



12-1-1959

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## Recommended Citation

Anton-Hermann Chroust, *Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 Notre Dame L. Rev. 48 (1959).

Available at: <http://scholarship.law.nd.edu/ndlr/vol35/iss1/2>

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## THE DILEMMA OF THE AMERICAN LAWYER IN THE POST-REVOLUTIONARY ERA

*Anton-Hermann Chroust\**

On the eve of the Revolution the legal profession in the American colonies,<sup>1</sup> in the main, had achieved both distinction and recognition. It had come to enjoy the respect as well as the confidence of the people at large. This is borne out, for instance, by the fact that twenty-five of the fifty-six signers of the Declaration of Independence, and thirty-one of the fifty-five members of the Constitutional Convention were lawyers. Of the thirty-one lawyers who attended the Constitutional Convention, no less than five had studied law in England.<sup>2</sup>

The American Revolution itself, directly and indirectly, affected the legal profession in a variety of ways. First, the profession itself lost a considerable number of its most prominent members; secondly, a bitter antipathy against the lawyer as a class soon made itself felt throughout the country; thirdly, a strong dislike of everything English, including the English common law became widespread; and fourthly, the lack of a distinct body of American law as well as the absence of American law reports and law books for a while made the administration of justice extremely difficult and haphazard.

Aside from the fact that a great many lawyers took an active part in the Revolution either as fighting men — usually they held a commission in the militia — or as politicians, the profession was sorely depleted by the defection of many lawyers, among them some of the most outstanding men in the profession, who decided to remain loyal to the British Crown. These Loyalists either completely retired from practice or left America. It has been estimated that in Massachusetts alone at least seventeen prominent lawyers, not counting judges, fled the country: Jonathan Sewall, Timothy Ruggles, Benjamin Kent, Samuel Fitch, Jeremiah Dummer Rogers, Benjamin Gridley, Samuel Quincy, Andrew Caze-neau, Samuel Sewall, Abel Willard, James Putnam, Samuel Porter, Daniel Leonhard, Pelham Winslow, Jonathan Adams, Sampson Salter Blowers and Rufus Chandler. Several other lawyers, among them Joseph Howley and John Worthington, assumed a position of neutrality in the general conflict and gave up the practice of law. William Sullivan describes this situation vividly though not always accurately:<sup>3</sup>

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<sup>1</sup> See also Chroust, *The Legal Profession in Colonial America*, 33 NOTRE DAME LAW. 51, 350 (1957); 34 NOTRE DAME LAW. 44 (1958).

<sup>2</sup> Also ten of the twenty-nine Senators and seventeen of the sixty-five Representatives in the First Congress were lawyers.

<sup>3</sup> SULLIVAN, AN ADDRESS TO THE MEMBERS OF THE BAR OF SUFFOLK, MASS. 39 (1825). This address was delivered in March, 1824, at the "stated meeting" of the Suffolk Bar.

There were then [*scil.*, at the outbreak of the Revolution] in the whole Province [*scil.*, Massachusetts] thirty-six barristers<sup>4</sup> and twelve attorneys,<sup>5</sup> practising in the superior court. These, in common with all other persons, were driven to the necessity of deciding, whether they would adhere to the royal cause, or take the fearful chance of assisting to rescue the country from its oppressors, on failure of the common effort, to be treated as rebellious subjects. Of those who took the side of their country, *sixteen* survived the Revolution. . . . Thirteen<sup>6</sup> of them were royalists, and left the country. . . . Some who remained were neutral, so far as they could be, consistently with safety. . . . Such effect had the Revolution on the members of the [Massachusetts] bar, that the list of 1779 comprized only ten barristers, and four attorneys, for the whole state; who were such before the Revolution.<sup>7</sup>

In other colonies, too, the Revolution caused many losses to the legal profession. Through defections to the Loyalist cause Connecticut, for instance, was deprived of the services of Amos Botsford, Joshua Chandler, Feyler Dibblee (attorney), Thomas Fitch, Nathan Frink and Jared Ingersoll. Georgia lost Anthony Stokes, and Maryland saw the departure of George Chalmers, Daniel Dulany, Lloyd Dulany and Charles Gordon (attorney). New Jersey, where many prominent lawyers became Tories, lost Ozias Ansley, Isaac Allen, John Brown Lawrence, David Ogden, Henry Waddell, Frederick Smyth, Cortland Skinner (the last Royal Attorney General), William Franklin (the last Royal Chief Justice) and William Taylor. New York<sup>8</sup> was deprived of the professional

4 At that time there were actually forty-four barristers in Massachusetts whose names can still be ascertained. Of these forty-four barristers, twelve practiced in Boston (Suffolk), namely, James Otis, Jr., William Read, Samuel Quincy, Benjamin Kent, Richard Dana, Andrew Cazeneau, Samuel Fitch, Benjamin Gridley, Samuel Swift, John Adams, Robert Auchmuty and Sampson Salter Blowers; five in Essex, namely, John Chipman, Daniel Farnham, John Lowell, William Pynchon and Nathaniel Peaslee Sargent; three in Bristol, namely, Robert Treat Paine, Daniel Leonhard and Samuel White; two in Plymouth, namely, James Hovey and Pelham Winslow; three in Worcester, namely, Rufus Chandler, James Putnam and Abel Willard; three in Springfield, namely, Moses Bliss, Jonathan Bliss and John Worthington; two in Cambridge, namely, Francis Dana and William Brattle; two in Great Barrington, namely, Mark Hopkins and David Ingersoll; and one each in Braintree (Jonathan Adams), North Hampton (Joseph Hawley), Concord (Daniel Bliss), Barnstable (Shearjahub Bourne), Littleton (Jeremiah D. Rogers), Taunton (Zephaniah Leonhard), Amherst (Simeon Strong), Hardwick (Daniel Oliver), Charleston (Thomas Danford), Bridgewater (Oakes Augier), Brookfield (Joshua Upham), and Middlesex (Jonathan Sewall).

5 There were at least fourteen outstanding attorneys at the time, namely, Josiah Quincy, Theodore Sedgwick, Isaac Mansfield, David Gorham, Samuel Sewall, Edward Pope, Timothy Langdon, John Sprague, Edward Winslow, Jr., Woodbridge Little, James Boutineau, David Porter, Ebenezer Bradish and Elijah Williams.

6 The actual count is at least seventeen, and possibly more. See text, *supra*.

7 The "anti-revolutionary bar" of Massachusetts and New York furnished the admiralty and common law courts of New Brunswick, Nova Scotia, Canada and the Bermudas with many of their most distinguished lawyers and judges. William Smith, the Chief Justice of New York, attained to the same office in Canada. Daniel Bliss, Joshua Upham, Edward Winslow, Ward Chipman, Jonathan Sewall, Jonathan Bliss and James Putnam were appointed to the bench in New Brunswick. Foster Hutchinson and Sampson Salter Blowers were on the bench in Nova Scotia. William Hutchinson became King's Counsel in the Bahamas, Samuel Quincy King's Attorney in Antigua, Daniel Leonard Chief Justice in the Bermudas, and Jonathan Stearns Attorney General of Nova Scotia. For details, see generally, SABINE, *THE AMERICAN LOYALISTS* (1847). Sabine believes that the majority of the lawyers were Whigs, and that comparatively few lawyers adhered to the Crown. This statement is not supported by the facts. The record shows that many of the eminent members of the bench and bar were Loyalists, although not all of them by any means.

8 The legislature of New York passed an act on October 9, 1779, "suspending from prac-

services of Thomas Barclay, Crean Brush, Benjamin Hilton (attorney), John Tabor Kempe, Benjamin Kissam, George Duncan Ludlow, Lindley Murray, Isaac Ogden, William Smith and Peter Van Schaack.<sup>9</sup> From North Carolina departed Edmund Fanning, George Hooper and Henry Eustace McCulloch. Pennsylvania lost William Allen, Andrew Allen, Isaac Allen, Miers Fisher, Joseph Galloway and Christian Huck. Rhode Island lost James Brenton, James Honeyman, Robert Lightfoot, Matthew Robinson and William B. Simpson. South Carolina was deprived of the services of Thomas Knox Gordon, William Gregory, Egerton Leigh, John Savage, James Simpson and William Wragg,<sup>10</sup> and Virginia lost John Randolph and John Warden. It would not be amiss to estimate that one hundred and fifty lawyers of prominence and another two hundred lawyers of lesser standing left the country or retired from active practice. Perhaps one-third of the legal profession became political refugees on account of the Revolution which "left a huge gap in what had become a great body of lawyers."<sup>11</sup>

The position of the American legal profession was further jeopardized by a disastrous and widespread economic depression which followed in the wake of the Revolution. The economy of the young Republic was in a chaotic state; and large segments of the population were restless and frequently disappointed with the results of the war. As is so often the case after a protracted conflict, business was thoroughly disrupted and even at a complete stand-still in certain areas, and unemployment and general poverty were rampant. The closing of the ports by the British Navigation Acts as well as prohibitory duties in effect cut off the one time profitable West-Indian trade. High prices and enormous public debts necessitating confiscatory taxation all but ruined the country's economy. The paper money issued by the Government was worthless, and in many instances people refused to accept it. A paralyzing inability to pay debts soon set in. The new federal government owed its soldiers large sums of money. People with property were "property-poor," while those who had organized businesses were unable to meet their obligations. Loyalists or Tories, under the terms of the peace treaty, were reclaiming their estates, despite confiscatory legislation which frequently was ignored by the courts.<sup>11a</sup> English creditors and their agents were making strenuous efforts to recover old claims barred by various statutes of confiscation and sequestration. Debts, therefore, plagued the country.

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tice all attorneys, solicitors, and counsellors at law, who had been licensed previous to April, 1777, to practice in any of the courts of law or equity of the former colony of New York." This suspension could only be removed if a jury found that the application for re-admission had been "a good and zealous friend of the American cause." In March, 1785, an attempt was made to procure a repeal of this act, at least so far as it affected certain respected members of the profession. This attempt, however, proved unsuccessful.

9 Peter Van Schaak, who had revised the statutes of colonial New York, was excluded by the act of 1779. See note 8, *supra*. He was re-admitted, however, in April 1786. VAN SCHAACK, *THE LIFE OF PETER VAN SCHAACK* 400, 402-03 (1842). After his re-admission, Peter Van Schaak turned his attention to teaching rather than the practice of law.

10 Since the majority of the better South Carolina lawyers had been trained in the Inns of Court where some of them developed a strong attachment to the Crown *cf.* Chroust, *The Legal Profession in Colonial America*, 34 NOTRE DAME LAW. 44 (1958), it must be assumed that many more of these so-called "South Carolina Templars" left the country.

11 POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 174 (1953).

11a *Cf.* *Ware v. Hylton*, 3 U.S. (3 Dall.) 158 (1796).

Jefferson estimated Virginia alone owed between ten and fifteen million dollars to British merchants. During the war, of course, payment to Englishmen had been suspended by law. But the peace treaty contained a clause providing that bona fide debts could be collected. Popular feeling ran high on this issue, especially since British debts threatened to absorb what little money was left. British merchants before the war had been extremely generous with credit, and the colonial planters and businessmen frequently had made it a practice to wipe out one debt by incurring another, often without bothering to keep books on them. Now the old issue of debts to British creditors was revived and the agents of these British creditors put in an appearance in the American courts to press their claims.

