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ESSAY

EXPLORING SOUTHERN LEGAL HISTORY

PAUL FINKELMAN†

[W]e may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze to-day, and to-day may not paralyze to-morrow.

—Frederic Maitland*

Whether the South has a distinct legal history has not been adequately explored by scholars. In this essay, Professor Paul Finkelman discusses southern legal history through an examination of race relations, violence, crime, legal institutions, and legal culture, concluding that marked differences exist between northern legal history and southern legal history. By highlighting the many unanswered questions concerning the South's legal heritage, Professor Finkelman invites and encourages scholars to engage in research that will relieve the South of "the pressure [its] past must exercise upon" it today.

Stanford Law School's Lawrence M. Friedman has recently noted: "American legal history . . . is booming."¹ Legal history now is taught at most major law schools, by historians as well as lawyers. Sitting judges somehow have found time to publish works concerning legal history.² West Publishing Company has stamped its approval on the trend with the publication of the casebook

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* Maitland, *A Survey of the Century*, in III THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 438-39 (1911).

1. Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563, 563 (1984).

The growth of interest in legal history has led to a small explosion in scholarship. Most major law reviews have devoted space to articles that are historical in focus. Many were written by academic historians rather than by law faculty. Even student notes in law reviews occasionally are historical. Two journals, LAW AND HISTORY REVIEW, published by the Cornell Law School, and THE AMERICAN JOURNAL OF LEGAL HISTORY, published by the Temple University Law School, provide a regular forum for articles on legal history. STUDIES IN LEGAL HISTORY is a series of publications sponsored by the American Society for Legal History and the University of North Carolina Press. Other publishers, both university and commercial, are active in this field. It is possible that we are in the middle of a "golden age" of legal history.

2. See, e.g., E. DUMBAULD, THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS (1969); A. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978); Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C.L. REV. 287 (1985). Dumbauld is a Senior District Judge on the United States District Court for the Western District of Pennsylvania; Higginbotham is a Circuit Judge on the United States Court of Appeals for the Third Circuit; and Whichard is an Associate Judge on the North Carolina Court of Appeals.

Law and American History.³ All of this suggests more than mere antiquarian interest in legal history. Scholars, practitioners, and judges have begun to realize that through legal history they can better understand the law they study, practice, and apply.

Many scholars have begun to examine what role regionalism—particularly southern regionalism—has played in the growth of American law.⁴ All scholars would readily agree that there is a distinctive southern history. Scholars are uncertain, however, whether a distinctive southern *legal* history exists. Certain aspects of the historical development of law in the South—the law of slavery and segregation—clearly differ from the general development of law in the North. Similarly, the South has had a distinct history of local legislation and case law on matters of particular relevance to the region, such as the regulation of the cotton gin in the nineteenth century. It is unclear, however, to what extent these local concerns affected southern legal developments.

I. LEGAL HISTORY FROM A NORTHERN VIEW

Most published scholarship in legal history has focused on the North—especially Massachusetts, New York, Pennsylvania, Illinois, and Wisconsin.⁵ The best early legal history focused on northern states and jurisdictions. The Handlins' classic study of Massachusetts,⁶ Goebel and Naughton's study of criminal law in the New York colony,⁷ and Louis Hartz's work on Pennsylvania⁸ laid the groundwork for later books and articles on legal history.

3. S. PRESSER & J. ZAINALDIN, *LAW AND AMERICAN HISTORY* (1980).

4. For the most recent publications, see *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* (D. Bodenhamer & J. Ely eds. 1984) [hereinafter cited as *AMBIVALENT LEGACY*] and *Symposium on the Legal History of the South*, 32 *VAND. L. REV.* 1 (1979). The fiftieth anniversary of the Southern Historical Association, celebrated in November 1984, underscores the importance of Southern history to American history.

5. In Kermit Hall's five-volume work, *A COMPREHENSIVE BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, 1896-1979* (1984), only one southern state, Virginia, has more than 400 entries, though five northern states have that many. Wisconsin's importance to legal history is due to the influence of J. Willard Hurst, the prolific teacher and writer of legal history at the University of Wisconsin School of Law. As one scholar has recently noted, "of the major traditions in American legal history . . . clearly the most important . . . is that begun after World War II by James Willard Hurst at the University of Wisconsin Law School." Katz, *The Problem of a Colonial Legal History*, in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 457, 464 (J. Greene & J. Pole eds. 1984).

6. O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (rev. ed. 1969). K. HALL, *supra* note 5, contains 928 entries for Massachusetts, including some of the major works in American legal history. The presence of major graduate research institutions (Harvard, Brandeis, and others), of the old and established Massachusetts Historical Society, of easily accessible state records and archives, and of other research facilities such as the Boston Public Library has no doubt contributed to the vast literature on the legal history of Massachusetts.

7. J. GOEBEL & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* (1944). K. HALL, *supra* note 5, contains 980 entries for New York. Just as in Massachusetts, see *supra* note 6, major graduate research institutions (Columbia, Cornell, New York University, and others), the New York Historical Society, the New York Public Library, and an abundance of records have contributed to the literature on New York's legal history.

8. L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948). Pennsylvania, with over 500 entries in K. HALL, *supra* note 5, ranks fourth among the states in number of entries. Virginia ranks third. A tradition of graduate training, the Historical Society of

There are no comparable studies of southern states.

The absence of early studies of southern legal history may have influenced later scholars. From reading Grant Gilmore one would assume that the South, southern judges, and southern law played absolutely no part in the various ages of American law.⁹ Gilmore discusses nineteenth century American legal history—the “Golden Age of American Law”¹⁰—without mentioning a southern state judge. Even his brief treatment of slavery and the law ignores southern jurisprudence and focuses entirely on how northern judges dealt with that institution.¹¹ Moreover, Gilmore pays tribute to Joseph Story and James Kent for their treatises,¹² but seems unaware of St. George Tucker’s first American edition of Blackstone,¹³ Samuel Livermore’s first American treatise on the conflict of laws,¹⁴ and Henry St. George Tucker’s *Commentaries on the Laws of Virginia*.¹⁵

Morton Horwitz’ prize winning book, *The Transformation of American Law, 1780-1860*,¹⁶ is based almost entirely on evidence from northern states.¹⁷ Although its title implies a treatment of the law of the entire nation, the book is about the transformation of law in the North. The question whether the South participated in the transformation remains unanswered. If the law in the South was transformed, the transformation was truly American; if southerners resisted these changes, the transformation was not American, but northern. Even if the South accepted some of the transformation, it is unclear whether these changes affected slavery or if slavery affected the changes.¹⁸ Horwitz wrote about a period when the great political, social, and legal issues focused on slavery. The word slave, however, does not appear in the index to his book.¹⁹

Pennsylvania, the Library Company of Philadelphia, and the availability of records have led to a great deal of literature on Pennsylvania.

9. G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

10. C. HAAR, *THE GOLDEN AGE OF AMERICAN LAW* (1965). Gilmore calls this period “The Age of Discovery,” G. GILMORE, *supra* note 9, at 19-40, and admits his description of it “sound[s] like a romp through the Garden of Eden.” *Id.* at 41. Few scholars, it seems, can resist such descriptions of the jurisprudence of Marshall, the scholarship of Story and Kent, and the power of Taney.

11. G. GILMORE, *supra* note 9, at 36-39.

12. *Id.* at 27-30.

13. BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (S. Tucker ed. Philadelphia 1803) (five volume work).

14. S. LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* (New Orleans 1828).

15. H. TUCKER, *COMMENTARIES ON THE LAWS OF VIRGINIA*, (Winchester, Va. 1831) (two volume work).

16. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

17. Almost all of Horwitz’ material comes from New England, New York, and Pennsylvania. For example, in his chapter on the transformation of property law, Horwitz cites cases from the 15 slave states 28 times. *Id.* at 274-88. In contrast, there are over 65 citations to Massachusetts cases and over 60 citations to cases from five other northeastern states.

18. One attempt to evaluate how the transformation of the law affected slavery is Mark Tushnet’s *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981). Tushnet’s work has many problems, but it is nevertheless an important first step. See Fede, *Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet’s ‘The American Law of Slavery,’* 2 LAW & HIST. REV. 301 (1984).

19. The only discussion of slavery in Horwitz’ book concerns masters’ tort liability for the acts of their slaves. M. HORWITZ, *supra* note 16, at 92-93. See *infra* text accompanying notes 98-105.

Horwitz is not alone in neglecting the South. The work of J. Willard Hurst, the dean of American legal history, has centered mostly on Wisconsin.²⁰ Hurst's most interesting work, *Law and the Conditions of Freedom in the Nineteenth-Century United States*,²¹ seldom mentions the South. Although the book explores economic developments and their relation to law, Hurst fails to mention the southern economy; slavery—the mainstay of that economy—is absent from his history.

G. Edward White's *The American Judicial Tradition: Profiles of Leading American Judges*²² is similar in disregard of the South. White depicts the American judicial tradition as a federal and northern phenomenon.²³ The only southerners who appear in White's book are Supreme Court justices, who, in a sense, had ceased to be southern. White finds that Justice John Marshall Harlan's claim to greatness is based on his rejection of his southern roots and his opposition to the constitutionalization of southern racism and segregation.²⁴ In

20. See J.W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); J.W. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964); J.W. HURST, *LAW AND THE SOCIAL ORDER IN THE UNITED STATES* (1977) [hereinafter cited as J.W. HURST, *LAW AND THE SOCIAL ORDER*].

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

22. See G.E. WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* (1976) [hereinafter cited as G.E. WHITE, *JUDICIAL TRADITION*].

23. See G.E. WHITE, *JUDICIAL TRADITION*, *supra* note 22 (study of leading appellate judges). White's important state judges come from New York, Massachusetts, New Hampshire, Michigan, and California. White profiles James Kent, Benjamin Cardozo, Learned Hand and Jerome Frank of New York; Lemuel Shaw of Massachusetts; Thomas Cooley of Michigan; Charles Doe of New Hampshire; and Roger Traynor of California. Besides Cardozo, two other Supreme Court Justices profiled in the book sat on state supreme courts—Holmes of Massachusetts and Field of California. Of the 26 men discussed by White, only five—Marshall, Taney, Harlan, McReynolds, and Black—were from the South; none served on major courts in the South. Black served as a police court judge in Alabama; Marshall and Taney rode circuit in southern states as United States Supreme Court justices. Taney's most famous circuit opinion, *Ex parte Merryman*, 17 F. Cas. 144 (1861), was essentially a southern, secessionist opinion that failed to command the respect of the Lincoln administration and eventually tarnished Taney's reputation. White's treatment of the American judiciary suggests that state judges are important only if they come from the North and that United States Supreme Court justices from the South can become important only if they reject their southernness.

White also ignores the South and southern jurisprudence in his *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980).

