BOOK REVIEWS

Looking Backward: The Early History of American Law


There has occurred in the last year what may be viewed as a modest revival of interest in the early history of American law. The bulkiest manifestation of this renaissance is a two-volume study of the rise of the legal profession from the seventeenth century to 1860, but at the same time several other books have appeared which in whole or in part bear on the same subject. The historian is tantalized but at the same time troubled by the traditional character of much of the new work.

Legal historians have tended to define the substance of the law quite narrowly. We have a great many legal and judicial biographies, treatises on the formal categories of law and procedure, accounts of constitutional development, and histories of particular courts. Legal history has been slow, however, in responding to the newer concerns and techniques of contemporary historians, particularly in the realm of social and economic history. The possibility of examining the law in its actual relation to social and economic process through the systematic exploitation of a fuller range of documents, such as legislative and administrative records, economic and social data, and the records of lower courts and ordinary lawyers is now emerging. To keep pace with the times, legal historians must move from the study of appellate opinions to the broader context of law in society, from what law was to how law worked, from substance to process.

Likewise, the chronological horizons of American legal history must
be broadened. Legal historians, operating on the unspoken assumption that American law derives from the requirements of industrial society, traditionally have concentrated on a period beginning in the mid-nineteenth century. The colonial period has been neglected almost totally, while even the revolutionary and early national periods have been viewed merely as a "formative" stage. The periodization which rejects everything before 1776, bows perfunctorily to the antebellum era, and sets to work in earnest after 1861, no longer seems satisfactory. It derives from the formalism which has afflicted legal history quite generally, and seems unlikely to survive the current reexamination of the field. For as the focus of study becomes the law in action and as the socio-economic aspects of legal development are probed, the long-term continuities of legal history are bound to emerge. After all, to demonstrate that our present law would not be the same had the industrial revolution never occurred is not necessarily to show that one aspect of the economy determined the nature of legal development. To the historian it seems more reasonable to suppose that a wide range of phenomena—political, economic, social, and ideological—helped to shape the character of American law. And at least to the colonial historian, it seems likely that the century and three-quarters preceding the Revolution, as well as the first decades of the national period, made a basic contribution to the growth of American law. If we are to turn our attention to the operation of the law in a broad social context, we shall also have to accept a more sweeping definition of the chronological bounds of the problem.

The books under review illustrate some of the possibilities now available to legal historians in terms of sources, techniques, and periodization. None of them is entirely successful, but as a group they hint at what might be done. One day, with a bit of luck and hard work, we shall have an American legal history which looks to the entire range of society for its context and which begins in the beginning.

Professor Anton-Hermann Chroust of the University of Notre Dame prefaced his two volumes on *The Rise of the Legal Profession in America* with the disclaimer that they are intended "primarily, though not exclusively, for the instruction of law students, and, perhaps, for the entertainment of practicing lawyers rather than for the enlightenment of the critical historian." He acknowledges that his book makes "little pretense to original scholarship" and expresses his fear that students of American colonial and legal history will disagree with him
"on many points of information." Writing for an audience of lawyers, the historian is compelled to confess that his reservations not only fulfill the author's fears, but also extend to Professor Chroust's underlying suppositions.

_The Rise of the Legal Profession in America_ carries the profession from its origins in the seventeenth century to the decades immediately preceding the Civil War. Chroust sees the seventeenth century (until 1690) as an era of "justice without lawyers and, in consequence, frequently without a stable and reliable body of laws as well as without proper courts of law." The primitive condition of the law obviated the need for trained lawyers, contributed to the widespread distrust of the profession, and allowed "incompetent and irresponsible opportunists" to preempt the transaction of legal business. After 1690, however, the situation improved rapidly. A "regular and independent" system of courts was developed, and a group of trained lawyers appeared, "doing business according to law and in keeping with the strict rules of procedure." Standards for the admission of lawyers to practice were rationalized, and the bar began its first, feeble attempts to organize itself for the achievement of definable standards of professional conduct. By the mid-eighteenth century, the stature of the legal profession had "drastically improved in most colonies," aversion to lawyers had been transformed into admiration, and law-trained men had become the leaders of the revolutionary new nation in response to the popular recognition that the lawyers had sprung "to the defense of the people's rights and liberties."