This general economic depression probably was at its worst in 1785. The states had stopped issuing paper money for a short time, but this measure did not add any stability to the old notes. Money grew extremely scarce at a time when a real extension of credit was sorely needed to start up the national economy. In addition, although commerce began to revive somewhat in 1786, it suffered much from the commercial rivalry between the several states. In western Massachusetts the discontent arising from these economic conditions led to an organized uprising—known as Shay's rebellion—which was directed against taxes and debts, and, unfortunately, against the unpopular courts and lawyers.<sup>12</sup> Debtors found the obvious symbols of all their calamities and burdens in the lawyers and the courts through which their creditors moved in on them. Hence the many efforts, often supported by legislative acts, to close the courts by force and drive out the lawyers. When the frontier moved westward during the early decades of the nineteenth century, this suspicion of the courts and the lawyers was carried along. The new states, to be sure, set up courts as a matter of fact, but their readiness of accepting judicial institutions did by no means imply that they regarded judges above popular control or suspicion. Plainly the pioneers held some very pragmatic views of the role to be assigned to the courts, and they generally insisted on the election of all judges by popular vote: in Kentucky, for instance, there raged a fierce contest over the election of a supreme court which could be relied upon to stay debts.

The prevailing laws of strict foreclosure and imprisonment for debt created

12 "The circumstances of the country, from the peace of 1783, to the adoption of the Federal Constitution, were exceedingly oppressive. In such times, professional agency has a very direct relation to real or imaginary evils. This vice of the times, or the unwelcome operations of government are referred to those whose duty it is to aid, in coercing the performance of contracts, or in the furnishing a legal remedy for wrongs. Our profession was most reproachfully assailed by newspaper essayists; and even the legislature entertained projects of reform in practice. . . ." SULLIVAN, *op. cit. supra* note 3, at 48. — The lawyers and the courts also came under strong attack in the so-called Whiskey Insurrection which in 1794 broke out in western Pennsylvania over the enforcement of a federal excise tax on domestic spirits. The anti-rent riots in New York (1839-1846) likewise did not contribute to the general popularity of the legal profession and the courts. While much of the widespread dissatisfaction with the early courts stemmed from charges that they were "undemocratic," there were also many (and, indeed, well-deserved) complaints about the slowness with which the courts performed their tasks. In time these complaints and charges effected extensive alterations in the judicial systems of several states. For the charge that the courts were "undemocratic," see, for instance, CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 168-69 (1918). Carpenter also points out that the alleged "undemocratic deportment of the courts in many instances were considered the result of long tenure (which turned judges into a privileged class), as well as of the fact that they were appointed rather than elected by the people."

widespread individual hardship.<sup>13</sup> Hence, it was only natural that in keeping with the popular tendency always to confound cause and effect, the lawyers especially should be singled out as the real villains. The chief law business of this period, to be sure, was the collection of debts, foreclosures, insolvencies, and the recovery of property—a type of professional activity which, aside from attracting inferior and unscrupulous men, has always been unpopular with the public at large. Whenever the common man came into contact with the law, the legal profession or the law courts, whether this contact involved a dispute over a personal note, a squabble over farm boundaries, a tax collection case, or a sheriff's sale, his experience was not likely to be always a happy one; for he often got less satisfaction from this encounter than he had anticipated in his lay mind. Dependent upon the law but antagonistic to the alleged pretensions of its servants, he became greatly exasperated at "the slow trials, heavy costs . . . frequent misusages of justice,"<sup>14</sup> and the often disappointing outcome of his recourse to law. In addition, the prevailing system of lawyer's fees and court costs established by the various local bar associations aroused much indignation. When the lawyers, because of their training and experience began to assume an active and in some instances a commanding role in the political life of the country, they were frequently attacked with great vehemence.<sup>15</sup> The hostility to the lawyer to some degree delayed the adoption of the new Federal Constitution. Much of the opposition to the proposed constitution which was voiced by the several state conventions between 1787 and 1789 stemmed from the fact that it was considered the work of lawyers. "Beware of the lawyers," warned the *New York Daily Advertiser*. "Of the men who framed the monarchical, tyrannical, diabolical system of slavery, the *New Constitution*, one half were lawyers. Of the men who represented, or rather misrepresented this city [*scil.*, New York] and county in the late [*scil.*, constitutional] convention of this state, to whose wicked arts we may chiefly attribute the adoption of the abominable system, seven out of nine were lawyers."<sup>15a</sup>

This antagonistic sentiment naturally also involved the courts which likewise came under much adverse criticism throughout this period. It was this sentiment which subsequently became one of the chief obstacles to the development of a strong judicial system during the early period of American history. Also the fact that only lawyers seemed to be busy and prosperous while nearly everyone else was perforce idle or in dire economic straits added to the general distrust and dislike of the legal profession. It was not realized that lawyers invariably have a great many "clean-up-jobs" during and immediately after an economic

13 "In the county of Worcester [Massachusetts], then containing a population of less than fifty thousand souls, there were two thousand actions [for debt] on the dockets of its Common Pleas." 1 AMORY, *LIFE OF JAMES SULLIVAN* 186 (1859).

14 FEE, *THE TRANSITION FROM ARISTOCRACY TO DEMOCRACY IN NEW JERSEY, 1789-1829*, 107 (1933).

15 In some instances lawyers who entered politics were denounced as "almost the sole dictators of public life." Their influence was called "improper and dangerous," and one man, from South Jersey, announced that he would not vote for any lawyer "as these men were interested in fomenting disputes and belonged in a class with Tories, liars, drunkards and adulterers." FEE, *op. cit. supra* note 14, at 107-08.

15a *New York Daily Advertiser*, March 4, 1789. See also Fox, *New York Becomes a Democracy*, 6 *HISTORY OF THE STATE OF NEW YORK* 6-7 (Flickled. 1934).

depression. This sort of business comes to some lawyers when other men are conspicuously not busy or not profiteering. Since the lawyer as a rule would do nothing without a retainer, he soon waxed rich and this prosperity soon marked him as a fit subject for the discontented to vent their anger on. The lawyers "were denounced as banditti, as blood-suckers, as pickpockets, as windbags, as smooth-tongued rogues. . . . The mere sight of a lawyer . . . was enough to call forth an oath. . . ." <sup>16</sup> Authors dealing with the economic conditions of the times agree that a violent universal prejudice existed against the legal profession as a whole. Lawyers were called

plants that will grow in any soil that is cultivated by the hands of others — men who derive their fortunes from the misfortunes of people and amass more wealth without labour, than the most opulent farmer with all his toils. . . . What a pity that our forefathers, who happily extinguished so many fatal customs . . . did not also prevent the introduction of a set of men so dangerous. <sup>17</sup>

Public sentiment was also inflamed by radical elements who excoriated the common law of England as "rags of despotism"; and the judges or magistrates who followed the common law were denounced as "tyrants, sycophants, oppressors of the people, and enemies of liberty." <sup>18</sup>

Contemporary journalism likewise joined in this general condemnation of the profession. The New York papers, for instance, were filled with exhortations, written in the style of the hangman, beseeching all true patriots to beware of the sinister machinations of the lawyers — "men so audacious," according to the press, "that they venture, even in public, to wrest, turn, twist, and explain away the purport and meaning of our laws." <sup>19</sup> These men, it was alleged, are the bane of society; "and of all aristocracies, that of the lawyers is the worst." <sup>20</sup> Another paper called upon the electors to refuse lawyers public office, and still another suggested the complete abolition of the legal profession. A knowledge of the law was held to be the best reason in the world why a man should be disqualified for public office. The animadversion against the lawyer found its official expression in a bill proposed, but finally rejected in New York, to throw open the profession to all persons of good character, to fix the fees of attorneys, and to restrain all forms of champerty. The people of New Hampshire insisted that the legal profession was the cause of all their misfortunes. It was maintained that the lawyers were grinding the faces of the poor, that they grew rich while their neighbors approached beggary, and that their fees were exorbitant and their number too great. The farmers of Vermont resolved that all "At-

16 1 McMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES 302 (1927).

17 CRÉVECOEUR, LETTERS FROM AN AMERICAN FARMER 141 (1787) (Everyman's Library).

18 POUND, THE SPIRIT OF THE COMMON LAW 116-17 (1921).

19 1 McMASTER, *op. cit.* *supra* note 16, at 254.

20 *Id.* In 1835 Tocqueville wrote: "The special information which lawyers derive from their studies ensures them a separate station in society; and they constitute a sort of privileged body in the scale of intelligence. . . . In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated circle of society. . . . If I were asked where I place the American Aristocracy, I should reply without hesitation, that it is not composed of the rich, who are united by no common tie, but that it occupies the judicial bench and the bar." 1 DEMOCRACY IN AMERICA 278 (Bradley ed., 1945). See also 2 BRYCE, THE AMERICAN COMMONWEALTH 306 (1913).

torneys whose eternal gabble, || Confounds the inexperienced rabble," as one contemporary "poet" puts it,<sup>21</sup> should be expelled from the courts, and all debts cancelled. A newspaper called upon all lawyers to have a care, and lawyers on the whole were referred to as outright nuisances. Cries went up, "kill the lawyer," but Chittenden, the Governor of Vermont, conceded that while this might be desirable, it would be but a temporary cure in that it did not and could not remove the real cause of the general distress.

Efforts to restrain, suppress and even to abolish the legal profession throughout the young Republic were also voiced by private persons. Benjamin Austin, who wrote under the *nom de plume* of Honestus,<sup>22</sup> in 1786 maintained that all contemporary evils besetting the people could be traced back to the lawyers. Hence, he suggested that the legal profession be "annihilated," that no lawyer "should be admitted to speak in court," and that "the order [of lawyers] be abolished as not only a useless but a dangerous body to the public."<sup>23</sup> Even members of the profession itself, such as John Gardiner of Massachusetts, very much to the discomfort of their brethren, advanced a proposal for a thorough reform of the bar.<sup>24</sup> Benjamin Austin flatly demanded in his much publicized writings<sup>25</sup> that a State Advocate-General should appear on behalf of persons indicted for a crime, that parties were to appear in person or by a friend whether the latter was an attorney or not, and that boards of referees should take the place of courts. As an outspoken anti-Federalist, in 1801 Austin also attacked the very idea of federal courts, remarking that these courts tend to increase the number of lawyers "in ten-fold proportion to other professions. . . . [I]n time," he contended, "the country would be . . . overrun by this 'order' as Egypt with Mamelukes."<sup>26</sup>

John Quincy Adams, in 1787, observed in his *Diary* that the legal profession of Massachusetts was laboring "under the heavy weight of public indignation"; and that it was "upbraided as the original cause of all the evils" which

21 1 McMASTER, *op. cit. supra* note 16, at 344.

22 See also AMORY, *op. cit. supra* note 13, at 188 (1859). Benjamin Austin's (1752-1820) "article" originally appeared under the title of *Observations on the Pernicious Practice of the Law by Honestus as Published occasionally in Independent Chronicle in Boston*, of April 20, 1786. This "article" was printed in several "installments" in the *Boston Independent Chronicle* from March 9 to June 15, 1786. A Digest was then made of this "article" which was published as *Observations on the Pernicious Practice of Law*. A second edition was published in 1819. — Needless to say, the proposals of Austin were assailed by the lawyers, and he was accused of fomenting Shay's Rebellion which broke out in 1786. Resentful of these charges he became even more extreme in his expressions and proposals. His views were well received by the masses in Boston. John Quincy Adams describes a town meeting in Boston attended by about seven hundred of Austin's followers "who looked as if they had been collected from all the jails on the continent. . . ." 4 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 63 (2nd series).

