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# Law vs. Politics: The Self-Image of the American Bar (1830-1860)

by MAXWELL BLOOMFIELD \*

THE ADVENT OF JACKSONIAN DEMOCRACY in American politics coincided with a vigorous levelling movement in American law. In one sense the latter crusade was nothing new: hostility toward the elitism of the legal fraternity had been rife since the days of the Revolution. But whereas earlier critics had worked to simplify the content of the law, reformers in the 1830's and 1840's attacked the problem from a different angle. Eschewing substantive changes, they sought instead to bring the administrators of the law under more direct popular control. Their program embraced a wide range of legislative measures in which worried conservatives read portents of mob rule.

Mississippi inaugurated one important trend in 1832 by adopting a constitutional provision which called for the popular election of all state judges for a term of years. By 1852 fifteen other states were following her example; of the remaining sixteen states, ten endorsed the principle of indirect election of judges by the legislature, while only six adhered to the older system of executive appointment during good behavior. Complementing this extension of the spoils system to the bench went a curtailment of judicial power over jury trials. Many states witnessed the enactment of procedural rules which made the judge little more than a passive moderator in his own court, forbidden to comment on the evidence or otherwise to assist the jury in reaching a verdict.

Nor did the ordinary lawyer escape the ken of the reformers in these years. Legislatures redefined professional standards in many states, scaling down educational requirements for admission to the bar or eliminating them altogether in such areas as New Hampshire, Wisconsin, and Indiana. Champions of the common man likewise found the local bar association as vulnerable a target as the "monster" Bank of the United States. Both these institu-

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tions shared the same defects in the eyes of a militant democracy: they impaired economic competition and they threatened to become dangerous political pressure groups, isolated from the masses behind a wall of corporate solidarity.

"The tendency of the age is clearly marked," lamented a legal writer in 1847.

The voice of the multitude is against the legal community. Leveling begins with the mount of justice. In a sister State, systems are tottering to their downfall, and innovation and experiment walk about the ruins. The day is past when the lawyer can call upon the legislature to assert his rights. The bar finds no favour at the ballot box. The influence which impresses the stranger, arises from individual energy and not from association. A cry is going out over the land. Radicalism is infectious as the pestilence. The tide of popular will must soon sweep away our prerogative, unless we stay its waters.<sup>1</sup>

Aside from the admission that lawyers *had* a prerogative worth defending, this was a standard complaint which later historians have tended to accept at face value. It enables them to fit the second third of the nineteenth century neatly into a dramatic triptych illustrating "The Lawyer's Progress." On one side appears the Golden Age of revolutionary jurisprudence; on the other, the dawn of modern professionalism with the formation of the American Bar Association (1878) and similar agencies. In between sprawls a scene of darkness and confusion—the lower depths of the American bar, whose earlier attainments and esprit de corps are alike submerged beneath a wave of barbarian invasions. "Demoralization" and "deprofessionalization" are the terms most often used to describe the condition of the lawyer in the 1840's and 1850's.<sup>2</sup>

Appealing to the imagination through its vivid contrasts, this interpretation satisfies the demands of common sense as well. It even adds another link to the chain of causation leading to the Civil War, insofar as popular contempt for legal authority may have contributed to the ultimate recourse to armed violence. But for all its

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<sup>1</sup> "New Publications: *Règles sur la Profession d'Avocat, par Mallot*," 7 *Penn. L. J.* 99 (1847).

<sup>2</sup> Standard surveys include: Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul, 1953), 232 ff.; and Blackard, "The Demoralization of the Legal Profession in Nineteenth Century America," 16 *Tenn. L. Rev.* 314 (1940).

plausibility, it rests upon a very shaky foundation. The closing with eclat of several small bar associations; the jeremiads of conservative academics such as James Kent and Joseph Story; the presumed incompetence of elected judges and self-taught lawyers—these are the meager sources from which elaborate, and often unwarranted, inferences have been drawn.

Wherever one turns, the details of the picture cry out for re-appraisal. Did the caliber of state judges deteriorate as a result of popular election? Basic to such an inquiry should be a clear understanding of the nature and rate of turnover among judicial personnel both before and after the elective system went into effect. The materials for a thorough study are abundant, but to date no scholar has undertaken the task, even at the superior court level. Yet the results might well prove shattering to conventional assumptions regarding the vagaries of mass political behavior. To cite only one example: Isaac F. Redfield, chief justice of the Vermont Supreme Court and a distinguished jurist, was re-elected to his post annually for twenty-five years, from 1835 to his retirement in 1860, although he was a rather stiff-necked character who opposed the dominant political forces of his state. Except for his unusually long period of service, his case typified a general trend in Vermont, where judges were regularly returned to office from year to year during good behavior.