In the years between the American Revolution and the Civil War, Chroust finds a confusion of seemingly contradictory trends. For one thing, there was a serious tendency toward "deprofessionalization" of the bench and bar immediately following the Revolution and again after 1830, caused by an influx of unqualified practitioners and an intrusion of state legislators into the judicial process. By the eve of the Civil War, the egalitarian spirit of Jacksonian democracy had corroded the institutional safeguards of the profession to the extent that men "unfit by character, culture, or training to become members of a learned profession" had brought its public reputation to a new low point. Nevertheless, in several significant ways the profession was "rising" during this period. Public and professional revulsion with

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2 Id. at 331.
3 Id. at 332.
4 Id. at 334.
English common law in the post-revolutionary years resulted in the production of the first American law reports and legal treatises. Legal education was removed from the practitioners' offices and placed in the leading universities. A "golden age" of "creative legal accomplishments" ("mostly concerned with the applicability of traditional legal materials to the specific American circumstances") emerged as American judges and lawyers created a system of law "applicable to the new and unique American social scene." Lawyers attained higher standards of professional skill and, imbued with the national spirit of "rugged individualism," rose to unprecedented heights of "public leadership." Aside from their contributions to public life, "the cumulative though unofficial services which the legal profession rendered the country in the promotion of vital causes are beyond estimate."

The working historian finds that he disagrees with this bold and romantic summary in three major respects. The first has to do with Chroust's treatment of lawyers and their profession. He exaggerates the significance of the lack of a trained bench and bar in the seventeenth century, and poses a misleading dichotomy between "lawyers" and "charlatans." Recent work in colonial legal history indicates that in the seventeenth century both laymen and lawmen (the distinction is not by any means clear before the middle of the eighteenth century) dealt with legal problems in a sophisticated and conscientious manner, acting as lawyers and as judges. That they should have been able to cope with the law is not surprising, for in the seventeenth century English local law was for the most part in the hands of laymen. The emergence of an educated and professionalized bar in the eighteenth century thus did not cause as radical a reorientation in the conduct of legal business as Chroust suggests. At the same time, Chroust underestimates colonial lawyers and overvalues English legal education. Examination of the working materials of American lawyers for the first third of the eighteenth century reveals a surprising familiarity with contemporary English law and a high degree of technical com-

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6 Id. at 283.
7 Id. at 285.
8 Id. at 286.
9 See vol. I, p. 277.
10 See, e.g., Chafee, Records of the Suffolk County Court, 1671-1680, 29 COLONIAL SOC'Y OF MASS. PUBLICATIONS xxviii-xxix (1933); COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1639-1702): THE PYNCHON COURT RECORD 65-68 (Smith ed. 1961); COURT RECORDS OF PRINCE GEORGES COUNTY, MARYLAND 1696-1699, xliii-xmlv (Smith & Crowl eds. 1964); HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 113-62 (1960).
petence, and the proposition that men trained in the Inns of Court emerged with "sound legal learning" and "acquired a vast intellectual culture" is highly dubious. Chroust's treatment of lawyers in the revolutionary period is altogether unsatisfactory, since he is content simply to list the leading Whig lawyers of each colony seriatim, without analyzing their professional stature or revolutionary leadership. He notices the large number of Loyalist lawyers who left the country in the 1770's, but never comes to terms with the really interesting question of whether there was anything in their professional training or outlook which predisposed them to side with Great Britain. Since lawyers are credited with a leading role in the revolutionary and constitution-making eras, Chroust's failure to examine their group attitudes and social functions in the last third of the eighteenth century is especially disappointing.

As far as the nineteenth century is concerned, suffice it to say that Chroust never manages to disentangle the welter of conflicting lines of development which he suggests. Was there no connection between the "deprofessionalization" of bench and bar and the emergence of lawyers as the leading public figures in the United States? Why should bar associations have fallen into disuse at the very time that legal thought and legal education were attaining true distinction? In any case, what is the relevance of the popular reputation of lawyers to their professional development?

Second, one must question Professor Chroust's account of the substantive history of law in the one hundred and fifty years following the settlement at Jamestown. One difficulty here is that he rejects the currently accepted interpretation of law in the seventeenth century in favor of the view that:

English law and English precedents often were neither followed nor used as a guide by the courts. . . . The law itself often was extremely flexible and amateurish. In some instances, it was the highly questionable product of personal caprice, prejudice, or just plain ignorance.

