

## UNEXPLORED AVENUES IN COMPARATIVE ANGLO-AMERICAN LEGAL HISTORY

ROBERT STEVENS\*

I assume Harry Lawson has always had the ability to stimulate. Certainly in the Oxford of the early 1950's, he stood almost alone. With the exception of linguistic philosophy and Roman law, the Honour School of Jurisprudence was committed to traditional legal scholarship. For those who cared about the common law and its institutions, and were anxious to see what lay "out there" in related disciplines, or even in what we naively believed to be the real world, the Lawson seminars at Brasenose became a "must." In different ways, through these seminars and his other teaching, Lawson must have inspired generations of undergraduates and graduates to begin asking the difficult questions: to think in an informal way about the law in context, and, in a more formal sense, to explore the boundaries of law and history and law and social sciences. Insofar as I have found myself able to ask questions about these relationships, I know I owe a great deal to the Professor of Comparative Law.

It would be nice—in the legal sense—to say that Harry had turned me into a comparativist. I fear this is far from true; but he taught us all a great deal about what I would now call the English and American legal cultures. It was really he who first explained to me the subtleties of Anglo-American law and taught me to approach the common law of the two countries as a comparativist. For just as Bernard Shaw saw England and the United States as "two nations divided by a common language," Harry saw the dangers of "two nations divided by a common legal system."

In the last twenty years, of course, much has changed. Nobody—with the possible exception of the officers of the American Bar Association and editors of the *Law Quarterly Review*—now believes that, because some substantive rules are couched in similar terms in the United States and England, the two legal systems are thereby made the same. The legal cultures of the two nations are probably still growing apart and the role of law in the two societies may, indeed, be moving in different directions. Thus, although American authors understandably trace American substantive doctrines from their English sources, and English authors seek to illuminate tort or contract from the latest American judicial decisions or legisla-

---

\* Professor of Law, Yale University. B.A. 1955, M.A. 1959, B.C.L. 1956, University of Oxford; LL.M. 1958, Yale University. Barrister at Law.

tive solutions, this cross-referencing is no longer in the mainstream of legal development.

At a broader intellectual level, comparative contextual analysis of doctrine is highly significant: whether Jim Gower's work on comparative law<sup>1</sup> or Mauro Cappelletti's study of executive privilege.<sup>2</sup> However, much remains to be done. There is still, for instance, no serious comparative Anglo-American work on civil liberties, nor, despite Kenneth Culp Davis' exhortations,<sup>3</sup> in administrative law; and comparative Anglo-American analysis in labor law is only now under way.

Nevertheless, in view of the limits on the value of doctrinal comparisons, the more important future developments in comparative studies probably lie in the comparison of legal institutions. Already Delmer Karlen has undertaken preliminary studies of the appellate<sup>4</sup> and criminal<sup>5</sup> process in the two countries. Other studies are about to take off: The Yale Economics Department is considering a study of the use of judicial time in England and the United States; the Institute of Comparative Law in Florence is to undertake a study (including both England and the United States) of access by the poor to the courts. And comparative criminology promises to stimulate increasing interest in the next few years as the most effective method of evaluating criminological developments.

So, too, comparative studies of the professions and their training are expected to be productive in the coming years. In view of the criticism of the divided profession in England,<sup>6</sup> and the suggestion by Chief Justice Burger that something along the same lines be reinvented in this country,<sup>7</sup> the need for a serious comparative study is obvious, for example, to illuminate the relative economics of litigation, to mention but one aspect of the overall problem. To those of us in legal education, there is the fascinating prospect of a socio-psychological study of the relationship between professional attitudes—both ethical and intellectual—and legal training. The various relationships in England between professional apprentice-

---

<sup>1</sup> Gower, *Some Contrasts Between British and American Corporation Law*, 69 Harv. L. Rev. 1369 (1956).

<sup>2</sup> Cappelletti & Golden, *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 Stan. L. Rev. 836 (1973).

<sup>3</sup> Davis, *The Future of Judge-Made Public Law in England*, 61 Colum. L. Rev. 201 (1961).

<sup>4</sup> D. Karlen, *Appellate Courts in the United States and England* (1963).

<sup>5</sup> D. Karlen, *Anglo-American Criminal Justice* (1967).

<sup>6</sup> M. Zander, *Lawyers and the Public Interest* (1968).

