mission to practice in the territories or in the states which were carved out of these territories were fairly high. The territorial judges were inclined, on the whole, to admit only those applicants who were able to meet the rather exacting standards laid down in the territorial statutes.[245] As a matter of fact, these requirements were so exacting that some men preferred to procure their licenses in some Eastern or Southern state, and on returning to the territory to be admitted on the strength of their "out-of-state" licenses.[246] But after 1816, for some reason, an increasing number of persons with deficient or inadequate educational and professional backgrounds were admitted to practice throughout the frontier.[247] In 1832, for instance, the requirements for licensing were substantially lowered in Missouri by the elimination of a definite period of preparatory study.[248] When in 1841 the right to issue licenses was turned over to the circuit judges in Missouri,[249] applicants were subjected to purely perfunctory examinations concerning their educational backgrounds, legal knowledge, and moral qualification by uninterested and often ignorant judges or by a "board" of equally uninterested and ignorant lawyers. In this manner it became quite easy to procure a license, not only in Missouri but all along the frontier.[250]

245 1 *The Laws of the Northwest Territory, 1788–1800* 340 (Pease ed., 1925); 1 *Laws of a Public and General Nature of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to 1824* 123 (1842).

246 In some instances the territorial judge went so far as to insist upon a further examination of "out-of-state" lawyers before he granted them a license to practice within the territory. See 1 *Record of the Superior Court of the Territory of Louisiana* 54.

247 See, for instance, Bay, *Reminiscenses of the Bench and Bar of Missouri* 383 (1878).

248 2 *Laws of a Public and General Nature of the State of Missouri, Passed Between the Years 1824 and 1836* 206 (1842).

249 *Laws of the State of Missouri, Passed by the First Session of the Eleventh General Assembly* 16 (1841).

250 See English, *The Pioneer Lawyer and Jurist in Missouri* 95–96 (21 The University of Missouri Studies, No. 2, 1947).

IV

BRIEF SUMMARY

DESPITE THE FACT that, on the whole, lawyers had played a prominent role in the American Revolution, this historical event for a time had an adverse effect on the legal profession. Many of the more distinguished members of the colonial bar, especially in the North, remained loyal to the British crown, and, after the departure of the British forces, either voluntarily or, as for instance in New York, under compulsion, withdrew from active practice. Others simply deserted the country. Many of those who had sided in with the rebels accepted political positions in the young republic and, hence, were lost to the profession.

The profession, which on the eve of the Revolution had succeeded in gaining the respect and confidence of the people, was also adversely affected by the effects of a widespread and calamitous economic depression which followed in the wake of the war. The lawyers, as a class, had a great deal of clean-up business, such as the collection of debt, foreclosures, and insolvencies and, hence, were busier and more prosperous than most of the people. In consequence, they became the object of much public distrust and animosity. They were blamed for all the miseries besetting the country. Acts and resolves were passed by the several state legislatures

to restrict, and, if possible, to abolish the legal profession; and an adverse press made every effort to depict the lawyer as a scoundrel, an oppressor, and an enemy of the newly gained freedoms who had no place in a true republic.

Probably because of the unusual opportunities which the practice of law afforded, no less than the relative prosperity which the lawyer enjoyed during these troubled days, a large number of young men were attracted to the profession, among them persons of outstanding abilities as well as persons of questionable moral or professional qualifications. The better organized local bars, especially those of New England, tried to stem the influx of pettifoggers, sharpers, and spellbinders. In this they were not always successful, however, especially since some people regarded any control over admission to practice as a kind of conspiracy by a "closed order" to monopolize the practice of law. Matters certainly were not helped by the fact that some of the earliest American judges, including members of the highest state courts, were laymen. State legislatures constantly and, in some instances, successfully, interfered with the proper administration of justice; and everywhere a growing tendency could be felt to deprofessionalize not only the bar but also the bench. This trend became particularly noticeable immediately after the Revolution and, again, after 1830.

