

Reviews

Heart Against Head: Perry Miller and the Legal Mind

Lawrence M. Friedmant†

The Life of the Mind in America, From the Revolution to the Civil War. By Perry Miller. New York: Harcourt, Brace & World, 1965. Pp. 338. \$7.50.

I.

When Perry Miller, the great intellectual historian, died suddenly in 1963 at the age of 58, he left behind him fragments of a massive, comprehensive study of the American mind from the Revolution to the outbreak of the Civil War. Of nine projected parts, two and a portion of the third have been published in one volume.¹ Book II of this volume, *The Legal Mentality*, contains Professor Miller's judgment on the intellectual life of American law. Publication of an essay on the intellectual side of the law by an author of high prestige is a major—and rare—event in American legal historiography. On the whole, however, this is a disappointing work. It has a certain grandeur of design, a certain beauty of style, but it is disfigured by many errors of fact² and more significantly by its strained and strange view of American law and the legal profession. Some errors would no doubt have been corrected had the author lived. Others, however, are more fundamental errors in deep-seated premises, errors that infuse the entire

† Professor of Law, University of Wisconsin. B.A. 1948, J.D. 1951, LL.M. 1953, University of Chicago.

1. P. MILLER, *THE LIFE OF THE MIND IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR* (1965) [hereinafter cited as *THE LIFE OF THE MIND*].

2. For example, a discussion of equity, *id.* 171-182, consistently confuses the various senses in which this complex legal word is used. Professor Miller also states that "[i]n the colonies, such controversies as in mid-eighteenth century England were finding their way to Chancery usually had to be adjudicated, if at all, by the legislatures." *Id.* 171. This ignores the fact that some colonies (such as South Carolina) had fully-developed Chancery courts; moreover, some jurisdictions enforced in their ordinary courts what would be elsewhere labeled equitable claims.

work. I shall attempt to set forth Professor Miller's approach to American legal history, to state frankly why I think it is wrong, and then to suggest alternative ways of looking at the same field.

II.

Professor Miller, of course, is an intellectual historian. The actual content of the legal system is not his concern; his subject, rather is the development of legal ideas and their relationship to other aspects of American intellectual life.³ He finds the substance of American legal thought in works of formal jurisprudence and in the speeches and treatises of important lawyers. Professor Miller, however, was not a lawyer. His vast erudition did not extend to such technical legal material as case reports and statutes. His research was generally limited to the study of formal texts of leading or archetypical jurists; on these he bases his generalizations. He then compares his jurisprudential findings with other data, drawn in the same manner from formal writings in other fields, such as religion and literature. His findings are further compared with his conceptions of the "American character" or the "American mind," which is in turn a composite of or an abstraction from the legal mind, the literary mind, the revivalist mind, and the scientific mind.

Any scholar must be granted the right to choose his own subject, and the intellectual historian has the right to deal solely with products of the intellect if he desires. He may treat his subject in relative isolation; though society is a seamless web, it is neither necessary, nor even possible, to take fully into account the railroad and the cotton gin in dealing with Emerson and Poe. But it is another thing entirely when an intellectual (or social, or economic) historian claims for *his* subject matter and his concepts that they alone explain what makes and moves the world.⁴ To blame Auschwitz and Buchenwald exclusively or even largely on Nietzsche or Wagner would be blatantly untrue to the science of society. Judgments of causation are slippery at best. Many slight or invisible ropes bind and loose the social order; present knowledge of causation is too embryonic to unravel them.

3. *THE LEGAL MIND IN AMERICA, FROM INDEPENDENCE TO THE CIVIL WAR II* (Miller ed., 1962). This was a collection of documents edited by Professor Miller, with brief essays introducing each selection.

4. John Higham wrote, almost prophetically, in 1951 that Miller seemed "chiefly concerned with estimating the force of ideas themselves. There are dangers in this enterprise—dangers of assuming the autonomy of ideas and losing oneself in abstractions." Higham, *The Rise of American Intellectual History*, 56 *AM. HIST. REV.* 470 (1951).

Whether the Civil War was in essence a culture conflict, a moral crusade, the working out of blind economic forces, or all of these in some specific mix, or something entirely different, is beyond our capacity to determine.