24. Justice Harlan's greatness also resulted from the knowledge and experience he gained from his slave holding past and his post-Civil War residence in the South. Harlan's experience in the South is similar to that of another great southern justice, Hugo Black. The key to both men's opposition to segregation was their southern background. Both men understood how segregation had corrupted and undermined democratic society. Harlan's important dissents, e.g., *Plessy v. Ferguson*, 163 U.S. 538, 552-64 (1895) (Harlan, J., dissenting); *The Civil Rights Cases*, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting), were possible only because Harlan was a southerner. In *Plessy* Harlan wrote from first-hand experience: "[I]t seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race." *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). Harlan rejected the legal fiction of separate but equal treatment because he knew its failings. Unlike the *Plessy* majority, Harlan had lived with slavery and segregation, and he knew that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution." *Id.* at 562 (Harlan, J., dissenting). Harlan recognized that "[t]he thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done." *Id.* (Harlan, J., dissenting).

In his concurring opinion in *New York Times v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J.,

contrast, Taney's great failure as a Supreme Court justice was the Dred Scott case,²⁵ in which Taney acted as a southerner, rather than as a nationalist.²⁶ If there is a distinctly southern judicial tradition, even one that has been overturned by the force of events²⁷ or by the Supreme Court, it is a tradition that White ignores.²⁸

More specialized studies are equally oriented toward the North. No work of judicial biography compares with Leonard Levy's masterful study of Massachusetts Chief Justice Lemuel Shaw.²⁹ Shaw's historical reputation as the most important state judge of the nineteenth century is partly attributable to Levy's book. Similar research on southern judges is needed to determine whether the South produced jurists of Shaw's caliber and influence.³⁰ Furthermore, because scholars know very little about doctrinal legal history in the South, it is unclear how much Shaw and other northern judges influenced southern jurisprudence³¹ or if southern jurists actually influenced northerners.

There are many other examples. William E. Nelson's book *The Americanization of the Common Law*³² focuses entirely on Massachusetts.³³ The only book-length study of codification³⁴ makes only passing reference to the Georgia

concurring), Justice Black argued, based on his personal knowledge of Alabama politics, that Sullivan could not have suffered any political damage even if the newspaper advertisement at issue actually had libeled him. "Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication." *Id.* at 294 (Black, J., concurring). Black's majority opinion in *Chambers v. Florida*, 309 U.S. 227 (1940), similarly reflects his southern background. In *Chambers* the Court overturned the murder convictions of four blacks who had pled guilty after being held incommunicado for five days in a Florida jail. Perhaps only a lawyer native to the deep South could write of blacks "who have suffered most from secret and dictatorial proceedings" leading to sunrise confessions and quick convictions. *Id.* at 238.

25. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

26. See G.E. WHITE, JUDICIAL TRADITION, *supra* note 22, at 82-83.

27. The "events" included secession—the south's greatest experiment in constitutional theory—and Lincoln's successful efforts to uphold his constitutional duty to "preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 8. For a discussion of the history of secession, see H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* (1982) (discussing the pre-Civil War, Civil War, and Reconstruction periods).

28. White's book is patterned after Richard Hofstadter's *THE AMERICAN POLITICAL TRADITION* (rev. ed. 1973). Hofstadter, however, recognizes the importance of a southern political tradition in his chapter on John C. Calhoun. *Id.* at 86-117.

29. L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957).

30. The obvious candidate for a book similar to Levy's is Thomas Ruffin, former chief justice of the North Carolina Supreme Court. A good example of the kind of work that needs to be done is Judge Willis P. Whichard's recent article on North Carolina's premier chief justice in the twentieth century, Walter Clark. See Whichard, *supra* note 2.

31. Shaw is not the only northern judge who should be examined. There is some evidence that James Kent's chancery opinions were well received in South Carolina. See G.E. WHITE, JUDICIAL TRADITION, *supra* note 22, at 44-45. It is equally important to know whether northern judges cited their southern counterparts.

32. W. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

33. The implications of Nelson's title are important. Could a similar study of common law in North Carolina or Virginia be given such a title? It is unlikely that most scholars would view a tradition of legal changes in a southern jurisdiction as an "Americanization" of the law.

34. C. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981). Cook's chapter on "Developing National Patterns" is devoted almost en-

code that was authorized in 1858 and finally adopted in 1863³⁵ and makes no reference at all to Georgia's criminal code of 1816, "the first of its kind in the country."³⁶ The growing body of work on women's legal history also adopts a generally northern perspective.³⁷ Two recent books on married women's property acts focus on New York;³⁸ no similar work has appeared on the first married women's property act, passed in Mississippi in 1839,³⁹ or on the provision to protect married women's property in the 1845 Texas Constitution.⁴⁰

Work on legal education and the changing nature of the bar has also focused on the North. William R. Johnson's book on the growth of legal education and its relationship to the bar deals only with Wisconsin.⁴¹ Johnson demonstrates that the demand for academic certification of lawyers through educational institutions stemmed in part from a hostility toward non-English im-

tirely to Massachusetts. In only one chapter does Cook examine a southern state. Curiously he chooses South Carolina, where the codification movement "failed utterly." *Id.* at 121.

35. *Id.* at 198. Indeed, Cook's book does not even indicate when the code, *THE CODE OF THE STATE OF GEORGIA* (1861) (codified by R. Clark, T. Cobb, & D. Irwin), became effective. Although the imprint date was 1861, the code was not published until 1862 and did not go into effect until January 1, 1863, which was "twenty days . . . after Thomas Cobb was killed at the battle of Fredericksburg." W. McCASH, *THOMAS R.R. COBB: THE MAKING OF A SOUTHERN NATIONALIST* 65 (1983).

36. W. McCASH, *supra* note 35, at 58; see also Surrency, *The First American Criminal Code: The Georgia Code of 1816*, 63 GA. HIST. Q. 420 (1979) (discussing the Georgia Penal Code of 1816 and comparing it with criminal laws in other states). For a discussion of the Georgia Code of 1816, often called the "Cobb Code," see W. McCASH, *supra* note 35, at 57-67.

37. There are some exceptions. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038 (1979), uses evidence from throughout the nation. Salmon, *Women and Property in South Carolina: The Evidence from Marriage Settlements*, 39 WM. & MARY L.Q. 655 (1982), and Censer, *Smiling Through Her Tears: Ante-Bellum Southern Women and Divorce*, 25 AM. J. LEGAL HIST. 24 (1981), both focus on the South.

Divorce law should prove a fruitful topic for those interested in southern legal history. There is no clear pattern in the South. South Carolina refused to allow divorce until the middle of the twentieth century, while Tennessee adopted a divorce statute in 1799. Lawrence Friedman asserts that divorce in the nineteenth century was more available in the North than in the South. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 181-82 (1973). Thus, a distinct difference in statutory law and judicial decisions may have developed between the North and the South on this issue. The best work on the subject is N. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* (1962). Michael Hindus has made some useful observations about divorce in ante-bellum South Carolina, but that state clearly was different from all other states on this issue. See M. HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878*, at 50-53 (1980). For criticism of this book and a discussion of the problem of divorce in South Carolina, see Finkelman, Book Review, 129 U. PA. L. REV. 1485 (1981).

38. N. BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982); P. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* (1980).

39. Act of Feb. 15, 1839, ch. 26, 1839 Miss. Laws 920. The Act was entitled "An Act for the protection and preservation of the rights and property of married women."

40. The Texas Constitution of 1845 stated:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

TEX. CONST. OF 1845, art. VII, § 19.

41. W. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* (1978).

migrants, who were entering the legal profession to the dismay of older members of the bar. This theory helps explain why Wisconsin and other northeastern and midwestern states willingly embraced mandatory legal education, but it fails to explain why the South, which had relatively few immigrants, also adopted mandatory legal education.

Equally unknown is how and why law schools developed in the South. A recent history of American law schools⁴² centers on the development of legal education at Harvard University and the case method of legal study begun there by Dean Langdell in 1873. The study notes that "large state universities in the South began to succumb" to the case method beginning in the 1920s.⁴³ An opponent of the method at the University of North Carolina complained that its adoption at most schools was "due not so much to any merit in the system as to the fact that it is a system adopted by Harvard University."⁴⁴ The reasons for southern opposition to Harvard Law School's intellectual imperialism deserve further study.

Authors who have attempted to include the South in American legal history have achieved mixed results. Although Presser and Zainaldin include the South in their casebook on American legal history,⁴⁵ most of their material comes from New York, Pennsylvania, and Massachusetts. The book contains only scattered cases from Virginia, Maryland, Tennessee, Alabama, and Mississippi.⁴⁶ Lawrence M. Friedman uses examples from the South to illustrate points throughout his *A History of American Law*.⁴⁷ Friedman, more than anyone else, has integrated the South into American legal history. Even Friedman's work, however, is limited by the paucity of monographic work on southern legal developments and the failure of other scholars to use southern materials in their studies of specialized topics. As Friedman has noted, with the exception of slavery, the legal history of the South in both the colonial period and the nineteenth century "is badly neglected."⁴⁸

II. WHY ONLY NORTHERN LEGAL HISTORY?

Three possible conclusions may be drawn from the preceding survey. First, most legal historians may have lived or studied in the North, and their scholarship may merely reflect their location.⁴⁹ If this premise is correct, then the

42. R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

43. *Id.* at 191-92.

44. *Id.* at 192.

45. S. PRESSER & J. ZAINALDIN, *supra* note 3.

46. *Id.* at 221-31, 337-41, 235-38, 288-91, 788-89, 813-19. There is also a long section on slavery and law which surprisingly includes only one southern state case, *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829), and one Supreme Court case that originated in the South, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). S. PRESSER & J. ZAINALDIN, *supra* note 3, at 442-509. This section also includes two northern cases on slavery, *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). The rest of the section is devoted to excerpts from secondary literature.

47. L. FRIEDMAN, *supra* note 37.

48. Friedman, *supra* note 1, at 575.

49. See *supra* notes 20-21 and accompanying text. For other examples of the Wisconsin school

growing number of legal historians at southern institutions may soon conduct studies to determine whether law in the South developed in tandem with law in the North.

A second hypothesis is that the most important legal developments since 1775 actually occurred in the North. Under this view, southern legal history is underdeveloped because the South lacks a distinctive legal history. This thesis suggests that legal changes began in the North and were adopted by the rest of the nation. Because followers rarely are as interesting as leaders, this premise would explain why the South, a follower, has been ignored.⁵⁰ Jamil Zainaldin's excellent study of child custody and adoption supports this thesis, concluding that in the ante-bellum period "[s]outhern courts embraced the developments in the North."⁵¹ Zainaldin's characterization, however, differs from those of most other legal historians because he has carefully examined southern cases and statutes as well as the law of New York, Massachusetts, and Pennsylvania. Similar work in other areas of the law may prove the validity of this thesis.

A third possible conclusion is that many legal historians have ignored the South on the *assumption* that nothing really important or influential happened there. This view would be a version of Whig history—only history's winners need be studied. According to this thesis, legal change should be studied only if it leads to present day developments. Under this view, if the South did not change in the direction of progress, its legal history is not worth studying.⁵²

The value of these three explanations will remain unclear until more work has been done in southern legal history. Scholars must investigate and explain the dynamics of legal change and continuity in the North and the South, and must study the interaction between the regions' development before the true nature of American legal history can be known.