Was the Vermont pattern repeated in other states? Did the elective principle offer greater security of tenure to frontier judges than to their counterparts in more sophisticated urban environments? These questions still await serious investigation, as does the role of bar associations in the middle years of the nineteenth century.

The statistical incidence of these associations has never been computed. To do so would involve an exhaustive search through local newspapers, since state and national organizations did not exist. But a careful study of even one key area, such as Massachusetts, would do much to test the validity of the accepted hypothesis that institutional ties crumbled before an aroused public opinion.<sup>3</sup>

Meanwhile some new perspectives on the alleged demoralization of the bar may be gleaned from a study of legal periodicals. These publications have been strangely neglected by historians,

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<sup>3</sup> Anton-Hermann Chroust has verified the existence of some seventeen bar associations in various states during the post-1830 period, but his fragmentary researches leave many important questions unanswered and serve chiefly as a useful introduction to the problem. See Chroust, *The Rise of the Legal Profession in America* (2 vols., Norman, 1965), II, 129-154.

although in volume alone they form a striking feature of the post-1830 years, as the following chart attests:

<i>Date</i>	<i>New Law Magazines</i>
Pre-1830	12
1830-1839	5
1840-1849	13
1850-1859	19
1860-1869	15 <sup>4</sup>

To be sure, these figures are somewhat misleading, since most fledgling journals failed to survive more than a few years. A tabulation of all law magazines in existence at the beginning of each decade reveals a more conservative picture:

<i>Date</i>	<i>Law Magazines</i>
1810	1
1820	1
1830	5
1840	2
1850	10
1860	9
1870	17

Nor should it be forgotten that magazine publishing generally experienced a boom during these years, due to low postage rates, typographical innovations, and improved transportation and distribution facilities.

Yet with due allowance for these caveats, the rate of growth for such specialized publications remains impressive, and suggests that the legal journal may have filled a peculiar need among American lawyers sensitive to popular distrust of more formal professional agencies.

The changing format of the law magazine itself supports this impression. Whereas earlier journals (of which Hall's *American Law Journal* (1808-1817) was both pioneer and prototype) tended to be speculative and treated many subjects of general interest to the educated community, the typical magazine of the post-1830 years conceived its function in rigorously utilitarian terms. De-

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<sup>4</sup> This statistical table, and the one below, have been compiled from lists found in Frederick C. Hicks, *Materials and Methods of Legal Research* (2d ed., Rochester, 1933), 147-148, supplemented by material from Leonard A. Jones, ed., *An Index to Legal Periodical Literature* (Boston, 1888).

signed to serve the "workingmen of the profession," such journals as the *Monthly Law Reporter* (1838-1866), *New York Legal Observer* (1842-1854), *Pennsylvania Law Journal* (1842-1848), and *Western Law Journal* (1843-1853) disdained theorizing and offered their readers a "medium of communication concerning legal matters of fact useful and interesting to gentlemen of the bar."<sup>5</sup> A major portion of every issue was devoted to a reporting of recent court decisions, in advance of their appearance in official volumes of reports. Reviews of new law books, hints for the improvement of office habits or courtroom techniques, summaries of new state laws, and memoirs of practitioners living and dead completed the contents. Behind these diverse features and pervading them all lay a further objective which was seldom openly avowed: to create for lawyers an effective counterimage to the popular stereotype of the crafty despoiler of the poor.<sup>6</sup>

In this quest for a usable symbolism the obituary notice played a conspicuous part. Perhaps, as Herbert Butterfield has suggested in regard to seventeenth-century science,<sup>7</sup> every great movement sooner or later enters a myth-making phase, in which earlier achievements and personalities are reappraised and idealized as guides for the future. The traits of the departed pioneer then become an imaginary yardstick by which to measure the progress of his successors.

American law was clearly ripe for such a retrospective critique by 1830. A juristic revolution had long been completed; new institutions and techniques were in successful operation; and the old actors were fast passing from the stage. For beleaguered law writers necrology held both the seeds of corporate identity and a possible answer to the egalitarian challenge.