Chroust cites the outdated works of Hilkey and Reinsch in support

12 Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, 41-105, 139-45, 148-51 (Katz ed. 1963).
14 See vol. II, pp. 5-11.
17 Reinsch, The English Common Law in the Early American Colonies, 1 Select Essays in Anglo-American Legal History 367 (1907).
of the view that English common law did not make an appearance in the colonies until the beginning of the eighteenth century, tempering this blunt assessment with the suggestion that colonial law was a "half-remembered and half-understood technical language of English courts and English lawyers" which was "roughly applied" to frontier American conditions.\textsuperscript{18} If one examines the actual substance of colonial law, however, it seems difficult not to conclude that early American law was a quite sophisticated combination of English and indigenous ideas which evolved in response to the changed conditions of life in the New World. To notice that the common law was not transported \textit{in toto} to Massachusetts does not demonstrate that English law had no influence there. It was out of the familiar English local law that the Puritans framed their own system.

Furthermore, regardless of the precise "sources" of the law, the printed records of seventeenth century courts alone seem sufficient to indicate the complexity and surprising maturity of American law at that time. Professor Chroust's concern with the lack of a legal profession in the early period leads him to the indefensible position that so long as laymen were permitted to manage lawsuits "there was little need and little use for a refined and stable law."\textsuperscript{19} Is it not anachronistic to argue that "the administration of justice without a stable and detailed body of laws is at best a constant source of difficulties and uncertainties"?\textsuperscript{20} Blackstone would have been appalled by the state of the law in early Massachusetts, but would Michael Dalton have been?\textsuperscript{21}

Moreover, Chroust's dark view of the first century of settlement leads him to take the position that the "reception of the common law" was a sudden and widespread phenomenon of the early eighteenth century, a response to the increase in numbers and influence of trained lawyers.\textsuperscript{22} This approach minimizes the extent to which common law ideas were known and used in the seventeenth century and ties the growth of substantive law to the formal education of lawyers. In fact, as Chroust himself notes, each colony developed its own primitive common law,\textsuperscript{23} and it was into this existing tradition that the common law

\textsuperscript{18} Vol. I, pp. 7, 71.
\textsuperscript{19} Id. at 17.
\textsuperscript{20} Id. at 194.
\textsuperscript{21} Dalton, a Cambridgeshire justice of the peace in the first half of the seventeenth century, was the author of the best-known handbook on English local justice of the period: \textsc{The Country Justice} (1618). The volume was widely used in colonial America; it was one of the small group of legal works imported by the Massachusetts General Court and was still to be found in the libraries of revolutionary American lawyers.
\textsuperscript{22} See vol. I, pp. 17-18.
\textsuperscript{23} Id. at 17.
law of England was gradually fed for reasons of political convenience, intellectual sophistication, and practical necessity. The process was continuous throughout the eighteenth century, and the behavior of American courts in the last quarter of the century makes it appear that the rejection of English common law which Chroust attributes to nationalistic feelings spawned by the Revolution was more rhetorical than practical. Indeed, Professor Levy has made a strong case for the idea that the framers of the state and federal constitutions and the writers of the first amendment accepted the notion of an American common law.24

Third, the historian's concern for periodization leads him to feel that Professor Chroust's rigid temporal divisions distort his perception of legal development. We have already noted his arbitrary distinction between the seventeenth and eighteenth centuries according to their supposed receptiveness to English common law, and the division of the eighteenth century itself at the Revolution for the same reason. A similar artificiality characterizes his discussion of the years 1776-1860 as a new and unitary period, the achievements of which "may favorably be compared with the legal achievements of any epoch in Western history."25 This periodization (and thus the general plan of The Rise of the Legal Profession in America) derives from Roscoe Pound's notion of the "formative era" of American law. Pound argued that colonial law bore little relation to the distinctly American law inspired by the independent United States. He emphasized the formal, medieval, and pre-commercial character of colonial law. "[T]he common law as the colonists knew it was the law of the age of Coke, not the law of the age of Mansfield";26 the entire heritage amounted to no more than "Coke's Second Institute and Blackstone."27 The task of the formative era was thus to work out a body of law suitable to a modern society "from our inherited legal materials."28 Admittedly, nineteenth century law responded to economic pressures which had been maturing since the middle of the eighteenth century, but, as we shall see, it seems unlikely that the post-revolutionary generation of lawyers, judges, and legislators was creating an American law de novo.

