Jersey the offices of governor and chancellor were united until 1844.[167] In some early states the legislature had practically unlimited powers not only to organize the judiciary, but to select and remove judges as well.[168] For when the early American states first constituted their legislatures, they insisted that the powers of these legislatures were necessarily supreme and uncontrollable, and that all judicial and constitutional restrictions upon these powers were simply unthinkable. In other words, in some states the written state constitutions were not given the rank of a law, much less the rank of the supreme law of the state. An act of the state legislature in many instances was considered superior to the state constitution, and, consequently, every act of the legislature, however repugnant to the state constitution, continued to be in force until expressly repealed by the legislature itself.

When the frontier moved westward during the early decades of the nineteenth century, this profound and lasting suspicion of the courts (and the lawyers)was carried along. The new states, to be sure, set up systems of courts, but their readiness to accept

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but to authorize the Supreme Court to hear [this petition] by special act, if without such act the court was incompetent. Divorces, however, were granted [by the legislature] as late as 1850. In January, 1851, the assembly had several petitions pending before it and transferred them, together with all documents and depositions in support of them, to the Supreme Court . . . and at the same time authorized and required the court to try them."

[167] One of the decisive factors contributing to the weakness and dependence of the state judiciary on the legislature was the almost universal tendency to pay little or no salaries to judges. When Jeremiah Smith, a truly prominent lawyer, was appointed Chief Justice of New Hampshire in 1802, the salary attached to this office was a mere $850.00 per annum. See Plumer, *Life* 181 (1857); Corning, "Highest Courts," *loc. cit.*, 472. Subsequently, on Smith's insistence, the salary was raised to $1,000.00, $1,200.00, and finally, to $1,500.00. When the Court of Appeals was organized in Kentucky, the annual salary of each judge was originally set at $666.66. In 1801 it was raised to $833.33; in 1806, to $1,000.00; and in 1815, to $1,500.00.

[168] In Virginia, Connecticut, Georgia, Rhode Island, North Carolina, South Carolina, and New Jersey the selection of judges was entirely in the hands of the legislature. In New York judges were appointed by a special Council of Appointment. In Pennsylvania and Delaware the legislature combined with the executive in the selection and appointment of judges. In New Hampshire, Massachusetts, and Maryland the governor and Council made the choice, and in New Jersey judges were appointed for a fixed term of years "during good behavior." This "good behavior" was frequently determined by the judges' submissiveness to the legislature.

judicial institutions did by no means imply that they regarded judges, especially lawyer-judges, above popular control and suspicion.[169] In Ohio, for instance, this popular hostility toward the judiciary led to extreme measures. In 1808–1809, by the so-called "sweeping resolutions," three Supreme Court Justices, three presiding judges of the Courts of Common Pleas, all associate judges of the Courts of Common Pleas—more than one hundred in number—and all the justices of the peace were removed from their offices by a single sweeping action of the legislature.[170] Plainly, the pioneers held some very pragmatic views of the role assigned to the courts of judicature, and they generally insisted on the election of all judges by popular vote, which often amounted to an undisguised "popularity contest." In Kentucky, to cite just one other example, there raged a prolonged and fierce controversy over the election of a supreme court that could be relied upon to stay debts.[171]

Several factors other than popular resentment and low standards of admission to the practice of law contributed heavily to the progressive deterioration or, as Pound puts it,[172] to the "deprofessionalization" of the young American legal profession. Among these factors were, first, the particular geographical conditions of the early republic as well as the primitive and often wholly inadequate means of communication between the various parts of the country.[173] Many communities for a long time were cut off from the more important centers of culture along the East Coast. Second, in keeping with the tendency to bring justice "to every man's door,"[174] a vast number of independent courts of general jurisdic-

[169] It was this widespread distrust which in some of the states contributed materially to a policy, frequently expressed in the new state constitutions, of electing judges by popular vote, and of changing judicial tenure from lifetime (or "during good behavior") to a specified term of years. See Foote, *The Bench and Bar of the South and Southwest* 22 (1876).

[170] See King, *Ohio, First Fruit of the Ordinance of 1787* 314 (1888).

[171] See, in general, Carpenter, *Judicial Tenure in the United States* (1918), *passim*, especially at 128ff., 160ff., 172ff.

[172] Pound, *The Lawyer from Antiquity to Modern Times* 232ff. (1953).

[173] The memoirs of many an early judge or lawyer "riding the circuit" give a vivid picture of the dangers and inconveniences of travel.

[174] Under the provisions of the First Constitution of Ohio (1802), for instance, members of the Ohio Supreme Court were required to hold a term once a year in each county. Moses Granger, one of the judges, points out that this provision kept the judges on horseback half of the year: "Every lawyer-judge,"

tion were established throughout the country. To each of these courts an independent local bar was attached wherever feasible. These local bars, especially in the back country, on the whole lacked effective organization, discipline, and professional competence. Every local court, as a rule, acting on its own discretion and frequently without discrimination, admitted to practice all sorts of people, regardless of their moral and professional qualifications.[175] After a certain number of years a person so admitted was considered qualified to practice before all the state courts, including the highest court of the state.

This system of attaching distinctly local but wholly unorganized and frequently unprofessional bars to each local court constituted a grave danger to professional ideals, professional deportment, and professional competence. Discipline by the courts, if

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Granger writes, "travelled many hundreds of miles each year upon a circuit in which the best roads were very poor, and most of them almost impassable on wheels. . . . Members of the county bar travelled with, or met, the judges, and lodged with or near them during term. The saddle-bag carried Ohio Statutes, then small in bulk, Blackstone's *Commentaries*, sometimes Coke on Littleton, sometimes a volume or two of an English law or equity report, and a small 'vade mecum' legal treatise, the name of which is now known to few of our profession." Quoted in Aumann, *The Changing American Legal System: Some Selected Phases* 154–55 (1940). "Riding the circuit in the old days [of the Northwest Territory] was not an unmixed pleasure. . . . No lawyer thought of staying at home and practicing in the home court only. . . . In making the trip from Marietta to Cincinnati, the trail—only a bridle path through the woods—led across at least a score of streams . . . the largest of which had to be crossed by swimming their horses. The attorneys carried their books and papers in old-fashioned leather saddlebags. In swimming the streams they put these around their necks to keep the papers dry. They usually carried provisions for themselves and horses for the entire trip, and slept in the open air, with their saddles for pillows and their cloaks for coverings. In spring and fall the travelling was not so disagreeable, but in hot and cold weather it was—in winter, on account of cold, in summer, on account of mosquitoes and chiggers." 1 Monks (ed.), *Courts and Lawyers of Indiana* 8–9 (1916). ". . . [T]he Third circuit [of Indiana] . . . was the worst. . . . The trip was not so bad if winter was still unbroken; but if the spring thaw had begun and the streams were not frozen, it was necessary to swim at least a score of streams on the trip. The summer trip . . . was not more attractive. . . . [T]he country from Winchester to Fort Wayne was an endless quagmire." *Ibid.*, 66–67. The work on the circuit "was hard and the exposure great. Only men of the strongest physique could hold out on the circuit." *Ibid.*, 62. See also Chapter II, below.

[175] Massachusetts, for instance, threw the practice of law open to non-lawyers in 1785, 1786, and 1790. See Act of March 6, 1790, 1 *Laws of Massachusetts, 1780–1807* 493.

ever invoked, especially after the 1830's, was singularly ineffective and inefficient, while discipline by the profession itself or by a professional organization, provided there ever existed such an organization, simply had ceased to function by that time. Reprehensible practices often remained unchecked, and the question of competence was rarely if ever raised. At first some influential local bars, such as the bar organizations in eastern Massachusetts, which shortly before the Revolution had achieved a high level of standards and discipline, tried to stem this general tide of professional deterioration. Also, the so-called circuit bars, which accompanied the circuit courts on their travels from county to county, at least for a while had a wholesome and restraining effect upon the disorganized local bars by keeping alive or by kindling a professional spirit.[176] But a general and widespread trend toward deprofessionalization, which had briefly manifested itself right after the Revolution, became permanent after the 1830's. In the face of this trend and its concomitants, such as the universal lowering of educational requirements and rather indiscriminate admission to practice, the efforts on the part of some lawyers or lawyers' organizations to maintain a high level of professional standards and discipline proved in vain.

Hence, at least in some sections of the country and then only for a limited period of time, the years following the Revolution down to about 1840 might also be called the period of the valiant struggle of the legal profession to preserve its pre-Revolutionary attainments. In the final outcome this struggle was unsuccessful. As time went on, the pernicious institution of the "habitual client-caretaker" developed, especially in the larger Eastern urban centers. A contemporary critic of the legal profession bitterly attacked these deplorable conditions: "Another pernicious practice is, *making bargains upon the event of the cause*. How ruinous is it to a people to have an 'order' of men [*scil.*, the legal profession] among them, who are rendering the laws a mere business of traffick! How disgraceful is such a mode of conduct. Are the PEOPLE of this

[176] The "circuit bars" not only stimulated "a substantial corporate sense" as well as a feeling of "professional fellowship," but also promoted "a close sense of what was done and what was not done. And even if there was little formal discipline, there was nevertheless pressure to conform to group standards." Hurst, *The Growth of American Law* 286 (1950).

Commonwealth [*scil.*, Massachusetts] in so dreadful a state, as to give one quarter of their property to secure the remainder, when they appeal to the laws of their country? Shall we nourish an 'order' in the community merely to take advantage of our distresses, and under pretense of doing us justice, demand any proportion of our property they may see fit? In a few years we may expect their influence to be so great that no man will be able to apply to the law without mortgaging a certain part of his estate to a lawyer."[177] This type of practitioner, which also included the habitual criminal lawyer, did little to enhance the reputation of the profession. Neither the courts nor the opinion of the honorable and respectable members of the essentially unorganized and, hence, powerless bar, were able to cope effectively with the reprehensible methods and performances of these men.

This general situation, besides having its deleterious effects on early American law as well as on the administration of justice, inevitably caused the complete breakdown of the traditional English distinction between barrister and attorney (or solicitor): "The profession," Richard Rush observed in 1815, "is not subdivided, in any of the states, in the ways that it is in England, and the American lawyer is called upon at one period or other of his life to understand the constitution of each of these forums."[178] Aside from the expense inherent in such a differentiation—in England, as a rule, the client consulted the attorney or solicitor who, in turn, called in the barrister whenever he considered such a step necessary—the relatively small number of lawyers that were to be found after the

[177] Austin (Honestus), *Observations* 11 (1786).

[178] Rush, *American Jurisprudence* (1815), reprinted in part in Miller, *The Legal Mind in America* 43–52 (1962), especially at 46. It will be noted, however, that the English distinction between barrister and attorney (solicitor) had been generally disregarded in colonial America. Moreover, the relatively small number of competent lawyers in the colonies made the bifurcation of the profession inopportune, not to mention the fact that unlike in England the several colonies lacked one single center of appellate jurisdiction. Hence, it could be maintained that the young American legal profession merely continued a practice that already was solidly established in most of the American colonies. The closest early America ever came to the English institution of the barrister was perhaps that handful of prominent lawyers such as William Pinkney, William Wirt, Walter Jones, and others, who, after the year 1800, began to establish themselves in or around the city of Washington, for the purpose of handling appellate cases before the Supreme Court of the United States.

Revolution could not successfully have been divided into barristers and attorneys. The fusion between these two branches of the profession became a permanent feature of legal practice in the United States. As a matter of fact, the English attorney or solicitor, rather than the barrister, became the model for the American legal practitioner. But the English attorney or solicitor of that time lacked an efficient professional organization and the tradition of professional responsibility which such an organization engenders.[179] Hence, the young American legal profession had no precedent upon which it could model itself.

The widespread irritation among people who attributed all their economic and social troubles to lawyers, together with a deeply rooted hostility toward everything British, led, as might be expected, to a strong and lasting sentiment against the common law of England, which during the eighteenth century had gradually asserted itself as the law of the colonies. This antagonism toward the common law probably became more pronounced during the so-called Jeffersonian era, a period in American history which seems to have favored everything French, including the promulgation of a radically new code of laws fashioned after the recently introduced Code Napoléon. Over the vociferous protests of such staunch "conservative" legalists as James Kent, David Hoffman, Daniel Webster, and to some extent Joseph Story, the clamor for a fresh codification of all American laws (which as early as 1798 had been raised by Jesse Root of Connecticut) was revived during the 1820's by a number of prominent lawyers who might also have voiced "progressivist" social ideas. Addressing the Historical Society of New York in 1823, William Sampson extolled the advantages of a written code of laws: "A sister state has already set on foot the experiment of a penal code and committed its execution to the hands of one of its most capable citizens. Let us hail the happy augury and prepare for a still nobler effort, which imperious necessity will force upon us, and which cannot and ought not be long delayed," namely, the codification of all American laws. "[With the introduction of such a code] the law will govern the decisions of judges, and not the decisions the law. . . . Our jurisprudence then will be no longer intricate and thorny. . . .

[179] Pound, *The Lawyer* 182 (1953).

