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Chief Justice John Appleton
(1804-1891)

CHIEF JUSTICE JOHN APPLETON

At a banquet celebrating the seventy-fifth anniversary of the Maine Historical Society, one of the speakers, George F. Talbot, expressed his desire someday to see biographies of two of Maine's most eminent public figures, William Pitt Fessenden and John Appleton.¹ The fame of Fessenden, Civil War senator and secretary of the treasury under Lincoln, has been revived in recent years because of his key role in Reconstruction politics. Appleton, however, remains relatively unknown; the only substantial essay on him is now more than seventy years old.² An ardent legal reformer, Appleton served with distinction for thirty-one years on the Supreme Judicial Court of Maine, published many articles in leading law journals attacking anachronistic and unjust rules of evidence, and gained renown for his successful struggle to make the accused in a criminal case competent to testify in his own behalf. This article is intended as a first step towards fulfilling Talbot's hope that historians fully accord Appleton the credit due this remarkable man.

Personal and Professional Life

The name Appleton comes from the Anglo-Saxon words *aepl* and *tun*, meaning apple garden. Because it appeared as a place name shortly after 1066 and because the early given names of the family in England were Norman, one author surmised that "the first of the Appletons was a Norman knight accompanying William the Conqueror to whom was given an estate called Aepl-tun, as a reward for his military service."³ Samuel Appleton, progenitor of the American branch of the family, emigrated to Massachusetts in 1636, becoming a prominent citizen in the town of Ipswich and taking part

in the deposition of Governor Edmund Andros at the time of the Glorious Revolution of 1688. In the mid-eighteenth century Samuel's descendant Isaac Appleton helped settle New Ipswich, New Hampshire. Isaac's younger brother Francis, John Appleton's grandfather, followed him there around 1770 and settled down to the quiet life of a modest farmer, interrupted only by brief military service during the Revolutionary War.⁴

Although it appears that he was among the most heavily assessed taxpayers of New Ipswich in 1774,⁵ Francis Appleton was not a wealthy man. On the contrary, according to an acquaintance of his son Jesse, the respected theologian and educator, "Mr. Francis Appleton was a farmer in the ordinary circumstances of that class of our community. So contracted indeed were his means, that [Jesse] was designed to a mechanic's trade."⁶ Jesse went on to become president of Bowdoin College and the family farm devolved upon his brother John.

The elder John Appleton remains even more of an enigma than his father. He was not distinguished enough to merit more than the merest mention in the published histories of New Ipswich. He lived from 1763 to 1849 and married Elizabeth Peabody of Wilton, New Hampshire, on March 10, 1803. Elizabeth, the daughter of a blacksmith who could trace his American roots back to 1635, died in 1809 at the age of thirty-two.⁷ The couple produced two children, John and Elvira.

The younger John Appleton entered the world on July 7, 1804. The course of his early years remains a matter of speculation for there is very little evidence as to how he spent his boyhood days. In a brief autobiographical letter written in 1858 Appleton covered the period from his birth to his teaching career in one sentence.⁸ The published accounts of his life follow this precedent. We do know, however, that Appleton received his early education at the New Ipswich Academy.⁹

The New Ipswich Academy, renamed Appleton Academy in 1853 in honor of its benefactor Samuel Appleton of Boston, was organized in 1787 by a group of thirty-two men from New Ipswich and neighboring towns. The founders, including Isaac and Francis Appleton, were perhaps dissatisfied with the limited education then provided in the town's schools.¹⁰ The second academy to be incorporated in New Hampshire and only the third in the country to be coeducational, the New Ipswich Academy was chartered in 1789

for the purpose of promoting piety and virtue, and for the education of youth in the English, Latin and Greek languages, in Writing, Arithmetic, Music and the Art of Speaking, practical Geometry, Logic, Geography, and such other of the liberal arts and sciences or languages, as opportunity may hereafter permit, or as the trustees hereinafter provided shall direct.

With a population exceeding 1,200 New Ipswich was large enough to support the academy and it endured until recent times.

In John Appleton's day the New Ipswich Academy had about eighty-five students, more than a third of whom were girls and more than a third of whom pursued classical studies. Young Appleton must have been among the latter, for when he was accepted at Bowdoin College in Brunswick, Maine, at the tender age of fourteen the admission requirements included familiarity with Greek and Latin.¹¹ At Bowdoin the classics were again stressed, along with mathematics and religion, and the lasting impression they made is apparent from the frequent Greek and Latin references in the written opinions of Judge Appleton.

At least some of the judge's love of classical learning must have been imbibed from his uncle Jesse who was not only the president of Bowdoin College but one of its better instructors. In general, however, the teaching of classics at that time was not very good. Alpheus Spring Packard, who

graduated from Bowdoin in 1816 and taught there for sixty-five years, recalled: "Classical teaching in my day was altogether inefficient. The first professor was more skillful in exploring the wild lands of the college on the Piscataquis, and in introducing choice fruits in this and neighboring towns, than in inspiring students with love for Greek."¹²

Appleton entered Bowdoin in 1818. The "journey of several days to Brunswick from New Ipswich in an old-fashioned, two-wheeled chaise with his uncle was an event to be remembered, for he often referred to it in his allusions to his boyhood days."¹³ The college itself was less remarkable. Located in a small, unattractive town and consisting of just two buildings, its rooms were small and spare, its course work rigidly prescribed, and its required hours of study long. Nevertheless, the students managed to find diversion. Drunkenness and pranks were perhaps no less common than now; offenders were punished with fines or suspensions and required to live for a time with clergymen selected by the faculty.