III. DEFINING THE SOUTH

To explore southern legal history it is first necessary to define the South.

of legal history, see L. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965); R. HUNT, *LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD ON WISCONSIN LAW IN THE NINETEENTH CENTURY* (1958); W. JOHNSON, *supra* note 41; and F. LAURENT, *THE BUSINESS OF A TRIAL COURT: 100 YEARS OF CASES* (1959). Although not a study of Wisconsin, H. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861* (1969) is part of the Hurstian tradition of state studies that focus on law and economic development. Perhaps if J. Willard Hurst had taught in Chapel Hill, instead of Madison, we would know a great deal about southern lumber, railroads, lawyers, and the like, and much less about midwestern legal history.

50. This thesis also presupposes a "national" legal history with some local variations. If this view is correct, future scholars might profitably investigate local and state developments, rather than studying developments in large sections and regions. The study of the law of slavery might fit into this thesis because slavery was local, important, and interesting, but (so the theory goes) did not affect the development of legal history *per se*.

51. Zainaldin, *supra* note 37, at 1069.

52. Stanley N. Katz has observed that the "Hurst school" of legal history "has been both Whiggish and present-minded" in its interests. According to Katz, this orientation explains these scholars' lack of interest in the colonial period. Katz, *supra* note 5, at 466. The whiggishness of the Hurst school also may explain its lack of interest in slavery, which it erroneously perceives as disconnected from the main flow of American history.

The major theme of southern history—race and racial separation—provides the basis for a working definition. Slavery before the Civil War and segregation after the War set the boundaries of the South. Racial prejudice and discrimination have not been confined to the South,⁵³ but only in the South were they consistently and pervasively institutionalized through statutes, constitutions, local ordinances, and customs that functioned as laws.⁵⁴ As racial segregation and discrimination decline in the South and equal opportunity for blacks increases,⁵⁵ scholars eventually may question whether the “South” continues to

53. The legal history of race relations in the North is limited. The leading survey on the antebellum period, L. LITWACK, *NORTH OF SLAVERY* (1961), explores the popular prejudice against blacks but is sometimes incorrect or misleading in its discussion of legal discrimination. Studies of individual states or cities have dominated work on northern race relations. See, e.g., R. COTTRILL, *THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA* (1982); D. GERBER, *BLACK OHIO AND THE COLOR LINE, 1860-1915* (1976); J. HORTON & L. HORTON, *BLACK BOSTONIANS* (1979); K. KUSMER, *A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930* (1976).

The nation's first school desegregation case, which took place in Boston in 1849, was unsuccessful. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). This case, however, arose before the Civil War and the adoption of the fourteenth amendment and was overturned by the state legislature, which passed a law prohibiting segregated education. Law of Apr. 28, 1855, ch. 256, 1855 Mass. Acts 674. See L. LEVY & D. JONES, *JIM CROW IN BOSTON* (1974). For a more modern school desegregation case in the North, see *Taylor v. Board of Educ.*, 191 F. Supp. 181 (S.D.N.Y.) (drawing of school district lines to preserve segregated schools violates Constitution), *aff'd*, 294 F.2d 36 (2d Cir. 1961).

Most northern segregation developed out of social and economic conditions, including white hostility toward blacks, rather than out of statutory prohibitions against integration. See, e.g., *Bell v. City of Gary*, 213 F. Supp. 819 (N.D. Ind.) (holding that de facto segregation in Gary was a result of housing discrimination rather than intentional actions by the school system), *aff'd*, 324 F.2d 209 (7th Cir. 1963). The courts have declared some types of de facto segregation unconstitutional, but the remedies for such conditions are uncertain. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (rejecting cross district busing between Detroit and its suburbs to end de facto segregation, which the court recognized was caused in part by acts of the City of Detroit and the State of Michigan).

54. The statutes mandating segregation in the South are too numerous to list. These laws went far beyond the well-known segregation of schools, public facilities, and public conveyances. Some were quite creative, such as an Oklahoma law segregating telephone booths for blacks, Law of Mar. 30, 1915, ch. 262, 1915 Okla. Sess. Laws 513; a Mississippi law making it criminal to advocate or publish “matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes,” Law of Mar. 25, 1920, ch. 214, 1920 Miss. Laws 307; a Georgia law prohibiting blacks and whites from playing billiards together, Law of Aug. 26, 1925, No. 407, § 3, 1925 Ga. Laws 286, 286-88; and a Louisiana statute requiring separate entrances at circuses for blacks and whites, Law of July 9, 1914, No. 235, § 1, 1914 La. Acts 465, 465-66. Kentucky not only required separate schools, but also provided that no textbook issued to a black would “ever be reissued or redistributed to a white school child” or vice versa. Law of Mar. 16, 1928, ch. 48, § 11, 1928 Ky. Acts 183, 187-88. Similarly, Florida required that school books for blacks be stored separately from those for whites. C.V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 102 (3d rev. ed. 1974).

By 1907 most southern state constitutions mandated segregation; the few that did not predated 1870. See ALA. CONST. of 1901, art. XIV, § 256; DEL. CONST. of 1897, art. X, § 2; FLA. CONST. of 1885, art. XII, § 12; GA. CONST. of 1887, art. VIII, § 1; KY. CONST. of 1890, § 187; MISS. CONST. of 1890, art. 8, § 207; N.C. CONST. of 1876, art. IX, § 2, art. XIV, § 8; OKLA. CONST. of 1907, art. I, § 5, art. XIII, § 3, art. XXIII, § 11; S.C. CONST. of 1895, art. XI, § 7; TEX. CONST. of 1876, art. VII, § 7; VA. CONST. of 1902, art. IX, § 140. The importance of custom and popular attitudes toward segregation was revealed in the struggles to register black voters in the South during and after the 1960s. Even when laws did not prohibit blacks from voting, white hostility and black fear often prevented registration.

55. On the enduring problems of race and law in the South, see the discussion of racial classification in Louisiana in Diamond & Cottrell, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOYOLA L. REV. 255 (1983).

exist as a distinctive region.⁵⁶

The colonial South consisted of the six colonies south of Pennsylvania. The nineteenth century South included the fifteen states that maintained slavery until the Civil War.⁵⁷ The twentieth century South consists of the fifteen ex-slave states plus Oklahoma and West Virginia because all seventeen mandated racial segregation at the state-wide level.⁵⁸

The South began to emerge as a distinct region in the early colonial period.⁵⁹ Some legal historians, however, have questioned whether the "South"

56. In a recent book on crime in the nineteenth century South, Edward Ayers alludes to a possible disappearance of the South as a distinctive region. E. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH* 276 (1984). The South may have begun to disappear in the last generation, although even that is unclear. Perhaps the election of Jimmy Carter in 1976, the emergence of black voters and office holders, and the creation of a two party political system signal the end of the South as it has been defined in the past. If integration finally is achieved, the South may cease to be a distinctive region.

57. The states were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

58. These definitions may seem obvious. Nevertheless, some scholars, including the contributors to the most recent book on southern legal history, *AMBIVALENT LEGACY*, *supra* note 4, would not accept them. Kermit Hall's analysis of southern judges completely ignores the judiciaries of Delaware, West Virginia, and Oklahoma. Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920*, in *AMBIVALENT LEGACY*, *supra* note 4, at 229. The classic study of the politics of the South, V.O. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949), limited the South to the 11 states that formed the Confederacy. Some scholars would place Delaware outside the South. For example, Ely & Bodenhamer, *Regionalism and the Legal History of the South*, in *AMBIVALENT LEGACY*, *supra* note 4, at 3, assert that "southern legislators . . . never entered competition with other jurisdictions to lure corporate headquarters with hospitable laws." Such a statement must be qualified if Delaware is considered a southern state.

The existence of slavery or the maintenance of racial segregation characterize states designated as Southern. The nineteenth century South must include all slave states. Delaware certainly was southern under this criterion. Slavery also existed in the Indian Territory which became Oklahoma. West Virginia had slavery until it seceded from Virginia. (Congress required West Virginia to adopt a gradual emancipation scheme as a condition of entering the Union. See W. VA. CONST. of 1861-63, art. XI, § 7, reprinted in 7 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* 4031-32 (1909)).

All states that practiced or mandated racial segregation at the state-wide level must be included in the twentieth century South. Delaware, one of the defendants in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), clearly was southern by that definition. As Mark Tushnet cogently argues, Topeka, Kansas was in the *Brown* litigation precisely because it was not in a southern state. Tushnet, *Organizing Civil Rights Litigation: The NAACP's Experience*, in *AMBIVALENT LEGACY*, *supra* note 4, at 171. Similarly, Oklahoma, which maintained segregated facilities, must qualify as a southern state. See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Oklahoma also filed an amicus brief in *Brown* on behalf of the defendants and in favor of segregation. R. KLUGER, *SIMPLE JUSTICE* 724 (1975). West Virginia also maintained segregated facilities until forced to integrate. For earlier indications that West Virginia is a southern state, see *Strauder v. West Virginia*, 100 U.S. 303 (1890).

The F.B.I. UNIFORM CRIME REPORTS consider all of the above states except Missouri to be in the South. Indicative of the cultural misplacement of Missouri is that state's homicide rate. In 1978 the average homicide per 100,000 in the West North Central region was 5.1. In Missouri the average was 10.4. F.B.I., U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* 42 (1979).

59. It is possible that the South as a distinctive region no longer exists. Certainly this may be true in a political sense. There is no longer a "solid South." It also may be true that a segregated South is on its last legs, but this is a question that cannot yet be answered. See *supra* note 55.

The fate of Lenell Geter also raises the question whether racial discrimination in the South has truly ended. In 1983 Lenell Geter, a black engineer, was convicted of robbing a fast-food restaurant in Greenville, Texas of \$615. Geter was sentenced to life in prison for this offense. The jury in the case was entirely white. N.Y. Times, May 31, 1983, at A14, col. 1. A number of witnesses placed Geter fifty miles from the scene of the crime at the time of the robbery. *Id.*, March 23, 1984, at A14, col. 1. In November 1983 the NAACP raised questions about the fairness of the trial. *Id.*, Nov. 6,

existed before the nineteenth century. James W. Ely, Jr. and David Bodenhamer, for example, concede that "[i]t is debatable whether there was a distinct South before the sectional crisis that preceded the Civil War."⁶⁰ Lawrence Friedman also seems willing to exclude the colonial period from any study of a southern legal history.⁶¹ Certainly the colonial South was not a politically conscious region bent on southern nationalism, states' rights, and anti-Yankee sentiment. That would have been impossible because southern nationalism could not exist in royal colonies. The cultural and economic patterns of the South, however, especially the development of a slave-based planter elite, are rooted in the history of the colonial South. No one would dispute that there was a distinctive South after the Revolution; that South must have had a colonial past. No southern historian would begin a history of the region in the antebellum period. The literature on the history of the colonial South is too rich, and the differences between the colonial South and the North on such matters as labor systems, the source of immigrants, land holding patterns, religious denominations, and political developments are too great to ignore.⁶² Therefore, if there is a distinct southern legal history, it must have begun its development in the colonial period.⁶³

1983, § I, at 29, col. 1. After he had served more than a year in prison Geter was granted a new trial despite the objections of the prosecutors. The judge in the case publicly warned the prosecutors that he would not allow them to use the jury selection process to exclude blacks from the jury. *Id.*, Feb. 19, 1984, § 1, at 33, col. 1. In March 1984, after serving more than 14 months in prison, Geter was released and all charges against him were dropped. Geter felt that the first conviction was due primarily to "personal motivation" on the part of some of those who arrested and prosecuted him" and, like the media commentators, felt that the ultimate reversal was due to public outrage over the conviction. *Id.*, March 27, 1984, at A17, col. 6; *id.*, March 23, 1984, at A14, col. 1.

