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THE AMERICAN LEGAL PROFESSION: ITS AGONY AND ECSTASY (1776-1840)

*Anton-Hermann Chroust**

A. The American Revolution and the Post-Revolutionary Era

During the final stages of the Colonial period the legal profession in some of the American colonies had achieved remarkable distinction and prestige.¹ This is illustrated by the fact that twenty-five of the fifty-six signers of the Declaration of Independence, thirty-one of the forty-five members of the Constitutional Convention, and ten of the twenty-five Senators as well as seventeen of the sixty-five Representatives in the First Congress of the United States were men who had been trained in the law.² For their numbers, the legal profession had a disproportionately large impact on the formative stages of our democracy.

The American Revolution affected the legal profession in several significant ways. First, the profession lost a considerable number of its prominent members in the Revolutionary War; second, a widespread, and at times violent, antipathy against the lawyer made itself felt in many parts of the country. A pronounced aversion to everything English, including the traditional English common law, English legal institutions, and the English way of administering justice, waxed rather strong. Finally, the almost complete lack of a distinct body of typically American law and the total absence of American law books and other authoritative American legal materials for some time made the administration of justice as well as the professional practice of law difficult and, in some instances, outright haphazard in the young Republic. The early American legal profession, however, was able to successfully overcome these serious difficulties, primarily because it was able to produce a significant number of eminent lawyers, in effect, because it met the challenge of democracy by gradually developing a legal system befitting a democratic society.

As a direct result of the Revolution and the Revolutionary War, the American Republic lost many of its most prominent and most learned lawyers. Some lawyers took an active part in the Revolution itself, either as fighting men or as statesmen, never to return to the practice of law. Others, who decided to remain loyal to the British Crown, either left the country, retired from practice, or were forcibly prevented from practicing their profession by legislative enactments or court rulings.³ Indeed, so many lawyers were expelled from the profession in 1779,

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1 Address by Joseph Story, Delivered Before the Members of the Suffolk Bar, 1821, reprinted in part in MILLER, *THE LEGAL MIND IN AMERICA* 67-68 (1962).

2 See generally 1-2 CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965).

3 An Act [of 1778] to Prevent the Return to this State [Massachusetts] of Certain Persons Therein Named and Others, Who have Left This State, or Either of the United States, and Joined the Enemies Thereof, reprinted in *COLLECTION OF ACTS AND LAWS PASSED IN THE STATE OF MASSACHUSETTS BAY, RELATIVE TO THE AMERICAN LOYALISTS AND THEIR PROPERTY* 3-9 (1785); An Act [of 1779] to Confiscate the Estates of Certain Notorious Conspirators Against the Government and Liberties of the Inhabitants of the Late Province, Now State of Massachusetts Bay, *id.* at 22-23. The Act of 1778, but not the Act of 1779, was repealed in

and afterwards, in New York, that the bar of the State Supreme Court almost ceased to exist.⁴ It might be reasonable to estimate that about three hundred lawyers, among them many "giants of the law,"⁵ found themselves in disagreement with the political aims and actions of the American patriots. In a way the revolution and its aftereffects, as Roscoe Pound has pointed out, "left a huge gap in what had become a great body of lawyers."⁶

The standing of the post-Revolutionary legal profession was also adversely affected by the disastrous depression and poverty which gripped the whole country in the wake of the Revolution. Such conditions were disheartening to the war-weary populace. The American victory in 1783 seemed to promise a brighter future; however, the outcome of the war eventually proved, to even the most optimistic observer, to have been a Pyrrhic victory, at least from the economic standpoint. In a nation so ill-equipped for a contest of such magnitude and expenditure—indeed, merely a territory that possessed no real credit system or highly reliable industrial yield prior to the war—the costly monetary output of the Revolution promised almost certain economic and financial disaster even if a military victory could be achieved. Too many manufactured goods had to be imported; too many citizens had to supply themselves with all the implements of war they required; and too little capital lay in the hands of those who sympathized with the rebel cause.

In western Massachusetts the popular discontent arising from these conditions led, in 1786, to an organized uprising—Shays' Rebellion—which was directed against taxes, the collection of debts, and against the lawyers as well as the law courts. These objects also came under attack during the Whiskey Insurrection in 1794 in Pennsylvania. Referring to Shays' Rebellion, William Sullivan of Boston remarked: "The circumstances of the country, from the peace of 1783 . . . were exceedingly oppressive. In such times, professional agency has a very direct relation to real and imaginary evil. . . . Our profession was most reproachfully assailed."⁷ In keeping with the frequent tendency to confound cause and effect, the lawyers were singled out as the villains who were causing the general economic distress. Charges were made that they were "undemocratic,"⁸ that they were the champions of ruthless creditors and, hence, the mortal enemies of the debtors who saw in the lawyer the symbol of all their calamities.⁹ One spokesman of this anti-lawyer attitude summarized the popular sentiments as follows:

1784. *Id.* at 26-29. In 1781, the Massachusetts Supreme Court of Judicature made the following ruling: "Whereas it is provided that all Attorneys . . . shall take the Oath prescribed by Law for Attorneys, and the Oath of Allegiance to this Commonwealth . . . in order . . . to exclude men who are enemies of their country." Quoted in BAILEY, *ATTORNEYS AND THEIR ADMISSION TO THE BAR OF MASSACHUSETTS* 29 (1907). In 1785, it was provided that "no person shall be admitted an attorney in any Court of this Commonwealth, unless he is . . . well affected to the constitution and government of this Commonwealth." Act of 1785, ch. 23, § 1, *THE GENERAL LAWS OF MASSACHUSETTS* 199 (1823). Similar acts were passed in New York (in 1779 and 1781) as well as in other states.

4 A description of the plight of the Massachusetts bar after the Revolution is described in an address by Sullivan to the Members of the Bar of Suffolk, Mass. (1825).

5 SABINE, *AMERICAN LOYALISTS* 52-53 (1847).

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

7 Sullivan, *supra* note 4, at 48.

8 CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* 168-69 (1918).

9 FEE, *THE TRANSITION FROM ARISTOCRACY TO DEMOCRACY IN NEW JERSEY, 1789-1829*, 107-08 (1933).

"Why should the community be hampered by such evils . . . ? Why should any of this 'order' [of lawyers] pursue their destructive measures with impunity? As practitioners of the law, are they to be indulged with the privilege of involving every individual in ruin . . . ?"¹⁰

The chief legal business of this period, indeed, was collection of debt, foreclosure, ejectment, and recovery of property—professional activities which have always been unpopular with the public at large. Whenever the common man came into contact with the law or with lawyers, his experiences, as a rule, were rather unpleasant, something for which he almost always blamed the cursed lawyers.

During and immediately after an economic depression lawyers invariably have to attend to a great many clean-up jobs: "After the [Revolutionary] war . . . the [legal] profession was called into the most active business";¹¹ and some among them grew relatively rich when most people were exceedingly poor.¹² This prosperity caused much jealousy as well as widespread anger. One contemporary pamphleteer resentfully remarked that "the 'order' [of lawyers] are daily growing rich, while the community in general are as rapidly becoming impoverished."¹³ No wonder, then, that lawyers should be "denounced as banditi, as blood-suckers, as pick-pockets, as wind-bags, as smooth-tongued rogues The mere sight of a lawyer . . . was enough to call forth an oath."¹⁴ They were referred to as "plants that will grow in any soil that is cultivated by the hands of others"—scoundrels who "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 [as the lawyers]."¹⁵ In some quarters the lawyers were excoriated as "tyrants, sycophants, oppressors of the people, and enemies of the people,"¹⁶ and it was said that "[a]mong the multiplicity of evils which we at present suffer, there are none more justly complained of than those we labour under by the many pernicious practices of the profession of the law."¹⁷ It was pointed out "[h]ow ruinous it is to a people to have an 'order' of men among them, who are rendering the law a mere business. . . . How disgraceful is such a mode of conduct. Are the PEOPLE of this commonwealth [Massachusetts] in so dreadful a state, as to give a quarter of their property to secure the remainder? Shall we nourish an 'order' in the community merely to take advantage of our distress . . . ?"¹⁸

Contemporary journalism joined in the widespread condemnation of the legal profession. New York newspapers warned their readers to beware of the sinister machinations of the lawyers who were called the "bane of society" as well as "men so audacious that they venture, even in public, to wrest, turn, twist,

10 AUSTIN (HONESTUS), OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW 6 (1786).

11 Address of James Kent Before the Law Association of the City of New York (1836).

12 AUSTIN (HONESTUS), *supra* note 10.

13 *Id.* at 6.

14 1 McMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES 302 (1927).

15 CRÈVECOEUR, LETTERS FROM AN AMERICAN FARMER 140 (1847).

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

17 AUSTIN (HONESTUS), *supra* note 10, at 3.

18 *Id.* at 11.

and explain away the purpose and meaning of our laws."¹⁹ It was claimed that the lawyers were grinding the faces of the poor, and that they were a public nuisance.²⁰ Benjamin Austin, who in 1786, under the *nom de plume* of Honestus, claimed outright that all contemporary economic, social and political evils must be traced back to the lawyers; that the legal profession should be "annihilated"; that "the 'order' [of lawyers] be abolished, as being not only USELESS, but a DANGEROUS body to the Republic"; and that "their [the lawyers'] annihilation had become absolutely necessary."²¹ William Duane, a journalist and pamphleteer in Philadelphia, likewise ranted and raved against the legal profession. In a pamphlet, published in 1805, he referred to "the loose [moral] principles of persons of that 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 on 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 courts."²² According to Duane, "[p]eace, honesty, and agreement among men is their happiness, but the ruin of lawyers. Fraud, disputes, and law suits are the happiness of lawyers, but the ruin of honest men."²³ He maintained that lawyers "so manage justice as to engross the general property to themselves, through the medium of litigation."²⁴ To remedy all these alleged evils, William Duane suggested a series of radical reforms, which, if carried out, would ultimately have resulted in the complete abolition of the existing laws, the traditional law courts, and, above all, the legal profession.²⁵

One contributor to the *Aurora*, a paper published by Duane in Philadelphia, deplored the heavy hand of the legal profession which could be felt throughout the country. Lawyers, he asserted, "form an indissoluble bond of association and union. . . . Cemented by one common principle, and impelled by the same interest, . . . they have . . . placed themselves on the *highest* ground in the state . . . so as to afford them a well-grounded hope of taking possession, at some future day, of the country itself."²⁶ Another contributor to the *Aurora* lamented that the recently won American independence was:

endangered by the ambition of particular classes of men. . . . The military conspirators, the mercantile body, the clergy, the speculators—have all failed to reduce us to a condition of *vassals and villains*, . . . but we have yet to bring to a due sense of their equality with the rest of their fellow citizens a corps, which from its particular character is at this time both formidable and dangerous to the public prosperity—I mean the lawyers' corps.²⁷

19 Quoted in 1 McMASTER, *supra* note 14, at 254.

20 *Id.* at 344-50.

21 AUSTIN (HONESTUS), *supra* note 10, at 6, 14-16, 34.

22 DUANE, SAMPSON AGAINST THE PHILISTINES OR THE REFORMATION OF LAWSUITS 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 12 (1805).

23 *Id.* at Preface IV.

24 *Id.* at 73.

25 *Id.* at 30.

26 *Aurora*, Nov. 9, 1804.

27 *Aurora*, Nov. 13, 1804.

And still another contributor insisted that "either the people must determine at once to abandon their liberties, their properties, and their understandings to the discretion of the *lawyers' corps*—or bring them to a due sense of their equality with the rest of their fellow citizens."²⁸

These deplorable and prejudiced statements, which frequently paraded under the disguise of "American patriotism" or "American democracy," elicited from Timothy Dwight the remark that:

in a state of society recently begun, influence is chiefly gained by those, who directly seek it: and these in almost all instances are the ardent and bustling. Such men make bold pretences to qualities which they do not possess, clamour everywhere about liberty . . . are patriots, of course . . . , arraign the integrity of those, whose wisdom is indisputed, and the wisdom of those, whose integrity cannot be questioned. . . . These things, uttered everywhere with preemptory confidence, and ardent phraseology, are ultimately believed by most men. . . .²⁹

Moreover, when lawyers began to assume an active and, in some instances, a commanding role in the political life of the young Republic, they were fiercely attacked and viciously denounced by the new "democrats":³⁰ "Can we suppose the Republic to be free from danger, while this 'order' [of lawyers] are admitted so abundantly as members of our Legislature."³¹ The *New York Daily Advertiser*, in an editorial agitating against the adoption of the New York State Constitution, warned its readers to beware of lawyers:

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 and county in the late convention of this state, to whose wicked arts we may chiefly attribute the adoption of the abominable system, seven out of nine were lawyers.³²

In almost every town in Massachusetts and, for that matter, throughout New England, a knowledge of the law was considered the best reason for excluding a candidate from public office or membership in the state legislature.³³

The people of New Hampshire maintained outright that the lawyers were the ultimate cause of all their social and economic misfortunes; that they were exploiting the poor and afflicted; that they grew rich while their neighbors approached beggary; that their fees were exorbitant; and that their number was excessive.³⁴ Some enraged people went so far as to advance the proposition that all law courts be abolished, and that the legal profession should be completely

²⁸ Aurora, Dec. 18, 1804.

²⁹ 2 DWIGHT, TRAVELS IN NEW ENGLAND AND NEW YORK 470 (1821).

³⁰ Lawyers active in public life or political affairs were called "the sole dictators of public life"; and their activities were referred to as "improper and dangerous." One man from New Jersey flatly stated 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, *supra* note 9.

³¹ AUSTIN (HONESTUS), *supra* note 10, at 8.

³² Fox, *New York Becomes a Democracy*, 6 HISTORY OF THE STATE OF NEW YORK 6-7 (Flick ed. 1934).

³³ 1 McMASTER, *supra* note 14, at 302.