There were also amusements of a more enlightening nature in the form of literary and debating clubs. Among these was the Peucinian Society, formed "in order to cherish the love of literature . . . cultivate among the members a spirit of affection for the parent institution . . . and promote and preserve a feeling of fellowship."¹⁴ The club's constitution called for fortnightly meetings to discuss moral and intellectual themes and develop forensic abilities. During his years of membership Appleton was supposed to have presented "forensics" on the following questions: Did the first settler of New England use justifiable means of obtaining possession of the country? Does climate influence genius? In a Christian Republic ought the laws to oblige every man to contribute to the support of the Christian religion? There is no way of knowing how Appleton responded to these challenges. In

fact, the society's records reveal that it was not uncommon for members, Appleton included, to neglect their assigned tasks altogether, despite the fines provided for such omissions in the organization's bylaws.

Appleton graduated from Bowdoin in 1822, the third youngest in a class of twenty-four men. As with many educated young men of that period, his initial employment after graduation was teaching, first at the Dummer Academy in Byfield, Massachusetts, and later at Oliver Wellington's school in the Boston suburb of Watertown. The Dummer Academy, founded in 1763 by Lieutenant Governor William Dummer as the first boys' boarding school in the country, is still in existence. Wellington's academy, on the other hand, had a brief life, twenty years or less. Founded around 1822 by Watertown parents who thought the district schools inadequate, the academy seems never to have gotten firmly established, and the building was later occupied by a succession of church groups and masons.¹⁵

Appleton had a short but successful teaching career. One of his students was the future United States Supreme Court Justice Benjamin Curtis whose brother remembered Appleton as a flower among the thorns who came and went as masters at the Watertown school. "I think my brother gained more from Mr. Appleton," wrote George Ticknor Curtis, "than he did from all the previous masters whom he had attended. He was a good teacher, and a person of superior mind."¹⁶

After a year of teaching Appleton turned to the study of law. As was customary in those days, he received his legal education not in a law school but in the offices of established attorneys. He had for mentors George F. Farley of New Ipswich and a relative, Nathan Dane Appleton of Alfred, Maine, both of whom became prominent lawyers in their own right.¹⁷ In 1826, having

attained the age of majority, John Appleton was admitted to the bar in Amherst, New Hampshire. Later that same year he began to practice law in Dixmont, Maine, named for Dr. Elijah Dix, the town's founder and grandfather of the advocate for the mentally ill, Dorothea Lynde Dix.¹⁸ For reasons unknown Appleton moved again after three months, this time to Sebec, Maine, his first real home after New Ipswich.

Sebec was a mill town of some promise at that time, but its 1820 population of 431 exceeded the current number of inhabitants by more than 100. Appleton was the town's second lawyer.¹⁹ Little is known of the six years he spent there except that it was during this time that, inspired by Jeremy Bentham's *Rationale of Judicial Evidence*, he began to write his widely respected articles on evidence.

In 1832 Appleton resettled once again, this time for good. He moved to the fast-growing mill town and lumber port of Bangor, where a skillful and hard-working young lawyer could exercise his craft to much greater advantage than in small country outposts like Dixmont and Sebec. When Bangor was incorporated as a town in 1791 it had perhaps 500 inhabitants, but by the time it became a city in 1834 the population had swelled to 8,000 and excitement was high. Bangor was on its way to becoming one of the great lumber ports of the world and speculation in the surrounding timberland was rife.²⁰ (Although adventurism in business was not in his nature, Appleton may have succumbed to the speculation fever for, according to a newspaper article published shortly after his death, he owned 130,000 acres of Maine timberland.)²¹ In that atmosphere, more people were bringing lawsuits than could afford to pay and the firm of Allen and Appleton, though enjoying a large clientele, reaped only a modest revenue. "In those days," Judge Appleton remembered upon his retirement from the bench, "the main business of the law consisted of vain efforts to collect uncollectable

debts, and with about as much promising results as those attained by a venerable prosecuting officer of this county, who procured from the grand jury an indictment against a town for not repairing irreparable roads.”²²

In Bangor Appleton settled down to the life of a family man and prominent attorney. He married his partner’s sister Sarah, daughter of Massachusetts Congressman Samuel Allen, in 1834 and built a house on the corner of Fifth and Cedar streets. His first son, John Francis, was born the following year. His law practice yielded only a moderate income, but, as Appleton once remarked, “in respect of experience and multiform legal knowledge, it was largely remunerative.”²³

The partnership of Allen and Appleton came to an end with Elisha Allen’s election to Congress in 1840.²⁴ By that time Appleton’s reputation was firmly established and a distinguished citizen of Bangor recommended him as a “gentleman of great legal attainments and discriminating mind” and a worthy candidate for the position of reporter of decisions for the Supreme Judicial Court of Maine.²⁵ Appleton was duly appointed, but after one year he returned to private practice on a full-time basis. He formed partnerships first with John Boynton Hill and later with his cousin Moses Appleton. The second association lasted until his appointment to the Supreme Court in 1852.²⁶

That same year, 1852, saw the judicial reorganization of the state in accordance with a bill drawn by Appleton. For the previous thirteen years the judicial system had consisted of three district courts of original jurisdiction and the Supreme Court, plus a number of special courts of limited jurisdiction. Appointed by the legislature to head a commission to review the court system, Appleton recommended the abolition of the district courts and the transfer of their powers to an enlarged Supreme Court.

