

Introduction

Today Auburn, New York, is a sleepy upstate town most notable for its prison. But in the antebellum period, Auburn was a bustling mercantile center built astride the Erie Canal and a convenient stop en route from Syracuse to Buffalo. It was a town served by newspapers, publishers, a variety of retail businesses, and, of course, a thriving professional community. In the early years of the nineteenth century, one of the most respected members of the Bar was Judge Elijah Miller, who built a splendid mansion on one of Auburn's wide, tree-lined avenues. In 1823 Judge Miller took as his partner a young lawyer fresh from New York City: William Henry Seward.¹ In 1824 Seward married Judge Miller's daughter, Frances, whom he had met several years earlier. From this time until his death, Seward made Judge Miller's house his home. Over the next half century, Seward led a distinguished career as a lawyer and politician holding the office of Governor of New York, U.S. Senator from New York, and Secretary of State in the administration of President Abraham Lincoln. Travel as he may, however, Seward always returned to the house in Auburn, where he died in 1870.

The house in which Seward spent his life still stands on its quiet street in Auburn and has changed very little over the past century and a half.²

¹ Biographical details on Seward are taken from John Grant Wilson and John Fiske, *Appleton's Cyclopaedia of American Biography* (New York: Appleton, 1898), v. 5, 470–73.

² The Seward House is now maintained as a museum; its Web site is www.sewardhouse.org/house/.

One enters through a grand entry and is confronted by a majestic staircase that leads up to the second floor. The furniture is high Victorian, and the walls are covered with portraits of the great and good of nineteenth-century America, portraits that once hung in Seward's Washington residence. But what strikes the visitor to Seward house immediately and forcefully are the books, row upon serried row in virtually every room. In some of the rooms they fill whole walls from floor to ceiling; in other rooms they are contained in bookshelves that stretch from one wall to another. Up the stairs and in the main upper hall, one walks between gorgeous glass-fronted cases that reach to the high ceilings. These are filled with thousands of leather-bound volumes.

Visitors to the Seward house are surrounded by not only the tools of trade of several generations of lawyers but also one essential tangible manifestation of antebellum American legal culture: books. Without books, American law and the American legal profession could not have developed as it did. Books were the medium by which the various legislatures, judges, lawyers, and others concerned with the law shaped the Bar and the legal system itself.

For nearly two millennia, the relationships among lawyers, the law, the producers of law books, and the distributors of law books has been exceptionally close. One may fairly say that this relationship has been symbiotic; lawyers and judges needed books, and law publishers and sellers needed lawyers and judges. In late Antiquity, when the world of written communication underwent the shift from scroll to codex in copies of the Christian Bible, it was the lawyers who embraced the format shift and championed the new mode.³ In the high Middle Ages, when the faculties of law came to dominate universities around Europe, one could always find booksellers, many of whom owned scriptoria to mass produce legal texts in affordable format, close by the lecture halls.⁴ In the late fifteenth century, when Johann Gutenberg introduced the art of printing from moveable type to the West, first it was the Bible and related theological texts that poured from the new presses; but soon, it was law books that dominated the trade for the next

³ See Franz Wieacker, *Textstufen klassiker Juristen* (Gottingen: Van den Hoeck & Ruprecht, 1975), 93–119.

⁴ See Frank Soetermeer, *Utrumque Ius in Peciis: Aspetti della Produzione Libraria a Bologna Fra Due e Trecento* (Milan: Giuffrè, 1997).

Introduction

3

half-century.⁵ For the past two thousand years, where one found lawyers, one found law books and those who produced and sold them.