60. Ely & Bodenhamer, *supra* note 58, at 3.

61. See Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY*, *supra* note 4, at 30 (noting a "neglect of southern legal history" in the colonial period).

62. See, e.g., W. CRAVEN, *THE COLONIES IN TRANSITION 1660-1713* (1968); W. CRAVEN, *THE SOUTHERN COLONIES IN THE SEVENTEENTH CENTURY 1607-1689* (1949); W. CRAVEN, *WHITE, RED, AND BLACK: THE SEVENTEENTH-CENTURY VIRGINIAN* (1971); C. EATON, *A HISTORY OF THE OLD SOUTH 1-15* (3d ed. 1975) (beginning with a short chapter on the colonial South); R. ISAAC, *THE TRANSFORMATION OF VIRGINIA 1740-1790* (1982); E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975); P. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA* (1974).

63. The emphasis on the North in published works on the legal history of the United States is mirrored in works on the legal history of the American colonies. Most of the work published on colonial legal history has been about northern colonies.

Only minimal research exists concerning southern legal history during the colonial period. The best available collection of essays on colonial legal history, *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* (D. Flaherty ed. 1969), contains only one essay on the South, and it is about Delaware. Another collection contains seven essays on Massachusetts and New England, one on New York, one on Maryland, and one on Virginia. *LAW AND AUTHORITY IN COLONIAL AMERICA* (G. Billias ed. 1965).

Scholars have explored law in colonial Massachusetts extensively. See, e.g., D. ALLEN, *IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERRAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* (1981); G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* (1960); D. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS* (1979); W. NELSON, *supra* note 32; W. NELSON, *DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825* (1981); *PLYMOUTH COURT RECORDS, 1686-1859* (D. Konig & W. Nelson eds. 1976-81) (16 volume work); Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth Century Massachusetts*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* (S. Katz & J. Murrin 3d ed. 1983).

IV. THE CONTOURS OF SOUTHERN LEGAL HISTORY

Three major topics help define the nature of southern legal history: slavery and race, violence and criminal law, and legal culture and institutions.⁶⁴ An exploration of these subjects illustrates how southern legal history is distinctive from or similar to the legal history of the rest of the Nation. Such an exploration must be tentative because much remains unknown about American legal history in general and about southern legal history in particular.

A. *Slavery, Race, and Law*⁶⁵

The most distinctive aspect of southern legal history is the region's use of

Much is also known about legal history in colonial New York. See, e.g., J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (S. KATZ 2d ed. 1972); L. BIEMER, WOMEN AND PROPERTY IN COLONIAL NEW YORK: THE TRANSITION FROM DUTCH TO ENGLISH LAW, 1643-1727 (1983); COURTS AND LAW IN EARLY NEW YORK (L. Hershkowitz & M. Klein eds. 1978); J. GOEBEL & T. NAUGHTON, *supra* note 7; D. GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 (1976); H. JOHNSON, ESSAYS ON NEW YORK COLONIAL LEGAL HISTORY (1981); H. JOHNSON, THE LAW MERCHANT AND NEGOTIABLE INSTRUMENTS IN COLONIAL NEW YORK, 1664-1730 (1963); THE LAW PRACTICE OF ALEXANDER HAMILTON (J. Goebel & J. Smith eds. 1964-81) (five volume work).

Outside of Virginia, however, we know very little about law in the colonial South. See R. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH CENTURY VIRGINIA (1979); W. BRYSON, A BIBLIOGRAPHY OF VIRGINIA LEGAL HISTORY BEFORE 1900 (1979); CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA ix-xxii (P. Hoffer & W. Scott eds. 1984); Konig, *'Dale's Laws' and the Non-Common Law Origins of Criminal Justice in Virginia*, 26 AM. J. LEGAL HIST. 354 (1982) [hereinafter cited as Konig, *Dale's Laws*]; Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53 (1983). A. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1660-1810 (1981), is the best work on southern legal history for the colonial period. Roeber's bibliography contains an exhaustive list of published primary materials on colonial legal history in Virginia, as well as an important list of secondary materials.

64. This list is not meant to be exhaustive. Other topics include real property, the intergenerational transmission of property, law and economic development, and family law. These subjects are mentioned in some of the articles in AMBIVALENT LEGACY, *supra* note 4.

65. The subject of slave law has proved extremely compelling. In contrast to the paucity of work in most areas of southern legal history, the volume of literature on slave law, especially in the post-Revolutionary period, is enormous. Indeed, the law of slavery has become a minor growth industry among academics. One law professor has tried to write "a sort of 'Restatement of the Law of Slavery,'" M. TUSHNET, *supra* note 18, at 9, while another has sought to understand the moral implications of judges' decisions in cases involving slaves. R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975). A.E. Keir Nash, a political scientist, has written numerous articles on slave law. See Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970); Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C.L. REV. 197 (1970); Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neill*, 21 S.C.L. REV. 141 (1969); Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7 (1979). Legal scholars have written on manumission, see Howington, "Not in the Condition of Horse or an Ox": Ford v. Ford, *The Law of Testamentary Manumission, and the Tennessee Court's Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249 (1975); slave crime, see M. HINDUS, *supra* note 37; Flanagan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J.S. HIST. 537 (1974); Schwartz, *Forging the Shackles: The Development of Virginia's Criminal Code for Slaves*, in AMBIVALENT LEGACY, *supra* note 4, at 125; business aspects of slave law, see Morris, "Society is not marked by punctuality in the payment of debts": The Chattel Mortgages of Slaves, in AMBIVALENT LEGACY, *supra* note 4, at 147 [hereinafter cited as Morris, *Chattel Mortgages*]; Morris, "As if the Injury was Effected by the Natural Elements of Air, or Fire"; or Slave Wrongs and the Liabilities of Masters, 16 LAW & SOC'Y REV. 569 (1982) [hereinafter cited as Morris, *Slave Wrongs*]; Stealy, *The Responsibilities and Liabilities of the Bailee of Slave Labor in Virginia*, 12 AM. J. LEGAL HIST. 336

the legal system to perpetuate racial separation and the subordination of non-whites. Courts in the colonial period helped create slavery, and courts after the Revolution helped preserve it. The legal system after the Civil War developed a rigid code of segregation; courts in the late twentieth century—especially federal courts—were instrumental in ending legally enforced racial segregation.

1. Slavery and the Law

Although slavery existed in every American colony before 1775,⁶⁶ by 1804 all the northern states had taken steps to end slavery, either through constitutional provisions or statutory schemes of gradual emancipation.⁶⁷ Prior to these developments, however, slavery had become a southern institution.

Most scholars agree that the development of a distinctive law of slavery, and later segregation, was uniquely a southern phenomenon. That many books on American legal history ignore slavery underscores the difficulty of integrating southern legal developments into "American" legal history.⁶⁸ This neglect may stem from two beliefs: slavery is unimportant to mainstream American legal

(1968); northern responses to fugitive slave laws, see T. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861* (1974) [hereinafter cited as T. MORRIS, *FREE MEN ALL*]; Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Antislavery Use of a Proslavery Decision*, 25 *CIVIL WAR HIST.* 5 (1979); and the *Somerset* precedent, see P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981) [hereinafter cited as P. FINKELMAN, *AN IMPERFECT UNION*]; Finkelman, *The Law of Slavery and Freedom in California, 1848-1860*, 17 *CAL. W.L. REV.* 437 (1981); Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 *U. CHI. L. REV.* 86 (1974) (characterizing *Somerset* as a landmark opinion in Anglo-American jurisprudence). Even historians not generally known as "legal historians" have added significantly to the literature on slavery. See D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823* (1975); Genovese, *Slavery in the Legal History of the South and the Nation* (Book Review), 59 *TEX. L. REV.* 969 (1981). Sitting judges and practicing attorneys have also joined the fray. See A. HIGGINBOTHAM, *supra* note 2; Fede, *Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet's THE AMERICAN LAW OF SLAVERY*, 2 *LAW & HIST. REV.* 301 (1984).

John P. Reid, of New York University Law School, one of the most prolific legal historians, has reached the following conclusion concerning one aspect of slavery and law:

Now, for the first time, one can claim that a topic in American legal history has been investigated and analyzed so sufficiently that our comprehensive knowledge of its issues and data compares favorably with the work done in some of the more extensively researched areas of political, social, and economic history. That topic is the pre-Civil War slave rendition law, applicable to the return of sojourning, transit, and fugitive slaves from free states to the states of their owners.

Reid, *Lessons of Lumpkin*, 23 *WM. & MARY L. REV.* 571, 571 (1982). Reid's observations, however, apply only to scholarship concerning questions of interstate relations, slavery, and law. Despite the explosion in scholarly literature on the subject, many questions about slave law remain unanswered. William M. Wiecek has correctly observed that "the law of slavery still awaits its Maitland." Wiecek, *Book Review*, 1982 *AM. BAR FOUND. RESEARCH J.* 274 (reviewing M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860* (1981)). Fortunately, there are many scholars working hard to provide the kind of research that might one day lead to a Maitland for this subject. Two areas of slave law, however, have been particularly neglected and are not yet understood: the interaction between slave law and legal doctrine, and the theoretical underpinnings of the law of slavery.

66. See Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 *WM. & MARY L.Q.* 258, 260 (1977).

67. See A. ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967). For differences in how northern and southern courts dealt with slavery after emancipation in the North, see P. FINKELMAN, *AN IMPERFECT UNION*, *supra* note 65.

68. See *supra* notes 9-48 and accompanying text.

history because it ended abruptly in 1865⁶⁹ or slavery was such a "peculiar" institution⁷⁰ that it did not affect other areas of law.

Both beliefs are wrong. Although slavery ended in 1865, the statutes, court decisions, and informal quasi-legal mechanisms for race control, as well as the rationales for the law of slavery, continued to affect southern law. The slave codes of the ante-bellum period were the basis of the black codes of 1865-66 and later were resurrected as the segregation statutes of the period after 1877.⁷¹ The legal heritage of slavery did not end with its demise,⁷² nor is it likely that slavery's impact on the law was limited to legal relationships involving slaves.⁷³

The use of the law to control race relations and to advance the interests of whites at the expense of blacks emerged in the colonial period when Virginia and Maryland began to develop legal rationales, mechanisms, and institutions to support the slave system. It is not surprising that jurists and lawyers born and reared in the southern slave culture of the nineteenth century manipulated the law to protect that culture. More interesting is how men not raised in such a culture were able to adapt, or ignore, English common law to create a system of slavery.