The plan was adopted and thereafter the Supreme Court justices held trial terms in various parts of the state, and at least one law term annually in each of the three districts into which the state had been divided to decide upon important questions of law.

The reform was not without its critics. One, writing a few years after the new system was inaugurated, complained that the Supreme Court now occupied itself with trivial causes instead of matters of high principle, and that without sufficient leisure for research and deliberation the court's intellectual character and authority would suffer. Looking back after his retirement, however, Appleton expressed satisfaction with his work. The elimination of undue opportunities for appeal and protracted litigation, he said, resulted in a great saving of "delay, expense and vexation . . . so that I think it may be truly said that there is no State in New England where a judgment may be obtained so speedily and with so little expense as in this good State of ours." By that time, however, superior courts had been established in several counties, for the growth of the state after the Civil War had placed too heavy a burden on the Supreme Court for it to continue as the sole court of first instance.²⁷

Appleton, serving on the bench with distinction for thirty-one years, was living proof that his court system did not necessarily bar legal scholarship of the highest order. Although a Whig, he received his appointment to the bench in 1852 from a Democratic governor whose election he had opposed.²⁸ Ten years later he succeeded John Tenny as chief justice. During his tenure on the bench Appleton supplemented his judicial duties by preparing his articles on evidence for publication in book form, and by codifying, indexing, and annotating the Maine Constitution which had been amended twenty-one times over the years, a task assigned him by the legislature.²⁹ He retired in 1883 at the age of seventy-nine, leaving "not a

stitch of work” for his successor, John Peters.³⁰

After a lifetime in the legal profession Appleton willingly put aside law to pursue reading in other fields and to enjoy the companionship of family and friends.³¹ (And probably also to play cards, for according to Peters he excelled at euchre and whist.)³² Appleton lived out his final years in contentment, possessing a sound mind and vigorous health until the end. The tributes he received from friends and associates upon his retirement and death stressed his industriousness and intelligence, his even temper and kindness, especially toward younger members of the bar.³³ Appleton also possessed a delightfully dry sense of humor. Among the anecdotes related by Charles Hamlin, for example, was the one in which a merchant exclaimed to the judge, “This bankrupt law is robbing our firm of thousands of dollars.” “Oh, no! neighbor Jones,” replied the judge, “it is the insolvency of your debtors.”³⁴ On another occasion, when Appleton’s voracious literary appetite had led him to attempt an indigestible autobiography, he wrote to an acquaintance:

I had forgotten about Williamson and his interminable life. I plead *guilty* – the plea is the proper one – to reading the first volume of his useless life – but the Court Martials were too much – I gave up in despair. I never heard of anybody else who read as much as I did of that prosy book – unless it was the corrector of proofs – proofreader I should rather say – who taking that as all other jobs as a mere matter of duty, never faltered or never should have faltered and who therefore may be *presumed* to have read it. As he read it only to correct errors he was under very little obligation to interest himself about the text and therefore may be pardoned.³⁵

Appleton’s family in his last years consisted of his second wife, the former Anne Greeley, two sons and a grandson. Between 1844 and 1874 he had lost his father and sister, an infant daughter and two sons, and his first wife. His first-born achieved distinction as a soldier and lawyer. During the Civil War John Francis Appleton served gallantly under General Nathaniel P. Banks at the siege

of Port Hudson and, over objections of fellow officers who felt it was beneath the dignity of a gentleman, he commanded a colored regiment. In 1865 he was breveted brigadier general. A Bowdoin graduate, John Francis Appleton passed the bar in 1866 and three years later received Senate confirmation as a federal judge for the Eastern District of Texas. He had to refuse the appointment due to poor health and died in 1870 from an illness first contracted in the swamps of Louisiana during the War.³⁶

For the last two decades of his life Judge Appleton lavished his abundant parental affection upon his two surviving sons, Frederick, a prominent attorney, and Henry, a prosperous lumber merchant. The final paragraph of his will, addressed to the sons, testifies eloquently to the character of the father:

In making the foregoing provisions, I have endeavored to do equal and exact justice to each and to regard their best interests. I exhort my sons to aid, assist, and watch over each other and ever to cultivate loving and fraternal feelings each for the other. I leave them loving wishes for their prosperity and happiness, which temperance, industry and economy will always ensure.³⁷

Judge Appleton died peacefully at home on February 7, 1891.