A few simple themes recur from obituary to obituary, from journal to journal. The American lawyer was invariably a man of indomitable industry and perseverance. Lamenting the early death of a promising young Massachusetts attorney, his biographer struck a familiar chord when he informed his readers:

He was a born lawyer. His mind had a native affinity for the study of legal rules and principles . . . His taste for the law was natural and instinctive, and the study of it was a labor of

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<sup>5</sup> "Miscellany," 1 *Monthly L. Rep.* 55 (1838).

<sup>6</sup> The generalizations which follow are based upon a survey of sixteen law magazines, selected with a view to geographical distribution and representing the least as well as the most successful publications.

<sup>7</sup> Herbert Butterfield, *The Origins of Modern Science: 1300-1800* (rev. ed., N.Y., 1958), 161-174.

love. He would have been a good lawyer with very little study, for the legal character of his mind would have supplied the deficiencies of book knowledge, and led him by a sort of "*rusticum iudicium*" to the same results to which others had arrived by the laborious processes of study. . . . Many men would have been contented with this original turn for the law, this legal mother-wit, and have preferred to solve the questions which came before them by a sort of Zerah Colburn process, rather than avail themselves of the borrowed aid of the learning of others. But his ambition was of a nobler and higher kind, and he studied the law as zealously and conscientiously as if his books had been his only guides and dependence. He had that invaluable property in a lawyer—one not often found in combination with a mind so rapid in its movements and powerful in its grasp as his—unwearied patience in legal investigation.<sup>8</sup>

The need for constant application scarcely diminished as one moved upward in the profession. The example of Reuben Saffold (1788-1847), chief justice of the Supreme Court of Alabama, could serve as a text for many another early jurist: "Endowed by nature with sound judgment and an accurate and discriminating mind, he never feared that laborious attention which enabled him to master the subjects he was to decide."<sup>9</sup>

A stress on the laborious pursuit of legal knowledge acquitted the lawyer of quackery but opened the door to a paradox. For if the path to success was indeed so arduous, how could the average man hope to achieve it? And was this not the chief complaint against the bar of the 1830's—that its members formed an exclusive clique sustained by esoteric rules which the masses could not understand? To reconcile the technicalities of the law with the demands of an open society required no little skill; but the publicists of the day measured up to the challenge.

They were careful to dissociate the practice of their craft from mere dilettantism or an undue reliance on book learning. Since law was a rational science, they argued, its basic principles could be easily grasped by all men. Uncertainties arose only when one sought to apply these principles to varying fact situations. Success in this context depended upon common sense and a firsthand knowledge of everyday life, two qualities in which most early lawyers had excelled.

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<sup>8</sup> Hillard, "Biographical Sketch of James C. Alvord," 2 *Am. Jurist and L. Mag.* 377-378 (1840).

<sup>9</sup> "Obituary Notices," 10 *Monthly L. Rep.* 383 (1847).

Plain-spoken Oliver Ellsworth, Chief Justice of the United States Supreme Court (1796-1800), demonstrated the "active virtue" of an entire generation of legal types who solved their problems with rule-of-thumb practicality: "He satisfied or subdued the reason, with little endeavour either to excite the feelings or to gratify the fancy."<sup>10</sup> And a grass-roots realism characterized the successful practitioner of later days as well. When the brilliant Massachusetts jurist Lemuel Shaw died in 1861, his eulogists found that his most advantageous trait had been "good, sound, Anglo-Saxon common sense:"

This it was which gave him such mastery over the rules and principles of the common law, that "ample and boundless jurisprudence" which the experience and common sense of successive generations of men have gradually built up, and which came to us from our English ancestors, a precious inheritance of freedom and of the great principles of justice and right.<sup>11</sup>

As a paragon of industry, fortitude, and shrewdness, the American lawyer shared several of the attributes ascribed to the "self-made man" by contemporary writers of success manuals and didactic novels. Nor does the analogy end here. Both ideals embodied the "work and win" formula of the Protestant ethic, according to which rewards invariably followed well directed effort. "I have often thought that if other men could have been as diligent and assiduous as Mr. Webster, they might have equalled him in achievement," declared a member of the New York Bar in a characteristic vein.<sup>12</sup> Success for the lawyer, as for the self-made man, did not necessarily imply large financial returns, however; the true measure of accomplishment lay in the moral satisfaction afforded by a life well spent in the service of others.

Striking in their parallelism, the two mythologies diverged in equally important ways that point up the limits within which law writers had to operate. As John G. Cawelti has shown, the self-help advocates of the antebellum period spoke for a status-oriented, preindustrial America that no longer existed in fact. Fearful of violent social change, they continued to preach the gospel of improvement within one's God-given calling; hostile to big business

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<sup>10</sup> "Biographical Sketch of Chief Justice Ellsworth," 3 *Am. L. Mag.* 271 (1844).