Through punishments and other legal innovations, Virginia moved to a system of chattel slavery. The Virginia courts' treatment of runaway indentured servants illustrates how the colonial legal system facilitated the emergence of slavery. The blacks who came to Virginia before 1640 usually were not slaves, but were servants indentured for a limited time. Some of these servants eventually gained their freedom; others were reduced to slavery through the intervention of the Virginia courts. Runaway servants—black or white—were punished severely by the Virginia authorities. With no explicit legislative sanction, the

69. See J.W. HURST, *supra* note 21. In a more recent work Hurst acknowledges that "[l]aw, of course, actively maintained slavery before 1862" but asserts that after that time "other factors outside the law" such as the "structure of markets and education and class customs" created "barriers to justice that were not only law-made." J.W. HURST, *LAW AND THE SOCIAL ORDER*, *supra* note 20, at 64-65. This perhaps leads to the conclusion that the law of slavery is unimportant to the development of American legal history. It seems quite apparent, however, that the law of slavery paved the way for the law of segregation and helped lay the groundwork for the very "barriers to justice" that Hurst describes.

70. Ante-bellum southerners used the term "our peculiar institution" to describe slavery. The term is now associated with one of the most important books on slavery, K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956).

71. On the continuity between ante-bellum slavery and post-bellum segregation, see Scott, *Segregation: A Fundamental Aspect of Southern Race Relations, 1800-1860*, 4 J. EARLY REPUBLIC 421-41 (1984).

72. As late as the 1930s a black was prosecuted in Georgia under a statute that originally was designed to prevent slave insurrections. *Herndon v. Lowry*, 301 U.S. 242 (1937) (overturning defendant's conviction for attempting to overthrow the government of Georgia by organizing a racially integrated march of unemployed workers). For a more detailed analysis of this case, see C. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* (1976).

73. In 1860 southerners owned more than 4,000,000 slaves, worth over two billion dollars in the aggregate. The price of slaves varied, but an estimate of \$500 per slave is very conservative. The average sale price of Tennessee slaves in 1860 was over \$850. In 1857 prime hands sold for as much as \$1550 and common hands for \$1100. Women slaves sold for about \$200 less than men, ranging in value from \$900 to \$1350. In Louisiana average slaves sold for over \$1,200 and skilled slaves for up to \$3,000. K. STAMPP, *supra* note 70, at 414-17. It is very likely that the huge amount of wealth represented by slaves in the South affected legal developments beyond the master-slave relationship.

Virginia courts often punished blacks more harshly than whites. For example, in 1640 a black named John Punch ran away with a group of whites. All the runaways were whipped, and the whites had additional time added to their indentures. Punch, however, was ordered to "serve his said master or his assigns for the time of his natural Life here or elsewhere."⁷⁴ Judge A. Leon Higginbotham asserts that this sentence "exemplifies the court's intent to deliberately exercise partiality in its dealings with blacks."⁷⁵ Higginbotham argues that the "court turned social biases, at will, into hard legal judgments. In the true sense of the word, the colonial judges constituted an activist court, in order to perpetuate disparate cruelty on blacks."⁷⁶

The Virginia court may not have been so purposefully racist as Higginbotham asserts. Rather, Punch represents just one of a number of instances in which Virginia gradually moved toward slavery on a case-by-case basis, with little planning or forethought. The haphazard nature of the early cases involving blacks suggests that Virginia's adoption of slavery was, in Winthrop Jordan's apt phrase, "an unthinking decision."⁷⁷ The initial impetus for slavery was the Virginia authorities' willingness to exploit anyone they could.⁷⁸ Having neither a European background nor a government to protect them, blacks were more vulnerable to such exploitation than other Virginians. In addition, by the 1640s the Spanish and Portugese had been enslaving Africans for nearly two centuries. The English in Virginia accepted what others in the New World were already doing. Virginia colonists, however, did not merely copy Spanish and Portugese practices; they creatively used courts of law, wills (and thus equity jurisdiction), and eventually legislation to enslave blacks and create a system of slavery.

Legal doctrine concerning the treatment of slaves may have developed in the South in three different ways. First, slave law may have developed separately from other aspects of law. Thus, a body of law for torts committed by or

74. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA (H.R. McIlwaine ed. 1979) [hereinafter cited as MINUTES]. This, and many other early cases involving slavery, are excerpted in JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (H. Catterall ed. 1926).

75. A. HIGGINBOTHAM, *supra* note 2, at 28.

76. *Id.* Other cases from colonial Virginia that delineate the relationship between blacks and whites are scattered throughout MINUTES, *supra* note 74. Included in this work is a 1630 case in which a white man was punished "for abusing himself to the dishonor of God and the shame of Christianity by defiling his body in lying with a negro," *id.* at 479, a 1674 case which shows the different treatment of black and white runaways, *id.* at 382, and a 1640 case in which a white was punished for fathering a child by a black servant, *id.* at 477; see also Act CII of the March 1661-62 session of the Virginia Grand Assembly, reproduced in 2 STATUTES AT LARGE 116 (W. Hening 2d ed. New York 1823) (1st ed. Richmond 1810) (providing special punishment for English servants who run away with blacks); Act I of the Sept. 1668 session of the Virginia Grand Assembly, reproduced in 2 STATUTES AT LARGE 270 (W. Hening 2d ed. New York 1823) (1st ed. Richmond 1810) (declaring that masters would not be held responsible for any slaves killed while being punished).

77. On the origin of slavery, see W. JORDAN, *WHITE OVER BLACK* (1968); E. MORGAN, *supra* note 62; and Deglar, *Slavery and the Genesis of American Race Prejudice*, 2 COMP. STUD. SOC'Y & HIST. 52 (1959); see also Cottrol & Diamond, Book Review, 56 TUL. L. REV. 1107 (1982) (reviewing A. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978)). For an account of the transition from freedom to racially based slavery, see T. BREEN & S. INNES, "MYNE OWNE GROUND": RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640-1676 (1980).

78. *Cf.* E. MORGAN, *supra* note 62, at 295-315 (describing the shift from a system of indentured servitude to slavery in Virginia).

against slaves may have developed apart from tort law for cases not involving slaves. Second, nonslave law may have affected slave law. Under this theory, tort law for slaves would not have differed from tort law for nonslaves. Last, tort law for slaves might have affected other types of law. Thus, the adjudication of tort cases between nonslaves might have differed in the South from the North because southern judges applied principles of slave torts. Brief examples in specific areas of law illustrate the connections between the law of slavery and other aspects of law.

The intergenerational transmission of slave property led to unusual rulings by some courts. A testator's intent to free his slaves often raised tremendous policy problems and resulted in peculiar interpretations of precedent. For example, in 1799 in *Pleasants v. Pleasants*,⁷⁹ Virginia's highest court strained to enforce two Quaker testators' wishes to emancipate their slaves. The *Pleasants* court asserted that slaves were "on the same footing with other chattels,"⁸⁰ but then proceeded to treat the *Pleasants*' slaves as a class rather than as individuals.⁸¹ More importantly, the court treated the case as though the slaves were litigants rather than "chattels." To free the slaves the court ignored the specific dictates of Virginia's 1782 manumission statute⁸² and refused to apply the rule against perpetuities.⁸³ It is obvious that the court freed the slaves because of the judges' humanitarian instincts, even though existing law had to be ignored or rejected.

In *Elder v. Elder's Executor*,⁸⁴ an 1833 case, the same Virginia court stated the well-known rule that "[i]n the construction of wills, we are to find out the meaning, the intention, the will, of the testator; and unless that violates some principle of law, it must be carried into execution."⁸⁵ The court in *Elder* ignored the strict letter of the will in order to effectuate the testator's intent to free his slaves. By 1858, however, the Virginia court was less solicitous of the intention of the testator. In *Bailey v. Poindexter's Executor*⁸⁶ the court rejected *Elder*'s adherence to the testator's intent, because by that time, a majority of the justices opposed manumission on political grounds. A year later Mississippi's

79. 6 Va. 329, 2 Call 319 (1800).

80. *Id.* at 334, 2 Call at 335.

81. *Id.* at 335, 2 Call at 339.

82. *Id.* at 336, 2 Call at 340-41. In 1771, shortly before he died, John Pleasants wrote a will requesting that his slaves, and any children of his slaves, be emancipated "if they chuse it when they arrive at the age of thirty years, and the laws of the land will admit them to be set free without their being transported out of the country." *Id.* at 329, 2 Call at 319. In absence of a law allowing manumission the slaves were divided among various family members. In 1782 a Virginia statute allowed the manumission of slaves within the state. Act XXI of the 1619 session of the Virginia General Assembly, reproduced in 11 STATUTES AT LARGE 39 (W. Hening ed. Richmond 1823). This law required that no old or infirm slave could be manumitted unless the master provided funds to prevent the slave from becoming a charge of the community. The court ignored this provision of the will because "the testator cannot reasonably be supposed to have contemplated an act of emancipation, making no provision to prevent the persons liberated from being chargeable to the public." *Pleasants*, 6 Va. at 336, 2 Call at 341.

83. *Pleasants*, 6 Va. at 338-41, 2 Call at 347-57.

84. 31 Va. (4 Leigh) 930 (1833).

85. *Id.* at 931.

86. 55 Va. (14 Gratt.) 428 (1858).

highest court also refused to enforce the intent of a testator with respect to his slaves on purely political grounds.⁸⁷

These decisions suggest how slavery created special problems for judges. They also indicate how the "law of slavery" may have affected other aspects of law. If the rule against perpetuities could be ignored to free slaves, as it was in *Pleasants*, perhaps it also could be ignored in other cases. Similarly, if the intent of the testator could be frustrated as it was in *Bailey*, it might also be disregarded in cases that did not involve slaves. The decisions involving slavery and wills made the law of property transmission uncertain. Although more research is needed to determine how this uncertainty affected other areas of the law, the case law involving slavery and wills does evidence the tensions slavery created for the legal system.

Slavery also affected the law of industrial accidents. The "fellow servant rule" articulated by Chief Justice Shaw in Massachusetts⁸⁸ theoretically could not have been applied to slaves. Shaw's decision, which was followed by most American jurisdictions, held that a worker injured on the job by the negligence of another worker (a fellow servant) could not sue his employer; instead, the injured worker could sue only the negligent fellow servant. Given the wages of most nineteenth century workers, the fellow servant was likely to be judgment proof.⁸⁹ Shaw asserted that workers gained extra compensation for dangerous work through their contracts and that workers were in the best position to know if their fellow servants were likely to be negligent. If a worker knew that fellow servants were negligent, the worker could, according to Shaw, leave the danger-

87. *Mitchell v. Wells*, 37 Miss. 235 (1859) (former slave voluntarily taken to Ohio and freed by her owner could not inherit property in Mississippi). *Mitchell* rejected earlier precedents established in *Hinds v. Brazeale*, 2 Miss. 88, 2 Howard 837 (1838), and *Shaw v. Brown*, 35 Miss. 246 (1858).