Hand in hand with the popular irritation over the lawyer in general went a strong sentiment against the English common law, which gradually had gained acceptance in the colonies during the eighteenth century. The intricacies and technicalities of the English law were looked upon as diabolical machinations designed by lawyers in order to give them an iron grip on the legal affairs of people, and to perpetuate a monopolistic profession. A great many schemes were devised to deprive the common law of its binding force; for example, only those of its provisions were to be recognized which had been adopted expressly either by the various state conventions or by statute or by court decisions because they seemed to fit the new American condition of life. Some extremists went so far as to propose abolishment of the common law in its entirety. The citation of English authorities was discouraged and, in isolated cases, actually prohibited by legislative enactment. This severance from English authorities and the nearly complete

absence of any official American law reports for some time left the courts and the legal profession practically without authoritative legal materials and guides. Lawyers no less than courts frequently had to rely on vague and not always trustworthy recollection, unquestioned usage, or plain guesswork. Not until 1789 did the first American state report appear, and some state jurisdictions had no official reporter system until far into the nineteenth century. The same holds true as regards American law treatises: aside from those law texts which were clearly intended for use by laymen, justices of the peace, petty officers, and the like, the first American law treatises for the professional lawyer, which appeared after 1788, consisted of a few scattered works on some special legal topics.

Despite the many adverse factors which seemed to work against the development of the American lawyer, there were also indications of an incipient growth and vigor of the legal profession. The period following the Revolution in a way was the "formative era" or, perhaps, even the "golden age" of American law and the American legal profession. The creative legal accomplishments of this period—a period which was mostly concerned with the applicability of traditional legal materials to the specific American circumstances—may favorably be compared with the legal achievements of any epoch in Western history. By arguing, demonstrating, and determining what was applicable and what was not applicable to the new and unique American social scene, and by creating an apparatus of rules and precepts equal to the early American life, the young American legal profession not only helped the courts in developing and stabilizing a body of laws in each jurisdiction, but it also rose to unprecedented heights of professional excellence and accomplishments. Associate Justice James M. Wayne, in the so-called Passenger Cases of 1849, asserted that "[t]he case of Gibbons v. Ogden . . . will always be a high and honorable proof of the eminence of the American bar of that day. . . . There were giants in those days."[1] It is commonly held that John Marshall in his opinion in Gibbons v. Ogden was greatly indebted to the splendid argument made by Daniel Webster. Webster himself said later that "[t]he opinion of the court, as rendered by the chief justice, was little else than a recital of my argument. The

[1] 48 U.S. (7 How.) 300, 460–61 (1849).

chief justice told me that he had little more to do than repeat that argument."[2] Charles Jared Ingersoll conceded that "Webster's professional influence [is] much more signal than his political," indicating the lasting influence which Webster had on the development of American law.[3] In addition, the early American lawyers constantly added new branches to the law, as well as found solutions to newly arising problems. It was precisely this general situation which expanded the range of law and, at the same time, stimulated the practice, scope, and importance of the legal profession.

By common consensus, six outstanding judges, namely, John Marshall of Virginia, James Kent of New York, Joseph Story of Massachusetts, Lemuel Shaw of Massachusetts, John Bannister Gibson of Pennsylvania, and Thomas Ruffin of North Carolina; and nine outstanding lawyers, namely, Luther Martin of Maryland, William Pinkney of Maryland, William Wirt of Virginia, Jeremiah Mason of New Hampshire, Daniel Webster of Massachusetts and New Hampshire, Rufus Choate of Massachusetts, James Louis Petigru of South Carolina, Horace Binney of Pennsylvania, and Reverdy Johnson of Maryland, to an eminent degree are responsible for the legal accomplishments of this period.[4] Hence, the history of the legal profession after the American Revolution is not so much the story of institutions, organizations, or policies as it is a running account of individual lawyers who by their determination and astounding competence shaped not only the history of American law and American jurisprudence but also the fate and fortune of the profession itself and, indeed, of the whole young nation. These lawyers, to be sure, were definitely animated by a common spirit that is characteristic of any profes-

[2] Harvey, *Reminiscences and Anecdotes of Webster* 142 (1877). The *New York Evening Post*, March 5, 1824, said of the decision in Gibbons v. Ogden: "This morning Chief Justice Marshall delivered one of the most able and solemn opinions that has ever been delivered in any court. . . . This opinion . . . presents one of the most powerful efforts of the human mind that has ever been displayed from the bench of any country. Many passages indicated a profoundness and a forecast in relation to the destinies of our confederacy peculiar to the great man who acted as the organ of the court."

