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## BOOK REVIEW: LEGAL PAPERS OF ANDREW JACKSON

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# BOOK REVIEW

LEGAL PAPERS OF ANDREW JACKSON. Edited by James W. Ely, Jr. and Theodore Brown, Jr. Knoxville, Tenn.: The University of Tennessee Press, 1987, pp. lxvi, 420.

*Reviewed by Walter F. Pratt, Jr.\**

The *Legal Papers of Andrew Jackson* is a handsomely edited book and a credit both to its editors and its publisher.<sup>1</sup> James W. Ely, Jr. and Theodore Brown, Jr. have done an impressive job of supplementing the limited manuscript record with information about the attorneys, the litigants, and the issues involved in each of the selected cases.<sup>2</sup> In fact, the additions are so substantial that the title is somewhat misleading: this is really a carefully documented account of the history of law in central Tennessee between 1787 and 1804.<sup>3</sup> The result is a valuable addition to the emerging history of law in early America. One can only hope that this will not merely become part of what one reviewer termed the "last extended series to contain the papers of a great American"<sup>4</sup>

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1. The *Legal Papers of Andrew Jackson* is a supplement to *The Papers of Andrew Jackson* (S. Smith, H. Owsley, H. Moser & S. Macpherson eds. 1980, 1984), also published by the University of Tennessee Press.

2. The editors were hindered by the fact that most of Jackson's papers and those of his contemporaries in the Tennessee legal community have not survived. LEGAL PAPERS OF ANDREW JACKSON lx-lxi, xlv (J. Ely & T. Brown eds. 1987) [hereinafter LEGAL PAPERS].

3. I refer especially to the almost 50-page introduction and the equally long biographical register of Jackson's colleagues in the legal profession. Both are valuable starting points for anyone doing research in the period. The editors have already begun the exploration of Tennessee's early legal history using these papers. See Ely, *Andrew Jackson as Tennessee State Court Judge, 1798-1804*, 40 TENN. HIST. Q. 144 (1981); Ely, *The Legal Practice of Andrew Jackson*, 38 TENN. HIST. Q. 421 (1979); Note, *The Tennessee County Courts Under the North Carolina and Territorial Governments: The Davidson County Court of Pleas and Quarter Sessions, 1783-1796, as a Case Study*, 32 VAND. L. REV. 349 (1979) (authored by Theodore Brown).

4. Rogers, Book Review, 83 S.C. HIST. MAG. 80, 80 (1982). One would also hope that the success of this compilation would encourage the collection of manuscripts in one place, preferably the state archives. The editors' descriptions of lost materials and of journeys to remote county seats are distressing, though familiar. Surely the time has come for each state to have a single, central archive to maintain all court records that are more than, say, 50 years old.

and that publishers will be encouraged by this success to continue to make manuscripts available to a wide audience.<sup>5</sup>

Although not advertised as a contribution to the celebration of the bicentennial of the Constitution, this book is that as well. Andrew Jackson became a member of the bar on September 26, 1787, the very day that Congress first considered the proposed Constitution.<sup>6</sup> In the same month one James Robertson deeded his half interest in lot nine in Nashville to a James Lanier.<sup>7</sup> None of those events of September 1787 created a fissure in history; they reflect more continuities than disjunctions. The actions of the Philadelphia Convention, to be sure, have had a more momentous impact than did Jackson's admission to the bar. Even so, Jackson's brief career in the law, as illustrated in this volume, reminds us of the continuously emerging mosaic of American legal culture. Especially in a "Bicentennial Year," it is all too easy to allow the allure of federal constitutional law to overshadow the more mundane but arguably more important events in the trenches of the legal system. This volume corrects our focus by giving us a legal footsoldier's view of law in the frontier society of Tennessee as the eighteenth century became the nineteenth.

Having presented a corrected, or at least complementary, view, this volume is still sufficiently rich to suggest any number of topics for further research. For a "legal" or "judicial" biography of Jackson the sources are inadequate because Jackson left so few traces; yet for a history of the legal profession the sources are highly suggestive because Jackson provides an archetype.