We shall be delivered too from those ever increasing swarms of foreign reports . . . which darken the very atmosphere by their multitude."[180] In reviewing Sampson's suggestions in the *North American Review* in 1824, Henry Dwight Sedgwick admitted that he was not suggesting "a novelty in speculation or practice." Sedgwick himself advocated such a codification which "has been frequently recommended and, as we believe, is the only remedy which can be applied with success. . . . [A]t least some of the larger and more wealthy states of the Union should cause their laws to pass under a general revision, and to be formed into *written codes*."[181] In 1837 in Cincinnati, perhaps in response to the general

[180] Sampson, *An Anniversary Discourse, Delivered before the Historical Society of New-York, on Saturday, December 6, 1823: Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law* (1824), reprinted in part in Miller, *Legal Mind* 121–34 (1962), especially at 130, 132. William Sampson, the implacable foe of the English common law, refers here to Edward Livingston's penal code for Louisiana.

[181] Sedgwick, *On an Anniversary Discourse Delivered before the Historical Society, on Saturday, December 6, 1823, Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law. By William Sampson.* This "review article," which appeared first in 45 *North American Review* 416–39 (October, 1824), is reprinted in part in Miller, *Legal Mind* 136–46 (1962), especially at 140–41. Sedgwick admitted, however, that codification might not always be the hoped-for cure: "It is said, and no doubt truly, that if a written code of the laws were prepared with the greatest care and ability, there would still be many lurking ambiguities; that new cases and new difficulties would arise; that comments would shortly be appended to the code; that these comments would themselves form the basis of fresh annotations; that different opinions would be entertained of the meaning of the code itself, and conflicting decisions made thereon, and thus in a short time there would grow up a mass of authority and adjudication, as ponderous and oppressive as that from which we now seek to be relieved; and, finally, that all expectations of reducing the law to a state of simplicity and certainty would prove fallacious." Miller, *Legal Mind* 143 (1962). Thomas S. Grimké of South Carolina came out strongly in favor of codification: "All [informed people] are deeply sensible of the exceedingly confused and imperfect state of our laws. . . . Hence has arisen the question . . . 'Is it practicable and expedient to reduce the whole body of our law, to the simplicity and order of a code?' That it is expedient, will be denied by none. That it is practicable, has been doubted by many. . . . It is not uncommon for the champions of reform . . . to pronounce . . . [the Common] law a chaos of absurdity and injustice; of antiquated rules, inapplicable to modern society, and even hostile to its progressive improvement. . . . But for myself, as one of the advocates of reformation, I do protest emphatically and anxiously against such views. . . . [I]t is my admiration of the Common Law . . . which creates the strong desire, to see it redeemed" through intelligent codification. Grimké, *An Oration on the Practicability and*

Western dislike of the common law tradition, perhaps in the spirit of "Jacksonian democracy," Timothy Walker likewise came out strongly in favor of codification: "Could our whole law be found in our statute books, we might dispense with law schools, and almost with lawyers. . . . [W]hat would the stranger say, if I should tell him, that although in our theory, the legislature makes our laws, yet, in fact, our legislative acts do not contain, perhaps, a fiftieth part of the law which governs us? . . . Nowhere, in this country, is there to be found any thing approaching to a complete code of statute law. . . . [O]n the contrary, until very recently, those who have proposed measures for enlarging our codes, have been sneered at . . . as visionary schemers. . . . [C]odification has been condemned as but another humbug."[182] Needless to say, the

Expedience of Reducing the Whole Body of the Law to the Simplicity of a Code, Delivered to the South Carolina Bar Association, March 17, 1827 (1827), reprinted in part in Miller, *Legal Mind* 148–58 (1962), especially at 149–50. Grimké also rejected the claims made by the advocates of codification that if a code were to be introduced, "the people at large will become better acquainted with the law . . . and litigation will disappear, to a very great extent. . . . [N]o code will ever accomplish them." *Ibid.*, 150. Nevertheless, with some reservations, Grimké recommended codification of the laws for the following reasons: (1) Since method and system are vastly superior to confusion, "a code must be eminently a public blessing." *Ibid.*, 152. (2) "The value of principle, as compared with a heterogeneous mass of facts and details . . . will be questioned by no one. . . . Our laws, in the present conditions, may be called the grave, rather than the cradle of principles." *Ibid.*, 152–53. (3) A code would be a "most efficient barrier against careless and hasty . . . legislation." Legislation would have to pay attention to basic principles, make direct reference to an existing body of laws, and be on the whole more systematic. *Ibid.*, 153–54. (4) Codification "must exercise a happy influence on the character and usefulness of the Law." *Ibid.*, 155. (5) "If the Law itself shall become more respectable . . . the Legislator and the Judge, as well as the Professors of the Law will rise . . . in public estimation." *Ibid.*, 155–56. (6) "[T]he control which science," organized in a systematic code, "invariably exercises over those who are engaged in a [practical] pursuit to which it applies" strongly argues in favor of a code. *Ibid.*, 156. (7) A code would greatly facilitate the teaching of law. *Ibid.*, 157. (8) A systematic code would substantially assist the leading men in public life who would "find in a code, the best preparative for their duties," the more so, since "[l]aw, indeed . . . pervades . . . all society." *Ibid.*, 157–58.

[182] 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 (1962), especially at 247–48. Robert Rantoul, Jr., who despite his Massachusetts upbringing and Harvard training was first a Jeffersonian and later a Jacksonian Democrat, in 1836 insisted that not the

cry for a systematic codification of American law came in part from "progressive" social liberals, in part from people who simply harbored an abiding distrust and dislike of the traditional English common law, or who felt that this common law could not adequately cope with the particular "American condition."

The Antifederalists, who around the turn of the century were also interested in reforming existing practices and procedures, were strongly inclined to urge the wholesale reception of French law or, at least, a workable combination or integration of the English common law and the French civil law which, in essence, was but a "modernized and modified" form of Roman law. Gratitude to France for her timely assistance during the Revolution was at a high point during these years, and great interest was displayed in the language, literature, customs, fashions, ideas, and manners of the "enlightened" French people. It is no surprise, therefore, that French law and French legal authorities, which were given high standing in many quarters,[183] should frequently find their way

traditional common law but "[s]tatutes enacted by the legislature, speak the public voice. Legislators . . . are strongly influenced by public feeling. They must . . . express its will. . . . [T]he whole body of the law must be codified. . . . All American law must be statute law." Rantoul, *Oration at Scituate, Delivered on the Fourth of July, 1836* (1836), reprinted in part in Miller, *Legal Mind* 222–27 (1962), especially at 225, 227. See also the remarks of James Richardson in his *Address before the Members of the Norfolk Bar, at Their Request, February 25, 1837* (1837), reprinted in part in Miller, *Legal Mind* 230–36 (1962); Richardson strongly objected to any codification. Peter (Pierre Étienne) du Ponceau, a lawyer actually bred in the tradition of the French civil law, had reminded his audience as early as 1824 "[t]hat there are real and serious inconveniences in our [*scil.*, American] actual system of jurisprudence, is what no candid man will deny; but none of them is, nor are all of them sufficient to induce the abolition of the Common Law. Were it abolished, a still greater difficulty must arise. . . . The task of legislation is not so easy a one as some people seem to imagine. . . . [I]t is impossible to abolish the Common Law. . . . [It] is destined to acquire in this country the highest degree of perfection of which it is susceptible, and which will raise it in all respects above every other system of laws, ancient or modern." Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States, Being a Valedictory Address Delivered to the Students of the Law Academy of Philadelphia, at the Close of the Academic Year, on the 22nd April, 1824* (1824), reprinted in part in Miller, *Legal Mind* 107–17 (1962), especially at 112–13, 117. See also note 183, which follows.

[183] Peter du Ponceau, in 1824, warned American lawyers and reformers that the "blending" and "combining" of English common law and French civil law, advocated (but not always carried out) by James Kent, David Hoffman,

into the early American law reports.[184] "In our courts of justice the writings of the [French] civilians are referred to freely and fearlessly. The Institutes of Justinian and the commercial treatises of Pothier, Emerigon and Roccus, are naturalized among us."[185] Obviously, certain imperfections of the common law of the day, especially as regards commercial transactions, on occasion compelled American courts to turn to French treatises on the civil law for guidance and information. But even when adequate English authorities were available, the courts did not hesitate to consult French as well as other Continental sources: "The common, civil, and customary law of Europe have each precisely the same force with us in this branch [the law merchant and maritime law]. . . . [O]ur courts study them all, and adopt from them whatever is

Joseph Story, and others, might be the cause of renewed and even greater troubles: "The emperor Napoleon gave to the French a new and uniform code of laws, which has been now in force about twenty years. It is admitted to be as complete as a work of this kind can be. . . . But I assure you, that, as far as I have been able to observe, the digests and code of Justinian, the former laws and ordinance of the [French] kingdom, and the immense collection of the works of the civilians and French jurists are not less quoted at present in the [French] lawyers' pleadings than they formerly were, and so it would be with us if we were to abolish the Common Law. We should still recur to it for principles and illustrations, and it would rise triumphantly above its own ruins, deriding and defying its impotent enemies." Du Ponceau, *Dissertation* (1824) (Miller's partial reprint), 113.

[184] French and other basic legal works were translated into English or published about that time: Nugent's translation of Montesquieu's *Ésprit des lois* was published in Boston in 1800 and in Philadelphia in 1802. François Xavier Martin's translation of Pothier's work on *Contracts* was published in New Bern, North Carolina, in 1802; and W. D. Evans published the same work in Philadelphia in 1806. John E. Hall's translation of Emerigon's *Maritime Loans* was published in Baltimore in 1811; and Jared R. Ingersoll translated Roccus' *De navibus et nauto* in 1809. Nugent's translation of Burlamaqui's *Principes du droit de la nature et politique* was published in Boston in 1792. For additional information, see Marvin, *Legal Bibliography, or a Thesaurus of American, English, Irish, and Scotch Law Books* (1847), *passim*.

[185] Anonymous, 21 *North American Review* 387–88 (October, 1825). Roscoe Pound has pointed out that the first volume of *Johnson's Reports* of decisions of the New York Supreme Court of Error for the year 1806 contains a number of citations from French legal authorities. Pound, "The Place of Judge Story in the Making of American Law," 48 *American Law Review* 685 (1914). See also, in general, Aumann, "The Influence of English and Civil Law Principles upon the American Legal System during the Critical Post-Revolutionary Period," 12 *Cincinnati Law Review* 289–317 (1938).

most applicable to our situation, and whatever is on the whole just and expedient, without considering either course obligatory. If Mansfield, Scott or Ellenborough is cited with deference or praise, so likewise are Bynkershoek, Valin, Cheirac, Pothier, and Emerigon. The authority of a decision or opinion, emanating from either of these sources, is rested on . . . its intrinsic excellence. And if we seek instruction on the mercantile law from jurists in England, why not seek it from their masters on the continent of Europe? Why do we not get at the fountain-head? Why do we content ourselves with second-hand information? In fact, all eminent lawyers in this country sooner or later find it necessary to study the law books of the continent. . . . [T]he continental law ought to be made an important, it might also be said the most important, branch of elementary legal education."[186] Peter du Ponceau, the scholarly Philadelphia lawyer, stressed the practical importance of the civil law in the United States, "where the administration of the Civil and the Common Law is committed to the same judges, and the same body of judges is called upon to practice them both";[187] and Hugh Swinton Légaré of South Carolina, James Kent, David Hoffman of Maryland, and Joseph Story considered it practicable and even desirable to infuse into American jurisprudence a large portion of the spirit and philosophy of the French civil law.[188]

One of the specific reasons for the public distrust of the existing laws arose from the intricacies and technicalities of the English common law. Special pleading (which had been introduced in England during the eighteenth century), Latin, French, and other terms unfamiliar to the layman were generally regarded as tricky

[186] Anonymous, 40 *North American Review* 412 (October, 1820). In 1821, Caleb Cushing published his translation of Joseph Pothier's *Treatise on Maritime Contracts of Letting to Hire*. See also Anonymous, 6 *North American Review* 76 (March, 1817), where a reviewer of David Hoffman's *Course in Legal Studies* deplores Hoffman's failure to give adequate consideration to the Continental civil law.

[187] Anonymous, 36 *North American Review* 400 (April, 1835).

[188] The general adoption of the French civil law, however, ran into many practical difficulties, including the language barrier. In consequence, few lawyers or judges were able to make effective use of French legal sources. By the time translations became more generally available, sufficient Anglo-American materials had been developed to counteract the "civilian" influence. This was due mainly to the efforts of James Kent, Joseph Story, John Marshall, and others.

devices to mislead and despoil ordinary people.[189] William Duane of Philadelphia, attacking the "mysterious" and "unintelligible" common law of his day, was of the opinion that it was invented and kept in force by the lawyers solely for the purpose of preventing the non-initiated from acquiring any knowledge of the law. He suggested that the law be so simplified as to enable everyone to be his own lawyer: ". . . law would soon become a part of academic study. . . . By this means . . . society would be prodigiously advanced in knowledge."[190] "One reason of the pernicious practice of the law, and what gives great influence to this 'order' [of lawyers]," Benjamin Austin lamented, "is, that we have introduced the whole body of English law into our Courts; why should these States be governed by British laws? Can the monarchial and aristocratical institutions of England, be consistent with the republican principles of our constitution? . . . The numerous precedents brought from 'old English Authorities' . . . answer no other purpose than to increase the influence of lawyers."[191] To be sure, there existed a number of lawyers, at least on the eve of the Revolution, who fiercely resisted every legal reform, and who regretted the fact that Blackstone's *Commentaries*, which made their appearance in the colonies just before the Revolution, should simplify and arrange the law of England in such a manner that even laymen could acquire a modicum of legal knowledge without undue effort.