23 HONESTUS (Austin), *op. cit. supra* note 22, at 11 (Digest of 1819). Compare this statement with what one speaker had to say during the debates of the Indiana Constitutional Convention of 1850: "Gentlemen of the bar seem to think that hard things are said here of those who oppose this salutary reform. But let me say to these honorable gentlemen that this is a reform for which the PEOPLE call—a reform that the people's INTEREST demands, and those gentlemen will hear a voice from the people, ere long, which will tell them in tones of muttering thunder, that 'the day of their powers that be, are numbered.'" 2 REPORTS OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1823 (1850).

24 PARSONS, MEMOIR OF THEOPHILUS PARSONS 162 (1859).

25 HONESTUS, *op. cit. supra* note 23.

26 *Ibid.*



besat the Commonwealth: "when the legislatures have been publicly exhorted by a popular writer [Benjamin Austin, alias "Honestus"] to abolish it entirely, and when the mere title of lawyer is sufficient to deprive a man of the public confidence, it should seem this profession would afford but a poor subject of panegyric." But Adams consoles himself with the thought that the future as well as the status of the legal profession will "not be determined by the short-lived frenzy of an inconsiderate multitude, nor by the artful misrepresentation of an insidious writer."<sup>27</sup> In another place Adams laments

that the popular odium which has been excited against the practitioners in this Commonwealth prevails to so great a degree that the most innocent and irreproachable life cannot guard a lawyer against the hatred of his fellow citizens. The very despicable writings of Honestus were just calculated to kindle a flame which will subsist long after they are forgotten. . . . [T]he poison has been so extensively communicated that its infection will not easily be stopped. A thousand lies in addition to those published in the papers have been spread all over the country to prejudice the people against the 'order,' as it has invidiously been called, and . . . the gentlemen of the profession have been treated with contemptuous neglect and with insulting abuse.<sup>28</sup>

In 1803 Charles Jared Ingersoll of Philadelphia, himself a prominent lawyer, reported that "our State rulers threaten to lop away that excrescence on civilization, the Bar,"<sup>29</sup> while William Duane, a journalist in Philadelphia, ranted about "the furrago of finesse and intricacy and abstruseness" by which lawyers had degraded the law of the land. In a pamphlet which carried the formidable title of *Sampson Against the Philistines or the Reformation of Law-suits and Justice made cheap, speedy and brought home to every man's door agreeable to the Principles of the Ancient Trial by Jury before the same was innovated by Judges and Lawyers*, published in 1804-05, this Duane spoke about

the loose principles of persons of that profession [the legal profession]; their practice of defending right and wrong indifferently for reward; their open enmity to the principles of free government, because free government is irreconcilable to the abuses upon which they thrive; the tyranny which they display in the courts; and in too many cases the obvious . . . collusion which prevails among the members of the bench, the bar, and the officers of the court. . . . [He then suggests that these alleged abuses] demand the more serious interference of the legislature and the jealousy of the people, . . . [especially since the lawyers] so manage justice as to engross the general property to themselves through the medium of litigation; and the misfortune is that to be able to effect this point, it is attended by loss of time, by delay, expense, ill blood, bad habits, lessons of fraud and temptation to villainy, crimes, punishments, loss of estate, character and soul, public burden, and even loss of national character.

William Duane continues: "So long as justice can be demanded only by professional lawyers, so long will the knowledge of it [*scil.*, the law] be the ex-

<sup>27</sup> *Diary of John Quincy Adams*, 16 MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS 291, 343 (2d series 1902).

<sup>28</sup> *Ibid.* at 358.

<sup>29</sup> MEIGS, *LIFE OF JARED INGERSOLL* 14 (1897).

clusive property of the profession. . . ."<sup>30</sup> To remedy all these evils, he proposed a series of radical reforms which, if fully carried out, ultimately would have resulted in the abolition of the legal profession: all trials were to be held before local or county tribunals in order to expedite justice, with practically no right to appeal; lawyers, if they were to be admitted at all, should be appointed and paid for by the government, and then only in order to assist the litigants; and a system of arbitration by laymen should replace, wherever feasible, the courts of law.<sup>31</sup>

The widespread and popular aversion to the legal profession<sup>32</sup> assumed a variety of forms in the several states. In Vermont and New Hampshire vociferous demands were made to suppress the legal profession completely, or at least to reduce the number of lawyers and, incidentally, to cut down substantially the usual legal fees. In Vermont, where the people apparently were particularly vehement in their actions, court houses were set afire; in New Hampshire some people even advanced the ridiculous proposition that all courts be abolished. This will also explain why the Vermont legislature arrogated to itself the right to set aside or modify court decisions, or grant new trials over the heads of the courts.<sup>33</sup> In New Jersey debtors nailed up the doors of the court houses, and irate mobs attacked lawyers on the streets. In Rhode Island lawyers were compelled by the state legislature under penalty of disbarment to accept paper money at par, although a previous act providing for compulsory payment of debts in paper money had been held unconstitutional. Massachusetts, which on the eve of the Revolution could boast of one of the most outstanding and best organized bars in America, also seems to have become extremely hostile to the legal profession. In 1785 and again in 1786, acts were passed by the General Court to the effect that parties to a litigation were to be permitted to plead their own cases in court. Also, no party was to employ more than two lawyers at one time. Subsequently an act was passed authorizing parties to a litigation to appoint as their attorney any person irrespective of whether this particular person had duly been admitted to practice. And in 1790 the General Court proposed a thorough investigation of the "present state of the law and its professors." As early as 1786, the town of Braintree in Massachusetts passed a resolve "to crush" or, at least, to restrain "that order of Gentlemen denominated Lawyers . . . whose . . . conduct appears . . . to tend rather to the destruction than the preservation of this Commonwealth";<sup>34</sup> and the town of Dedham reported that it was aware of the universally prevailing complaints against the lawyers. The town felt that by their "unreasonable and extravagant exactions"

30 Quoted in WARREN, A HISTORY OF THE AMERICAN BAR 223 (1911).

31 *Ibid.* DUANE, SAMPSON AGAINST THE PHILISTINES 36-42 (1804-1805).

32 See note 15a *supra*.

33 The impeachment proceedings against Justice Samuel Chase are also in point. William Branch Giles of Virginia, the spokesman for the extreme Jeffersonian position, stated the real issue of these proceedings as follows: ". . . if the Judges of the Supreme Court should dare, AS THEY HAD DONE, to declare an act of Congress unconstitutional . . . it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them. . . ." 1 MEMOIRS OF JOHN QUINCY ADAMS 322 (Adams ed., 1874).

34 *Diary of John Quincy Adams*, 16 MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS (2d series) 291, 342 (1902); 2 ADAMS, THREE EPISODES OF MASSACHUSETTS HISTORY 897 (1896).

the lawyers were guilty of a "pernicious" and "unconstitutional" conduct. Hence, Dedham instructed its representative in the General Court (the State's legislative body) to initiate legislation for the restraint of the legal profession, and, if necessary, "to endeavor that the order of Lawyers be totally abolished; an alternative preferable to their continuing in their present mode."<sup>35</sup> In Pennsylvania several statutes were passed to repress not only the profession but also the common law and the existing system of courts. These acts provided for lay referees in place of trained judges, and for trials without intervention of counsel. Parties were to file informally a statement in court, and the adversary's rejoinder was likewise to be informal. As a matter of fact, the situation in Pennsylvania became so threatening to the bar that Charles Jared Ingersoll of Philadelphia informed his friends that all the eminent lawyers in Philadelphia "have their eyes on one city or another to remove to in case of extremes." He added that his own father, Jared Ingersoll, a barrister of the Middle Temple, and one of the most distinguished Philadelphia lawyers in an age when this city boasted the finest legal talent of the country, planned to transfer his practice to New York.<sup>36</sup>

At the same time the practice of law and the many opportunities it afforded during these troubled years still seemed to be the most honorable and, it may be added, the most promising and attractive profession open to young men of ambition and talent.

After the peace of 1783 . . . a few gentlemen of the colonial school resumed their ancient practice; but the Bar was chiefly supplied by a number of ambitious and high-spirited young men, who had returned from the field of arms with honorable distinction, and by extraordinary application, they soon became qualified to commence their career at the Bar [of New York] with distinguished reputation. . . .<sup>37</sup>

Alexander Hamilton, for instance, prepared for the practice of law by intensive reading for a period of three months under the tutelage of Robert Troup.<sup>38</sup> At the July term of the New York Superior Court in 1782 he was admitted to practice as an attorney, and in October of 1782 granted the additional license of a counsellor. Despite this abbreviated preparation for the bar, Hamilton, because of his outstanding mental gifts, soon became a brilliant and successful lawyer.

But there is another side to this story. Alexander Hamilton's less talented contemporaries, who had been admitted to practice after the same scanty preparation, on the whole proved to be little qualified for the profession.<sup>39</sup> Much of the work which should have been done by responsible and experienced professional men was taken over by sharpers and pettifoggers; in fact, a large segment of the young American bar was made up of men who had but a sketchy acquaintance with the law and with the standards required of an honorable profession.

As early as 1768 the Essex bar in Massachusetts enacted a rule, later adopted

35 Quoted in COHEN, *THE LAW: BUSINESS OR PROFESSION* 27 (1924).

36 MEIGS, *op. cit. supra* note 29, at 14.

37 KENT, *MEMOIRS AND LETTERS OF JAMES KENT 1763-1847*, 31 (1898).

38 SCHACHNER, *ALEXANDER HAMILTON* 145 (1946). In his private reading Hamilton had already become familiar with Blackstone, Grotius and Puffendorf.

39 Cf. CLARK, *MEMOIR OF JEREMIAH MASON* 22 (1917): "Most of the members of the bar were poorly educated, and of vulgar manners and indifferent morals."

by other Massachusetts county bars, that no person be admitted to the practice of law without the consent and recommendation of the bar. In particular, it was provided that no person be admitted as an attorney in the inferior courts who had not studied law with some lawyer for at least three years; and that any person to be admitted as an attorney to the Superior Court must have been an attorney of good standing in the inferior courts for at least two years. Any person wishing to become a barrister must have been an attorney in the Superior Court for at least two years.<sup>39a</sup> During the Revolution, as may well be expected, this particular rule was not always strictly enforced. Thus, Christopher Gore, subsequently an outstanding lawyer and Governor of Massachusetts, in 1778 was considered to have studied law according to the rules of the Essex Bar since July, 1776, although his main activities were those of a patriot rather than of a law student.<sup>39b</sup> In 1779 Fisher Ames, although he was living in Dedham at the time, was considered as having been a student under the tutelage of Mr. Tudor of Boston since January 1, provided that at the expiration of three years from January 1, 1779 he was still in the office of Mr. Tudor. He was also ordered to submit then to an examination by the Essex Bar "in the practical business of the bar."<sup>39c</sup> In 1783 a Richard Brook Roberts of South Carolina was admitted as a student in the office of Mr. Hichborn "with a deduction of one year from the usual term required by the rules for such students," provided he could produce a certificate from a South Carolina lawyer to the effect that he had studied law for at least one year in this lawyer's office.<sup>39d</sup> In 1806 Massachusetts laid down the rule that graduates from out-of-state colleges would have to study one year more than graduates from Harvard.<sup>40</sup>

The New Hampshire bar, in 1788 and again in 1805, adopted some rules concerning the admission to legal study and to the bar. These rules provided that a candidate for admission to a law office must be duly qualified to be enrolled in Dartmouth college as a first-year student. A non-college student was required to study in a law office for at least five years, while a college graduate had to take only three years of legal training within the state.<sup>41</sup> Also, no lawyer was to be admitted to the bar of the Superior Court of New Hampshire until he had practiced for at least two years in the Court of Common Pleas. In Vermont, under the statute of 1787, the term of legal study was two years,<sup>42</sup> and in Connecticut and Rhode Island two years were prescribed for college graduates and three years for persons without college training.<sup>43</sup> In Vermont, as in Rhode Island, any candidate for admission to practice had to have the approbation of the local bar.