Professor Miller can and does contribute to understanding when he confines himself to the intellectual life of his society, considered as a set of circles of literary effort which overlap or surround each other and are in turn collectively enclosed in one grand circle of American thought. Unfortunately, however, he goes further. Throughout the section on the legal mind, he makes assertions which are, explicitly or not, assertions of causal connections between intellectual developments and socio-economic events. These go beyond his data and frequently offend against common sense. Moreover, his boldest leaps are concealed by a highly metaphoric style, so that the reader is apt to follow along, dazzled into agreement, unless he stops to analyze each phrase.

III.

Let us first take an example of the kind of general argument that Professor Miller makes. The "mass of the People," he says, distrusted the law in the post-revolutionary period. This was because law was "by its very nature sophisticated, whereas the American people" were "natural, reasonable, equitable."⁵ The lawyers' "real controversy with their society was that they stood for the Head against the Heart."⁶ Though great courtroom "romantics" appeared later on in the century, American legal thought remained intellectually committed to the forces of cold reason. The legal profession bent every effort to the pursuit of reason and to the creating, out of its rude past, of an intellectual profession and a rational system of law. The mind of the lawyers differed from the revivalist mind (the subject of Book I of the volume), which dreamed of creating in America "a distinct, unique millennial utopia." The lawyers sought rather to "subject the society to a rule of universality," that is, to the dominance of the (supranational) common law.⁷ Partly because of this basic intellectual posture, the lawyers—exemplified by such men as James Kent, Joseph Story, and John Marshall—constituted a highly conservative element in society. They fought to preserve the property qualification; they fought against the elective

5. THE LIFE OF THE MIND 104.

6. *Id.*

7. *Id.* 133.

judiciary. The “conservative” bar, we are told, “trembled” at the equation of the elective principle with democracy.⁸ To them, elected judges meant the rule of the mob, the dethronement of reason, the triumph of “instinct.”

The reader will note that the molding of opinion on specific, concrete policies (appointive judgeships, the property qualification) is explained by the logical relationship between these positions and a more general intellectual position. That, for example, certain lawyers might want to preserve the rule of the rich because they themselves were relatively rich seems not to have entered Professor Miller’s mind. Moreover, Professor Miller thinks it makes sense to speak of the legal profession as a whole. To him, the profession represents a distinct stratum of society, with a distinctive frame of mind. That frame of mind, of course, is the one he senses peering out of the pages of formal legal texts. At least he is consistent; he generalizes no less glibly about society as a whole:

The populace in general, however, were strongly of the opinion that if there were to be lawyers at all, those who worked by instinct were the most tolerable.⁹

Neither here nor, of course, anywhere else does Professor Miller tell us how he knows what the “populace in general” thought about this or any other subject. The passage is based on evidence drawn solely from the writings of some articulate portion of the public. Thus there are two weaknesses in the argument: first, a sort of intellectual determinism; second, the drawing of conclusions that go far beyond the data.

Not that the methodological puzzle is easily solved. It may seem plausible to assume that most lawyers objected to the elective principle for judges and the broadening of the suffrage. But how can we prove it? There is no historical equivalent of the Gallup poll. We must settle for the best available evidence. But how shall we gather it? How much weight shall we place on a speech by Chancellor Kent? Was he a leader? Who listened to him? How many prominent leaders spoke on the other side? Who listened to them? Is there any way of finding out what less prominent lawyers thought? Of course these are hard questions, perhaps even impossible ones. But a historian of opinion owes his audience some rigor, some attention to methodology. Professor Miller’s book not only fails to solve these problems, it seems barren of any awareness that the problems exist.

8. *Id.* 234.

9. *Id.* 110.

We could forgive a lack of journeyman's rigor if instead we gained flashes of insight that no dull empiricism could hope for. And there are such flashes of insight, here and there. Unfortunately, we also find great expanses of vague metaphor, papering over a basic hollowness of argument. For example, in one passage, dealing with the appointment of Joseph Story to a chair at Harvard Law School, we read that when Story

joined to the crushing burden of his work . . . the labor of teaching at Harvard, his prestige made the Law School a national institution. From this point on may be dated the rapid growth . . . of law schools, so that by mid-century the time when a youth could set up as a lawyer merely by reading Blackstone in the office of the local practitioner was fast becoming a thing of what seemed a distant past. . . .¹⁰