³⁴ *Id.* at 344.

suppressed or, at least, that the number of lawyers be reduced substantially, as should the customary lawyer's fees. The farmers of Vermont resolved that all lawyers should be expelled from the state, and the cry went up, "kill the lawyers."³⁵ During Shays' Rebellion in Western Massachusetts in 1786, the demand was made that all lawyers be eliminated.³⁶ That year, Braintree, a town in eastern Massachusetts, resolved "to crush" or, at least, restrain "that order of Gentlemen denominated Lawyers . . . whose . . . conduct appears . . . to tend rather to the destruction than the preservation of this Commonwealth."³⁷ Dedham, also in eastern Massachusetts, perhaps under the influence of Austin's (Honestus) widely circulated anti-lawyer writings, instructed its Representatives in the Massachusetts General Court to initiate legislation to restrain the legal profession and, if necessary, "to endeavor that the order of Lawyers be fully abolished; an alternative preferable to their continuing in the present mode."³⁸ Pennsylvania enacted a number of statutes to suppress or repress the legal profession and to hold court trials without the intervention of lawyers, the more so, since "a great portion of the time employed in the courts of quarter sessions are spent in the frivolous disputes of contentious people."³⁹ Benjamin Austin (Honestus) bluntly asserted that "[e]very one seems to be convinced that if this 'order' [of lawyers] . . . are permitted to go on in their career, without some check from the legislature, the ruin of the Commonwealth [of Massachusetts] is inevitable."⁴⁰

At the same time numerous and determined efforts were being made by several state legislatures as well as by courts of judicature to closely supervise, control and, in some instances, to cripple or embarrass the young American legal profession, either by unreasonably restrictive statutes or by senseless court rulings.⁴¹ In the main, this hostile attitude, which frequently assumed the aspects of a deliberate public policy, manifested itself in attempts to establish educational prerequisites for admission to practice, regulate admission, supervise professional deportment and activities, and establish stringent schedules for maximum legal fees which, as might be expected, were discouragingly small. These attempts to control and, if possible, to suppress the profession, like most actions motivated by spite and ill will, were on the whole clumsy, ill-advised and generally ineffective. In many instances, they were profoundly resented and strongly opposed by the lawyers who felt that they should regulate themselves and their professional activities through the instrumentality of local bar associations. It should be borne in mind, however, that already during Colonial times the legal profession in some places had been subjected to many and often oppressive supervisory regulations. Hence, in many instances the several state legislatures or higher state courts merely continued, in close co-ordination with the newly created political

35 *Id.* at 349-50.

36 *Id.* at 306-09.

37 *Diary of John Quincy Adams*, 16 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 342 (2d ser. 1902); ADAMS, THREE EPISODES OF MASSACHUSETTS HISTORY 897 (1893).

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

39 House Journals (Pa.) 16 (1803-1804).

40 AUSTIN (HONESTUS), *supra* note 10, at 3.

41 See generally 2 CHEROUST, *supra* note 2, at 224-80.

and social conditions, policies already established and enforced prior to the Revolution.

The sweeping denunciations of, and attacks upon, the legal profession as well as the various efforts by legislatures and courts to control and cripple it by restrictive measures, were deeply resented by leading lawyers. James Sullivan of Boston, for instance, pointed out in several articles the important contributions the profession made to the stabilization and maintenance of an orderly society; he also indicated its effect on the preservation as well as a realization of rights and liberties.⁴² "Our profession was most reproachfully assailed by newspaper essayists," Sullivan remarked, "and even the legislature [of Massachusetts] entertained projects of reform in the [legal] profession."⁴³

John Quincy Adams, in 1787, observed that the legal profession in Massachusetts was laboring "under the heavy weight of public indignation," and that it was "upbraided as the original cause of all the evils" which did beset the Commonwealth: "When the legislature [of Massachusetts] has been publicly exhorted by a popular writer [Benjamin Austin *alias* Honestus] to abolish it [the legal profession] entirely, and when the mere title of lawyer is sufficient to deprive a man of the public confidence, it should seem that this profession would afford but a poor subject for a panegyric." Adams also realized, however, that the future of the American legal profession would "not be determined by the short-lived frenzy of an inconsiderate multitude nor by the artful misrepresentations of an insidious writer [Benjamin Austin]."⁴⁴ In another place Adams lamented:

The popular odium which has been excited against the [legal] practitioners in the Commonwealth [of Massachusetts] 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 we 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" [of lawyers], as it has invidiously been called; and . . . the gentlemen of the profession have been treated with contemptuous neglect and with insulting abuse.⁴⁵

Charles Jared Ingersoll, one of the most prominent lawyers in Philadelphia, observed that "[o]ur State rulers threaten to lop away that excrescence on civilization, the Bar," and that "[a]ll the prominent lawyers [of Philadelphia] have their eyes on one city or another, to remove to in case of extremes."⁴⁶ His father, Jared Ingersoll, a barrister of the Middle Temple and a highly respected member of the Philadelphia bar, actually made plans to transfer his practice to New York City in order to escape the violent anti-lawyer agitation in Pennsylvania.⁴⁷

42 1 AMORY, *THE LIFE OF JAMES SULLIVAN* 189 (1859).

43 Sullivan, *supra* note 4, at 48. Sullivan refers here to Benjamin Austin's attacks upon the lawyers.

44 *Diary of John Quincy Adams, supra* note 37, at 291, 343.

45 *Id.* at 358-59.

46 MEIGS, *CHARLES JARED INGERSOLL* 36 (1897).

47 *Id.*

The position of the legal profession in early America was further weakened by widespread attacks on the traditional common law of England, English legal institutions, English legal authorities and English rules of procedure, which in the course of the eighteenth century had gradually developed as the law of the American colonies. Attacks on the establishment became more articulate during the Jeffersonian era, which seems to have favored everything French, including the promulgation of a radically new code of laws fashioned after the *Code Napoléon*. William Duane, for instance, ranted and raved about the “*farrago of finesse and intricacy*” by which the lawyers had degraded the law of the land, that is, the traditional common law.⁴⁸ One spokesman, addressing the Pennsylvania Legislature, stated that under the existing laws the expenses of bringing a legal action “are so enormous, as to make lawsuits rather a contest of wealth, than an inquiry into, and establishment of, justice”; that under the common law “evasions are so numerous and by technical forms so established that the plainest and most incontestable questions stand for years on the records of our courts”; and that “[u]nmeaning forms and absurd modes are so multifarious that a man of soundest sense, and best judgment, is disqualified from defending his own rights, except through the medium of a hired pleader.”⁴⁹ In the wake of these attacks, a number of statutes were enacted in Pennsylvania attempting to abolish the common law as “dark, arbitrary, unwritten, incoherent, cruel and inconsistent.”⁵⁰ As a substitute for the common law, some radicals proposed a code of laws which, they believed, could be “definite, compact, and simple enough to be understood by everyone.”⁵¹

One of the specific reasons for the popular distrust and dislike of the existing laws arose from the intricacies and technicalities of the English common law. Special pleading, Latin, French, and archaic legal terms unfamiliar to the layman were generally considered to be nothing other than tricky devices invented by scheming lawyers to confound and despoil ordinary decent (and unsuspecting) people. Benjamin Austin (Honestus) claimed outright that:

[o]ne reason of the pernicious practice of the law, and what gives great influence to this “order” [of lawyers] is, that we have introduced the whole body of English law in our Courts. Why should these [United] States be governed by British laws? Can the monarchical and aristocratical institutions of England, be consistent with the republican principles of our Constitution? . . . The numerous precedents brought from “old English Authorities” . . . answer no other purpose than the influence of lawyers.⁵²

William Duane, denouncing what he called the “mysterious” and “unintelligible” common law of the times, was of the opinion that it was expressly invented and kept in force by lawyers solely for the purpose of preventing the non-initiated layman from acquiring a knowledge of the law. Hence he urged that the law be so simplified as to enable everyone to be his own lawyer.⁵³ He went on to decry

48 DUANE, *supra* note 22, at 22.

49 Aurora, Nov. 9, 1804.

50 Aurora, Jan. 30, 1805.

51 Aurora, Jan. 31, 1805.

52 AUSTIN (HONESTUS), *supra* note 10, at 12.

53 DUANE, *supra* note 22, at 68.

“the inextricable and destructive farrago of the common law.”⁵⁴

Even some lawyers of repute and prominence soon began to denounce the English common law. Thus, Henry Dwight Sedwick, by no means a fanatic opponent of English legal institutions, deplored America’s slavish dependence on the common law. In 1824, very much to the discomfiture of his brethren, he raised the question

whether these United States . . . have not so increased in magnitude, whether their institutions, . . . tenure of property and, in short, all their [legal] relations . . . have not become so materially different from those existing in England . . . that the change and alienation . . . ought not to be formally recognized; whether we have not derived all the aid we ought to expect from the land of our ancestors; whether any further servile dependence on a foreign country does not rather tend to retard than promote our advancement; and, lastly, . . . whether we should not . . . declare a final separation, . . . an independence in jurisprudence, as really and nominally absolute, as it has long been in point of political sovereignty.⁵⁵

William Simpson, the “wild Irishman” who had studied law at Lincoln’s Inn, claimed that the language of the common law was “a barbarous jargon” which had “its roots in savage antiquity, its growth through ages of darkness, its fruits but bitterness and vexation.” He compared the English common law to a

pagan idol to which they daily offered up much smoky incense, [calling it] by the mystical and cabalistic name of Common Law . . . not to be seen or visited in open day, [sitting] motionless upon its antique altar for no use and purpose, but to be praised and worshipped by ignorant and superstitious votaries. . . . We should have had laws suited to our condition and high destiny; and our lawyers would have been ornaments of our country. . . . We must either be governed by laws made for us, or made by us. . . . English judges . . . are not fit persons to legislate to us. . . . Our law is justly dear to us . . . because it is the law of a free people. . . . The English common law is an acknowledged folly, [and] [f]olly cannot form a bond of union among enlightened men.⁵⁶

Charles Jared Ingersoll maintained that American lawyers would never take their destined position in the forefront of American intellectual life until they had declared their complete independence from the English common law and English precedents by terminating their “colonial acquiescence” in all legal and institutional matters.⁵⁷

The attacks upon the English common law, frequently coupled with a vociferous demand that all American law should be statutory law, also raised the question of which parts of the traditional common law should be abolished. The moderates, on the whole, agreed that the common law which had developed

⁵⁴ *Id.* at 22.

⁵⁵ Address by Henry Sedwick Before the Historical Society, Dec. 6, 1823, in 45 *NORTH AMERICAN REV.* 416 (Oct. 1824), reprinted in part in MILLER, *supra* note 1, at 136-46. This paper was a reply to William Sampson and his fierce denunciation of the common law. See note 56, *infra*, and corresponding text.

⁵⁶ Address by William Simpson Before the Historical Society of New York, Dec. 6, 1823, reprinted in part in MILLER, *supra* note 1, at 121-34.

⁵⁷ Reprinted in MILLER, *supra* note 1, at 78-79.

subsequent to the Revolution should be wholly ignored and, if necessary, abrogated and replaced by statutory law. The "radicals," on the other hand, insisted that only the English law as it had existed prior to the fourth year of the reign of James I (1606), the year which was regarded as the date on which the colonization of America had begun, should be binding upon the Republic. Thomas Jefferson, for instance, insisted that the American colonies had asserted against the British Crown not the "rights of Englishmen," but the "rights of man," and he seriously doubted the propriety of citing in American courts English authorities subsequent to the year 1606. Some extremists went so far as to demand the abolition of the English common law in its entirety, except those provisions which had been expressly adopted by the constitutions, legislatures, or courts of the several states. It was felt that as soon as the colonies had severed their political ties with England, the common law had ceased to be the law of the land; that it was wholly unbecoming for a democracy to be ruled by a law devised in a monarchy; and that the American people should shake off this last vestige of their colonial dependence on England and the British Crown.

Delaware (in 1776), Maryland (in 1776), New Jersey (in 1776), New York (in 1777), Massachusetts (in 1780), and New Hampshire (in 1792) stipulated that only those parts of the common law which had been developed in America after 1775 or 1776, or after the adoption of the respective state constitutions, should remain in force, unless otherwise indicated.⁵⁸ North Carolina adopted the common law by special statute, but only insofar as it was applicable to, and not inconsistent with, the North Carolina Constitution, the Federal Constitution, the laws of the United States or the laws of the other states. All this, as might be expected, led to great confusion and much uncertainty as to what laws were actually in force. In the main, however, the several states pursued the vague and somewhat ambiguous policy of accepting only those parts of the common law which they considered suited to the specifically American condition.⁵⁹ In some instances this policy assumed specific forms. In 1779, New Jersey enacted a statute forbidding lawyers under heavy penalties to cite in its courts any decision, opinion, practice, compilation, or exposition of the common law made or written in England after July 1, 1776.⁶⁰ In 1805, in Pennsylvania, Edward Shippen, Chief Justice of the Supreme Court of Pennsylvania, and two Associate Justices, Thomas Smith and Jasper Yeates, were impeached for having applied certain provisions of the English common law.⁶¹ In 1810 Pennsylvania enacted a statute forbidding the citation of any English decision handed

58 DEL. CONST. art. 25 (1776) (was not submitted to the voters for ratification). 1 CONSTITUTIONS OF THE UNITED STATES (S. Abrahamson ed. 1962) (hereinafter *Abrahamson*). MD. DECLARATION OF RIGHTS art. 3 (1776) (was not adopted). 1 *Abrahamson*. N.J. CONST. art. 22 (1776) (not ratified). 2 *Abrahamson*. N.Y. CONST. art. 35 (1777) (adopted without popular vote and then repealed in 1822). 2 *Abrahamson*. CONST. OF MASS. ch. 6, art. 6. CONST. OF N.H., pt. II, § 90 (as amended 1792).

59 See, e.g., *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 391 (1798); Chipman, *A Dissertation on the Act of Adopting the Common and Statutory Law of England*, 1 CHIPMAN 117 (1792); 2 KENT, COMMENTARIES ON THE CONSTITUTION 472 (1858).

60 Act of June 13, 1799 § 7 (1799) [New Jersey]; PATTERSON, LAWS OF THE STATE OF NEW JERSEY (1703-1798) 438 (1800).

61 *Bayard v. Passmore*, 3 Yeates (Pa.) 438 (1802); *Respublica v. Passmore*, 3 Yeates (Pa.) 441, 2 Am. Dec. 388 (1802).

down after July 4, 1776.⁶² In 1808, a Kentucky statute declared that "all reports and books containing adjudged cases in the Kingdom of Great Britain, which decisions have taken place since the fourth of July, 1776, shall not be read, nor considered as authority in any of the courts of this commonwealth."⁶³ Thomas Jefferson, in 1779, flatly rejected the idea that the traditional common law should be recognized and enforced in the newly created federal courts.⁶⁴ Some of the opposition to English law, English authorities, and English precedent may also be explained as a rather crude effort on the part of ill-trained lawyers, judges and magistrates "to palliate their lack of information by a show of patriotism."⁶⁵

In certain parts of the country, the position of the legal profession was further aggravated by the fact that, in keeping with the antagonistic sentiment against professional lawyers so characteristic of the post-Revolutionary period, in many instances the judiciary was made up of incompetent laymen totally ignorant of the law. In some states the aversion to the lawyer went so far as to regard almost anyone but a trained lawyer as fit to sit on the bench. Thus it happened that even the highest courts were manned by people who excelled by their "patriotic" or "democratic" zeal, but had little or no knowledge of the law. Many complaints were heard of judges who were "independent of conventionality," "attached no importance to precedents," "had no law learning," "made the law suit the case," "despised the law" because they were "utterly ignorant of it," and were "very inefficient and unsatisfactory."⁶⁶ A judicial utterance characteristic of this period was made by John Dudley, a tradesman and a farmer by profession but no lawyer, who between 1785 and 1797 was Associate Justice of the Supreme Court of New Hampshire. Charging the jury, he made the following statement: "Gentlemen, you have heard what has been said in this case by the lawyers, the rascals . . . They talk of the law. . . [I]t is not law that we want, but justice. . . Common sense is a much safer guide."⁶⁷ Confronted with such an unprofessional bench, the bar, needless to say, was frequently compelled to adapt itself to these deplorable conditions, very much to the detriment of professional standards and professional deportment.

