THE RISE OF THE LEGAL PROFESSION IN AMERICA

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THE REVOLUTION AND THE
POST-REVOLUTIONARY ERA

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I

THE GENERAL IMPACT OF THE REVOLUTION ON THE LEGAL PROFESSION[1]

"Before the American Revolution," Joseph Story once observed, "from a variety of causes, which it is not difficult to enumerate, our progress in the law was slow, though not slower, perhaps, than in the other departments of science. The resources of the country were small, the population was scattered, the business of the courts was limited, the compensation for professional services was moderate, and the judges were not generally selected from those, who were learned in the law. . . . That there were learned men in the profession in those times, it is not necessary to deny. But the number was small. And from the nature of the business, which occupied the courts, the knowledge required for common use was neither very ample, nor very difficult. The very moderate law libraries, then to be found in the country, would completely establish this fact. . . . Great lawyers do not usually flourish under such auspices, and great judges still more rarely. Why should one accomplish himself in that learning, which is more of curiosity than use? which neither adds to fame nor wealth?

[1] Parts of this chapter were published separately under the title "The Dilemma of the American Lawyer in the Post-Revolutionary Era," 35 *Notre Dame Lawyer* 48–76 (1959).

which is not publicly sought for or admired? which devotes life to pursuits and refinements, not belonging to our own age or country? The few manuscripts of adjudged cases, which now remain, confirm these remarks. If, here and there, a learned argument appears, it strikes us with surprise, rather from its rarity than its extraordinary authority. In the whole series of our reports, there are very few cases, in which the ante-revolutionary law has either illustrated or settled an adjudication."[2] Story fails to mention, however, that on the eve of the Revolution the legal profession in several of the American colonies,[3] in the main, had achieved reasonable (and in some instances noteworthy) distinction and, at least in the larger urban centers along the seacoast, even some recognition, although it must be admitted that in the rough-and-ready back country, that is, among the rural population which was mostly in debt, the lawyer was still, and for some time to come would be, looked upon as a despicable and evil man. In any event, it is not without significance that twenty-five of the fifty-six signers of the Declaration of Independence,[4] thirty-one of the fifty-five members of the Constitutional Convention in Philadelphia, and ten of the twenty-five Senators and seventeen of the sixty-five Representatives in the First Congress were men who had

[2] *Address Delivered before the Members of the Suffolk Bar, 1821* (1821), reprinted in part in Miller, *The Legal Mind in America* 67–75 (1962), especially at 67–68.

[3] See also Chroust, "The Legal Profession in Colonial America," parts 1 and 2, 33 *Notre Dame Lawyer* 51–97 (1957), and *ibid.*, 350–79 (1958); part 3, 34 *ibid.*, 44–64 (1958).

[4] Of these twenty-five lawyers no less than six had studied law in England, namely, Arthur Middleton, Thomas Hayward, Edward Rutledge, Thomas Lynch (all of South Carolina), William Paca of Maryland, and Thomas McKean of Pennsylvania. Paca attended the Inner Temple and the others were members of the Middle Temple. See Jones, *American Members of the Inns of Court* x, xv, xx, 98, 140, 166, 188 (1924). See also Hamilton, "Southern Members of the Inns of Court," 10 *North Carolina Historical Review* 282 (1933). Hamilton points out that the Southern members of the Inns of Court supplied five signers of the Declaration of Independence, twenty delegates to the Continental Congress, five members of the Constitutional Convention, seven outstanding diplomats, seven members of the United States Congress, two Justices of the Supreme Court (one Chief Justice–John Rutledge), several state governors and Chief Justices of state supreme courts, and innumerable lesser officers.

been trained in the law but who were not necessarily practicing law.[5]

The American Revolution itself affected the legal profession in a variety of ways, both direct and indirect: first, the profession lost a considerable number of its most prominent members; second, a particularly bitter antipathy against the lawyers as a class—an antipathy which had always existed among certain segments of the colonial population—soon made itself felt in many sections of the country; third, a strong and at times unreasonable dislike of everything English, including the English common law, the English statutes, and the English way of administering justice, became widespread; and fourth, the lack of a distinct body of American law as well as the absence of American law reports and lawbooks for a while made the administration of justice and, concomitantly, the practice of law extremely difficult and haphazard. Thomas Jefferson's gloomy prediction that "[f]rom the conclusion of this war [*scil.*, the Revolutionary War], we shall be going down hill"[6] turned out to be only too accurate in regard to the immediate future of the young American legal profession.

Aside from the fact that not a few lawyers took an active part in the Revolution either as fighting men or as politicians who decided to stay in politics, the profession was sorely depleted by the loss of many of its most prominent members who chose to remain loyal to the British crown. These loyalists either left America (or at least the thirteen young states) or completely retired from practice, or were forcibly excluded from the profession by legislative acts or rulings of the courts. Thus, Massachusetts, for instance, in 1778 passed An Act to Prevent the Return to This State of Certain Persons Therein Named, and Others, Who Have Left This State, or Either of the United States, and Joined the Enemies Thereof.[7] A year later, in 1779, it passed a further Act to

[5] See Boorstin, *The Americans: The Colonial Experience* 205 (1958). In 1789, T. Lowther wrote to James Iredell that "lawyers . . . compose three-fourth of the Representatives." Letter of July 1, 1789, 2 McRee, *Life and Correspondence of James Iredell* 260 (1856).

[6] Quoted in Sydnor, *Gentlemen Freeholders: Political Practice in Washington's Virginia* 9 (1952).

[7] This Act listed by name the following lawyers (and attorneys): Timothy Ruggles, William Brattle, Sampson Salter Blowers, Andrew Caz(e)neau, Richard

Confiscate the Estates of Certain Notorious Conspirators against the Government and Liberties of the Inhabitants of the Late Province, Now State of Massachusetts Bay.[8] Both acts named a large number of lawyers who in this fashion were banished from the country and had their estates confiscated. In 1781 the Massachusetts Supreme Judicial Court also took action by the following rule: "Whereas it is provided that all Attorneys commonly practising in the Courts within this Government 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 to their Country."[9] In 1785, by An Act Regulating the

Clark, William Coffin, Nathaniel Coffin, John Erving, Jr., George Irvin, Samuel Fitch, Joseph Green, Silvester Gardiner, Harrison Gray, Joseph Goldthwait, John Gore, Benjamin Hallowell, Robert Hallowell, Thomas Hutchinson, Jr., Benjamin Gridley, Elisha Hutchinson, Foster Hutchinson, Henry Hulton, Richard Lechmere, Henry Lloyd, John Murray, William Marstin, Adino Paddock, Charles Paxton, John Powel, Nathaniel Perkins, Samuel Quincy, Jonathan Simpson, Jonathan Snelling, Samuel Sewel (Sewall), Joseph Scott, Gregory Townsend, William Vassal, John Upham, Robert Auchmuty, Joshua Loring, and Nathaniel Hatch—all of Suffolk County; William Brown(e), Benjamin Pickman, Samuel Porter, and Richard Saltonstall—all of Essex County; Jonathan Sewall, John Vassal, David Phipps, Isaak Royal, Jeremiah Dummer Rogers, Daniel Bliss, and Thomas Danford—all of Middlesex County; Jonathan Bliss and Elijah Williams—both of Hampshire County; Pelham Winslow, Edward Winslow, Jr., Peter Oliver, Josiah Edson, and Nathaniel Ray (Rea) Thomas—all of Plymouth County; Daniel Leonard of Bristol County; John Chandler, James Putnam, Abijah Willard, Abel Willard, Daniel Oliver, and John Murray—all of Worcester County; Francis Waldo, Arthur Savage, and William Tyng—all of Cumberland County; and David Ingersoll of Berkshire County. *Collection of Acts and Laws Passed in the State of Massachusetts Bay, Relative to the American Loyalists* 3–9(1785). See also *ibid.*, 9–12. The Act 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, passed in 1779, named the following lawyers (and attorneys): Harrison Gray, Thomas Flucker, Peter Oliver, Foster Hutchinson, John Erving, Jr., George Erving, Joshua Loring, Nathaniel Hatch, William Brown(e), Richard Lechmere, Josiah Edson, Nathaniel Rea (Ray) Thomas, Timothy Ruggles, John Murray, Abijah Willard, Daniel Leonard, William Burch, Henry Hulton, Charles Paxton, Benjamin Hallowell (Hollowell), Robert Auchmuty, Jonathan Sewall, Samuel Quincy, and Samuel Fitch. *Ibid.*, 22–23. The Act to Prevent the Return . . . of Certain Persons . . . (of 1778) was repealed in 1784, but not the Act to Confiscate the Estates of Certain Notorious Conspirators . . . (of 1779). *Ibid.*, 26–29.

[8] See the preceding note.

[9] Bailey, *Attorneys and Their Admission to the Bar of Massachusetts* 29ff. (1907).

Admission of Attorneys, it was provided that "no person shall be admitted an attorney in any Court in this Commonwealth, unless he is . . . well affected to the constitution and government of this Commonwealth."[10]

The state of New York, on October 9, 1779, passed an act requiring all attorneys, solicitors, and counselors at law to produce upon demand certificates or other evidence "of their attachment to the liberties and independence of America," under penalty of permanent suspension from practice. This particular act also revoked all licenses to practice law issued prior to April 21, 1777, subject to restoration under the condition that the lawyer could give a jury satisfactory proof that he had "conducted himself as a good and zealous friend to the American cause."[11] On November 20, 1781, a further statute was enacted providing for the administration of a test or loyalty oath, and forbidding all members of the legal profession who refused to take this oath to pursue the practice of law.[12] These stringent provisions, which admitted of much unfair abuse, remained in full force until April 6, 1786.[13]

It has been estimated that in Massachusetts alone at least seventeen prominent lawyers, not counting judges, permanently fled the country: Jonathan Sewall, Timothy Ruggles, Benjamin Kent, Samuel Kent, Samuel Fitch, Jeremiah Dummer Rogers, Benjamin Gridley, Samuel Quincy, Andrew Cazneau (or Cazeneau), Samuel Sewall, Abel Willard, James Putnam, Samuel Porter, Daniel Leonard,[14] Pelham Winslow, Jonathan Adams, Sampson Salter Blowers,

[10] *Act of 1785*, chap. 23, sec. 1; *The General Laws of Massachusetts* 199 (1823).

[11] 1 *Laws of the State of New York Passed at the Sessions of the Legislature* 155–57 (Reprinted by the Secretary of State, 1886). In March, 1785, an unsuccessful attempt was made by some people to procure a repeal of this harsh act, at least as it affected certain highly respected members of the profession. "[M]any men of talent were thereby excluded from the profession to which they had been educated, and which constituted their dependence for the support of their families." Van Schaack, *The Life of Peter Van Schaack* 402 (1842).

[12] 1 *Laws of the State of New York* 420–21 (1886).

[13] 2 *Laws of the State of New York* 237 (1886).