Legal Thought

An ideal representative of nineteenth-century liberalism, John Appleton exhibited one predominant trait in all his writings: rationalism. Whether espousing the virtues of a free enterprise system or challenging an ossified legal doctrine, he argued his case in a clear, logical style, considering the intellectual edifice erected by his opponents in the best possible light and nevertheless demolishing it brick by brick.

Appleton's intellectual mentors were all preachers of reason. His uncle Jesse appealed to reason time and again

in his lectures.³⁸ In religious matters Appleton followed the teachings of Frederic Henry Hedge, Charles C. Everett and Joseph H. Allen, all leading Unitarian ministers who served for a total of more than thirty years in Bangor.³⁹ Hedge authored a book entitled *Reason in Religion* in which he wrote: "In every clear conflict between reason and authority, the genius of Christianity inclines to the rational side. The cause of reason is ever the cause of faith."⁴⁰ Everett attempted to harmonize faith and reason in his article "The Faith of Science and the Science of Faith."⁴¹ In his writings on political economy and evidence Appleton claimed no originality, proclaiming himself merely a disciple of those apostles of reason Adam Smith and Jeremy Bentham.

As a follower of Smith and Bentham, Appleton naturally opposed governmental interference with individual freedom in matters of economics and conscience, although fanaticism in such things was entirely alien to his temperament. "Restrictions are always considered *prima facie* inexpedient," he wrote in an early article for the *Yankee*. "Any infringement on liberty of action is dangerous."⁴² Opposing usury laws as products of prejudice rather than reason, Appleton argued from both principle and utility. "It may be assumed as an unquestionable truth," he wrote, "that each individual is *best* competent to manage his own concerns."⁴³ When usury laws, intended to protect the poor, set the rate of interest below that which would obtain in the absence of legislation, the poor man was thrown upon the mercies of the loan shark, who would charge more than the market rate to compensate for the risk involved.

In developing his arguments on usury Appleton touched upon themes that would emerge nearly half a century later in a lengthy opinion he wrote as chief justice concerning the relationship between business and government. The heady expansion of business and

industry in the post-Civil War years had been accompanied by the wide-spread belief that governmental intervention in the economy was both morally wrong and practically inadvisable. Appleton had an opportunity to discuss the subject in a rather unusual case. In 1871 the Maine House of Representatives asked the Supreme Court for an opinion as to whether the legislature could constitutionally authorize towns to aid private manufacturing enterprises, either by gifts of money or loans of bonds; and further, whether towns might go into business for themselves.⁴⁴ When the court answered both questions with a resounding No, the legislature gave such authorization anyway and the court declared it unconstitutional.⁴⁵ Interestingly, Appleton's consistent application of laissez faire principles in this case worked *against* the immediate interests of the company involved. The court rejected the donation of public aid to private enterprise.

Appleton regarded the efficient use of capital and the proper allocation of profit and loss as the practical benefits obtained from an economy free of governmental intervention. "Capital naturally gravitates to the best investment," he wrote. "If a particular place or a special kind of manufacture promises large returns, the capitalist will be little likely to hesitate in selecting the place and in determining upon the manufacture."⁴⁶

The practical, in Appleton's view, soon blended with the moral. Capital, he said, is the fruit of saving and when it is not protected accumulation stops. "When the government is despotic, when private right is disregarded, when there is no security for and no protection of property, men will cease to accumulate, for they will not save to be robbed."⁴⁷ The political consequence of too much intervention in the economy would be despotism.

The less the State interferes with industry, the less it directs and selects the channels of enterprise, the better. There is no safer rule than to

leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital. If it were not so, as a general rule, guardians should be appointed, and who would guard the guardians?⁴⁸

In the area of religious belief, too, Appleton believed in individual freedom. In another early article for the *Yankee* he asserted that “Government has no right to interfere with the religions of its citizens – it is entirely a question between them and their God.”⁴⁹ At a time when Unitarians and Universalists were often rejected as competent witnesses in court, Appleton advocated the right even of atheists to testify under oath. Again examining the logic of the situation Appleton asked if it were not odd that a person who falsely swore to a belief in God might be deemed a trustworthy witness, whereas an atheist who truthfully disclosed his opinions on religion would be excluded. Thirty years later, in his treatise on evidence, Appleton reaffirmed his belief in both the sagacity and the morality of allowing atheists to testify in court.

Appleton published *The Rules of Evidence* in 1860.⁵⁰ It was a collection of articles written over the years, most of which had originally appeared in the *American Jurist* in the 1830s and 1840s. In it Appleton expressed his faith in human reason by trusting juries of ordinary men to weigh properly the credibility of all kinds of evidence the wisdom of the ages had ordained they must not hear. When reason told him that tradition was mistaken he did not hesitate to fling his Benthamic arguments in the face of a convention-bound legal profession. In his preface to the book Appleton stated the general principles which he felt should govern the admissibility of evidence:

All persons, without exception, who, having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses.

Objections may be made to the credit, but never to the competency of witnesses.

While the best evidence should always be required, the best existing and obtainable evidence should not be excluded, because it is not "the best evidence of which the case in its nature is susceptible."