This deplorable situation, which in many instances proved to be disastrous to the legal profession, in part was created and aggravated by what has been called *legislative supremacy*, which during the first half of the nineteenth century

62 Act of March 19, 1810, *Public Laws* 136 (1810) [Penna.]. During the debates in the Pennsylvania House of Representatives, Michael Leib maintained that the common law of England was "dangerous and immoral" and, hence, must be abolished. Addressing the House he raised the question whether the people of Pennsylvania were to go to England in order to find out what their laws and their constitution meant — whether they were slaves of English law and creatures of English precedent. *JOURNAL OF THE NINETEENTH HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA* (1809).

63 Act of February 12, 1808, *ACTS OF KY.* 23.

64 Letters of Thomas Jefferson to Edmund Randolph, August 18, 1799, 4 *WRITINGS OF THOMAS JEFFERSON* 301 (Washington ed., 1858).

65 POUND, *THE SPIRIT OF THE COMMON LAW* 116 (1921).

66 See, e.g., FOOTE, *THE BENCH AND BAR IN THE SOUTH AND SOUTHWEST* 22 (1876). See also note 110, *infra*.

67 Corning, *The Highest Courts of Law in New Hampshire — Colonial Provincial, and State*, 2 *THE GREEN BAG* 469-71 (1890); PLUMER, *THE LIFE OF WILLIAM PLUMER* 153-54 (1857). Justice Miller is said to have pointed out that the prime factor in shaping the law of the western states was ignorance. The first judges "did not know enough to do the wrong thing, so they did the right thing." Quoted in POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 11 (1938).

became characteristic of several states. The sovereign will of the people was considered almost omnipotent, and the legislature was simply looked upon as the chief instrument of this omnipotent popular will, thus making it not only the favorite organ of early American political life, but also uncontrollable by judicial review or executive interference. The legislature, and the legislature alone, was considered the only truthful *American* institution in that it was thought to express more adequately the deeply ingrained localism in early American politics—the notion that the natural and democratic unit representing the sovereign people of America was the local assembly which, therefore, should have practically unlimited powers. It is not surprising, therefore, that the early state constitutions should grant the legislature sweeping powers, and that, for all practical purposes, they should abolish the formal separation of powers among the branches of government. Many of the early state legislatures did not hesitate to interfere with the traditional functions of the court in a most arbitrary manner. Subordination of the courts to the “appellate jurisdiction” of the legislature (or governor), as a matter of fact, was a fairly common policy in the early history of the United States, and in some instances the judiciary was considered simply a “subordinate department of the government.”⁶⁸ This undisguised distrust of the judiciary (and of the lawyer) simply implied that judges, especially lawyer-judges, were not above suspicion. In short, the people as a whole held rather pragmatic views of the role assigned to the courts of judicature; they generally insisted on the election of judges by popular vote, which not infrequently amounted to little more than a popularity contest. In some states all appellate jurisdiction was vested in the legislature (or governor), and in others (Connecticut, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina, and Virginia) the legislature had almost unlimited powers not only to organize the judiciary, but also to select and remove judges at will.⁶⁹

Other factors, too, contributed to the woes of the early American legal profession, such as the particular geographical conditions of the young Republic as well as the primitive and often wholly inadequate means of communications between the sections of the country. Many communities, especially along the Western frontier, were almost completely cut off from the more important centers of culture along the East Coast. In keeping with the “democratic” tendency to bring justice “to every man’s door,” a vast number of independent courts of general jurisdiction were established throughout the country. Frequently these courts were manned, as we have seen, by totally incompetent lay judges, and to each of these courts an independent local bar was frequently attached. These local bars, especially in the back country, lacked effective organization, discipline, and professional competence. Every local court, as a rule, acting on its own discretion and often without discrimination, admitted to practice all sorts of people, regardless of their moral and professional qualifications.⁷⁰ This policy of attaching distinct local but wholly unorganized and frequently unprofessional bars to each local court of general jurisdiction constituted a grave danger to profes-

68 CHIPMAN, MEMOIR OF THOMAS CHITTENDEN 102 (1849).

69 See, e.g., *id.* at 102; HOLCOMBE, STATE GOVERNMENT 62 (1926).

70 Massachusetts, for instance, in 1785, 1786 and 1790, by statute threw the practice of law open to non-lawyers. Act of March 6, 1790, 1 LAWS OF MASSACHUSETTS, 1780-1807 493.

sional ideals, department and competence. Supervision or discipline by the courts, if ever exercised, was usually ineffective; and discipline or supervision by the profession itself or by some professional organization, provided there was such an organization, simply did not exist. Reprehensible practices remained unchecked, and the question of professional competence was rarely, if ever raised.

At first some local bars or bar organizations, such as the bar associations in eastern Massachusetts, and in other parts of New England, which on the eve of the Revolution had achieved a high level of professional efficiency, attempted to stem this general tide of "deprofessionalization." But in the face of the new "democratic," "populist" or "egalitarian" demands and policies their efforts proved in vain. As a matter of fact, they were soon to disappear from the scene.

The widespread aversion to, and rejection of, the traditional common law of England also tended to leave the courts and the lawyers without the guidance of authoritative legal materials. "[T]he principles applicable to our Constitution," Chancellor James Kent observed, "were unsettled, and the rules of the law unknown, except through the distant and dim vision of English reports. . . . Everything in the law seemed . . . to be new; we had no domestic precedents to guide us. . . . Almost every point of practice had to be investigated and tested . . ." ⁷¹ When Kent came to the bench in New York in 1798, he found himself almost completely without assistance from reported cases. ⁷² The legal uncertainties engendered by this situation were much deplored by members of both bench and bar. William Cranch, in the Preface to the first edition of his *Reports* of 1804, complained that "[m]uch 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." ⁷³ James Sullivan remarked in 1801 that "[t]he want of accurate reports . . . is very discouraging. . . . It would be well for us . . . to have our own reporters;" ⁷⁴ and George Caine related that "[t]he inconveniences resulting from the want of a connected system of judicial reports have been experienced and lamented by every member of the [legal] profession." ⁷⁵

The young American legal profession, however, soon remedied this deplorable situation. In 1789, Ephraim Kirby published the first law reports in America, in which he collected the decisions of the Connecticut Superior Court from 1785 to May, 1788, as well as some decisions of the Connecticut Supreme Court of Errors. ⁷⁶ Jesse Root reported Connecticut cases from July, 1789 to 1798. ⁷⁷ In 1790, Alexander J. Dallas published the first volume of his *Report of Pennsylvania cases*; ⁷⁸ Nathaniel Chipman reported for Vermont in 1793; ⁷⁹ George Wythe, in 1795, published the *Decisions of Cases in Virginia by the High*

71 Address of James Kent Before the Law Association of the City of New York 2 (1836).

72 KENT, MEMOIRS AND LETTERS OF JAMES KENT, 1763-1847 112-13 (1898).

73 5 U.S. (1 Cranch) iii (1911). See also CHIPMAN, CHIPMAN'S REPORTS (Vt.) 4-5, reprinted in 1 VT. RPT. ANN. (1888).

74 SULLIVAN, HISTORY OF LAND TITLES IN MASSACHUSETTS, preface (1801).

75 2 CAINE'S REPORT (N.Y.), preface (1801).

76 KIRBY'S REPORTS (Conn.) (1785-1788).

77 1 ROOT'S REPORTS (Conn.) and 2 ROOT'S REPORTS (Conn.) (1789-1798).

78 DALLAS REPORTS (Penna.) (1790).

79 1 VT. (CHIPMAN'S REPORTS) 3-59 (1793).

Court of Chancery;⁸⁰ Francois Xavier Martin reported for North Carolina in 1797;⁸¹ the first unofficial reports for the State of New York were compiled by Coleman in 1801;⁸² and the first official reports for New York were those of George Caine who was appointed Court Reporter in 1804.⁸³ The first volume of cases decided by the newly established Supreme Court of the United States was published by Alexander J. Dallas in 1798;⁸⁴ and in 1804, William Cranch started the publication of his *Supreme Court Reports*.⁸⁵ Other states soon introduced reporter systems of their own.

During the years following the Revolution, there existed almost no American law treatises,⁸⁶ and the American judge or lawyer wishing to become acquainted with law was compelled to consult English law books. The first American law treatises published after 1788 owed their origin largely to the general demand for "native" law texts to be used by practitioners.⁸⁷ They dealt with pleading,⁸⁸ real property,⁸⁹ maritime law, maritime insurance, and some other specialized subjects. Most of the early American legal texts or law treatises were manuals for petty officials, justices of the peace, or town officials, and, hence, were of little value to the professional lawyer.⁹⁰ The dearth of competent law treatises, in turn, compelled the courts and the lawyers to resort to English works, especially to Blackstone's *Commentaries*, which for some time became the most authoritative law text in the United States, even though these "sources" had practically been outlawed in some states. During and shortly after the Revolution the dearth of law books was so acute that the law libraries of loyalist lawyers were ordered to be confiscated by the authorities. The legislature of Massachusetts, for instance, passed several statutes permitting judges and lawyers to purchase these confiscated law libraries or law books at fair valuation.⁹¹ Judge James Sullivan of Massachusetts, in 1779, was authorized by the legislature to purchase some of the confiscated law books which formerly had belonged to Jeremiah Gridley, a loyalist lawyer.⁹² As a result of this distressing situation, a number of English law books were simply republished or reedited in America.⁹³ But it took time before the bench and the bar were in possession of an adequate collection of authorita-

80 21 Va. Rpt. Ann. (Wythe) 81-349 (1903).

81 1 N.C. (1 Martin) (1797).

82 COLEMAN'S CASES (N.Y.) (1801).

83 CARNES REPORTS (N.Y.) (1804).

84 2 U.S. (2 Dall.) (1798).

85 5 U.S. (1 Cranch) (1804).

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

87 MARVIN, LEGAL BIBLIOGRAPHY, OR A THESAURUS OF AMERICAN, ENGLISH, IRISH, AND SCOTCH LAW BOOKS (1847).

88 STORY, SELECTION OF PLEADINGS IN CIVIL CASES (1805).

89 SULLIVAN, *supra* note 74.

90 James, *supra* note 86. Of more than local importance were SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT (1795-1796); CHIPMAN, REPORTS AND DISSERTATIONS (1793); BLACKSTONE, COMMENTARIES (Tucker ed. 1803); WILSON, LAW LECTURES (1804); BRACKENRIDGE, LAW MISCELLANIES (1814).

91 COLLECTION OF ACTS AND LAWS PASSED IN THE STATE OF MASSACHUSETTS BAY, RELATIVE TO THE AMERICAN LOYALISTS AND THEIR PROPERTY 15, 22 (1785). These two acts were repealed or amended in 1784. *Id.* at 26, 31. See also note 3, *supra*.

92 2 AMORY, THE LIFE OF JAMES SULLIVAN 4 (1859).

93 E.g., W. JONES, ESSAY ON THE LAW OF BAILMENTS (4th ed. 1833); S. KYD, TREATISE OF THE LAW OF BILLS OF EXCHANGE AND PROMISORY NOTES; and PARK, SYSTEM OF THE LAW OF MARITIME INSURANCE. Much of Joseph Story's literary activities centered on re-editing leading English law texts, such as, CHITTY, BILLS AND NOTES (Story ed. 1809).

tive law treatises, especially American law treatises which were adapted to the new American conditions and could be used by courts and lawyers as reliable guides. In the meantime, they had to rely mainly on "the memory of man and the silent influence of unquestioned usage."⁹⁴

Despite the pronounced hostility toward the lawyer by the general populace, the legislatures, and even by some members of the profession itself, despite the dearth of authoritative legal materials, and despite other circumstances in the main unfavorable to professional activities, the prestige and influence of the early American legal profession, after a short decline, on the whole remained fairly high, at least for a while. In some places, especially along the eastern seaboard, a pronounced *esprit de corps* among the more prominent lawyers made itself felt. This *esprit de corps* became manifest in bar organizations or bar associations: the strictly supervised and enforced training of prospective lawyers, the control over admission to practice, the many stringent measures adopted by bar associations as well as the many effective steps taken to raise professional standards and professional deportment, and the united front presented by lawyers against pettifoggers and rabble-rousers. All this gave the young American legal profession, at least for the time being, an unsuspected strength and indisputable success in the face of much animadversion and obloquy. Rather effective in this progressive conquest of public opinion was a consistent and clever barrage of self-serving propaganda which the lawyers unleashed in their own behalf. The gradual ascendancy of the legal profession in early America to what De Tocqueville later was to describe as "the highest political class and the most cultivated position of [American] society," to no mean degree was due not only to the brilliance of some truly outstanding lawyers and to their frequently dazzling display of erudition in a country where true learning and solid knowledge were still at a premium, but also to the undeniable propensity of the profession for advertising its unrivaled merits and achievements in a clever and rather persuasive manner.

After 1820, the legal profession rallied to extoll publicly its excellence and its many services to the community. David Hoffman of Maryland proclaimed that the legal profession was the most sublime profession and pursued only by the most honorable men. The true lawyer, he maintained, "labours not for those who can afford the honorarium, but the widow, the fatherless, and the oppressed are ever in his mind."⁹⁵ James Kent of New York, in a similar vein, reminded his audience that:

whoever looks forward to the duties of any great public trust . . . and means to perform those duties with usefulness and reputation, must have the essential qualifications of a lawyer. . . . Knowledge alone is not sufficient . . . unless it be regulated by moral principle. If the . . . lawyer . . . expects to be a blessing . . . and not a scourge . . . he must cherish . . . a firm . . . zeal for justice.⁹⁶

94 *Review of Tyng's Massachusetts Reports*, 1 AMERICAN L.J. 361 (1808).