[14] See, in general, 1 Parrington, *Main Currents in American Thought: The Colonial Mind* 206–13 (1927). Vernon L. Parrington has selected Daniel Leonard as the most representative Tory lawyer, calling him "probably the most finished prose writer, certainly one of the most cultured minds, among the notable group of American Loyalists." Under the pen name of "Massachusettensis," Leonard

and Rufus Chandler.[15] Several other lawyers, among them Joseph Howley and John Worthington, assumed a position of neutrality in the general conflict and gave up the practice of law. William Sullivan described this situation vividly though not always accurately:[16] "There were then [at the outbreak of the Revolution] in the whole Province [of Massachusetts] thirty-six barristers[17] and twelve attorneys,[18] practicing in the superior court. These, in common with other persons, were driven to the necessity of deciding, whether they would adhere to the royal cause, or take the fearful chance of assisting to rescue the country from its oppressors, and on failure of the common effort, to be treated as rebellious subjects. Of those who took the side of their country, *sixteen* survived the Revolution. . . . Thirteen[19] of . . . [the others] were royalists, and left the country. . . . Some who remained were neutral, so far as they could be, consistently with safety. . . . Such effects had the Revolution on the members of the [Massachusetts] bar, that the list of 1779 comprised only ten barristers, and four attorneys, for the whole state; who were such before the Revolution."[20]

published a series of weekly letters running from December 12, 1774, to April 3, 1775. His letters, which may be taken as the final statement of the Tory position, argued in a Hobbesian vein for the need of a strong central government and the undesirability of revolution. John Adams, who wrote replies under the pen name "Novanglus," rejected Leonard's position. Leonard was subsequently forced to withdraw to Halifax.

[15] "Out of the barristers in Boston and its immediate vicinity . . . five were loyalists, and John Adams alone lived through the Revolution as the advocate of the American Independence. Twenty-four of the principal barristers and attorneys in the colony . . . signed the address to Governor Hutchinson, 30 May 1774; and a similar address to Governor Gage, as late as 14 October 1775. . . . Plymouth colony was the stronghold of the loyalists." Quoted in Grinnell, "The Bench and Bar in Colony and Province, 1630–1776," 2 *Commonwealth History of Massachusetts* 181–82 (Hart ed., 1928).

[16] *An Address to the Members of the Bar of Suffolk, Mass.* 39 (1825). This address was delivered in March, 1824, at the "stated meeting" of the Suffolk bar.

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

[18] There were at least fourteen outstanding attorneys (none barristers) at the time, namely, Josiah Quincy, Theodore Sedgwick, Isaac Mansfield, David Gorham, Samuel Sewall, Edward Pope, Timothy Langdon, John Sprague, Edward Winslow, Jr., Woodbridge Little, James Boutineau, David Porter, Ebenezar Bradish, and Elijah Williams.

In each of the other states, too, the profession was severely crippled by the loss of the loyalists. Connecticut, for instance, was deprived of the services of Amos Botsford, Joshua Chandler, Feyler Dibblee, Thomas Fitch, Nathan Frink, and Jared Ingersoll, Sr.; Georgia lost several members of the bar, among them Anthony Stokes. Maryland saw the retirement of George Chalmers, Daniel Dulany, and Charles Gordon. New Jersey, where many prominent lawyers were Tories, lost Ozias Ansley, Isaac Allen, John Brown Lawrence, David Ogden, Henry Waddell, Frederick Smyth, Cortlandt Skinner (the last royal attorney general), William Franklin, and William Taylor. Edmund Fanning, George Hooper, and Henry Eustace McCulloch retired from the North Carolina bar. Pennsylvania lost William Allen, Andrew Allen, Isaac Allen, Miers Fisher, Joseph Galloway, and Christian Huck.

[19] The actual count is at least seventeen, and possibly more. See the text above.

[20] The "anti-Revolutionary bar" of Massachusetts and New York furnished the admiralty and common law courts of New Brunswick, Nova Scotia, Canada, and the Bermudas with many of their most distinguished lawyers and judges. William Smith, the Chief Justice of New York (1763), served in the same office in Canada (1786–93). Daniel Bliss, Joshua Upham, Edward Winslow, Ward Chipman, Jonathan Sewall, Jonathan Bliss, and James Putnam were appointed to the bench in New Brunswick; Foster Hutchinson and Sampson Salter Blowers were on the bench in Nova Scotia. William Hutchinson became king's counsel in the Bahamas; Samuel Quincy, king's attorney in Antigua; Daniel Leonard, Chief Justice in the Bermudas; and Jonathan Stearns, attorney general of Nova Scotia. For details, see, generally, Sabine, *The American Loyalists* 2 vols. (1847), *passim*. Sabine believes that the majority of the lawyers were Whigs, and that comparatively few lawyers adhered to the crown. This statement is not supported by the facts: the record shows that many of the eminent members of the bench and bar were loyalists, although by no means all of them.

New York, which probably had a larger portion of Tories than any of the other states, was deprived of the professional services and legal talents of Thomas Barcley, Crean Brush, Benjamin Hilton, John Tabor Kempe, Benjamin Kissam, George Duncan Ludlow, Lindley Murray, Isaac Ogden, William Smith, Jr., and Peter Van Schaack.[21]

As a matter of fact, so many lawyers in New York were unable to meet the "loyalty test" required in 1779 that the bar of the state Supreme Court had almost ceased to exist. The only lawyers still practicing before that court in 1779 were John Bay, Egbert Benson, John Sloss Hobart, John Jay, John Lansing, John McKesson, John Strang, Peter W. Yates, and Robert Yates. Hence, the same year, during the April term, a rule of court was made "that any Attorney of the respective inferior Courts of Common Pleas who is of Good Moral Character and who shall on due Examination be found by the Justices of this [Supreme] Court to be of sufficient ability and Competent learning to practice as an Attorney or Counsellor at Law of this Court may be admitted and licensed to practice as one, or both Capacities provided that such application and Examination be made before the end of next Term of July, until which time and no longer this rule shall remain in force."[22] But only four lawyers, it seems, availed themselves of this opportunity: Leonard Gansevoort, Sr., Leonard Gansevoort, Jr., James Matthew Vissher, and James G. Livingston.[23]

The hostile attitude displayed by the majority of the Philadelphia bar toward the "Rebels" is well described in a letter of Joseph Reed addressed to Jared Ingersoll in 1779: "All the lawyers of any considerable ability in Philadelphia . . . were against the popular side."[24] Rhode Island saw the withdrawal of James Brenton, James Honeyman, Robert Lightfoot, Matthew Robinson, and William B. Simpson. South Carolina was deprived of the services of Thomas Knox Gordon, William Gregory, Egerton Leigh, John Savage, James Simpson, and William Wragg,[25] while John Randolph, John Warden, and other remarkable men retired from the Virginia bar. This brief list contains only a small fraction of the profession's members who, finding themselves in disagreement with the political aims of the revolutionists, were lost to the American bar. It would not be extravagant to estimate that 150 leading lawyers[26] and another 200 lawyers of lesser standing left the country or retired from active practice. Perhaps one-fourth of the former colonial legal profession became political "refugees" on account of the Revolution which, it was pointed out, "left a huge gap in what had become a great body of lawyers."[27]

[21] Peter Van Schaack, who had revised the statutes of colonial New York, was excluded by the Act of 1779. He was readmitted, however, in April, 1786. See Van Schaack, *Life* 400, 402–403 (1842). After his readmission, Peter Van Schaack turned his attention to teaching law rather than to practicing law.

[22] *Minutes of the Supreme Court of Judicature of the State of New York, 1775–1781* 177.

[23] Only Leonard Gansevoort, Sr., and James Matthew Vissher successfully passed the examination required to practice before the Supreme Court, while Leonard Gansevoort, Jr., and James G. Livingston failed. In order to give Livingston another chance, the Supreme Court extended this rule for another term.

[24] Meigs, *The Life of Charles Jared Ingersoll* 20 (1897).

The position of the American legal profession was further compromised by the widespread and far-reaching economic dislocation, often bordering on depression, that followed in the wake of the Revolution. In some parts of the young republic the economy was in a chaotic state, and large segments of the population were restless and frequently disappointed with the results of the war. "[T]he time I commenced the study of law [in 1788]," Jeremiah Mason remarked, "was a period of intense depression and poverty throughout the country."[28] As is so often the case after a protracted conflict, business in certain areas was thoroughly disrupted, and for a while even at a complete standstill, while unemployment and poverty added to the general restlessness. The British Navigation Acts as well as the prohibitory duties in effect cut off the once profitable West Indian trade. High prices and enormous public debts necessitating confiscatory taxation further jeopardized the country's already strained economy. The paper money issued by the government was worthless, and in many instances

[25] Since the majority of the better South Carolina lawyers had been trained in the Inns of Court in London, where some of them developed a strong attachment to the crown, it must be assumed that many more of these so-called South Carolina Templars left the country or withdrew from the active practice of law.

[26] "The giants of the law," according to Lorenzo Sabine, "were nearly all loyalists." 1 Sabine, *American Loyalists* 52–53 (1847).

[27] Pound, *The Lawyer from Antiquity to Modern Times* 174 (1953).

[28] Clark, *Memoir of Jeremiah Mason* 17 (1917).

people simply refused to accept it. A paralyzing inability and in many instances a deliberate unwillingness to pay debts soon set in. The new federal government owed its soldiers large sums of money. People with real property were land-poor, while those who had organized businesses were either unable or unwilling to meet their obligations. Loyalists or Tories, under the terms of the peace treaty, were reclaiming their estates, despite confiscatory legislation which frequently was ignored by the courts.[29] "[I]f we look through the different counties throughout the Commonwealth [of Massachusetts], we shall find that the troubles of the people arise principally from debts enormously swelled by tedious law suits."[30] Jefferson estimated that Virginia alone owed several million dollars to British merchants. During the war, of course, payment to Englishmen had been suspended by law, but the peace treaty contained a clause providing that bona fide debts could be collected. Popular feeling ran high on this issue, especially since the British claims threatened to absorb what little wealth was left. British merchants before the war had been extremely generous with credit, and the colonial planters and businessmen frequently had made it a practice to wipe out one debt by incurring another, often without bothering to keep books on these transactions. Now the old issue of debt to British creditors was revived, and the agents and lawyers of these creditors put in an appearance in the American courts to press their claims.

The prolonged rural depression which struck the eastern counties of Virginia soon after 1800 continued for about thirty years to wear away what little prosperity was left after the Revolution. This depression, which was especially acute at the close of the War of 1812, dealt the tidewater a blow from which it never fully recovered. It precipitated a major exodus of Virginians to the West. By 1830, it has been estimated, almost a third of those born in Virginia and Maryland around the turn of the century had crossed the Alleghenies in search of greater opportunities. The decline of the prosperity in the two Carolinas came somewhat later, after the opening of the Southwest.[31] During the 1820's a depres-

[29] See, for instance, Ware v. Hylton, 3 U.S. (2 Dall.) 158 (1796).

[30] Austin (Honestus), *Observations on the Pernicious Practice of the Law* 6 (1786). See note 55, Chapter I, below.

sion of great severity struck South Carolina. The expansion of cotton culture into the more fertile virgin lands of the Southwest brought on a sharp decline in cotton prices. The merchants and shipowners of Charleston, South Carolina, soon began to feel the competition from Savannah, Georgia, and the river ports of Alabama, Mississippi, and New Orleans. This depression, equal in severity to the one which had laid waste to South Carolina at the close of the Revolution, caused widespread distress as well as a major migration from the coastal areas.[32]

The general post-Revolutionary economic depression in the North was probably at its worst in the year 1785. The states had stopped issuing paper money for a short time, but this measure did not add any stability to the old notes. Money grew extremely scarce at a time when a real extension of credit was sorely needed to start up the national economy. Although commerce began to revive somewhat in 1786, it still suffered much from the commercial rivalry between the several states. In western Massachusetts the discontent arising from these economic conditions led to an organized uprising—known as Shays' Rebellion—which was directed against taxes and the collection of debts, and against the unpopular courts and lawyers who also came under strong attack in the so-called Whiskey Insurrection which in 1794 broke out in western Pennsylvania over the enforcement of a federal excise tax on domestic spirits. "The circumstances of the country," William Sullivan deplored, "from the peace of 1783, to the adoption of the Federal Constitution, were exceedingly oppressive. In such times, professional agency has a very direct relation to real or imaginary evils. This vice of the times, or the unwelcome operations of government, are referred to those whose duty it is to aid, in coercing the performance of contracts, or in furnishing a legal remedy for wrongs. Our profession was most reproachfully assailed."[33] The antirent riots in New York (1839–46) likewise demonstrated the general unpopularity of the legal profession and of the courts. While much of the widespread dissatisfaction with the early courts

[31] Taylor, *Cavalier and Yankee* 155 (1961).