<sup>7</sup> See Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 238-41 (1973).

ship, the didactic analytic form of much of institutionalised legal training, the role of law, and the behaviour patterns of the profession are both superficially apparent and neatly contrasting when compared with parallel patterns in the United States: the absence of formal apprenticeship, the methodological or process oriented system of institutionalized education, and, in turn, what are thought of as characteristic sets of professional and judicial attitudes.<sup>8</sup> Yet the descriptions of such relationships are, in both countries, based on assertions rather than on research.

The prospect of massive sociological comparisons may seem a trifle awe-inspiring, not to mention expensive in time and money. But a series of lesser Anglo-American comparative studies are much more readily available, as well as being, logically, a preface to wider undertakings. In particular, historical studies on a comparative basis are essential if we are to develop intelligent hypotheses to be tested quantitatively. At the very least, we must first sharpen our understanding of how far the two legal systems are, in the words of Erwin Griswold, "Two Branches of the Same Stream."<sup>9</sup> I would argue, as we begin to peer into the past, that in some ways the parallels between the two systems will seem closer and in other ways, further apart.<sup>10</sup> Yet, in every respect, the comparative efforts handsomely repay any effort put into them in terms of understanding the peculiar nature of legal institutions and the legal process—and the myths which have been woven around legal traditions.

I should like to illustrate the potential of historical reappraisals by superficial glances at two comparative episodes. Both, as I will argue for the purposes of stimulating more specific debate, misunderstand, misuse or ignore the English element. (I would like to reserve the right to re-argue the positions at greater length, on the basis of further research at some later time. At this point, I am only anxious to show that the assumed bases of comparison are in need of further refining.)

*The Early Settlers: "We hate Lawyers more than you hate Lawyers"*

Let me begin with the earliest possible Anglo-American comparisons as an illustration that American scholars have tended to ignore English law and politics. Over the years, controversy has

<sup>8</sup> The relationship achieves some mention in L. Jaffe, *English and American Judges as Lawmakers* 104-13 (1969).

<sup>9</sup> E. Griswold, *Two Branches of the Same Stream* (1962).

<sup>10</sup> One of the problems in developing these comparative historical examples in law is the absence of good comparative Anglo-American history in other fields. A notable and elegant exception is H. Pelling, *American and the British Left* (1956).

swirled around what the early settlers, in New England in particular, intended to be the basis of their laws. Pound<sup>11</sup> and Morris<sup>12</sup> argued that the early settlers knew little of the common law and instead sought to develop a dispute settlement system based on the word of God; Goebel<sup>13</sup> emphasized the importance of English local law in shaping colonial law, a view partially shared by Haskins;<sup>14</sup> others have seen the colonial law as a largely indigenous development responding to the physical conditions of the settlers; meanwhile, the courts, both English and American, have taken the legal position that the colonists were governed by the common law from the moment of their arrival.

Fortunately, one need not enter into these battles here. Since Chafee's study,<sup>15</sup> it is generally accepted that all four influences were at work, with the common law gaining the upper hand after 1660. Nor is my point here merely to say that much of the earlier academic dispute could have been avoided by looking at the administration of justice outside London—where many of these same competing influences and systems were at work in the first half of the seventeenth century—rather than by looking primarily at the work of London's royal courts. (It is true, however, that until we have good studies of the English legal system outside London we shall always have problems of distortion in interpreting American legal history.) My basic point, however, is primarily concerned with the political interpretation by American legal historians of the early seventeenth century.

While many of the early settlers in New England had had some kind of legal training, there was a strong anti-lawyer rhetoric<sup>16</sup> which may have confused historians of the American legal scene. I use the word confused because many American legal historians seem largely unaware of the strong anti-lawyer sentiment in England during the Eleven Years Personal Rule and the succeeding English Revolution. Yet, the hostility to lawyers and the common law, real and strong in England, was carried over to the colonies; moreover, when that hostility largely subsided in England after the Restoration, it also largely subsided in the colonies—including

---

<sup>11</sup> R. Pound, *The Formative Era of American Law* (1938).

<sup>12</sup> R. Morris, *Studies in the History of American Law* 17-41 (1959).

<sup>13</sup> Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 *Colum. L. Rev.* 416 (1931).