With the adoption of the New York Constitution of 1777, the admission

39a 2 ADAMS, LIFE AND WORKS OF JOHN ADAMS 197 (1885). Cf. *Record-Book of the Suffolk Bar*, 16 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 749 (1881-1882).

39b *Ibid.* at 152.

39c *Ibid.* at 153.

39d *Ibid.* at 157.

40 Apparently the lawyers of Massachusetts, who were mostly graduates from Harvard College, did not think too highly of the education offered in other colleges.

41 CLARK, *op. cit. supra* note 39, at 23.

42 CLARK, *op. cit. supra* note 39, at 21.

43 The Connecticut rule, which dates back to the year 1795, was established by custom, but in 1807 became a rule of the Supreme Court.

to practice was regulated by the provision that all attorneys, solicitors and counsellors should be appointed and licensed by the court in which they intended to practice. By rule of the Supreme Court of 1797,<sup>44</sup> it was further provided that candidates for admission to practice must have served a regular seven-year clerkship with a practicing lawyer, but a period not exceeding four years devoted to classical studies (college) after one had attained the age of fourteen years might be accepted as partial fulfillment of the required seven year period of clerkship. After four years of practice (modified in 1804 to three years)<sup>45</sup> as an attorney, or after four years of study under a professor or counsellor (also modified in 1804),<sup>46</sup> a person might be admitted as a counsellor to practice before the Supreme Court.<sup>47</sup> In 1829 the rules for admission were further amended to the effect that an attorney should be admitted as counsel, not as a matter of right after four (or three) years, but only if he were found to be duly qualified. In New Jersey, a candidate for admission to the practice of law had to be recommended by the judges of the Supreme Court to the Governor who licensed him, provided the candidate had served a clerkship of three years if a college graduate, or four years if a non-graduate. He also had to pass an examination before a committee of three out of the twelve serjeants who composed the uppermost level of the New Jersey legal profession.<sup>48</sup>

In Delaware as well as in Maryland, three years of law study was required. In Maryland in particular, this study had to be under the supervision of a practicing lawyer or judge, and the candidate had to submit to an examination by two members of the bar. How deplorably lax, in the main, these examinations could be may be gathered from the following account: in Kentucky a candidate was unable to give one single correct answer. Nevertheless, he was admitted on the ground stated officially by the court that "no one would employ him anyhow." The question of character fitness was duly met by the statement that he "had never fought a duel with deadly weapons either in the state or without the state with a citizen of the state [of Kentucky.]"<sup>49</sup> In Virginia

44 1 N. Y. (Cole. Cas.) 32-33 (1797).

45 2 N. Y. (2 Cai. R.) 418 (1804).

46 *Ibid.*

47 Smith, *Admission to the Bar in New York*, 16 YALE L. J. 514-15 (1906). Similar rules governed the admission of solicitors in Chancery, with the additional provision that the candidate had to pass a satisfactory examination before the Chancellor, Vice-Chancellor, or any other officer of the court appointed by the Chancellor.

48 New Jersey, until 1839, retained the rank of serjeant. Cf. Chroust, *The Legal Profession in Colonial America*, 33 NOTRE DAME LAW. 350, 363 (1958).

49 Cf. SMITH, *op. cit. supra* note 47, at 519. Jonathan Birch of Bloomington, Illinois, recalled the circumstances of his "examination" for the Illinois bar by Abraham Lincoln, a member of the board of examiners by appointment of the Supreme Court of Illinois. The candidate found the examiner, Lincoln, in his hotel room, partly undressed, and so far as facilities permitted, taking a bath, which proceeded during the "examination": "Motioning me to be seated, he began his interrogatories at once, without looking at me a second time to be sure of the identity of his caller. 'How long have you been studying?' he asked. 'Almost two years,' was my response. 'By this time, it seems to me,' he said laughingly, 'you ought to be able to determine whether you have in you the kind of stuff out of which a good lawyer can be made. What books have you read?' I told him, and he said it was more than he read before he was admitted to the bar. . . . He asked me in a desultory way the definition of a contract, and two or three fundamental questions. . . . Beyond these meager inquiries . . . he asked nothing more. As he continued his toilet, he entertained me with recollections—many of them characteristically vivid and racy—of his early practice. . . . The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was

only one year of study was prescribed, while in South Carolina the applicant had to pass an examination unless he had served four years as a clerk to a practicing lawyer. Pennsylvania, by a rule of the Supreme Court issued in 1788, required either four years of clerkship and one year of practice in the Court of Common Pleas; or three years of study and two years of practice as well as an examination by two lawyers; or two years of clerkship or two years of practice, as well as an examination, if the candidate had commenced his legal studies after he had reached the age of twenty-one.

In many states the antagonism towards the lawyer went so far that almost any one but a trained lawyer was regarded a fit person to sit on the bench. Thus, it came about that even the higher courts in many jurisdictions were manned by people who probably excelled in their patriotic zeal, but had little or no training in the law. In New Hampshire, during the Revolution, Meschec Weare, a theologian by profession, was Chief Justice of the Superior Court, and Matthew Thornton, one of his two associates, was a physician by profession.<sup>50</sup>

In 1782 Samuel Livermore became Chief Justice. According to tradition, he was an independent of conventionality as any living being could be. . . . He attached no importance to precedents, and to quote any would invite his anger. . . . Even when gross inconsistency marked his decisions . . . he was not disturbed, but merely replied that 'Every tub must stand on its own bottom.' He frequently cautioned the jury against 'paying too much attention to the niceties of the law to the prejudice of justice.' He was firm in his determination not to go back into the past for the quest of authorities; so he layed down the inflexible rule that all reports of a date prior to the Declaration of Independence might be cited, not, however, as authorities, but as enlightening. . . .<sup>51</sup>

Jeremiah Mason recalls that Livermore had "no law learning himself . . . [and] did not like to be pestered with it at his court. . . . [L]aw books were laughed out of court."<sup>52</sup> Brackenridge, an Associate Justice of the Supreme court of Pennsylvania, according to Horace Binney,

despised the law, because he was utterly ignorant of it, and affected to value himself solely upon his genius and taste for litera-

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really being examined at all or not. . . . [H]e wrote a few lines on a sheet of paper, and, enclosing it in an envelope, directed me to report with it to Judge Logan, another member of the examining committee, at Springfield. The next day . . . I delivered the letter. . . . On reading it, Judge Logan smiled, and, much to my surprise, gave me the required certificate without asking a question beyond my age and residence, and the correct way of spelling my name. The note from Lincoln said: 'My dear Judge:—The bearer of this is a young man who thinks he can be a lawyer. Examine him, if you want to. I have done so, and am satisfied. He's a good deal smarter than he looks to be.' " WOLDMAN, *LAWYER LINCOLN* 153-54 (1936).

50 During the same period, Nathaniel Peabody and Jonathan Blanchard discharged the duties of attorney general for New Hampshire, although neither of them had been trained in the law. In 1791, Josiah Bartlett, a physician, became Chief Justice of New Hampshire. Woodbury Langdon, a judge of the Supreme Court of New Hampshire at different periods from 1782 to 1791, was a merchant; and Timothy Farrar, who served from 1771 to 1803, originally had studied for the ministry. See PLUMER, *THE LIFE OF WILLIAM PLUMER* 152 (1857). It should be noted here that other states, too, made use of lay judges. In Rhode Island, for instance, a blacksmith was judge of the highest state tribunal from 1814 to 1818, and from 1818 to 1826 the Chief Justice was a farmer. See POUND, *THE SPIRIT OF THE COMMON LAW* 113 (1921).

51 Corning, *The Highest Court of Law in New Hampshire,—Colonial, Provincial and State*, 2 *THE GREEN BAG* 470 (1890).

52 CLARK, *op. cit. supra* note 39, at 28 (1917).

ture. . . . He once said to me . . . 'Talk of your Cokes and Littletons, I had rather have one spark of the ethereal fire of Milton than all the learning of all the Cokes and Littletons that ever lived.' . . . He hated Judge Yeates [very good judge, and a first-rate Pennsylvania lawyer] to absolute loathing. If Chief Justice Tilghman had not sat between them, I think that Brackenridge would sometimes . . . have spit in Yeates' face, from mere detestation . . . for Yeates was vastly his superior in everything that deserves praise among men. . . . It is not certain that Brackenridge was at all times sane, and he would have been just as good a judge as he was if he had been crazy outright.<sup>53</sup>

In New York, John Sloss Hobart, an Associate Justice of the Supreme Court, was not a lawyer, and the conditions prevailing at this court prior to 1804, the year James Kent became Chief Justice, were described as

very inefficient and unsatisfactory. . . . The cases that came before the court were slightly examined both at the bar and on the bench. . . . [T]alent and legal learning . . . had not been applied in that thorough, laborious and businesslike way so necessary to give strength and character to the court and to the law. . . .<sup>54</sup>

The early courts of Vermont, we are told, "were badly organized and usually filled with incompetent men."<sup>55</sup> In New Jersey, Isaac Smith, a physician by training, and Samuel Tucker, who had no particular training at all, were members of the Supreme Court,<sup>56</sup> while in Rhode Island, Tristram Burges, an orator and professor of oratory, was Chief Justice from 1817 to 1818; and James Fenner, a person little qualified to perform judicial duties, and Charles Brayton, a blacksmith by trade, were Associate Justices of the Supreme Court. Between 1819 and 1826 Isaac Wilbur, a farmer by profession, held the position of Chief Justice. Samuel Randall, who was Associate Justice of the Supreme Court from 1822 to 1832, was admitted to the bar two years after his retirement from the bench.<sup>57</sup> Jeremiah Mason recollects that Lot Hall, a Justice of the Supreme Court of Vermont, was "a man of ordinary natural talents, little learning, and much industry."<sup>58</sup> John Louis Taylor, the first Chief Justice of North Carolina, had only a smattering of a college education. For awhile he read law "without preceptor or guide"; and he was admitted to the bar at the age of nineteen.<sup>59</sup>

A judicial utterance, which is perhaps most characteristic of this period, was made by John Dudley, a trader and farmer by profession, who, between 1785 and 1797, was also an Associate Justice of the Supreme Court of New Hampshire.<sup>60</sup> He addressed the jury:

Gentlemen, we have heard what has been said in this case by the lawyers, the rascals. . . . They talk of law. Why, gentlemen,

53 BINNEY, *THE LIFE OF HORACE BINNEY* 40 (1903).

54 BARNARD, *DISCOURSE ON THE LIFE, CHARACTER AND PUBLIC SERVICES OF AMBROSE SPENCER* 46 (1849).

55 CLARK, *op. cit. supra* note 39, at 22.

56 Whitehead, *The Supreme Court of New Jersey*, 3 *THE GREEN BAG* 401, 402, 404 (1891).

57 Edwards, *The Supreme Court of Rhode Island*, 2 *THE GREEN BAG* 525, 531, 532, 533 (1890). See also POUND, *THE SPIRIT OF THE COMMON LAW* 113 (1921).