The character of the legal profession from the mid-eighteenth to

26 POUND, THE FORMATIVE ERA OF AMERICAN LAW 6 (1938).
27 Id. at 9.
28 Id. at 8.
the mid-nineteenth century is one of the subjects of Daniel H. Calhoun’s *Professional Lives in America*, which also includes essays on medicine and religion. Calhoun applies some of the techniques of quantitative analysis, as well as a well-trained intuition, to the problem of the interaction of social structure and professional thought. He has singled out the history of a county in the Cumberland River country of middle Tennessee, from roughly 1790 to the Civil War, as a case study of the relationship between American society and the law. During this period, Sumner County evolved from a frontier community to one increasingly characterized by urban and commercial concerns. The lawyers of Sumner County, like the law they practiced, underwent a measurable change as their society changed its character. In the earliest days, lawyers on horseback followed judges on horseback around the judicial circuits of Sumner and its neighboring counties. The peripatetic county bar was small in numbers and quite inflexible in character, but it monopolized the legal business of the communities into which it travelled. The first signs of change occurred in reaction to the economic hard times preceding the War of 1812, when the rapid accumulation of suits for the recovery of debt crowded other types of lawsuits off the calendars of the county courts. In response, Tennessee lawyers remolded the law to suit the new conditions—for example, a statute of limitations set a term on real property disputes. The profession itself was also changing. Lawyers, no longer content merely to assist in the collection of debts, began to reorient themselves toward individual clients rather than local communities, and as Tennessee towns and commerce expanded, the circuit-riding lawyer gave way to the urban commercial lawyer. In the end, “it was not merely the expansion of business, but expansion against the communal rigidities of an earlier system, that forced the emergence of a new kind of legal profession.”

Taken by itself, the legal history of Sumner County, Tennessee, is unlikely to quicken many pulses, but Professor Calhoun has used it as an example of the socialization of the American legal profession from 1750 to 1850. He takes the transition from the colonial to the national period, or from the eighteenth century to the nineteenth, quite seriously. He sees a gradual change from a communally-oriented era to an era characterized by liberal, market-oriented values. To a great extent, this shift can be seen in the “continuing, growing spill of town standards over into the countryside.”

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29 P. 85.
30 P. 13. See also pp. 18-19.
cial context, the legal profession was dramatically transformed. The level of the profession had been quite low before 1750, but at about that time a general effort to raise "its intellectual level and practical performance" began. The result was that the status of lawyers was institutionalized, both superficially—gowns and wigs were introduced—and profoundly—legal commentary achieved new heights. This pursuit of professional excellence extended through the revolutionary period, carrying with it aristocratic, hierarchical implications.31

Focusing on the middle of the nineteenth century, Calhoun finds a radically changed professional outlook. The egalitarian spirit of Jacksonian democracy forced the legal profession toward mediocrity and individualistic chaos. A bifurcation appeared within professional life as the leveling tendencies of the democratic trend toward conformity forced lawyers to accommodate themselves to popular ideas as well as to pursue "their highest professional concerns in spheres removed from the public."32 Furthermore, as market relationships rather than the notion of an elite came to determine the social structure of the profession, leadership was transferred from men endowed with intellectual authority to the bureaucrats who administered bar associations and other professional institutions. Lawyers, like physicians and ministers, retained their "sense of being a special in-group, yet seemed to move toward uniformity, away from any individual distinction other than what emerged from impersonal competition in the labor market that the profession itself became."33 In this situation, the leadership of the legal profession repressed the extraordinary individual lest his efforts endanger the structure of the profession.

Professional Lives in America is a brief book, only tangentially concerned with the history of the legal profession, and the experience of a county in Tennessee is, of course, far removed from the mainstream of the urban profession in the northeastern states. Yet the scope and quality of Calhoun's analysis provide us with a glimpse of some promising avenues open to legal historians. The particular virtue of the book is that it combines the study of lawyers as social beings, caught up in the currents of social change, with the study of legal thought, which takes its meaning from the social context in which it is conceived. Calhoun views lawyers from a sophisticated sociological point of view; he asks how the changing nature of legal business (from debt collection to commercial litigation) affected the structure of the legal profession, how basic economic and social change forced a reorga-

32 P. 184.
33 P. 187.
nization of that profession, and how professional problems caused lawyers to seek changes in the law. It is clear that legal historians of the early period have much to learn from the techniques of sociological history.