Even some lawyers of prominence soon joined Austin in his denunciations of the English common law. Deploring America's "slavish" dependence on English legal institutions, Henry Dwight Sedgwick, by no means a fanatical opponent of the common law, in 1824 raised the question "whether these United States, or some of them, have not so increased in magnitude, whether their institutions, mode of society, tenure of property, and, in short, all their relations and their whole character, have not become so materially different from those existing in England . . . that the change and alienation . . . ought not to be formally recognized; whether we

[189] See also 2 *Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1128ff. (1850).

[190] Duane, *Sampson against the Philistines* 68 (1805). See note 69, Chapter I, above, and the corresponding text.

[191] Austin (Honestus), *Observations* 12 (1786).

have not derived all the aid we ought to expect from the land of our ancestors; whether any farther servile dependence on a foreign country does not rather tend to retard than promote our advancement; and, lastly, while we pay to England all due courtesy and respect, . . . whether we should not, nevertheless, declare a final separation, not a nonintercourse, but an independence in jurisprudence, as really and nominally absolute, as it has long been in point of political sovereignty?"[192] Charles Jared Ingersoll, in his famous

[192] Sedgwick, *On an Anniversary Discourse Delivered before the Historical Society, on Saturday, December 6, 1823, Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law. By William Sampson.* This article, which was a reply to William Sampson's attack upon the common law, was first published in 45 *North American Review* 416–39 (October, 1824), and is reprinted in part in Miller, *Legal Mind* 136–46 (1962), especially at 140–41. William Sampson, the "wild Irishman" who had studied law at Lincoln's Inn, had insisted that the language of the common law was "a barbarous jargon, its root in savage antiquity, its growth through ages of darkness, its fruits but bitterness and vexation." He had compared English law to a "pagan idol to which they daily offered up much smoky incense," calling it "by the mystical and cabalistic name of Common Law . . . not to be seen or visited in open day; of most indefinite antiquity; sometimes in the decreptitude of age, and sometimes in the bloom of infancy, yet still the same that was, and was to be, and evermore to sit . . . motionless upon its antique altar for no use and purpose, but to be praised and worshipped by ignorant and superstititious votaries. . . . If the hundredth part of that painful industry and acknowledged talent, which is wasted upon vain and ever baffled efforts to reconcile the irregularities, explain the anomalies, sustain the paradoxes, and solve the riddles of our entangled jurisprudence, was bestowed upon a science capable of improvement or advancement, what glorious fruits would it not, e'er now, have brought forth, instead of that sickly and exotic growth, that has no sap or freshness. . . . We should have had laws suited to our condition and high destiny; and our lawyers would have been the ornaments of our country. . . . We must either be governed by laws made for us, or made by us. . . . [T]he decisions of our [American] judges . . . stand so far above those which we import [from England]. It is for that reason also, that we should import no more; for with every deference due to the learning, wisdom, and integrity of English judges, they are not fit persons to legislate for us. . . . Dependence can never cease if one nation is always to teach, and the other always to learn. Our condition is essentially different from theirs. . . . Our law is justly dear to us . . . because it is the law of a free people, and has freedom for its end, and under it we live both free and happy. . . . But even this part of our law which thus secures our rights and liberties, is not untainted with pedantry, not free from all absurdity. . . . The best reason urged for the adherence to English precedents, is the preserving of uniformity amongst the sister states. It has not, nor cannot answer this end. This evil of divergence has already begun. . . . Folly cannot form a bond of union amongst enlightened men." Sampson, *An Anniversary Discourse, Delivered before the Historical Society of New-York, on Saturday, December 6, 1823: Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law* (1824), reprinted in part in Miller, *Legal Mind* 121–34 (1962), especially at 121, 123, 125f., 128, 130, and 133.

Discourse Concerning the Influence of America on the Mind (1823), maintained outright that American lawyers would never take their destined position in the forefront of America's intellectual life until they had declared their complete independence from the English common law and English precedents. "American lawyers and judges," he lamented, "adhere with professional tenacity to the laws of the mother country. The absolute authority of recent English adjudications is disclaimed: but they are received with a respect too much bordering on submission."[193] But with a tone of gratification he added that "[o]ur professional bigotry [of adhering to the laws of England] has been counteracted by penal laws in some of the States against the quotation of recent British precedents."[194]

The early strictures of Benjamin Austin and others were restated in essence some decades later by Frederick Robinson, a spokesman of "Jacksonian democracy," who attacked most vehemently the existing common law, the legal profession, and the judiciary: "[B]y means of . . . [an] organized combination of lawyers throughout the land . . . the laws have always been molded to suit their purposes, and what are called Courts of Justice are only engines to promote their interests and secure their ascendency in the community."[195] The judge, Robinson alleged, "is a member of . . . [this] combination of lawyers,"[196] and "it is for the interest of this trades union of lawyers to have the laws as unintelligible as

[193] Reprinted in part in Miller, *Legal Mind* 78–82 (1962), especially at 78–79. Ingersoll's *Discourse* of 1823, which must be considered the most outstanding of the predecessors of Emerson's *The American Scholar* of 1837, is one of the several hortatory addresses to the genius of America and the American people. It attempted to arouse America to an intellectual outlook and perspective beyond mere pioneering, technical development, or imitation. Insisting upon complete independence from English law, Ingersoll strongly opposed what he regarded as "colonial acquiescence" in legal and institutional matters.

[194] Miller, *Legal Mind* 79 (1962). Like William Sampson (see note 180, Chapter I, above), Ingersoll refers here to Livingston's penal code for Louisiana.

[195] Robinson, *A Program for Labor: An Oration Delivered before the Trades' Union of Boston and Vicinity, July 4, 1834* (1834), reprinted in *Social Theories of Jacksonian Democracy* 320–43 (Blau ed., 1947), at 330.

[196] *Ibid.*

possible, since no one would pay them for advice concerning laws which he himself could understand."[197] Taking a dim view of the courts, Robinson alleged that "[t]he judiciary . . . in every State where judges hold their office during life, is the headquarters of the aristocracy. And every plan to humble and subdue the people originates there."[198] "One of the most enormous usurpations of the judiciary," Robinson continued, "is the claim and possession of common law jurisdiction."[199] Although "contained in ten thousand different books," this common law "is said to be unwritten law, deposited only in the head of the judge, so that whatever he says is common law, *must be* common law, and it is impossible to know, before the judge decides, what the law is."[200]

Robinson's strictures could be summarily dismissed by the legal profession as the rantings of an ill-informed and prejudiced rabble-rouser. But the articulate attacks upon the common law by Robert Rantoul, the foremost Democratic member of the predominantly Federalist Massachusetts bar during the 1830's and 1840's,[201] understandably caused some considerable concern among the lawyers. "The Common Law," Rantoul bluntly asserted, "sprung from the Dark Ages. . . . [It] had its beginnings in the time of ignorance . . . in folly, barbarism, and feudality. . . . [It] sheds no light but rather darkness. . . . No man can tell what the Common Law is; therefore it is not law: for law is a rule of action, but a rule which is unknown can govern no man's conduct. Notwithstanding this, it has been called the perfection of human reason. The Common Law is the perfection of human reason,—just as alcohol is the perfection of sugar. The public spirit of the Common Law is reason doubly distilled, till what is wholesome and nutritive becomes rank poison . . . [a] sublimated perversion [which] bewilders, and perplexes, and plunges its victims into a

[197] *Ibid.*, 331.
[198] *Ibid.*, 318.
[199] *Ibid.*
[200] *Ibid.* See also De Tocqueville, *Democracy in America*, part 1, chap. 16.
[201] Robert Rantoul, Jr., a graduate of Harvard (1826), was admitted to the Salem bar in 1829, and to the Boston bar in 1838. He was first a Jeffersonian and later a Jacksonian Democrat—a rare phenomenon in Whig New England. A staunch humanitarian and Abolitionist, he agitated against capital punishment, advocated labor unions, worked for the establishment of tax-supported public schools, and gave his professional services to the "Dorr rebels" in Rhode Island.

maze of errors. . . . No one knows what the [common] law is, *before* he [*scil.*, the judge] lays it down. . . . No man knows what the [common] law is *after* the judge has decided it. . . . Statutes, enacted by the legislature, speak the public voice. . . . The objections to the Common Law have a peculiar force in America, because the rapidly advancing state of our country is continually presenting new cases for the judges. . . . If a Common Law system could be tolerable anywhere, it is only where every thing is stationary. With us, it is subversive of the fundamental principles of a free government. . . . All American law must be statute law."[202]

While the "moderates" agreed that the common law which had developed in England subsequent to the American Revolution should be wholly ignored and, if necessary, abrogated, the "radicals" expostulated that only the English law as it had existed prior to the fourth year of the reign of James I (the year 1606)[203] should

[202] Rantoul, *Oration at Scituate, Delivered on the Fourth of July, 1836* (1836), reprinted in part in Miller, *Legal Mind* 222–27 (1962). A year later James Richardson, perhaps in reply to Rantoul's attacks, came out strongly in defense of the existing common law and of the legal profession: "Among nations . . . where life, liberty and property are protected by standing laws, the construction and application of . . . laws, and the numerous causes and questions arising under them, are closely connected with the security, tranquillity and prosperity of the body politic; and under all such governments, the legal profession has had extensive influence;—the honest and able advocate has been respected, honored and rewarded, his opinions confided in, and his influence extended; and thus his duties have become more important, and more solemnly obligatory. . . . That there are those occasionally creeping into the [legal] profession, who lie open to the censure of the high and low, to the shaft of the witty, and to the contempt or commiseration of all . . . is not denied, but where is the justice of pointing the finger of scorn, or aiming the shaft of ridicule, at the whole profession . . . ? There are, however, other and superior classes of men who hold . . . the legal profession in too low an estimation. These are theorists without practical knowledge. . . . These contend that the study and practice of the law contract the mind, [and] narrow the range of thought." Richardson, *An Address before the Members of the Suffolk Bar, at Their Request, February 25, 1837* (1837), reprinted in part in Miller, *Legal Mind* 230–36 (1962), especially at 230–32. Richardson graduated from Harvard in 1797, took his M.A. in 1800, and studied law with Ames Fisher, a staunch anti-Democrat Whig and Federalist in Boston. He soon became one of the leading lawyers of the Norfolk bar, serving as its president from 1822 to 1858.

[203] See Short v. Stotts, 58 Ind. 29, 32 (1877); Penny v. Little, 3 Scammon (Ill.) 301 f. (1841). The date of 1606 was chosen because it was regarded as the year in which the colonization of America began. It was fixed by the Constitutional Convention of Virginia in 1776 (chap. 5, par. 6; *Virginia Public Acts, 1768–83*, at 33), and it appears to have gained currency from Tucker's edition of

have binding force in America. Thomas Jefferson, for instance, maintained that the American colonists had asserted against the British crown not "the rights of Englishmen" but "the rights of man"; and he seriously doubted the propriety of quoting in American courts English authorities subsequent to the emigration, that is, subsequent to the year 1606. Some "extremists," on the other hand, went so far as to suggest the abolishment of the English common law in its entirety, claiming that it had no *ipso facto* validity whatsoever in the United States, except those of its provisions which expressly had been adopted by the several state conventions, by statute, or by court decisions. "As soon as we cut asunder the legatures that bound us together . . . the Common Law was done away."[204] It was urged, to cite one example, that the Virginia courts abandon the practice of quoting British decisions, because it was thought to be unbecoming for a free republican government to be administered by principles "of a rigid and high toned monarchy."[205] At the same time the hope was expressed that "substituting acts" would soon be passed by the people enabling them to "shake off this last seeming badge and mortifying memento of their dependence [*scil.*, the common law of England] *on her* [*scil.*, England]."[206] In sum, nothing less was proposed than that "wholesome statutes," enacted by patriotic American legislatures, should eradicate "this engine of oppression," namely, the English common law, from the American soil. "Instead of living under British laws after we had thrown off the government which produced those laws, we should have adopted republican laws, enacted in codes, written with the greatest simplicity and conciseness, alphabetically arranged in a single book, so that every one could read and understand them for himself."[207]

Some states, such as Delaware,[208] Maryland,[209] Massachu-

Blackstone's *Commentaries*, vol. 1, pp. 373ff. Different states have fixed different dates, especially as regards the date of the "emigration of our ancestors," after which English statutes ceased to be applicable. See 1 Kent, *Commentaries* 473.

[204] Quoted in Warren, *History of the American Bar* 226 (1911).

[205] *Ibid.*

[206] *Ibid.*, 226–27.

[207] Robinson, *Program for Labor* 311 (1834). See also note 231, Chapter I, below.