[32] Craven, "The Rural Depression, 1800–1832," *The Coming of the Civil War* 59 (1942).

[33] *Address* 48 (1825).

(and the lawyers) stemmed from the charges that they were "undemocratic,"[34] there were also many and, indeed, often well-deserved complaints about the slowness with which these courts performed their duties. In time these complaints and charges effected extensive and far-reaching alterations or reforms in the judicial system of several states.

It must not be overlooked, however, that since colonial days and far into the nineteenth century (and beyond) there has always existed a chronic tension not only between creditor and debtor but also between predominantly "creditor areas" and "debtor areas" in this country. Obviously, the lawyer was most unpopular, not to say despised, in the "debtor areas," while in the "creditor areas" he was, if not always respected, at least welcomed. Debtors, as might be expected, found the obvious symbols of all their calamities and burdens in the lawyers and the courts through which their creditors moved in on them. Hence, many efforts were made, usually supported by shortsighted (and short-lived) legislative acts, to close the courts by force and drive out the "abominable" lawyer. "Why should the community be hampered with such evils without endeavouring in some manner to remedy them," queried a contemporary pamphleteer. "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 who appeals to the laws of this country?"[35] The prevailing laws of strict foreclosure and imprisonment for debt, to be sure, created much individual hardship.[36] There was no property exempt from seizure on execution except the clothes on the debtor's back. The officer could take the bed

[34] For the charge that the courts were "undemocratic," see, for instance, Carpenter, *Judicial Tenure in the United States* 168–69 (1918). William S. Carpenter also points out that the alleged "undemocratic" deportment of some of the courts was considered to be the result of long or lifetime judicial tenure (which supposedly turned judges into a privileged class and often made them tyrannical, indolent, or inefficient), as well as of the fact that they were appointed rather than elected by the people. *Ibid.*, 168, 171.

[35] Austin (Honestus), *Observations* 4 (1786).

[36] "In the county of Worcester [Massachusetts], then containing a population of less than fifty thousand souls, there were two thousand actions [for debt] on the dockets of its [Court of] Common Pleas." 1 Amory, *Life of James Sullivan* 186 (1859).

on which the debtor slept, the last potato in his cellar, and the only cow or pig in his barn to satisfy the execution. There was no homestead exemption. Property at the execution sale brought nothing approaching its real value, and the debtor could only look on in despair while the sheriff sold the house over his head and the last mouthful of his provisions for the winter at a fifth of their real value, knowing at the end that he would be turned into the streets with his family. People then were more stern and uncompromising in asserting their legal rights than they are now, and if the proceeds of the sale did not bring the amount of the execution and costs, the debtor was straightway carried off to jail and kept there as long as his creditors would pay his board, or until the debt was discharged, or friends came to his relief. The prison records of Worcester County in Massachusetts for the years from 1784 to 1786 show that in 1784 seven persons were jailed for debt and four for all other offenses; in 1785, eighty-six for debt, six for nonpayment of taxes, and eleven for all other offenses; and in 1786, eighty for debt, four for nonpayment of taxes, and four for all other offenses.[37]

Hence it is only natural that, in keeping with the popular tendency to confound cause and effect, the lawyers should be singled out as the real villains. The chief law business of this period, it will be noted, was the collection of debt, foreclosure, insolvencies, and recovery of property, not to mention the tedious drafting of deeds, titles, and other legal documents, the recording of these instruments, contract negotiations, formalities attending the payment of taxes, and the many (and at times unpleasant) dealings with embittered tenants—a type of professional activity which, aside from attracting inferior, unscrupulous and cantankerous men, has always been unpopular with the public at large. To make matters worse, not a few lawyers who acted as land agents often indulged in sharp practices bordering on dishonesty. Whenever the common man came into contact with the law, the law courts, the officers of the court, or the legal profession, whether this contact involved a dispute over a personal note, a squabble over farm boundaries, a tax collection, or a sheriff's sale, his experience was not

[37] Smith, "Features of Shays' Rebellion," reprinted in 5 *William and Mary Quarterly* (3rd series) 77, 82 (1948).

likely to be a happy one. For he often got less satisfaction from this encounter than he had anticipated. Dependent upon the law but basically antagonistic to the alleged pretensions of the lawyers, he became greatly exasperated at "the slow trials, heavy costs . . . , frequent misuses of justice,"[38] and the often disappointing outcome of his recourse to law. Many people had contracted debts while they were serving in the Revolutionary Army: Timothy Bigelow, one of the most distinguished soldiers from Worcester, Massachusetts, spent the last years of his life in the Worcester County jail for debts incurred in support of his family while serving the cause of independence.

In addition, the prevailing system of lawyers' fees established by the various local bars or bar associations as well as the court costs and other legal expenses aroused much indignation.[39] When some lawyers, because of their training and experience, began to assume an active and in some instances a commanding role in the political life of the country, they were frequently attacked and denounced with great vehemence.[40] "Can we suppose the Republic to be free from danger," a contemporary commentator remarked, "while this 'order' [of lawyers] are admitted so abundantly as members of our Legislature?"[41] The hostility to the lawyer to some degree might have been responsible for the delay of the adoption of the new federal Constitution and the several state constitutions. Some of the opposition to the proposed federal Constitution and to certain state constitutions which was voiced in the several state conventions or by public opinion during these crucial years probably stemmed from the fact that these "organic laws" were considered the "evil" work of scheming lawyers: "Beware of lawyers," warned the *New York Daily Advertiser* in its fierce agita-

[38] Fee, *The Transition from Aristocracy to Democracy in New Jersey, 1789–1829* 107 (1933).

[39] For some samples of court costs and fees, see Smith, "Features," *loc. cit.*, 81.

[40] In some instances lawyers who entered politics were openly denounced as "almost the sole dictators of public life." Their influence was called "improper and dangerous," and one man, from South Jersey, announced that he would not vote for any lawyer, "as these men were interested in fomenting disputes and belonged in a class with Tories, liars, drunkards and adulterers." Fee, *Transition* 107–108 (1933).

[41] Austin (Honestus), *Observations* 8 (1786).

tion against the adoption of the New York state Constitution. "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."[42]

The fact that in certain sections of the country only lawyers on the whole seemed to be busy and, occasionally, even prosperous, while nearly everyone else was idle or in dire economic straits, added to the general distrust and dislike of the legal profession. It was not always realized that lawyers invariably have to do a great many "cleanup jobs" during and immediately after an economic depression. This sort of business comes to some lawyers when other men are conspicuously not busy and not profiteering. "After the war . . . [t]he [legal] profession was called into the most active business. . . . [T]he claims of real property opened at once a large field."[43] Since the lawyers as a rule would do nothing without a retainer, they soon waxed relatively wealthy. The "order [of lawyers] are daily growing rich," one contemporary observer lamented, "while the community in general are as rapidly becoming impoverished."[44] This prosperity, it goes without saying, marked them as fit subjects for the discontented and jealous to vent their anger on. The lawyers "were denounced as banditti, 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."[45] Authors dealing with the economic and social conditions of the times agreed that there existed a violent universal prejudice against the legal profession as a class or "order." Lawyers were called "plants that will grow in any soil that is cultivated by the hands of others"—men who derive their fortunes from the misfortunes of people and "amass more wealth without labour, than the most opulent farmer, with all his toils. . . . What a pity that our

[42] March 4, 1789. See also Fox, "New York Becomes a Democracy," 6 *History of the State of New York* 6–7 (Flick ed., 1934).

[43] Kent, *Address by James Kent before the Law Association of the City of New York* (1836) 2 (1889, reprint).

[44] Austin (Honestus), *Observations* 6 (1786).

[45] 1 McMaster, *History of the People of the United States* 302 (1927).

forefathers, who happily exstinguished so many fatal customs . . . did not also prevent the introduction of a set of men so dangerous."[46] "Among 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 in the profession of the law."[47] Public sentiment was also inflamed by radical elements who excoriated the common law of England as "rags of despotism"; and the judges, magistrates, and lawyers who followed the common law were denounced as "tyrants, sycophants, oppressors of the people and enemies of liberty."[48]

Contemporary journalism joined in this general condemnation of the profession. The New York papers, for instance, were filled with exhortations, written in the style of the hangman, beseeching all true patriots to beware of the sinister machinations of the lawyers—"men so audacious," according to the press, "that they venture, even in public, to wrest, turn, twist, and explain away the purport and meaning of our laws."[49] These men, it was alleged, are the bane of society; "and of all aristocracies, that of the lawyers is the worst."[50] Another paper called upon the electors to refuse lawyers public office, and still another suggested the complete abolition of the legal profession. This animadversion against the lawyer found its official expression in a bill proposed but finally rejected in New York, to throw open the profession to all persons of good character and to fix the fees of attorneys. The people of New Hampshire insisted that the legal profession was the cause of all their misfortunes. It was maintained that the lawyers were

[46] Crèvecoeur, *Letters from an American Farmer* (Everyman's Library) 140 (1787).

[47] Austin (Honestus), *Observations* 3 (1786).

[48] Pound, *The Spirit of the Common Law* 116–17 (1921).

[49] 1 McMaster, *History* 254 (1927).

[50] *Ibid.* In 1835, De Tocqueville wrote: "The special information which lawyers derive from their studies ensures them a separate station in society; and they constitute a sort of privileged body in the scale of intelligence. . . . In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated circle of society. . . . If I were asked where I place the American Aristocracy, I should reply without hesitation, that it is not composed of the rich, who are united by no common tie, but that it occupies the judicial bench and the bar." 1 *Democracy in America* (part 1, chap. 16) 278 (Bradley ed., 1945). See also 2 Bryce, *The American Commonwealth* 306 (1913).

grinding the faces of the poor, that they grew rich while their neighbors approached beggary, and that their fees were exorbitant and their numbers too great.[51] The farmers of Vermont resolved that all "attorneys whose eternal gabble, / Confounds the inexperienced rabble" (as one contemporary "poet" put it[52]) should be expelled from the courts, and all debts canceled.[53] A newspaper called upon all lawyers to have a care, and lawyers on the whole were referred to as outright nuisances. Cries went up, "kill the lawyer," but Chittenden, the governor of Vermont, retorted that while this might be desirable, it would be but a temporary cure in that it would not and could not remove the real cause of the general distress.[54]

Proposals to restrain, suppress, and even to abolish the legal profession throughout the young republic were also voiced by private persons. Benjamin Austin, who wrote under the *nom de plume* of Honestus, in 1786 maintained that all contemporary evils besetting the people could be traced back to the lawyers.[55] Hence,

[51] 1 McMaster, *History* 344 (1927).

[52] *Ibid.*, 349n.