The best mode of extracting testimony, orally, in public, and before the tribunal which is to decide upon the facts in dispute, should be adopted on all occasions, and before all courts, when practicable. The only exception to the universality of this rule is one arising from special delay, vexation and expense in its observance; as, in case of sickness, or the absence of witnesses.⁵¹

The common law concept of incompetency prohibited many classes of persons from testifying because their testimony was regarded as untrustworthy. The jury was not free to assess the credibility of such persons, for they were entirely excluded from the trial process. In separate chapters of his book Appleton attacked the various exclusions, applying the principles expressed in the preface to the particular exclusion under discussion. As Appleton noted, by the time the treatise appeared several of the suggested reforms had been enacted in different states. A pecuniary interest in the outcome of the litigation had generally ceased to be a ground for exclusion. Restrictions on the testimony of parties to civil suits had been reduced or removed. On the other hand, incompetency on religious grounds was still the rule and attorney-client communications remained privileged.

It would take more space than is presently available to discuss Appleton's arguments against all the many exclusionary rules. In two areas, however, his work merits special attention. These are the racial exclusion and the prohibition of testimony of criminal defendants.

An ardent Republican, Appleton championed the rights of blacks in his judicial opinions and in his personal correspondence. Following the *Dred Scott* case in 1857 the Maine Senate asked the state supreme court for its opinion on whether "free colored persons, of African descent," having satisfied the residence requirement, were entitled

to vote under the Maine Constitution.⁵² Appleton's lengthy response, wrote Charles Hamlin, demonstrated "a masterly grasp of the law, history and research of authorities."⁵³ The Maine Constitution conferred the right of suffrage on male citizens of the United States, so Appleton's primary task was to decide whether free blacks were United States citizens. He produced a wealth of documentation in answering affirmatively, but because Chief Justice Taney had held otherwise in *Dred Scott* Appleton felt compelled to examine the bases upon which Taney's opinion rested.

In the first place Appleton pointed out that the ruling that no blacks, free or slave, could be citizens was not binding on other courts because it had not received the support of a majority of the Supreme Court. But beyond that, Appleton continued, "whatever may be the authoritative force of a decision of the Supreme Court of the United States, there can be no doubt that its statements, as to the past history of the country, are binding neither on the historian nor the jurist."⁵⁴ Taney's opinion rested in part upon his view that public opinion had been favorably disposed toward slavery at the time of the nation's founding. Appleton introduced impressive evidence to show that the general sentiment of the country at that time had been opposed to slavery. But, in either event, the point was irrelevant, for "the necessary degradation of the slave affords no reason for the denial of citizenship to the free man."⁵⁵

Appleton further showed that even by Taney's reasoning free Negroes were citizens. Having demonstrated that blacks were citizens in various states when the United States Constitution was adopted, he said:

If these things be so, and that they are so cannot be denied or even doubted, and if they had been known to the learned Chief Justice, his conclusions would have been different, for he says, "every person and every class and description of persons, who *were at the time of the adoption*

of the constitution recognized as citizens of the several states, became also citizens of this new political body." His published opinion, therefore, rests upon a remarkable and most unfortunate misapprehension of facts, and his real opinion upon the actual facts must be considered as in entire and cordial concurrence with that of his learned dissenting associates.⁵⁶

In conclusion Appleton briefly showed that Maine had conferred citizenship on native-born blacks; that these blacks were therefore citizens of the United States; and that, consequently, according to the state constitution they were entitled to vote.

Appleton's sensitivity to the injustice endured by subjugated peoples prompted him to add an appendix to the collection of articles reprinted in *The Rules of Evidence*. Appleton was generally opposed to the many exclusions of evidence found in the common law. "But," he wrote in the appendix, "there will be found one class of exclusions, so enormous in its extent and so disastrous in its results, that it absolutely requires notice and consideration": the exclusions of blacks and Indians.⁵⁷ As was his wont he proceeded to establish that the exclusions were not merely unjust, but illogical. In summary he wrote: "The argument runs thus: – The negro and the Indian are unworthy of credit – all know this – yet for fear all will believe them, we will not permit them to be heard. Hence, whole nations and races are branded in advance, as liars, by statute, and are not even heard."⁵⁸

In 1864 Charles Sumner reported favorably to the United States Senate on a bill to permit Negro testimony in federal courts. To his report he appended a long letter on the subject by John Appleton, the "distinguished authority on the exclusion of colored testimony."⁵⁹ The bill became law, providing "that in courts of the United States there shall be no exclusions of any witness on account of color."⁶⁰

The work for which Appleton gained his chief fame was his campaign against the exclusion of the testimony of criminal defendants. The move toward competency of the accused to testify in his own cause aroused considerable controversy. Appleton was at the center of the debate that took place in the national law journals of the day.

The arguments put forth by Appleton and his supporters seem unanswerable today, but fear of the unknown, plus some reasoned objections, gave rise to stiff resistance. Traditionally, the testimony of criminal defendants had been excluded as likely to be perjured. Opponents of reform also contended that under the pressures of cross-examination the testimony of the accused, even if he were innocent, could easily become confused and incriminating. Should a defendant having the right to speak try to avoid this problem by remaining silent, the suspicions of the jury would be aroused. Finally, change was resisted out of deference to the honored rule of *stare decisis* (adherence to precedent).⁶¹

Appleton was alert to the possibility of perjury by criminal defendants, but he felt that the jury would be particularly sensitive to this problem and that falsehood would not be so easily believed.