[208] Constitution of 1776, art. 25.

setts,[210] New Hampshire,[211] New York,[212] New Jersey,[213] and Rhode Island, [214] in their state constitutions expressly stipulated that only those parts of the common law which had been developed in America after the year 1775 or 1776, or after the adoption of the respective state constitutions, should be in force, unless otherwise indicated. In other states, such as North Carolina, the common law of England, so far as it was applicable and not inconsistent with the North Carolina Constitution, the federal Constitution, the laws of the United States or those of other states, was adopted and declared to be in force by special statute. Other states, again, debated at great length the extent, if at all, to which the English common law was still applicable in their courts—debates which are reminiscent of the discussions once carried on in the early American colonies over the same issue.[215] In these states the adoption of the English common law frequently had to await some authoritative declaration by the courts or the legislature. This situation, which frequently bordered on utter chaos, is well illustrated by the remark attributed to Littleton Waller Tazewell of Virginia: "[Edward] Pendleton [Chief Justice of the Virginia Court of Appeals] always professed the most profound respect for British decisions, but he rarely followed them; while [Chancellor George] Wythe, who spoke disrespectfully of them, almost invariably followed them."[216] In the main, however, the several states pursued the somewhat vague policy of accepting only those parts of the common law which they considered suited to the changed conditions and circumstances.[217] Hardly anywhere was the common

[209] Declaration of Rights of 1776, art. 3.

[210] Constitution of 1780, chap. 6, art. 6.

[211] Constitution of 1792, part 2, sec. 90.

[212] Constitution of 1777, art. 35; Constitution of 1846, art. 1, sec. 17.

[213] Constitution of 1776, art. 22.

[214] Constitution of 1842, art. 14, sec. 1.

[215] See Chroust, "The Legal Profession in Colonial America," part I, 33 *Notre Dame Lawyer* 51–54, 65–68, 87–88, 92, 94 (1957).

[216] Grigsby, *Discourse on the Life and Character of the Hon. Littleton Waller Tazewell* 84 (1860).

[217] See Chipman, *A Dissertation on the Act Adopting the Common and Statute Laws of England*, 1 Chipman (Vt.) 117 (1792): "That so much of the common law of England as is not repugnant to the constitution, or to any act of the Legislature of this State, be, and is hereby adopted, and shall be, and continue to be, law within this State."

law adopted in its entirety; and it was frequently left to judicial decisions as well as to the usages and customs of the respective states to determine how far, if at all, the common law had been introduced and sanctioned.

"[T]he common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country."[218] Justice Chase summed up this whole situation when he stated:[219] "[E]ach colony judged for itself, what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity, in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England is the law of each state, so far as each state has adopted it."[220]

The general aversion to the traditional common law of England in some instances assumed specific forms. In 1800 the General Assembly of Virginia instructed its senators and representatives in Congress to "oppose the passing of any law founded on recognizing the principle lately advanced that the Common Law of England is in force under the Government of the United States."[221]

[218] 1 Kent, *Commentaries on the Constitution* 472 (1858).

[219] United States v. Worrall, 2 U.S. (2 Dall.) 33, 341 (1798).

[220] See also Gatton v. Chicago R. I. P. Ry. Co., 95 Iowa 112, 116–24 (1895), 63 N.W. 589ff. (1895).

[221] Warren, *History of the American Bar* 231 (1911).

Governor Tyler of Virginia found it most inappropriate that "the time of the court . . . [should be] taken up in reconciling absurd and contradictory opinions of foreign judges which certainly can be no part of an American judge's duty."[222] In 1799, New Jersey enacted a statute forbidding the bar under heavy penalty to cite in court any decision, opinion, treatise, compilation, or exposition of the common law made or written in England after July 1, 1776.[223]

In Pennsylvania, in the year 1805, Edward Shippen, the Chief Justice of the Supreme Court, and two Associate Justices, Thomas Smith and Jasper Yeates, were impeached for an "arbitrary and unconstitutional act," namely, for having fined and jailed Thomas Passmore for "constructive contempt."[224] It was alleged that punishment for contempt was a form of barbarism sanctioned by the English common law wholly unsuited to this country and, hence, illegal. It appears, therefore, that in Pennsylvania the mere reliance on English law could cause the impeachment of a state judge.

The trial of the three justices became the occasion for renewed attacks on the lawyers, the courts, and the common law in general. And when the leading lawyers of Philadelphia—Jared Ingersoll, Alexander J. Dallas, and Peter du Ponceau—refused to serve the legislature as attorneys for the prosecution, these attacks waxed ever more vehement. "It is in vain to disguise it," wrote a contributor to the *Aurora*, "either the people must determine at once to abandon their liberties, their property and their understandings to the discretion of the *lawyer's corps*—or bring them to a due sense of their equality with the rest of their fellow citizens."[225] Another critic alleged that "[t]he spirit of independence of our lawyers is now established beyond all controversy, and the people ought to be congratulated that there has not been one found to aid the commonwealth."[226] And a person who apparently considered himself a great wit suggested that "[w]e shall . . . learn what

[222] *Ibid.*, 226.

[223] *Acts of June 13, 1799* sec. 7, Patterson, *Laws of New Jersey* 438.

[224] See Bayard v. Passmore, 3 Yeates (Pa.) 438 (1802); Respublica v. Passmore, *ibid.*, 441.

[225] *Aurora*, December 18, 1804. The *Aurora*, edited by William Duane, was a paper in which the radical Republicans vented their political grievances.

[226] *Ibid.*, December 24, 1804.

the opinions of our lawyers are respecting the common law and our constitutions, and know whether we were 'our own worst enemies' in declaring independence and not remaining under the *protection* of the British *magna carta* and bill of rights."[227]

The three justices were declared acquitted, however, since the prosecution failed by three votes to obtain a two-thirds majority.[228] As a matter of fact, their case was won by an appeal to the principles of the common law of England. At once the common law came under fierce attack: "The actual issue was," an irate author wrote in the *Aurora*, "whether the constitution established upon the principles of the revolution of 1776 should remain—or, the dark, arbitrary, unwritten, incoherent, cruel, inconsistent, and contradictory maxims of the *common law* of England, should supersede them. And the sentence on this trial has been such, that the liberty and safety of the citizens of this commonwealth, hitherto the example of the union, and the admiration of the ancient nations, are by the verdict of *eleven senators*, of this commonwealth, put afloat upon the unbounded and trackless ocean of the common law."[229] Other critics maintained that the puzzling terminology of the common law, which no common person could possibly understand, had been invented by the priests during the Dark Ages purposely to mystify the people. But the resentment against the acquital of the justices, it was prophesied, would "hasten the permanent emancipation of the people from the only remaining unaltered, imposture of the popish priesthood."[230] As a substitute for the common law of England, some radicals proposed a code, which, they naïvely believed, could be definite, compact, and simple enough to be understood by every person.[231]

227 *Ibid.*, January 23, 1805. See also Newlin, *The Life and Writings of Hugh Henry Brackenridge* 149 (1932).

228 Thirteen out of twenty-four senators voted for conviction. See, in general, Hamilton, *Report of the Trial and Acquittal of Edward Shippen* (1805).

229 *Aurora*, January 30, 1805.

230 *Ibid.*, February 9, 1805.

231 *Ibid.*, January 31, 1805. See also Newlin, *Hugh Henry Brackenridge* 250 (1932). Similar suggestions were made by Frederick Robinson about thirty years later (see note 207, Chapter I, above) and by practically every legislature in the several frontier states which were under the spell of "Jacksonian democracy." See also notes 180–82 and 192–93, Chapter I, above, and the corresponding text.

In 1810 a statute was passed in Pennsylvania[232]—not repealed until 1836[233]—forbidding the citation of any English decision handed down after July 4, 1776. This statute came about in the following manner: In 1809 a member of the Pennsylvania House of Representatives, Michael Leib, chanced to be present during a trial in a court of justice. An old English case was cited as authority that truth may be admitted in evidence in a case of criminal libel, but may not be used as justification. Profoundly shocked by this ruling, Leib resolved that such "dangerous and immoral" doctrines must be abolished at all cost. Addressing the House of Representatives, he raised the question whether the people of Pennsylvania were to go to England in order to find out what their laws and constitution meant—whether they were slaves of English law and creatures of English precedent.[234]

The Kentucky legislature, between 1807 and 1808, considered an interdict prohibiting the citation or reference to English decisions or authorities of any date. It relented, however, and in 1808 passed a statute which provided that "all reports and books containing adjudged cases in the Kingdom of Great Britain, which decisions have taken place since the fourth day of July, 1776, shall not be read, nor considered as authority in any of the courts of this commonwealth, any usage or action to the contrary notwithstanding."[235] In Ohio, as late as 1819, a pamphleteer, John Milton

232 *Act of March 19, 1810, Public Laws* 136.

233 *Act of March 29, 1836, Public Laws* 224.

234 See *Journal of the Nineteenth House of Representatives of the Commonwealth of Pennsylvania*, 1809. At the next session, in 1810, the bill was passed. See 3 McMaster, *History of the People of the United States* 418 (1892).

235 Act of February 12, 1808, *Acts of Kentucky* 23 (1808). In 1808, Henry Clay was expressly prohibited from citing an English authority by the Supreme Court of Kentucky. Hickman v. Boffman, 1 Hardin (Ky.) 356, 372 (1808). Said the court: "In the argument of his cause, Clay offered to read, from 3 *East's Reports*, 199, 200. . . . The chief justice stopped him, and stated it was a violation of the act . . . that 'reports and books containing adjudged cases, in the kingdom of Great-Britain, which decisions have taken place since the 4th day of July, 1776, shall not be read, nor considered as authority, in any of the courts of the commonwealth,' etc. . . . The books prohibited, ought not to be used at all." In a footnote on page 373 reference is made to the case of Gallatin v. Bradford, fall term, 1808, where "the court stopped counsel, who cited Douglass' reports . . . and declared it was improper for counsel to refer to them." Incidentally, Justices Hughes and Wickliffe, in Hickman v. Boffman, on pages 372–73, state: "There are many books,

Goodenow, declared that the common law of England was not the law of the United States, and that it had absolutely no authority in any of the states that had been formed out of the old Northwestern Territory.[236] As a matter of fact, it became a rule in Ohio that the common law was part of the law only in so far as its principles were reasonable and consistent with the letter and spirit of the state Constitution and suitable to the peculiar conditions and business of its people and the state of its society; but if wanting in any of these ways, it would be changed.[237] Thomas Jefferson, in 1799, plainly rejected the idea that the common law of England should be recognized and made enforceable in the newly established federal courts. He called this idea an "audacious, barefaced and sweeping pretention," beyond the power of the federal courts. "If this assumption be yielded to," Jefferson contended, "the State courts may be shut up."[238] Some opposition to English precedents and English authorities may also be explained as a crude effort on the part of many ill-trained lawyers, judges, and magistrates "to palliate their lack of information by a show of patriotism."[239]

which are not authority, but which ought to be read and used, for the sound and clear reasoning they contain, as Pothier on Obligations." This would indicate that Kentucky courts, too, at that time displayed a distinct preference for the "civilians" and for French legal authorities in particular. See also Collins, *Historical Sketches of Kentucky* 102–107 (1848).

[236] Goodenow, *Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of the English Common Law on the Subject of Crimes and Punishments* (1819). Goodenow's book, which was typical of the post-Revolutionary and "frontier" dislike for English law, had a limited circulation in the East, but greatly influenced the "Western" attitude toward the common law.

[237] See Lessee of Moore v. Vance, 1 Ohio 1 (1821); Lindsley v. Coats, 1 Ohio 243, 245 (1821).

[238] Letter of Thomas Jefferson to Edmund Randolph, dated August 18, 1799, 4 *Writings of Thomas Jefferson* 301 f. (Washington ed., 1854).

[239] Pound, *The Spirit of the Common Law* 116 (1921). Ralph Waldo Emerson, in his *Essay on Power*, states that a "Western lawyer of eminence [Judge Emmons of Michigan] said to me he wished it were a penal offense to bring an English law-book into a court of this country." *Conduct of Life*, 6 *The Complete Works of Ralph Waldo Emerson* 62 (1904). See also Baldwin, *The American Judiciary* 114–15 (1905). Some of these attitudes and measures, it must be conceded, were also occasioned by other considerations. Thomas Jefferson, for instance, favored a rule prohibiting the citation of English authorities after George III, because such a rule would eliminate "Mansfield's innovations," which he detested. Peter du Ponceau summarized this situation as follows: "[A] spirit of

This anti–common law trend caused much excitement and grave concern among lawyers and judges alike. Many protests were made by both bench and bar against the actions taken to restrict, modify, or abolish the common law. Hugh H. Brackenridge, Associate Justice of the Supreme Court in Pennsylvania, in 1814 insisted that the Pennsylvania act of 1810, forbidding the citation of English cases and authorities subsequent to July 4, 1776, should be repealed without delay. He felt that this particular statute was unconstitutional on its face in that it abridged the immemorial right of the courts to hear all reasons and arguments on any issue before them.[240] In the Kentucky Assembly, Henry Clay violently objected to the proposal, supported by almost every member of the Assembly, that no English law treatise, report, or decision whatever could be cited as an authority in the state courts. But the most he could obtain in the face of a nearly universal popular demand was an amendment limiting the interdict to such legal works or decisions as had been written or delivered after July 4, 1776.[241]

The anti–common law sentiment was revived during the period of "Jacksonian democracy." Francis Wright, for instance, expostulated in 1829: "*Her* [England's] *law is your law*. Every part and parcel of the absurd, cruel, ignorant, inconsistent, incomprehensible jumble styled the common law of England—every part and parcel of it, I say, not abrogated or altered expressly by legislative statutes, which has been very rarely done—is at this hour the

hostility . . . against this system . . . began in Virginia in the year 1799 or 1800. . . . Not long afterwards, the flame caught in Pennsylvania, and it was for some time believed that the [Pennsylvania] Legislature would abolish the common law altogether. Violent pamphlets were published to instigate them to that measure. . . . It was not long before this inimical disposition towards the common law made its way into the State of Ohio. . . . In other States, attacks upon the Common Law, more or less direct, have appeared from time to time." Du Ponceau, *Dissertation* (1824), reprinted in part in Miller, *Legal Mind* 111 (1962).