[53] The same "poet" wrote in 1786:

These lawyers from the courts expel,
Cancel our debts and all is well—
But should they finally neglect
To take the measures we direct,
Still fond of their own power and wisdom,
We'll find effectual means to twist 'em.

Vermont Gazette, February 28 and March 6, 1786; *Vermont Journal*, March 24, 1786, quoted in 1 McMaster, *History* 349n. (1927).

[54] *Ibid.*, 350. Jack Cade's henchman, Dick the Butcher, likewise had suggested: "The first thing we do, let's kill all the lawyers."

[55] See also 1 Amory, *James Sullivan* 188 (1859). Benjamin Austin's (1752–1820) article originally appeared under the title of *Observations on the Pernicious Practice of the Law as Published Occasionally in the Independent Chronicle.* See note 30, Chapter I, above. This article was printed in several installments in the *Boston Independent Chronicle* between March 9 and June 15, 1786. A digest was then made of it and published as *Observations on the Pernicious Practice of the Law* (in 1786). A second edition was published in 1819.

Needless to say, the denunciations and proposals of Austin were at once assailed by the lawyers, and he was accused of fomenting Shays' Rebellion, which broke out in 1786. Resentful of these charges, he became even more extreme in his expressions and proposals. His views were well received by the masses in Boston as well as elsewhere. John Quincy Adams describes a town meeting in Boston attended by about seven hundred of Austin's followers "who looked as if they

he suggested that the legal profession be "annihilated,"[56] that "no Lawyers be admitted to speak in Court," and that "the 'order' [of lawyers] be abolished, as being not only USELESS, but a DANGEROUS body to the Republic."[57] Even members of the profession itself, such as John Gardiner of Massachusetts, very much to the annoyance and discomfort of their brethren, advanced a number of proposals for a thorough reform of the bar.[58] Gardiner had developed a profound dislike of American lawyers while studying and practicing law in England.[59] Since his arrival in Massachusetts he had made untiring efforts to reorganize the bar, and especially to introduce simple and economic methods in the administration of justice and the practice of law. Benjamin Austin, who assured his readers that his observations "do not arise from pique or resentment to the gentlemen of the [legal] profession . . . but from a sincere regard to the interest and well being of the Commonwealth,"[60] flatly demanded in his much-publicized writings that a "State Advocate-General" should appear on behalf of persons indicted for a crime,[61] that parties were to appear in person or represented by a friend regardless of whether the latter was an

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had been collected from all the Jails on the continent." Letter of John Quincy Adams, dated February 1, 1792, 4 *Proceedings of the Massachusetts Historical Society* (2nd series) 63 (1889).

[56] Austin (Honestus), *Observations* 6, 14, 16, 34 (1786). See also *ibid.*, 15, where Honestus proclaims: ". . . their [the lawyers'] annihilation has become absolutely necessary."

[57] *Ibid.*, 6. Compare this statement with what one speaker had to say during the debates of the Indiana Constitutional Convention of 1850: "Gentlemen of the bar seem to think that hard things are said here of those of them that oppose this salutary reform. But let me say to these honorable gentlemen that this is a reform for which the PEOPLE call—a reform that the people's INTEREST demands, and those gentlemen will hear a voice from the people, ere long, which will tell them in tones of muttering thunder, that 'the day of their power that be, are numbered.'" 2 *Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1823 (1850).

[58] Parsons, *Memoir of Theophilus Parsons* 162 (1859).

[59] John Gardiner entered the University of Glasgow in 1752, taking the degree of M.A. in 1755. He was admitted to the Inner Temple in 1758, and called to the bar in 1761. In 1766 he was appointed attorney general of St. Christopher's in the West Indies. In 1784 he returned to his native Boston and was naturalized as an American citizen. See Jones, *Inns of Court* 4 (1924).

[60] Austin (Honestus), *Observations* 7 (1786).

[61] *Ibid.*, 24.

attorney or not,[62] and that boards of referees manned by laymen should take the place of courts of law.[63] In 1801, Austin also attacked the very idea of federal courts, remarking that these courts tended to increase the number of lawyers "in tenfold proportion to other professions. . . . [I]n time," he contended, "the country would be . . . overrun by this 'order' as Egypt with Mamelukes."[64]

Austin's sweeping denunciations of the whole legal profession, which numbered among its ranks some of the most honorable, patriotic, and public-spirited men of the state, were deeply resented by several of the most prominent lawyers in Boston. Over the signatures of "Lawyer," "Laelius," and "Democraticus," they strongly defended the existing system. James Sullivan, in reply to Austin's attacks, wrote a series of three articles, signed "Zenas," in which he not only reviewed the history of the legal profession in other times and countries, but also vindicated the importance of the profession to the maintenance of society and the preservation of private rights.[65] John Quincy Adams, in 1787, observed in his *Diary* that the legal profession of Massachusetts was laboring "under the heavy weight of public indignation," and that it was "upbraided as the original cause of all the evils" which beset the Commonwealth: "When the legislature has been publicly exhorted by a popular writer [Benjamin Austin] to abolish it entirely, and when the mere title of lawyer is sufficient to deprive a man of the public confidence, it should seem this profession would afford but a poor subject for panegyric." But Adams consoled himself with the thought that the future of the legal profession will "not be determined by the short-lived frenzy of an inconsiderate multitude, nor by the artful misrepresentations of an insidious writer."[66] In another place Adams lamented: "The popular odium which has been excited against the practitioners in this Commonwealth prevails to so great a degree that the most innocent and irreproachable life cannot guard a lawyer against the hatred of his fellow citizens. The very despicable writings of Honestus were just calculated to

[62] *Ibid.*, 23–24.

[63] *Ibid.*, 5f., 23, 25, and *passim*.

[64] Quoted in Warren, *History of the American Bar* 253 (1911).

[65] 1 Amory, *James Sullivan* 189 (1859).

[66] "Diary of John Quincy Adams," 16 *Proceedings of the Massachusetts Historical Society* (2nd series) 291, 343 (1902).

kindle a flame which will subsist long after they are forgotten. . . . [T]he poison has been so extensively communicated that its infection will not easily be stopped. A thousand lies in addition to those published in the papers have been spread all over the country to prejudice the people against the 'order,' as it has invidiously been called; and . . . the gentlemen of the profession have been treated with contemptuous neglect and with insulting abuse."[67]

In 1803, Charles Jared Ingersoll of Philadelphia, himself a prominent lawyer, reported that "[o]ur State rulers threaten to lop away that excrescence on civilization, the Bar."[68] William Duane, a journalist in Philadelphia, ranted about the "*farrago of finesse and intricacy*"[69] by which lawyers had degraded the law of the land. In a pamphlet which carried the formidable but fashionable title of *Samson 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*, published in 1805, Duane spoke about "the loose principles of persons of that profession [the legal profession]; their practice of defending right and wrong indifferently, for reward; their open enmity to the principles of free government, because free government is irreconcilable to the abuses upon which they thrive; the tyranny which they display in the courts; and in too many cases the obvious . . . collusion which prevails among the members of the *bench*, the *bar*, and the *officers* of the court."[70] He then suggested that these alleged abuses "demand the more serious interference of the legislature, and the jealousy of the people,"[71] especially since the lawyers "so manage justice as to engross the general property to themselves, through the medium of litigation; and the misfortune is, that to be able to effect this point, it is

[67] *Ibid.*, 358–59. See also Sullivan, *Address* 48 (1825): "Our profession was most reproachfully assailed by newspaper essayists; and even the legislature entertained projects of reform in practice."

[68] Meigs, *Charles Jared Ingersoll* 36 (1897).

[69] Duane, *Sampson against the Philistines* 22 (1805). See also *ibid.*, 78, where Duane denounces "the inextricable and destructive farrago of the common law."

[70] *Ibid.*, 12. See also *ibid.*, Preface, iv: "Peace, 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."

[71] *Ibid.*, 12.

attended by loss of time, by delay, expense, ill blood, bad habits, lessons of fraud and temptation to villainy, crimes, punishments, loss of estate, character and soul, public burden, and even loss of national character."[72] In brief, Duane essentially repeated here the statement attributed to Lord Brougham, who had defined the lawyer as "a learned gentleman who rescues your estate from your enemies and keeps it to himself." "So long, therefore, as justice cannot be demanded," Duane continued, ". . . [except] by professional lawyers, so long will the knowledge of it [*scil.*, the law] be the exclusive property of the profession."[73] To remedy all these evils, he proposed a series of radical reforms which, if fully carried out, ultimately would have resulted in the complete abolition of the legal profession: all trials were to be held before local or county tribunals in order to expedite the administration of justice, with practically no right to appeal;[74] lawyers, if they were to be admitted at all, should be appointed and paid for by the government,[75] and then only in order to assist the litigants; and a system of arbitration by laymen should replace, wherever feasible, the courts of law.[76]

One contributor to the *Aurora*, a paper published by Duane in Philadelphia, maintained that "[t]he time of the court and the jury is wasted, to no other purpose than to display the ingenuity of the pleader,"[77] and a writer who signed himself "Sidney" had this to say of lawyers in general: "Already the citizens feel the weight

[72] *Ibid.*, 73. See also *ibid.*, 63, where Duane points out that the "absolute independence" of judges is due to "the artful management of the gentlemen of the law, to secure themselves seats of power and wealth . . . undisturbed by the tempests of liberty. . . . The very men who planned it, planned their own aggrandizement . . . at the expense of all the rest of the society." See also note 34, Chapter I, above.

[73] *Ibid.*, 68. See also *ibid.*, 16, where Duane insists that the "*professional mystery*" which surrounds the common law "has contributed to the oppression and plunder of the people." See also *ibid.*, 27, 31.

[74] *Ibid.*, 38ff.

[75] *Ibid.*, 30.

[76] *Ibid.*, 31ff. It might be amusing to note here that on account of his political agitations Duane several times got himself into serious legal trouble and, in consequence, had to call on the professional services of a lawyer—Alexander J. Dallas—who promptly got him out of trouble. See Walters, *Alexander James Dallas* 78–79 (1943).