Charles M. Haar's *The Golden Age of American Law*, which anthologizes the legal literature of the forty years before the Civil War, deals with "the interaction of law with the ideals, technology, and physical conditions of these formative years . . .". The "golden age" of the title, although required by the publisher's series of which this is only one volume, betokens Haar's fundamental agreement with the Pound notion that the pre-Civil War years laid the foundation for the modern American legal system:

Dissolution of the vestiges of feudal society in the New World [during the Revolution] created the need for a fresh analysis of goals, as well as for a legal framework to establish the conditions necessary for community life and order consistent with the approved goals. The anthology includes extracts from legal treatises, periodicals, judicial opinions, courtroom addresses, and a wide range of nonlegal sources. It is subdivided into five topics: the legal profession, public law, law and reform, law and economic development, and "the search for legal identity."

Haar's introductions to the several sections of the volume are concise, intelligent, and frequently original. With respect to the problems of public law, for example, he addresses himself to the incisive question of why "there was never to be a *McCulloch v. Maryland* for slavery," concluding that for slavery there could never have been, as there was for national banks, "the degree of consensus which permits recourse to law." Haar also contributes to our understanding of nineteenth century social reform by his discussion of the manner in which Americans agreed to use the law "as a tool for evolutionary growth"—permitting judges to act as arbiters of social change while at the same time developing legal agencies through which the reform movements could respond to the needs of the age. The essay on law and the economy succinctly states the major legal problem of the antebellum years: "the need for new legal instrumentalities and fresh

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34 P. v.
35 P. vi.
36 P. 120.
37 P. 210.
concepts to give the entrepreneur the organization and discipline he required" in the face of Jacksonian prejudices against the intervention of the state into the economy.38

Although The Golden Age of American Law is an anthology, Haar's introductions raise an interesting question about the sources of legal history, for it is evident that the editor's most interesting speculations are based, not on the sorts of literary evidence which the anthology preserves, but on the social, economic, and political imperatives of the period. Reviewing contemporary speculation on the nature of law, Haar concludes that two contradictory forces were at work in the law of the "formative era": "the old and the given" (accepted law, English traditions, settled business relations, social and economic privilege) and "the new" (universal suffrage, anti-monopoly, anti-professionalism, a Bill of Rights, hostility to corporations). The task of the law was "to mediate between these two forces and to maintain the status quo until a general consensus could be reached and conflicts resolved. This function made the law of the period unique."39 Such a "mediatory" function, is however, precisely the sort of aspect of the law which the writings Haar reprints do not in themselves illuminate. In so far as the law is merely a general statement of rules necessary to social order, it can be dealt with in terms of legal "literature." To the extent that law is itself a factor in socio-economic change, however, such literary evidence gives a very limited notion of the process of legal development. It relates to the dead letter of the law in the statute book rather than to the life of the law in legislatures, courts, and counting houses. At bottom, the implication of the "literary" approach to legal history is that the law is essentially a self-conscious creation of men's minds, a branch of the history of thought.

It is from precisely this point of view that the foremost student of American intellectual life, the late Perry Miller of Harvard, deals with the law in his "The Legal Mentality," published in his posthumous volume The Life of the Mind in America.40 Of a projected nine long essays on various aspects of the American intellect in the period from the Revolution to the Civil War, "The Legal Mentality" is one of two completed by Professor Miller before his death. Miller's sources are of the formal literary type collected in Professor Haar's anthology. He is aware that "the life of the mind" has no existence apart from society, but he believes that historical change can best be gauged by

38 P. 333.
39 P. 423.
40 See also the anthology which preceded Miller's study of the law, The Legal Mind in America: From Independence to the Civil War (Miller ed. 1962).
the expressions of the human intelligence. Thus, institutional and social developments are inferred from their literary manifestations (using the term broadly), and legal history becomes the study of what lawyers and judges have committed to print.

"The Legal Mentality" surveys the legal profession, the character of legal theory, the relation of law to morality, and the negative character of public law in the period between 1776 and 1860. The argument is too complex to be summarized briefly, but Miller's long chapter on the movement for codification of the law indicates the nature of his approach. He begins by noticing the attempts of James Wilson in Pennsylvania and Thomas Jefferson and others in Virginia to prepare digests of the post-revolutionary laws of their states. These early digests were of the eighteenth century, rational sort and encountered serious opposition even from a populace that passionately feared the mysterious common law which the digests promised to make coherent. Miller notices that this was a phenomenon that persisted throughout the period: an ambivalence "between hostility to the intricacy of the Common Law and . . . reluctance to abandon it as constituting the bulwark of rights and liberties."41 The layman's fear of codification was, however, dissipated by the gradual realization that the unsystematic character of the common law might lead to rule by the judges empowered to interpret the law, and eventually "believers in democracy found a special appeal in the idea of a digest speaking in a language familiar to everybody."42 The idea was strengthened by Edward Livingston's success in codifying the procedure and criminal law of Louisiana along the lines of the Code Napoleon, and by the influence of the first legal textbooks, which became "in effect drafts of codes" by reason of their "effort to impose a logical structure upon their material."43