[240] Brackenridge, *Law Miscellanies* 49–53 (1814).

[241] See note 235, Chapter I, above. The original proposal had called for the complete abolition and disregard of the whole of English law and English adjudications. For the general policy of forbidding the citation of English decisions rendered after the Revolution, see also Gray, *The Nature and Sources of the Law* 245–46n. (1921); Aumann, "Influence of English and Civil Law Principles," *loc. cit.*, 292–96.

law of revolutionized America."[242] And Frederick Robinson, arguing in the same vein, queried his audience in 1834: "But Shall we, who claim to be free and equal, voluntarily continue in a state of almost total ignorance [as regards the law], with laws so multiplied, so obscure, and so contradictory, as to render the general knowledge of them impossible?"[243]

"Jacksonian democracy," it must be borne in mind, was essentially rural. It was based upon the spirit of good fellowship as well as the genuine feeling of the frontier, in which classes, privileges, particular distinctions, and inequalities of fortune played little or no part. It propagated the doctrine that the self-made man had a natural right to his success wherever he could find it in the free competition with all other men. Conversely, it viewed governmental and institutional restraints of all sorts with the utmost suspicion as an arbitrary and wanton limitation on the right to work out one's own "destiny." What it objected to most were all forms of allegedly artificial obstacles and restrictions, including legal restraints, upon the individual to plan and pursue his own career without fear or favor. What it instinctively opposed was the crystallization of differences, the monopolization of opportunity, and the determination of such monopolies by government, classes, social customs, or law. "The road must be open. The game must be played according to the rules. There must be no artificial stifling of equality of opportunity, no closed doors to the able, no stopping of the free game before it was played to the end." In brief, "Jacksonian democracy" was not one "which expected or acknowledged on the part of the successful ones the right to harden their triumphs into the rule of a privileged class. . . . [I]t resented the conception that opportunity under competition should result in the hopeless inequality, or rule of class."[244] But in fairness to "Jacksonian democracy" it should also be observed that it initiated a great many positive social programs through the establishment of public welfare institutions, through the use of public revenues, public credit, or land grants for the purpose of internal improvements, and

[242] Wright, *On Existing Evils and Their Remedy*, reprinted in *Social Theories of Jacksonian Democracy* 282–88 (Blau ed., 1947), at 282.

[243] Robinson, *Program for Labor* 331 (1834).

[244] Turner, *The Frontier in American History* 302, 342–43 (1953).

through the subsidizing of free or cheap distribution of public lands. In the light of these far-reaching or "revolutionary" social reforms, which could not but violently affect the existing creditor-debtor relations, it is more than likely that much of the anti-Jacksonian feelings of the times were connected with the paramount creditor-debtor situation which the government tried to alleviate by introducing certain measures, such as credit and currency controls, debt moratoria, and the like. Such measures, to be sure, were most unpopular with the creditors, banks, lenders, and, incidentally, the majority of the lawyers who, in the main, were on the side of the creditors. Hence, the general aversion of the contemporary legal profession, especially of the more successful lawyers who represented the creditors, to "Jacksonian democracy" must be gauged not only by the fact that it undoubtedly brought on a devastating trend toward deprofessionalization, but also by the far-reaching effects it had upon the existing creditor-debtor relations which obviously provided a great many lawyers with the bulk of their professional incomes.

In an essay published in New York in 1830, P. W. Grayson, an ignorant but vociferous Jacksonian demagogue, attacked both the common law and the legal profession with equal vehemence:

> I have already sufficiently considered the demoralizing influence of law . . . on the temper and principles of men. . . . [There exists, however,] another influence to inflame its mischievous power . . . [namely,] that of a certain class of men who are know[n] by the name of lawyers, whom we find swarming in every hole and corner of society. . . . [M]en in general . . . exert all their craft in turning the laws to their own advantage. . . . But who can set bounds to their iniquity, when these natural impulses come to be instructed and fomented by the learned and licensed jugglers in legal chicanery, creatures who are *ever at hand* . . . shedding upon it the pestilence of discord, strife, and injustice! . . . [This] long train of congenital . . . blood suckers, and caterpillars . . . this mighty corps of undertakers—these slippery factors of justice— . . . [should be banished] as dangerous pests, as *paltry things*. . . . Gain . . . is their animating principle . . . [and] they are ready to execute any prescription of either justice or injustice. . . . [T]hese counterfeits of men are now to be the proud dictators of human destiny. . . . Their practices . . . supersede all other cri-

terions of right. . . . What then is this [legal profession] . . . ?—*genius putting itself to sale* . . . offering itself a loose prostitute to the capricious use of all men alike, for gold! . . . Surely the system, which involves such a spectacle . . . must be rotten.[245]

The widespread aversion to and rejection of the traditional common law of England which made itself felt after the Revolution also tended to leave the courts and the lawyers without the guidance and systems of authoritative legal materials in the administration of justice. "[A]s principles applicable to our Constitution were unsettled, and the rules of law unknown, except through the distant and dim vision of English reports, the claims of real property opened at once a large field of forensic legislation. Everything in the law seemed, at that day, to be new; we had no domestic precedents to guide us. . . . Almost every point of practice had to be investigated and tested, even Mr. Hamilton thought it necessary, at a circuit at which I was present, in 1784, to produce authorities to demonstrate and guide the powers of the court in the familiar case of putting off a cause at circuit."[246] It has already been noted that a number of states legislated against the citation of English decisions or authorities. At the same time practically no contemporary American case was officially reported. When, for instance, James Kent came to the bench in 1798, he found himself almost completely without assistance from reported decisions of his predecessors on the New York bench.[247] The legal uncertainty,

[245] Grayson, *Vice Unmasked, An Essay: Being a Consideration of the Influence of Law upon the Moral Essence of Man, with other Reflections* (1830), reprinted in part in Miller, *Legal Mind* 192–200 (1962). P. W. Grayson "confesses" that he himself was once "one of the faculty [*scil.*, the legal profession], up to a time that is now very recent, when . . . I renounced the detestable calling forever." *Ibid.*, 200.

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

[247] See Kent, *Memoirs and Letters of James Kent* 112–13 (1898). Roscoe Pound quotes Kent as having said: "[When I came to the bench in 1798,] there were no reports or state precedents. The opinions from the bench were *ore tenemus*." Kent continued: "We had no law of our own and nobody knew what the law was." Referring to his experiences as Chancellor of New York, Kent remarked: "[F]or the nine years I was in that office there was not a single decision, opinion, or dictum of either of my predecessors . . . from 1777 to 1814 cited to me or ever suggested." Pound, "The Place of Judge Story in the Making of American Law," 48 *American Law Review* 683 (1914).

and even chaos, which this situation engendered was strongly deplored by reputable members of both bench and bar. Lawyers no less than courts frequently had to rely on vague and not always trustworthy recollections: "The *United States* have, until within a few years, trusted to tradition the reasons for their judicial decisions. But . . . with more enlarged views of jurisprudence it became obvious, that the exposition of our statutes and the validity of our customs should rest upon a more secure basis than the memory of man or the silent influence of unquestioned usage."[248] Cranch, in the Preface to the first edition of his *Reports* of 1804, lamented: "Much of that uncertainty of the law, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports."[249] And James Sullivan, in the Preface to his *History of Land Titles in Massachusetts*, observed in 1801: "The want of accurate reports . . . is very discouraging. . . . It would be well for us . . . to have our own reporters." Caine, in the Preface to the first edition of his *New York Reports*, likewise deplored this situation: "The inconveniences resulting from the want of a connected system of judicial reports have been experienced and lamented by every member of that [legal] profession . . . The determinations of the court have been with difficulty extended beyond the circle of those immediately concerned in the suits in which they were pronounced; points adjudged have been often forgotten, and instances may be adduced where those solemnly established, have, even by the bench, been treated as new. If this can happen to those before whom every subject of debate is necessarily agitated and determined, what must be the state of the lawyer whose sole information arises from his own practice, or the hearsay of others? Formed on books, the doctrines of which have in many respects been wisely overruled, he must have frequently counseled without advice, and acted without a guide."[250]

[248] Anonymous, "Review of Tyng's Massachusetts Reports," 1 *American Law Journal* 361 f. (1809).

[249] 5 U.S. (1 Cranch), Preface III (3rd ed., 1911). See also Preface, 1 Chipman (Vt.) 4–5: "While former decisions rest only in the memory of the Judge, overburthened in term, and perplexed with a multiplicity of cases; on the memory of the counsel, frequently under a powerful bias . . . ."

[250] Preface to the First Edition (1801), 2 Caine 33 (Smith and Hitchcock

In 1784, through the efforts of two prominent lawyers, Richard Law and Roger Sherman, the state of Connecticut passed a statute[251] requiring the judges of the state Supreme Court and Superior Court to render written reasons for their opinions whenever a legal issue was involved, so that they might be properly reported[252] and thus a foundation might be laid "for the more perfect and permanent system of Common Law in this State."[253] In 1789, Ephraim Kirby published the first report, known as *Kirby's Reports* (one volume),[254] in which he collected the decisions of the Superior Court from 1785 to May, 1788, together with some decisions of the Supreme Court of Errors. Subsequently, Jesse Root (*Root's Reports*, in two volumes) reported cases from July, 1789, to 1798.[255] In his Preface, Kirby stated:

> The uncertainty and contradiction attending the judicial decisions in this state, have long been subjects of complaint. The source of this complaint is easily discovered. . . . [O]ur ancestors . . . brought with them the notions of jurisprudence which prevailed in the country from whence they came. The riches, luxury, and extensive commerce of that country, contrasted with the equal distribution of property, simplicity of manners, and agricultural habits and employments of this, rendered a deviation from the English laws, in many instances, highly necessary. . . . Our courts were still in a state of embarrassment, sensible that the common law of England . . . was not fully applicable to our situation; but no provision being made to preserve and publish proper histories of their adjudications, every attempt of the judges, to run the line of distinction, between what was applicable and what not, proved abortive: For the principles of their decisions were soon forgot, or misunderstood, or erroneously reported from memory. Hence arose a confusion in the determination of our courts.[256]

ed., 1883). See also Kent, *Memoirs and Letters* 158 (1898): "I took to the court [the Chancery Court of New York] . . . [and] I had nothing to guide me."

[251] *Revised Statutes of Connecticut of 1784* 207 (1804).

[252] See *Kirby's Reports* (Conn.) Preface, iii–iv (1889).

[253] See also Anonymous, "American Reports and Reporters," 22 *American Jurist and Law Magazine* 108 (1839); *Revised Statutes of Connecticut of 1784* 207 (1784).

[254] The full title was *Report of Cases Adjudged in the Superior Court and Court of Errors of the State of Connecticut from the Year 1785 to May, 1788* (1789).

[255] *Kirby's Reports* hold a place in American legal literature comparable to Plowden's *Commentaries* in English legal literature.

In 1790, Alexander J. Dallas published the first volume of his reports of Pennsylvania cases;[257] Nathaniel Chipman (*Chipman's Reports*) reported for Vermont in 1793;[258] George Wythe published the *Decisions of Cases in Virginia by the High Court of Chancery* in 1795;[259] and François Xavier Martin (*Martin's Reports*) reported for North Carolina in 1797.[260] The first unofficial reports of the state of New York, on the initiative of James Kent, were compiled by Coleman in 1801, while the first official reports were those of George Caine, who had been appointed regular reporter by the state legislature in 1804. The first volume (2 Dallas) of cases decided by the Supreme Court of the United States was published by Alexander J. Dallas in 1798;[261] and in 1804, William Cranch began the publication of his *Supreme Court Reports*.[262]

[256] *Kirby's Reports* Preface, iii (1899).

[257] This collection contains decisions dating as far back as the year 1754.

[258] Nathaniel Chipman's brother, Daniel Chipman, became the first official reporter for Vermont. In 1823 the legislature appointed Daniel to that position, and he published, in 1824, the first volume of *Reports of Cases Argued and Determined in the Supreme Court of the State of Vermont*.

[259] Between 1796 and 1799, Wythe published seven additional cases in several pamphlets.

[260] *Cases Adjudged in the Superior Courts*, referred to as 1 Martin, reports decisions from November, 1778, to March, 1797; *Cases Adjudged in the U. S. Circuit Court for North Carolina*, referred to as 2 Martin, reports two cases, Hamilton v. Eaton, and Palyart v. Goulding, decided in the June term, 1796. See 1 North Carolina 1–84, 641–91 (1901).

[261] Dallas, in volumes 2–4, reported cases from the organization of the Supreme Court of the United States in 1790 to the August term of 1800.