58 CLARK, *op. cit. supra* note 39, at 19.

59 Clark, *The Supreme Court of North Carolina*, 4 *THE GREEN BAG* 457, 461 (1892).

60 PLUMER, *op. cit. supra* note 50, at 150-56 (1857). Plumer said about Dudley that he "had not only no legal education but little learning of any kind. But he had a dis-

it is not law what we want, but justice! They would govern us by the common law of England. Common-sense is a much safer guide. . . . A clear head and an honest heart are worth more than all the law of the lawyers. There is one good thing said at the bar from Shakspeare [*sic*], — an English player, I believe. . . . It is our duty to do justice between the parties, not by any quirks of the law out of Coke or Blackstone, — books that I never read and never will. . . .<sup>61</sup>

The bar, confronted with such an unprofessional bench, was frequently compelled to adapt itself to these conditions, very much to the detriment of its own professional standards.

It should be borne in mind that the first state governments were largely characterized by what has been called "legislative supremacy." The will of the people in many instances was considered omnipotent, and the legislature was simply looked upon as the chief organ of this omnipotent popular will. Hence the earlier state legislatures did not hesitate to interfere with the traditional functions of the courts. They enacted statutes reversing judgments of the courts in particular cases;<sup>62</sup> they attempted to admit to probate wills previously rejected by the courts on good legal grounds;<sup>63</sup> and they sought to dictate the details of administration of particular estates.<sup>64</sup> By special laws they validated particular invalid marriages,<sup>65</sup> and they attempted to exempt a particular wrongdoer from liability for a particular wrong for which his neighbors would be held liable by the general law as administered by the courts.<sup>66</sup> They suspended

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criminating mind, a retentive memory, a patience which no labor could tire, and integrity proof alike against threats and flattery, and a free elocution, rude indeed, and often uncouth, but bold, clear and expressive, with a warmth of honest feeling which was not easy to resist." *Ibid.* at 153. Theophilus Parsons, an outstanding lawyer of the time, maintained, however, that Dudley was "the best judge I ever knew in New Hampshire"; and Arthur Livermore, another able lawyer, was of the opinion that "justice was never better administered in New Hampshire, than when the judges knew very little of what we lawyers call law." PLUMER, *op. cit. supra*, at 155-56. William Plumer observes that some of the lay judges were not only prone to disregard the known principles of the law, but were inclined in some instances to mete out a very uncertain product of their own: "So much, indeed, was the result supposed to depend upon the favor or aversion of the courts, that presents were not uncommon, nor perhaps, unexpected." *Ibid.* at 150.

61 Corning, *op. cit. supra* note 51, at 470. See also note, 40 AMERICAN LAW REVIEW 436-37 (1906). — Compare this statement with what one of the delegates to the Indiana Constitutional Convention of 1850 said: "I have been a lawyer for some years, and I have no hesitation in telling gentlemen that I never studied Latin; and I will tell them further, that any man who studies Latin for the purpose of making himself a lawyer, is a fool for his pains." 2 REPORTS OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1136 (1850). Justice Miller is reported to have pointed out that the prime factor in shaping the law in our Western states was ignorance: the first judges "did not know enough to do the wrong thing, so they did the right thing." POUND, THE FORMATIVE ERA OF AMERICAN LAW 11 (1938). During the debates of the Indiana Constitutional Convention of 1850, a speaker quoted a judge as having said: "During the fifteen years that I have practiced law, I can say, with safety, that not one-half of the suits with which I was familiar, were decided upon their merits, or upon principles of substantial justice." 2 REPORTS OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1738 (1850).

62 See *Preface* to 1 Chip. No. 4, 5, 21-25 (Vt.) (1792); 2 Root (Conn.) 350 (1796); *Calder v. Bull*, 3 U.S. (3 Dall.) 385 (1798); *Merrill v. Sherburne*, 1 N.H. 199 (1818); *Hamilton v. Hempsted*, 3 Conn. 332 (Day 1809).

63 *Calder v. Bull*, 3 U.S. (3 Dall.) 385 (1798).

64 *Leland v. Wilkinson*, 31 U.S. (6 Pet.) 206, 207 (1832).

65 *Local Laws of Ind.*, 1842, ch. 140 at 130.

66 *Holden v. James*, 11 Mass. 396 (1814); 5 *Watts and Sergeant* 171 (Pa. 1843); *Local Laws of Ind.*, 1839, ch. 75 at 158.



the statute of limitations for a particular litigant in one case,<sup>67</sup> and they dispensed with, for particular and specified litigants, the statutory requirements for bringing suit for divorce.<sup>68</sup> Subordination of the courts to the "appellate jurisdiction" of the legislature (or the governor), as a matter of fact, was not uncommon in the early history of the United States. In some instances the judiciary was considered simply "a subordinate department of the government."<sup>69</sup> In colonial days, it will be remembered, appellate jurisdiction rested with the king and council. When the first state constitutions were adopted, courts of last resort were established to assume this function.<sup>70</sup> But in some states appellate jurisdiction was vested in the legislature or governor.<sup>71</sup>

Several factors other than popular resentment and low standards of admission to legal practice contributed to the deterioration or, as Pound puts it,<sup>72</sup> to the "deprofessionalization" of the young American legal profession. Among these factors were, first, the particular geographical conditions of the early Republic as well as the primitive and often wholly inadequate means of communication between the various parts of the country.<sup>73</sup> Many communities for a long time were cut off from the more important centers of culture along the East coast. Secondly, in keeping with the tendency to bring justice "to every man's door,"<sup>74</sup> a vast number of independent courts of general jurisdiction was

67 *Holden v. James*, 11 Mass. 396 (1814); *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 162 (1804).

68 Local Laws of Ind., 1842, ch. 122 at 119, ch. 125 at 121. — In order to understand this "legislative overbearance," it must be borne in mind that for a long time the legislature had been the favorite of the early American. The colonial period left a long memory of conflicts in which the colonial legislatures spoke out against British arbitrariness. While the courts and the executive had been creatures of the Crown, the legislative assemblies, as the champions of the people's interests, had assumed the initiative in the gathering drive for independence. Hence it is not surprising that the early state constitutions should grant the legislature sweeping and, frequently, too sweeping powers "to make all laws which shall be deemed necessary." As often as not, such broad grants of power simply swept away the formal separation of powers among legislature, judiciary, and executive. In addition, the legislature rather than the courts seemed to express more adequately the deeply ingrained localism in early American politics — the notion that the natural unit representing the sovereign people was the local assembly which, therefore, should have practically unlimited powers.

69 CHIPMAN, *A MEMOIR OF THOMAS CHITTENDEN*, 112 (1846).

70 Until 1835 Georgia did not have a Supreme Court. The people of Georgia apparently feared the power of lawyers and judges who, it was alleged, would be beyond popular control if fortified by a supreme court. When in 1835 the Constitution of Georgia was amended, provisions were made for a supreme judicial court. But not until ten years later was the necessary legislation enacted that put the Supreme Court into operation.

71 See generally, MATTHEWS, *AMERICAN STATE GOVERNMENT* 430 (1924); Browne, *The New York Court of Appeals*, 2 *THE GREEN BAG* 277, 278 (1890); Eaton, *The Development of the Judicial System in Rhode Island*, 14 *YALE L. J.* 148, 153 (1905). — When the legislature could not be induced by the people to interfere with the courts, violent action was taken against these courts in some instances as in Shay's Rebellion in Massachusetts, the Whiskey Insurrection in Pennsylvania, and the anti-rent disorders in Eastern New York.

72 POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 183 (1953).

73 The memoirs of many an early judge or lawyer "riding the circuit" give a vivid picture of the dangers and inconveniences inherent in travel.

74 Under the provisions of the first Constitution of Ohio of 1802, for instance, members of the Ohio Supreme Court were required to hold a term once a year in each county. Moses Granger, one of the judges, points out that this provision kept the judges on horseback half of the year: "Every lawyer-judge," Granger writes, "traveled many hundreds of miles each year upon a circuit in which the best roads were very poor, and most of them almost impassable on wheels. . . . Members of the county bar traveled with, or met, the judges, and lodged with or near them during term. The saddle-bag carried Ohio Statutes, then small in bulk, Blackstone's *Commentaries*, sometimes Coke on Littleton, sometimes a volume or two of an English

established throughout the country. To each of these courts an independent local bar was attached wherever feasible. These local bars, especially in the "back country," on the whole lacked effective organization, discipline and professional competence. Every local court, as a rule, acting on its own discretion and frequently without discrimination, admitted to practice all sorts of people, irrespective of their moral and professional qualifications. After a certain number of years a person so admitted was considered qualified to practice before all the state courts, including the highest court of the state.

This system of attaching distinctly local but wholly unorganized and frequently unprofessional bars to each local court constituted a grave danger to professional ideals, professional deportment and professional competence. Discipline by the courts, if ever invoked, was singularly inefficient, while discipline by the profession itself or by a professional organization simply had ceased to exist by that time. Reprehensible practices often remained unchecked, and the question of competence was rarely if ever raised. At first, some influential local bars, such as the bar organizations in eastern Massachusetts, which shortly before the Revolution had achieved a high level of standards and discipline, tried to stem the general tide of professional deterioration. Also, the so-called "circuit bars," which accompanied the circuit courts in their travels from county to county, at least for a while had a wholesome and restraining effect upon the disorganized local bars by keeping alive or by kindling a professional spirit. But in the face of the general trend towards "deprofessionalization" and its concomitants, such as the universal lowering of educational requirements and indiscriminate admission to practice, these efforts proved to be in vain. Hence, the years following the Revolution might also be called the period of an unsuccessful struggle of the legal profession to preserve its pre-Revolutionary attainments. As time went on, the pernicious institution of the "habitual client-caretaker" developed, especially in the larger Eastern urban centers. This type of practitioner, which also included the habitual criminal lawyer, did little to enhance the reputation of the profession. Neither courts nor the opinion of the honorable members of the unorganized and, hence, powerless bar, were able to cope effectively with the reprehensible methods and performances of these men. This general situation, besides having its effects on the common law, inevitably caused the complete breakdown of the traditional English distinction between barrister and attorney (or solicitor), a distinction which, however, had been to some degree rejected by the colonies before the Revolution. Aside from the expense inherent in such a differentiation, the relatively small number of lawyers that was to be found after the Revolution could not successfully have been divided into barristers and attorneys; and the fusion between these two branches of the profession became a permanent feature of legal practice in the United States. As a matter of fact, the English attorney or solicitor, rather than the barrister, became the model for the American legal practitioner. But the English attorney or solicitor of that time, whom the newly emerging American bar to a large

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law or equity report, and a small 'vade mecum' legal treatise the name of which is now known to few of our profession." Quoted in AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 154-55 (1940).

extent imitated, lacked an efficient professional organization, and the tradition of professional responsibility which such an organization engenders.