88. *Farwell v. Boston & Worcester R.R.*, 44 Mass. (4 Met.) 49 (1842). As Lawrence Friedman points out, the *Farwell* case was not the first American use of the "fellow servant rule" but only the "leading case." Friedman, *supra* note 61, at 31. The first American case was *Murray v. South Carolina R.R.*, 26 S.C.L. 166, 1 McMul. 385 (1841). Significantly, *Murray* was one of two American cases (the other was from Massachusetts) that Shaw cited in his opinion. This suggests the possibility of a development in American law that was not sectional. In fact, the "fellow servant rule" appears to have been applied by virtually all American courts to accidents involving free men. L. LEVY, *supra* note 29, at 171. It does not appear, however, that the rule was universally applied to slaves or even to blacks. M. TUSHNET, *supra* note 18, at 183-88.

89. Shaw's opinion implied that workers who sought higher wages would take riskier jobs at higher pay. Shaw noted that plaintiff *Farwell* was paid two dollars a day, "that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed." *Farwell v. Boston & Worcester R.R.*, 44 Mass. (4 Met.) 49, 50 (1842). But, as Charles Warren pointed out many years ago, "students of political economy know that as a matter of fact wages of a particular workman are not regulated in this way." Warren, Volenti Non Fit Injuria in *Actions of Negligence*, 8 HARV. L. REV. 457, 466 (1895). More likely, *Farwell*'s higher wages were due to his greater level of skill. An engineer on a train was probably in no greater danger than anyone else on the train. Even if *Farwell*'s negligent fellow servant had earned as much as *Farwell*, he probably would have had insufficient resources to satisfy *Farwell*'s claim. The logic behind the fellow servant rule was that workers who are less averse to risks will seek dangerous jobs with higher salaries. But as Stanford Law School's Robert Rabin has pointed out, "the history of workmen's compensation reform is singularly free of any reference to laborers protesting against the legislation on the grounds that a compulsory safety premium was likely to have a depressing effect on wages." Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 940 (1981).

ous job site, report the negligent workers to someone in charge, or reprimand the workers himself.

Shaw's rationale for the fellow servant rule could not apply to slaves. Slaves were not free to negotiate contracts, leave unsafe job sites, or instruct fellow workers on job safety. The fellow servant rule, therefore, clearly was inapplicable to the thousands of slaves owned by or hired out to southern manufacturing, mining, and transportation industries.⁹⁰ As a Louisiana court noted, the fellow servant rule could not apply to slaves because a slave "cannot decline any service, still less leave the service."⁹¹ The Kentucky Court of Appeals had previously expressed a similar sentiment. In refusing to apply the fellow servant rule to a slave the court noted: "A slave may not, with impunity, remind and urge a free white person, who is a co-employee, to a discharge of his duties, or reprimand him for his carelessness or neglect."⁹² South Carolina, the first American jurisdiction to adopt the fellow servant rule,⁹³ refused to apply the doctrine to slaves.⁹⁴

The use of slaves in industrial situations also complicated the application of the fellow servant rule to whites. Slaves could not be deemed the "fellow servants" of anyone. Thus, if a slave's negligence injured a free worker, that worker could sue the owner or bailee of the slave for damages.⁹⁵ Indeed, with the exception of the North Carolina Supreme Court,⁹⁶ no southern court was willing to treat a slave as a fellow servant.⁹⁷

Slavery also affected other aspects of tort law. One troublesome question for southern jurists was the allocation of liability for torts committed by slaves. In *Snee v. Trice*⁹⁸ the South Carolina court refused to hold a master liable for

90. See R. LEWIS, *COAL, IRON, AND SLAVES: INDUSTRIAL SLAVERY IN MARYLAND AND VIRGINIA, 1715-1865* (1979); R. STAROBIN, *INDUSTRIAL SLAVERY IN THE OLD SOUTH* (1970); Dew, *Disciplining Slave Ironworkers in the Ante-Bellum South*, 79 AM. HIST. REV. 393 (1974); Miller, *The Fabric of Control: Slavery in Antebellum Southern Textile Mills*, 55 BUS. HIST. REV. 471 (1981).

91. *Howes v. Steamer Red Chief*, 15 La. Ann. 321, 324 (1860).

92. *Louisville & Nashville R.R. v. Yandell*, 56 Ky. 466, 473, 17 B. Mon. 586, 596 (1856).

93. *Murray v. South Carolina R.R.*, 26 S.C.L. 166, 1 McMul. 385 (1841).

94. *White v. Smith*, 46 S.C.L. 201, 12 Rich. 595 (1860). In *White* the court held that an employer would be relieved of liability for the injury or death of hired slaves only if the slaves had been negligent and essentially had harmed themselves. The fellow servant cases suggest that the southern state courts cited each other more frequently than the northern state courts cited southern courts. This is another area in which research might help determine whether legal doctrine differed between the North and the South.

95. See e.g., *Cook & Scott v. Parham*, 24 Ala. 21 (1853); *Forsyth v. Perry*, 5 Fla. 337 (1853); *Scudder v. Woodbridge*, 1 Ga. 195 (1846); *Louisville & Nashville R.R. v. Yandell*, 56 Ky. 466, 17 B. Mon. 585 (1856); *Kelly v. White*, 56 Ky. 98, 17 B. Mon. 124 (1856); *Howes v. Steamer Red Chief*, 15 La. Ann. 321 (1860); *Harvey v. Skipwith*, 57 Va. 154, 16 Gratt. 393 (1863); *Randolph v. Hill*, 34 Va. 669, 7 Leigh 383 (1836).

96. See *Ponton v. Wilmington & Weldon R.R.*, 51 N.C. (6 Jones) 245 (1858); *Heathcock v. Pennington*, 33 N.C. (11 Ired.) 640 (1850).

97. But see M. TUSHNET, *supra* note 18, at 183. Mark Tushnet finds "confusion" in the "cases adopting and applying the fellow-servant rule in the South." *Id.* He notes "explicit disagreement among the courts over the question of a hirer's liability to an owner for injuries to the hired slave caused by the hirer's other employees." *Id.* Tushnet believes this "disagreement rested precisely on the varying degrees to which the courts were willing to go in treating the owner-hirer-slave relationship as a purely market relationship." *Id.*

98. 2 S.C.L. 137, 2 Bay 345, *modified*, 3 S.C.L. 84, 1 Brev. 178 (1802).

damages caused by a fire started by his slaves for a benign purpose.⁹⁹ The court rejected "the rigid doctrine . . . in England" that masters were strictly liable for the torts of their servants.¹⁰⁰ The court in *Snee* held masters responsible for slave torts only when the slave was acting "in pursuance of his master's directions."¹⁰¹

Morton Horwitz asserts that *Snee* is "[t]he earliest reported American master-servant case in which failure to prove carelessness in the servant becomes the basis for denying the master's liability."¹⁰² Horwitz correctly notes that the result in this case reflects "a strong incentive to limit the scope of liability for the acts of slaves."¹⁰³ Horwitz finds "no indication that the South Carolina decision had any influence on the course of American law. Outside South Carolina, the decision was ignored, probably having been regarded as limited to the peculiar problem of slavery."¹⁰⁴ This is not entirely correct; courts in at least three other states cited *Snee* for the proposition that masters were not liable for damages caused by their slaves.¹⁰⁵ *Snee* and similar cases in other states suggest the development of a distinctively southern law.

Thomas D. Morris interprets *Snee* in a different way.¹⁰⁶ Morris argues that *Snee* merely applied the English rule that the law "would not impose a liability upon a master beyond that defined by the analogous rules of English master-servant law."¹⁰⁷ In England a master was responsible only for torts committed by his servant while acting under the master's direction. Morris argues that this was the same concept of limited liability of the master adopted by the South Carolina court. Morris' argument is no less persuasive than Horwitz'.¹⁰⁸ If

99. In *Snee* Trice's slaves started a fire in the morning, when there was no wind. The fire was either for clearing brush or cooking their meals. Later in the day a sudden wind revived the smoldering coals and the ensuing fire destroyed *Snee's* corn crib and corn crop. *Id.* at 137, 2 Bay at 345.

100. *Snee*, 2 S.C.L. at 139, 2 Bay at 349. It is not at all clear that this understanding of English law was correct. See *infra* notes 106-08 and accompanying text.

101. *Id.* at 139, 2 Bay at 350.

102. M. HORWITZ, *supra* note 16, at 92.

103. *Id.* at 93.

104. *Id.*

105. *McConnell v. Hardemen*, 15 Ark. 151, 153-54 (1854); *Ewing v. Thompson*, 13 Mo. 132, 136 (1850); *Wright v. Weatherly*, 15 Tenn. (7 Yer.) 367 (1836). It is possible that *Snee* was cited in other states as well. One problem for legal historians is that ante-bellum cases cannot be shepardized between states. Thus, the only way to determine if a case has been cited by other courts is to read the decisions of the other courts.

That Horwitz found no use of *Snee* by other courts underscores the neglect of the South by most legal historians. The number of citations a case has received is only one measure of its acceptance by other jurisdictions. For example, a number of southern courts cited *Wingis v. Smith*, 14 S.C.L. 162, 3 McCord 400 (1825), a case that reaffirmed the doctrine of *Snee*. Because of the difficulty of obtaining reports from other states in the early nineteenth century, it is likely that courts cited *Wingis* more frequently than *Snee* because reports of *Wingis* were more available than those of *Snee*.

106. Morris, *Slave Wrongs*, *supra* note 65.

107. *Id.* at 580.

108. The differences between Morris and Horwitz reflect utter confusion about the emergence of negligence as a doctrine in Anglo-American law. This confusion stems from a lack of consensus about the state of law in England as well as "[t]he meager quality of the English and American evidence . . . [concerning] pre-nineteenth century tort doctrine." Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1722 (1981). One reason for the paucity of relevant evidence, as Stanley Katz notes, is the "emphasis on medieval

Morris' reading of *Snee* is correct, however, the South Carolina court accepted an English doctrine at the expense of the traditional slave state view that slaves were theoretically *always* under the control of the master.

Whether one accepts Horwitz' reading of *Snee* as a creative new American doctrine, or Morris' view of *Snee* as an adaptation of existing English doctrine, one aspect of the case was innovative. *Snee* clearly rejected the venerable common-law doctrine that those who caused damage by fire were strictly liable. In *Snee* plaintiff could not recover for the loss of his corn crib because defendant was not held responsible for the fire damage caused by his slaves. Had the fire been started by free servants instead of slaves, it is possible that the master of the servants still would not have been liable. Nevertheless, a plaintiff injured by the negligence of free servants would have been able to sue such servants. *Snee*, in contrast, certainly could not sue the negligent slaves directly. Thus, the effect of *Snee* was to create a major exception to the law of fires; if for legitimate purposes slaves started a fire that accidentally burned someone's property, neither master nor servant would be liable.

In 1838 the South Carolina court extended the holding in *Snee* to free servants.¹⁰⁹ Thus, a decision concerning slaves set a precedent for cases involving whites.¹¹⁰ By 1860 most southern jurisdictions had adopted *Snee*'s holding that masters could not be held responsible, either at civil or criminal law, for the unauthorized acts of their slaves.¹¹¹ The complicated nature of slave negligence cases demonstrates the importance of studying how doctrinal developments of southern states were affected by slavery.¹¹²

studies" by most English legal historians; "[f]or Maitland and his followers, the 'modern' era began with Henry VII and history ended with the English Civil War." Katz, *supra* note 5, at 458. This problem is also discussed in L. FRIEDMAN, *supra* note 37, at 409-27 (considering the impact of the industrial revolution on the modern law of torts); M. HORWITZ, *supra* note 16, at 67-108 (tracing the development of tort law and its impact on economics); G.E. WHITE, JUDICIAL TRADITION, *supra* note 22, at 43-45 (discussing the absence of published court decisions and established law in nineteenth century America); Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth Century Law of Torts*, 128 U. PA. L. REV. 361 (1979) (suggesting that civil liability in trespass actions was strict in the medieval period); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (addressing the development and function of negligence in tort); and Rabin, *supra* note 89 (suggesting that the scarcity of recorded decisions makes it difficult to determine whether tort liability required a finding of fault in the preindustrial era).