This book cuts across disciplinary lines. As I sat in my study over the past ten years writing it I often wondered how some anonymous cataloguer deep within the bowels of the Library of Congress would deal with the dilemma this work poses: is it a work of legal, business, or book history? The answer, I fear, is not one that fits within the Library of Congress cataloging categories. To my mind, this is a book about the co-evolution of the law, the legal profession, and one of the principal ancillary support and communication networks, which together combined to make the development of American law and the American legal profession possible. It is not a traditional book about legal doctrine or about legal institutions. It is not a compilation of biographical stories of great men and women. The heroes of the story I tell in this book are, for the most part, humble and obscure people whose professions were to make and sell law books. Some achieved wealth and notoriety in their time. Most did not. Even those who did, like John Livingston or Hocquet Caritat, are now forgotten even among historians. But without them, there would be no history of American law because they were enablers. These obscure printers, binders, and booksellers provided the means by which great men like Joseph Story and James Kent could disseminate their ideas and achieve greatness. When we think today of a Story or a Kent, we seldom think of all those forgotten people and of the long-vanished mercantile infrastructure on which the great jurists depended. It has been my self-appointed task over the past decade to try to write the history of that long forgotten and neglected world.

⁵ See the monumental work of Douglas Osler, *Bibliographica Iuridica: Catalogue of Books Printed on the Continent of Europe from the Beginning of Printing to 1600 in the Library of the Max-Planck Institut für Europäische Rechtsgeschichte, Frankfurt am Main* (Frankfurt: Klostermann, 2000), 2 vols.

Chapter 1

A Bookish Profession

In 1848 Rufus Choate made a motion before the Massachusetts Supreme Court for the admission of his student and protégé, Matthew Hale Carpenter.¹ Carpenter was duly admitted and began his preparations to leave Boston for Wisconsin in the hopes of building a professional and personal life in this frontier state. Upon learning of his student's decision, Choate's first question to Carpenter was whether he had enough money to equip himself with an adequate professional library to bring with him to his new home.² When Carpenter replied that he had not and that "the idea of going to a new country as an attorney with no books" had been a great worry, Choate immediately told Carpenter to go to Little, Brown & Co., establish a credit line, which Choate himself would guarantee, and buy a library.³ Delighted with this offer, Carpenter did so and soon returned to Choate with a list of the books he had purchased. Choate looked at the list and scolded Carpenter that he had been too parsimonious. He sent Carpenter back, and this time Carpenter spent almost \$1,000 on his new professional library.⁴

In December 1825, Charles Augustus Dewey, a young lawyer and Harvard graduate living in Williamstown, Massachusetts, wrote a letter to I. L. Bangs, proposing that they consider becoming law partners.

¹ Frank Flower, *Life of Matthew Hale Carpenter* (Madison, WI: David Atwood, 1883), 52.

² *Ibid.*, 52. ³ *Ibid.*, 53.

⁴ *Ibid.*, 53. Within a short time, Carpenter paid his debt in full to Little, Brown & Co. and became a lifelong customer; *Ibid.*, p. 54.

His greatest concern in forming this union was the question of offices. He wrote:

I would enter into the concern with no view less than that of having a business office where clients could be as well served as in any of the western counties – to effect this your own personal attention will be requisite – *so too should there be a very extended and perfect library, which can easily I believe be made out from ours united – I have more than 300 vols.*⁵

Joseph Story, Associate Justice of the Supreme Court of the United States and Dane Professor of Law at Harvard, devoted his life to the law and to books; he collected books,⁶ he read books constantly, he wrote books from an early age. Books were at the center of his life. According to his son William, every morning Story would awaken and, if breakfast was not immediately available, hasten to his library. He spent much of the day reading and writing among his books, except when he was in the classroom.⁷ Indeed, so important was constant access to the library to Story that he arranged his books and papers so that he might be able to find them even at night in the darkness.⁸ Thus, it is not surprising that William Story found the following notation of advice for ambitious lawyers in his father's memorandum book for 1831–1832: "Books should be read."⁹

James Kent, the great Chancellor of New York, first law professor at Columbia University, and author of the first great American institutional legal work, the *Commentaries on American Law*, also built up a large library.¹⁰ He expressed his devotion to his books and his library in the strongest terms: "next to my wife my library has been the solace of

⁵ This manuscript letter is contained in the Dewey-Bliss Collection at the American Antiquarian Society in Worcester, Massachusetts; emphasis added.

⁶ According to his son William, "His library was very select and extensive. It had been collected with great care, and at a large expense, and was precisely adapted to his wants," quoted in W. W. Story, *Life and Letters of Joseph Story*, vol. 2 (Boston: Little, Brown & Co. 1851), 40.