<sup>14</sup> G. Haskins, *Law and Authority in Colonial Massachusetts* 105, 123, 163-75 (1960).

<sup>15</sup> Chafee, *Colonial Courts and the Common Law*, 68 *Proceedings Mass. Hist. Soc'y* 132 (1952), reprinted in *Essays in the History of Early American Law* 3 (D. Flaherty ed. 1969) [hereinafter cited as Flaherty].

<sup>16</sup> I. A. Chroust, *The Rise of the Legal Profession in America* 55-94 (1965) [hereinafter cited as Chroust].

New England. Indeed, looked at in the context of what happened in England, the developments in Massachusetts, for instance, seem far less a break with the past than is traditionally assumed.

The New England colonies were heavily influenced by the forces shaping England in the 1630's and 1640's. There may have been relatively few Levellers and Diggers in the colonies, but many, especially in New England, would have sympathised with the radicals in the Barebones Parliament, while the Hale Commission might well have been regarded as a conservative body. In Massachusetts, the puritan clergy were clearly the most powerful force; the demand for the integration of the laws of God and man in a Code was strong.<sup>17</sup> The code produced by Nathaniel Ward, and enacted as the *Body of Liberties* in 1641, did justify certain provisions, especially those relating to capital punishment, with biblical authority. Yet, this document, later adopted by Connecticut, bore many of the marks of the common law, both in substance and procedure. Nor was this surprising, for Ward had been a member of Lincoln's Inn before becoming a minister.<sup>18</sup> And when, in 1647, the time came to revise the code, the General Court ordered the importation of various law books, including Coke, "to the end we may have the better light for making and proceeding about laws." *The Book of General Laws and Liberties* of 1648 was the result.<sup>19</sup>

These influences were reflected in the early history of the profession. During the period under discussion there were no full-time lawyers, mainly because the economy could not support them. But, as already noted, a surprising number of the colonists had had some legal training; and increasingly, the part-time legal practitioner was making his appearance. Even a primitive society had to have its "law-jobs" performed; as its arms of government became functionally differentiated, it could even afford full-time lawyers.

The first Governor of Massachusetts had been admitted to the Inner Temple and some half-dozen more early colonists had some

---

<sup>17</sup> In 1636, John Cotton produced his systematic "Moses, his Judicials"—an attempt to develop a code of law based solely on biblical sources. While, in that year, the General Court went so far as to urge magistrates to decide causes "as neere the law of God [or of Moses] as they can," John Cotton's efforts never reached the statute book in Massachusetts although they were influential in the dour New Haven colony.

<sup>18</sup> And the Puritan mind could take a neat legal distinction. In 1645 the General Court convinced itself that the laws specifically invoking the laws of God could not be contrary to English law since the common law was itself based on the laws of God. 1 Warren, *History of the Harvard Law School and of Early Legal Conditions in America* 11 (1908).

<sup>19</sup> Chroust, *supra* note 16, at 59-61. See also Wolford, *The Laws and Liberties of 1648*, 28 Boston U.L. Rev. 426 (1948), reprinted in Flaherty, *supra* note 15, at 147.

legal training at one of the Inns. But at least two persons who had some training in the demi-monde of the Inns of Chancery made an attempt to practice as attorneys during these early years. Thomas Morton<sup>20</sup> appeared in the early 1620's and managed to be deported twice, his chief "crimes" being heavy drinking, obscene verse, cavorting with Indians, and, perhaps worst of all, setting up a maypole! Thomas Lechford, from Clements' Inn, appeared in 1638 and attempted to work as a scrivener. But when he began to practice law, his ethics appeared somewhat suspect. He was found both lobbying juries out of court and actually tampering with them. His hostility to puritanism did not help. He went home in 1641, the year the *Body of Liberties* forbade the practice of paying persons to appear on the behalf of others in court.