What do we learn here? No doubt, Story's prestige was important to Harvard (let us leave aside what it means to say that his prestige "made" the Law School a "national institution"). According to Miller there seems to have been some connection between the growing prestige of Harvard and the decline of the apprenticeship method. Plausible perhaps: but precisely what was the connection? Professor Miller does not quite *say* that there was a connection, or of what sort; he merely says that the new development "may be dated" from the appointment of Story to his professorship—a baffling ambiguity. What is the mechanism which made Story's appointment crucial for Harvard and made the rise of Harvard a crucial factor in inducing radical change in the aims and methods of American legal education? One might guess that legal training and admission to the bar were affected by changes in the economics and social status of the bar, that these changes were connected with general trends in the professionalization of American occupational groups, and that these trends were in turn connected with gross changes in the economy, population, and society of the United States. Not a word, or a hint of these factors is to be found in *The Life of the Mind*. The passage on Story, typically, takes us to some distant realm where only disembodied thought exists. And even in that sphere the argument moves by poetry and allusion. On close inspection, the bones of the argument turn to water. Nor can we save the argument by calling Story's appointment not a cause but a landmark or symbol—an occurrence which may be taken as a dramatic outward manifes-

10. *Id.* 142. Story was appointed to a professorship established at Harvard by Nathan Dane in 1829. I C. WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 415-18 (1908).

tation, an external stigma of deep silent forces or events, The trouble is that Professor Miller does not treat it as such; at best he equivocates between the symbolic and causal planes. And his metaphors serve not to illuminate, but to hide the vacillation between these two levels of analysis.

The same vacillation recurs throughout the text. One page away from the passage about Story is an even more blatant example. Theophilus Parsons, we are told, “sadly” noted in 1852 two great streams of opinion in the bar—one, that legal scholars must turn to specialization, the other, that law, “like all true sciences, springs from a few simple principles which can readily be acquired.”¹¹ It made Parsons “melancholy” to realize that the specialist view was on the rise. Professor Miller here adds his own view:

The behemoths of legal scholarship had overreached themselves. They had created so massive an engine of rational erudition that the intellects of ordinary American students could not keep up with it.¹²

Now the historical problem under discussion is what was the origin of specialization in the study and practice of law. Are we really to believe that this phenomenon owes anything—let alone everything—to “behemoths of legal scholarship” who created an “engine of rational erudition” too “massive” for the “intellects of ordinary American students?” Is specialization in medicine, the sciences, and history to be blamed on “behemoths” who “overreached themselves” in their philosophical writings? The increasing *bulk* of American law was due more to population growth, economic development, and social diversity than to “behemoths.” If anything, “legal scholarship” was struggling to reduce the enormous burden of raw legal matter to practical, manageable form. This bulk was one reason why Parsons longed for a skeleton key of simple principles. Professor Miller speaks as if scholars *created* specialization at the bar by pushing legal erudition past the point of easy grasp. There is a grain of truth in the argument, but only a grain. No lawyer could grasp the whole of the legal system because the system became simply too big. Its size, however, owed nothing to Story and Kent and everything to social and economic events which Professor

11. The reader will be immediately reminded here of Langdell's famous passage: “Law, considered as a science, consists of certain principles or doctrines. . . . [T]he number of fundamental legal doctrines is much less than is commonly supposed.” C. LANGDELL, *CASES ON CONTRACTS* vi (1871).

12. *THE LIFE OF THE MIND* 142-143.

Miller entirely ignores. Moreover, professional specialization is a response to market demands. There is a patent bar and a tax bar because these are needed; nobody wants a bailments bar.

By ignoring the world in which the legal profession worked, Professor Miller constantly misses the point, even in the *intellectual* history of law. Here is a prime example:

. . . the accumulated weight of . . . tomes . . . rolled through the decades before the Civil War like a juggernaut. Hoffman's lectures and the volumes of Kent and Story were reinforced by other classics of what Roscoe Pound calls "doctrinal writings:" Reve's *Baron and Feme* (1816), Gould's *Pleading* (1832), Greenleaf's *Evidence* (1842-1843), Parson's *Contracts* (1853-1855), Washburn's *Real Property* (1860-1862), to mention only the most ponderous. Against the whimpering protests of beginners who felt that all they need know was American statute, such overpowering figures as Thomas Sergeant of Philadelphia patiently explained that these treatises were indispensable. . . . [T]hey shed upon the law a light of order.¹³