⁷ *Ibid.*, 102. ⁸ *Ibid.*, 604.

⁹ *Ibid.*, 90. The fact that this note was written in the book in which Story kept his case notes may well indicate his dissatisfaction with the level of learning displayed by some counsel before the court. The full couplet reads: "Books should be read; but if you can't digest, The same's the surfeit, take the worst or the best."

¹⁰ See William Kent, *Memoirs and Letters of James Kent, LLD* (Boston: Little, Brown & Co. 1898).

my greatest pleasure and devoted attachment.”¹¹ At least he put his wife first.¹²

All of these anecdotes provide a very different view of lawyers and the legal profession from the popular image of lawyers today as oral advocates who vanquish their opponents by the strength of their rhetoric in court. In fact, even the most skilled litigator must know the law and argue from legal principles. To do otherwise is to risk the displeasure of the court and almost certain defeat to an opponent who does know the law. The law in Western society for the past millennium has been acquired by its students through tedious reading in often dry and bloated tomes that embody the sum total of legislative, court, and private literature, which together make up the law. Thus, though a lawyer might well have practiced on horseback, as did Lincoln 150 years ago, or out of the back of a minivan, as some do today, all still have needed and continue to need access to the books and documents that contain the accumulated law and legal wisdom with which they must be familiar.¹³ Choate’s assistance to his young student simply testifies to the continuity over centuries of this connection between lawyers and books.

In the period from the founding of the new republic to the beginning of the Civil War, American law and the American legal profession underwent profound changes.¹⁴ This was a period of extensive legal syncretism of American and English law. English law was neither wholly rejected nor wholly accepted, and every lawyer during this period had to know something of English statutes and cases as well as the great treatise literature that had dominated English legal thought,

¹¹ Quoted in Dan Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, NC: University of North Carolina Press, 2005), 285.

¹² Every bibliophile should ponder carefully the scene from Umberto Eco’s *Name of the Rose* in which the master, in the face of a devastating fire in the library, chooses to save the most precious books, leaving his apprentice to save himself, if he could. My wife has chided me more than once that were such a choice to be mine, I too would save the books and leave her to fend for herself.

¹³ See Henry C. Whitney, *Life on the Circuit with Lincoln* (Boston: Estes & Lauriat, 1892), for an excellent evocation of the life of a circuit-riding lawyer in antebellum Illinois.

¹⁴ See M. Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (Cambridge, MA: Harvard University Press, 1976); G.W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts 1760–1840* (Westport, CT: Greenwood Press, 1979), 81–128.

particularly the works of Coke and Blackstone.¹⁵ At the same time each of the new American states and the new federal government were developing legal literatures of their own, in courts, in legislatures, and in law offices and law schools. No antebellum American lawyer could risk not knowing his own state's and nation's laws. Finally, American lawyers of this period were cosmopolitan in their thinking and writing. If they could not find relevant English or American law they would gladly look to the law of ancient Rome, and of contemporary France or Germany, among others.¹⁶ The new nation in its formative period offered lawyers unparalleled freedom to look widely for their authorities.

In practice this broadly syncretic approach to legal sources meant that lawyers needed to aspire to have access, either through proximity or ownership, to a major law library, one that could indeed offer the full range of legal sources that lawyers of the period used in drawing their arguments and documents. Many were not satisfied simply with a few reports of local cases and a dog-eared Blackstone. Instead they longed for copies of Pothier on contracts and Vattel on natural law, of Vinnius on Justinian's *Institutes*, and Littleton on the English law of tenures.¹⁷

As the economists have taught us, when one finds a conjunction of demand with the ability to pay for the goods demanded, a market to supply such goods will inevitably result. This is precisely what happened in the first decades of the new United States. Prior to the Revolution, a number of booksellers offered law books, mostly imported from England, and a few even issued catalogues or held the occasional auction

¹⁵ See, esp., A. W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," in *Legal Theory and Legal History*, ed. A. W. B. Simpson (London: Hambledon Press, 1987), 273–320. See also Michael Lobban, "The English Legal Treatise and English Law in the Eighteenth Century," *Iuris Scripta Historica* 13 (1997): 69–88; and M. H. Hoeflich, "American Blackstones," in *Blackstone Studies*, ed. Wilfred Prest (London: Hart, 2009).