[77] *Aurora*, October 20, 1804.

of their *hands*, from one extremity of the state to the other. . . . [T]hey form an indissoluble bond of association and union. . . . Cemented by one common principle, and impelled by the same interests, they have completely realized the fabled idea of the Macedonian phalanx. . . . [L]ike all other professions that of the law has its peculiar tendencies and *vices*. And in defence of truth and liberty I will hazard the observation, that their numbers, their wealth, learning, talents, and general information, joined to their knowledge and experience in business, have already placed them on the *highest* ground in the state, with such a commanding view of the *promised land*, as to afford them a well grounded hope of taking possession at some future day, of the country itself."[78] Another contributor to the *Aurora* lamented that "[a]fter the establishment of our independence, we were endangered by the ambition of particular classes of men—the military soon after the peace of 1783—the *clerical body*—the body of *speculators*—and the *lawyer's corps*, have each severally aimed to obtain exclusive dominion over us. . . . The military conspirators, the mercantile body, the clergy, the speculators—have all failed to reduce us to the 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 *lawyer's corps*."[79]

An address to the Pennsylvania Legislature, published in the *Aurora*, cited the following complaints:

> 1. The expenses [of bringing an action] are so enormous, as to make lawsuits rather a contest of wealth, than an inquiry into, and establishment of justice. 2. The 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. 3. Unmeaning forms and absurd modes are so multifarious that a man of the soundest sense, and best judgment, is disqualified from defending his own rights, except through the medium of a hired pleader.[80]

Another source of the general opposition to the legal profes-

[78] *Ibid.*, November 9, 1804.
[79] *Ibid.*, November 13, 1804.
[80] *Ibid.*, November 9, 1804.

sion was the spirit of individualism, egalitarianism, and self-sufficiency which the recent Revolution had engendered. This spirit, among other things, manifested itself in a growing popular resentment toward all aristocracies and, especially, toward the aristocratic (and haughty) tendencies displayed by some leaders of both bench and bar. In New York, for instance, practically all the prominent lawyers and judges were conspicuous and even offensive by their artistocratic bearing. Alexander Hamilton's description of the people as "the great beast," and Gouverneur Morris' view (which was shared by John Jay) that "there never was and never will be a civilized society without an aristocracy," were widely known and profoundly resented.[81] Rufus King, very much to the amusement of the populace, "had the manner as well as the mental outlook of the old ruling class, preserving its formal courtesy and, long after it had generally disappeared, the old costume of prestige and dignity, silk stockings and silver buckles, small clothes and lace."[82] Chancellor James Kent throughout his life fought against universal suffrage. In this he had the full support of Chief Justice Ambrose Spencer, William W. Van Ness, and Jonas Platt. "Old Tory lawyers in the city [of New York], men like Richard Harison, Josiah Ogden Hoffman and Cadwallader D. Colden, found the principles of Hamilton and Jay the best now practicable, and were welcomed to the party by conservative Whigs in the profession—Col. Robert Troup, now a powerful land agent in the Genesee country and one who did 'not admire the . . . republican system'; Col. Richard Varick, the high-toned austere mayor of New York for many years; Egbert Benson, the state's first attorney general; John Wells, the Laurences, the Ogdens, and others."[83] This aristocratic or, better, antidemocratic frame of mind and attitude, which could not have been lost upon the common man, was undoubtedly responsible for much of the general distrust, dislike, and disrespect for the profession of the law.[84]

[81] Fox, "New York Becomes a Democracy," 6 *History of the State of New York* 5–6 (Flick ed., 1934).
[82] *Ibid.*, 6.
[83] *Ibid.*, 23ff.
[84] *Ibid.*, 7. See also Aumann, "The Influence of English and Civil Law Principles upon the American Legal System during the Critical Post-Revolutionary Period," 12 *Cincinnati Law Review* 289, 299ff. (1938).

The widespread and popular aversion to the legal profession assumed a variety of forms in the several states. During Shays' Rebellion[85] in 1786 people actually demanded that all inferior courts and all lawyers be entirely eliminated.[86] One Job Shattuck, at the head of an armed band of malcontents, took possession of the courthouse in Worcester, Massachusetts, and sent a threatening message to the judges declaring that "it is in the sense of the people that the courts should not sit."[87] In Vermont and New Hampshire vociferous demands were made to suppress the legal profession completely, or at least to reduce the number of lawyers and, incidentally, to cut down substantially the usual legal fees. In Vermont, where the general populace was particularly vehement in its actions and denouncements, courthouses were set afire.[88] In New Hampshire some people even advanced the ridiculous proposition that all courts be abolished. The Vermont legislature arrogated to itself the right to set aside or modify "unpopular" court decisions, or grant new trials over the heads of the courts.[89] In New Jersey debtors nailed up the doors of the courthouses, and irate mobs attacked lawyers on the streets. In Rutland and Windsor (in Vermont) court sessions were broken up by Regulators who rushed into the courtroom brandishing muskets and swords. In Rhode Island lawyers were compelled by the legislature under penalty of disbarment to accept paper money at par value, although

[85] One commentator remarked about Shays' Rebellion: "Nothing perhaps, but the firmness of the Senate of the State [of Massachusetts] preserved the whole system of . . . government from being trampled under foot by the unprincipled Jack-Cades of that day." 29 *North American Review* 420 (1829).

[86] 1 McMaster, *History* 306–309 (1927).

[87] *Ibid.* See, in general, Minot, *The History of the Insurrection in Massachusetts* (1810); Smith, "Features," *loc. cit.*

[88] See 27 *North American Review* 376 (1823). The same article also remarks that the basic defect in Vermont's judiciary was due to "the want of a provision for a permanent and independent judiciary." This, in turn, caused a great instability in the administration of justice. *Ibid.*

[89] The impeachment proceedings against Justice Samuel Chase are also pertinent. William Branch Giles of Virginia, the spokesman of the extreme Jeffersonian position, stated the real issue as follows: "'. . . if the Judges of the Supreme Court should dare, AS THEY HAVE DONE, to declare an act of Congress unconstitutional . . . it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them." 1 *Memoirs of John Quincy Adams* 322 (Adams ed., 1874).

a previous act providing for compulsory payment of debts in paper money had been declared unconstitutional.[90]

All these deplorable incidents fully bear out Timothy Dwight's observation 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 pretenses to qualities which they do not possess; clamour everywhere about liberty, and rights; are patriots of course, and jealous of the encroachments of those in power; thrum over, incessantly, the importance of public economy; stigmatize every just and honorable public expenditure, arraign the integrity of those, whose wisdom is undisputed, and the wisdom of those, whose in-

[90] Trevett v. Weeden (1786). See, in general, 1 McMaster, *History* 331–41, especially at 332 and 338–39 (1927). The facts of this case were as follows: At Newport, Rhode Island, a butcher named John Weeden refused to accept at par value the paper money which one of his customers, John Trevett, tendered for the purchase of some meat. Trevett brought an action against Weeden under the Bank Act, one of the numerous legal tender acts of the period which compelled people to accept the paper money of the state at par value. This Act also provided that any violation of its provisions should be tried within three days, that there should be no jury, that three judges should constitute a quorum, and that the judges' decision should be final. A heavy penalty was attached to any refusal to accept this money. Since in Rhode Island the judges were subject to recall by the Assembly, there was every reason to believe that the Act would be rigorously enforced by the courts. The contest between Trevett and Weeden was actually a contest between the "pro-paper-money" farmers and the "anti-paper-money" merchants. Each side was represented by able counsel—Weeden had as his lawyers Henry Marchant and James Mitchell Varnum, two of the most prominent lawyers in Rhode Island. The general excitement aroused by this case was immense, and the arguments on both sides were conducted with great animosity. In the heat of the trial two of the judges actually went so far as to denounce the Act from the bench. David Howell, an Associate Justice of the Supreme Court of Rhode Island (from 1786 to 1787), delivered the opinion of the court, declaring the Bank Act unconstitutional and, hence, null and void. This was one of the first cases in which an American state court assumed jurisdiction over the constitutionality of an act passed by the state legislature. The Assembly, dismayed by the decision, cited the judges to appear before it and assign the reason for the fact that they had "adjudged an act of the supreme legislature of this State to be unconstitutional and absolutely void." The Assembly also stated that "the said judgment is unprecedented in this State, and may tend to abolish the legislative power thereof." The defense of the court was made by David Howell, who laid down the principle that the judges were not accountable to the Assembly, and that the right to trial by jury, denied under the Bank Act, was a fundamental right which the Assembly could not abolish. This incident, it will be noted, greatly contributed to the establishment of an independent judiciary in Rhode Island.

tegrity cannot be questioned; and profess, universally, the very principles and feelings, of him with whom they are conversing. These things, uttered everywhere with peremptory confidence, and ardent phraseology, are ultimately believed by most men in such a state of society."[91]

Massachusetts, which on the eve of the Revolution could boast of one of the most outstanding and best organized bars in America, also seems to have become extremely hostile to the legal profession. In 1785[92] and again in 1786 acts were passed by the General Court (the legislature) to the effect that parties to a litigation were to be permitted to plead their own cases in court. Also, no litigant was to employ more than two lawyers at one time. Subsequently a statute was enacted authorizing parties to appoint as their attorney any person, regardless of whether this particular person had been duly admitted to the practice of law. In 1790 the General Court proposed a thorough investigation of the "present state of the law and its professors." As early as 1786 the town of Braintree,[93] Massachusetts, passed a resolve "to crush" or, at least, to restrain "that order of Gentlemen denominated Lawyers . . . whose . . . conduct appears . . . to tend rather to the destruction than the preservation of this Commonwealth."[94] The town of Dedham, Massachusetts, reported that it was aware of the universally prevailing complaints against the lawyers. It decreed that by their "unreasonable and extravagant exactions" the lawyers were guilty of a "pernicious" and "unconstitutional" conduct. Hence, Dedham, perhaps under the influence of Benjamin Aus-

[91] 2 Dwight, *Travels in New-England and New York* 470 (1821).

[92] Acts of 1785, chap. 23, sec. 2, *Laws and Resolves of Massachusetts* (1785). See also notes 16–18, Chapter V, below.

[93] Judging from the observations and complaints made by John Adams, Braintree must have been overrun with a host of sharpers and pettifoggers: "These dirty and ridiculous litigations have been multiplied, in this town, till the very earth groans and the stones cry out. The town has become infamous for them throughout the country. I have absolutely heard it used as a proverb in several parts of the province,—'As litigious as Braintree.' This multiplicity is owing to the multiplicity of pettifoggers. . . . But people's eyes begin to open, and I hope wider and wider." 2 Adams, *Works of John Adams* 90–91 (1850); 1 *The Adams Papers: Diary and Autobiography of John Adams* 136–37 (Butterfield ed., 1961).

[94] "Diary of John Quincy Adams," *loc. cit.*, 342n. (1902); Adams, *Three Episodes of Massachusetts History* 897 (1893).

tin's widely circulated writings,[95] instructed its representatives in the Massachusetts General Court to initiate legislation for the restraint of the legal profession, and, if necessary, "to endeavor that the order of Lawyers be totally abolished; an alternative preferable to their continuing in their present mode."[96] In almost every country town in Massachusetts and, for that matter, throughout New England, a knowledge of the law was held to be the best reason in the world why a candidate should be refused public office or membership in the state legislature.[97] Benjamin Austin bluntly proclaimed 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 is inevitable."[98]

In Pennsylvania several statutes were passed to repress not only the legal profession but also the common law of England, including the existing system of courts. These statutes provided for lay referees in place of trained lawyer-judges,[99] and for trials without intervention by counsel. Parties were to file informally a statement in court, and the adversary's rejoinder was likewise to be informal. In 1803 and 1804 the Pennsylvania legislature was swamped with petitions calling for radical reforms. The people of Lancaster County, for instance, complained "that a great portion of the time employed in the courts of quarter sessions are spent in the frivolous disputes of contentious people, to the prevention of a decision in civil actions."[100] Governor Thomas McKean, a sensible man, warned the legislature against these popular demands. Addressing the Assembly on December 9, 1803, he conceded that the administration of justice in Pennsylvania was somewhat defective in that a Supreme Court manned by only four Justices could not possibly handle the recent increase in litigation. "The spirit of

[95] See notes 55–64, Chapter I, above, and the corresponding text. Austin (Honestus) constantly refers to the legal profession as the "order," an expression that is also used in the instructions which the town of Dedham gave its representative in the General Court. See below.

[96] Quoted in Cohen, *The Law: Business or Profession* 27 (1924).

[97] 1 McMaster, *History* 302 (1927).

[98] *Observations* 3 (1786).

[99] *House Journals, 1803–1804* (Pennsylvania) 16.