The struggle for codification ultimately left the refined atmosphere of the law school and lawyer's club and became the political issue of codification versus common law, driving the common man even more surely into the party of codification.44 The problem that intrigues Miller is why the profession should have been so bitterly divided over such a question. He remarks that opponents of codification ranged all the way from those who merely desired "to monopolize a profitable mystery" to those who saw in the common law "an intellectual vision

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41 P. 241.
42 P. 243.
43 P. 245.
44 P. 246.
of infinite extensibility."\textsuperscript{45} He examines the thought of the leading codifier, David Dudley Field, in search of clues, and they are forthcoming. Field was angered by the chaotic state of the law, by the complexities of special pleading, and by the artificial distinction between law and equity. He sought instead a "simple and natural scheme of legal procedure," claiming that his "radical" method of going back to first principles would not introduce substantive novelties into the law.\textsuperscript{46} At this point, Miller introduces a characteristic interjection: "Had the crux of the argument, up to the Civil War, been only a matter of the simplicity of codes versus the malleability of precedents, the entire contentious episode would be only a sad footnote to a period of intellectual exertion."\textsuperscript{47}

After this remark, we are not startled to find that "something more was involved": "[T]he crevasse which opened within the fraternity represented a division between two opposing ideals of America. At bottom, the dispute over codes was a dispute over the identity of the nation."\textsuperscript{48} The point, as Miller sees it, is that Field and his supporters were legal nationalists, seeking an American law derived pragmatically from the American experience. In Field's words:

\begin{quote}
Not being provided with a literature of his own, the American is subjected to two opposite systems of training; one from books, the other from the life he sees around him.\textsuperscript{49}
\end{quote}

Field preferred the empirical method—constructing law out of native materials rather than "applying here the customs and maxims which belong to Europe."\textsuperscript{50} At the same time, he associated the common law with the corrupt and aristocratic societies of Europe and fervently wished to develop a domestic law which would fulfill the republican promise of the Revolution. Of course the proponents of the common law felt fully as American as Field, but they were inclined to seek the fulfillment of their own civilization "by remaining within the context of an international culture . . . ."\textsuperscript{51} Thus, the debate over codification was a conflict about the content of American democracy—the one publicly debatable issue in the law. Miller concludes that in the end, Field was doomed to failure by the onrush of industrial society:

\begin{footnotes}
\item[45] P. 253.
\item[46] Pp. 260-61.
\item[47] P. 261.
\item[48] P. 254.
\item[49] P. 262.
\item[50] Ibid.
\item[51] P. 264.
\end{footnotes}
Compared with the palatial steamboats, the roaring railroads, the Atlantic cable (which David Field's brother laid in 1858), wherein was the majesty of a code, or even of the Common Law?\textsuperscript{52}

Codification, like Puritanism, was too remote and intense a vision to control the forces at work in America.

The legal historian will find that despite its undoubted merits, "The Legal Mentality" is unsatisfactory in several respects. The principal objection arises out of the author's view of the law as only one instance of a general intellectual manifestation, a view which frequently leads him to wrench contours of the history of legal thought in order to fit them into a larger scheme. Miller's language is a case in point, since it reflects the duality he perceives throughout American history: the conflict between the natural and the artificial. He discusses the conflict over the state of the law in post-revolutionary America in terms of a series of parallel antinomies: nature vs. society, nature vs. law, equity vs. sophistication, genius vs. system, romantic vs. Newtonian, heart vs. head.\textsuperscript{53} For Miller, the history of law is a revealing test case of the American experience. Man could not live absolutely naturally even in America, though that is the ideal for which he strove, and the types of legal systems he established reflect the degree to which he sacrificed his democratic genius to the demands of social order. This, to be sure, overstates Miller's case, but it points up the fact that most students of the law have been less nostalgic than Miller about the subjugation of nature to legal order.

A more pedestrian objection concerns the periodization employed in "The Legal Mentality." Miller accepts the general idea of the "formative era," even though he selects his terminal dates for more profound, non-legal, reasons. Following Joseph Willard\textsuperscript{54} and Henry St. George Tucker,\textsuperscript{55} Miller argues that American law had to start

\textsuperscript{52} P. 265.