The first thing we notice about the passage is its maddening imprecision: what, if anything, does it mean to say that the accumulated weight of these "tomes . . . rolled through the decades . . . like a juggernaut?" In what respect were the treatises mentioned the "most ponderous" of pre-Civil War treatises? Professor Miller has probably never really read these books and compared them with others which he found less "ponderous." In what respect was Thomas Sergeant an "overpowering figure"? Few readers will have heard of this minor figure in American legal history.¹⁴ In the second place, the passage is sublimely innocent of law and life. Legal neophytes, whether of the whimpering sort or not, surely had heard of the common law. They surely knew that statutes were not the whole of the law. A naive student might have thought the matter was the other way around. Moreover, there is the innuendo, quite characteristic of Professor Miller's thought, that the "ponderous" tomes were exercises in pure legal logic and that they were somehow imposed on the helpless young, mesmerizing them despite their "whimpering" complaints. Nothing could be more fanciful. The simple fact is that these treatises were written to make money. Nathan Dane financed Story's chair at Harvard out of the proceeds of his multi-volume

13. *Id.* 156-7.

14. Thomas Sergeant (1782-1860) is probably remembered, if at all, for his reports of cases decided by the Pennsylvania Supreme Court, which he edited in collaboration with William Rawle. He also served as a justice on that court from 1834 to 1846, and wrote a number of treatises. 16 *DICTIONARY OF AMERICAN BIOGRAPHY* 590 (1935).

pot-boiler.¹⁵ Lawyers were hungry for plain, useful texts. They did not buy these books for philosophy. The books indeed contained no philosophy, but only a thin soup of borrowed notions served up with the meat and potatoes of law. Lawyers bought these books for the same reason then that they buy them today: to help them in study or practice. The "light of order" shed by these books was pragmatic in conception and execution. Some of them were as severely practical as a form-book; others discussed the "principles" underlying particular rules of law and made some attempt to harmonize cases and isolate exceptions to the rules.¹⁶ In general, the impact of legal treatises on the intellectual life of their readers (Kent and Story were perhaps partial exceptions) was probably not much more than the intellectual impact of the Sears Roebuck catalog on farmers.

IV.

In short, Professor Miller constantly romanticizes and exaggerates the impact of formal intellect on the habits and achievements of the law. The "sublimity" of legal literature—such as it was—probably meant next to nothing in the life of the average lawyer. In the absence of more hard facts, one may also gently doubt whether the jurisprudential elites had quite as much and as baneful an influence on American politics as Professor Miller seems to suggest. As we have seen, he equates his post-revolutionary lawyers with classical rationalism, with Head rather than Heart, and with conservatism and revulsion against democracy. To him the work of the lawyers was "negative." They inherited and cherished an ancient system of law, which had been decisively formed in a struggle against the power of the English crown. Well into the era of independence, the lawyers continued to be deeply suspicious of power. They were fearful of government—particularly a government ruled by the mob. America, a "hard-working, pushing society," "appeared headed for catastrophe" in its race to achieve popular democracy.¹⁷ The lawyers fought manfully against the evils of their

15. See 1 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 415 (1908).

16. Here is an example from Tapping Reeve's *Baron and Feme*, one of Professor Miller's "ponderous" tomes: "Sons-in-law are not obliged to maintain the pauper parents of their wives. This case is an exception to the rule [that husbands can be compelled to perform duties incumbent on the wife prior to her marriage]; for before marriage the wives were obliged by law (if they were of sufficient ability) to maintain their necessitous parents. It is not very easy to discover the principle which governs this exception to the general rule. Perhaps it consists in an anxious desire to preserve domestic tranquility, which might be endangered by the operation of the general rule." T. REEVE, *BARON AND FEME* 75 (1816).