The widespread irritation among people who attributed all their economic and social troubles to lawyers, together with a deeply rooted hostility to everything British, led, as might be expected, to a strong and lasting sentiment against the common law of England, which during the eighteenth century had gradually asserted itself as the law of the colonies. The antagonism against the common law probably became more pronounced during the so-called Jeffersonian era, a period in American history which in its dislike of everything British seems to have favored everything French, including the promulgation of a radically new code of laws fashioned after the recently introduced French *Code Napoléon*.<sup>75</sup>

One of the specific reasons for the public distrust of the existing laws was the intricacies and technicalities of the English common law. Special pleading, which had been introduced in England during the eighteenth century, Latin, French, and other terms unfamiliar to the laymen, were generally regarded as tricky devices to mislead and despoil ordinary people.<sup>75a</sup> William Duane of Philadelphia, attacking the "mysterious" and "unintelligible" common law of his day, was of the opinion that it was invented and kept in force by the lawyers solely for the purpose of preventing the non-initiated from acquiring any knowledge of the law. He suggested that the law be so simplified as to enable everyone to be his own lawyer: "Law would soon become a part of academic study. . . . By this means society would be prodigiously advanced in knowledge. . . ." <sup>76</sup> Benjamin Austin lamented that:

One reason of the pernicious practice of the law and what gives great influence to the 'order' [of lawyers], is that we have introduced the whole body of English law into our courts. Why should these States be governed by British laws? Can the monarchical and aristocratic institutions of England be consistent with the republican principles of our Constitution? The precedents brought from 'old English authorities' . . . answer no other purpose than to increase the influence of lawyers.<sup>77</sup>

To be sure, there existed a number of lawyers, at least on the eve of the Revolution, who fiercely resisted every legal reform, and who regretted the fact that Blackstone's *Commentaries*, which made their appearance in the colonies just before the Revolution, should simplify and arrange the law of England in such a

<sup>75</sup> The Anti-Federalists, who were not only hostile toward England and English institutions, but also interested in reforming existing practice and procedure, were inclined to urge the reception of French law. Gratitude to France for her timely assistance during the Revolution was at a high point during these years, and great interest was displayed in the language, literature, fashions, and manners of the French people. It is no wonder, therefore, that French law and French legal authorities were given high standing in many quarters, and frequently found their way into the earlier American reports. "In our courts of justice the writings of the civilians are referred to freely. . . ." Anonymous, 21 NORTH AMERICAN REVIEW 387-88 (1925). Pound has pointed out that the first volume of Johnson's Reports of decisions in the New York Supreme Court of Error for the year 1806 contains a number of citations from French legal authorities. Pound, *The Place of Judge Storey in the Making of American Law*, 48 AM. L. REV. 676, 685 (1914).

<sup>75a</sup> See also 2 REPORTS OF THE DEBATES, etc. quoted in note 61, *supra*, at 1128.

<sup>76</sup> Duane, *op. cit. supra* note 31, at 36-42.

<sup>77</sup> Benjamin Austin (Honestus), quoted in WARREN, *op. cit. supra* note 30, at 228.

manner that even laymen could acquire a modicum of legal knowledge without undue effort.

While the "moderates" agreed that the English common law which had developed subsequent to the American Revolution, should be wholly ignored, the "radicals" expostulated that only the English law as it existed prior to the fourth year of the reign of James I (the year 1607)<sup>78</sup> should have binding force. The "extremists," on the other hand, insisted that the whole of the English common law prior to the Revolution had no validity in the United States, except those provisions which expressly had been adopted by the various state conventions, by statute or by court decisions. Jefferson, for instance, maintained that the American colonists asserted against the British Crown not "the rights of Englishmen," but "the rights of man"; and he seriously doubted the propriety of quoting in American courts English authorities subsequent to the emigration, that is, subsequent to the year 1607. Some "extremists" even went so far as to suggest the complete abolishment of the common law in its entirety: "As soon as we cut asunder the legatures that bound us together . . . the common law was done away. . . ."<sup>79</sup> It was urged, for instance, that the Virginia courts abandon the practice of quoting British decisions, because it was thought to be unbecoming for a free republican government to be administered by principles "of a rigid and high toned monarchy."<sup>80</sup> At the same time the hope was expressed that "substituting acts" would soon be passed by the people enabling them to "shake off this last seeming badge [the common law of England] and mortifying moment of their dependence on her [*scil.* England]."<sup>81</sup> In sum, nothing less was proposed than that "wholesome" statutes, enacted by patriotic American legislatures, would eradicate "this engine of oppression," namely, the common law of England, from the American soil.

Some states, such as Delaware,<sup>82</sup> Maryland,<sup>83</sup> Massachusetts,<sup>84</sup> New Hampshire,<sup>85</sup> New York,<sup>86</sup> New Jersey<sup>87</sup> and Rhode Island,<sup>88</sup> in their state constitutions expressly stipulated that only those parts of the common law as had been developed after the year 1775 or 1776, or after the adoption of the respective state constitutions should be in force, unless otherwise indicated. In other states, such as North Carolina, for instance, the common law of England, so far as it was applicable and not inconsistent with the Constitution or the laws of the United States, or of any individual state, was adopted and declared to be in force by special statute. Other states, again, debated at great length the extent to which the English common law, if at all, was still applicable in American courts — debates which are reminiscent of the discussions once carried on in the early Amer-

78. Cf. *Short v. Stotts*, 58 Ind. 29, 32 (1877); *Penny v. Little*, 3 Ill. 301, 302 (Scammon 1841). The date of 1607 was chosen because this year was regarded as the year in which the Virginia Colony was founded.

79. Quoted in WARREN, *op. cit. supra* note 30, at 226.

80. *Ibid.*

81. *Ibid.* at 226-27.

82. Constitution of 1776, art. 25.

83. Declaration of Rights of 1776, art. 3.

84. Constitution of 1780, chap. 6, art. 6.

85. Constitution of 1792, part 2, sec. 90.

86. Constitution of 1777, art. 35; Constitution of 1846, art. 1, sec. 17.

87. Constitution of 1776, art. 22.

88. Constitution of 1842, art. 14, sec. 1.

ican colonies over the same issue.<sup>89</sup> In these states the adoption of the English common law frequently had to await some authoritative declaration by the courts. In the main, however, they followed the somewhat vague policy of accepting only those parts of the common law which they considered suited to the changed conditions and circumstances. Hence, nearly everywhere the common law was not adopted in its entirety, and it was left to judicial decisions as well as to the usages and customs of the respective states to determine how far the common law had been introduced and sanctioned:

The common law so far as it is applicable to our situation and government has been recognized and adopted as one entire system by the Constitutions of Massachusetts, New York, New Jersey and Maryland. It has been assumed by the courts of justice or declared by statute, with the like modifications, as the law of the land, in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charter and colonial statutes. It is also the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.<sup>90</sup>

Justice Chase seems to sum up this whole situation when he states:<sup>91</sup>

[E]ach colony judged for itself, what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity, in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England is the law of each state, so far as each state has adopted it.<sup>92</sup>

The general aversion to the traditional common law of England in some instances assumed specific forms. In 1800, the General Assembly of Virginia instructed its senators and representatives in Congress to "oppose the passing of any law founded on recognizing the principle lately advanced that the common law of England is in force under the Government of the United States."<sup>93</sup> Governor Tyler of Virginia found it most inappropriate that "the time of the court . . . [should be] taken up in reconciling absurd and contradictory opinions of foreign judges which certainly can be no part of an American judge's duty. . . ."<sup>94</sup> In 1799, New Jersey enacted a statute forbidding the bar under heavy penalty to cite in court any decision, opinion, treatise, compilation or exposition of the common law made or written in England after July 1, 1776.<sup>95</sup>

89 Cf. Chroust, *The Legal Profession in Colonial America*, 33 NOTRE DAME LAW. 51-54, 65-68, 87-88, 92, 94 (1957).

90 1 KENT, COMMENTARIES 472.

91 *United States v. Worrall*, 2 U. S. (2 Dall.) 333, 341 (1798).

92 Cf. *Gatton v. Chicago, R. I. & P. Ry. Co.*, 95 Iowa 112, 116, 63 N. W. 589, 590 (1895).

93 WARREN, *op. cit. supra* note 30, at 231.

94 *Ibid.* at 226.

95 Acts of June 13, 1799, sec. 7, PATTERSON, LAWS OF NEW JERSEY 438.

In Pennsylvania, in the year 1805, Edward Shippen, the Chief Justice of the Supreme Court, and two Associate Justices, Thomas Smith and Jasper Yeates, were impeached for an "arbitrary and unconstitutional act," namely, for having fined and jailed Thomas Passmore for "constructive contempt."<sup>96</sup> It was alleged that punishment for contempt was a form of barbarism sanctioned by the English common law but wholly unsuited to this country, and hence, illegal. The three justices were declared acquitted, however, since the prosecution failed by three votes to obtain a two-thirds majority.<sup>97</sup> It appears, therefore, that in Pennsylvania the mere reliance of English law could cause the impeachment of a state judge. In 1810 a statute was passed in Pennsylvania<sup>98</sup>—not repealed until 1836<sup>99</sup>—forbidding the citation of any English decision handed down after July 4, 1776. Kentucky, in 1807, provided by statute that English Reports and decisions prior to July 4, 1776, were not to be cited or considered in any of the state courts;<sup>100</sup> and in Ohio as late as 1819 a pamphleteer declared that the common law of England was not the law of the United States, and that it had absolutely no authority in any of the states which were formed out of the old Northwestern territory. Jefferson, in 1799, plainly rejected the idea that the common law of England should be recognized and made enforceable in the newly established federal courts. He called this idea an "audacious, bare-faced and sweeping pretention," beyond the power of the federal courts. "If this assumption be yielded to," Jefferson contends, "the State courts may be shut up. . . ."<sup>101</sup> Some opposition to English precedents and English authorities may also be explained as a crude effort on the part of many ill-trained lawyers, judges and magistrates "to palliate [their] . . . lack of information by a show of patriotism."<sup>102</sup>

96 Cf. *Bayard v. Passmore*, 3 Pa. 438 (Yeates 1802); *Respublica v. Passmore*, 3 Pa. 438 (Yeates 1802).

97 Thirteen of the twenty-four senators voted for conviction. See generally, HAMILTON, *REPORT OF THE TRIAL AND ACQUITTAL OF EDWARD SHIPPEN* (1805).

98 Act of March 19, 1810, PUBLIC LAWS 136.

99 Act of March 29, 1836, PUBLIC LAWS 224.

100 Act of February 12, 1808, ACTS OF KENTUCKY 23 (1807). In 1808 Henry Clay was expressly prohibited from citing an English authority by the Supreme Court of Kentucky. *Hickman v. Boffman*, 1 Ky. 356, 372 (Hardin 1808). Said the court: "In the argument of his cause, Clay offered to read, from 3 East's Reports, 199, 200. . . . The chief justice stopped him, and stated it was a violation of the act . . . that 'reports and books contained adjudged cases, in the Kingdom of Great Britain, which decisions have taken place since the 4th day of July, 1776, shall not be read, or considered as authority, in any of the courts of the commonwealth,' etc. . . . The books prohibited, ought not to be used at all. . . ." In a footnote on page 373 reference is made to the case of *Gallatin v. Bradford*, fall term, 1808, where "the court stopped counsel, who cited Douglass' reports . . . and declared it was improper for counsel to refer to them." Incidentally, Justice Hughes and Wickliffe, in *Hickman v. Boffman*, 372-73, state: "There are many books, which are not authority, but which ought to be read and used, for the sound and clear reasoning they contain, as Pothier on Obligations." This would indicate that Kentucky courts, too, at the time displayed a distinct preference for the "civilians" and for French legal authorities in particular.

101 Letter of Thomas Jefferson to Edmund Randolph, dated August 18, 1799, 4 WRITINGS OF THOMAS JEFFERSON 301, 302 (Washington ed., 1854).

102 POUND, *THE SPIRIT OF THE COMMON LAW* 116-17 (1921). Ralph Waldo Emerson, in his *Essay on Power*, states that "a Western lawyer of eminence said to me, he wished it were a penal offense to bring an English law book into a court in this country." *CONDUCT OF LIFE* 63 (1893 ed.). See also BALDWIN, *THE AMERICAN JUDICIARY* 114-15 (1905). Some of these attitudes and measures, it must be conceded, were also occasioned by other considerations. Thomas Jefferson, for instance, favored a rule prohibiting the citation of English authorities after George III, because such a rule would eliminate "Mansfield's innovations" which he detested. I TYLER, *THE LIFE AND TIMES OF THE TYLERS* 265 (1884).