All who have searched legal manuscripts for information about judges or lawyers will find much that is familiar here. The pleadings are so filled with formal language that they furnish frustratingly little insight into the actual facts behind each case. The records are agonizingly lacking in evidence about the nature of actual argument before the judges. The judicial opinions are so sparse that we get only the barest glimpse into the judicial process. The editors have responded admirably to these gaps in the manuscript records. Using the records as a framework, they have constructed an annotated bibliography, and even

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5. There are no doubt other items worthy of publication, but I especially have in mind *The Bland Casebook*, which the editors discovered at the Maryland Historical Society in Baltimore. This manuscript is 140 pages long and contains reports of superior court cases written by Theodorick Bland while he was in Tennessee between 1799 and 1801. See LEGAL PAPERS, *supra* note 2, at lxxv. For an example of the successful publication of court documents, see 1-4 NORTH CAROLINA HIGHER-COURT RECORDS [SECOND SERIES] (M. Parker & W. Price eds. 1968-74) and 5-6 NORTH CAROLINA HIGHER-COURT MINUTES [SECOND SERIES] (W. Price ed. 1974-81).

6. See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, at 322, 327-28 (M. Jensen ed. 1976)

7. LEGAL PAPERS, *supra* note 2, at 90.

prosopography, for early Tennessee.

From the editors' efforts we have a valuable statistical picture of Jackson's practice. For example, Jackson, as prosecutor, had a conviction rate of just over sixty percent in criminal cases.<sup>8</sup> As a private attorney he sometimes tried eight jury cases in a single day.<sup>9</sup> Obviously those statistics contribute to our understanding of the frontier court system, allowing us to better compare developments in the first southwest with those in the original colonies. Likewise, Jackson's experiences tell us a great deal about the kinds of cases decided by the courts of early Tennessee. The editors, for example, call attention to the "vigorous economy of land speculation and [the] burgeoning commerce" reflected in the cases.<sup>10</sup>

But the editors also show us a problem with many sources of this kind: we learn little about Jackson the man.<sup>11</sup> The Jackson encountered in this volume is not the swashbuckling military hero. It is not even the Jackson who, as judge, steps down from the bench and single-handedly apprehends a menacing criminal.<sup>12</sup> Instead, we find a Jackson who was a "gentleman" of "unblemished moral character."<sup>13</sup> Indeed! In short, the problem for any prospective biographer is that the papers tell us what Jackson *did* but not what he *thought*. The sources do not allow a biographer to provide the "graphic portrayal of character and exploit" that is essential to any biography.<sup>14</sup>

The primary difficulty facing any biographer is that, in spite of the volume's title, Jackson himself plays but a small role. These are really the legal papers of middle Tennessee. Fittingly for a collection centered on the hero of the common people,<sup>15</sup> yet also ironically for a man who gave his name to an era of American politics,<sup>16</sup> there are no figures who tower over the legal landscape in the way that James Madison stands astride the Philadelphia convention or John Marshall reigns over the

8. *Id.* at xxxviii. For articles based on these manuscripts, see *supra* note 2.

9. LEGAL PAPERS, *supra* note 2, at xl.

10. *Id.* at xli; see, e.g., *id.* at 22-27 (Jackson representing Detroit mercantile firm); *id.* at 60-67 (Jackson seeking to recover client's share of expenses for transport of goods between Pennsylvania and Nashville); *id.* at 78-89 (Jackson representing Maryland merchant).

11. See *id.* at liii-liv.

12. The editors report in an appendix their unsuccessful efforts to verify this tale of Russell Bean. *Id.* at 395-97. I must concede to being torn between admiring their professional skills and recalling an image of the Grinch who stole another legend.

13. *Id.* at 3 (Jackson's license to practice in the county courts of North Carolina).

14. Lee, *Principles of Biography*, in ELIZABETHAN AND OTHER ESSAYS 31, 51 (F. Boas ed. 1929).

15. Cf. R. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822-1832, at 116 (1981) (stating that "Jackson saw his role as the champion of the people").

16. See generally A. SCHLESINGER, THE AGE OF JACKSON (1945); J. WARD, ANDREW JACKSON, SYMBOL FOR AN AGE (1955).

Constitution itself. Those who populate this volume, though not petty, are by no means giants. Jackson serves as the focal point more because of fame earned by later political activities than because of any excellence in his legal career. The available sources give us only the occasional insight into Jackson's intellect or personality. Indeed, for insight into Jackson's character, one would look in vain even in the main volumes of this series<sup>17</sup> because the "many invisible circumstances . . . are more important than publick [sic] occurrences."<sup>18</sup>

The manuscript sources cannot, therefore, support a biography of any single member of this early nineteenth century legal community. That fact does not, however, diminish the value of these papers, for they offer a wealth of information about their legal community. They allow us to study Jackson and other lawyers "in terms of their broader involvement in the everyday life of their local communities, whose mores they necessarily shared to a greater or lesser degree."<sup>19</sup> In particular, these papers suggest two especially intriguing topics for those who would "row out over [the] great ocean of material and lower down into it, here and there, a little bucket, which will bring up to the light of day some characteristic specimen, from those far depths, to be examined with a careful curiosity."<sup>20</sup> For both the emergence of American law and the development of legal ethics this volume reveals a legal system on the verge of substantial change. Careful study of the evidence will allow us to better understand the colonial legal system and that of the early nineteenth century.