<sup>11</sup> "The Death of Chief Justice Shaw," 24 *Monthly L. Rep.* 10 (1861).

<sup>12</sup> "Proceedings of the Bar upon the Occasion of the Death of Daniel Webster," 15 *Monthly L. Rep.* 585 (1853).



and immigrant labor, they reaffirmed the standards of the independent craftsman as a guide to success in the age of the corporation. Self-made men, by definition, were conservative Christians who aspired only to a modest respectability that posed no threat to established power structures.<sup>13</sup>

This formula did not meet the needs of law writers. Since the bar was already under attack for its alleged exclusiveness, any talk of stabilizing vocational lines would mean a gain for the enemy. Instead, publicists sought to show that the law had always been a wide-open field, inviting ambitious men from other walks of life to abandon their previous pursuits in order to join the ranks of its leaders. This was a far cry from the static society envisaged by the self-help school; in its fully developed form it amounted to an endorsement of continuing social upheaval within the profession:

It is as hard for a rich man's son to obtain the honors of the bar, as it is for the rich man himself to enter the kingdom of heaven. They come from the farm and the workshop, from that condition of life to which the great majority belong. They are counted by the multitude as one of themselves, and they hail their elevation as a triumph of their own over all that looked like aristocracy. With enthusiastic pride they push them on from honor to honor, until a new generation arises that knew not their origin and see them only in their exaltation. They see them lifted above the common level; their jealousy is awakened; the order of aristocracy is scented in the atmosphere that surrounds them, and they receive no cordial support except for those august stations to which only advanced age and extensive renown can aspire. A new set is brought up from the same origin to run the same career. And thus it happens that the children of the cabins come up and occupy the palaces of the Republic.<sup>14</sup>

This mobility received specific documentation in the obituary columns. A random sampling of forty-eight death notices carried in the *Monthly Law Reporter* (which made a point of listing obscure practitioners as well as celebrities) reveals the following family backgrounds:

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<sup>13</sup>John G. Cawelti, *Apostles of the Self-made Man* (Chicago, 1965), 39-75.

<sup>14</sup>"Inaugural Address of Hon. A. Caruthers, Professor of Law in Cumberland University, Lebanon, Tennessee," 3 *U.S. Monthly L. Mag.* 542 (1851).

Doctor	- 3
Merchant	- 5
Minister	-11
Farmer	-10
Mechanic	- 2
Soldier	- 2
Lawyer	-11
Judge	- 4

Several foreign-born lawyers figure in the list, as a further indication of the varied sources of legal recruitment. While spokesmen for the self-made man might draw invidious comparisons between the mores of the immigrant and the old-stock native, law writers could not ignore the contributions to their science made by men of the stamp of Peter S. Du Ponceau of France, Thomas Addis Emmet of Ireland, and Francis Lieber of Germany.

Similarly, lawyers were more realistic in acknowledging pecuniary motives as a major factor in their choice of a career. If they insisted that the average practitioner "lived well and died poor," this was hardly a counsel of Christian moderation. A surplus of riches enhanced one's legal reputation. "It is understood, that he was as eminently successful in the accumulation of wealth, as in the prosecution of his professional pursuits," observed the biographer of one minor figure, with obvious satisfaction.<sup>15</sup>

Having entered the law to improve their economic status, young men could not be expected to conform to the strict vocational limitations imposed by the self-help manuals. Law was accordingly defined as a primary, but not exclusive, pursuit. Since an attorney's practice so often revolved about business questions, a personal involvement in the world of affairs could prove beneficial both to his pocketbook and to his standing at the bar. He might safely engage in real estate ventures, railroad promotion, or banking, so long as he continued to give his paramount allegiance to the law. For there was no way to move *up* from the legal profession, which alone offered a satisfying blend of material reward, intellectual challenge, and social utility. Attorneys who abandoned their practice to pursue other callings were like apostates from a true faith; and none deserved greater censure for their acts of heresy than lawyer-politicians.

The divorce of law from politics was the most significant contribution which publicists of the Jacksonian era made to legal

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<sup>15</sup> "Obituary Notices: Lewis Bigelow," 1 *Monthly L. Rep.* 275 (1839).

mythology. Hitherto political service had always been regarded as a legitimate by-product of legal competence. Few of the practitioners whose deaths were recorded in the law journals of the 1840's had missed election to a state or national legislature at some point in their careers. Collectively they established a pattern of public leadership which had answered well the needs of the early Republic. Biographers described their conduct in office as "fearless," "manly," and "independent," and paid tribute to their statesmanlike vision and grasp of sound principles.