[262] See, in general, Anonymous, "American Reports and Reporters," 22 *American Jurist and Law Magazine* 108–42 (1839). The *National Intelligencer*, July 10, 1804, said about the first volume of the Supreme Court Reports: "Gentlemen of the profession throughout the United States are much indebted to the industry and learning of Mr. Cranch. . . . We are happy to state that these reports have been compiled with the utmost attention to accuracy and that the learned reporter will continue them under proper encouragement. . . . We feel sanguine then that this specimen may operate as an incentive to legal gentlemen in different parts of the Union towards lending their aid to similar publications. By the proper exertion in this way, we may expect to see a code of Common Law arising out of our own Constitutions, laws, customs and state of society, independent of that servile recourse to the decisions of foreign Judicatures to which, since our revolution, we have been too much accustomed."

By the Act of March 22, 1816, provision was made for the first time for an official publication of the decisions of the Supreme Court of the United States, but with no provision for a salary to be paid to the official reporter. However, not until March 14, 1834, was there any order that all opinions of the Supreme Court must be filed with the clerk.

Other states gradually introduced a reporter system of their own: Kentucky (*Hughes' Reports*) in 1803,[263] Massachusetts (*William's Reports*, continued by *Tyng's Reports*) in 1805,[264] Maryland (*Harris & McHenry's Reports*) and South Carolina (*Day's Reports*) in 1809,[265] Maine (*Greenleaf's Reports*) in 1822, New Hampshire (*Adam's Reports*) in 1819, Georgia (*T.U.P. Charlton's Reports*) in 1824, and Delaware (*Harrington's Reports*) in 1837. Thus in a relatively short period of time a fairly large number of reported cases became generally available. It has been estimated that by the year 1822 there existed about 140 or 150 volumes of American reports.[266] The rate of increase was so rapid that by 1824 complaints were already voiced about the "vast and increasing multiplications of reports as well as law treatises."[267] More realistic observers, however, hailed this development as one of the most significant steps in American jurisprudence. They asserted that it would substantially improve the quality of American

[263] The first constitution of Kentucky contained a provision which required the judges of the appellate court "to state in their opinions such facts and authorities as should be necessary to expose the principle of each decision." However, no method of reporting decisions was provided by the legislature until 1815, when the governor was authorized to appoint an official reporter. But as early as 1803, James Hughes, an eminent lawyer, had, at his own expense, published an unofficial volume of decisions handed down between 1785 and 1801. Achilles Sneed, clerk of the Court of Appeals, published a small volume of opinions in 1805; and Martin D. Hardin, a lawyer of great distinction, published a volume of decisions from 1805 to 1808. George M. Bibb was the first reporter appointed by the governor.

[264] It should be noted that New York and Massachusetts were the first states to institute reports by statute.

[265] During the colonial history of South Carolina important or controversial decisions were preserved in full in the records of the court or the journals of the Assembly. In 1799 an act was passed providing that every judge of the Court of Appeals must reduce to writing his opinion and reason for the purpose of preserving them. But only in 1823 was an official reporter appointed.

[266] Anonymous, 15 *North American Review* 65 (1822).

[267] Anonymous, 19 *ibid.*, 377 (1824).

law, and that it compelled the judiciary to adhere to a more regular and more efficient administration of justice.[268] "More than one hundred and fifty volumes of reports are already published," Justice Joseph Story observed in 1821, "containing a mass of decisions, which evince uncommon ambition to acquire the highest professional character. The best of our reports scarcely shrink from a comparison with those of England in the corresponding period."[269]

"In the hundred years beween the publication in 1687 of William Penn's gleanings from Lord Coke and the issuance of the American editions of Buller's *Nisi Prius* and Gilbert's *Evidence* in 1788, not a single book that could be called a treatise intended for the use of professional lawyers was published in the British Colonies and the American States."[270] The first American law treatises published after 1788 owed their origin largely to the general demand for "native" legal texts to be used by practitioners of all sorts.[271] The first legal texts which appeared after the year 1788 dealt with pleading,[272] real property,[273] maritime law, or maritime insurance. In addition, a few scattered works on some special subjects were published. Of more than local importance was Zephaniah Swift's *A System of the Laws of the State of Connecticut*, published in 1795–96. Four general comprehensive works on law were also published during this period, namely, *The Reports and Dissertations* (1793) of Nathaniel Chipman, Chief Justice of Vermont; St. George Tucker's edition of Blackstone's *Commentaries* of 1803, which had a widespread circulation; the lectures on law

[268] Some of these laudatory statements were published in the *North American Review* between 1822 and 1826.

[269] Story, *Address Delivered before the Members of the Suffolk Bar, at Their Anniversary on the 4th September, 1821, at Boston* (1821), reprinted in part in Miller, *Legal Mind* 67–75 (1962), at 68. In a spirit of caution Story continued: "The danger, indeed, seems to be, not that we shall hereafter want able reports, but that we shall be overwhelmed by their number and variety." *Ibid.*

[270] James, "A List of Legal Treatises Printed in the British Colonies and the American States before 1801," *Harvard Legal Essays* 159 (1934).

[271] For a compilation of early American legal treatises, see also Marvin, *Legal Bibliography, or a Thesaurus of American, English, Irish, and Scotch Law Books* (1847).

[272] The most famous treatise on pleading was probably Joseph Story's *Selection of Pleadings in Civil Cases*, published in 1805.

[273] See, for instance, James Sullivan, *History of Land Titles in Massachusetts*, published in 1801. See the text corresponding to note 250, Chapter I, above.

which were delivered in 1804 at the College of Philadelphia by James Wilson, Associate Justice of the Supreme Court of the United States; and *Law Miscellanies* (1814) by Hugh Henry Brackenridge, Associate Justice of the Supreme Court of Pennsylvania. Also, Blackstone's original *Commentaries* were still much in use throughout the United States. But most of the earliest American law texts were clearly intended for the use of laymen–they were largely manuals for petty officials, justices of the peace, town officers, and the like.[274] Hence, they were of little value to the professional lawyer or judge. This dearth of reliable authoritative legal materials and guides in turn compelled the lawyer to resort to English texts, and, frequently, to English reports, even though these sources had practically been outlawed in some states. During the Revolution the dearth of lawbooks was so acute that the libraries of lawyers who had remained loyal to England were confiscated. The Massachusetts legislature passed resolves permitting judges to purchase these books at a fair valuation.[275] Judge James Sullivan, for instance, in 1779 was authorized to buy several lawbooks which formerly had belonged to Jeremiah Gridley.[276]

It is not surprising, therefore, that during this period a number of English lawbooks and law texts were republished or re-edited, such as Jones's *Essay on the Law of Bailments*, Kyd's *Treatise of the Law of Bills of Exchange and Promissory Notes*, and Park's *System of the Law of Maritime Insurance*. Much of Joseph Story's early literary activity was dedicated to the re-editing of leading English law texts, such as Chitty's *Bills and Notes* in 1809. But it took some time before the bench or the bar had an adequate body of legal authorities, especially American authorities, that were adapted to the new conditions and could be used as consistent and reliable guides during the earliest stages in the formative era of

[274] See James, "List of Legal Treatises," *loc. cit.*, 4.

[275] See, in general, *Collection of Acts or Laws Passed in the State of Massachusetts Bay Relative to the American Loyalists and Their Property* (1785), especially at 15ff. (An Act for Confiscating the Estates of Certain Persons, Commonly Called Absentees, 1799) and 22ff. (An 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, 1779). In 1784 these two Acts were repealed, viz., amended. See *ibid.*, 26ff., 31ff.

[276] See 2 Amory, *Life of James Sullivan* 4 (1859).

American law and jurisprudence. In the meantime, American lawyers were compelled to rely mainly on "the memory of man and the silent influence of unquestioned usage."[277] Naturally, they could always fall back on, and frequently had to rely upon, Blackstone's *Commentaries*, of which the first American edition appeared in the year 1771–72.

An entirely novel development of the post-Revolutionary era was the establishment of a federal bar. The newly created Supreme Court of the United States opened in New York on February 2, 1790. On February 5 three lawyers were admitted to practice before it as counselors: Richard Harison of New York, Elisha Boudinot of New Jersey, and Thomas Hartley of Pennsylvania. Between February 8 and February 10, 1790, fifteen additional counselors and seven attorneys were sworn in: seven counselors from New York, three from Massachusetts, two from New Jersey, one from Pennsylvania, one from South Carolina, and one from Georgia. All seven attorneys were from New York. A contemporary newspaper of Federalist leanings remarked of the earliest bar of the Supreme Court: "Every friend of America must be highly gratified when he peruses the long list of eminent and worthy characters who have come forward as practitioners at the Federal Bar, where the most important rights of Man must, in time, be discussed and determined upon, as well as those of Nations, as of individuals."[278] Of the first nineteen counselors admitted to the bar of the Supreme Court, two were Senators and nine were Representatives attending the First Congress held in New York City. The Antifederalist newspapers, as might have been expected, were highly critical of the number of members of Congress admitted to the federal bar: "It is alarming to find so many Members of Congress sworn into the Federal Court at its first sitting in New York. The question is whether it is proper that Congress should consist of so large a proportion of Members who are sworn attorneys in the Federal Courts; or whether it is prudent to trust men to enact laws who are practising on them in another department. . . . If Congress does consist of practising Attorneys, the laws enacted

[277] Anonymous, "Review of Tyng's Massachusetts Reports," 1 *American Law Journal* 361f. (1808).

[278] *Gazette of the United States*, March 6, 1790.

[by them] may, in a great measure, depend on the particular causes such individuals may have to manage in the Judiciary."[279]

In 1791 the Supreme Court of the United States moved from New York to Philadelphia, where it sat until 1801. The majority of the additional lawyers admitted to practice before it during that period were, as might be expected, members of the Philadelphia bar, among them such legal luminaries as Jared Ingersoll, William Bradford, William Lewis, Edward Tilghman, Alexander J. Dallas, and William Rawle. When the Court convened for the first time in Philadelphia on February 7, 1791, an unusual incident happened: The Philadelphia lawyers apparently assumed that, since Associate Justice James Wilson himself had been a member of the Philadelphia bar and, hence, knew them all intimately, no insistence would be made by the Court on the production of certificates of character and ability.[280] To the surprise and anger of every attending lawyer, Wilson, who was a somewhat cantankerous man, simply refused to vouch for them.[281] In the beginning the vast majority of lawyers constituting the bar of the Supreme Court came from New York, New Jersey, Massachusetts, Connecticut, Delaware, Pennsylvania, Virginia, South Carolina, Maryland, and Rhode Island. Around the year 1820 this bar, however, underwent considerable changes: Lawyers from other states, including the "Western" states, began to appear with ever greater regularity before the highest federal court, especially since by that time improved means of communication and transportation had made Washington more accessible for lawyers from distant states. At the same time some of the better known lawyers settled in or around Washington and made it a regular practice to argue cases before the Supreme Court, among them such prominent men as Charles Simms, Thomas Swann, Richard S. Coxe, Francis Scott Key, William Sampson, and, above all, Walter Jones, who has been called a "rival of Pinkney, Wirt and Webster."[282]

The early federal bar, which practiced with outstanding success before the Supreme Court of the United States, without doubt contributed heavily to the development of American law, especially American constitutional law. While the general trend of political, social, and economic history of early America was decisively influenced by the statesmanlike decisions of Chief Justice Marshall, not a small share in the accolades paid to the enduring greatness of these decisions must be awarded to resourceful lawyers who argued before him.[283] It has been justly remarked about the early federal bar that "[w]hile no judge ever profited more from argument; it is not, perhaps, diverging into the circle of exaggeration to say, that no Bar was ever more capable of aiding the mind of the Bench, than the Bar of the Supreme Court, in the time of Chief Justice Marshall."[284] By the year 1821 the discriminating Joseph Story had this to say about the lawyers who in ever-increasing numbers were admitted to practice before the Supreme Court:

> The discussion of constitutional questions throws a lustre round

[279] *Independent Chronicle*, September 23, 1790.

[280] See Rule of the Supreme Court, 2 U.S. (2 Dall.) 347 (1790).

[281] See letter of Edward Hurd to Jasper Yates, dated February 8, 1791, 34 *American Law Review* 628–29 (1900).

[282] Quoted in 2 Warren, *The Supreme Court in United States History* 344n. (1924).

[283] The courts, too, have also acknowledged on occasion the influence which a capable bar had, and still has, upon the decisions of the bench. In Bridge Proprietors v. Hoboken Company, 68 U.S. (1 Wall.) 116, 142 (1864), Justice Miller commented on the significance of a previous case (Crowell v. Randell, 35 U.S. [10 Pet.] 240 [1836]) which had been argued at such length by Webster, Sergeant, and Clayton, "whose names are a sufficient guarantee that the matter was well considered." In Sauer v. New York, 206 U.S. 536, 538 (1907), Justice McKenna, dissenting, stated: "The *Elevated Railroad* cases get significance from the arguments of counsel. Such arguments, of course, are not necessarily a test of the decision. But they may be. The opinion may respond accurately to them."