[100] *Ibid.*

litigation," he concluded, "the ruin of honest suitors, and the triumph of others equally culpable, can no longer be disingenuously ascribed to the machinations of a profession [*scil.*, the legal profession]."[101] His warnings, however, went unheeded. As a matter of fact, the situation in Pennsylvania became so threatening to the professional bar that Charles Jared Ingersoll of Philadelphia informed his friends that "[a]ll the eminent lawyers [in Philadelphia] have their eyes on one city or another, to remove to in case of extremes." He added that his own father, Jared Ingersoll, a barrister of the Middle Temple and one of the most distinguished Philadelphia lawyers in an age when the city boasted the finest legal talent in the country, planned to transfer his practice to New York.[102]

Despite this sullen hostility of the general populace toward the lawyers as a class, for a while the prestige as well as the influence of the legal profession steadily and stealthily increased. Along the Eastern seaboard the pronounced *espirit de corps* manifested by the various bar associations, the strictly supervised and uniform training of prospective lawyers, the many measures adopted to raise professional standards, and the uniting of the lawyers in strong denunciations of pettifoggers and rabble rousers, at least until about 1840, gave the young American bar an unsuspected strength in the face of much animadversion and obloquy. Highly effective in the gradual conquest of public opinion and the common mind was the consistent and clever barrage of self-serving propaganda which the lawyers levied in their own behalf. The ascendency of the legal profession to what De Tocqueville later was to describe as "the highest political class and the most cultivated portion of [American] society," to no mean degree was due not only to the undisputed brilliance of the great lawyers and jurists of that time and to their increasing display of dazzling erudition in a country where true learning was at a premium but also to their propensity for advertising, often in a most brazen manner, their unrivaled merits.[103]

[101] *Ibid.*, 28–29. See also Newlin, *The Life and Writings of Hugh Henry Brackenridge* 247 (1932).

[102] Meigs, *Charles Jared Ingersoll* 36 (1897).

[103] Miller, *The Legal Mind in America* 41 (1962).

During the early days of the Republic a number of individual lawyers took personal issue with the vicious attacks launched by Benjamin Austin, William Duane, and others upon the legal profession, stressing its importance for the preservation of a well-functioning society as well as for the protection of the rights of individuals.[104] After the year 1820, the American legal profession rallied in unison to advertise and extoll its nobility, integrity, and achievements. "A profession so liberal and extended," David Hoffman of Maryland intonated, "so sublime and important [as the legal profession], should be cultivated by those only who are actuated by principles of the purest, and most refined honour. . . . [I]t should be the ardent desire of its votaries to see its shine unprofaned by knavery and ignorance, and its retainers not more eminent, from the importance of their functions, than from the honesty and skill with which they discharge them. . . . The character of a lawyer who does justice to his profession, and to the important station he holds in life, is, indeed, truly excellent and dignified. He is one, whom early education has imbued with the principles of probity. . . . He labours not for those alone who can afford the *honorarium*, but the widow, the fatherless, and the oppressed are ever in his mind. No prospect of gain will ever induce him to advise the pursuit of law against right, or sober judgment; nor will any man's greatness be a shield against the justice due to his client."[105] James Kent, in a similar vein, admonished his audience: "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. . . . [M]y purpose is . . . to remind . . . the lawyer, of the gravity of his pursuit, and the dignity of the trust. . . . Knowledge alone is not sufficient for pure and lasting fame . . . unless it be regulated by moral principle. If the . . . lawyer intends to render himself truly useful to mankind, if he expects to be a blessing and not a scourge to his fellow citizens, he must cherish in his own bosom . . . a firm and animated zeal

[104] See note 65, Chapter I, above, and the corresponding text.

[105] Hoffman, *A Lecture, Introductory to a Course of Lectures, Now Delivered in the University of Maryland* (1823), reprinted in part in Miller, *Legal Mind* 84–91, especially at 85–87 (1962). The term "liberal" used here by David Hoffman denotes a judicious and impartial reasoning backed by vast erudition.

for justice."[106] Five years later, in 1829, Joseph Story reminded the public that a 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. Let him consider it, not as a mere means of subsistence, an affair of petty traffic and barter, a little round of manoeuvres and contrivances. . . . The profession has far higher aims and nobler purposes. In the ordinary course of business . . . sound learning, industry, and fidelity, are the principal requisites. . . . But there are some, and in the lives of most lawyers many occasions, which demand qualities of a higher, nay, of the highest order. Upon the actual administration of justice . . . must depend the welfare of the whole community. . . . The lawyer is placed . . . upon the outpost of defence, as a public sentinel, 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 shrinks from his duty, he is branded as the betrayer of his trust. . . . If he succeeds, he may, indeed, achieve a glorious triumph for truth, and justice, and the law."[107]

When Joseph Story was delivering his lofty and somewhat stereotyped peroration on the excellence of the contemporary legal profession, he could not know that a new flood of vituperations and radical proposals was about to threaten the very existence of the American lawyer in the name of "Jacksonian democracy." Undismayed by this renewed onslaught, the lawyers once more rallied to the defense of their profession. Timothy Walker of Cincinnati pointed out:

> [T]he mass of our citizens . . . will be compelled to seek for a great deal [of law] in the heads of our lawyers. . . . [A]s a lawyer, I am bound to rejoice in those difficulties of acquisition, which render our profession so arduous, so exclusive, so indispensable, and, therefore, so respectable. . . . The province of a lawyer is to vindicate rights and redress wrongs, and it is a high and holy

[106] Kent, *A Lecture, Introductory to a Course of Law Lectures in Columbia College, Delivered February 2, 1824* (1824), reprinted in part in Miller, *Legal Mind* 95–104, especially at 95–96 (1962).

[107] Story, *Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829* (1829), reprinted in part in Miller, *Legal Mind* 177–89, especially at 179–81 (1962).

> function. Men come to him in their hours of trouble. . . . The guilty . . . and the wronged, the knave and the dupe, alike consult him, and with the same unreserved confidence. . . . It is not given to man to see the human heart completely unveiled before him. But the lawyer perhaps comes more nearly to this, than any other. . . . [F]rom the days of the revolution down to the present time, no single class of the community has performed so much of the public service of the country, as the members of this profession, . . . a proof of the estimation in which the profession has been held. . . . I would hold up the legal profession, as an end in itself. . . . In fact, there is nothing higher. He who stands at the head of this profession, is on a level with the most elevated in the land. . . . I am well aware that there are prejudices against the [legal] profession. It is said to abound with pettifoggers, who pervert the law to the purposes of knavery; with quacks, who sacrifice their clients through their ignorance; and with needy hangers-on, who will foment lawsuits. . . . Lawyers are said to delight in tricks, stratagems, and chicanery; to argue as strenuously for the wrong as for the right, for the guilty as for the innocent; and to hire out their conscience, as well as their skill, to any client, who will pay the fee. . . . I, for one, am willing to admit their truth, to some extent. . . . We lay no claim to superhuman virtue. . . . If there were no dishonest or knavish clients, there would be no dishonest or knavish lawyers. Our profession . . . does but adapt itself to circumstances; and it depends upon the community, whether it shall be elevated or degraded; or rather, in what degree it shall incline one way or the other: for there is no bar, anywhere, which has not its ornaments, as well as blemishes; and these must be well known to the community. And we stand conspicuously before the public eye. . . . [T]here need be no deception or mistake about a lawyer's standing [in his community]. If therefore clients will employ those who are unworthy, they do so with their eyes open, and have no right to find fault with the profession in general.[108]

[108] Walker, *Introductory Lecture on the Dignity of the Law as a Profession, Delivered at the Cincinnati College, November 4, 1837* (1838), reprinted in part in Miller, *Legal Mind* 240–57, especially at 248, 251, and 253–56 (1962). Timothy Walker was graduated from Harvard College in 1826, and attended the Harvard Law School, where he studied under Joseph Story. He migrated to Cincinnati in 1830 and was admitted to the bar there. In 1835 he founded a private law school in Cincinnati, which two years later became incorporated into Cincinnati College. See Chapter IV, below. Walker also edited the *Western Law Journal*.

In the earliest days of the republic, the practice of law and the many and varied opportunities it afforded during these troubled times still seemed to be one of the most honorable and, it may be added, one of the most promising and attractive professions open to young men of ambition and talent. The Revolution had created opportunities of expansion for some lawyers already established in the profession, as well as new careers for persons seeking a profession. One of the best chances for establishing a professional career fell to the patriotic lawyer. The general dislocation caused by the war increased litigation, while the fortunes of Revolution considerably reduced the number of available lawyers. Ample and rewarding opportunities offered themselves to enterprising young men of ability, particularly if they had gambled their own future on the success of the Revolution, and prosecuted both in the name of patriotism.[109] "After the peace of 1783, a few gentlemen of the colonial school resumed their ancient practice; but the Bar was chiefly supplied by a number of ambitious and high-spirited young men, who had returned from the field of arms with honorable distinction, and by extraordinary application, they soon became qualified to commence their careers at the Bar [of New York] with distinguished reputation."[110] Alexander Hamilton, for instance, prepared himself for the practice of law by intensive reading for a period of three months under the tutelage of Robert Troup.[111] At the July term of the New York Superior Court in 1782, he was admitted to practice as an attorney, and four months later was granted the additional license of a counselor. Despite this abbreviated preparation for the bar, Hamilton, because of his outstanding mental gifts, soon became a brilliant and successful lawyer.

But there is another side to this story. Alexander Hamilton's less talented contemporaries, who had been admitted to practice after the same scanty preparation, on the whole proved to be little qualified for the profession.[112] Much of the work which should

[109] Haskett, "William Paterson, Attorney General for New Jersey: Public Office and Private Profit in the American Revolution," 7 *William and Mary Quarterly* (3rd series) 26 (1950).

[110] Kent, *Memoirs and Letters of James Kent, 1763–1847* 31 (1898).

[111] Schachner, *Alexander Hamilton* 145 (1946). In his private reading Hamilton had already become familiar with Blackstone, Grotius, and Pufendorf.

[112] See Clark, *Memoir of Jeremiah Mason* 22 (1917): "Most of the members

have been done by responsible and experienced professional men was thus taken over by sharpers and pettifoggers; in fact, a large segment of the young American bar was made up of men who had but a sketchy acquaintance with the law and with the standards required of an honorable profession.

As early as 1768 the Essex bar in Massachusetts enacted a rule, later adopted by other Massachusetts county bars,[113] that no person be admitted to the practice of law without the consent and recommendation of the bar. In particular, it was provided that every person, in order to be admitted as an attorney in the inferior courts, must have a college education and must have studied law with some lawyer for at least three years; and that any person, to be admitted as an attorney to the Superior Court, must have been an attorney of good standing in the inferior courts for at least two years. Any person wishing to become a barrister must have been an attorney in the Superior Court for at least two years.[114] During the Revolution, as may well be expected, this particular rule was not always strictly enforced. Thus, Christopher Gore, subsequently an outstanding lawyer (and governor of Massachusetts), in 1778 was considered to have studied law according to the rules of the Suffolk bar since July, 1776, although his main activities were those of a patriot rather than of a law student.[115] In 1779, Fisher Ames, although he was living in Dedham at the time, was considered as having been a "law student" under William Tudor in Boston since January 1, provided that at the expiration of three years from January 1, 1779, he was still in the office of Mr. Tudor. He was also ordered to submit in 1782 to an examination by the Suffolk bar "in the practical business of the bar."[116] In 1783 a Richard Brook Roberts of South Carolina was admitted

of the bar were poorly educated, and some of vulgar manners and indifferent morals."

[113] The Suffolk bar, for instance, adopted this rule in 1771. See *Record-Book of the Suffolk Bar*, reprinted in 19 *Proceedings of the Massachusetts Historical Society* 149 (1881–82).