17. *THE LIFE OF THE MIND* 215.

times. Professor Miller thinks it is "fair" to say that the "tremendous concern of the legal generation of 1820 to 1850 for the imposition of negatives upon the emerging society is largely responsible for the great esteem the principle has subsequently enjoyed."¹⁸

Much of this argument is more or less plausible. But the final hypothesis is far too sweeping. No doubt there is *some* connection between doctrines and tactics employed by appellate courts before the Civil War (*Dred Scott* is a hideous example) and the conservatism of the due process cases in the late nineteenth century.¹⁹ Cooley, Tiedeman, and the other postwar theorists of constitutional limitations used prewar case law and theory in constructing their manifestoes against popular democracy.²⁰ But movements generate manifestoes; manifestoes do not make movements. The "great esteem" enjoyed in this country by principles of limitation on the power of the government is not a matter of esthetic tastes and only partly a matter of ideological conviction. Limitations on government cannot be fully understood without reference to specific economic and social struggles in which principles of limitation were asserted. They cannot be summed up in so pat a formula as Professor Miller suggests, and they cannot be treated as a closed system of theories explainable as dialectic developments from earlier ideas and dialectic ancestors of later ones. The "negatives" imposed on a Populist legislature, on King George III, on the Congress of the nineteenth century, and on a white supremacist city council today are not the same either in theory or in context, and it is wrong to treat them as the same.

The point about negativism is all glitter and no gold in another sense, too. Here is Professor Miller again: "Oddly enough, all Marshall's great decisions were aimed at striking something down, whether a state or the administration. Whatever may have been his inward dreams of empire, what he most notably did as a jurist was to prevent people from acting."²¹ A curious way to characterize this great and varied career! Moreover, every time Marshall prevented one side in a law suit from acting, by the same token he allowed the other side to have its way. Every lawsuit is a clash of interests; no lawsuit can have purely negative results. Perhaps Professor Miller is speaking of some

18. *Id.* 216.

19. See CLYDE JACOBS, *LAW WRITERS AND THE COURT* (1954).

20. T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1868); C. TIEDEMAN, *LIMITATIONS OF POLICE POWER* (1886).

21. *THE LIFE OF THE MIND* 219.

specific kind of negation or "prevention"—but what is it? Restrictions on state government meant more freedom for the federal government or for the entrepreneur. In a new government, institutional boundaries needed definition; economic and political consequences flowed from jurisdictional decisions. The courts mapped borders of authority between the states, between state and federal governments, between private citizens and various levels of government, between competing interest groups, and between the judiciary and other branches of government. This work was as much positive and creative as it was negative and restrictive. As Professor Miller elsewhere concedes, American law and government in all its branches served the cause of rapid, unfettered economic development, which nineteenth century policy-makers felt was the best road to the common good, and which seemed to serve best the interests of that broad class of literate freeholders who mattered in society. Thus the aim of law and policy was the release of economic energy, as Hurst has argued;²² not negation, but the creation of a framework of order that might maximize desirable economic growth. And this goal of growth was not held merely by an intellectual elite (law and layman) but widely shared among the mass of the people, insofar as can be judged by their habits, expressions, and work.

V.

But perhaps enough has been said about Professor Miller's data, methods, and general point of view. He has at least raised a question about the character of American legal thought in the post-revolutionary period; and the influence of that thought on the legal system. His general verdict is highly laudatory: though conservative, American jurists produced a powerful system of legal thought. For this reason, and despite some conspicuous failures and omissions, a brilliantly adaptive legal system developed.

Another less laudatory view of American jurisprudence and law can be plausibly advanced. As to jurisprudence in the strict sense, most scholars would agree that precious little in the post-revolutionary period was worthy of the name. Kent's *Commentaries*, for example, were modeled on Blackstone's; like Blackstone's, they were extremely useful to American lawyers,²³ were clearly organized, well written and imbued

22. J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

23. James Kent's *Commentaries on American Law* were first published in 4 volumes from 1826 to 1830, were enormously successful, and went through many editions. The standard biography of Kent is J. HORTON, *JAMES KENT, A STORY IN CONSERVATISM* (1939).

with much good sense. But Kent was not a great systematic thinker, and he did not pretend to be. Nor is there any depth or system to the rather pedantic prose of Joseph Story. There was political genius in America; the Federalist papers are proof of that. But the reason, system, and logic that Professor Miller somehow sees in windy prefaces and orations hardly seem worthy of his praise. Perhaps after years of reading sermons, even the prose of the lawyers appeared profound.