[284] Quoted in Warren, *History of the American Bar* 262ff. (1911). See also the address of Justice Harlan on the occasion of the "Centennial Celebration of the Organization of the Federal Judiciary," held at New York, February 4, 1890, 134 U.S. 751, 753 (N.S. 1890): "It has been said of some of the judgments of the Supreme Court of the United States that they are not excelled by any ever delivered in the judicial tribunals of any country. Candor, however, requires the concession that their preparation was preceded by arguments at its bar of which it may be said . . . that they were of such transcending power that those who heard them were lost in admiration." Justice James Iredell, in Ware v. Hylton, 3 U.S. (3 Dall.) 158, 203 (1796), stated: "The cause has been spoken to, at the bar, with a degree of ability equal to any occasion. . . . I shall, as long as I live, remember, with pleasure and respect, the arguments which I have heard on this case; they have discovered an ingenuity, a depth of investigation, and a power of reasoning fully equal to anything I have ever witnessed." It might be interesting to note that Ware v. Hylton was argued by John Marshall and Alexander J. Campbell against William Lewis and Edward Tilghman.

the Bar, and gives a dignity to its functions, which can rarely belong to the profession in any other country. Lawyers are here, emphatically, placed as sentinels upon the outposts of the constitution; and no nobler end can be proposed for their ambition or patriotism, than to stand as faithful guardians of the constitution, ready to defend its legitimate powers, and to stay the arm of the legislative, executive, or popular oppression. If their eloquence can charm, when it vindicates the innocent, and the suffering under private wrongs; if their learning and genius can, with almost superhuman witchery, unfold the mazes and intricacies, by which the minute links of title are chained to the adamantine pillars of the law;—how much more glory belongs to them, when this eloquence, this learning, and this genius, are employed in defence of their country; when they breathe forth the purest spirit of morality and virtue in support of the rights of mankind; when they expound the lofty doctrines, which sustain, and connect, and guide, the destinies of nations; when they combat popular delusions at the expense of fame, and friendship, and political honors; when they triumph by arresting the progress of error and the march of power; and drive back the torrent, that threatens destruction equally to public liberty and private property, to all that delights us in private life, and all that gives grace and authority in public office.[285]

It has been pointed out that the American Revolution and the novel political and socioeconomic conditions which it created on the whole had a temporarily adverse effect on the American legal profession, which before the Revolution had achieved real prominence. After having recovered fairly quickly and certainly most

[285] Story, *Address Delivered before the Members of the Suffolk Bar, 1821* (1821), reprinted in part in Miller, *Legal Mind* 67–75 (1962), at 71–72. Six years before Story spoke out, Richard Rush, sometime Attorney General of the United States, Secretary of State, Minister to Great Britain, Secretary of the Treasury, and Minister to France, had this to say about the lawyers who argued before the Supreme Court: "The men among us . . . who become as well the safe counsellors as the eloquent advocates, are only those . . . who . . . devote their days to business and their nights to study. . . . [W]e see no reason why we may not breed Gibbs's and Garrows, and Saubreys, and Lawrences [all outstanding English lawyers and judges around the turn of the century—A.-H. C.], and breed them in abundance. . . . Let the courts of England boast of Sir William Scott. Those of America will boast of John Marshall." Rush, *American Jurisprudence* (1815), reprinted in part in Miller, *Legal Mind* 43–52 (1962), especially at 46–47, 52.

successfully from this first setback, beginning with the 1830's the profession was faced with the more serious and more lasting threat of "Jacksonian democracy." Within the postwar period as well as during the first half of the nineteenth century, however, important signs of coming growth and vigor can also be noticed. In fact, the period between the years 1789 and approximately 1850 in a way may be called the "formative era" or, perhaps, even the "golden age" of American law and, with some important reservations, also of the American legal profession.[286] This paradoxical situation may possibly be explained by the fact that in spite of much adversity, and perhaps on account of it, America produced during this period a disproportionately large number of outstanding lawyers (Luther Martin, William Pinkney, William Wirt, Jeremiah Mason, Daniel Webster, Rufus Choate, James L. Petigru, Horace Binney, and Reverdy Johnson, to mention only the most prominent practitioners) as well as eminent judges (John Marshall, James Kent, Joseph Story, Lemuel Shaw, John B. Gibson, and Thomas Ruffin).

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

[286] See, in general, Pound, *The Formative Era of American Law* (1938).

inexpedient.[287] The most pressing problem during the formative era of American law, therefore, was to work out and lay down certain rules—to create an apparatus of legal precepts equal to the requirements of early American life. This basic problem determined the American system of courts, the American judicial organization, and to a large degree, the course of American legal development for about three-quarters of a century. It was less important, therefore, to decide particular cases "justly" than to work out sound, consistent, and abstract "just" rules. The chief concern of the early American courts was the development and stabilization of a body of laws in each jurisdiction by means of judicial decisions, and the function of ascertaining and declaring the law came to be the most important activity of the courts.[288]

After the year 1789 the growth of American law was largely due to great lawyers and great judges. The creative legal achievements of these men will bear favorable comparison with the great legal accomplishments of any age in Western history. Within a relatively short span of time the English common law of the seventeenth and eighteenth centuries was made over into a common law for America. It should be borne in mind that the bases of the American rules in real property, contracts, sales of goods, torts, equity, and conflict of laws, to mention only the staple fields of law, were laid in the period between 1810 and 1850. The War of 1812, while of questionable political significance, had far-reaching effects upon American economic and legal history in that it not only gave rise to the rapid development of law in general, but stimulated the growth of the many branches of modern law. It gave great impetus to the expansion of admiralty and prize law, as well as to maritime insurance law.[289] The development of early

[287] *Ibid.*, 96–97; Pound, "The Ideal Element in American Judicial Decisions," 45 *Harvard Law Review* 136, 142–43, 147 (1931).

[288] See Pound, *Formative Era* 102–104 (1938).

[289] It will be noted that some of the great lawyers of the early American bar made lasting contributions to the development of international law, admiralty law, and prize law in America. Originally this particular aspect of legal practice was little known in the United States. See, for instance, The Dos Hermanos, 15 U.S. (2 Wheat.) 37, 39 (1817), where Justice Joseph Story stated: "This court [*scil.*, the Supreme Court of the United States] cannot but watch with considerable solicitude irregularities, which so materially impair the simplicity of prize proceedings. . . . Some apology . . . may be found in the fact, that from our having

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

It may also be noted here that the legal profession in the early United States was never a "class" determined by family lineage. The closest approach to such a "class" can be detected in pre-Revolutionary Virginia, South Carolina, New York, and probably Massachusetts. In Virginia and South Carolina the landed and wealthy gentry made it a practice to send their sons to the Inns of Court in London. In Massachusetts the beginnings of a self-perpetuating and somewhat closed class of "Harvard lawyers" made themselves felt. New York, like some other cities, had a number of men "born to the law" or bred in it, such as the Livingstons. But, in the main, the leading lawyers both shortly before and im-

been long at peace no opportunity was afforded to learn the correct practice in prize causes. But that apology no longer exists." See also Story's letter to Sir William Scott, later Lord Stowell, dated January 14, 1819: "The Admiralty Law was in a great measure a new system to us; and we had to grope our way as well as we could by the feeble and indistinct light which glimmered through allusions incidentally made to the known rules and proceedings of an ancient court. Under these circumstances, every case, whether of practice or principle, was required to be reasoned out, and it was scarcely allowable to promulgate a rule without at the same time expounding its conformity to the usages of Admiralty tribunals." 1 Story, *Life and Letters of Joseph Story* 318 (1851). It was largely with the aid of the learning and arguments of such great lawyers as William Pinkney, William Wirt, Daniel Webster, Samuel Dexter, Joseph Hopkinson, Henry Wheaton, John Sergeant, David B. Ogden, and William H. Winder that, between 1815 and 1822, John Marshall and Joseph Story were enabled to create and employ in a masterly series of opinions a distinct American conception of international law, admiralty law, and prize law. It should also be borne in mind that many of the most prominent lawyers of this period made their first appearance before the Supreme Court of the United States in prize or admiralty cases: William Pinkney in 1806 in Manella, Pujals & Co. v. James Barry, 7 U.S. (3 Cranch) 249 (1806); Joseph Hopkinson in 1807 in Rhinelander v. Insurance Company of Pennsylvania, 8 U.S. (4 Cranch) 18 (1807); John Sergeant in 1816 in The Aurora, 14 U.S. (1 Wheat.) 45 (1816); Henry Wheaton in 1816 in The Antonia Johanna, 14 U.S. (1 Wheat.) 74 (1816); Daniel Webster in 1814 in The St. Lawrence, 12 U.S. (12 Cranch) 268 (1814), and The Grotius, *ibid.*, 282; and William Wirt in 1817 in The Fortuna, 15 U.S. (2 Wheat.) 76 (1817).

mediately after the Revolution came from the "middle" or "upper-middle" class. Such men as the Livingstons and Jays of New York, the Randolphs and Lees of Virginia, the Carrolls of Maryland, the Pinckneys and Rutledges of South Carolina, or the Ingersolls of Philadelphia, on the other hand, belonged to the upper stratum of American society. As time progressed, the American legal profession drew its members from all social and economic levels: the poor immigrant or immigrant's son and the small farmer's boy—William Wirt of Virginia is perhaps the classical example of the "success story" as a lawyer[290]—no less than the scion of the aristocratic and prosperous landowner or thriving merchant aspired to the bar. From its very beginning the American legal profession was, and still is, one of the main avenues of self-advancement for ambitious young men; and many leaders of the early American bar came from a background that was socially modest, though often above average in culture.

It appears that during the first decades of the republic the law exerted less of an attraction on New Englanders than it did, for instance, on Southerners.[291] The new post-Revolutionary generation in the South, whose approach and outlook on life in general was in sharp contrast to the views held by the old colonial gentry,

[290] In 1850 a book was published anonymously, entitled *Success in Life: The Lawyer*, which was principally concerned with the life and professional success of William Wirt, as well as with his ascendency from obscure beginnings to fame and fortune. The personal legends woven around Wirt's life grossly exaggerated his professional achievements as well as his abilities. As a self-made man, Wirt remarked in his *Letters of a British Spy* (on p. 68), published in 1803, on "a venerable group of humble *homines novi* [in Virginia] . . . who, from the lowest depths of obscurity and want [Wirt was the orphan child of a German mother and a tavern-keeper of Swiss origin in Bladensburg, Maryland, who had been brought to the colonies as an indentured servant—A.-H. C.], and without even the influence of a patron, have risen to the first honors of their country." It goes without saying that this is a bit of autobiographical self-appraisal of a "successful" man. Wirt also took great pleasure in advising young men as to how they might succeed in life, and his advice frequently amounted to a quaint blending of Benjamin Franklin and Lord Chesterfield. See, for instance, 2 Kennedy, *Memoirs of the Life of William Wirt* 16, 97, 356 (1860). Wirt's *Sketches of the Life and Character of Patrick Henry*, published in 1817, essentially is nothing more than a fantastic "success story." The Patrick Henry who emerges from this book is the forerunner not only of the American "success tycoon" but also of the American "popular hero." See Taylor, *Cavalier and Yankee* 71–94 (1961).

[291] Taylor, *Cavalier and Yankee* 43 (1961).

soon discovered that law was an effective stepping stone to political and social success. These "new men," or "*homines novi*" as they were called in the classically minded South, were shrewd, imaginative, and energetic; and their whole approach was frequently opportunistic. They brought to law and, incidentally, to politics a novel atmosphere of intense competition that had been wholly alien to the older generation of lawyers.[292] "The profession of law in this country," William C. Preston, a representative of the old ways, commented in 1843, "involves the cultivation of eloquence and leads to public advancement and public honors."[293] The representative of the "new generation," in the words of William J. Grayson, "was an able speaker and good lawyer; bold, ready, regardless of respect to opposing counsel, witnesses, or clients, and unscrupulous as to the language in which he expressed his contempt; skilled in cajoling the jury and bullying the judge; little sensitive as to his own feelings, and utterly without regard to the feelings of others. One purpose only seemed to govern him—the purpose to gain his case at all hazards. He was a formidable adversary, and the lawyers of the old school were reluctant to encounter his rude assault."[294]

Lawyers' incomes from the practice of law during the first fifty years of the new republic varied greatly. On the whole they were on the modest side, however. Around 1790 "[t]he State of Connecticut," Jeremiah Mason relates, "was overstocked with lawyers; most of them had but little business, with fees and compensation miserably small. The professional income of Pierpont Edwards, supposed to be the largest in the State, was said not to amount to two thousand dollars a year. Very few [lawyers] obtained half of that sum; my master Baldwin, with his utmost diligence, was scarcely able to maintain his small family, living in the most simple manner."[295] John Marshall, who made practically no money as a lawyer during his first year at the bar of Richmond, Virginia, in 1783, and received only a very modest income in the year 1784, by 1785 saw a reasonable growth of his law practice

[292] *Ibid.*, 58.

[293] Preston, *Eulogy on Hugh Swinton Légaré* 14 (1843).

[294] Grayson, *James Louis Petigru* 89–90 (1866); Taylor, *Cavalier and Yankee* 58–59 (1961).