95 Address by David Hoffman at the University of Maryland (1823), reprinted in part in MILLER, *supra* note 1, at 85-87.

96 Address by James Kent at Columbia College, Feb. 2, 1824, reprinted in part in MILLER, *supra* note 1 at 95-96.

Joseph Story, in 1829, stated that the true lawyer always had "a just conception of the dignity and importance of his vocation," and that he would never "debase it by a low and narrow estimate of its prerequisites or its duties." Story also maintained that the practice of law was not "a mere means of subsistence," but had nobler aims; that it required "sound learning, industry, and fidelity"; and that it called upon general qualities "of the highest order." The lawyer "is placed . . . upon the outpost of defense . . . to watch the approach of danger and to sound the alarm It is then the time for the highest efforts of genius, and learning, and eloquence, and moral courage at the Bar. . . . If he succeeds, he may, indeed, achieve a glorious triumph for truth, justice, and the law."⁹⁷

It should also be borne in mind that the creation of a distinct federal court system, especially of the Supreme Court of the United States, and, concomitantly, the creation of a federal bar, which in the case of the bar of the Supreme Court contained some of the most prominent lawyers, not only constituted an entirely novel development during the post-Revolutionary period, but also had a decisive influence upon the emergence of a distinctly American law as well as upon the improvement and strengthening of the American legal profession. This new federal bar practiced with signal success before the Supreme Court of the United States and the federal courts of appeal. "Every friend of America," it was observed, "must be highly gratified when he peruses the long list of eminent and worthy characters who have come forward as practitioners at the Federal Bar, where the most important rights of Man must, in time, be discussed and determined upon, as well as those of Nations, as of individuals."⁹⁸

While the general trend in the social, political and economic history of early America was decisively moulded by the statesmanlike decisions of Chief Justice John Marshall, not a small share in the praise bestowed upon the enduring greatness of these decisions must be awarded to the brilliant and resourceful lawyers who argued before him.

It has been said of some of the judgments of the Supreme Court of the United States that they are not excelled by any ever delivered in the judicial tribunals of any country. Candor, however, requires the concession that their preparation was preceded by arguments at its bar of which it might be said . . . that they were of such transcending power that those who heard them were lost in admiration.⁹⁹

Referring to *Ware v. Hylton*,¹⁰⁰ James Iredell, Associate Justice of the Supreme Court of the United States, remarked:

The cause has been spoken to, at the bar, with a degree of ability equal to any occasion I shall, as long as I live, remember, with pleasure and respect, the arguments which I have heard on this case; they have discovered an ingenuity, a depth of investigation, and a power of reasoning fully equal to anything I have ever witnessed.¹⁰¹

⁹⁷ Address by Joseph Story at Harvard University, Aug. 25, 1829, reprinted in part in MILLER, *supra* note 1, at 179-81.

⁹⁸ Gazette of the United States, Mar. 6, 1790.

⁹⁹ Address of Justice Harlan on the occasion of the "Centennial Celebration of the Organization of the Federal Judiciary," Feb. 4, 1890, reprinted at 134 U.S. 751, 753 (1890).

¹⁰⁰ 3 U.S. (3 Dall.) 199 (1796).

¹⁰¹ *Id.* at 203. The case was argued by John Marshall and Alexander J. Campbell against William Lewis and Edward Tilghman. *Id.* at 206-19.

By the year 1821, the discriminating Joseph Story had this to say about the lawyers who in ever-increasing numbers and with ever-greater success practiced before the Supreme Court of the United States:

The discussion of constitutional questions throws a lustre round the Bar, and gives a dignity to its functions, which can rarely belong to the profession of any other country. Lawyers are here, emphatically, placed as sentinels upon the outposts of the constitution; and no nobler end can be proposed for their ambition or patriotism, than to stand as faithful guardians of the constitution. . . . If their eloquence can charm, . . . if their learning and genius can . . . unfold the mazes and intricacies . . . of the law;—how much more glory belongs to them, when this eloquence, this learning, and this genius are employed in defense of their country; when they breathe forth the purest spirit of morality and virtue in the support of the rights of mankind; when they expound the lofty doctrines, which sustain, and connect, and guide the destinies of nations. . . .¹⁰²

During the second half of the eighteenth century some colonies had established, and had started to enforce, a number of regulations for the preparation and admission of qualified persons to the practice of law.¹⁰³ During and immediately after the Revolution, some of these regulations were temporarily relaxed with the result that for a while a number of people with little or no preparation or qualification succeeded in entering the profession. Soon, however, the old regulations were revived and enforced in some states, either by legislative enactments, rules of court, or by the efforts of the bar itself which frequently acted through local bar organizations. In New England as well as in some of the mid-Atlantic states the requirements for admission to the bar, at least for a while, were rather stringent. In other parts of the country, especially along the frontier, there existed hardly any adequate control over admission. Some western states, however did insist on an entirely superficial "examination" of all persons wishing to practice law.

102 Address by Joseph Story Before the Members of the Suffolk Bar (1821), reprinted in part in MILLER *supra* note 1, at 71-72. Richard Bush, onetime Attorney General of the United States, Secretary of State, Secretary of the Treasury, Minister to Great Britain, and Minister to France, insisted that the lawyers who in the early days argued cases before the Supreme Court of the United States were the equals of any British lawyer or judge of any period. RUSH, AMERICAN JURISPRUDENCE (1815), reprinted in part in MILLER, *supra* note 1, at 46-47, 52.

103 See RECORD BOOK OF THE SUFFOLK BAR, 19 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 147-79 (1881-82); UPDIKE, MEMOIRS OF THE RHODE ISLAND BAR, 55, 294 (1842); NEW YORK COLONIAL MANUSCRIPTS 54:80, [MSS Historical Section, State Library, Albany, N.Y.]; MORRIS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1784 53 (1935); 3 HAMLIN AND BAKER, SUPREME COURT 108-18 (1959); JAY PAPERS 130x3, no. 16-V, [New York Historical Society Library]; SMITH MSS, COMMONPLACE BOOK, [New York Public Library]; Ordinance for Establishing the Remedies for Abuses in the Practice of Law, 15 Minutes of the Council of New York 200-21, reprinted in Hamlin, *The First Grievance Committee in New York*, 1 ANGLO-AMERICAN HISTORY SERIES (Hamlin ed., 1939); MINUTES OF THE [NEW YORK] SUPREME COURT OF JUDICATURE, 1727-1732, 208; MINUTES OF THE [NEW YORK] SUPREME COURT OF JUDICATURE, 1766-1769, 180; AGREEMENT [OF THE NEW YORK BAR] OF OCTOBER 1756; James Alexander Papers, "Diary," [MSS New York Historical Society Library]; ARTICLES OF AGREEMENT OF THE BAR OF THE CITY OF NEW YORK OF NOVEMBER 26, 1756, [MSS of the Library of the Association of the Bar of the City of New York], reprinted in HAMLIN, LEGAL EDUCATION 160-61 (1939); 9 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 506 (Ricord and Nelson, eds.); 1 KEASBEY, COURTS AND LAWYERS OF NEW JERSEY 285 (1912); 1 CHEROUST, *supra* note 2, at 90, 101, 161, 166, 172, 180, 184, 204.

The control and supervision of the preparation and qualification for, and the admission to, the bar by the profession itself required that the latter should be organized in order to lay down, and enforce, uniform policies. Bar organizations, wherever they had existed during the Colonial period, had survived both the Revolution and the post-Revolutionary outcry against the legal profession. As a matter of fact, these bar organizations, which frequently acted as a single and determined body, became one of the reasons why the profession managed successfully to withstand the antilawyer agitations during the period immediately following the Revolution—why it emerged victoriously from this ordeal. Prior to the year 1820, bar meetings or local bar associations existed in Massachusetts, in what is now Maine, in New Hampshire, Vermont, Connecticut (Hartford), New York, Pennsylvania (Philadelphia), as well as in other places.¹⁰⁴

The original bar associations, bar organizations, or "bar meetings," which in some instances date back to pre-Revolutionary days,¹⁰⁵ were founded by and for all lawyers practicing before a certain court, or in a certain district or county. Its rules and regulations were binding upon all lawyers practicing within this district or county, or before this particular court. The original founding of these associations was prompted by the realization that a responsible and competent legal profession as a whole had certain common problems, functions and duties. Unfortunately, under the impact of Jacksonian democracy during the thirties, these wholesome organizations gradually disbanded. The laments uttered by the Cumberland Bar in Maine in 1829 certainly echo the feelings of the responsible members of the early American legal profession:

[U]nder the hostile system of legislation . . . that prevailed [in the several states] . . . the members [of the original bar meetings] . . . have yielded in despair to the spirit of reckless innovation upon old and established principles and the [bar] association[s] . . . have fallen into decay.¹⁰⁶

When, in 1836, the renowned Suffolk County Bar of Massachusetts was dissolved by its own members, the reason given for this drastic step was "the Revised Statutes" which had made "essential changes in the admission to the bar."¹⁰⁷ The *Massachusetts Revised Statutes* of 1836, chap. 38, had significantly relaxed all the requirements for the preparation for, and the admission to, the practice of law. Apparently Massachusetts no longer regarded the bar as a learned profession, but rather as a sort of "business activity."

A factor which further strengthened the American legal profession in its valiant efforts to withstand the widespread antilawyer trends during the early days of the Republic were the improved methods of training young men for the practice of law. After the Revolution, and for a long time to come, the chief method of acquiring a legal education was apprenticeship served in the office of a renowned lawyer, although there were still instances of self-directed law studies

104 See generally 2 CHROUST, *supra* note 2, at 129-72.

105 See note 103, *supra*.

106 RULES AND REGULATIONS OF THE CUMBERLAND BAR ASSOCIATION 1 (1864). See also CLAYTON, HISTORY OF CUMBERLAND COUNTY, MAINE 84 (1880).

107 RECORD-BOOK OF THE FRATERNITY OF THE SUFFOLK BAR 1 (1836). The Supreme Judicial Court of Massachusetts, during the March 1836 term, repealed all previous court rulings or rules relating to the admission of attorneys. This repeal took effect on October 1, 1836. 24 PICKERING 383 (Mass.) (1836).

and, on fairly rare occasions, attendance at one of the Inns of Court in London. Obviously, the apprenticeship training was of varying degrees of quality, depending on whether the "senior lawyer" took an active interest in the legal education of his apprentices. Soon, also, distinct law schools (or law professorships) were established, some affiliated with already existing colleges or universities, others as the academic outgrowth of the traditional apprenticeship system.¹⁰⁸ In 1779, Thomas Jefferson inaugurated the first law professorship at William and Mary, and George Wythe became the first law professor there. In 1789, James Wilson, an Associate Justice of the Supreme Court of the United States, became professor of law at the College of Philadelphia. When, in 1792, the College of Philadelphia was merged with the University of Pennsylvania, a new law professorship was established with James Wilson as the first incumbent. In 1793, Columbia College in New York created a law professorship which was assigned to James Kent. In 1799, the Transylvania University in Lexington, Kentucky, appointed George Nicholas, a graduate of the law school of William and Mary, its first "professor of law and politics." After several unsuccessful attempts (in 1777 and 1810-11), Yale College established a permanent law school in 1826 with David Dagget as its first law professor. As early as 1785 or 1786, Harvard College considered the establishment of a law professorship, but only in 1815 was such a professorship actually created with Isaac Parker as the first incumbent (lectures were started in 1816). In 1817 this law professorship was expanded into a distinct law school with Isaac Parker and Asahel Stearns as the "faculty." Due to the lack of a sufficient number of students, this law school closed down in 1829, only to be reopened the same year under the direction of Joseph Story and John Hooker Ashmun. This particular event has been called the turning point in the history of American law and American legal education. A law school was also established at the University of Maryland (in 1812) as well as at some other colleges and universities.

Independent of the early "college-connected" law schools, law professorships or law courses, a rather large number of private local "law schools" grew up in many parts of the country shortly after the Revolution. These private local "law schools" first developed in New England and were later imitated throughout the nation. Unlike the "college-connected" schools, they stressed the practical side of legal training and, in essence, were nothing more than "systematized extensions" of the old apprenticeship method, available, however, to a much larger group of students than the traditional "private law office method" could possibly and effectively accommodate. They usually had a fairly large law library, thus being able to offer a more thorough, more systematic, and more "academic" law training. In brief, they were really nothing more than an academic offshoot of a practicing law firm, especially well-equipped for instructing apprentices. These private law schools initially were quite successful and enjoyed much popularity. For some time to come they overshadowed the college-connected law schools. In the end many of them were absorbed by universities or colleges which, after some not altogether successful beginnings, started to shape their law curricula and programs after those of the private local schools.

108 See generally 2 CHEROUST, *supra* note 2, at 173-223.

The most important and certainly the most renowned among these private local law schools and, incidentally, for a long time the most important and most famous law school in America, was Litchfield Law School. Founded in 1784, it was supervised by such remarkable men as Tapping Reeve and James Gould. It finally closed down in 1833. Its total student enrollment over a period of fifty years was in excess of one thousand, and among its many illustrious graduates were men from every part of the United States. Few law schools have had so great a proportion of prominent graduates, and the general influence of this law school upon the legal, political and cultural history of the United States during the nineteenth century is beyond calculation.

Seth P. Staples, Samuel J. Hitchcock, and David Daggett founded a renowned private law school in New Haven in 1800, which in 1826 became merged with the Yale School. There was also the law school of John Reed in Carlisle, Pennsylvania, which became connected with Dickinson College; and that of William H. Battle in Chapel Hill, North Carolina, which in 1845 merged with the University of North Carolina. Whatever the ultimate fate of these private local law schools might have been, they became a powerful and significant rallying point for the lawyers' resistance to the unreasonable "democratic" or "populist" demands for the abolition or emasculation of the young American legal profession.

The American Revolution as such, and the political, social, and economic events immediately following it, commonly had a temporarily adverse effect on the legal profession. Prior to the Revolution, the profession had achieved signal prominence in some places, and, on the whole, played a distinguished role in the Revolution as well as in the political reconstruction of the nation. The legal profession was fortunate to successfully withstand the popular attacks launched, in the name of "democracy," against the profession. Indeed, it recovered rather quickly from this temporary setback. In the post-Revolutionary era, important indications of growth and vigor in the ranks of the young American bar can be detected. The period immediately following the Revolution may fairly be called the beginning of the formative era or, perhaps, golden age, of American law and, to a lesser degree, of the American legal profession.

This somewhat paradoxical situation may possibly be explained by the fact that in spite of much adversity, more likely on account of it, during this period America produced a large number of eminent lawyers and prominent judges. The creative legal achievements of these men will bear favorable comparison with the greatest legal achievements of any age in Western history.