\textsuperscript{53} See pp. 104-06, 112-13, 121. Professor Calhoun uses similar terminology in noting the conflict between "intensity" and "training" within the legal profession, but the sense of his dichotomy is more obviously related to the social situation of the law. \textit{CALHOUN, PROFESSIONAL LIVES IN AMERICA} 16, 195-97 (1965).

\textsuperscript{54} In accordance with the practice in Miller's earlier volumes, \textit{The Life of the Mind in America} is unannotated, so that no specific reference to Willard's views is given. Willard (1798-1865) was a graduate of Harvard College and the Harvard Law School (1820) who established his reputation for legal knowledge during a long career as a master in chancery and Clerk of the Court of Suffolk County, Massachusetts.

\textsuperscript{55} Miller's reference to Tucker is as unspecific as his citation of Willard. Tucker (1780-1848) was a graduate of William and Mary (1799) and the most distinguished Virginia lawyer of the ante-bellum period. He was successively a judge in chancery, President of the Supreme Court of Appeals of Virginia, and Professor of Law at the University of
afresh after the Revolution: "[C]olonial precedents were of little worth, and . . . therefore we had no such venerable body of antique wisdom as gave the Common Law in England its sacerdotal power." Thus, the legal theorists of the early nineteenth century provide evidence of a rejection of the colonial period through a process which Miller describes as the "shifting from a philosophy of law which was primarily contractual in character to one that was conscious of history" or the "getting out of the eighteenth century and into the nineteenth." Miller also finds support for his analysis in the economic developments taking place in America around 1800: the transformation from landed to corporate property and the socio-economic explosion following the War of 1812: "the new importance of admiralty law, the beginnings of manufactures, and the sudden need of policies for patents, for the development of canals and turnpikes, and soon thereafter for railroads."

No one would deny the impact of early nineteenth century economic change upon the law, but it is disappointing that Miller is not more concerned with the colonial roots of nineteenth century law. It is surprising that the leading intellectual historian of the colonial period does not trace a connection between the movement for codification in the nineteenth century and the persistent demands for codification in virtually all of the American colonies in the seventeenth century. Plymouth, Massachusetts Bay, Connecticut, and New Haven all produced one or more legal codes, and there was even a primitive code in the first decade of Virginia's settlement. The demand for certainty in the law and an unsophisticated quest for legal rationality were widespread popular feelings in the first half of the seventeenth century, somewhat as they were in the Jacksonian era. Colonial ideas of law were obviously quite different from those of the 1830's in most respects, but the similarities are at least as important as the differences. Again, the stultifying preconception of the "formative era" is an unfortunate hindrance to what seems a more promising topic—the organic growth of law and legal thought in America from the colonial settlements to the Civil War and after.

The Life of the Mind in America and, by implication, The Golden Age of American Law also raise a problem even more disturbing than the one of periodization. They lead one to the belief that the study

Virginia. Tucker was the author of learned treatises, including Lectures on Constitutional Law (1843) and Commentaries on the Laws of Virginia (1836-1837).

56 P. 118.
57 P. 127.
58 Ibid. See also p. 232.
of legal literature alone, removing as it does the law from the legislature, the courtroom, and the marketplace, is too restricted an approach. Consider the question of codification once more. Miller examines the debate on codification at the New York Constitutional Convention of 1846 in order to investigate the conflict between Field and the proponents of the common law. He finds that the "opponents of codification planted themselves upon the rational patriotism of an irrational but native development, and so challenged codifiers to wage war with them on the issue of legal allegiance. This the codifiers were more than ready to do." 59 Calhoun chooses the same incident to sample the character of the bar in the mid-nineteenth century and finds that the convention was divided between nativists and anti-nativists, lawyers and farmers. 60 The two points are not necessarily contradictory, and Miller's is obviously profound, but the comparison suggests that the use of purely literary evidence (debates, in this instance) runs the risk of abstracting law from its social significance.

A review of the foregoing books suggests two ways in which the study of the early history of American law might profitably be reoriented: a reassessment of the traditional periodization and a broadening of the range of our source materials.