First, and above all else, this book evidences the powerful continuity of the English common law.<sup>21</sup> But there are also signs of an emerging *American* law—a process of birth that certainly merits careful attention as we expand our knowledge beyond New England.<sup>22</sup> The reader is likely to be struck initially by the dearth of what might be termed "local" arguments and precedents. Attorneys refer to English

17. See 1-2 THE PAPERS OF ANDREW JACKSON (S. Smith, H. Owsley, H. Moser & S. Macpherson eds. 1980, 1984); see also 1-7 THE CORRESPONDENCE OF ANDREW JACKSON (J. Bassett ed. 1926-35).

18. Johnson, *Rambler* No. 60 (Oct. 13, 1750), reprinted in 3 THE YALE EDITION OF THE WORKS OF SAMUEL JOHNSON 321 (W. Bate & A. Strauss eds. 1969).

19. M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at viii (1976).

20. L. STRACHEY, EMINENT VICTORIANS v (1919); cf. Frank, *Ingredients of Judicial Biography*, 24 IND. L.J. 374, 375 (1949)(judicial biography "is a peephole into an era").

21. Cf. LEGAL PAPERS, *supra* note 2, at xxviii-xxx. See also the invoice for books that Jackson purchased in 1797 from a Philadelphia bookseller, *id.* at 5-6, and the notes taken by Jackson on the oral argument by counsel in 1802, *id.* at 233-34. The invoice shows that most of the books Jackson purchased were English; the notes show that most of the cases cited by counsel were English.

22. See AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (D. Bodenhamer & J. Ely eds. 1984); see also Finkelman, *Exploring Southern Legal History*, 64 N.C.L. REV. 77 (1985).

precedent, followed by unchallenged observations that the similarity between English and Carolina statutes requires that they be applied in a like manner.<sup>23</sup> Anyone expecting to find a freewheeling frontier law will be surprised to read a comment by one of Jackson's colleagues on the bench that "where the Practice of this country is unsettled it is proper to recur to that of England."<sup>24</sup> Thus it happened that a lighted squib thrown in a county market in England and an Indian provincial prince came to influence a court in frontier Tennessee of 1801.<sup>25</sup> This volume, then, well illustrates the strength of the intellectual tradition that so tightly unified the new nation even at the moment when it precariously considered whether to throw off the Articles of Confederation in favor of the new Constitution.

There are, however, sporadic signs of an emerging American law. In public law, the new national and state constitutions percolated quickly to the frontier legal community. For example, in 1798, only two years after Tennessee joined the union, Jackson and others petitioned against a Tennessee law that required twelve months residence before anyone could be admitted to practice law. The petitioners asserted that the law was "inconsistent with the spirit of the federal constitution which declares that citizens of the United States shall be entitled to all the privileges of citizenship in the several states."<sup>26</sup> Similarly, in 1800 an attorney argued (though without citation or elaboration) that it was a violation of the Tennessee Constitution to impose the death penalty for horse stealing.<sup>27</sup>

The final year of the eighteenth century also offers a revealing example from private law. The dispute involved efforts to recover on a note that was twenty-five years old. The defendant's attorney relied upon a presumption of payment after a lapse of so much time. The attorney for the plaintiff responded:

It ought to be recollected by the Jury that the cases read [by the opposing attorney] are decisions of the British Courts and principally founded on the nature of that country. Such is the narrow insular situation of Great Britain that it is almost impossible for a Debtor to remove out of the reach of his Creditor[.] [I]f the Debtor had gone to the most remote corner of the Island the Creditor could easily pursue or send after him have suit brot and enforce the payment[.] [B]ut how different is the nature of the U.S. [T]he citizens are spread over an immense tract of Country and so little social intercourse carried on amongst those citizens that an age almost might elapse before the Creditor could possibly discover the retreat of his abscond-

23. *LEGAL PAPERS*, *supra* note 2, at 139. The act concerned the admissibility of book accounts. See also *id.* at 113-14 (depicting a similar dispute about another statute).

24. *Id.* at 292-93.

25. *Id.* at 210-11 nn.2-3. The cases are *Scott v. Shepherd*, 96 Eng. Rep. 525 (K.B. n.d.), and *Rafael v. Verelst*, 96 Eng. Rep. at 579 (K.B. n.d.).