[3] Meigs, *The Life of Charles Jared Ingersoll* 192 (1897).

[4] Pound, "The Legal Profession in America," 19 *Notre Dame Lawyer* 334, 343 (1944).

sion and, hence, considered themselves members of a distinct class of professionals. But, on the whole they were individualists—rugged individualists. But it would be a most tedious undertaking, to say the least, to reduce the history of the early American legal profession to a monotonous report on "the lives and deeds of great American lawyers." This fact has already been noticed by Horace Binney, who pointed out that "[i]f a lawyer confines himself to the profession, and refuses public life, though it is best . . . for his own happiness, it makes sad work with his biography. You might almost as well undertake to write the biography of a mill-horse. It is at best a succession of concentric circles, widening a little perhaps from year to year, but never, when most enlarged, getting away from the original centre. He always has before him the same things, the same places, the same men, and the same end. . . . The more a man is a lawyer, then, the less he has to say of himself. . . . The biography of lawyers, however eminent, *qua* lawyers, is nothing. . . . [T]he life of the best practical lawyer that ever lived, if confined to the history of his practice, or to the history of his social and intellectual march through the world within the proper limits of his profession, would in general be truly summed up as I have summed it."[5]

The years between 1765 and 1840 were also the golden age of the lawyer in the sense that the public leadership of the American legal profession attained unprecedented height. It was a time when lawyers spoke and acted with that conscious authority which is characteristic of truly creative founders and promoters of public institutions and policies.[6] But in doing this, they did not act with the belligerent or frantic dogmatism so often found among men who consider themselves mere agents of a condition or "historical tide" to whose fortunes their own are irrevocably committed.[7] More than one-half of all the United States Senators and just a little less than half of all the Members of the House of Representatives were lawyers. The legal profession also contributed between one-half and two-thirds of all state governors. Southern state legislatures in particular had a noticeably high percentage of lawyer-members.

[5] Binney, *The Life of Horace Binney* 70–72 (1903).

[6] Hurst, *The Growth of American Law* 352–53, 366 (1952).

[7] *Ibid.*, 366.

Aside from these official contributions to public welfare and political life, the cumulative though unofficial services which the legal profession rendered the country in the promotion of vital causes are beyond estimate.

Around the middle of the eighteenth century, at least in New England, the legal profession became organized in local "bar meetings" which included all lawyers practicing in a certain district. These bar meetings exercised a wholesome supervisory control over the profession, especially over the requirements for admission to the study and practice of law. Somehow these bar meetings survived the Revolution, but under the steady pressure of hostile legislation, they progressively lost their influence. With the advent of "Jacksonian democracy," which held to the popular pioneer belief that every man was as good as every other, and that everyone should find open the gates to self-advancement, a trend toward deprofessionalization set in. The requirements for the admission to the bar were progressively lowered and, in some instances, completely abolished, with the result that even the least qualified person came to be admitted to the practice of law. Having lost most of their former functions and significance, the old bar meetings or bar organizations, wherever they had developed, dissolved. In some instances they were replaced by selective and voluntary (and often short-lived) lawyers' organizations which were devoid of any power to supervise or control the profession. Due to the constant influx of a large number of people unfit by character, culture, or training to become members of a learned profession, the deterioration of the American bar as a whole assumed new and unprecedented proportions on the eve of the Civil War. The general contempt and distrust in which the contemporary legal profession was held by the public at large around the middle of the nineteenth century was often well deserved. On the other hand, it was only natural that men—lawyers—who constantly had to assume the responsibility of making important decisions should be highly self-conscious individualists in their professional attitudes. This individualism, as well as the almost complete absence of any professional organization or internal discipline after 1830, was deeply rooted in the social, economic, and political thinking of the time;

individualism and lack of professional cohesion were predominant in a society where each person primarily was bent on personal self-advancement and gain in the hectic exploitation of a new continent and its vast resources.