[114] 2 Adams, *Works of John Adams* 197 (1850). See also *Record-Book of the Suffolk Bar, loc. cit.*, 149; 1 *Adams Papers* 224–25, 316 (Butterfield ed., 1961).

[115] *Record-Book of the Suffolk Bar, loc. cit.*, 152–53, entry under July 21, 1778.

[116] *Ibid.*, 153, entry under December 3, 1779. See also *ibid.*, 155, entry under October 9, 1781.

as a student in the office of Mr. Hichborn in Boston "with a deduction of one year from the usual term required by the rules for such students," provided he could produce a certificate from a South Carolina lawyer to the effect that he had studied law for at least one year in this lawyer's office.[117] In 1800, Massachusetts laid down the rule that graduates from out-of-state colleges would have to study for one year more than graduates from Harvard.[118]

The New Hampshire bar, in 1788 and again in 1805, adopted some rules concerning the admission to legal study and to the bar. These rules provided that a candidate for admission to a law office must be duly qualified to be enrolled in Dartmouth College as a first-year student. A non-college student was required to study in a law office for at least five years, while a college graduate had to take only three years of legal training within the state.[119] Also, no lawyer was to be admitted to the bar of the Superior Court of New Hampshire until he had practiced for at least two years in the Court of Common Pleas. In Vermont, under the statute of 1787, the term of legal study was two years;[120] and in Connecticut and Rhode Island, two years were prescribed for college graduates and three years for persons without college training.[121] In Vermont, as in Rhode Island, any candidate for admission to practice had to have the approbation of the local bar.[122]

With the adoption of the New York Constitution of 1777, the admission to practice was regulated by the provision that all attorneys, solicitors, and counselors should be appointed and licensed by the court in which they intended to practice. By rule of the state Supreme Court of 1797,[123] it was further provided that candidates for admission to practice must have served a regular

[117] *Ibid.*, 157, entry under October ——, 1783.

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

[119] Clark, *Jeremiah Mason* 23 (1917).

[120] *Ibid.*, 21.

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

[122] See, in general, Reed, "Training for the Public Profession of the Law," 15 *Bulletin of the Carnegie Foundation for the Advancement of Teaching* 82–87 (1921).

[123] 1 N.Y. (*Coleman Cases*) 32–33 (1797).

seven-year apprenticeship with a practicing lawyer, but a period not exceeding four years devoted to classical studies (college) after one had attained the age of fourteen years might be accepted as partial fulfillment of the required seven-year period of clerkship. After four years of practice (modified in 1804 to three years)[124] as an attorney, or after four years of study under a professor or counselor (also modified in 1804),[125] a person might be admitted as a counselor to practice before the Supreme Court.[126] In 1829 the rules for admission were further amended to the effect that an attorney should be admitted as counsel not as a matter of right after four (or three) years, but only if he were found to be duly qualified. In New Jersey a candidate for admission to the practice of law had to be recommended by the judges of the Supreme Court to the Governor who licensed him, provided the candidate had served a clerkship of three years if a college graduate, or four years if a nongraduate. He also had to pass an examination before a committee of three out of the twelve serjeants who composed the uppermost level of the New Jersey legal profession.[127]

Pennsylvania, by rule of its Supreme Court in 1788, required either four years of clerkship and one year of practice in the Court of Common Pleas, or three years of study and two years of practice as well as an examination by two approved lawyers, or two years of clerkship or two years of practice as well as an examination if the candidate had commenced his legal studies after he had reached the age of twenty-one. In Delaware as well as in Maryland, three years of law study were required. In Maryland these studies had to be pursued under the supervision of a practicing lawyer or judge, and the candidate had to submit to an examination by two members of the bar. In Virginia only one year of law study was prescribed, while in South Carolina the applicant had to pass an

[124] 2 N.Y. (2 *Caines*) 418 (1804).

[125] *Ibid.* See also 1 *Caines* 239 (1803).

[126] Smith, "Admission to the Bar of New York," 16 *Yale Law Journal* 514f. (1907). Similar rules governed the admission of solicitors in chancery, with the additional provision that the candidate had to pass a satisfactory examination before the Chancellor, Vice-Chancellor, or any other officer of the court appointed by the Chancellor.

[127] New Jersey retained until 1839 the title and rank of serjeant. See Chroust, "The Legal Profession in Colonial America," part 2, 33 *Notre Dame Lawyer* 350, 363 (1958).

examination unless he had served four years as a clerk with a practicing lawyer.[128]

In New England and in some of the Mid-Atlantic states, therefore, the requirements for admission to the bar at least for a while were fairly stringent. But in other parts of the country, especially along the frontier, there hardly existed anything resembling standards. It appears, however, that for reasons which at best might be described as a mere formality, the majority of the "western" states insisted that anyone wishing to become a lawyer had to submit to an examination. How deplorably lax, in the main, these examinations could be in some states may be gathered from the following incident: In Kentucky a candidate was unable to give one single correct answer. Nevertheless, he was admitted on the ground stated officially by the court which acted as an examining board that "no one would employ him anyhow."[129] The question of character fitness of another candidate was duly met by the statement of the court that he "had never fought a duel with deadly weapons either in the state or without the state with a citizen of the state [of Kentucky]."[130] Andrew Jackson, at the age of twenty-one, after a legal apprenticeship of rollicking travels with an itinerant court and the haphazard tutelage of the convivial Colonel John Stokes, in 1788 was found by the court to be "a person of unblemished moral character, and competent . . . knowledge of the law."[131] In California two "law students," who clerked in the same building, had applied for admission to the bar. One day a member of the Supreme Court of California called upon one of the students and announced that he had come to ascertain his professional qualifications. The whole examination consisted in the question: "Is the Legal Tender Act constitutional?" The student replied: "It is!" Whereupon the judge observed: "I have just examined your friend in the other office and he says that the Act is unconstitutional, but we need lawyers who are able to answer great constitutional questions so quickly, right or wrong. You are both admitted."[132]

[128] For details on admission to practice in the various states, see Chapter V, below.

[129] Smith, "Admission to the Bar," *loc. cit.*, 519.

[130] *Ibid.*

[131] Boorstin, *The Americans: The Colonial Experience* 205 (1958).

In some parts of the country the antagonistic sentiment against the lawyer became one of the chief obstacles to the development of a strong and well-organized judicial system during the early period of American history. In many states the aversion to the lawyer went so far that almost anyone but a trained lawyer was regarded as a fit person to sit on the bench. Thus it came about that even the higher and in some instances the highest state courts were manned by people who probably excelled in their patriotic or "democratic" zeal, but had little or no training in the law. In New Hampshire, during the Revolution, Meshech Weare, a theologian and a person of many "extralegal" accomplishments, was Chief Justice of the Superior Court;[133] and Matthew Thornton,

[132] Smith, "Admission to the Bar," *loc. cit.*, 519. Jonathan Birch of Bloomington, Illinois, recalled the circumstances of his "examination" for admission to the Illinois bar. Abraham Lincoln was, by appointment of the Supreme Court of Illinois, a member of the board of examiners. The candidate found the examiner, Lincoln, in his hotel room, partly undressed, and so far as facilities permitted, taking a bath, which proceeded during the "examination": "Motioning me to be seated, he [*scil.*, Lincoln] began his interrogatories at once, without looking at me a second time to be sure of the identity of the caller. 'How long have you been studying?' he asked. 'Almost two years,' was my response. 'By this time, it seems to me,' he said laughingly, 'you ought to be able to determine whether you have in you the kind of stuff out of which a good lawyer can be made. What books have you read?' I told him, and he said it was more than he read before he was admitted to the bar. . . . He asked me in a desultory way the definition of a contract, and two or three fundamental questions. . . . Beyond these meager inquiries . . . he asked nothing more. As he continued his toilet, he entertained me with recollections—many of them characteristically vivid and racy—of his early practice. . . . The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all or not. . . . [H]e wrote a few lines on a sheet of paper, and, enclosing it in an envelope, directed me to report with it to Judge Logan, another member of the examining committee, at Springfield. The next day . . . I delivered the letter. . . . On reading it, Judge Logan smiled, and, much to my surprise, gave me the required certificate without asking a question beyond my age and residence, and the correct way of spelling my name. The note from Lincoln read: 'My dear Judge:—The bearer of this is a young man who thinks he can be a lawyer. Examine him if you want to. I have done so, and I am satisfied. He's a good deal smarter than he looks to be.'" Woldman, *Lawyer Lincoln* 153–54 (1936).

[133] Woodbury Langdon, Judge of the Superior (or Supreme) Court of New Hampshire at different periods, was a merchant; Timothy Farrar, who served on the same court from 1791 to 1802, had originally studied for the ministry; Ebenezer Thompson, who had prepared himself for the practice of medicine, likewise sat on the supreme bench of New Hampshire (1795–96), as did William Whipple, a mariner and merchant. See Bell, *Bench and Bar of New*

one of his associates, was a physician and, perhaps, a "metaphysician" of sorts, as well as the author of an unpublished essay, "Paradise Lost or the Origin of the Evil Called Sin Examined."[134] While hearing a case, Thornton had the annoying habit of meditating on some lofty transcendental subject or of perusing a book on philosophy or theology, disdaining to listen to the arguments of counsel. When once an exasperated lawyer complained of Thornton's undisguised indifference to what went on in his courtroom, the latter, with gentle composure, for a moment laid down the book he was studying and reassured counsel with the bland remark: "When you have anything to offer pertinent to the case on trial, the Court will be happy to hear you. Meantime I may as well resume my reading."[135]

During the same period, Nathaniel Peabody and Jonathan Blanchard discharged the duties of attorney general for New Hampshire, although neither of them had any legal background. In 1782, Samuel Livermore became Chief Justice of New Hampshire. According to tradition, he "was as independent of conventionality as any living being could be. . . . He attached no importance to precedents, and to quote any would invite his anger. . . . Even when gross inconsistency marked his decisions . . . he was not disturbed, but merely replied that 'Every tub must stand on its own bottom.' He frequently cautioned the jury against 'paying too much attention to the niceties of the law to the prejudice of justice.' He was firm in his determination not to go back into the past in quest of authorities; so he layed down the inflexible rule that all reports of a date prior to the Declaration of Independence might be cited in his court, not, however, as authorities, but as enlightening."[136] Jeremiah Mason recalled that Livermore had "no law

Hampshire (1894), *passim*; Plumer, *The Life of William Plumer* 152 (1857). It should be noted that other states, too, made frequent use of lay judges. In Rhode Island, for instance, a blacksmith was judge of the highest state tribunal from 1814 to 1818; and from 1819 to 1826 the Chief Justice was a farmer. See Pound, *Spirit of the Common Law* 113 (1921). See also, in general, Dawson, *A History of Lay Judges* (1960).