The periodization imposed by the concept of the "formative era" has led to a neglect of colonial legal history and, as a result, a denial of the continuity between the pre-revolutionary years and the period of independence. Colonial history was mere antiquarianism from Pound's point of view. He relegated the seventeenth century to the oblivion of "law without lawyers" and dismissed the earlier eighteenth century as an irrelevant age of outmoded English common law. Chroust, Haar, and Miller all follow Pound in proclaiming the innovative character of the period from 1776 to 1860. Calhoun's choice of 1750 and 1850 as the end points for his study of professional life seems more original and promising, assuming as it does only the profound general transition from eighteenth to nineteenth century social organization. Moreover, it would seem reasonable to argue that 1750-1800 is the critical period for legal historians if continuity between colonial and national law is to be demonstrated. If the judges, lawyers, and legislators of Massachusetts and New York, for example, were not starting from scratch in 1776, there ought to be evidence of the forms and ideas from which they proceeded in the last half of the

59 P. 259.
60 Pp. 180-82.
eighteenth century. Happily, the recent appearance of the first volume of *The Law Practice of Alexander Hamilton* 61 and the three volumes of *The Legal Papers of John Adams* 62 dramatizes the wealth of material and maturity of analysis which can now be brought to bear on the period. Our concern with the public law and constitution-making of the last part of the century has perhaps blinded us to the persistent characteristics of private law. In any case, the argument for testing the hypothesis of continuity in early American law seems strong.

Similarly, it seems that only an extension of our inquiry to sources such as the working papers of lawyers, manuscript court and legislative records, statutes, and various socio-economic documents will reveal the role of the law in American life. We must not limit ourselves to the study of what men have said about the law, thus treating legal history solely as a branch of the history of ideas. This is the approach taken by both Haar and Miller, and although both the lawyer and the historian broaden their treatment of the law through their unspoken assumptions about social and economic organization, the better view would seem to be that these assumptions are in themselves proper subjects for legal historians. One of the virtues of Calhoun’s brief treatment of the legal profession is that it inquires directly into the social origins of the thought and behavior of American lawyers. He analyzes only one limited sample, 63 but he suggests some general lines along which future investigation might proceed. The sources for a broader legal history of the early period are hard to come by, since legal reports and judicial opinions, not to mention printed statutes, were extremely rare in pre-revolutionary days. The gathering of material will be slow, but it is necessary. 64

Such work as has already been done along these fresh lines 65 suggests that American law in the seventeenth century was far more sophisti-

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61 *The Law Practice of Alexander Hamilton* (Goebel ed. 1964). For Goebel’s comment on the persistence of the common law tradition, see id. at 9-25.


63 See also Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 204 (1965). Nash provides another sample, but his analysis falls into the more traditional type of social mobility study.


65 In addition to the work of Goebel, Haskins, and Smith which has already been cited, see, e.g., the learned introductions to the several volumes of the American Legal Records series and the superb volume of introduction, 1 *Supreme Court of Judicature of the Province of New York*, 1691-1704 (Hamlin & Baker eds. 1959).
cated than one would have expected and that the “reception” of the common law was a gradual process which bridged the first two centuries. The entire pre-revolutionary period is beginning to emerge as one in which the interaction of several varieties of English law with the requirements of the American situation provides a strong theme of continuity. Work on the law during the revolutionary period is still in a primitive state, but it is beginning to look as though the last part of the eighteenth century was a transitional stage rather than a fresh start. It is clear that in the early nineteenth century sweeping economic change and a new sense of the positive powers of government affected American law. We have ignored, however, the possibilities that the activity of the period did not occur in vacuo and that the “formative era” might perhaps better be called the “transformative era.” If we expand our methods and extend our view, we may discover that the lawyers and judges of the “golden age” were the children of their fathers.

STANLEY N. KATZ*

* Assistant Professor of History, The University of Wisconsin.


This is the sort of law book that appears once in a decade. If perchance the sensitive ears of Professors Kalven and Zeisel detect in that statement something of a double entendre—embodying, in their terminology, the imposition of a fact judgment on a value judgment—it really wasn’t meant that way. This volume has indeed been long in coming. But if the authors had written the book rapidly, they would not have written the book they have. A pioneering work like this needs time. Entirely new tools had to be engineered, tested and re-modeled; data had to be collected, analyzed, and reanalyzed. Then came the task of writing; one may guess that few chapters still have the form in which they sprang even from such a pair of fast and fertile minds. Wine from this new species of grape first had to mature in the cask. Now, bottled at precisely the right age, it will keep growing. This is a book to be savored and reread, not one to be gulped at a single sitting. Brilliantly avoiding Professor T. R. Powell’s barb at the kind of research where “counters don’t think and thinkers don’t