At first glance, such developments seem to confirm the feeling that early colonists were outstandingly hostile to lawyers. But that assumption would put too much faith in the political rhetoric of New England, while ignoring both the rhetoric and reality of the contemporary scene in England. Although, during the early part of the seventeenth century, the demands for legal reform in England had mostly been limited to demands for changes in imprisonment for debt and to attacks on the work of the ecclesiastical courts, both Coke and Bacon had achieved some reforms. And pressure mounted throughout the 'twenties and 'thirties. After the battle of Naseby in 1645, the tone changed. From the work of Veall, we now know that hostility towards the common law reached a peak not seen since the Peasants Revolt.<sup>21</sup>

Three months after Naseby, Lilburne wrote: "[t]he reformation of the courts of justice is a work of absolute necessity; without which . . . you shall have no peace. But if you have many lawyers they will never suffer any effectual law to pass for this purpose, because they get more by the corruption and delays of the law than by the law itself."<sup>22</sup> And the following year, Lilburne was in print again, arguing that the common law was a badge of slavery imposed by the Normans on the alien English and deliberately maintained through its use of foreign languages.<sup>23</sup> By this time the

---

<sup>20</sup> But Ward, the author of the *Body of Liberties*, in that very same year found himself in a sermon urging Magistrates not to give legal advice to litigants before a case came on. The *Laws and Liberties* of 1648 dropped the prohibition on the practice of advocacy for gain; and in 1649 magistrates were forbidden to give legal advice to those appearing before them. The role of the attorney was recognized by statute in 1673 and at least part-time "lawyers" had arrived. Chroust, *supra* note 16, at 71-79.

<sup>21</sup> D. Veall, *The Popular Movement for Law Reform 1640-1660* (1970) [hereinafter cited as Veall].

<sup>22</sup> *Id.* at 74.

<sup>23</sup> *Id.* at 75.

radicals were sufficiently organized to lobby Parliament for law reform. In 1647, Wildman, a Leveller lawyer, was demanding that the laws "be reduced to a smaller number, to be comprised in one volume in the English tongue, that every free commoner might understand his own proceedings, that courts might be in the respective counties or hundreds, that proceedings might become short and speedy and that the numberless grievances in the law and lawyers might be redressed as soon as possible."<sup>24</sup> The cry was soon taken up by the Diggers;<sup>25</sup> and it was perhaps fortunate for the lawyers that in 1648 the Army took over effective control. In 1649 the king was executed. His problems, at least, were over; the same could not be said for the lawyers.

While the army had little time for the Levellers—the lawyers had the pleasure of seeing Lilburne imprisoned—the Rump Parliament was determined to deal with the law and lawyers. In 1652, the Hale Commission was established and, although dominated by lawyers, was a reformist body.<sup>26</sup> It ultimately produced a "System of Law" in sixteen bills that called for the regulation of the legal profession, the devolution of justice, simplification of legal procedures, and considerable codification. But implementation of the new legislation was slow, because, according to Ludlow, of sabotage by the lawyers. Cromwell, dissolving Parliament in 1653, echoed the same complaint.<sup>27</sup>

The Barebones Parliament met later in the year and was a very different creature. Although forty of its members had been educated at the Inns of Court, it set to work with a will to reform the law and, in particular, to implement the work of the Hale Commission. Motions were passed in favor of abolishing Chancery and codifying the law to make it "easy, plain and short" and more in line with "the word of God and right reason."<sup>28</sup> And the work of codification actually began. In December, however, the conservatives, in a subtle parliamentary coup, succeeded in dissolving the Barebones Parliament. In the Temple the development was greeted with "great joy in making bonfires and drinking sack."<sup>29</sup> Since Cromwell shortly thereafter made himself Protector, and since he was, in many respects, concerned to halt the social effects of the political revolution, the new Parliament had a strict property qualification. Cromwell still talked of the need for law reform, but nothing was in fact

---

<sup>24</sup> *Id.* at 77.

<sup>25</sup> *Id.* at 78.

<sup>26</sup> See Cottrell, *Interregnum Law Reform; The Hale Commission of 1652*, 33 Eng. Hist. Rev. 689, 696-97 (1968).

<sup>27</sup> Veall, *supra* note 21, at 85.

<sup>28</sup> *Id.* at 87-88.

<sup>29</sup> *Id.* at 88.

accomplished. With Cromwell's death in 1658, law reform was again an active issue, but the following year Monck's army marched on London. The Revolution was over. The efforts to simplify and codify the law, to make it conform more closely to God's word, and, as far as possible, to manage without lawyers, ended.

With such broad strokes, it is difficult to do more than create an impression of the interaction—or at least parallel nature—of law and politics in England and New England in the early seventeenth century. Still, I hope these superficial strokes are enough to suggest that, in general, the literature has examined the colonies too much in isolation. The religious and social movements that swayed Boston were strong in London, and the anti-lawyer movement was by no means unique to the colonies. In this regard, to ignore the English scene is to run a real danger of distorting the American.