Is the witness false in all his statements? Each particular falsehood endangers; the more numerous the falsehoods the greater the chance of detection and disproof. The answer partly true and partly false? Each truth is in eternal warfare with the accompanying lie. Truth and falsehood have no greater fellowship than has new wine with old bottles. The truth uttered by the witness imperils the lie.⁶²

Appleton did indeed regard silence as suspicious and confusion on the part of a truthful witness unlikely. But these were matters for the jury to decide in each separate case.⁶³ The possibility of error, present under any circumstances, wrote Appleton, was no justification for

excluding testimony. “Falsehood may be credited, the truth may be disbelieved. But as this cannot be foreknown, it affords no reason for exclusion.”⁶⁴

The heart of Appleton’s argument was that every accused, being presumed innocent, should be permitted to testify to his innocence, especially since only he might be in possession of exculpatory facts. “Of all exclusions,” said Appleton, “that of a man presumed innocent would seem to be the most monstrous.”⁶⁵

Appleton’s long campaign for the accused succeeded first in Maine and then throughout the country. Maine adopted a statute in 1859 allowing defendants accused of certain minor crimes to testify in their own behalf, and in 1864 it extended the right to all defendants.⁶⁶ In the next two years both houses of the Massachusetts legislature solicited Appleton’s opinion on the subject⁶⁷ and before long Massachusetts and other northeastern states enacted similar laws. Most of the country followed suit in the 1870s and 1880s.⁶⁸

Appleton undoubtedly deserves a major portion of the credit for the implementation of the reform allowing the accused to testify, and he must have been grateful to have lived to witness its general acceptance. Succeeding authorities have recognized the key part he played in achieving this and other progressive changes in the law of evidence. Referring to the criminal defendant’s right to testify, Harvard’s James Bradley Thayer acknowledged Appleton’s role in making “this remarkable inroad upon the common law.”⁶⁹ Wigmore, in his monumental treatise on evidence, frequently cited Appleton as one of the country’s leading nineteenth-century advocates of reform in this branch of the law.⁷⁰

Although unfamiliar to a wider public, Appleton’s reputation remains secure among modern Maine jurists. Recently, the state’s late Chief Justice Robert B.

Williamson wrote: "In our state we owe much to the leadership of Chief Justice Appleton in bringing into the law many reforms in the law of evidence." He quoted with approval one of his predecessors in office who, while praising many of Maine's legal lights at the centennial celebration of her bench and bar, had said: "Of all this notable group Chief Justice Appleton doubtless made the greatest impress upon the jurisprudence of this State He was a legal reformer in the best sense."⁷¹

— NOTES —

¹ "Proceedings. March 11, 1897," *Collections of the Maine Historical Society*, 2nd ser., 8 (1897): 448.

² Charles Hamlin, "John Appleton," in William Draper Lewis, ed., *Great American Lawyers: the Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation, and Have Developed the Jurisprudence of the United States. A History of the Legal Profession in America* (Philadelphia: John C. Winston Company, 1907-09), 5: 39-80 (hereafter cited as Hamlin, "John Appleton"). See also Charles Hamlin, "The Supreme Court of Maine," pt. 2, *The Green Bag*, 8 (November 1895): 504-23 (hereafter cited as Hamlin, "Supreme Court of Maine"). For Appleton see particularly pp. 510-16.

³ "The Appleton Family," *New England Family History* 3 (January, April 1910): 448.

⁴ On the genealogy and history of the Appleton family see Hamlin, "Appleton," pp. 42-43; Frances W. Gregory, *Nathan Appleton: Merchant and Entrepreneur, 1779-1861* (Charlottesville, Virginia: University of Virginia Press, 1975), pp. 1-10; Louise Hall Tharp, *The Appletons of Beacon Hill* (Boston: Little, Brown and Company, 1973), pp. 14-28.

⁵ [Augustus A. Gould and Frederic Kidder], *The History of New Ipswich, from Its First Grant in MDCCXXVI to the Present Time: With Genealogical Notices of the Principal Families, and Also the Proceedings of the Centennial Celebration, September 11, 1850* (Boston: Gould & Lincoln, 1852), pp. 70-71 (hereafter cited as [Gould and Kidder], *History of New Ipswich*).

⁶ Jesse Appleton, *The Works of Rev. Jesse Appleton . . . With a Memoir of His Life and Character*, 2 vols. (Andover, Massachusetts: Gould & Newman, 1837), 1: 9.

⁷ On the Peabody family see C. M. Endicott, *A Genealogy of the Peabody Family, As Compiled by the Late C. M. Endicott, of Salem. Rev. and Cor. by William S. Peabody, of Boston. With a Partial Record of the Rhode Island Branch by B. Frank Pabodie, of Providence* (Boston: David Clapp & Son, 1867); C. M. Endicott, "The Peabody Family," *New England Historical and Genealogical Register* 2 (April 1848): 153-61, 2 (October 1848): 361-72, 3(October 1849): 359-73.