There is no reason for surprise in the lack of a great jurisprudential school in the early days of the republic. In the common law system, systematic legal thought does not serve as an authoritative guide to legal action. Cases and enactments make law; scholars do not, or, if they try to, they hide the fact. Therefore there was no *need* for a system of jurisprudence, and none sprang up. The common law countries were weak in philosophy of law. Legal writing was abundant, and abundantly welcomed, to be sure; but only because of the need for practical guides and shortcuts toward mastery of the empirical tools of the trade. The great value of Kent and Story was that they helped lawyers function in their jobs. Story's erudition, his civil law learning, his quotations from French and Latin jurists—these were of secondary value if not a downright nuisance. They lent tone to the works and did not unduly detract from the practical merits. But the utility of Story lay in the fact that he provided arguments, raw materials, models, guides—often in fields of law that had been poorly explored or were in process of rapid growth. His was merely a higher form of an art exemplified also in the hundreds of manuals and practice-books which were published or circulated in manuscript.

This is not to say that a formal jurisprudential system serves no function in a common-law jurisdiction. Such a system shows that a profession is mature and worthy of honor; that it is not a lowly trade, but is founded rather upon a body of independent non-self-evident principles. The layman must undergo specialized training before he can grasp the meaning of the science, let alone practice the art. Skills and learning therefore legitimize the claim of the profession to a monopoly of the work within the field of professional competence. The development of an occupational group, clearly demarcated from the lay public, and concerned with professional status, may be a likely prerequisite to the development of a school of formal jurisprudential thought. This does not mean that lawyers, in any culture, consciously sit down to create a formal jurisprudence to be used as a weapon in their struggle for legitimacy and economic power; but it does mean that the development of a jurisprudence is most likely to occur under such conditions.

Is the "sublime" then to be looked for, not in the literature of law, but in the law itself—in the creation of a sound legal order, well-suited to the American condition? Such a claim would have a surface plausibility. The claim would be that the practical work of judges like Kent, John Marshall, Lemuel Shaw, John Gibson, and hundreds of well-known and anonymous members of the bar produced a craftsmanlike American law. A proper assessment of such a claim would require close attention to precisely those source materials which Professor Miller omits: the case law, statute law, and working lawyers' files of the day. Moreover, though research would illuminate all sorts of dark pages in our legal history, it could not tell us whether or not our law was exceptionally adaptive. Against what criterion is adaptability to be measured? Can we agree upon the identity of other, maladaptive legal systems?

In general, a system of law suitable to the condition of its own society is no novelty in human history; it is, if anything, a constant. A legal system *must* respond to the needs of its time and its society. When one speaks of a legal system as out of tune with its society, one is usually referring to quite a different phenomenon: a conflict between parts of society or specific interest groups in which the legal system, or some specialized institution, responds to or reflects some interests but not others. To state, for example, that judges of the late nineteenth century who issued labor injunctions and voided welfare legislation were out of step with their society or unresponsive to social needs is simply to take the victor's view of history. These judges were out of step with a growing, powerful social movement; but their decisions were enunciated in cases brought or defended by real litigants with real economic and social interests.²⁴ A decision is an act of taking sides; one side may be ethically preferable to the other, but both sides represent social interests of *some* kind. A highly ritualized system of procedure—the medieval common law may be an example—might more plausibly be accused of disharmony with all social needs (other than those of legal professionals). But even here one must ask why society could and did tolerate what other societies, both "primitive" and "advanced," have found and do find utterly intolerable.

If it is sublime, therefore, to manufacture a working system of law, then *any* process is sublime—the development of American slang, or the decline of barge traffic when the railroads were built. Of course

24. For this thesis, see Friedman and Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 *COLUM. L. REV.* 50, 72-77 (1967).

the legal system had capacity for growth. All legal systems that are worthy of the name do. Legal systems do not "atrophy," except in the eyes of scholars who are watching closely the decline of one part or institution while another part or institution grows. Courts and legislatures may atrophy, but if their society continues to survive, some other institutions must carry on the functions they once performed. The work of social control *must* go on. A legal system is "great" if its society is great or if it takes a form such that other societies find it useful for *their* own purposes. The common law system is great chiefly in the former sense. It is the system that pertains to a major society. It is the system that governs legal relations in a number of countries which have become rich, populous, and powerful—the countries of the British Commonwealth and the United States. This fact is its chief claim to greatness, just as the chief claim of the English language to greatness is its vast utility in a world where millions of people—and members of dominant cultures—speak English. Of course English vocabulary is richer than that of, say, Icelandic or Manx. But this richness is a consequence of the numerical, political, and cultural strength of the speakers of English, and not vice versa. A Shakespeare is statistically more probable in a major population group. Or if a Shakespeare arises in what is or turns out to be a major society, he is that much more likely to be recognized as such. A great Nepali or Samoyed poet, if one exists, is not likely to ever get his due. And the major cultures define the standards of greatness.