*The New Nation: "Our Judges Are Better Than Your Judges"*

Let me now pass to an area where I think there has been something of a *misunderstanding* and *misuse* of the English parallel. I am sure it is far from deliberate; again, however, the situation is one that helps to distort any sophisticated analysis of the development of the American legal culture. I refer to the Federal and early Jacksonian period and, in particular, to that new sport in historical research—the discovery of the Americanization of the American legal system. I am not questioning that some Americanization took place; indeed, the initial premise of this paper was to treat the English and American legal systems as separate entities. What does concern me is the casualness (and frequently the inaccuracy) with which parallels are drawn and, in particular, the casualness of the references to the role of the judiciary in England.

A number of generalizations during the period concern the symbiotic relationship between English and American law and English and American lawyers. This symbiosis takes various forms. First, there was the relatively low-level problem of providing an American legitimacy or *grundnorm* for the basis of substantive law in the new nation.<sup>30</sup> Second, there was a need, during the Federal

---

<sup>30</sup> That the common law was derived from England could not be denied, any more than the fact that most of the ancestors of the inhabitants of the new United States came from England. Thus, in many of the state Constitutions emerging during the period of the Revolution, there were reception clauses. There was little effort to challenge such receptions, but the problem was what to do with English decisions decided after the legal ties with London had been severed. Lawyers, whose generally accepted method of reasoning at this time, treated leading decisions, no matter how creative superficially, as being no more than declaratory of pre-existing doctrines, could see little wrong in continuing to cite the post-1783 decisions of Westminster Hall; besides, the English had a surfeit of published law reports; the new States virtually none.

period, to provide a model for the American judiciary. Third, there was the need during these years of finding the appropriate process or role for the courts in the newly created society. In one sense, all were aspects of the need to "modernize," as those studying developmental economics would put it. To see these problems solely as issues of the American versus the English solution is, itself, deceptive. But they must be examined, no matter how briefly, because they are perceived by most scholars as an American solution to an English problem, and, therefore, inevitably concern us here.

More complex than the reception of substantive law is the alleged Americanization of the Judiciary, particularly of the appeal judges. Writers concerned with this point, however, encounter basic problems, both with the idea of what the English system was and what the American goal was. Thus the English concept of the role of law is assumed to be a highly formalistic, technical, and static one, with Lord Mansfield as an exception. The American judge is somehow assumed to be a natural Mansfield—creative, using precedents as mere stepping stones. This somewhat schizophrenic approach overlooks the fact that the worst insult Jefferson could muster to describe the Tory Blackstone was that he was a Mansfieldian. In other words, what later writers have often overlooked is that the Jeffersonians and many others, if not the Federalists, were opposed to a creative judiciary.<sup>31</sup>

Other problems remain. At the time of the American revolution, no specialized appellate judiciary existed in England,<sup>32</sup> hence, the idea that the newly created appeal courts in America were breaking with the English model is dangerously misleading. On the common law side, the Court of Exchequer Chamber, which was the first-level appeal court, was composed of the trial judges of the common law courts other than the one from which the appeal was taken. A second appeal in common law matters lay from Exchequer Chamber to the House of Lords where it was heard by a group of peers that frequently still included laymen. For this reason possibly, it was

---

But politicians were less willing to accept the sophistry which seemed reasonable to lawyers. Both the New Jersey (1799) and Kentucky (1807) legislatures prohibited the citation of English decisions: but within a few years this intellectual chauvinism had passed. New Jersey repealed its legislation in 1819. See generally L. Friedman, *A History of American Law* 96-98 (1973).

<sup>31</sup> On the English scene, too, there were violent objections to the Mansfield view of the creativity of the judiciary. See, e.g., the letters of Junius. Junius, *Letters et al.* 179-81 (1836).