134 Bell, *Bench and Bar* 28–30 (1894).

135 Quoted in *ibid.*

136 Corning, "The Highest Courts of Law in New Hampshire—Colonial, Provincial, and State," 2 *The Green Bag* 469, 470 (1890). See also Plumer, *Life* 150 (1857).

learning himself . . . [and] did not like to be pestered with it at his courts. . . . [L]aw books were laughed out of court."[137] In 1790, Livermore was succeeded as Chief Justice by Josiah Bartlett, a physician. Simeon Olcott, who held the office from 1795 to 1801, "was more distinguished for the uprightness of his intentions than for his knowledge of the law . . . [and] he frequently made the law to suit the case."[138] Hugh Henry Brackenridge, an Associate Justice of the Supreme Court of Pennsylvania, according to Horace Binney, "despised the law, because he was utterly ignorant of it, and affected to value himself solely upon his genius and taste for literature. . . . He once said to me . . . 'Talk of your Cokes and Littletons, I had rather have one spark of the ethereal fire of Milton than all the learning of all the Cokes and Littletons that ever lived.' . . . He hated Judge [Jasper] Yeates [a good judge, and a first-rate Pennsylvania lawyer] to absolute loathing. If Chief Justice [William] Tilghman [likewise an outstanding lawyer] had not sat between them, I think that Brackenridge would sometimes . . . have spit in Yeates' face, from mere detestation. . . . For Yeates was vastly his superior in everything that deserves praise among men. . . . It is not certain that Brackenridge was at all times sane, and he would have been just as good a judge as he was if he had been crazy outright."[139]

In New York, John Sloss Hobart, an Associate Justice of the Supreme Court, was not a lawyer, and the conditions prevailing at this court prior to 1804, the year James Kent became Chief Justice, were described as "very inefficient and unsatisfactory. . . . The cases that came before the court were slightly examined both at the bar and on the bench. . . . [T]alent and legal learning . . . had not been applied in that thorough, laborious and businesslike way so necessary to give strength and character to the court and to the law."[140] The early courts of Vermont, we are told, "were badly

137 Clark, *Jeremiah Mason* 28 (1917).

138 Plumer, *Life* 151–52 (1857).

139 Binney, *The Life of Horace Binney* 40 (1903).

140 Barnard, *Discourse on the Life, Character, and Public Services of Ambrose Spencer* 46 (1849). See also the remark of Chancellor Kent: "The Judges of the Supreme Court [of New York] (Morris, Yates and Lansing) were very illiterate as lawyers." Kent, *Address of James Kent before the Law Association of the City of New York* 6 (1836). "Our judges were not remarkable for law learning." *Ibid.*, 2.

organized and usually filled with incompetent men."[141] In New Jersey, Isaac Smith, a physician by training, and Samuel Tucker, who had no particular training at all, were members of the Supreme Court.[142] In Rhode Island, Tristam Burges, primarily an orator and professor of oratory, was Chief Justice from 1817 to 1818, and James Fenner, a person little qualified to perform judicial duties, and Charles Brayton, a blacksmith by trade, were Associate Justices of the Supreme Court. Between 1819 and 1826, Isaac Wilbour, a farmer, held the position of Chief Justice. Samuel Randall, who was Associate Justice of the Supreme Court from 1822 to 1832, was admitted to the bar two years after his retirement from the bench.[143] Jeremiah Mason recollects that Lot Hall, a Justice of the Supreme Court of Vermont, was "a man of ordinary natural talents, little learning, and much industry."[144] John Louis Taylor, the first Chief Justice of North Carolina, had only a smattering of a college education. He read law "without preceptor or guide," and he was admitted to the bar at the age of nineteen.[145]

A judicial utterance which is perhaps most characteristic of this period was made by John Dudley, a trader and farmer by profession, who, between 1785 and 1797, was also an Associate Justice of the Supreme Court of New Hampshire:[146] "Gentlemen," he addressed the jury, "you have heard what has been said in this case by the lawyers, the rascals! . . . The talk of law. Why, gentlemen, it is not law that we want, but justice! They would govern us by the common law of England. Common-sense is a much safer guide. . . . A clear head and an honest heart are worth more than all the law of the lawyers. There was one good thing said at the bar. It was from Shakspeare [*sic!*],—an English player, I believe. . . . It is our duty to do justice between the parties, not by any quirks of the law out of Coke or Blackstone,—books that I never read and never

[141] Clark, *Jeremiah Mason* 22 (1917).

[142] Whitehead, "The Supreme Court of New Jersey," 3 *The Green Bag* 401 f. (1891).

[143] Edwards, "The Supreme Court of Rhode Island," 2 *The Green Bag* 525, 531 ff. (1890). See also Pound, *Spirit of the Common Law* 113 (1921).

[144] Clark, *Jeremiah Mason* 19 (1917).

[145] Clark, "The Supreme Court of North Carolina," 4 *The Green Bag* 457, 461 (1892).

[146] Plumer, *Life* 150–56 (1857).

will."[147] William Plumer, speaking from personal experience, insisted that Dudley "had not only no legal education, but little learning of any kind."[148] The action of a New Hampshire court which interrupted the reading from an English lawbook because the court allegedly understood "the principles of justice as well as the old wigged justices of the dark ages did,"[149] perhaps illustrates best the spirit that permeated certain early American courts. Some of the judges in New Hampshire were not only prone to disregard the known principles of the law, but were inclined in some instances to mete out a very uncertain product of their own: "So much, indeed, was the result [of a lawsuit] supposed to depend upon the favor or aversion of the court, that presents from suitors to the judges were not uncommon, nor, perhaps, unexpected."[150] The bar, confronted with such an unprofessional bench, needless to say, was frequently compelled to adapt itself to these conditions, very much to the detriment of its own professional standards and accomplishments.

It should be borne in mind that the first state governments were largely characterized by what has been called "legislative suprem-

[147] Corning, "Highest Courts," *loc. cit.*, 471. Plumer, *Life* 153–54 (1857). See also "Note" in 40 *American Law Review* 436–37 (1906). Compare this statement with what one of the delegates to the Indiana Constitutional Convention of 1850 said: "I have been a lawyer for some years, and I have no hesitation in telling gentlemen that I never studied Latin; and I will tell them further, that any man who studies Latin for the purpose of making himself a lawyer, is a fool for his pains." 2 *Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1136 (1850). Justice Miller is reported to have pointed out that the prime factor in shaping the law in our western states was ignorance. The first judges, he insists, "did not know enough to do the wrong thing, so they did the right thing." Pound, *The Formative Era of American Law* 11 (1938). During the debates of the Indiana Constitutional Convention of 1850, a speaker quoted a judge as having said: "During the fifteen years that I practiced law, I can say with safety, that not one-half of the suits with which I was familiar, were decided upon their merits, or upon principles of substantial justice." 2 *Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1738 (1850).

[148] Plumer, *Life* 153 (1857). Theophilus Parsons, one of the most eminent lawyers of the time, insisted, however, that Dudley was "the best judge I ever knew in New Hampshire." And Arthur Livermore, another able lawyer, was of the opinion that "[j]ustice was never better administered in New Hampshire, than when the judges knew very little of what we lawyers call law." *Ibid.*, 155–56.

[149] Baldwin, *The American Judiciary* 14–15 (1905).

[150] Plumer, *Life* 150 (1857).

acy." The will of the people in many instances was considered omnipotent, and the legislature was simply looked upon as the chief organ of this omnipotent popular will. Hence many of the earlier state legislatures did not hesitate to interfere with the traditional functions of the courts. They enacted statutes reversing judgments of the courts in particular cases;[151] they attempted to admit to probate wills previously rejected by the courts on good legal grounds;[152] and they sought to dictate the details of administration of particular estates.[153] By special laws they validated particular invalid marriages,[154] and they attempted to exempt a particular wrongdoer from liability for a particular wrong for which his neighbors would be held liable by the general law as administered by the courts.[155] They suspended the statute of limitations for a particular litigant in one case,[156] and for particular and specified litigants they dispensed with the statutory requirements for bringing suit for divorce.[157] Subordination of the courts to the "appellate jurisdiction" of the legislature (or the governor), as a matter of fact, was not uncommon in the early history of the United States.[158] In some instances the judiciary was considered

[151] See Preface to 1 Chipman (Vt.) 4–5 (1792); Paine v. Ely, *ibid.*, 21–25 (1789); Calder v. Bull, 2 Root (Conn.) 350 (1796); Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798); Merrill v. Sherburne, 1 N. H. 199 (1818); Hamilton v. Hempsted, 3 Day (Conn.) 332 (1809). Bond, *The Courts of Appeals of Maryland, A History* 133 (1928), described this situation well: "Frequently during the first half of the century the Legislature interfered to direct specified cases to be heard at the first term after arrival of the cases, and, in at least one instance, such a provision was made by legislative enactment for a case not yet disposed of in the trial jurisdiction. And legislation was passed ordering proceedings to be taken in particular cases, for instance, ordering dismissed cases to be reinstated." See *Acts of Maryland* chap. 61 (1841); *ibid.*, chaps. 168 and 284 (1842); *ibid.*, chap. 108 (1837); *ibid.*, chaps 44, 222, and 240 (1841).

[152] Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798).

[153] Leland v. Wilkinson, 31 U.S. (6 Pet.) 206f. (1832).

[154] *Local Laws of Indiana*, 1842, chap. 140, p. 130.

[155] Holden v. James, 11 Mass. 396 (1814); 5 Watts & Sargeant (Pa.) 171 (1843); *Local Laws of Indiana*, 1842, chap. 75, p. 158.

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

[157] *Local Laws of Indiana*, 1842, chap. 122, p. 119; chap. 125, p. 121.

[158] In order to understand this "legislative overbearance," it must be borne in mind that for a long time the legislature had been the favorite of the early American. The colonial period left a long memory of conflicts in which the colonial legislatures spoke out against British arbitrariness. While the courts and

simply "a subordinate department of the government."[159] Under the doctrine of legislative supremacy or legislative sovereignty,[160] the courts frequently held that any attempt on their part to review the validity of a legislative enactment would be simply the assumption of arbitrary power not warranted by law.[161] Apparently no one supposed that "an act of the legislature, however repugnant to the Constitution, could be adjudged void and set aside by the judiciary."[162]

In colonial days, it will be remembered, appellate jurisdiction rested with the king and council. When the first state constitutions were adopted, courts of last resort were established to assume this function.[163] But in some states appellate jurisdiction was vested in the legislature or governor.[164] This practice prevailed in New York until 1846,[165] and in Rhode Island until 1857.[166] In New

the executive had been creatures of the crown, the legislative assemblies, as the champions of the people's interests, had assumed the initiative in the gathering drive for independence. Hence it is not surprising that the early state constitutions should grant the legislature sweeping and, frequently, too sweeping powers "to make all laws which shall be deemed necessary." As often as not, such broad grants of power simply swept away the formal separation of powers among legislature, judiciary, and executive. Moreover, the legislature rather than the courts seemed to express more adequately the deeply ingrained localism in early American politics—the notion that the natural unit representing the sovereign people was the local assembly which, therefore, should have practically unlimited powers.

[159] Chipman, *Memoir of Thomas Chittenden* 102 (1849).

[160] See Holcombe, *State Government* 62ff. (1926).

[161] Paine v. Ely, 1 Chipman (Vt.) 14 (1789).

[162] Chipman, *Memoir* (1849).

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

[164] See, in general, Matthews, *American State Government* 430 (1924); Browne, "The New York Court of Appeals," 2 *The Green Bag* 277, 279 (1890); Eaton, "The Development of the Judicial System in Rhode Island," 14 *Yale Law Journal* 148, 153 (1905). When the legislature could not be induced by the people to interfere with the courts, frequently violent action was taken against the courts as, for instance, in Shays' Rebellion in Massachusetts, the Whiskey Insurrection in Pennsylvania, and the antirent disorders in eastern New York.

[165] See Browne, "New York Court of Appeals," *loc. cit.*

[166] See Eaton, "Development of the Judicial System," *loc. cit.*: "After the constitution the more usual course for the assembly was, not to hear the petition,