A legal system acts in much the same way. As its society develops, it develops too; like language, it is a tool of culture, and it is static or dynamic when its culture is. There was nothing sublime or particularly praiseworthy in the development of railroad law in the United States. Railroads bring on railroad law, in one way or another, just as they bring on a railroad vocabulary. The new law may be borrowed from outside, made up of existing native materials, or enacted relatively fresh; it may take the form of case law evolution, executive decree, ratification of private arrangements by governmental authority, administrative manipulation, or any or all of these—all depending upon the nature and state of the legal culture. But in any event railroad law *must* come to be. If some institutions (such as the courts) prove incapable of handling the emerging functions of railroad law, then legitimized private arrangements, or statute law, or administrative law will fill the gap.

American legal institutions were, moreover, quite accustomed to the process of the adaptation of law to changed conditions; complex

methods of new ordering for old arrangements had been systematically explored during the Colonial period. The sudden flowering of American law in the early nineteenth century—Roscoe Pound's "formative period"—is a myth, or at best a gross exaggeration, as Stanley Katz has recently pointed out.²⁵ The Revolutionary War did not bring about total disruption of the legal system, nor necessitate a wholly new start. Colonial law was a long, rich process of adaptation of old law to new ends, and invention of new law to suit colonial conditions.²⁶ The process of adaptation continued, unabated, after the Revolution.

VI.

Something remains to be said about the legal profession, the possessor of that "mind" which has so preoccupied Professor Miller. As we have mentioned, Professor Miller draws his data almost exclusively from the literary remains of a small group of eminent jurists. The same names constantly recur in the book—notably Joseph Story, James Kent, David Hoffman. That the writings of these men reflect the "mind" of the profession requires a bold evidentiary leap, especially in the light of the extraordinary diversity and range of the profession. For one thing, there were no significant barriers to entry into the profession. Very little training was required of a man who decided to set himself up as a lawyer. The "training" of such eminent men as John Marshall, Alexander Hamilton, Abraham Lincoln—and of thousands of others less eminent—was brief, almost perfunctory.²⁷ Young lawyers started out their careers with nothing more than a few months spent with Blackstone, some exposure to copy-work in a law office, and perhaps some few months of practical training under a senior member of the bar. Nowhere did the state, the courts, or the organized bar succeed in making rigorous training a prerequisite to practice, or set up meaningful threshold examinations to control the quality or quantity of men entering the bar.²⁸ In general, American lawyers did not form a cohesive self-governing occupational group, and nobody governed

25. S. Katz, Book Review, 33 U. CHI. L. REV. 867 (1966).

26. Some notion of the range of current scholarly opinion on colonial law can be gathered from *LAW AND AUTHORITY IN COLONIAL AMERICA* (G. Billias ed., 1965).

27. On Marshall, who read Blackstone and attended law lectures at William and Mary College, see 1 A. BEVERIDGE, *LIFE OF JOHN MARSHALL* 154, 161, 174-76 (1929); on Hamilton, see 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 47-49 (J. Goebel ed. 1964); on Lincoln, see J. DUFF, *A. LINCOLN, PRAIRIE LAWYER* 3-34 (1960).

28. See generally A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921), still the best treatment of legal education and controls over admission to the bar in the nineteenth century.

them from above. Professional organizations hardly existed before the Civil War; the New York City Bar Association was founded in 1870, the American Bar Association in 1878.²⁹ Until the organized bar gradually gained strength and succeeded in imposing standards on the profession and in the law schools, the profession was enormously fluid and open-ended.