<sup>32</sup> Horwitz's work, while fascinating, fails to resolve the inconsistency in the American model of the judiciary and compares the American developments during the Federalist period with a stylized, and almost certainly inaccurate, version of the English model. See Horwitz, *The Emergence of the Instrumental Conception of American Law, 1780-1820*, 5 *Perspectives in Am. Hist.* 287 (1971).

not until well into the nineteenth century that more than one or two appeals annually in common law cases were taken to the Lords. On the Equity side, appeals were somewhat more frequent, but they were noted more for the fact that the only equity judge, the Lord Chancellor, was not only the trial judge but presided over the only appeal—to the House of Lords. Since there were, *de facto*, no appeals in criminal cases, it is not easy to say what in 1777 or 1783 was the attitude of the English judiciary to the appellate process. Moreover, it was not until the second half of the eighteenth century that courts, of common law or equity, in first instance or on appeal, were seriously concerned with matters other than those relating to land, where the primary judicial policy was understandably one of maintaining the status quo.

Thus, at the time of the American Revolution, there were appeal courts in England, though no appeal judges; but these courts had little work that might bare whatever their views were of the judicial process. This situation began to change with the beginning of the Industrial Revolution, which roughly coincided with the American Revolution. Thus, while it is difficult to say what the English judges perceived the judicial role to be, whatever their attitude was, one can argue that it was changing as rapidly as the attitude of the new American judiciary. Mansfield was followed by Ellenborough, Alderson, and Abinger in the period between 1783 and 1840; and, whereas in 1750 the English legal system had been a highly formalized system, concerned almost exclusively with land problems, in the period after the American Revolution, it entered a highly creative phase. In the first decades of the nineteenth century, the judiciary created the rules on wrongful death, established the bases of restitution, vicarious liability, the fellow servant rule, as well as many of the basic principles of contract. The English judiciary was thus as “Americanized” as the American. After the Reform Act of 1832, with redistribution of seats and a generally more democratic franchise, there was a greater application of *stare decisis* as judicial policy;<sup>33</sup> but the same trend may well have been true of American judges.<sup>34</sup>

---

<sup>33</sup> See B. Abel-Smith & R. Stevens, *Lawyers and the Courts* 18-19, 46-47 (1968) [hereinafter cited as Abel-Smith & Stevens].

<sup>34</sup> Friedman interprets the impact of the Impeachment of Chase (1805) in this way:

The judges won independence, but at a price. Their openly political role was reduced; and ultimately, most states turned to the elective principle. There would be no more impeachments, but also no more Chases. What carried the day, in a sense, was the John Marshall solution. The judges would take refuge in political decorum. The essence of their job would always be to make and interpret policy; but policy would be divorced from overt, partisan politics. Principles and politics would flow, at least ostensibly, from the logic of the law; they would not follow the naked give and take of the courthouse square. Justice would be blind; and it

The third main element in the so-called Americanization of the legal system exists with respect to the function of the lower courts. In the later Colonial period, lower "courts" performed many functions for the "good order" of society. Their scope was pervasive, and largely untrammelled by any concerns with separation of powers.<sup>35</sup> In this sense, they performed not only the political and economic, but also the social function of the English J.P.'s;<sup>36</sup> indeed, the earliest law books in both Massachusetts and Virginia—issued just before the Revolution—were magistrates' manuals. From an excellent study by Nelson,<sup>37</sup> we now know that a change came over the Magistrates courts in Massachusetts between 1760 and 1820 and, it is reasonable to think, in most of the other colonies. They ceased to be so concerned with morality and status and became more conscious of economic relationships and efficiency.

This development is similarly characterized as Americanization with its implication that either no or different changes occurred in England. It is conceivable that a definitive study would show no largely parallel movement in England, since nineteenth century English legal history is even more neglected than American legal history during the period. But once again, considerable initial evidence exists that many parallel developments took place in the lower courts in England. During a similar period, many of the regulatory functions of the magistrates were abandoned; the 1834

---

would wear a poker face. The picture of the behavior of judges had enough truth, and enough hypnotic force, to influence the role-playing of judges; and to bring some peace and consensus to issues of tenure, selection behavior and removal of judges.

L. Friedman, *A History of American Law* 116 (1973).

<sup>35</sup> In Connecticut, the elected grand jury worked with the County Court (magistrates or J.P.'s). They "were required to oversee workmen in clearing the commons, to present persons for selling drinks [and] . . . for not attending public worship . . . to inform against killing deer, to meet with selectmen and constables in nominating tavern keepers, to present servants for being out unreasonable hours, to see that Indian children learned to read, to present persons for setting up lotteries, to inspect taverns, and to pull down secular notifications posted on the Sabbath or a Day of Fast." *The Superior Court Diary of William Samuel Johnson, 1772-1773*, at xlii (J. Farrell ed. 1942).