[295] Clark, *Jeremiah Mason* 16–17 (1917).

and a corresponding increase in his professional earnings. He earned about £508 in 1786 (this amount also included income from sources other than the practice of law), and in 1787 his earnings were still mounting, though rather slowly. In 1788 he earned about £1,170 (or about $3,500 Virginia currency); in 1789, £710 (or $2,130); in 1790, £800 (or $2,400); in 1791, £733 (or $2,200); in 1792, £402 (or $1,210); in 1793, a trifle less than £400 (or $1,200); and in 1794, about the same amount—all after expenses.[296] La Rochefoucauld recorded in 1797 that "Mr. Marshall does not, from his practice, derive above four or five thousand dollars per annum and not even that sum every year."[297]

According to George W. Strong, his father, who practiced in upstate New York, earned $217 during his first year at the bar (1826–27), but "in his third year of practice was evidently making good headway, for his receipts in 1829 amounted to $670.00."[298] Bartholomew F. Moore, who was admitted to the North Carolina bar in 1823, relates that his total income from the practice of law during his first seven years amounted to only $700, or about $100 per year.[299] Mr. Redin, a distinguished lawyer in the District of Columbia, around 1835 was so "straitened in his means" that on "his first visit to Rockville [Maryland] he walked all the way there and back, twelve miles each way, in one day, to save expenses."[300]

By contrast, William Pinkney of Maryland, in 1816, had a professional income greatly in excess of $20,000 a year.[301] Alex-

[296] 1 Beveridge, *The Life of John Marshall* 176–90 (1929); 2 Beveridge, *The Life of John Marshall* 170–71 (1929).

[297] 3 La Rochefoucauld, *Travels through the United States of America* 75–76 (1799).

[298] Strong, *Landmarks of a Lawyer's Lifetime* 11 (1910).

[299] Haywood, *Some Notes in Regard to the Eminent Lawyers Whose Portraits Adorn the Walls of the Supreme Court Room at Raleigh, North Carolina* (An Address delivered before the Wake County Junior Bar Association, June 1, 1936) 15–16 (no date).

[300] Cox, "The Old Circuit Bar," 2 *Bulletin of the Bar Association of the District of Columbia* 15, 21 (October, 1935). "Judge" David Hart of the old First Circuit of Indiana was the proprietor of a tavern. He maintained during the year 1816 that "the legal profession [in Indiana] was the least profitable occupation in the country, and 'merchandising' the most profitable." 1 Monks (ed.), *Courts and Lawyers of Indiana* 63 (1916). Hart was probably aware of the fact that the tavern-keeper or bartender is, and always has been, America's favored "legal advisor."

ander James Dallas of Philadelphia earned around $10,000 by 1801 and double that amount by 1814;[302] Charles Cotesworth Pinckney, Edward Rutledge, and John Julius Pringle, all of Charleston, South Carolina, each are said to have earned from $18,000 to $23,000 a year;[303] and François Xavier Martin reported that around 1811 "a lawyer of common talent makes from $4 to $5,000 [per year]; several make $8 or $10,000" in New Orleans.[304] Philip Barbour, an eminent Virginia lawyer who in 1836 was appointed to the Supreme Court of the United States, was making less than $7,000 in 1824;[305] and around the year 1830, William Wirt was told that $6,000 or $8,000 was a good professional income in New York City, while $10,000 was the maximum.[306] Reverdy Johnson, the great Maryland lawyer, in 1831, at the age of thirty-five and fifteen years after he had been admitted to the bar, had an annual income of $11,000, and for several years thereafter he received about the same amount.[307] In 1838, Alphonso Taft estimated that without too much effort a lawyer could earn between $3,000 and $5,000 annually in Cincinnati, Ohio.[308] Thomas L. Anderson, who in 1832 located in Palmyra, Missouri, revealed that he made from $3,000 to $5,000 a year for a period of over fifty years, or a total of approximately $200,000 solely from the practice of law.[309] John Living-

[301] Letter of Joseph Story to his brother Stephen, dated February 26, 1816, 1 Story, *Life and Letters of Joseph Story* 278–79 (1851). Pinkney's professional income is believed to have been the largest during his time.

[302] Walters, *Alexander James Dallas* 160 (1943).

[303] Fraser, *Reminiscences of Charleston* 71 (1852).

[304] Howe, "François X. Martin," 2 Lewis, *Great American Lawyers* 411, 418 (1907).

[305] 1 *Life, Letters, and Journals of George Ticknor* 347–48 (Hillard ed., 1876). At the time Joseph Story was appointed to the Supreme Court of the United States (in 1811), his professional income, probably the largest in Essex County, Massachusetts, was slightly less than $7,000 a year. His salary as a Justice was a mere $3,500.

[306] Baldwin, *The American Judiciary* 355–56 (1905). Lemuel Shaw, who was reputed to be at the head of the profession in Boston, Massachusetts, might by 1830 have earned as much as $15,000 annually. Chase, *Life of Lemuel Shaw* 131 (1918).

[307] See Steiner, *The Life of Reverdy Johnson* 11 (1914).

[308] Letter of Alphonso Taft to Fanny Phelps, dated November 12, 1838, quoted in 1 Pringle, *The Life and Times of William Howard Taft* 9 (1939).

[309] Autobiography of Thomas L. Anderson 7–8 (Western Historical Manuscripts Collection, University of Missouri, Columbia, Missouri).

ston, in 1851, estimated that throughout the United States the average annual income of a lawyer was about $1,500.[310]

In the earlier days lawyers' fees either were regulated by statute—often a short-lived and shortsighted policy reflecting the distrust in which the profession was held during the first days of the Republic—or were based upon arrangement between attorney and client, or wherever a sort of "bar organization" existed, were settled by agreement among the several members of the profession. In Massachusetts, for instance, a schedule of specific charges was adopted in 1796 by the whole bar as the lowest fees that might honorably be demanded by its members for professional services.[311]

Although Massachusetts has always been considered the pioneer state for the admission of Negro lawyers, Maine holds the distinction of having admitted the first Negro lawyer in the United States: Macon B. Allen, an Indiana-born Negro, who was licensed to practice law as an attorney and counselor in Portland, Maine, in 1844.[312] Allen, however, never practiced law in Maine, but immediately moved to Boston, Massachusetts, where he was admitted to the Suffolk County bar on May 3, 1845. The second Negro admitted to practice was Robert Morris, who studied law in the office of Ellis Gray Loring in Boston, and was admitted to the Suffolk bar in 1846 or 1847.[313] Morris was regarded "as a talented gentleman who stands high at the Boston bar."[314] Governor George N. Briggs appointed him judicial magistrate holding court both in Boston and Chelsea. Thus, Morris was probably the first Negro in the United States to hold judicial office. Together with Charles Sumner, Morris appeared as counsel for the plaintiff in Roberts v. City of Boston,[315] the first "school segregation case" in

[310] 4 *United States Monthly Law Magazine* xiv (1851).

[311] See Chase, *Lemuel Shaw* 129 (1918).

[312] *State of Maine, Supreme Judicial and Superior Courts, Cumberland County, Roll of Attorneys*, July 3, 1844. See also Brown, "The Genesis of the Negro Lawyer in New England," 22 *Negro History Bulletin* 148 (1959); Willis, *History of the Law, the Courts, and the Lawyers of Maine* 552–53 (1863).

[313] *Commonwealth of Massachusetts, Supreme Judicial Court, County of Suffolk, Roll of Attorneys*, February 3, 1847; Brown, "Negro Lawyer," *loc. cit.*, 149ff.

[314] Delany, *The Conditions, Elevation, Emigration, and Destiny of the Colored People in the United States* 122 (1857).

[315] 59 Mass. (5 Cush.) 158 (1849).

the United States, which subsequently was cited as precedent in Plessy v. Ferguson.[316]

One of the most remarkable phenomena of the post-Revolutionary period, it has been shown, was the publication of American law reports. The appearance of the first printed reports, state and federal alike, with their lasting effects upon future generations of lawyers, happily coincided with the ascendency of such outstanding lawyers presiding over the highest state courts as James Kent (New York), Theophilus Parsons (Massachusetts), William Tilghman (Pennsylvania), Henry W. de Saussure (South Carolina), and Jeremiah Smith (New Hampshire). It is also fortunate that during this crucial era of growth and consolidation of American law the Supreme Court of the United States, under the leadership of John Marshall, adhered to a fairly steady legal policy.[317] But perhaps even more decisive was the fact that a small but efficient core of brilliant lawyers had successfully weathered the Revolution and the trying post-Revolutionary years. They managed to preserve and carry on the high professional standards and accomplishments of the late colonial bar. The Revolution itself, as well as the many challenges and problems of the post-Revolutionary period, had called forth the greatest efforts on the part of lawyers. It was a sign of greatness that the budding American legal profession met these challenges successfully and enthusiastically.

[316] 163 U.S. 537 (1896).

[317] Aside from the first four Chief Justices who served on the highest federal bench, namely, John Jay (who resigned in 1795), John Rutledge (who was never confirmed by the Senate), Oliver Ellsworth (who was appointed in 1796, resigned in 1800), and John Marshall (1801–35), the following Associate Justices sat on the Supreme Court of the United States: John Blair (who resigned in 1796), John Rutledge (who resigned in 1791), Thomas Johnson (1791–93, who took the place of John Rutledge), James Wilson (who died in 1798), William Cushing (who died in 1810), James Iredell (who died in 1799), Samuel Chase (1796–1811, who succeeded John Blair), William Paterson (1793–1806, who took the place of Thomas Johnson), Alfred Moore (1799–1804, who replaced James Iredell), Bushrod Washington (1798–1820, who took the place of James Wilson), William Johnson (1804–34, who took the place of Alfred Moore), Henry Brockholst Livingston (1806–23, who succeeded William Paterson), Joseph Story (1811–45, who replaced William Cushing), Thomas Todd of Kentucky (1807–26, who was the new sixth Associate Justice), Gabriel Duval (1812–35, who took the place of Samuel Chase), Smith Thompson (1823–43, who took the place of Henry B. Livingston), Robert Trimble (1826–28, who took the place of Thomas Todd), and John McLean (1829–61, who took the place of Robert Trimble).

II

THE LEGAL PROFESSION ON THE FRONTIER

THE GENERAL CONDITIONS surrounding the administration of justice in most of the frontier states at times seemed to be discouragingly primitive.[1] As late as 1841 the court in Springfield, Missouri, convened in the shade of a tree on the banks of a stream;[2] and the first courthouse in Springfield, Illinois, a town destined to become the capital of the state of Illinois, was a crude single-room log cabin erected at a cost of $42.50.[3] In Montgomery County,

[1] See, in general, Clark, *The Rampaging Frontier* 163–82 (1939); English, *The Pioneer Lawyer and Jurist in Missouri* (21 University of Missouri Studies, no. 2, 1947); Rogers, "The Epic of the American Lawyer," *Proceedings of the State Bar Association of Wisconsin* (1934); Bond, *Civilization of the Old Northwest* (1934); Zillmer, "The Lawyer on the Frontier," 50 *The American Law Review* 27–42 (1916); Clark, "Manners and Humors of the American Frontier," 35 *Missouri Historical Review* 3–24 (1940); King, "A Pioneer Court of Last Resort," 20 *Illinois Law Review* (1916); Hallem, "Early Courts and Lawyers," 25 *Yale Law Journal* 386–96 (1916); McCurdy, "Courtroom Oratory in the Pioneer Period," 56 *Missouri Historical Review* 1–11 (1961); Foote, *Bench and Bar of the South and Southwest* (1876); Stewart (ed.), *The History of the Bench and Bar of Missouri* (1898); Utter, *History of the State of Ohio: The Frontier State* (Ohio State Archeological and Historical Society, 1942).

[2] Letter of Charles Yancey to Marry Bedford, dated November 28, 1841, Charles Yancey Papers, Western Historical Manuscript Collection, University of Missouri, Columbia, Missouri.

Missouri, a primitive log cabin served as a combination of courtroom and jail, and when it was not used in the interest of administering justice, it sheltered sheep.[4] A judge in Tennessee, who had been charged with failing to hold court as required by law, gave as an excuse for his dereliction of duty the fact that the "courthouse" was infested with vermin and, hence, unusable, having served as a pigpen during vacations. In other places court was held in open houses without floors or windowpanes. During the wintertime the room was often cold, the seats were not fit to sit on, there existed no accommodations to permit private consultations between lawyer and client, and the general atmosphere, as August S. Merrimon puts it, made everyone feel "revengeful."[5] Courthouses frequently served as centers of social activities in small towns. County fairs and contests as well as recreational activities were held there, and exhibits of all sorts were placed within the courtroom. In the midst of all this confusion and uproar civil as well as criminal trials were conducted.

Many of the earliest judges or justices—usually wealthy farmers, squires, merchants, or landlords—were uneducated men: some were almost illiterate, and virtually none were grounded in the law or versed in its most fundamental technicalities.[6] They were chosen, as a rule, not for their legal knowledge, but often because they had been conspicuous leaders on the frontier in fighting Indians and, hence, knew how to wield authority effectively. In civil actions they assumed the role of referees, proceeding under the assumption that both parties were at fault, but they knew so little law that frequently they refused to instruct the jury in the presence of lawyers for fear that they would disclose their ignorance. They interpreted and dispensed justice according to their

[3] Beach, *History of Sangamon County, Illinois* 554 (1881). The adjoining jailhouse, it will be noted, cost twice as much as the courthouse.

[4] For a description of early courthouses in western Pennsylvania, see Crumrine, *The Courts of Justice: Bench and Bar of Washington County, Pennsylvania* 13–31 (1902).

[5] Newsome, "The A. S. Merrimon Journal, 1853–1854," 8 *North Carolina Historical Review* 315, 318 (1931). In *ibid.*, 327, Merrimon reports that at one time it was so cold in the courtroom that he could not stay to hear the charge.

[6] See, for instance, the many and amusing anecdotes and episodes connected with the earliest Illinois bench and bar, as they have been related by Ford, *A History of Illinois from Its Commencements as a State in 1818 to 1847* (1854), *passim.*