26. *LEGAL PAPERS*, *supra* note 2, at 102.

27. *Id.* at 148.

ing Debtor even if he were to use all the diligence in his power, in England this could never be the case.<sup>28</sup>

Apparently accepting the plaintiff's argument, the court concluded that the question of payment, under the circumstances of the lapse of time, was one for the jury.<sup>29</sup>

On another occasion the court also let a case go to the jury, rejecting the common law distinction between trespass and case. "The line of distinction," the court said, "in many instances, is so nice, that it seems difficult to discover it."<sup>30</sup> If other instances could be found, the two cases might provide the nucleus for an analysis of the role of the jury in early Tennessee.<sup>31</sup> Regardless of the availability of other records, the court's willingness to ignore a distinction between trespass and case is provocative. Less than a year before, the court had dismissed a plaintiff's writ for using the phrase "a plea of Case" and omitting the words "Trespass on."<sup>32</sup> The apparent inconsistency between the two holdings is all the more suggestive because the earlier case (which the court did not allow to reach the jury) involved one of the rare examples of an attorney being sued for malpractice.

The treatment of malpractice suggests the second of the topics deserving of "careful curiosity"—the development of legal ethics. Even more striking than the court's willingness to protect an attorney is Jackson's seeming disregard for proper conduct as either a lawyer or a judge. He acted as an arbitrator in a case in which he had appeared as counsel;<sup>33</sup> he served as a judge in cases in which he had represented one of the parties;<sup>34</sup> and he even sat as judge in cases in which he was a

28. *Id.* at 165-66. The use of the verb "read" in the passage quoted in text suggests the nature of the argument to the court. The lawyers clearly had access to printed English reports which they apparently read to the court. Furthermore, the absence of written briefs or memoranda throughout this volume shows the legal culture to be predominantly oral. For a more complete understanding of the development of the legal system, we need to know when lawyers and judges began to communicate with each other in writing. To the extent that writing became distinctive, it would serve to separate the professional communications from the inevitably oral communications with a jury. For a more technical argument addressed to the differences between English and American appellate procedure, see *id.* at 195-96. See also the discussion of Tennessee's divorce law as being more liberal than that in England. *Id.* at 256-57.

29. *Id.* at 166.

30. *Id.* at 209-10.

31. In a similar vein, the editors report two instances of judges joining petitions for clemency for defendants convicted in trials before the same judges. *Id.* at 127 (Jackson did not join the petition); *id.* at 224 (Jackson signed this petition). The jurors' petition for clemency raises further questions about the complex factors that would ameliorate the harshness of the criminal law. For instance, in 1801 Jackson and another judge granted a defendant's plea of benefit of clergy. *Id.* at 212-15.

32. *Id.* at 182, 184.

33. *Id.* at 92-93.

34. See *id.* at 107-08, 151; see also *id.* at 80 (Jackson filed petition for client with court of which he was a member though he did not sit with court when it rendered a decision).

party.<sup>35</sup>

Jackson's actions seem to violate the spirit, if not the language, of the Tennessee Constitution: "No judge shall sit on the trial of any cause where the parties shall be connected with him, by affinity or consanguinity, except by consent of parties."<sup>36</sup> Moreover, Jackson's conduct violated a maxim of ancient lineage: "*nemo sibi esse iudex vel suis jus dicere debet.*"<sup>37</sup> Jackson's conduct in the face of such powerful edicts is puzzling. Possibly his insensitivity to ethical issues reveals his true personality—and we at last encounter the rake we expected. Yet Jackson continued to be one of the most popular, if not most respected, legal figures in middle Tennessee.<sup>38</sup> Therefore, it seems likely that his conduct was not an aberration. If Jackson did share the mores of his local community, then the editors have again given us a valuable benchmark. They quote G. Edward White's observation that the "specter of judicial conflicts of interest did not loom large to nineteenth-century Americans."<sup>39</sup> But that comment only raises the issue; it does not explain. Why, for example, if the issue was truly unimportant would it merit even a limited provision in the state constitution?

These papers are especially valuable for suggesting the chronology of inquiry because Jackson would himself later campaign against corruption in Washington, D.C.<sup>40</sup> In turn, the subsequent excesses of Jacksonian democracy found an articulate opponent in David Hoffman, "the father of American legal ethics."<sup>41</sup> Hoffman originally included "Observations on Professional Deportment" in his *Course of Legal Study* in 1817.<sup>42</sup> Reacting "against the debasement of professional mores that he perceived in the Jacksonian era,"<sup>43</sup> Hoffman expanded his observations to a list of *Fifty Resolutions in Regard to Professional Deportment*,

35. *Id.* at 201 & n.1; *id.* at 263; see also *id.* at 151-56 (Jackson sat as judge on case in which he was potentially liable as assignor of note in dispute).