¹⁶ See M. H. Hoeflich, *Roman and Civil Law and the Development of Anglo-American Jurisprudence* (Athens, GA: University of Georgia Press, 1997); see also Peter Stein, "The Attraction of the Civil Law in Post-Revolutionary America," *Virginia Law Review*, 52 (1966): 403–34; R. H. Helmholz, "Use of the Civil Law in Post-Revolutionary American Jurisprudence," *Tulane Law Review*, 66 (1992): 1649–84.

¹⁷ See, for example, the comments of Daniel Mayes, a professor at the Transylvania Law School, *An Address to the Students of Law in Transylvania University* (Lexington, KY, 1834), reprinted in M. H. Hoeflich, ed., *The Gladsome Light of Jurisprudence* (Westport, CT: Greenwood Press, 1988), 145–64.

of a private library. A few law libraries of the colonial period were notable for the breadth and depth of their holdings. There were not a great number of such libraries. Thomas Jefferson, for example, built up a respectable legal collection, which eventually became the foundation for the Library of Congress.¹⁸ Edwin Wolf has shown how readily available English law books were in colonial cities such as Philadelphia.¹⁹ The Loganian Library there is one such example.²⁰ John Adams, too, built up a substantial law library in Boston. But the colonial law book trade and the demand for law books in colonial America were far less significant and far smaller than that which grew up in the first seventy-five years after independence. It was in the antebellum period that the American legal profession saw its first dramatic increase in size and prestige, soon eclipsing, as Perry Miller has demonstrated, at least in prestige, the American clergy.²¹ And all of these lawyers needed books. Thus, we find the growth of the law book trade in every major city during this period: Little, Brown in Boston; Banks in Albany; Johnson in Philadelphia; and Voorhies and Livingston in New York City are just a few of those that prospered during this period.²²

The complete history of the trade in law books in the antebellum United States has still to be written. But even preliminary research shows that the law booksellers of this period carried on a sophisticated trade, importing books from both England and the Continent (and pirated English editions from Ireland) as well as printing, publishing,

¹⁸ See, above all, M. Sowerby, ed., *Catalogue of the Library of Thomas Jefferson* (Charlottesville, VA: University of Virginia Press, 1983).

¹⁹ Edwin Wolf II, *The Book Culture of a Colonial American City* (Oxford: Clarendon Press, 1988), 131–63.

²⁰ See *Catalogue of the Books Belonging to the Loganian Library* (Philadelphia: Z. Poulson, Jr., 1795).

²¹ Perry Miller, *The Life of the Mind in America from the Revolution to the Civil War* (New York: Harcourt, Brace, 1969); see also Samuel Haber, *The Quest for Authority and Honor in the American Professions, 1750–1900* (Chicago: University of Chicago Press, 1991), esp. 91–116; Samuel Haber, “The Professions,” in *Encyclopedia of American Social History*, vol. 2, ed. Mary K. Cayton, Elliot J. Gorn, and Peter W. Williams (New York: Scribner, 1992); Bruce Kimball, *The True Professional Ideal in America* (Cambridge, MA: Blackwell, 1992), 106–97.

²² The standard work on the history of American law publishing is Edwin Surrency, *A History of Law Publishing* (New York: Oceana, 1990). Surrency does not deal with either auctions or retail sales in any detail. H. Amory and D. Hall, *The Colonial Book in the Atlantic World* (2000) only touches on the period covered in this present work and is little concerned with law publishers and bookselling.

and selling American-produced translations of foreign works and texts and reports of American origin. Most of the major law booksellers and publishers also sold books by catalogue through the newly created and often unpredictable United States Postal Service, when it became possible to do so.²³ Finally, a number of booksellers, both those in general trade and those specializing in legal materials, began to hold auctions of notable law libraries and collections of law books.