During this era the main concern of American courts and American lawyers was the application of traditional (mostly English) authoritative legal materials to the specifically American condition. This applicability constituted the overriding criterion by which courts and lawyers determined whether certain English authorities and institutions had been received or should be received, and in case they were not found to be applicable, what should obtain in their place. 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 nineteenth century America. In creating and stabilizing a body of legal rules and precepts consonant

with the early American life, the lawyers assisted the courts as well as the legislatures in creating a typically American law. They spoke and acted with that conscious authority which is so characteristic of truly creative founders and promoters of public institutions and public policies. But in doing this, they wisely did not act with belligerent or frantic dogmatism. Moreover, the lawyers and the courts were constantly adding new branches to the law, as well as finding novel solutions to newly arising problems and issues. It was precisely this general situation which constantly expanded the range of the law and, at the same time, stimulated the practice, scope, and importance of the legal profession. Hence, the history of the American legal profession immediately after the Revolution, in the final analysis, is a running account of great lawyers who by their professional competence not only shaped the history of American law and American legal institutions, but also determined the fate and fortune of the whole nation. Animated by a common spirit which is characteristic of any true profession, these lawyers, consciously or unconsciously, considered themselves members of a distinct class of professional men. But, on the whole, they were rugged though imaginative individuals. James M. Wayne, Associate Justice of the Supreme Court of the United States, asserted in 1849 that "[t]he case of *Gibbons v. Ogden* [of 1824] . . . will always be a high and honorable proof of the eminence of the American bar of that day. . . . There were giants in those days."¹⁰⁹

B. The Jacksonian Era

Arising along the Western and Southern frontier, and fed by the indomitable individualism so characteristic of the adventurous pioneers who pushed this nation's boundaries ever farther west, Jacksonian democracy assumed the proportions of a prevailing, widely spread social philosophy in America. This new philosophy came to proclaim, among other matters, the overriding importance of the common man; the pioneer was viewed in particular esteem as one who underwent great hardships and constantly faced mortal dangers in order to turn the Western wilderness into a paradise through the exercise of his reckless courage and desperate cunning. The frontier was no place for social distinctions. It had, in turn, a major impact on the nature of the young American legal profession. Since the harsh demands of plain survival demanded the utmost of every man, the pioneer developed and cherished a unique sense of freedom and egalitarianism. Men were judged solely by the manner in which they were coping with the pressing problems of survival in an essentially hostile environment, each man shaping his own destiny. His success or failure was determined solely by his own ability to meet the demands placed on him.

Jacksonian democracy was an essentially rural social philosophy and was, hence, fiercely distrustful of those distinctly urban views which were characteristic of the major population centers along the Eastern seaboard. The intense feeling of rugged individualism engendered by the life on the frontier did not find ready acceptance in the essentially secure and easygoing atmosphere of Eastern urbanism which had spawned, heretofore, the majority of lawyers and almost all

109 48 U.S. (7 How.) 300, 460-61 (1849).

of the more prominent legal practitioners. Jacksonian democracy was based on the spirit of good fellowship, propagating the doctrine that the only good man was the self-made man who had a natural and inalienable right to personal success wherever he could find it in the free competition with all other men, as well as in the brave confrontation of deadly challenges. Conversely, it viewed governmental or institutional restraint of any kind with the utmost suspicion as an arbitrary and capricious limitation of the absolute right of all men to work out their "destiny" at their own risk. What it objected to most were all forms of allegedly artificial obstacles and restrictions, including legal restraints, which might interfere with the individual's determination to plan and live his own life without fear or favor. What it instinctively opposed was the crystallization of alleged differences among people, the monopolization of economic opportunities, and the determination of such monopolies by government, social classes, traditional customs, or law. In brief, Jacksonian democracy was not one "which expected or acknowledged on the part of the successful ones to harden their triumphs into the rule of a privileged class. . . . [I]t resented the conception that opportunity under competition should result in the hopeless inequality, or rule, of a class."¹¹⁰

This democratic philosophy, or social program, echoed, in part, antilaw and antitraditionalist aspirations that were voiced immediately after the American Revolution. The post-Revolutionary and Jacksonian era trends had several characteristics in common: for one thing, the intention of abolishing British influence as well as everything British; for another, the glorification of the frontier spirit which many people considered typical of the new America. In both instances one can observe an intensive striving for equality based on the presumption that during the Revolution all patriotic Americans had equally contributed to the attainment of political independence, while in the post-Revolutionary period all democratically minded people had made equal contributions in carving out a new and better country as well as a superior society for all in the hostile wilderness. Any kind of privilege or elitism was outrightly rejected and violently denounced as something decidedly un-American by men who felt that by their hard work and sacrifice they had made this country. The general mood along the frontier was merely a delayed and intensified reaction to what during the Revolution had occurred earlier along the Eastern seaboard.

As the pioneers began to settle down and establish some sort of articulate communities, the necessity arose for a stable society with a minimum of law and order, including trained legal practitioners and experienced lawyer-judges. Soon also, the age-old debtor-creditor issues once again were raised, threatening to snatch from the pioneer what he had wrested from the wilderness and what he thought to be his just and inalienable reward: his land, his cabin, his animals, his tools and his food stores.

The basic problem lay in the general tendency of the pioneer to disregard some of his legal or contractual obligations because of his intense conviction that he deserved special consideration for what he had risked, suffered, and contributed. The lawyer, following in the wake of the pioneer, without being exposed

to the dangers which the latter faced daily, usually sided with the creditors and, at the same time, tried to enforce a law which, on the whole, not only discriminated against the debtor but in some instances did not take into consideration the peculiar conditions of the frontier. The pioneer, like a cornered animal, turned upon the lawyer whom he considered his tormentor.

Under such circumstances, it was difficult to convince the frontiersman that the lawyers were merely doing what, given the existing laws, they had to do. Thus, in 1830 P. W. Grayson, a vociferous advocate of Jacksonian democracy, denounced both the common law and the legal profession:

I have already sufficiently considered the demoralizing influence of law . . . on the temper and principles of men. . . . [There exists, however,] another influence to inflame its mischievous power . . . [namely,] that of a certain class of men who are known by the name of lawyers, whom we find swarming in every hole and corner of society. . . . [M]en in general . . . exert all their craft in turning the laws to their own advantage. . . . But who can set bounds to their iniquity, when these natural impulses come to be instructed and fomented by the learned and licensed jugglers in legal chicanery, creatures who are . . . shedding upon it the pestilence of discord, strife, and injustice! . . . [This] long train of congenital . . . blood suckers, and caterpillars . . . this mighty corps of undertakers—these slippery factors of justice— . . . [should be banished] as cancerous pests . . . Gain . . . is their animating principle . . . [and] they are ready to execute any prescription of either justice or injustice [T]hese counterfeits of men are now to be the proud dictators of human destiny Their practices . . . supersede all other criterions of right What then is this [legal profession] . . . ?—*genius putting itself to sale* . . . offering itself a loose prostitute to the capricious use of all men alike, for gold! . . . Surely the system, which involves such a spectacle . . . must be rotten.¹¹¹

The judges and lawyers of the early frontier years were, as a rule, an unusual breed of men, well-suited to the temperament and expectations of the people and the environment in which they had to work.¹¹² The typical conditions included, *inter alia*: log cabin courthouses, or simply no courthouse at all, drunken and boisterous crowds who regarded trials as entertaining spectacles rather than as

111 GRAYSON, VICE UNMASKED, AN ESSAY: BEING A CONSIDERATION OF THE INFLUENCE OF LAW UPON THE MORAL ESSENCE OF MAN, WITH OTHER REFLECTIONS (1830), reprinted in part in MILLER, *supra* note 1, at 192-200 (1962).

112 See generally BAY, REMINISCENCES OF THE BENCH AND BAR OF MISSOURI (1878); BOND, CIVILIZATION IN THE OLD NORTHWEST (1934); BRACKENRIDGE, RECOLLECTIONS OF PERSONS AND PLACES IN THE WEST (1868); BUSH, *Some Great Lawyers of Kentucky*, PROCEEDINGS OF THE TWENTY-FOURTH ANNUAL MEETING OF THE KENTUCKY STATE BAR ASSOCIATION (1925); 1-2 CALDWELL, SKETCHES OF THE BENCH AND BAR OF TENNESSEE (1898); CATON, EARLY BENCH AND BAR OF ILLINOIS (1893); Childs, *Recollections of Wisconsin since 1820*, 4 REPORTS AND COLLECTIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN (1859); Chroust, *The Legal Profession in Early Missouri*, 29 MO. L. REV. 129 (1964); 2 CHROUST, *supra* note 2, at 92; CLARK, THE RAMPAGING FRONTIER (1939); Clark, *Manners and Humors of the American Frontier*, 35 MO. HISTORICAL REV. (1940); CROSSLY, COURTS AND LAWYERS OF ILLINOIS (1893); Dishman, *Some Great Lawyers of Kentucky*, PROCEEDINGS OF THE EIGHTEENTH ANNUAL MEETING OF THE KENTUCKY STATE BAR ASSOCIATION (1919); DONALD, LINCOLN'S HERNDON: A BIOGRAPHY (1948); DUFF, ABRAHAM LINCOLN: PRAIRIE LAWYER (1960); English, *The Pioneer Lawyer and Jurist in Missouri* in 21 UNIVERSITY OF MO. STUDIES, no. 2 (1947); Farmer, *Bar Examinations and Beginning Years of Legal Practice in North Carolina, 1820-1860*, 29 N.C. HISTORICAL REV. (1952); Farmer, *Legal Practice and Ethics in North Carolina, 1820-1860*, 30 N.C. HISTORICAL REV. (1953); FOOTE, BENCH AND BAR OF THE SOUTH AND SOUTHWEST (1876); FRANK, LINCOLN AS A LAWYER (1961);

dignified aspects of an orderly administration of justice,¹¹³ circuit courts and circuit bars that roughed it for weeks at a time,¹¹⁴ and trials which replaced church-going or social get-togethers not unlike noisy county fairs or carnivals.

There can be little doubt as to the cause of the rather discouraging atmosphere which prevailed during court trials along the frontier. The early judges and lawyers, to an admirable degree, managed to overcome these rather dismal conditions and see to it that justice was done. The fact that, in the beginning most of the judges and some of the lawyers were chosen from among their fellow pioneers and, hence, were inured to the hardships and the primitive conditions aided these men to no mean degree. The early judges or justices were usually selected from among the more prosperous landowners, merchants, farmers, or men who had distinguished themselves as Indian fighters—who had achieved their standing in a pioneer community unaided by formal education, family connections, or wealth. These men often verged on illiteracy, and were seldom, if ever, versed in the intricacies of the law and legal procedure.¹¹⁵ Their selection was generally predicated on leadership ability, as the frontier understood it. Their frequent lack of any legal knowledge often forced them to fall back on a kind of pioneer common sense, or homespun wit adapted to the local conditions, rather than on the more rigid common law of the East. In effect, they assumed the role

Gillespie, *Recollections of Early Illinois and Her Noted Men*, 13 FERGUS HISTORICAL SOCIETY SERIES (1880); GREEN, LAW AND LAWYERS (1950); HALL, LEGENDS OF THE WEST (1857); Hallem, *Early Courts and Lawyers*, 25 YALE L.J. 286 (1916); HILL, LINCOLN THE LAWYER (1906); King, *A Pioneer Court of Last Resort*, 20 ILL. L. REV. (1916); HURST, THE GROWTH OF AMERICAN LAW (1952); THE LAWYERS AND LAWMAKERS OF KENTUCKY (Levin ed. 1897); 1-4 MARSHALL, A HISTORY OF THE COURTS AND LAWYERS OF OHIO (1924); McCurdy, *Courtroom Oratory in the Pioneer Period*, 56 MO. HISTORICAL REV. 1 (1961); COURTS AND LAWYERS OF INDIANA, 3 vols. (Monks ed., 1916); NEFF, HISTORY OF THE BENCH AND BAR OF NORTHERN OHIO (1921); PALMER, THE BENCH AND BAR OF ILLINOIS (1899); Pavin, *The Early Bar of Iowa*, HISTORICAL LECTURES UPON EARLY LEADERS IN THE PROFESSION IN THE TERRITORY OF IOWA (1894); Pound, *The Legal Profession in America*, 19 NOTRE DAME LAWYER 334 (1944); POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953); Rodes, *Some Great Lawyers of Kentucky*, PROCEEDINGS OF THE FOURTEENTH ANNUAL MEETING OF THE KENTUCKY STATE BAR ASSOCIATION (1915); 1-2 REED, BENCH AND BAR OF OHIO (1897); Rogers, *The Epic of the American Lawyer*, PROCEEDINGS OF THE STATE BAR ASSOCIATION OF WISCONSIN (1934); SMITH, EARLY INDIANA TRIALS AND SKETCHES (1858); THE HISTORY OF THE BENCH AND BAR OF MISSOURI, WITH REMINISCENCES OF THE PROMINENT LAWYERS OF THE PAST, AND A RECORD OF THE LAW'S LEADERS IN THE PRESENT (Stewart ed., 1898); TAYLOR, BIOGRAPHICAL SKETCHES AND REVIEW OF THE BENCH AND BAR OF INDIANA (1895); UTTER, HISTORY OF THE STATE OF OHIO: THE FRONTIER STATE (1942); Webb, *Some Great Lawyers of Kentucky*, PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETING OF THE KENTUCKY STATE BAR ASSOCIATION (1917); Woldman, LAWYER LINCOLN (1936); Zillmer, *The Lawyer on the Frontier*, 50 AMERICAN L. REV. 42 (1916). Admittedly, this brief bibliography is selective and incomplete.

113 See, e.g., Farmer, *Legal Practice and Ethics in North Carolina, 1820-1860*, 30 N.C. HISTORICAL REV. 338 (1953); Newsome, *The A.S. Merrimon Journal, 1853-1854*, 8 N.C. HISTORICAL REV. 315, 318, 327-30 (1931); FOOTE, BENCH AND BAR OF THE SOUTH AND SOUTHWEST 21 (1876); Jefferson Republican (Jefferson City, Missouri), July 23, 1842; THE HISTORY OF THE BENCH AND BAR OF MISSOURI 381, 390 (Stewart ed., 1898) (if a court session got off on a slow start, the judge would worry about the poor impression he was making on his friends and on the community in general. Hence he would privately instruct the lawyers to put on a "lively show" in order to keep everyone in a happy frame of mind); SMITH, EARLY INDIANA TRIALS AND SKETCHES 5-7 (1858); HALL, TRAVELS IN NORTH AMERICA IN THE YEARS 1827 AND 1828 at 167 (1830).

114 See, e.g., 1 COURTS AND LAWYERS OF INDIANA 8-9, 62, 66-67 (Monks ed. 1916); WOLDMAN, LAWYER LINCOLN 79, 87, 89 (1936); DUFF, ABRAHAM LINCOLN, PRAIRIE LAWYER 168, 178, 198 (1960); Farmer, *Legal Practice and Ethics in North Carolina, 1820-1860*, 30 N.C. HISTORICAL REV. 338, 329-53 (1953).