⁸ Appleton to [unidentified], April 2, 1858, Appleton Papers, Bowdoin College Library (hereafter cited as the Appleton Papers).

⁹ "Pupils of Old Appleton," *Boston Herald*, February 26, 1890. According to Hamlin, Appleton was educated in "the common schools and academy of his native town." See Hamlin, "Supreme Court of Maine," p. 512.

¹⁰ On the academy and education in New Ipswich see [Gould and Kidder], *History of New Ipswich*, ch. 12. Harriet Webster Marr, *The Old New England Academies Founded Before 1826* (New York: Comet Press Books, 1959) also contains some discussion of the academy in New Ipswich.

¹¹ Louis C. Hatch, *The History of Bowdoin College* (Portland, Maine: Loring, Short & Harmon, 1927), p. 23. Other sources for the information presented here include Nehemiah Cleaveland and Alpheus Spring Packard, *History of Bowdoin College, with Biographical Sketches of Its Graduates from 1806-1879, Inclusive* (Boston: James Ripley Osgood & Company, 1882), (hereafter cited as Cleaveland and Packard, *Bowdoin College*), and *General Catalog of Bowdoin College and the Medical School of Maine, 1794-1912* (Brunswick, Maine: Bowdoin College, 1912).

¹² Cleaveland and Packard, *Bowdoin College*, p. 88.

¹³ Hamlin, "John Appleton," p. 43.

¹⁴ Records of the Peucinian Society Instituted at Bowdoin College November 22nd, 1805, vol. 3, 1819-1831, (unpublished mss.), Bowdoin College Library.

¹⁵ Maude DeLeigh Hodges, "The Story of Our Waterford," (unpublished ms., 1956), Watertown Free Public Library, p. 165; Benjamin R. Curtis, ed., *A Memoir of Benjamin Robbins Curtis, LL.D. With Some of His Professional and Miscellaneous Writings*, 2 vols. (Boston: Little, Brown and Company, 1879), 1: 12-13 (hereafter cited as Curtis, *A Memoir*).

¹⁶ Curtis, *A Memoir*, 1: 13.

¹⁷ Nathan Dane Appleton is listed as the attorney general of Maine on the title pages of volumes 43-45 of the *Maine Reports* (1857-58). On Farley see Charles H. Bell, *The Bench and Bar of New Hampshire, Including Biographical Notices of Deceased Judges of the Highest Court, and Lawyers of the Province and State and a List of Names of Those Now Living* (Boston: Houghton, Mifflin and Company, 1894), pp. 351-52 (hereafter cited as Bell, *Bench and Bar*).

¹⁸ Helen E. Marshall, *Dorothea Dix: Forgotten Samaritan* (Chapel Hill, North Carolina: University of North Carolina, 1937), p. 3.

¹⁹ Sherry W. Burdin, "An Early History of Sebec, Maine" (Sebec Conservation Commission leaflet, 1975). There is a photograph of the Annis building in which Appleton had his Sebec law office in "John Appleton, LL.D.," *Sprague's Journal of Maine History* 6 (November-December 1918/January 1919): 101.

²⁰ George F. Godfrey, *A Sketch of Bangor, with Illustrations from Photographs by the Author* (Boston: James R. Osgood and Company, 1882), 11ff.; Stewart H. Holbrook, *Holy Old Mackinaw: A National History of the American Lumberjack* (New York: MacMillan Company, 1938), pp. 14-28.

²¹ "Judge Appleton's Wealth," unidentified newspaper clipping in the Appleton Papers.

²² "Crowned with Honors," unidentified newspaper clipping in the Appleton Papers (hereafter cited as "Crowned with Honors").

²³ Quoted in Hamlin, "John Appleton," p. 57.

²⁴ On Elisha Allen see *History of Penobscot County, Maine, with Illustrations and Biographical Sketches* (Cleveland: Williams, Chase & Co., 1882), p. 211 (hereafter cited as *History of Penobscot County*).

²⁵ Allen Gilman to Elias Dudley, February 6, 1841, in "Honorable Elias Dudley and Some of His Political Correspondence," *Sprague's Journal of Maine History* 4 (July 1916): 13.

²⁶ On Hill see Bell, *Bench and Bar*, pp. 438-39. On Moses Appleton see *History of Penobscot County*, p. 222.

²⁷ The reorganization of the court system is discussed in Louis Clinton Hatch, ed., *Maine: A History* (New York: The American Historical Society, 1919; reprint ed., Somersworth, New Hampshire: New Hampshire Publishing Company, 1974), pp. 740-41.

²⁸ "Crowned with Honors"; Hamlin, "John Appleton," p. 61.

²⁹ Hamlin, "John Appleton," p. 76.

³⁰ "Proceedings of the Penobscot Bar in Relation to the Death of the Honorable John Appleton," 83 Me. 587, 605 (1891), (hereafter cited as "Proceedings").

³¹ A Venerable Judge," *New York Times*, April 17, 1885, p. 3. Reprinted from the *Lewiston Journal*.

³² "Proceedings," 83 Me. at 607.

³³ "Crowned with Honors"; "Proceedings," 83 Me. 587

³⁴ Hamlin, "John Appleton," p. 68.

