional nonagenarian may still be seen scrivening away in time-honored manner."
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> Second, relations with lawyers and judges --
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> "Particularly does the Maine lawyer know the attorney with whom he is dealing. One is not in practice for a great while before he finds himself on at least speaking terms, if not on fraternally intimate relations, with about every lawyer with whom he is likely to do business. This foreknowledge of one's colleague or adversary at times simplifies proceeding and at times means merely another factor to be taken into account in the always complex task of legal generalship . . . Term time never fails in one of its incidental functions of perpetuating legend. The smoke-filled attorneys' room or judge's chamber, while the jury is deliberating, overflows with juicy anecdotes of the legal giants of yesteryear. The tradition of the Maine Bench and Bar is a very real and attractive part of the seasoned lawyer's equipment."
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> Third, our procedures --
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> "Another, and most essential, item of the Maine lawyer's

[17] Report, p.68.

[18] Throughout this piece I used "man" and "he", partly because this was before the age of awareness and partly because the number of women lawyers was exceedingly small. The woman attorney with whom I shared my office was one of three in the entire Lewiston-Auburn community.

equipment is a more than nodding acquaintance with common law pleading. We usually sue in assumpsit on an account annexed to which we append the omnibus general counts. We have our pleas in abatement. And if we bring an action for rent the account must read 'to use and occupation of a certain messuage and tenement'. General and special demurrers are well recognized."

Fourth, the subject matter of our practice --

"There are few specialists in our flock. To be sure there are some defense attorneys who handle much of the insurance company work, but these men are by no means confined to the courtroom in their practice. Every active attorney has his row of corporate seals and minute books -- and wishes he had more. He has his modicum of probate matters and once in a while he finds he must concern himself with drafting some marital deduction trusts. He has, especially after bad weather, a number of files of property damage cases and occasionally a substantial personal injury case. Of these he settles many, although the trial of cases has seemingly increased during the past year. He may even dabble in labor law and relations, but he is somewhat timorous of this field. In the field of insolvency and bankruptcy law he feels at home in trying to work out the best possible solution for a set of miserable circumstances. He is ingenious -- as must all lawyers be in dickering.

"This Maine practitioner is usually laden with a portfolio of divorce, custody, and non-support cases. He occasionally finds himself defending a client accused of crime. Those charged with serious crimes are usually represented by general practitioners who have earned a reputation for the astute and rigorous defense of such causes. The trial of such cases is often marked by ability comparable to that found in more heralded crime centers.

Fifth, our fees --

"As elsewhere, our lawyers find that their minimum fee schedules remain uncorrupted by the inflationary pressures of the past decade. And often the minimum becomes the practical maximum, for the shrewed countryman knows that a will or writing has always been five dollars, and he sees no reason for paying more. Our counties have varying fee schedules, but do not greatly differ. A conference may bring a minimum fee of $3; a deed, lease, or mortgage, $5; a divorce, $100; organizing a corporation, $150; searching a title, $25. At these rates, one must do a great deal of quarrying to bring in even a modest amount of ore."

Finally, the quality of a life in law --

> "The attitude of the Maine lawyer regarding his profession and his state may be summed up as follows. He has a great deal of fun in the general practice of the law. He enjoys being a part of his community and taking part in its municipal and charitable causes. He knows he will not die rich but he is reasonably sure that if he works hard enough he can live well and provide for the education of his children. He likes the idea of leaving his home and arriving at his office ten minutes later. He enjoys the turn of the seasons and opportunities for hunting and fishing. He has an abiding faith in the future of Maine. He likes his fellow lawyer and judge. He takes pride in the fact that his Bench and Bar need take second place to none."

I wrote this in 1951, completely unaware of the thrust of economic, sociological, political, and technical forces that would change the face of law practice more than a century and a half had been able to change it. In three decades the number of lawyers registered with the Board of Bar Overseers would triple, reaching 2,224. This growth is equivalent to adding in each decade a number equal to the entire bar of 1951. Seventeen percent, or 379, would be women. Instead of there being one ten lawyer firm and two seven lawyer firms at the peak of the pyramid, there are now 18 firms exceeding 10 lawyers, some of these approaching 50 persons. Instead of 604 solo practitioners, accounting for 77 percent of the total bar, there are now 238 or about 11 percent.[19]

Specialties would be more complex and demanding. Space would at last be something more than low walls to hang diplomas and bar certificates on, and it would be costly and elaborate. Equipment -- copiers, computers, word processors -- would be a major investment and its placement would often dictate the planning of space. Staff and salaries would proliferate and escalate. Litigation would be lengthy, complex, and costly. Fees would skyrocket. And time would experience its most revolutionary reorganization since the invention of the clock divided a day into 24 hours and an hour into 60 minutes -- the discovery of the billable hour.

Now as we stand at the threshold of the 21st century, we realize that even the changes of the last three decades are mild compared to what we can now expect. Alvin Toffler refers to this acceleration of change as "a concrete force that reaches deep into our personal lives, compels us to act out new roles, and confronts us with the danger of a new and powerfully upsetting psychological disease", which he calls "future shock", a "dizzying disorientation brought on by the premature arrival of the future".[20] Thinkers have out-done themselves in trying to find suitable analogies for the immensity of the changes lying ahead. Toffler asks us to think of the last 50,000 years of man's existence as the sum of 800 human lifetimes of 62 years each. He points out that 650 of these lifetimes were spent in caves, that only during the last 6 lifetimes have masses of people seen a printed word, and that virtually all the material goods we use today have been developed within this present 800th lifetime.[21]

This, then, is why we should welcome the work of the Consortium on a Study of the Future of the Legal Profession in Maine. Law and society no longer move like stately glaciers. Although our capacity to manage change is always limited, if I had to navigate a white water

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[19] Statistics furnished by Phyllis Givertz, Immediate Past President, Maine Bar Association, reflected numbers as of August 1983.

[20] Future Shock, pp. 10-11.

[21] Id., at p.14.

river, I'd rather do so with skilled canoeists, though equipped only with pole and paddle, than be on a raft. Let us then try to see what lies ahead, what we want, what we don't want, and what we can do about it. Let us learn to use the future as a tool.