Legal historians have paid too little attention to the law book trade in antebellum America.²⁴ There are a number of reasons for this. First, traditional legal history has been doctrinal history, interested in the contents of books, not in the more mundane matters of how such doctrines were, in fact, made known to lawyers and the public. The assumption has been that a doctrine in print was a doctrine of importance, particularly if it was incorporated into a court report or legislative text. The “new” legal history has broken from the doctrinal focus of the traditionalists to explore such issues as race and gender, but it too has been more concerned with the substance of the law than with the vectors by which legal doctrines became known. It is only within the past decade that a few hardy legal historians such as Richard Ross, Ann Fidler, Mary Bilder, and Al Brophy have attempted to combine the new field of book history with legal history.²⁵

²³ Books could not be sent securely or inexpensively through the U.S. Postal Service until 1851; see Richard R. John, *Spreading the News* (Cambridge, MA: Harvard University Press, 1995), 39; see also R. B. Kielbowicz, *News in the Mail: The Press, Post Office, and Public Information, 1700–1860s* (Westport, CT: Greenwood Press, 1989); R. B. Kielbowicz, “Mere Merchandise or Vessels of Culture? Books in the Mind, 1792–1942,” *Papers of the Bibliographical Society of America*, 82 (1988): 169–200.

²⁴ Historians of European law have done far better in this regard; see the works cited in notes 3–5.

²⁵ See Ann Fidler, “‘Till You Understand Them in Their Principal Features’: Observations on Form and Function in Nineteenth-Century American Law Books,” *Papers of the Bibliographical Society of America* 92, no. 4 (1998): 427–42; Richard Ross, “The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560–1640,” *Yale Journal of Law and the Humanities* 10, no. 2 (1998): 229–326; Mary Bilder, “The Lost Literates: Early American Legal Literates and Transatlantic Legal Culture,” *Yale Journal of Law and the Humanities* 11, no. 1 (1999): 231–85; Alfred Brophy, “The Rule of Law in Antebellum College Literary Addresses: The Case of William Greene,” *Cumberland Law Review* 31, no. 2 (2000/2001): 231–85; see also M. H. Hoeflich, “Legal History: A History of the Book: Variations on a Theme,” *University of Kansas Law Review* 46 (1998): 415ff.; M. H. Hoeflich and Steve Sheppard, “Disciplinary Evolution and Scholarly

A second reason the history of law books and the law book trade has not been written is because of the difficulty of finding the sources with which to write such a history. There are very few remaining business records of antebellum law booksellers and publishers. These were lost long ago as have most mundane business records. The printed remains of these businesses, their catalogues, can still be found; but they have, for the most part, suffered the fate of most printed ephemera. They have not been preserved by institutional libraries precisely because they are ephemera. Indeed, book catalogues are usually at a particular disadvantage in regard to library preservation. Librarians are inundated by such catalogues; once they have been perused they are disposed of. To do otherwise requires an institutional preservation vision of the greatest rarity.

Happily, a few institutions have had such a rare vision. Among such libraries, first rank must be given to the New York Public Library, the Athenaeum in Boston, the Harvard Law Library, and the library of the American Antiquarian Society. Other institutional libraries that had substantial collections of these materials, such as the New York State Historical Library, have sold off many of their holdings, but this, too, has served a purpose in that it has permitted these items to enter the current market to be purchased by other libraries and private collectors.

Although American legal historians generally have not paid adequate attention to the history of the American law book trade, such attention is necessary and long overdue. Indeed, despite some legal historians' resistance to the introduction of the methodologies and techniques of the emerging field of the history of the book, these methodologies and techniques have much to offer American legal historians.²⁶ Indeed, a merging of the two fields will produce a richer and more expansive view of American legal history, especially of the antebellum age. Let me explain why.

The antebellum lawyer's "lust" for books, as illustrated in the anecdotes at the beginning of this chapter, was one of the central facts of

Expansion: Legal History in the United States," in *American Law in the 21st Century: U.S. National Reports to the XVIIth International Congress of Comparative Law*, ed. John C. Reitz and David Clark (Ann Arbor, MI: American Society of Comparative Law, 2006), 23–44.

²⁶ See Hoeflich, "Legal History and the History of the Book."