109. *O'Connell v. Strong*, 10 S.C.L. (Dud.) 265 (1838).

110. The court in *O'Connell* relied on the principles announced in *Snee* and *Wingis*, drawing a direct analogy between slaves and hired workers. *Id.* at 266. This analogy suggests the need for work on the connections between slave law, legal theory, and proslavery thought. See *infra* notes 113-16 and accompanying text.

111. See, e.g., *Cawthorn v. Deas*, 2 Port. 276 (Ala. 1835); *McConnell v. Hardeman*, 15 Ark. 151 (1854); *Ewing v. Thompson*, 13 Mo. 132, 136 (1850). In *Garrett v. Freeman*, 50 N.C. (5 Jones) 78 (1857), the North Carolina Supreme Court held a master liable for fire damage caused by his negligent slaves acting under the authority of their master. If the slaves had acted on their own, the master perhaps would not have been liable.

112. See Morris, *Chattel Mortgages*, *supra* note 65. Morris suggests that the law of mortgages in the South was affected by slave mortgages.

The law of warranties also probably was affected by slavery. One of the few places in THE TRANSFORMATION OF AMERICAN LAW in which Professor Horwitz makes extensive use of southern decisions and legislation is his discussion of warranties of title. M. HORWITZ, *supra* note 16, at 58-62. Horwitz' discussion concerns real property, but the peculiar nature of slave property may have affected how southern courts and legislatures looked at all property. Certainly a warranty of soundness raised greater problems when the object of sale was a person, rather than a fungible

The theoretical basis of slave law remains unclear. Some years ago Daniel J. Boorstin pointed out "how few books on the laws of slavery came out of the South."¹¹³ The reasons southerners failed to produce both practical and theoretical books on the law of slavery deserve further exploration.¹¹⁴ The only major southern work on slave law for practitioners, Thomas R.R. Cobb's *An Inquiry into the Law of Negro Slavery*,¹¹⁵ was not published until 1858. Some major proslavery theorists, including Henry Hughes and George Fitzhugh, used legal theory, legal history, and legal reasoning in their defense of slavery.¹¹⁶ Scholars need to begin the important and difficult task of writing an intellectual history of slave law that will combine the works of theorists with case law. The nature of a separate southern jurisprudence can be understood only when scholars have examined its theoretical foundations.

2. Segregation Law

In the aftermath of slavery, racial segregation became a hallmark of the South. In the development of segregation law the major problems confronting lawmakers were less difficult theoretically than the problems of slave law. The dual status of slaves as both persons and things had complicated slave law, but this was no longer a problem after blacks gained legal status as persons and theoretical equality with whites.¹¹⁷ The demise of slavery, however, presented southern lawmakers with a difficult practical problem: how to maintain racial separation while exploiting black labor for the benefit of white planters and capi-

product of the farm or industry. M. TUSHNET, *supra* note 18, at 158-69, offers important insights into the fungibility of slaves as commodities. The problem of the warranty of soundness is explored in S. Fede, Consumer Protection and the Law of Slave Sales in the 19th Century U.S. South: A Caveat Concerning *Caveat Emptor* (unpublished paper on file with the North Carolina Law Review).

113. D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 204 (1965).

114. Several important works on slave law were published in the North. See W. GOODELL, *AMERICAN SLAVE CODE* (New York 1853); J. HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* (1st vol. Boston 1858) (2d vol. Boston 1862); G. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* (rev. ed. Philadelphia 1856) (1st ed. Philadelphia 1827); J. WHEELER, *A PRACTICAL TREATISE ON THE LAW OF SLAVERY, BEING A COMPILATION OF ALL THE DECISIONS MADE ON THAT SUBJECT, IN THE SEVERAL COURTS OF THE UNITED STATES* (New York 1837).

115. T.R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA TO WHICH IS PREFIXED AN HISTORICAL SKETCH OF SLAVERY* (Philadelphia & Savannah 1858). No careful analysis of this book has been written. Unfortunately, the recent biography of Cobb devotes little space to this book. See W. McCASH, *supra* note 35.

116. See G. FITZHUGH, *CANNIBALS ALL!* (rev. ed. 1960) (1st ed. Richmond 1857); G. FITZHUGH, *SOCIOLOGY FOR THE SOUTH: OR THE FAILURE OF FREE SOCIETY* (Richmond 1854); H. HUGHES, *TREATISE ON SOCIOLOGY, THEORETICAL AND PRACTICAL* (Philadelphia 1854).

117. See U.S. CONST. amends. XIII-XV. In *The Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), the United States Supreme Court stated that blacks technically were equal to whites and refused to examine the question of equality further. Justice Bradley's language in the *Civil Rights Cases* is particularly striking for its insensitivity to the plight of the recently freed blacks:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

The Civil Rights Cases, 109 U.S. at 25. It was, of course, precisely at this time that blacks were becoming the special target of the law.

talists. The imagination of southern lawmakers in devising new ways to segregate blacks deserves the attention of all Americans concerned about law, human dignity, and justice.

Legal historians have barely explored the ways in which courts and legislatures imposed a quasi-slavery on freedmen in the years after Reconstruction.¹¹⁸ Perhaps this is because there seem to be few doctrinal changes to study in this period. The "Jim Crow" legislation of the late nineteenth and early twentieth centuries appears more significant as a political or social phenomenon than as a legal development. Judicial decisions and doctrine seem to have played a lesser role in the development of racial segregation. In the wake of the Civil War "[t]he responsibility for defining the legal status of blacks fell to the legislature."¹¹⁹ This trend contrasts with the development of slavery in the seventeenth century and with the emergence of slave law between 1790 and 1861; judges created the legal doctrine that supported slavery.¹²⁰

Insufficient research exists in southern legal history for this period to know how judges and doctrine affected segregation. It is significant, for example, that the section about race in *Ambivalent Legacy*, the most important recent addition to the literature on southern legal history, jumps from an essay on slave law to one on the *Brown* decision.¹²¹ Similarly, although the recent Vanderbilt symposium on southern legal history focused primarily on the nineteenth century, it devoted only a handful of pages to race and law during Reconstruction and in the "New South."¹²² A legal history of race relations between the Civil War and the civil rights movement should be written to teach lawyers about the continuity of law from the era of the "Great Civil War"¹²³ to the era of the Great Society. One place to begin is with a study of state constitutions after Reconstruction and the development of a segregationist constitutional theory.¹²⁴

Although legal historians have shown little interest in questions of race in

118. See generally H. HYMAN & W. WIECEK, *supra* note 27 (comprehensive survey of legal and constitutional history from 1835-1875; chapter on the thirteenth and fourteenth amendments particularly useful in understanding Reconstruction); L. LITWACK, *BEEN IN THE STORM SO LONG* (1979) (Pulitzer Prize winning history of freedmen immediately after the Civil War, detailing the difficult transition from slavery to freedom, and the lack of protection former slaves received from the federal government.); H. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865-1890* (1978) (history of the development of urban segregation in the South, showing that segregation began with the end of the Civil War); C.V. WOODWARD, *supra* note 54 (arguing that segregation developed in the late nineteenth and early twentieth century, rather than immediately after the Civil War or after Reconstruction).

119. Haws & Namorato, *Race, Property Rights, and the Economic Consequences of Reconstruction: A Case Study*, 32 VAND. L. REV. 305, 312 (1979) (discussing Mississippi legislation).

120. See *supra* notes 74-78 and accompanying text.

121. Morris, *Chattel Mortgages*, *supra* note 65, at 147; Schwartz, *supra* note 65, at 125; Tushnet, *supra* note 58, at 171.

122. *Supra* note 4. The symposium contained 412 pages. 32 VAND. L. REV. 1-412 (1979). Nineteen pages were devoted to race and law during Reconstruction. See Haws & Namorato, *supra* note 119, at 305-26.

123. Address by President Abraham Lincoln, Gettysburg, Pennsylvania (November 19, 1863).

124. See *supra* note 54. One example of this kind of work is M. McMILLAN, *CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, & SECTIONALISM* (1955).

the post-Civil War South,¹²⁵ they have focused considerable attention on the struggle to end segregation in the twentieth century.¹²⁶ Such work helps make the connection between legal history and constitutional history; developments and activities at the local level, such as sit-ins, marches, and litigation to integrate schools, are thus linked to the decisions of the United States Supreme Court. Equally important is the connection between constitutional doctrine and the behavior of local courts, legislatures, and other public institutions. The study of the connection between local events and the nation's highest court also might lead to an understanding of a special southern constitutional history. The South, more than any other region of the nation, traditionally has been uncomfortable with the centralized federalist system that emerged from the Constitution and the Marshall court. Although concepts such as states' rights and state sovereignty have been used by northern politicians and activists,¹²⁷ these concepts generally are associated with the South. In the eighteenth and nineteenth centuries these doctrines sometimes were evoked for reasons that had little to do with slavery.¹²⁸ Slavery and racial segregation, however, were the chief motivations for the doctrines of states' rights and state sovereignty, especially during the period after the Civil War, when state nullification was forever buried by the results of the War.

Tony Freyer's recent study of integration in Little Rock illustrates the nature of southern constitutional thought, its connection to race relations, and how it ultimately was discredited. Freyer's book explores the tensions between local blacks, white-dominated school boards, fire-eating politicians, and the federal

125. One exception is Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. (1976).

126. See, e.g., T. FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* (1984); Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979). The best study of desegregation remains R. KLUGER, *supra* note 58.

127. Most significantly, northern opponents of slavery made use of states' rights theories in the late ante-bellum period. Under theories of states' rights northern courts freed slaves owned by visiting masters. See *Lemmon v. People*, 20 N.Y. 562 (1860); P. FINKELMAN, *AN IMPERFECT UNION*, *supra* note 65. More serious challenges to federal authority came from opponents of the 1850 Fugitive Slave Law, ch. 60, 9 Stat. 462 (entitled "An Act respecting Fugitives from Justice, and Persons escaping from the Service of their masters"). The Wisconsin Supreme Court vigorously challenged the federal government's power with respect to fugitive slaves in *Ex parte Booth*, 3 Wis. 145 (1854), and in *In re Booth*, 3 Wis. 157 (1854). These cases led to the Supreme Court's strong defense of federal power in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859). In *Ableman* Chief Justice Taney asserted that the concept of states' rights was "new in the jurisprudence of the United States as well as of the States." *Id.* at 514. Taney asserted that under the Constitution

many of the rights of sovereignty which the States . . . possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, [the federal government] should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities.