Yet their example, however useful in the days of Washington, Adams, and the Virginia Dynasty, had little relevance for a more democratic age. Latter-day lawyers were informed that they might learn more valuable lessons from studying the unworthy politicians of the past, such as the Maine legislator John Holmes, who "trimmed his sails to the prevailing wind of popular favor" during the first administration of James Madison:

"The gladsome light of jurisprudence" was not bright and warm enough for him;—he loved law, but he loved politics more. . . . In reviewing the life of such a man, we may perhaps derive a useful reflection upon the danger, not to say folly, of leaving the broad highway of an honorable and profitable profession, for the fitful and the exciting pursuits, and the unsubstantial rewards of the mere politician. That Mr. Holmes had as much of popular favor and its fruits, as falls to the lot of men, none will deny; that they furnished him the satisfaction and the rewards which he would have acquired in the quiet progress of his profession, we do not believe.<sup>16</sup>

Though Holmes's political opportunism was exceptional for its time, according to law writers, since 1830 the exception had become the rule. "It is well known," declared one commentator in reference to the latter period, "that men of the highest eminence in our profession are seldom members of legislative assemblies in this country, and, when they are, their influence is comparatively small."<sup>17</sup> Political posts now went to party men—third or fourth-rate lawyers who acknowledged no higher principle than self-interest. To retain the support of a mass electorate, these legal turncoats placed themselves at the head of every popular movement, however unwise or dangerous its objectives. They even spearheaded legislative attacks upon the bar and the judiciary, and encouraged a rash of other ill-considered measures which purportedly reflected an ever changing popular will. Under such circumstances politics

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<sup>16</sup> "The Hon. John Holmes," 6 *Monthly L. Rep.* 151, 154 (1843).

<sup>17</sup> "Codification," 7 *Monthly L. Rep.* 350 (1844).

no longer provided an attractive avocation for the responsible lawyer, who was advised by publicists to stick to his practice if he valued his self-respect.

Behind this warning lay no lament for the passing of the class-conscious "gentleman" in politics. Law writers of the 1830's denied that such a haughty personage had ever existed, at least among lawyers, who had always been simple, hardworking, democratic types. It was not pride or fastidiousness which kept the best attorneys out of politics in the Jacksonian era, but the fact that politics had developed into a full-fledged profession with specialized rules of its own—several of which ran counter to deeply cherished legal attitudes and practices.

Representation, for example, no longer meant what it once did. When biographers praised the manly independence of an early legislator, they were reading political history through legal spectacles. A good politician, by their criteria, represented his constituents as an attorney represented his clients. That is, he acted to promote their best interests as he understood them; and in case of disagreement, his judgment ultimately prevailed. This view of political responsibility could not be reconciled with the more democratic notion that a representative was bound in all cases to carry out the wishes of his constituents. While few successful law-makers ever disregarded the majority will in practice, law writers continued to promote the theory of legal representation until the perfecting of party organization and party discipline in the 1830's demonstrated its obsolescence for all purposes save that of myth.

A similar conflict between legal attitudes and political realities occurred in connection with the problem of electioneering. Lawyers were trained to believe that the job must seek the man. A mass of literature stretching back to the Middle Ages condemned the improper solicitation of legal business and required that the lawyer wait patiently in his office for clients to appear (which they were certain to do, by a process of legal legerdemain, if the would-be practitioner had worked sufficiently hard to prepare himself for the duties of the profession). Publicists incorporated this trait into their image of the early American lawyer, who allegedly looked upon public office as a temporary employment, to be secured like any other retainer. Typical were the circumstances surrounding the election of Charles Marsh, a Vermont attorney, to the House of Representatives in 1814: "He was always averse to holding elective offices, and in this instance, was forced into Congress against his will."<sup>18</sup>

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<sup>18</sup> "Obituary Notice," 11 *Monthly L. Rep.* 527 (1849).

Twenty years later the reluctant candidate stood little chance of winning an election, even in fiction. Political campaigning had become an art in itself, demanding catchy slogans, colorful personalities, and a degree of ballyhoo foreign to the thinking of earlier generations. No lawyer could now be a successful politician, writers cautioned, unless he abandoned his professional integrity and became a hireling of the masses. Perhaps the insistent appeal to the tradition of the independent practitioner betrayed some uneasiness over current values within the profession itself, where many an attorney had already shown an unseemly willingness to exchange his independence for a secure job with a law firm or corporation.