This anti-common law trend caused much excitement and grave concern among lawyers and justices alike. Many protests were made by both bench and bar against the many steps taken to restrict, modify or abolish the common law. Henry H. Brackenridge, Associate Justice of the Supreme Court of Pennsylvania, in 1814, insisted that the Pennsylvania act of 1810, forbidding the citation of English cases and authorities subsequent to July 4, 1776, should be repealed without delay. He felt that this particular statute was unconstitutional on its face in that it abridged the immemorial rights of the courts to hear all reasons and arguments of any issue before them.

The widespread aversion to and rejection of the traditional common law of England which made itself felt after the Revolution also tended to leave the courts and the lawyers without the guidance and systems of authoritative legal materials. It has already been noted that a number of states legislated against the citation of English decisions or authorities. At the same time practically no contemporary American case was officially reported. When, for instance, James Kent came to the bench in 1798, he found himself almost completely without assistance from reported decisions of his predecessors on the New York bench.<sup>103</sup> The legal uncertainty, even chaos, which this situation engendered was strongly deplored by bench and bar. Lawyers no less than courts frequently had to rely on vague and not always trustworthy recollections: "The *United States* have, until within a few years, trusted to tradition the reasons for their judicial decisions. But . . . with more enlarged views of jurisprudence it became obvious, that the exposition of our statutes and the validity of our customs should rest upon a more secure basis than the memory of man or the silent influence of unquestioned usage."<sup>104</sup> Cranch, in the preface to the first edition of his *Reports* of 1804, laments: "Much of that uncertainty of the law which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports."<sup>105</sup> And James Sullivan, in the preface to his work on *Land Titles*, observed in 1801: "The want of accurate reports . . . is very discouraging. . . . It would be well for us . . . to have our own reporters. . . ." Caine, in the preface to the first edition of his *New York Reports*, likewise deplores this situation:

The inconveniences resulting from the want of a connected system of judicial reports have been experienced and lamented by every member of that [legal] profession. . . . The determinations of the court have been with difficulty extended beyond the circle of those immediately concerned in the suits in which they were pronounced; points adjudged have been often forgotten, and instances may be adduced where those solemnly established, have, even by the bench, been treated as new. If this can happen to those before whom every subject of debate is necessarily agitated and determined, what must be the state of the lawyer whose sole information arises from his own practice, or the hearsay of others? Formed on books, the doctrines of which have in many respects been wisely overruled, he

103 Cf. KENT, MEMOIRS AND LETTERS OF JAMES KENT 112-13 (1898).

104 Anonymous, *Review of Tyng's Massachusetts Reports*, 1 AMERICAN LAW JOURNAL 361, 362 (1808).

105 1 Cranch (5 U.S.), *Preface* III (3d ed. 1911).

must have frequently counseled without advice, and acted without a guide.<sup>106</sup>

In 1785, through the efforts of two prominent lawyers, Richard Law and Roger Sherman, the State of Connecticut passed a statute requiring the judges of the State Supreme Court and Superior Court to render written reasons for their opinions whenever a legal issue was involved, so that they might be properly reported<sup>107</sup> and thus a foundation be laid "for the more perfect and permanent system of Common Law in this State."<sup>108</sup> In 1789, Ephraim Kirby published the first report, known as *Kirby's Reports* (one volume), in which he collected the decisions of the Superior Court from 1785 to May, 1788, together with some decisions of the Supreme Court of Errors. Subsequently, Jesse Root (*Root's Reports*, in two volumes) reported cases from July, 1789 to 1798. In his preface, Kirby states:

The uncertainty and contradiction attending the judicial decisions in this state, have long been subjects of complaint. The source of this complaint is easily discovered. . . . [O]ur ancestors . . . brought with them the notions of jurisprudence which prevailed in the country from whence they came. The riches, luxury, and extensive commerce of that country, contrasted with the equal distribution of property, simplicity of manners, and agricultural habits and employments of this, rendered a deviation from the English laws, in many instances, highly necessary. . . . Our courts were still in a state of embarrassment, sensible that the common law of England . . . was not fully applicable to our situation; but no provision being made to preserve and publish proper histories of their adjudications, every attempt of the judges, to run the line of distinction, between what was applicable and what not, proved abortive: For the principles of their decisions were soon forgot, or misunderstood, or erroneously reported from memory. Hence arose a confusion in the determination of our courts. . . .<sup>109</sup>

In 1790 Alexander Dallas published his first volume of reports on Pennsylvania cases; Nathaniel Chipman (*Chipman's Reports*) reported for Vermont in 1793; George Wythe published the *Decisions of Cases in Virginia by the High Court of Chancery* in 1795; and Francois Xavier Martin (*Martin's Reports*) reported for North Carolina in 1797. The first unofficial reports for the state of New York, on the initiative of James Kent, were compiled by Coleman in 1801, while the first official reports were those of George Caine, who had been appointed regular Reporter by the State Legislature in 1804. The first volume (2 Dallas) of cases decided by the Supreme Court of the United States was first published by Alexander Dallas in 1798;<sup>110</sup> and in 1804 Cranch began the publication of his *Supreme Court Reports*.<sup>111</sup> Other states gradually introduced

106 *Preface to the First Edition* (1804), 2 Cai. R. (N.Y.) 33 (Smith & Hitchcock, 1883). See also KENT, *op. cit. supra* note 103, at 158: "I took to the court [*scil.*, the Chancery Court] . . . [and] I had nothing to guide me . . ."

107 Kirby's Reports (Conn.) *Preface* III-IV (ed. 1899).

108 Cf. Anonymous, *American Reports and Reporters*, 22 AMERICAN JURIST AND LAW MAGAZINE 108 (1839).

109 Kirby's Reports (Conn.) *Preface* III (ed. 1899).

110 Dallas, in volumes 2-4, reported cases from the organization of the Supreme Court of the United States in 1790 to the August term of 1800.

111 See generally, Anonymous, *American Reports and Reporters*, 22 AMERICAN JURIST AND LAW MAGAZINE 108-42 (1839). The *National Intelligencer* of July 10, 1804, said about the



a "reporter system" of their own: Kentucky (*Hughes' Reports*) in 1803, Massachusetts (*William's Reports*, continued by the *Tyng's Reports*) in 1805, Maryland (*Harris and McHenry's Reports*) and South Carolina in 1809, Maine (*Greenleaf's Reports*) in 1822, and New Hampshire (*Adams' Reports*) in 1819, Georgia (*T.U.P. Charlton's Reports*) in 1824, and Delaware (*Harrington's Reports*) in 1837.<sup>112</sup>

In the hundred years between the publication in 1687 of William Penn's gleanings from Lord Coke and the issuance of the American editions of Buller's *Nisi Prius* and Gilbert's *Evidence* in 1788, not a single book that could be called a treatise intended for the use of professional lawyers was published in the British Colonies and the American States.<sup>113</sup>

The first American law treatises published after 1788 owed their origin largely to the general demand for "native" legal texts to be used by practitioners of all sorts. The first legal texts which appeared after 1788 dealt with pleading,<sup>114</sup> real property, maritime law or maritime insurance, and a few scattered works on some special subjects. Of more than local importance was Zephaniah Swift's *A System of the Laws of the State of Connecticut*, published in 1795-1796. Four general comprehensive works on law were also published during this period, namely, *The Reports and Dissertations* (1793) of Nathaniel Chipman, Chief Justice of Vermont; St. George Tucker's edition of Blackstone's *Commentaries* of 1803, which had a widespread circulation; the lectures on law which were delivered in 1804 at the College of Philadelphia by James Wilson, Associate Justice of the Supreme Court of the United States; and *Law Miscellanies* (1814) by Hugh Brackenridge, Associate Justice of the Supreme Court of Pennsylvania. Also, Blackstone's original *Commentaries* were still much in use throughout the United States. But most of the earliest American law texts were clearly in-

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first volume of the Supreme Court Reports: "Gentlemen of the profession throughout the United States are much indebted to the industry and learning of Mr. Cranch. . . . We are happy to state that these reports have been compiled with the utmost attention to accuracy and that the learned reporter will continue them under proper encouragement. . . . We feel sanguine then that this specimen may operate as an incentive to legal gentlemen in different parts of the Union towards lending their aid to similar publications. By the proper exertion in this way, we may expect to see a code of Common Law arising out of our own Constitutions, laws, customs and state of society, independent of that servile recourse to the decisions of foreign Judicatures to which, since our revolution, we have been too much accustomed." — By an Act of March 22, 1816, provision was made for the first time for an official publication of the decisions of the Supreme Court of the United States, but with no provision for a salary for the Reporter. Not until March 14, 1834, was there any order that all opinions of the Supreme Court must be filed with the Clerk.

112 In a very short time, however, an astonishing number of reported cases became available to the general public. It has been estimated that by the year 1822 there existed about one hundred and forty volumes of American reports. The rate of increase was so rapid that by 1824 complaints were made concerning the "vast and increasing multiplications of reports as well as law treatises." Anonymous, 9 *NORTH AMERICAN REVIEW* 377 (1824). More realistic observers, on the other hand, hailed this development as one of the most significant steps in American jurisprudence. They asserted that it would substantially improve the quality of the law; that it would help the promulgation of the law; that it was of inestimable importance to the protection of individual rights; and that it compelled the judiciary to adhere to a more regular and efficient administration of justice. Some of these arguments were expressed in the *NORTH AMERICAN REVIEW* between 1822 and 1826.

113 James, *A List of Legal Treatises Printed in the British Colonies and the American States before 1801*, *HARVARD LEGAL ESSAYS* 159 (1934).

114 The most famous treatise on pleadings was probably Joseph Story's *A Selection of Pleadings in Civil Cases*, published in 1805.

tended for the use of laymen; they were largely manuals for petty offices, justices of the peace, town officers and the like.<sup>115</sup> Hence, they were of little value to the professional lawyer or judge. This dearth of reliable authoritative legal materials and guides, in turn, compelled the lawyer to resort to English texts, and, frequently, to English reports, even though these sources had practically been outlawed in some states.

It is not surprising, therefore, that during this period a number of English law books and law texts were republished or re-edited, such as Jones' *Essay on the Law of Bailments*, Kyd's *Treatise on the Law of Bills of Exchange and Promissory Notes*, and Park's *System of the Law of Maritime Insurance*. Much of Joseph Storey's early literary activity was dedicated to the re-editing of leading English law texts, such as Chitty's *Bills and Notes* in 1809. But it took some time before the bench or the bar had an adequate body of legal authorities, especially American authorities, adapted to the new conditions, to be used as consistent and reliable guides during the earliest stages in the formative era of American law and jurisprudence. In the meantime American lawyers were compelled mainly to rely on "the memory of man and the silent influence of unquestioned usage."<sup>116</sup> Naturally, they could always fall back on, and frequently had to rely upon, Blackstone's *Commentaries* of which the first (colonial) American edition appeared in the year 1771.