Precisely because it was so easy to pass oneself off as a lawyer in the early nineteenth century, the conventional picture of an unstratified, homogenous bar must be regarded with suspicion. Lawyers were professionally a less diversified lot than they are today, of course, but the bar was stratified nonetheless. The professional life of a man like Alexander Hamilton at the height of his career was fundamentally different from that of a struggling small-town lawyer, in exactly the ways in which one might expect. Hamilton had rich clients, who brought him complex and lucrative matters. The small-town lawyer had petty clients; he collected debts, searched titles, handled minor contract and criminal litigation; perhaps he dabbled in real estate or ran for local office. Before the Civil War virtually all lawyers had courtroom experience—a record which today's bar could scarcely claim; yet most of these lawyers practiced before local courts, while only a famous few argued great cases before the United States Supreme Court. Cases of ocean trade went to sophisticated seaport lawyers; small lawyers of the plains replevied cows.³⁰

Along with business, land speculation, and politics, the practice of law was an avenue to social mobility. Anybody with intelligence and ambition could aspire to become a lawyer. Young men with nerve and energy often tried their hand at the law; many failed and drifted out into other lines of work. Others stayed on and made money, or used law as a stepping-stone to political or business success. Towns on the frontier of settlements attracted swarms of young lawyers on the make. Some were ignorant charlatans; others were men of ability and even of culture.³¹ The bar was diverse in talent and crowded with fortune-seekers because the door to the bar was wide open.

29. On the founding of the American Bar Association, see E. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* 3ff. (1953); on the founding of the Bar Association of the City of New York, see H. TAFT, *A CENTURY AND A HALF AT THE NEW YORK BAR* 147-50 (1938).

30. Compare the description of the career of R. M. Blatchford, in 1 R. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS 1819-1947*, at 14-15 (1946), with the description of Lincoln's early practice in *Duff*, *supra* note 28, at 62ff.

31. For a vigorous picture of the charlatans of the frontier bar see J. BALDWIN, *FLUSH TIMES OF ALABAMA AND MISSISSIPPI* (1853). For more balanced, if less entertaining pictures see W. ENGLISH, *THE PIONEER LAWYER AND JURIST IN MISSOURI* (1947); W. HAMILTON, *ANGLO-AMERICAN LAW OF THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES* (1953).

In the United States, an enormous number of people had a voice in the social order as owners of capital, voters, churchgoers, citizens, shapers and snarers of significant opinion. A broad-based middle-class society was evolving—and it was paralleled by a broad-based middle-class legal profession. Freedom of entry meant a great quantity of lawyers, some good, some bad, some cheap, and some expensive. Many jobs that lawyers were willing to perform could have been performed by other occupational groups, had the bar been a smaller, more guild-like occupation. Law would then have been a learned profession in the narrow sense, with the boundaries of its competence sharply defined. A small, proud, skillful—and expensive—profession, perhaps on the order of English barristers, would have grown up. As things turned out, however, a somewhat crudely trained, mobile bar and a broad-based middle-class society emerged at the same time, with important consequences for each other and for the law. Both lawyer and layman, for example, demanded radical simplification of those aspects of the legal system which came within their everyday experience. In a society where thousands of ordinary citizens dealt in land, and thousands of half-trained men were their land lawyers, the rococo excesses of British land law were not tolerable. Perhaps one reason why American procedure was successfully reformed was that the public could not trust its lawyers to maneuver through the classical arts of pleading.

At the same time, of course, the law was growing vastly more complex; but its complexity was a consequence of complexity in the economic sphere. This complexity gave rise to an urge for clarity and pragmatic order in legal literature, and that was the impetus that sent some lawyers rushing to their desks to write treatises. But the state of the profession did not provide a climate conducive to the development of formal jurisprudence. Nor did the bustling economy and its demands on the legal profession lead to a radical, consistent difference between the mind of the lawyer and that of the layman of similar income and locale. The lawyer was very much a man enmeshed in everyday affairs. It is likely that a complete study of the lawyers of 1800, 1830, or 1860 would show far fewer differences between the opinions of lawyers and laymen than Professor Miller seems to think. A thorough study would also have to abandon the notion of a monolithic legal mind and recognize instead a set of minds, divided by region (perhaps), by class (more likely), and probably also by size of town and nature of practice. Or it would give up the notion of a legal mind altogether, and choose instead to study the profession in context, admitting into evidence the work of the lawyers in courtrooms, offices, and in the streets, along with their higher flights of thought.