From a tactical standpoint, of course, the separation of the "real" lawyer from politics offered several advantages to propagandists. It enabled them to class as unprincipled demagogues all members of the bar who spoke up for legislative reform of the law; it suggested that most statutes were either unwise or unnecessary additions to an existing body of basic principles; and it reaffirmed the image of the lawyer as a hardworking technician whose services were as necessary to society as those of any other skilled craftsman:

To the mass of practitioners, the law is not, except on some rare occasions, an intellectual pursuit. Truth compels us to own, with Wordsworth, that "the demands of life and action," with us, as with men of other pursuits, "but rarely correspond to the dignity and intensity of human desires." We are clever men of business, as a mass, and no more. It is our BUSINESS TALENTS, our PROMPTNESS, ACCURACY, and DILIGENCE, that commands success, respect and influence.<sup>19</sup>

Much the same utilitarian and antipolitical line was taken by apologists for another unpopular occupational group—the officer corps of the United States Army and Navy—during these years, and for similar reasons. Military journalists argued that a permanent cadre of trained professionals posed no threat to democratic institutions, because their energies were wholly absorbed by the technical demands of their science, which gave them neither the time nor the inclination for political intrigues.<sup>20</sup>

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<sup>19</sup> "Office Duties," 4 *Am. L. Reg.* 193 (1856).

<sup>20</sup> See, for example: Sydney, "Thoughts on the Organization of the Army," *The Military and Naval Magazine of the United States*, II (December, 1833), 193-198; and "The Wants of the Navy," *Army and Navy Chronicle*, XI (December 17, 1840), 398-399. William B. Skelton of Ohio State University, who brought this analogy to my attention, is planning a major study of the military mind in nineteenth century America.

The defense of professional groups in terms of their practical usefulness to society deserves special emphasis, since Perry Miller, in a recent important study of the legal mind in nineteenth-century America, has suggested that the antebellum lawyers were trying to establish themselves as an intellectual elite in the eyes of the public.<sup>21</sup> While this may have been the objective of certain academic jurists such as Kent, Story, and David Hoffman, a different view prevailed among the rank and file who patronized the law magazines. For them legal practice was a bread-and-butter concern, a daily business in which intellectual refinements found little place. "The most learned lawyer in the world would not get business, if he did not attend to it," warned Timothy Walker to the graduating class of the Cincinnati Law School in 1839. "The question with the client is, not who knows the most law, but who will manage a cause the best; and, all other things being equal, he will manage a cause the best, who devotes most attention to it."<sup>22</sup>

Practitioners could not afford to waste time on frivolous cultural pursuits, when it took constant effort just to keep abreast of the increasing volume of new court decisions. If they turned to polite literature for occasional relaxation, they were likely to choose an established classic whose familiarity with the public could be put to good use in courtroom debate. The Bible and Shakespeare were particular favorites for, as one commentator explained, quite apart from their aesthetic qualities, "they may also, sometimes, be quoted to great advantage; the former never but with reverence; the latter, never pedantically."<sup>23</sup> At a time when legal reputations still owed much to oratorical skills, an acquaintance with "good" literature could further aid an attorney to develop a graceful speaking style. On the death of Rufus Choate (1799-1859), perhaps the most cultivated orator of his time, an attempt was made to place the whole matter of nonlegal learning in proper perspective: "True, he laid his foundations deep and broad, by no means confined to legal acquirements, but embracing a rich classic culture, and what we believe aided him more than all, the devoted reading of the Bible: yet these other studies were only episodes, or rather recreations, renewing his professional energies."<sup>24</sup>

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<sup>21</sup> Perry Miller, *The Life of the Mind in America from the Revolution to the Civil War* (New York, 1965), 99-265.

<sup>22</sup> "Ways and Means of Professional Success; being the substance of a Valedictory Address to the Graduates of the Law Class, in the Cincinnati College, by T. Walker, Professor of Law in that Institution: delivered March 2, 1839," 1 *Western L. J.* 545 (1844).

<sup>23</sup> "A Letter of Judge Daggett," 8 *Monthly L. Rep.* 94 (1845).

<sup>24</sup> Fuller, "Rufus Choate," 25 *Monthly L. Rep.* 266-267 (1863).