36. TENN. CONST. of 1796, art. V, § 8. At least one other judge recused himself in similar circumstances, though the editors could discover no direct evidence of the reason. LEGAL PAPERS, *supra* note 2, at lvi.

37. "No man ought to be his own judge, or to administer justice in cases where his relations are concerned." See, e.g., H. BROOM, A SELECTION OF LEGAL MAXIMS 116 (7th Am. ed. 1874).

38. R. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767-1821, at 124 (1977). As the editors note, "[A]s a lawyer, Jackson experienced considerable success and enjoyed a favorable reputation." LEGAL PAPERS, *supra* note 2, at xlv.

39. LEGAL PAPERS, *supra* note 2, at lvi (quoting G. WHITE, THE AMERICAN JUDICIAL TRADITION 40 (1976)). For another account of the development of ethical concerns in the early republic, see J. NOONAN, BRIBES 427-51 (1984).

40. See J. NOONAN, *supra* note 39, at 449-51.

41. T. SHAFFER, AMERICAN LEGAL ETHICS 59 (1985). The second chapter of *American Legal Ethics* is devoted to an exploration of Hoffman's principles. See *id.* at 59-164; see also Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673 (1979).

42. T. SHAFFER, *supra* note 41, at 59.

43. Bloomfield, *supra* note 41, at 684.



which he published in 1836.<sup>44</sup> Among Hoffman's resolutions was the following:

If I have ever had any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the *formal aspect* of the cause induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side, that the present is but the *ghost* of the former cause.<sup>45</sup>

Neither Jackson nor Hoffman seems to have appealed to the ethics of a profession. For both men, rules of proper conduct appear to have been standard across occupational lines. Still, the contrast between the reality of Jackson's conduct and the aspiration of Hoffman deserves explanation. It is possible that the elite who made up the bar sought to protect themselves—witness the court's rejection of the malpractice action. But that explanation is not consistent with Jackson's argument against a residency requirement.<sup>46</sup> If the elite wanted to protect themselves they should have attempted to limit access to the profession as well as to thwart malpractice actions. Moreover, not until Judge George Sharswood's 1854 lectures do we have an argument for a distinct professional ethics.<sup>47</sup>

In the absence of an established, self-protecting elite, we need to look elsewhere to begin understanding the benchmark provided by this volume. We need look no further than the legal system itself. In the early 1800s, the Tennessee legal system was still immature. There was not yet a strong sense of distinction between law and politics. In the absence of a professional bench and bar, decisions of courts retained much of the character of community decisions, in which it was appropriate for everyone to participate, accepting certain of the characteristics of the rough-and-tumble politics of the times.<sup>48</sup> Hoffman's 1836 work represents the final vestige of that undifferentiated system. By then there was developing a court system and bar which increasingly viewed itself as a profession. One result of that development was Sharswood's attempt to establish a separate professional ethic.<sup>49</sup> The *Legal Papers of Andrew Jackson* suggests that the development of a conscience peculiar to lawyers went hand-in-hand with the separation of

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44. T. SHAFFER, *supra* note 41, at 59-68. The entire list is published as an appendix to J. RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY 386-99 (J. Townshend 3d Am. ed. 1873).

45. J. RAM, *supra* note 44, at 387.

46. See *supra* note 26 and accompanying text.

47. T. SHAFFER, *supra* note 41, at 76-77, 167-77.

48. Cf. J. NOONAN, *supra* note 39, at 31 (indicating that "[t]o put an antibribery ethic into practice in even a limited sphere—as opposed to announcing what it should be—required men professionally interested in the process of judging; it required a corps of men whose skill consisted in the presentation of facts and law and argument").

49. For a more complete discussion of this point, see T. SHAFFER, *supra* note 41, at 167-361.

law from politics and the molding of a separate legal profession. But this collection of papers achieves its purpose by suggesting that, and doubtless other topics for research.

The *Legal Papers of Andrew Jackson* thus provides a fertile starting point for further research into the emergence of an American law and the development of legal ethics. The value of the book, however, is not limited to those two topics; the cases and notes in this volume are replete with hints and nudges toward any number of other profitable paths for investigation. A wide range of scholars will therefore be indebted to the editors and publisher for making these papers readily available.