<sup>36</sup> The system operated by the justices was based on the idea of universal obligations. . . . If (a road) was found not to be in repair that was an offence, a nuisance, and the parish on whom the obligation to maintain it rested, should be presented before the magistrates for a failing in duty. The parish would then be ordered to set its inhabitants to work in unpaid road labour, or to pay in the form of a note, for hired men to do the job for him. Pigs straying in the churchyard, the failure of a poor law surveyor to find a willing successor, the collapse of a local town hall, all these might be grouped together as nuisances, that is things contrary to that paper order and peace which all had a duty to maintain.

J. Watson, *The Reign of George III 45-47* (1960).

<sup>37</sup> W. Nelson, *The Americanization of the Common Law During the Revolutionary Era: A Study of Legal Change in Massachusetts 1760-1830* (Ph.D. dissertation, Harvard University, 1971).

Parliament gave Poor Law matters to special Guardians; the Municipal Corporations Act of 1835 took many other administrative matters away; after 1792 any borough might appoint a stipendiary magistrate; and in the 1820's the professionalization of the police began and control by the J.P.'s declined. There is evidence of the same movement away from defending social status toward protecting economic relationships that Nelson found in Middlesex County, Massachusetts.<sup>38</sup> Meanwhile, the judicial functions of the Magistrates were rationalized.<sup>39</sup> In this sense, the lowest courts in both England and America were rationalized or modernized or, if one accepts the chauvinistic approach of American academics, Americanized. Without necessarily criticizing what has gone before, it seems clear that the potential for more sophisticated comparative historical studies in the area is almost unlimited.

### *Final Thoughts*

The examples offered—the distinction which has occurred because the study of anti-lawyer sentiment in the colonies in the seventeenth century has been largely divorced from the study of anti-lawyer sentiment in England, and the untested assumptions about the English model which underlie discussions of the Americanization of the courts and judiciary after independence—are but the tip of the iceberg in terms of potentially fruitful comparative historical studies. The nineteenth century, in particular, could provide several more.

Indeed, in law, as in so many areas, the nineteenth century provides a fascinating galaxy of parallels and interactions between England and the United States. While nothing as dramatic as Jacksonian Democracy swept England, the Chartists, in their time, seemed to pose a similar threat to the established order. Utilitarian thought in general, manifested in such concepts as codification, was a powerful influence on both sides of the Atlantic. Despite all the talk of Americanization of the judiciary, by the end of the century the “formal style”<sup>40</sup> had largely engulfed both English and American judges. And, in professional matters, the American Bar Association was looking enviously at the Inns of Court while, in terms of academic law, the Oxford professorate was looking enviously at the Harvard Law School. The symbiotic relationship was far from dead.

---

<sup>38</sup> Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U.L. Rev. 450 (1967).

<sup>39</sup> Abel-Smith & Stevens, *supra* note 33, at 29-32.

<sup>40</sup> On the grand style and the formal style see K. Llewellyn, *Deciding Appeals: The Common Law Tradition* (1960).

Merely to state such apparent superficial relationships justifies the value of considering further comparative historical studies. It may, of course, emerge that the superficial is misleading, that the legal cultures were moving in antithetical, not parallel directions; the apparent intellectual relationships may thus, to put it mildly, be distorting. But such a discovery would itself be vital, and would more than justify more serious Anglo-American historical studies.

Some understanding of the parallel or diverging developments in the two legal systems (as well as interactions between them) is essential to any more extensive work in English and American law as a comparative study. Like all good comparative analysis, such studies will help to sharpen and define issues, and may raise as many questions as they seek to answer. Again, in the best traditions of comparative studies, the work may tell us as much about our own system as it does about the other system we are studying. Yet, the closeness and the historical ties involved in Anglo-American law make the work both more difficult and more important. The urge to be chauvinistic, ignoring the other system, or to be arrogant, assuming we know what the other system was like, are ever present. Thus, as legal scholars on both sides of the Atlantic turn their attention increasingly to studying recent legal history, it becomes vitally necessary to push forward with comparing the two major common law systems in a historical framework. Such studies would be in the best traditions of Comparative Law. I am sure Harry Lawson will approve.