To picture the lawyer as detached from all interests which did not relate to his professional life suited the needs of myth-makers; but they found it difficult to reconcile their antipolitical attitudes with the demands of public order. For if legislatures were corrupt and the laws they passed unwise, why should citizens obey? A mounting wave of lawlessness throughout the Union made the question far from academic, as journalists pointed with concern to lynchings in Mississippi, riots in Pennsylvania and Massachusetts, duels in Louisiana, and vigilante justice in the goldfields of California. Nor were these symptoms of social disintegration confined to the local level; even Federal authorities met with popular resistance in their efforts to enforce fugitive slave laws. Some anti-slavery agitators openly professed adherence to a "higher law" than that found in the Constitution of the United States, making the individual conscience the determining guide to political, as well as religious, behavior. Such subjectivity impressed legal writers as the ultimate democratic heresy, and they denounced the use of moralistic arguments to justify the overthrow of existing institutions:

It is among the strange signs of the times, that individuals are found saying and doing the most violent, unjust and dangerous things, without rebuke, *because they say and do them in the cause of anti-slavery*. Scarcely a voice is raised against these excesses, because, if raised, it would be answered with the charge of enmity to the slave. This should not be. . . . If we would resist the extension of slavery, we must equally resist the spirit of rebellion against the constitution.<sup>25</sup>

But counsels of moderation and proposals to strengthen the police forces in major urban centers provided no adequate solution to the problem of bad laws. Acknowledging that the public had reason to distrust its legislators, spokesmen for the "workingmen of the profession" sought a technique by which the bar might assume responsibility for a reform program without becoming embroiled in partisan politics. Their strategy called for the creation of a new institution which did not take practical shape until the next generation: the independent administrative commission.

In its most rudimentary form, the commission idea suggested a small permanent body of trained specialists appointed by the governor of a state to scrutinize the final draft of all legislative measures. They would act primarily as stylistic critics, correcting the language of a law to make it more intelligible to the general

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<sup>25</sup> "The Latimer Case," 5 *Monthly L. Rep.* 497 (1843).

public as well as consistent with professional norms. Some writers went further and argued for a true board of censors, with power to weed out in advance all doubtful bills, including any which contradicted previous enactments. Through their expert guidance a haphazard mass of state legislation might in time be reduced to an orderly system of harmonious rules.

But it was as a potential planning agency that the commission made its strongest appeal to the legal imagination. Publicists dreamed of interstate boards of lawyers and jurists entrusted with the duty of framing national laws to cover such matters as commerce, land tenures, education, and crimes. Unlike "tinkering legislatures," these professional bodies would engage in comprehensive social planning, working from basic principles to their most far-reaching ramifications:

. . . and this process seems to be most in harmony with the spirit of the time, which is inquiring, philosophical and theorizing. . . . What would be said of the architect, who, to build his arch, should try, one after another, all possible shapes, till at last he hit the one which would stand, when he had a slate, and in his head principles, on which he could in a little while reckon just what must be built to form a true and perfect structure?<sup>26</sup>

For the first time since the early Republic the interests of the technician could also be reconciled with those of the statesman, as lawyers proposed to bury sectional differences within a network of uniform economic and cultural regulations coextensive with the Union.

Their visions remained unfulfilled, however, for reasons which should have been apparent to every realistic member of the bar. Apart from their elitist pretensions, all of these schemes depended in greater or less degree upon the support of those very legislative bodies whose alleged irresponsibility had created the nation's lawless temper. Furthermore, the commission idea, for all its apolitical tone, pointed to the development of a fourth branch of the government—an administrative wing whose personnel would enjoy the substance of political power without its attendant risks.

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<sup>26</sup> "Advancement of the Law by Lawyers," 11 *Monthly L. Rep.* 150-151 (1848). For the details of several projects, see: Tellkamp, "On Codification, or the Systematizing of the Law," 8 *Am. Jurist and L. Mag.* 283 (1842); "National Jurisprudence," 3 *U.S. Monthly L. Mag.* 125 (1851); "Legislation," 5 *U.S. Monthly L. Mag.* 125 (1852); Bishop, "Law in the United States," 3 *Am. L. Reg.* 60 (1854).



And it would take a Civil War to demonstrate the merits of bureaucratic planning to a public still wedded to theories of laissez faire.