³⁵ Appleton to [unidentified], April 2, 1858, Appleton Papers.

³⁶ Cleaveland and Packard, *Bowdoin College*, p. 743-44; *Biographical Encyclopaedia of Maine of the Nineteenth Century* (Boston: Metropolitan Publishing and Engraving Co., 1885), pp. 372-74.

³⁷ Will of John Appleton, Penobscot County Probate Records, vol. 94, pp. 33-38.

³⁸ Jesse Appleton, *Lectures, Delivered at Bowdoin College, and Occasional Sermons* (Brunswick, Maine: Joseph Griffin, 1822).

³⁹ Hamlin, "John Appleton," p. 78. See the entries for Hedge, Everett and Allen in the *Dictionary of American Biography*.

⁴⁰ Frederic Henry Hedge, *Reason in Religion* (Boston: Walker, Fuller and Company, 1865), p. 198.

⁴¹ C. C. Everett, "The Faith of Science and the Science of Faith," *Christian Examiner* 85 (July 1868): 61-76.

⁴² X. Y. [John Appleton], "Rate of Interest and Usury Laws," *Yankee and Boston Literary Gazette*, February 12, 1829, p. 49.

⁴³ *Ibid.*, p. 50.

⁴⁴ Opinions of the Justices, 58 Me. 590 (1871).

⁴⁵ *Allen v. Jay*, 60 Me. 124 (1872).

⁴⁶ Opinions of the Justices, 58 Me. at 592.

⁴⁷ *Idem* at 597.

⁴⁸ *Idem* at 598.

⁴⁹ X. Y. [John Appleton], "Rules of Evidence," *Yankee and Boston Literary Gazette*, June 11, 1829, p. 188.

⁵⁰ John Appleton, *The Rules of Evidence, Stated and Discussed* (Philadelphia: T. & J. W. Johnson, 1860), (hereafter cited as Appleton, *Rules of Evidence*).

⁵¹ *Ibid.*, p. iii.

⁵² Opinions of the Justices, 44 Me. 505 (1857).

⁵³ Hamlin, "Supreme Court of Maine," p. 515.

⁵⁴ Opinions of the Justices, 44 Me. at 561.

⁵⁵ *Idem* at 563.

⁵⁶ *Idem* at 573.

⁵⁷ Appleton, *Rules of Evidence*, p. 271.

⁵⁸ *Ibid.*, p. 272.

⁵⁹ U.S., Congress, Senate, S. Rept. 25, 38th Cong., 1st sess, 1864, p. 11. (U.S. Congressional Serial Set, Vol. 1178).

⁶⁰ Hamlin, "John Appleton," p. 55 n. 7.

⁶¹ For arguments against the Appleton reform see, for example, J. F. B., "Testimony of Parties in Criminal Prosecutions," *American Law Register*, n.s., 6 (May 1867): 358-93.

⁶² Appleton to John Q. Adams, February 24, 1866, reprinted in "Testimony of Defendants in Criminal Prosecutions," *American Law Register*, n.s., 5 (October 1866): 705-15 at 710.

⁶³ The law today generally forbids juries to draw unfavorable inferences from the defendant's exercise of his right to remain silent. In the words of the great legal scholar John Henry Wigmore, this prohibition "gives at least as much benefit as in common sense can be afforded to the accused who takes the unnatural and suspicious course of declining to testify for himself. John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed., 10 vols. (Boston: Little, Brown, 1940). 2: 704 (hereafter cited as Wigmore, *Treatise*).

⁶⁴ Appleton to D. E. Ware, February 22, 1865, reprinted in "Testimony of Parties in Criminal Prosecutions," *American Law Register*, n.s., 4 (August 1865): 577-81 at 580-81.

⁶⁵ Appleton to Adams, February 24, 1866, reprinted in "Testimony of Defendants in Criminal Prosecutions," *American Law Register*, n.s., 5 (October 1866): 707.

⁶⁶ Appleton, *Rules of Evidence*, p. iv; Hamlin, "John Appleton," p. 50.

⁶⁷ See letters to Adams and Ware cited in notes 59 and 61 above.

⁶⁸ See R. V. W. Du Bois, "The Accused as Witness," *Criminal Law Magazine* 5 (May 1883): 323-58.

⁶⁹ James Bradley Thayer, "A Chapter of Legal History in Massachusetts," *Harvard Law Review* 9 (April 1895): 12.

⁷⁰ For example, regarding the various expositions on the exclusion of witnesses for interest in the litigation Wigmore wrote: "Perhaps the most comprehensive and concise, and the most profitable for perusal, next to Mr. Bentham's, are those of Chief Justice Appleton of Maine (a disciple of Bentham's) in his treatise (1860) on Evidence, chaps. I, IV,

and Mr. Justice Edward Livingston” Wigmore, *Treatise* 2: 687 n. 1.

⁷¹ Robert B. Williamson, “The Defendant Takes the Stand,” in Morris D. Forkosch, ed., *Essays in Legal History in Honor of Felix Frankfurter* (Indianapolis: Bobbs-Merrill, 1966), p. 94.

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