It has been pointed out that the American Revolution and the novel socio-economic conditions that it created, on the whole had an adverse effect on the American legal profession, which before the Revolution had achieved real prominence. Within this post-war period, however, we can also notice important signs of coming growth and vigor: in fact, the period between the years 1789 and 1835, in a way, may be called the "formative era" or, perhaps even, the "golden age" of American law and the American legal profession.<sup>117</sup>

During the formative era of American law the applicability of traditional (mostly English) authoritative materials to the specific American circumstances was the main concern of American courts and American lawyers. This applicability constitutes the paramount criterion by which American courts and American lawyers determined whether certain English rules, documents or institutions had been received or had to be received, and in case they were found not to be applicable, what should obtain in their place. There existed no rules defining applicability; nor was there a traditional technique of receiving the law of one country and making it the law of another. Hence, what the early American courts did, and what the early American lawyers tried to argue, was the determination of what was applicable and what was not applicable to the specific American condition by constant reference to an idealized picture of a pioneer, rural and agricultural society. In a way this idealized picture became an essential part of American law, often expressed in such abstract terms as "the nature of American institutions" or "the nature of American government." It was used by courts and lawyers alike to reject those parts of the English law

115 Cf. James, *op. cit. supra* note 113 at 1.

116 Anonymous, *Review of Tyng's Massachusetts Reports*, 1 AMERICAN LAW JOURNAL 361, 362 (Hall 1808).

117 See generally, POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

which they found inconvenient.<sup>118</sup> Therefore, the most pressing problem during the formative era of American law was to work out and lay down certain rules — to create an apparatus of legal precepts equal to the requirements of early American life. This basic problem determined the American system of courts, the American judicial organization, and to a large degree the course of American legal development for about three-quarters of a century. It was less important, therefore, to decide particular cases “justly” than to work out sound, consistent and abstractly “just” rules. The chief concern of the early American courts was the development and stabilization of a body of laws in each jurisdiction by means of judicial decisions; and the function of ascertaining and declaring the law came to be the most important activity of the court.<sup>119</sup>

After the year 1789, the growth of American law was largely due to great lawyers and great judges. The creative legal achievements of these men will bear favorable comparison with the great legal accomplishments of any age in Western history. Within a relatively short span of time the English common law of the seventeenth and eighteenth centuries was made over into a common law for America. It should be borne in mind that the bases of the American rules in real property, contracts, sales of goods, torts, equity and conflicts of laws, to mention only the staple fields of law, substantially were laid in the period between 1810 and 1850. The War of 1812, while of questionable political significance, had far reaching effects upon American economic and legal history in that it gave rise not only to the rapid development of law in general, but stimulated the growth of the many branches of modern law. It gave great impetus to the expansion of admiralty and prize law, as well as to maritime insurance law.<sup>120</sup> The development of early manufacturing stimulated the

118 *Id.* at 96-97; Pound, *The Ideal Element in American Judicial Decision*, 45 HARV. L. REV. 136, 142-43, 147 (1931).

119 *Cf.* POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 102-04 (1938).

120 William Pinkney's fame as a lawyer, for instance, primarily rests on his great constitutional arguments. But it should not be overlooked that he made a lasting contribution to the development of (American) international law, admiralty law and prize law. This aspect of legal practice originally was little known in the United States. See *The Dos Hernanos*, 15 U.S. (2 Wheat.) 37, 39 (1817), where Joseph Story stated: "This court [*scil.*, the Supreme Court of the United States] cannot but watch with considerable solicitude irregularities, which so materially impair the simplicity of prize proceedings. . . . Some apology . . . may be found in the fact, that from our being long at peace no opportunity was afforded to learn the correct practice in prize causes. But that apology no longer exists." See also Story's letter to Sir William Scott, later Lord Stowell, dated January 14, 1819: "The Admiralty Law was in a great measure a new system to us; and we had to grope our way as well as we could by the feeble and indistinct light which glimmered through allusions incidentally made to the known rules and proceedings of an ancient court. Under these circumstances, every case, whether of practice or principle, was required to be reasoned out, and it was scarcely allowable to promulgate a rule without at the same time expounding its conformity to the usages of Admiralty tribunals." 1 STORY, *LIFE AND LETTERS OF JOSEPH STORY* 318 (1851). It was largely with the aid of the learning and legal arguments of such great lawyers as William Pinkney, William Wirt, Daniel Webster, Samuel Dexter, Joseph Hopkinson, Henry Wheaton, John Sergeant, David B. Ogden and William H. Winder between 1815 and 1822 that John Marshall and Joseph Story were enabled to create and embody in a masterly series of opinions a distinctly American conception of international law, admiralty law and prize law. It should also be borne in mind that many of the most prominent lawyers of this period made their first appearance before the Supreme Court of the United States in prize or admiralty cases: Pinkney in 1806 in *Manella*, *Pujals & Co. v. James Barry*, 7 U.S. (3 Cranch) 249 (1806); Joseph Hopkinson in 1807 in *Rhineland v. Insurance Company of Pennsylvania*, 8 U.S. (4 Cranch) 18 (1807); John Sergeant in 1816

growth of corporation law and patent law. Since the traditional coastal trade was threatened by the British blockade, internal lines of communications, such as turnpikes, canals (and soon railroads) had to be constructed. These novel conditions and developments, needless to say, further expanded the range of law; they also stimulated the practice, scope and importance of the legal profession.

It may also be noted here that the legal profession in the early United States was never a "class" determined by family lineage. The closest approach to such a "class" based on inheritance can be detected in pre-Revolutionary Virginia, South Carolina, New York and probably Massachusetts. In Virginia and South Carolina the landed and wealthy aristocracy made it a practice to send their sons to the Inns of Court in London. In Massachusetts we can see the beginnings of a self-perpetuating and somewhat closed class of "Harvard lawyers." New York, like some other cities, had a number of men "born to the law" or bred in it, such as the Livingstons. But in the main the leading lawyers both before and after the Revolution came from the middle class or upper-middle class. Such men as the Livingstons or Jays of New York, the Randolphs of Virginia or the Carrolls of Maryland, on the other hand, belonged to the upper level of American society. As time progressed, the American legal profession drew its members all the way from the lower middle class to the top of the social hierarchy: the poor immigrant or immigrant's son and the small-farmer's boy no less than the scion of the prosperous and prominent land owner and merchant aspired to the bar. The American legal profession has always been, and still is, one of the main avenues of self-advancement for ambitious young men; and many leaders of the early American bar came from a background that was socially modest, though often above average in culture.

The post-Revolutionary era was a time when lawyers spoke and acted with that conscious and emphatic authority which is characteristic of truly creative founders and promoters of public institutions and legal policies. But in so doing they did not act with a belligerent or frantic dogmatism so often found among men who consider themselves mere agents of a condition to whose fortunes their own are irrevocably committed. Aside from many official contributions to public welfare and political life, the cumulative though unofficial services which the legal profession rendered the country in the promotion of vital causes are beyond estimate.<sup>121</sup> The early American lawyers, it appears, played their most prominent role as advocates or "special pleaders": the leaders of the bar were trial lawyers.<sup>122</sup> This fact alone determined their dominant interest. They were

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in *The Aurora*, 14 U.S. (1 Wheat.) 45 (1816); Henry Wheaton in 1816 in *The Antonia Johanna*, 14 U.S. (1 Wheat.) 74 (1816); Daniel Webster in 1814 in *The St. Lawrence*, 12 U.S. (8 Cranch) 268 (1814), and *The Grotius*, 12 U.S. (8 Cranch) 282 (1814) and William Wirt in 1817 in *The Fortuna*, 15 U.S. (2 Wheat.) 76 (1817). Associate Justice James M. Wayne, in the *Passenger Cases*, 48 U.S. (7 How.) 300, 460-61 (1849), stated: "The case of *Gibbons v. Ogden* . . . will always be a high and honorable proof of the eminence of the American bar of that day. . . . There were giants in those days. . . ." It is commonly said that John Marshall in his opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), was greatly indebted to the splendid argument made by Daniel Webster. Webster himself said later that "the opinion of the court, as rendered by the chief justice, was little else than a recital of my argument. The Chief Justice told me that he had little to do than to repeat that argument. . . ." HARVEY, *REMINISCENCES AND ANECDOTES OF WEBSTER* 142 (1877).

121 Cf. HURST, *THE GROWTH OF AMERICAN LAW* 336-38 (1950), and *ibid.* at 352-53; 366.

122 *Ibid.* at 302.

concerned nearly exclusively with "the law" at the expense of "the facts." Admittedly, "facts" were probably simpler then because the usual pattern of daily life was itself simpler and not yet complicated by involved social and economic problems of great and perhaps overwhelming magnitude. Early American law, in the main, dealt with situations that could be spelled out in terms of "man-to-man relations." The lawyer was not yet preoccupied with complex "package-deals," nor was he confronted with the forlorn sense of helplessness that grips the modern individual in the face of major social, political or economic events. Neither was he conscious of the possibility that the public at large might be concerned with matters "private" in origin. He was completely absorbed in devising and manipulating general legal principles and novel doctrines of law; and his interest remained focused on the problem of adapting these principles to the social conditions of a new society. This might also explain the lawyer's neglect, bordering on disdain, of investigating facts which he believed to be of little or no meaning to anyone but the parties.<sup>123</sup> And finally, it was only natural that men — lawyers — who had constantly to assume the responsibility of making important decisions should be highly self-conscious individualists in their professional attitudes. This individualism was deeply rooted in the social, economic and political thinking of the time: individualism was predominant in a society where each person primarily was bent on self-advancement and gain in the hectic exploitation of a new continent and its vast resources.

One of the most remarkable phenomena of the post-Revolutionary period, it has been shown, was the publication of American law reports. The appearance of the first printed reports, state and federal alike, with their lasting effects upon future generations of lawyers, happily coincided with the ascendancy of such outstanding lawyers, presiding over the highest state courts, as James Kent (New York), Theophilus Parsons (Massachusetts), William Tilghman (Pennsylvania), Henry W. DeSaussure (South Carolina) and Jeremiah Smith (New Hampshire). It is also fortunate that during this crucial era of growth and consolidation of American law, the Supreme Court of the United States, under the leadership of John Marshall, adhered to a fairly steady legal policy.<sup>124</sup> But perhaps even more decisive was the fact that a small but efficient core of brilliant lawyers had successfully weathered through the Revolution and the trying post-Revolutionary

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123 See, for instance, BINNEY, *op. cit. supra* note 53, at 71 (1903): "... the lawyer's facts are unproductive of all benefits, except to the fortunate client. . . . the facts are of no more importance to the lawyer himself than last year's price of calicoes, nor to the rest of mankind. . . . They are forgotten as soon as the verdict is given, and well for the lawyer is it that they can be forgotten."

124 Aside from the four Chief Justices who served on the highest Federal Bench, namely, John Jay (resigned in 1795), John Rutledge (who was never confirmed by the Senate), Oliver Ellsworth (appointed in 1796, resigned in 1799) and John Marshall (1801-1835), the following Associate Justices served on the highest Federal Bench: John Blair (resigned in 1796), John Rutledge (resigned in 1791), Thomas Johnson (1792-1793) who took the place of John Rutledge, James Wilson (died in 1798), William Cushing (1789-1810), James Iredell (died in 1799), Samuel Chase (1796-1811) who succeeded John Blair, William Paterson (1793-1806) who took the place of Thomas Johnson, Alfred Moore (1799-1804) who replaced James Iredell, Bushrod Washington (1798-1829) who took the place of James Wilson, William Johnson (1804-1834) who took the place of Alfred Moore, Henry Brockholst Livingston (1806-1823) who succeeded William Paterson, Joseph Story (1811-1845) who succeeded William Cushing, and Thomas Todd of Kentucky (1807-1826), the new sixth Associate Justice.

years. They managed to preserve and carry on the high professional standards and accomplishments of the late colonial bar. The Revolution itself as well as the many challenges and problems of the post-Revolutionary period had called forth the greatest efforts on the part of lawyers. It was a sign of greatness that the budding American legal profession on the whole met these challenges successfully and enthusiastically.