115 NAPTON, NOTEBOOK 41-42, quoted in English in *The Pioneer Lawyer and Jurist in Missouri*, 21 UNIV. OF MO. STUDIES, no. 2, 97-98 (1947).

of umpires chosen by the people, and were frequently forced to rely wholly upon their own (or the community's) concept of justice or "natural equity" to render a verdict. Precedent or legal authority was unknown—even undesirable. Their general dress, manners and demeanor, including occasional drunkenness, rowdiness, and unusual slovenliness, although highly indecorous, corresponded so well to popular modes of behavior that they were often indulged in merely to enhance judicial prestige and win popular acceptance and approval.¹¹⁶

Indeed, the "homey," sometimes crude, administration of justice on the frontier was quite popular and fitted rather well into the social and ideological context in which it was administered. One amusing incident occurred when a justice accosted a convicted horse thief in his court and shouted at him: "Hold up your head, you damned 'ornary pop.' Look the court in the eye." He then proceeded to plant a "judicial fist" in the middle of the convicted man's face.¹¹⁷ The foundation of such judicial behavior was the firm belief in "individualized justice"—the conviction that any transgression as such was an unwarranted act against a particular person or against the welfare of a particular community, rather than against a vague, general, and, hence, illusory legal norm. The administration of justice was a very personal and often extremely primitive instance of a distinct preference of the tangibly concrete over the remotely abstract. Legal theories and legal principles were regarded as something intangible and, hence, irrelevant, while personal injuries or individual aspirations were something real and therefore pressing. Justice, as the pioneer understood it, was wholly apparent from the concrete facts as they were presented, and no legal theory or judicial hairsplitting could ever alter these facts. Legal or procedural technicalities were just so many diabolical devices to evade the simple and obvious truth that needed no lawyers or legal chicanery to be recognized as such. Abstract justice, wrung from the dry tomes of law reports, was considered dangerous in a country where men were equal, and where right and wrong were not matters of abstraction but rather the wholesome product of certain intuitive insights gained by just men using down-to-earth common sense. Community consciousness of "what was right" was sufficient, and the most immediate and effective means of implementing this basic social policy was the true law—the best way and, therefore, the only just way. Abstract justice was meaningless to the frontier man, simply because his own self-sufficiency as well as peculiar moral convictions rejected the notion of a legal authority for its own sake.¹¹⁸

It would be unfair as well as incorrect, however, to assume that, because a loud voice, rude manners, and seemingly barbarian surroundings ruled much of the legal scene on the frontier, early Western administration of justice was a childish farce. Actually, it is to the lasting credit of the early pioneer that judicial decisions reached in accord with his homespun philosophy, as a rule, displayed an uncommon degree of common sense and practical concern with what

116 HILL, LINCOLN THE LAWYER 21-24 (1906).

117 21 SPIRIT OF THE TIMES 336 (1852). We are told that during a trial the defendant (who, incidentally, won his case) thought that the court had treated him wrongly and, hence, called the judge a liar. When he refused to apologize for his misconduct the judge adjourned the proceedings for five minutes. He whipped the offender and then called the court back into session. *Id.*

118 FOOTE, BENCH AND BAR OF THE SOUTH AND SOUTHWEST VII (1876).

was absolutely necessary for successful survival in the wilderness. The particular situation or condition of the Western pioneers would not admit a rigid legalism, and the ingenuity with which the law was in many instances adapted to unique circumstances merely attested to the creativity and dynamism of the frontier society.¹¹⁹ That some authority in the form of law and order is absolutely necessary was never contested. The people merely suited it to their own way of life. In so doing they succeeded in maintaining the relevance and effectiveness of the law within the community, no matter how inadequate or primitive their methods may seem to us today. All this they tried to achieve, if possible, without the intervention of lawyers.

Of course, we must also guard against the tendency of unduly extolling the activities of the legal profession on the frontier. The fact that most of the buckskin judges and juries were shrewd and fearless administrators of justice—as they understood justice—should not blind one to the many instances of incompetence among judges and lawyers. The essentially loose framework of early pioneer justice allowed a large measure of freedom, including the freedom to misunderstand and abuse authority, the existing laws, and the legal process as such under the pretext of adapting them to the real needs of a pioneer society. In fact, one judge in early Illinois, William Porter, was “a great rascal, but no lawyer . . . a very gentlemanly swindler from some part of Virginia. . . . He was assigned to hold court in Wabash, but being afraid of exposing his utter ignorance he never went to any of them.”¹²⁰ Another frontier judge treated the bar so outrageously that the lawyers resolved unanimously to dunk “His Honor” in the nearest pond if he did not mend his ways.

The position of the lawyer in this turbulent and unstable situation was, of necessity, a most difficult one. In some places he was considered an outright troublesome person who disturbed the peace of his fellow men by causing all sorts of quarrels—a rascal who initiated as many litigations as he settled. His title and his professional activities often came to be classified alongside those of ruthless land speculators, moneylenders, swindlers, and other despicable persons. Not infrequently such denunciations were fully justified, for many lawyers only too often took advantage of the abundant opportunities to abuse and exploit the simplistic and unsuspecting pioneers. Again, their frequent association with debt collection and mortgage foreclosures precipitated, as it had in earlier years along the Eastern seaboard, a violent public reaction against their professional activities, and they most certainly did not enhance their own popularity when they became relatively prosperous by making others poor—when, in other words, they acted as the agents of merchants or moneylenders or when they disturbed the title to land by a suit for ejectment in the name of an absentee landowner or speculator. They most certainly did not promote their own cause or their standing within

¹¹⁹ Justice Miller is reported to have pointed out that the prime factor in shaping the law of the western states was ignorance. The first judges, he insisted, “did not know enough to do the wrong thing, so they did the right thing.” Quoted in POUND, *THE FORMATIVE ERA OF AMERICA LAW* 11 (1938). Arthur Livermore, himself an able lawyer, maintained that “[j]ustice was never better administered in New Hampshire, than when the judges knew very little of what we lawyers call law.” PLUMER, *THE LIFE OF WILLIAM PLUMER* 155-56 (1857).

¹²⁰ FORD, *HISTORY OF ILLINOIS FROM ITS COMMENCEMENT AS A STATE IN 1818 TO 1842* 28 (1854).

the community when they assumed an air of social or intellectual superiority, lived perhaps in a better log cabin than most of their neighbors could afford, and openly allied themselves with the creditor class in politics and business.

At this period . . . on what was then called the "back country" . . . the gentlemen of the Bar were objects of obloquy and denunciation to a generally poor and illiterate people, and frequently experienced at their hands the grossest outrages. . . . [W]ith a blind prejudice many . . . only saw in the profession those who defended their oppressors. . . . The squatter on the frontiers of the Union, looks rather to his rifle than authenticated parchment for a title to his home; and he is more prompt to pay the demand of a legitimate owner in bullets than in the current coin.¹²¹

It was not infrequent that stories such as the following were circulated among the pioneers: "Lawyers were never buried in the city where they lived. They were simply laid out at night in a room with the window open and the door locked, and the next morning they were always gone . . . [and] there was always a strong smell of brimstone in the room."¹²²

Litigation on the frontier, in the main, was rather simple and, at times, almost crude. In most instances a comprehensive knowledge of law and legal procedure, or a special training in legal skills was not required of, and likely to be of little use to, the average lawyer. In many instances such professional skills were of a distinct disadvantage, looked upon with distrust and disbelief.

The majority of the cases a lawyer was expected to handle were of a type common to any new and sparsely settled community, and a knowledge of the fundamental elements of the common law, often gleaned from Blackstone, as well as an intuitive sense of natural justice were chiefly relied upon to dispose of the simple litigations that arose. There existed no voluminous collections of precedents to master and no array of authorities to cite. A sharp mind, an ability to marshal facts, a power of reasoning, a good deal of common sense, a tenacity of purpose, and as often as not a distinct gift of gab and a talent for story-telling were sufficient equipment to make a man a passable lawyer. Oratory or the appeal to emotions, which frequently went for legal argument, was marked by directness and force, and was largely relied upon to sway the court and the jury. Rough and ready wit as well as bold logic, or the lack thereof, counted infinitely more than subtle legal reasoning. . . . The outstanding strength of the pioneer lawyer lay perhaps in his ability to stir his listeners to anger, laughter, or tears, and it was often more important to know the life story of every man on the jury—his likes and dislikes, his associations, and his peculiarities of temperament—than to know the law or understand the facts of the case. Juries who shed tears over "the poor horse thief who just had to have that horse in order to feed his eight starving children" also delighted in hearing lawyers flay each other or the opposing party with invectives and accuse each other, without any justification whatever, of the three most reprehensible crimes a frontiersman could think of: lying, cheating, and cohabitating with Negroes. The victims of such attacks occasionally retaliated by issuing similarly groundless countercharges, by challenging their denouncers to a duel, by waiting outside the

121 1 McREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 96 (1856).

122 Jefferson City [Mo.] Inquirer, June 12, 1847, at 3.

courtroom door with a horsewhip, or by engaging in a bout of fisticuffs right in the courtroom.¹²³

The oratorical prowess of some lawyers won them a great deal of public attention and even admiration; the outcome of many a trial frequently hinged not on the legal merits of the case but rather on a contest of oratory and acting in which emotional pleas carried excessive weight.¹²⁴ Some judges went so far as to instruct lawyers to engage in outright oratorical bombast to keep the audience happy, revitalize the sagging interest of the jury, and protect his image and standing within the community.¹²⁵ Frontiersmen seldom had the distressing experience of having to adjourn court for lack of cases. Court day on the frontier, in many instances, was an important popular event as well as favorite pastime, and it brought large crowds into the county seats or towns. People attended trials not so much because they were interested in the course of justice, but because they wished to be entertained—because they considered a court session a welcome occasion to socialize or simply “raise hell.” However, the quiet and efficient approach to legal issues also received attention, depending on the ability and inclination of the lawyers to present and discuss legal arguments. In such instances, public opinion was not remiss in bestowing its admiration and approval. The prestige and professional standing of the frontier of such men as Joseph Hamilton Daviess of Kentucky or Archibald D. Murphy of North Carolina is a case in point.¹²⁶

Another important aspect in understanding the impact of Jacksonian democracy on the American legal scene is the fact that in keeping with the new democratic egalitarianism nearly everyone who chose to do so could follow the profession of the law. Usually the son of a poor or middle-class family, the early frontier lawyer was generally without any kind of college training. His knowledge of the law was acquired through a brief but often inadequate apprenticeship in some law office, through attending actual trials, through private study, very rarely through attending some Eastern law school, or, sometimes, through no study at all. Law in these early frontier times was conceived as merely another trade to be followed by anyone who wished to do so. In fact, most lawyers on the frontier were tradesmen. Litigation, as we have seen, was unpolished at best, and the ability to argue reasonably well, convincingly, and perhaps dramatically, using a bare minimum of legal knowledge, enhanced by an understanding of “what was right” according to the pioneer mentality, could make a man, if not a brilliant lawyer, at least a successful and respected one.¹²⁷

Lawyers' fees on the frontier were even smaller than those in the East, forcing an ambitious lawyer to handle a great many litigations or to engage in some sort of outside business, such as farming, selling of real estate, mining,

123 2 CHROUST *supra* note 2, at 107-08.

124 HALL, LEGENDS OF THE WEST 257-60 (1857).

125 CLARK, JEREMIAH MASON 164-66 (1917); CLARK, THE RAMPAGING FRONTIER 174-75 (1939); HALL, TRAVELS IN NORTH AMERICA IN THE YEARS 1827 and 1828, 167 (1830); SMITH, EARLY INDIANA TRIALS AND SKETCHES 5-7 (1858).

126 2 PAPERS OF ARCHIBALD D. MURPHY 426-27 (Hoyt ed. 1914).

127 See, e.g., English, *supra* note 115, at 12-13, 95-96; Rogers, *The Epic of the American Lawyer*, PROCEEDINGS OF THE STATE BAR ASSOCIATION OF WISCONSIN 84 (1914); Zillmer, *The Lawyer on the Frontier*, 50 AMERICAN L. REV. 33 (1916).

surveying, fur trading, river boating, teaching, tavern keeping, land speculation, moneylending, newspaper editing, banking, or general merchandising, in order to eke out a modest living.¹²⁸ The scarcity of money often compelled him to accept payment in kind for his professional services, including general merchandise (or credit for such merchandise), services, land, shares in mining interests, furs, or slaves. Adjoining a lawyer's cabin there were often pigpens, cowsheds, or sheep pens where he kept whatever "legal fees" he could collect.

Despite these many difficulties, the practice of law gradually came to be the most prestigious profession on the frontier. As late as 1857, the practice of law was regarded as "first in respectability in the eyes of every young man."¹²⁹ For one thing, the practice of law made it possible for a young man of a notably poor background to be regarded as a gentleman. Moreover, there were the many and varied challenges of adventure by which young men perennially sought to test themselves. For example, "riding the circuit" forced lawyers to travel hundreds of miles on horseback, through a roadless wilderness totally devoid of all the conveniences of civilization, in order to "bring justice to every man's door." This alone required a versatility, ingenuity, and hardiness of which few professions could boast: long nights alone on deserted and often dangerous trails; cheap hostleries, little sleep, poor and often no meals; the constant challenge of facing strange crowds as well as strange lawyers who acted as the determined champions of their community; and the opportunity of handling a large number of litigations with little or no preparation, and yet daring all comers to match their legal knowledge, wit, and oratorical prowess. Somehow, the law and the practice of law seemed to gradually capture the Western spirit and imagination.¹³⁰

Since truly qualified lawyers were few along the frontier, many men from the Atlantic seaboard left their home states, especially those which were overcrowded with lawyers, for the greater professional opportunities and prestige they envisioned for themselves in the West.¹³¹ Actually, the majority of frontier lawyers were of this type, and the vast majority of the "lawyer immigrants" were young men only recently admitted to practice in their home states. Only too often their dreams and aspirations were sorely disappointed, but the general contributions of this influx of better-educated lawyers on the West should not be underrated. They were the bearers of general civilization as well as legal culture, bringing with them an orderly and more thorough knowledge of the law based on systematic legal training and a fairly substantial educational background.¹³² If they could successfully adapt themselves to the particular conditions of their new environment, their ability and prestige would ultimately guarantee their acceptance among the Western pioneers and, concomitantly, enable them to bring about necessary legal reforms which an increasingly complex frontier society required.

