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Chroust: The Rise of the Legal Profession in America

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RECENT BOOKS

THE RISE OF THE LEGAL PROFESSION IN AMERICA. 2 vols. By *Anton-Hermann Chroust*. Norman, Oklahoma: University of Oklahoma Press. 1965. Pp. xxiii, 334; v, 318. \$15.

The volumes under review have been described as "a narrative history of law and lawyers in the United States from the colonial era to the middle of the last century." The author states that he has written "a general or narrative history of the American legal profession from its earliest colonial beginnings to the middle of the nineteenth century," but disclaims any intention to write a "treatise on the history and development of law." He recognizes, however, that it is impossible "to discuss the lawyer without some reference to the kind of law he handles and the type of court he faces," and that "occasional and brief excursions into the domains of legal history become necessary." In view of the fact that vast research projects will have to be carried out before a definitive history of American law and legal institutions can be written, research in any particular area is welcome. Professor Chroust has not undertaken original research but he has made diligent efforts to bring together and present in orderly arrangement the research products of many others. Using the rise of the legal profession as a vehicle, Professor Chroust has given a valuable introduction, primarily for the benefit of law students, to the whole development of American law.

The history of the early developments of an American legal institution which touches American legal history as a whole falls naturally into two periods: colonial and post-Revolutionary. The post-Revolutionary study is concerned with developments in the original states and with the law and legal institutions of the new "colonies" and states west of the original states.¹ Professor Chroust observes this natural division, devoting Volume I to "The Colonial Experience" and Volume II to "The Revolution and the Post-Revolutionary Era."

In a study of the law and legal institutions of the original colonies it is necessary to deal with each colony separately, as they were founded separately and administered independently of each other. Professor Chroust recognizes this necessity; with respect to each colony, he gives an account of the courts and the law in force, together with a more extended account of the activities of lawyers and the extent of their education. He divides the original colonies into three groups: New England, Mid-Atlantic, and Southern. The value of

1. This reference to "colonies" is, of course, a reference to the western areas called "territories," which were governed by the United States in much the same way as the original colonies were governed by England.

this grouping is not evident, since the similarities and differences presented in a summary at the end of Volume I bring together colonies from different groups. Charles Warren's well-known *History of the American Bar*, written in 1911, contains accounts of the legal conditions in each of the American colonies prior to the Revolutionary War—including the status of the common law, the court organization, and the names of leading lawyers with brief biographical data. Professor Chroust's excuse for a repeat performance is a claim that Warren's book "is so replete with misprints, inaccuracies of detail, errors of citation, and even errors of fact" that it cannot be trusted.

Part II of Warren's book, entitled "Federal Bar," deals with post-Revolutionary developments, and gives accounts of the "early state bars of New York and New England," referring specifically to New York, Massachusetts, New Hampshire, Vermont, and Connecticut. However, Warren does not include any systematic treatment of either law or lawyers in the territories and states west of the original states. In comparison, Professor Chroust in Volume II of his work does not show the post-Revolutionary developments in each of the original states separately. Instead, he reiterates earlier materials which he now entitles "The General Impact of the Revolution on the Legal Profession." References are made to post-Revolutionary developments in various original states, but there is little or no discussion of the influence of these developments in the new states established as the frontier moved westward in the early decades of the nineteenth century. In a chapter entitled "The Legal Profession on the Frontier," Professor Chroust describes the primitive physical conditions surrounding the administration of frontier justice, and undertakes to evaluate the work of the lawyers and judges by referring to many of the amusing anecdotes found in early accounts of bench and bar. This approach is inadequate because it does not reveal the quality of the unspectacular, routine work of the lawyer and judge. Only by examining lawyers' papers and the records of courts can one see what law was being applied, and how well the lawyers and judges performed their tasks.² Professor Chroust does make a valuable contribution, however, by his fairly detailed listing of the states from which lawyers came to particular frontier areas. The following is an example:

Of the fifty-five lawyers who are said to have practiced in Missouri around the year 1821, ten came from Virginia, seven from Tennessee, four from Kentucky, three from Connecticut,

2. For illustration, see *Judge James Doty's Notes of Trials and Opinions 1823-1832*, 9 AM. J. LEGAL HIST. 17, 156, 216, 350 (1965), with introduction by Elizabeth Gaspar Brown. The quality of Doty's work is not to be judged by his youth, his clothes, his brief legal training, his travel by canoe, or his holding court in primitive court houses, but by the content of his notes.

and one each from North Carolina, Maryland, New York, Massachusetts, New Hampshire, and Vermont. . . . The early Missouri bar, it could be said, displayed the diversity of background, education and social position commonly found on the frontier.

As stated by Professor Chroust, each of the original colonies "had its own government, its own system of courts, and in fact its own laws; and, at least in the beginning, each subsisted with little or no contact with the others." After the separate colonies became united states they continued to have their separate laws and legal institutions, and there were no common legal institutions other than the federal courts and laws. With the establishment of territorial governments as the frontier moved westward, Congress established similar judicial systems for the territories and enacted certain laws applicable to all, but left other legal developments to the local territorial governments. In the latter activity the participation by lawyers from many if not most of the original states meant an exchange of information concerning the laws and legal institutions of the various original states. How this exchange affected the character of the law of the territories, and of the states formed from them, is not discussed, and is an intriguing subject for further study.

Other chapters of Volume II deal with bar organizations, training for law practice, and legislative and judicial attempts to control the legal profession. In his account of attempts to control the legal profession, Professor Chroust refers to a definite pattern followed by territories and states carved out of the old Northwest Territory.

The volumes are printed on paper said to be good for three hundred years, and are attractively bound and boxed. An excellent index is provided, but there is no bibliography. The reviewer was for the most part not troubled by mechanical errors. Although the volumes contain a remarkable mass of detailed information, the reader may be disappointed in not finding realistic portraits of typical members of the early American bar.³ The reviewer has been told that Professor Chroust's manuscript had to be cut substantially for publication purposes. Perhaps some of the cut material would have given more color to the narrative, and afforded the reader a feeling of participation in the events as they occurred.

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3. In a history of the legal profession, biography seems peculiarly appropriate. If statistics could be put in charts and tables, and the narrative directed to the activities of the principal characters, the narrative would be more readable, but there may be doubt whether this arrangement would be more valuable than straight narrative including statistics.