Prior to 1850, and for some time thereafter, the lawyer played his most prominent role as an advocate and special pleader:[8] the leaders of the bar were trial lawyers. This fact alone determined their dominant interest. They were concerned almost exclusively with "the law" at the expense of "the facts."[9] Admittedly, "facts" were simpler then because the usual pattern of daily life was itself simpler and not yet complicated by involved social and economic problems of great magnitude. Early nineteenth-century law, in the main, dealt with situations that could be spelled out in terms of "man-to-man relations." The lawyer was not preoccupied with complex "package-deals," nor was he as yet aware of the forlorn sense of helplessness which grips the modern individual in the face of major social trends. Neither was he conscious of the possibility that the public at large might be concerned with matters "private" in origin. He was absorbed in devising and manipulating general legal principles and novel doctrines of law; and his interest became focused on the problem of adapting these principles to the social conditions of a new society. This would also explain the lawyer's neglect, bordering on disdain, of investigating facts which he believed to be of no meaning to anyone but the parties involved[10]—an attitude, incidentally, which also characterized the old English serjeant or barrister.

Originally the chief method of preparing a man for the practice of law was the apprenticeship method: the student "read law" in the office of an experienced older lawyer, preferably one with a large law library. After the Revolution, stimulated undoubtedly by the example of the Vinerian Professorship of Law at Oxford,

8 See *ibid.*, 339–40.

9 *Ibid.*, 302.

10 See Binney, *The Life of Horace Binney* 71 (1903): "... facts are unproductive of all benefits, except to the fortunate client. When the case is tried, the facts are of no more importance to the lawyer himself than last year's price of calicoes, nor to the rest of mankind perhaps half as much. They are forgotten as soon as the verdict is given, and well for the lawyer is it they can be forgotten."

some American colleges or universities began to introduce "academic" training in law. This training was to be integrated into the general college curriculum. Among the leading academic law schools were William and Mary, the College of Philadelphia, and Columbia College. The law courses offered under this new program were mostly of an encyclopedic nature and, hence, often disappointing from the point of view of a student seeking a specifically professional training. At approximately the same time special local "private law schools" developed independently of established colleges or academic institutions. These private schools, which for some time eclipsed the academic law schools, were established by individual lawyers who proposed to furnish an essentially practical training and preparation for the bar. They were actually nothing more than systematized and concentrated extensions of the old apprenticeship method, available to a larger body of students. This should also explain their initial popularity and success. The most renowned of these private law schools were Litchfield, operated by Tapping Reeve and James Gould; the school of Seth Staples, Samuel J. Hitchcock, and David Daggett (who later joined the Yale Law School) in New Haven, Connecticut; and the school of Samuel Howe and John Hooker Ashmun (who later joined the Harvard Law School) in Northampton, Massachusetts.

After an abortive start, both Harvard and Yale set up law schools which to some extent incorporated the better features of the William and Mary experiment and of the Litchfield system. It took considerable time, however, before the "academic" preparation for the practice of the profession made any appreciable inroads into the traditional apprenticeship system which remained the chief method of education until well past 1850.

The several legislatures as well as courts tried, as they had done during the colonial period, to regulate and control the legal profession by a veritable flood of statutes and rules of court which at times were the product of plain prejudice and ignorance. The very number of these regulations and the frantic and often chaotic frequency with which they were issued, repealed, and reissued, should be indicative of the fact that they were all but effective.

On the whole they were undesirable and even harmful, especially whenever they began to interfere seriously with the requirements connected with admission to the bar by lowering and, in some instances, abolishing minimum educational standards.