To be sure, some of these newcomers were attracted primarily by the possibility, real or imaginary, of amassing riches quickly and effortlessly.¹³³ This

128 ENGLISH, *supra* note 115, at 12-13.

129 *Editorial Table*, 7 N.C. UNIVERSITY MAGAZINE 187 (1857).

130 WOLDMAN, *LAWYER LINCOLN* 87 (1936); DUFF, *ABRAHAM LINCOLN, PRAIRIE LAWYER* 168 (1960).

131 HOLBROOK, *YANKEE EXODUS* (1950).

132 FOOTE, *supra* note 118, at 55.

133 ENGLISH, *supra* note 115, at 12-13.

latter attitude, in turn, precipitated a confrontation of the "immigrant lawyer" and the native Western lawyer or the pioneer who deeply resented this attitude. This confrontation became quite acute especially after the Western frontier began to develop prestigious lawyers of its own—lawyers like Andrew Jackson, James Polk, and Henry Clay, who in the opinion of the frontiersman were a match for, if not superior to, the Eastern-educated lawyers.

From this point on, the events and attitudes that characterize the general reaction of Jacksonian democracy to the legal profession in part may sound repetitious. Since human nature on the whole is constant, it would be unrealistic to imagine that in the brief span of thirty or forty years any appreciable changes would come about. Recurrent problems or situations produce essentially the same sensations and reactions that have been experienced by the previous generation. The widespread revival of the popular animadversion against the lawyer along the frontier during the Jacksonian period was due to the fact that the animosities of the immediate post-Revolutionary years along the seaboard were rekindled by the spirit as well as the particular conditions of the frontier. Lawyers, it appears, had never enjoyed unanimous popular approval, no matter how many services they had rendered the young Republic.

Probably one of the first signs of this renewed animadversion along the frontier was precipitated by the circumstance that, despite some earlier opposition and some attempts at radical reforms, much of the traditional (and widely distrusted) common law of England was still the basic law of the land. The fact that the traditional common law to a large extent still constituted the indispensable foundation of all American law in some circles still received scant acknowledgment and, correspondingly, was met with much resentment. Indeed, the very idea that a "foreign" law such as the English common law should have a controlling influence on the American legal and social scene was utterly repugnant to many Americans, especially to the frontiersman or pioneer.¹³⁴ This attitude, in the main, was due to two causes which progressively had come to overshadow the earlier "patriotic," post-Revolutionary attempts to reject and abolish the English common law, as well as some of the other "trappings" of the common enemy. One was more closely allied to the earlier Revolutionary sentiment: the existing and inspiring adventure of founding a new and wholly original society. In the final analysis, it was the spirit of the adventurous pioneer who faced problems he believed had never before been faced by men—who, in order to survive this ordeal, felt that he had to rely solely on his ingenuity and skill to cope with a novel situation he himself had created. In many circles and in many places young America was envisioned as a wholly original social and political venture, totally different from anything that had ever been attempted by man. This being so, it was proclaimed that America required entirely different and novel solutions to its unique and unprecedented problems. Any system or ideology, which had successfully worked for someone else in some other place at some time or other, could not possibly be relevant for such a unique societal structure as the new America. Human behavioral constancy was simply ignored or out-

¹³⁴ See, e.g., the amusing accounts found in Gillespie, *Recollections of Early Illinois and Her Noted Men*, 13 FERGUS HISTORICAL SOCIETY SERIES 21 (1880); CLARK, JEREMIAH MASON 168 (1917), quoted in note 139, *infra*.

rightly refuted, and any attempt to equate the particular American condition with that of any other country was considered unrealistic and unpatriotic. The feeling of adventure was dynamic, romantic, and, in its own way, often beneficially progressive; but at times it tended to become somewhat one-sided and even injudicious.

The second essential cause of the anti-common law attitude, especially during the period of Jacksonian democracy, can be traced to a strong feeling of egalitarianism which we have already noted as being one of the dominant aspects of the American Revolution and even more so of the westward movement in the early part of the nineteenth century. This popular and widespread objection was prompted by the utter failure to comprehend the common law which, because of its peculiar technique, method, and historical background, smacked of something dark, devious and, hence, hostile to the common man. A strong sentiment that such a legal system deliberately concealed abuse and deception grated on the minds of many people who were accustomed, and did cling, to the straightforwardness which was believed to be characteristic of the frontier.¹³⁵ The Western pioneers were basically simplistic though decent people—people whose very existence was necessarily bound to the basic demands of survival and cooperation. They desired, and believed in, simple laws that could be understood and approved by everyone—laws that would guarantee and secure what they had gained by their efforts and sacrifices, laws that would respect their particular outlook and ideals. No system of laws that rested on a remote and irrelevant past and delved into the dark and often incomprehensible recesses of history could ever hope to find popular acceptance among the frontiersmen. What they demanded was a simple and straightforward law which they could “feel within themselves” and which they could handle without ever having to consult a lawyer or a law book. The traditional common law most certainly was not the right answer; its complexity and technicality were the product of a cultural progress which the frontiersmen could not possibly be expected to comprehend or appreciate.

Understanding this popular sentiment, which frequently turned into deep resentment, we can appreciate the sense of frustration and anger in such pointed denunciations of the common law as that of Francis Wright, a staunch believer in Jacksonian democracy, uttered in 1829: “Every parcel of the absurd, cruel, ignorant, inconsistent, incomprehensible jumble styled the common law of England . . . is at this hour the law of revolutionized America.”¹³⁶ In 1834 Frederick Robinson, likewise a spokesman for Jacksonian democracy, raised the question: “But shall we, who claim to be free and equal, voluntarily continue in a state of almost total ignorance [as regards the law], with laws so multiplied, so

¹³⁵ See, e.g., Newsome, *The A.S. Merrimon Journal, 1853-1854*, 8 N.C. HISTORICAL REV. 304 (1931):

I do not consider it the duty of a lawyer to bewilder a Jury or the Court, and lead their minds astray. This is not what a lawyer ought to do, and I consider it highly dishonorable for him to do it. It is every lawyer's duty to seek after the true and just rights of his clients, and to present his case in the most forcible light to the court and jury, and he has not done his duty until he has done this. . . . A lawyer, in the true sense of the term, never studies Chicanery and low cunning.

¹³⁶ Wright, *On Existing Evils and Their Remedy* (1829), reprinted in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY* 282-88 (Blau ed. 1947).

obscure, and so contradictory, as to render the general knowledge of them impossible?"¹³⁷ A simple law that could be understood and approved by all the people was demanded, and the lawyer, as the alleged agent of the "absurd, cruel, ignorant, inconsistent, and incomprehensible" common law could not escape censure and obloquy. And Robert Rantoul, a prominent member of the Massachusetts bar, in 1836 asserted that:

The Common Law sprung from the Dark Ages. . . . [I]t has its beginnings in the time of ignorance . . . in folly, barbarism, and feudality. . . . [I]t shed no light but rather darkness. . . . No man can tell what the Common Law is; therefore it is not law: for law is a rule of action, but a rule which is unknown can govern no man's conduct. Notwithstanding this, it has been called the perfection of human reason. The Common Law is the perfection of human reason,—just as alcohol is the perfection of sugar. The public spirit of the Common Law is reason doubly distilled, till what is wholesome and nutritive becomes rank poison . . . [a] sublimated perversion [which] bewilders, and perplexes, and plunges its victims into a maze of errors. . . . No one knows what the [common] law is. . . . The objections to the Common Law have a particular force in America. . . . With us, it is subversive of the fundamental principles of a free government. . . .¹³⁸

Opposition to the traditional English common law, however, was not the only area of complaint and animosity among the proponents of Jacksonian democracy.¹³⁹ If we look closer into this complex problem, it becomes obvious that the real source of irritation lay even deeper—namely, in the almost sentimental belief in the essential equality of all men. Popular resentment was extremely strong and at times vehement against any class or "order" of men which

137 Address by Frederick Robinson Before the Trades' Union of Boston and Vicinity, July 4, 1834, reprinted in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY* 331 (Blau ed. 1947).

138 Address by Robert Rantoul at Scituate, July 4, 1836, reprinted in part in MILLER, *supra* note 1, at 222-27. Robert Rantoul, Jr., it will be noted, graduated from Harvard College in 1826, was admitted to the Salem, Massachusetts, bar in 1829, and to the Boston bar in 1838. He was first a Jeffersonian and later a Jacksonian Democrat, a rare phenomenon among the essentially Whig (or Federalist) New England bar. A staunch humanitarian and Abolitionist, he agitated against capital punishment, advocated labor unions, and worked for the establishment of tax-supported public schools.

139 In Indiana a lawyer with some familiarity with the law, during his argument referred several times to "the great English common law." His opponent, a lawyer of sorts, scored a telling success with the gentlemen of the jury when he insisted:

If we are to be guided by English law at all, we want their best law, not their common law. We want as good a law as Queen Victoria herself makes use of; for, gentlemen, we are sovereigns here. But we don't want no English law. United States' law is good enough for us; yes, Indi-a-na law is good enough for an Indiana jury; and so I know you will convince the worthy gentleman who has come here to insult your patriotism and good sense, by attempting to influence your decision through the common law of England. Quoted in CLARK, JEREMIAH MASON 168 (1917).

During the earlier days of Illinois, in a trial involving the title to a mill, a lawyer had the audacity to cite from Johnson's *New York Reports*. The opposing counsel evaded the force of the argument by informing the jury that this Johnson was a Yankee peddler who "had gone up and down the country gathering rumors and telling stories against the people of the West," and had published them under the title of "Johnson's Reports." He vehemently objected to the mere thought that this "book" should be given any authority or standing in an Illinois court, and he concluded his "rebuttal" with the following observation: "Gentlemen of the jury, I am sure you will not believe anything that comes from such a source, and, besides that, what did this Johnson know about Duncan's Mill no how?" When informed of the true nature of Johnson's *Reports*, he denounced his opponent for his outrageous attempt to insult an intelligent jury of the sovereign State of Illinois by introducing "foreign" law. See Gillespie, *Recollections of Early Illinois and Her Noted Men*, 13 *FERGUS HISTORICAL SOCIETY* 21 (1880).

strove to establish or maintain itself in a position of authority or superiority on such grounds as that of education, command of a special skill (particularly if this skill was considered irrelevant on the frontier), place of origin, or family background—especially if this class ignored the importance of possessing certain frontier virtues as well as the hard-earned respect of the frontier community. But communal respect and cooperation were the things which many lawyers in the West apparently lacked. A man had to earn the esteem of his fellow men by the manner in which he personally faced up to a cruelly hard and dangerous life on the frontier. His mettle had to be tested in a manly struggle with the wilderness before he could be accepted by the frontier society, and he had to constantly prove his personal worth and physical courage in order to retain this acceptance.¹⁴⁰

Obsessed with democratic egalitarianism and violently anti-aristocratic in his sentiments, the pioneer would frown on any attempt to control or regulate individual freedom, especially since he sensed that this control or regulation was being imposed from outside the immediate frontier community and, hence, constituted an element totally alien to the spirit of the frontier. The pioneer held stubbornly to the belief that a man was entitled to every opportunity of indulging in whatever occupation or activity he should choose, and that his performance in that occupation was the sole determinant of his qualification or "right."

This view, which definitely preferred practical (and successful) performance to theoretical training or book learning, almost became an article of faith along the Western frontier as regards all callings, including that of the law.¹⁴¹ Innumerable precedents drawn from the frontiersman's own immediate experiences served to justify and buttress this general attitude. An elitism based solely on educational background, family connections, or geographical provenance would have cut short such brilliant careers as that of Andrew Jackson and other prominent heroes of the frontier community—things that books or formal schooling could never teach a man. Intellectual culture, on the whole, was regarded as an artful and pretentious screen concealing certain basic deficiencies. Rude manners and crude straightforwardness were often identified with manliness and honesty and, hence, with a man's true worth.

Having become used to this highly individualistic attitude, the frontiersman was little disposed to look with favor on the steadily increasing influx of lawyers, especially young lawyers who had been trained in the East and who began to invade their land with law books in their hands and rigid notions of a legalistic and incomprehensibly technical law in their heads—with little or no real concern for the particular kind of people or for the particular conditions of the Western

140 In some places [along the Western frontier] the lawyer at times was considered a meddling fellow, a fomenter of quarrels, and the cause of all sorts of troubles, to be classed with land speculators, swindlers, and other evildoers, and he certainly did not increase his popularity when he became the agent for merchants and money-lenders, or tried to collect debts which the average frontiersman preferred to forget. As often as not he disturbed the title to land by a suit for an absentee owner or speculator. He did not help his own cause if he assumed an air of social or intellectual superiority, lived perhaps in a better house than most of his neighbors could afford, made at least some money when all others just barely subsisted, filled many public offices, and allied himself with the creditor class in politics, business, and social status. 2 CHROUST, *supra* note 2, at 99.

141 STEWART, BENCH AND BAR OF MISSOURI 13 (1898).

wilderness with which they were confronted. However, this lack of "realism" was by no means displayed by all the lawyers who came from the East, and certainly not by the "home grown" lawyers whose number and influence rapidly increased. This fact, on the other hand, seems to have escaped the majority of the frontiersmen who reacted to the lawyer in a spirit of distrust, often bordering on fear, of anything unfamiliar. This seeming incompatibility of the law as it was taught (and practiced) along the Eastern seaboard and the harsh realities of the Western wilderness annoyed as well as disturbed the pioneers.¹⁴² They could not conceive of Eastern law as *their* law, and their sense of manly freedom revolted against it as a pernicious threat or foreign intrusion personified by lawyers who seemed to expect that their educational background entitled them to a position of authority and influence.

A significant circumstance which further complicated and aggravated this situation was the tendency of many incoming lawyers to expect and demand that educational and professional standards similar to those advocated and enforced by the Eastern states, courts, or bar associations should also be initiated in the West. Two considerations probably entered into these demands for minimum educational and professional qualifications: one, an undoubtedly sincere desire to establish and maintain a high degree of professional competence in order to insure a stable and adequate administration of justice befitting civilized people as well as a progressive law; and the other, an undeniably monopolistic effort to concentrate the practice of law (and the emoluments derived therefrom) in the hands of a relatively small group of men seeking power and wealth. Suspecting that the second motive was the primary, if not the sole, motivation for this innovation, the Western pioneer generally averse to "the ways of the East," energetically resisted these reforms. Probably both considerations were present in the minds of the lawyers, but the frontiersman could not be expected to display a dispassionate attitude whenever he felt that his hard-won values were threatened.