Meanwhile the idealism of the antebellum bar found a practical outlet closer to home. In 1849 the American Legal Association was established

for the purpose of insuring safety and facility in the collection of claims and the transaction of legal business throughout the United States. Its design is to furnish professional and business men with the name of at least one prompt, efficient and trustworthy Lawyer in every shire-town and in each of the principal cities and villages in the Union, who will transact with despatch and for a reasonable compensation, such professional business as may be entrusted to him.<sup>27</sup>

Promoted largely through the efforts of John Livingston, a law writer and editor, the Association was both broader and narrower than any previous legal organization in the nation's history. While it claimed members in every state of the Union (as well as two in England), its objectives were rigorously limited. As a lawyer referral service, it disclaimed all interest in politics, community welfare, or even the encouragement of a general spirit of fraternalism among practitioners. Instead, it appealed to the technician's desire for more rational procedures, as it focused attention upon the lawyer as a competitive businessman.

Every practicing attorney who subscribed five dollars and furnished "satisfactory evidence of professional integrity and capacity" could join the A.L.A. on a two-year basis. He thereupon received an official Manual, complete with constitution, by-laws, and a list of the names and addresses of all members (including one director in each state). The Association undertook to distribute additional copies of the Manual to the "business public," and also to place advertisements from time to time in major newspapers across the country. The advantages of such a centralized reference bureau were sufficiently alluring to keep the A.L.A. in existence for some five years, after which it quietly expired.

As a stimulus to professional unity, the Association served a useful purpose; but even more important was the work of its Secretary, John Livingston. Drawing upon a voluminous legal correspondence, Livingston compiled in 1850 an authoritative list of the names and addresses of all practicing lawyers and judges in the United States. His *United States Lawyer's Directory and Official*

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<sup>27</sup> "The American Legal Association," 3 *U.S. Monthly L. Mag. Advertiser* (1851).

*Bulletin* incorporated data supplied by state and local officials down to the level of county sheriffs, and formed the first accurate legal census ever taken in America. Its publication testified both to the coming-of-age of the American bar and to its growing preoccupation with intramural matters. Livingston revised his register annually until the collapse of the A.L.A. in 1854; thereafter he continued to bring out new editions at irregular intervals through 1868.<sup>28</sup>

The approach of civil war did little to change the introspective bias of most legal writers. Characteristically they tended to view the slavery crisis as a contrivance of partisan politicians, useful in campaign years but of no real concern to the general public. As late as October, 1860, one commentator predicted that if "these contending dogmas be pressed to the practical result of deranging trade, augmenting prices, and curtailing commerce, a spirit will be roused which will put an end to all further disturbance from this source."<sup>29</sup>

One may deprecate these attitudes of olympian detachment as a cowardly flight from responsibility, but they may likewise have represented an inevitable stage in the professionalization of the American lawyer. This much at least is certain: in the developing pattern of nineteenth-century legal thought they played no inconsiderable role. Emory Washburn illustrated the ease with which they were transmitted to the postwar generation when he told a graduating class at Harvard Law School in July, 1864, of the destiny that awaited the legal expert in the reconstruction era to come:

You have only to wait a brief time, when the business of re-organization must be resumed; and the people will look to the aid and counsel of others than the mad or selfish politicians, whose evil counsels or rash judgments first involved them in the disastrous consequences of alienated affections and civil discord. Such a violence has been done to our institutions, such a strain has been made upon the strength of the common bond that bound us together as a nation, that it will require the wisest counsel, the calmest judgment, and the most devoted patriotism to restore the government again to anything like

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<sup>28</sup> The Library of Congress records list ten separate publications between 1850 and 1868. As editor of the *United States Monthly Law Magazine*, Livingston also devoted one composite issue (Oct.-Dec., 1851) to a reprinting of his complete *Law Register* for that year.

<sup>29</sup> "Slavery in the States and Territories," 23 *Monthly L. Rep.* 458 (1860).

harmonious action. And these, I repeat, are not to be found in the political leaders who caused the mischief to begin with. Nor is it to the mere man of business that we are to look, nor to the scholar, or man of letters, however speculative he may have shown himself in his study into causes which he hid beyond the reach of his unpractised vision. In the restoration of peace to our distracted country under the dominion of well administered law, such as she had enjoyed for three quarters of a century, I am sure that our profession are to take a most important part.<sup>30</sup>

Indeed, in the postwar world of regulatory commissions, scientific planning, and patrician politics, the elitist ideals of the antebellum bar became practical realities for the first time. But the growth of administrative agencies, far from settling the conflict between political and legal values, merely added a new dimension to the American lawyer's continuing quest for acceptance in a democratic society.

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<sup>30</sup> Washburn, "Reconstruction: The Duty of the Profession to the Times," 26 *Monthly L. Rep.* 278 (1864).