The popular reaction to the proposal of restrictive measures in order to control and limit the admission to the practice of law was swift and, in some instances, radical. In a way, this reaction resembled the anti-lawyer sentiment which had gripped the young Republic during the years immediately following the Revolution. On a nationwide scale it crystallized around the belief that the demand for rigid educational requirements was merely a clever though pernicious device to restrict the practice of law to a few privileged persons, and to create, in a wholly undemocratic spirit, a closed and exclusive class of legal practitioners—a kind of elitism which was totally incompatible with the ideals of democratic egalitarianism. This "pioneer philosophy" was tellingly restated by the Supreme Court of Indiana as late as 1893:

Whatever the objections of the common law of England, there is a law higher in this country, and better suited to the rights and liberties of American citizens, that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations.¹⁴³

142 BAY, REMINISCENCES OF THE BENCH AND BAR OF MISSOURI 50 (1878).

143 In re Petition of Leach, 134 Ind. 665, 668, 34 N.E. 641, 641-42 (1893).

In short, the dominant ideology of the time was that every man, or at least every citizen, was as good as every other, and that everyone should find open the gates to self-advancement, success, and economic gain in any field of his personal choice or preference.

The prime characteristic of the pioneer is versatility. When anything is to be done, he must do it himself. Thus he develops faith in the ability of any man to do anything. He would leave everyone free to change his occupation as and when he likes and to take up freely such occupations as he likes. A pioneer society does not believe in specialists. . . . The pioneer sees no reason to suppose that judges need any special training or that either judge or party needs the help of a lawyer to argue the law or to present a case adequately on the facts. He prefers to believe that he can prosecute and defend his own law suits and judge competently the law suits of others.¹⁴⁴

This boundless faith in the natural right of everyone to pursue any lawful calling of his choice, in turn, not only fostered a deeply rooted distrust of any specialization (and specialist) as well as of all requirements of special training for particular callings, but also caused a fear that the recognition of special professions would create a privileged caste not accessible to all people. The men who had fought for the independence of the nation or later had pushed, at great sacrifice and risk, the country's Western frontiers into the wilderness, simply clamored for less stringent educational requirements and, in some instances, for no requirements at all.¹⁴⁵

The several state legislatures, acting in response to the popular outcry, reversed their former stand on the issue of specialized legal education by throwing open the legal profession to nearly everyone who desired to practice law. This new policy was by no means confined to the West. The Eastern states likewise reacted favorably to the popular cry for lower admission standards, thus giving expression to their full approval and support to the demand for radical egalitarianism which was at the basis of Jacksonian democracy. Massachusetts, for instance, provides an instructive instance of this policy of facilitating the admission to the practice of law within the state. In 1836, this state reversed its traditional policy of requiring the most exacting educational standards of admission to the bar by enacting a statute which threw open the practice of law to almost all citizens:

Any citizen of this Commonwealth, of the age of twenty-one years, and of good moral character . . . who shall not have studied . . . [law, in the office of some attorney, in this state, for three years], may, on the recommendation of any attorney within this Commonwealth, petition the supreme court, or court of common pleas, to be examined for admission as an attorney in said courts, whereupon the court shall assign some time and place for the examination, and if they shall thereupon be satisfied with his acquirements and qualifications, he shall be admitted, in like manner as if he had studied three full years.¹⁴⁶

144 POUND, *supra* note 6, at 236.

145 See, e.g., ENGLISH, *supra* note 115, at 12-13, 95-96; Zillmer, *The Lawyer on the Frontier*, 50 AMERICAN L. REV. 33 (1916); WOLDMAN, *LAWYER LINCOLN* 153-54 (1936).

146 REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS: ch. 88, §§ 19-20, at 541-42 (1836).

Persons so admitted "to practice in any court, may practice in every other court, in the state, and there shall be no distinction of counsellors and attorneys."¹⁴⁷ Any person "who shall have been admitted an attorney or counsellor of the highest judicial court in any other state . . . and shall afterwards become an inhabitant of this state, may be admitted to practice here, upon satisfactory evidence of his good moral character and his professional qualifications."¹⁴⁸ Moreover, any person of good moral character, "although not admitted an attorney [in this Commonwealth], may manage, prosecute or defend a suit, for any other person, provided he is specially authorized for that purpose, by the party for whom he appears, in writing, or by personal nomination in open court."¹⁴⁹ All these provisions constitute a radical departure from, and reaction against, the previously enforced policy of restricting admission to the practice of law which was established in Massachusetts in 1806.¹⁵⁰ Since Colonial days there had always been legislation empowering a litigant to be represented in court by an "agent" of his own choice, including a person not formally admitted to, or especially qualified for, the practice of law. But now the revival of this archaic privilege of the parties, which in the course of time had gradually fallen into disuse, was turned into a deliberate policy by some state legislatures. Massachusetts in 1836,¹⁵¹ New Hampshire in 1842,¹⁵² Maine in 1843,¹⁵³ Wisconsin in 1849,¹⁵⁴ and Indiana in 1851,¹⁵⁵ to mention only a few states, passed legislation or made constitutional provisions entitling every citizen or resident to engage in the practice of law on the proof of good moral character. Thus, mere citizenship (or residence) and the absence of a criminal record made any person eligible for the practice of law. The lament uttered by the Cumberland Bar Association in Maine reflects the dismay of the American legal profession over this policy:

[U]nder the hostile system of legislation that . . . prevailed [in the several states] . . . the members [of this Bar Association] . . . have yielded in despair to the spirit of reckless innovation upon old and established principles, and the [bar] association[s] . . . have fallen into decay.¹⁵⁶

In this fashion, the practice of law was thrown open, recklessly and indiscriminately, to almost any and every person who chose to pursue it. The result was an influx of incompetent, morally unqualified, and greedy men which soon crowded the profession. This further degraded it in the eyes of the general public. With almost all exterior barriers and checks removed by "liberal" or "democratic" legislation, unscrupulous men were now virtually unhampered in misleading and exploiting the public in the name of the legal profession which, as a result

147 *Id.* § 23, at 542.

148 *Id.* § 24, at 542.

149 *Id.* § 27, at 542.

150 2 Mass. (Tyng) 72-75 (1806).

151 See note 149, *supra*.

152 Statute of December 23, 1842, ch. 177, § 2.

153 Acts and Resolves of the State of Maine, ch. 12 (1843).

154 Acts and Resolves passed by the Legislature of Wisconsin, ch. 152 (1849).

155 IND. CONST. art. 7, § 21 (1851).

156 RULES AND REGULATIONS OF THE CUMBERLAND [MAINE] BAR ASSOCIATION 1 (1864). See also, CLAYTON, HISTORY OF CUMBERLAND COUNTY, MAINE 84 (1880).

of this dismal situation, suffered a further loss of prestige and effectiveness. Many years of effort were required to even partially recover from this dismal situation and to counteract its effects, which had been brought about in the name of "democracy"—Jacksonian democracy.

Moreover, in an almost frantic but not always intelligent zeal for reform and democratic process, Jacksonian social philosophy also assailed, and ultimately destroyed, the one remaining check on the professional deportment of the lawyer—the various local bar associations. The pioneer society did not believe in, or trust, specialists or professional organizations. The pioneer regarded himself fully capable of accomplishing everything he wished to accomplish without the aid of experts, specialists, or organized enterprise. Hence, Jacksonian democracy rejected the allegedly undemocratic notion that the specially trained man, the man fitted for his specialized calling by intensive training and professional experience, should have a special place in society. The radical abolition of exacting standards of admission simply meant that any kind of expertise and any sort of professional organization (such as local bar associations), based upon, or demanding, distinct qualifications was not only irrelevant but actually undemocratic and subversive and, hence, wholly undesirable. Elbridge G. Gale, a delegate to the Michigan Constitutional Convention of 1850, proposed that since "any man [in this State] may give either medicine or gospel . . . I want the lawyers to stand on the same platform."¹⁵⁷ If any man could act as an attorney for another without having undergone at least some legal training, if some of the people officially admitted to practice by the courts were men who by their lack of proper educational and moral qualifications were likely to discredit the profession as a whole, and if the bar as such could not exercise any significant control over those who practiced the profession simply because its supervisory functions or professional approval was no longer necessary for admission to, or continuance in, the profession, then the true and undoubtedly wholesome objectives of bar associations had been completely thwarted. All that was left for these associations to do was to fade out of existence, or to turn into purely social clubs.

It will be observed, therefore, that some of the significant characteristics of the period between the Revolutionary and Civil wars were: (1) the development of an individualistic bar in an individualistic community; (2) unrelated and fitful attempts to organize, often unsuccessfully, but generally all-inclusive in theory; (3) practically no evidence of selective associations, at least in their purposive aspects; and (4) some claim to control standards of education, admission, and discipline, which melted away before a philosophy of democracy, pure and sovereign.¹⁵⁸

From then on, the judiciary in many states no longer relied upon the profession and its organizations for advice in matters concerning the practice of law. Moreover, by legislative enactments many states abolished all requirements for admission to practice, except the rather general requirements of "good moral character," something which could always be established to the satisfaction of the

157 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 812 (1950).

158 Wickser, *Bar Associations*, 15 CORNELL L. QUAR. 394 (1950).

courts by the testimony of some close friends of the applicant.¹⁵⁹ Whenever a few courageous and conscientious men still tried to band together in order to agitate for some minimum professional standards, their efforts were met with open hostility. In 1834, Frederick Robinson spoke out publicly against the

secret trade union of lawyers, called the bar, that has always regulated the price of their own labor and by the strictest concert contrived to limit competition by denying to everyone the right of working in their trade, who will not in every respect comply with the rules of the bar.¹⁶⁰

Robinson, who frequently and violently denounced what he called the "combination of lawyers," also claimed that lawyers were "better organized and more strict and tyrannical in the enforcement of their rules than even masonry itself." If the organized bar should ever be investigated, Robinson alleged, "[w]e shall discover that by means of the regularly organized combination of lawyers throughout the land the whole government of the nation is in its hands."¹⁶¹

In 1838 the *Southern Literary Messenger*, referring to bar associations, claimed they "were wrong in principle, betray competition, delay professional freedom, degrade the Bar."¹⁶² It is not surprising, therefore, that the Suffolk County Bar should voluntarily disband in 1836, justifying this drastic step by referring to the "essential changes in the admission to the bar" brought on by radical reforms.¹⁶³ One of the last holdouts was the Bar of Essex County, Massachusetts, which somehow managed to survive until 1856. In most places the bar organizations had disappeared many years before that time. All the wholesome and beneficial effects which the various bar associations had on the legal profession, as such, were dealt a staggering blow. As Moses Strong, the first president of the Wisconsin bar, pointed out, there were left "practically no prerequisites, of either knowledge of laws, or knowledge of anything else, as conditions of admission to the bar."¹⁶⁴ The result of this policy, which allegedly was consonant with the ideas of democracy, is well described by Samuel Hand, second president of the New York Bar Association, who lamented in 1879:

During the last thirty years there have poured into the profession . . . large numbers of men, unfit by culture or training or character to become in-

159 In Ohio, an applicant for admission to practice had to produce a certificate signed by an attorney that he had "regularly and attentively" studied law. His legal studies need not have been under the direction of the attorney who had signed his certificate. Good-natured lawyers frequently certified "regular and attentive study" without having inquired into the actual facts. POUND, *supra* note 6, at 229-30.

160 Robinson, *supra* note 137, at 30. See also, GRAYSON, VICE UNMASKED, AN ESSAY: BEING A CONSIDERATION OF THE INFLUENCE OF LAW UPON THE MORAL ESSENCE OF MAN, WITH OTHER REFLECTIONS (1830), reprinted in part in MILLER, *supra* note 1, at 192-200.

161 Robinson, *supra* note 137, at 329-30. Robinson also insisted that the lawyers are those whose combinations cover the land and who have even contrived to invest their combinations with the sanctity of the law. . . . And have they not forfeited their union with alliances . . . with the rich, and thus established a proud, haughty, overbearing, fourfold aristocracy in our country? . . . They know that the secret of their own power and wealth consists in the strictest concert of action. . . . They know from experience that unions among themselves have always enabled the few to rule and ride the people. . . . [T]his prosperous state of things could only have been brought about by union among lawyers and by their combination. . . . *Id.* at 330-31.

162 Quoted in Wickser *supra* note 158, at 393.

163 RECORD-BOOK OF THE FRATERNITY OF THE SUFFOLK BAR 1 (1836).

164 1 WISCONSIN BAR ASSOCIATION REPORT 13 (1879-1885).

corporated into any learned profession. Hundreds of men without a tincture of scholarship or letters . . . have found their way into our ranks. Men . . . uncouth in manners and habits, ignorant even of the English language . . . [are] vulgarizing the profession.¹⁶⁵

Many years would elapse before the grave errors of the democratic frontier philosophy would be realized and amended. That in spite of these serious onslaughts the lawyer should manage to survive at all is the real history of the American legal profession.

The period of Jacksonian democracy also came to be the "formative era" or, perhaps, the "golden age" of American law and of the American legal profession.¹⁶⁶ It was during this particular period that the traditional legal materials inherited from England were made applicable to the specific American conditions. By arguing, demonstrating, and determining what was applicable and what was not applicable to the new and in a way unique American scene, the young American legal profession not only assisted the courts in developing and stabilizing a body of laws for each jurisdiction, but also rose to unprecedented heights of professional excellence and professional accomplishments.¹⁶⁷ The lawyers constantly added new branches and, incidentally, new dimensions to the law, as well as found new solutions to newly arising problems and issues. It was precisely this general situation which expanded the range and meaning of law and, at the same time, stimulated and ennobled the importance and scope of the American legal profession. During the early part of the nineteenth century, the main pre-occupation of the lawyer was with the many and diverse problems which arose as an inherent counterpart of the new nation. While he was often involved in commercial matters, he also found himself bound up in public land policies, dealings with the new government itself, and an emerging involvement in politics and political lobbying. The lawyer began to assume an increasingly influential role in shaping public affairs, political issues, and party politics. While engrossed in this kind of activity, the young American legal profession, in some instances, developed outstanding qualities of political and social leadership—qualities devoid of calculating pettiness and sparked by a profound sense of public responsibility. The creative accomplishments of this period in the history of the American legal profession may be favorably compared with the legal achievements of any epoch in the legal history of the Western World. Caught between the disheartening hostility of Jacksonian democracy, which simply refused to understand and appreciate the real functions as well as the real achievements of the lawyers, and the almost unlimited challenges of rapidly emerging political, social, economic and legal issues of unprecedented dimensions and significance, this particular period also came to be the agony and the ecstasy of the American legal profession.

165 3 NEW YORK BAR ASSOCIATION REPORT 67 (1879).

166 HURST, *THE GROWTH OF AMERICAN LAW* 352-53, 366 (1952).

167 Pound, *The Legal Profession in America*, 19 NOTRE DAME LAWYER 334, 343 (1944).