Id. at 517. Taney reminded Wisconsin that "every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes." *Id.* at 525. It is perhaps not surprising, although somewhat ironic, that in the Little Rock decision the Supreme Court quoted Taney's proslavery decision with approval. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). For other antislavery uses of states' rights doctrine, see T. MORRIS, *FREE MEN ALL*, *supra* note 65. On the various uses of states' rights in American history, see A. SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* 220-44 (1922).

128. The best-organized and most vociferous opposition to the Sedition Act of 1798, ch. 74, 1 Stat. 596, came from the South and led to the Virginia Resolution, authored by James Madison, and the Kentucky Resolution, secretly authored by then Vice President Thomas Jefferson.

government.¹²⁹ Freyer acknowledges the contradictory elements of the South—localism, agrarianism, populism, and evangelical protestantism—and discusses the South's ambivalent relationship with the federal government after the New Deal brought electricity, highways, and educational aid to the South. He also demonstrates how some of the contradictory elements of the South conflicted during the Little Rock crisis.¹³⁰

Perhaps the most important lesson of Little Rock and the other desegregation struggles is that the push for integration in the South came from southerners. The school cases were initiated by southern black parents who took incredible risks to improve the educational opportunities of their children.¹³¹ Southern state law enforcement officers were rarely interested in protecting the rights of the southern blacks who demanded equality. It was left to federal district and circuit court judges, often native southerners themselves, to provide the means for black southerners to overcome their legal disabilities. Thus, a key aspect of twentieth century southern legal history is the federal courts' counterbalance to the racial discrimination of the majority. Decisions of federal judges at the local level were critical to ending segregation.¹³² The Little Rock case of *Aaron v. Cooper*,¹³³ initially a dispute at the local level over how to implement desegregation, grew into a constitutional and political crisis of national importance.¹³⁴ Thus, a study of local tensions and issues must be tied to the examination of larger constitutional and political issues.

The Little Rock crisis illustrates one other aspect of twentieth century southern legal history: the philosophy of localism, so much a part of the South, was easily jettisoned when it did not fit the prevailing orthodoxy. Governor Faubus' interference with the Little Rock school board "was contrary even to states' rights doctrines" because in a crucial election two integrationists had won "nearly two-to-one victories over segregationist candidates . . ."¹³⁵ Ideological consistency was easily sacrificed for racial solidarity in the South during this period. White supremacy, rather than states' rights or local control, thwarted the civil rights struggle. An understanding of this phenomenon may turn constitutional theory on its head, at least with regard to race relations. Terms such as

129. T. FREYER, *supra* note 126, at 10-13.

130. *Id.*

131. The best discussion of personal sacrifice for school integration is in R. KLUGER, *supra* note 58, at 1-26.

132. Cf. J. BASS, *UNLIKELY HEROES* (1981) (history of judges of the United States Court of Appeals for the Fifth Circuit who implemented *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

133. 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957), *same case on remand*, 163 F. Supp. 13 (E.D. Ark.), *rev'd*, 257 F.2d 33 (8th Cir.), *aff'd per curiam*, 358 U.S. 1 (1958); see also *Faubus v. United States*, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958) (district court did not abuse its discretion in granting a preliminary injunction to enjoin the Governor of Arkansas and other state officials from preventing black children from attending a city high school); *Brewer v. Hoxie*, 238 F.2d 91 (8th Cir. 1956) (complaint by the directors and superintendent of a school district against persons who conspired to disrupt the implementation of desegregation was sufficient to state a cause of action within the jurisdiction of the federal courts).

134. See Hutchinson, *supra* note 126, for a discussion of the critical importance of *Cooper v. Aaron*, 358 U.S. 1 (1958). *Cooper* enabled the United States Supreme Court to reaffirm its commitment to desegregation through an opinion signed by the entire Court.

135. T. FREYER, *supra* note 126, at 116.

"strict construction," an "activist court," or "judicial restraint" cease to have meaning when used by opponents of equality who were never committed to abstract principles, but only to preserving segregation at any cost.

Questions involving race and law remain integral to an understanding of southern legal history in areas other than race relations. The laws necessary to protect slavery and ensure racial stratification after the Civil War also retarded the industrialization of the South. Obviously, racial issues did not lead to statutes limiting corporate investment or regulating industries. Nevertheless, southern law and custom concerning race affected the southern economy. If most of the South was inhospitable to corporations, as two leading southern legal historians assert,¹³⁶ this may not have mattered, because the South could not attract many corporations as long as it remained segregated. Statutes such as South Carolina's prohibition on integrated work areas in textile mills¹³⁷ may have impeded industrialization as much as laws regulating corporations. Similarly, the South's focus on segregated schools rather than quality education undoubtedly retarded southern development. Most districts in the South could not bear the cost of a dual school system and provide quality education for either race.¹³⁸ The dual educational system also affected economic growth in the South because the region's most valuable resource—its human capital—was so poorly educated.

Race affected the whole experience of Reconstruction, the New South, and the modern period. The impact of race on southern politics and law making led to catastrophic results in the fifty years after the Civil War. Race had an especially important effect on criminal law in the post-bellum period. Between 1898 and 1908 approximately twelve hundred blacks were lynched.¹³⁹ Most of these lynchings occurred in the South.¹⁴⁰ The lynchings capped an era of brutality in which the southern legal system simply ignored murders—usually of blacks, but sometimes of whites. Thus, race affected the South's enforcement of its criminal laws and maintenance of its prisons, as well as numerous other aspects of southern life and law.

B. *Violence and Crime in the South*

Several proponents of southern legal history believe that the South's legal past is defined in part by "the prevalence and acceptance of violence as a means of conflict resolution."¹⁴¹ The great southern historian John Hope Franklin noted: "Far from loathing violence, the man of the South was the product of his

136. Ely & Bodenhamer, *supra* note 58, at 8.

137. See C.V. WOODWARD, *supra* note 54, at 98.

138. North Carolina went beyond separate schools to require that books used by white children be kept separate from those used by blacks. Florida required separation even while the books were in storage. *Id.* at 102. Such added costs led to inferior public education in the South for blacks and whites.

139. J.H. FRANKLIN, *RACIAL EQUALITY IN AMERICA* 68 (1976).

140. See NAACP, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918* (1919) (containing a list of reported lynchings between 1889 and 1918).

141. Ely & Calvani, *Forward to Symposium on the Legal History of the South*, 32 VAND. L. REV. 3 (1979); see also CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, *supra* note 63, (record of crimi-

experiences as a frontiersman, Indian fighter, slaveholder, self-sufficient yeoman, poor white, and Negro. He gladly fought, even if only to preserve his reputation as a fighter."¹⁴² For the nineteenth century, "[v]iolence permeates the most potent and indelible images of the American South: eye-gouging free-for-alls at the rural courthouse; men of aristocratic mien and pretension solemnly dueling at ten paces; rebellious slaves writhing under the lash; chain gangs, bloodhounds, and grisly lynchings."¹⁴³ The notion of a violent South continues in the twentieth century.

Statistics confirm the image of a violent South. Southern cities have the highest per capita murder rates in the nation.¹⁴⁴ More than a decade ago the *New York Times* noted that "[f]or years Houston, New Orleans, and Dallas have been handing back and forth the title 'Murder Capital of the United States.'"¹⁴⁵ More recently Houston and Miami have vied for this dubious distinction, with New Orleans running third.¹⁴⁶ These cities are not isolated examples. In 1983 the fifteen southern cities with over one million persons ranked in the top twenty-two cities for per capita homicides. Of the twenty-nine northern and western cities with over a million persons only seven ranked in the top twenty-two.¹⁴⁷ Smaller southern cities provide even grimmer statistics. In 1983, of fifteen cities between 500,000 and 1,000,000 with the highest homicide rates, twelve were in the South. The small towns of the South may be most dangerous of all. Of the fifteen cities under 500,000 with the highest homicide rates, fourteen were in the South.¹⁴⁸

The nonurban South is equally violent. As early as the 1870s H.V. Redfield estimated that the murder rate in South Carolina was ten times greater than that of Massachusetts and that the rate in Texas was ten times that of Minnesota.¹⁴⁹ More precise figures in the twentieth century narrow these gaps but lead to similar results. Between 1920 and 1925 seven southern states led the list for homicide rates among whites.¹⁵⁰ In 1960 twelve southern states were in the top fifteen for homicide rates.¹⁵¹ In 1977 and 1978 the South led the nation in per capita homicides and in per capita increases in homicides; although only thirty-five percent of the Nation's population lived in the South at that time, the South

nal proceedings in colonial Virginia); E. AYERS, *supra* note 56 (describing 19th century southern violence).

142. J.H. FRANKLIN, *THE MILITANT SOUTH, 1850-1861*, at 13 (1956).

143. E. AYERS, *supra* note 56, at 3.

144. See *infra* notes 146-48 and accompanying text.

145. N.Y. Times, June 4, 1971, at 71, col. 1, *quoted in* R. GASTIL, *CULTURAL REGIONS OF THE UNITED STATES* 200 (1975).

146. F.B.I., U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* 58-84 (1978); *id.* at 60-86 (1980); *id.* at 349-76 (1982); *id.* at 353-382 (1983). The only competition for third place has been from Los Angeles.

147. F.B.I., U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* 353-82 (1983).

148. *Id.*

149. H.V. REDFIELD, *HOMICIDE, NORTH AND SOUTH* (1880). Redfield's work is discussed in R. GASTIL, *supra* note 145, at 104-05.

150. R. GASTIL, *supra* note 145, at 106.

151. *Id.* at 107.

accounted for forty-five percent of the Nation's homicides.¹⁵² Between 1981 and 1982 fifteen southern states were in the top twenty-three for per capita murder rates.¹⁵³

In addition to its higher rate of homicides, scholars generally concede that the South is more lawless than the rest of the Nation. "The South has a long-standing reputation for violence and criminal disorder."¹⁵⁴ A recent book on nineteenth century southern crime concludes that "[c]rime and punishment, as much as anything, measure the continuity of the South with the past: the region still leads the nation in homicide and assault rates, still holds the greatest number of men on death row, and still contains the largest number of handguns."¹⁵⁵ This pattern of crime began in the colonial period. In early eighteenth century Virginia "there was more crime than in other colonies, even those with turbulent early modern cities and even more crime than in modern America."¹⁵⁶ In fact, according to Peter Hoffer, in the early eighteenth century, Richmond County had a higher homicide rate than New York City or the Colony of Massachusetts.¹⁵⁷

Eighteenth century Virginia was following a pattern of violence that developed early in the seventeenth century. Cannibalism, the wanton slaughter of Indians, and the incredibly severe punishments for whites who misbehaved are part of the legacy of Virginia's first twenty years.¹⁵⁸ Virginia's early laws were

152. F.B.I., U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 38-45 (1978). This statistic is based on an inclusion of Missouri as a southern state, which is listed as a west north central state in the UNIFORM CRIME REPORTS.

153. *Id.* at 44-49. The narrowing gap between homicides in the South and the rest of the Nation does not necessarily indicate that southern culture is becoming less violent or that northern culture is becoming more violent. Rather, the spread of violence to other parts of the Nation has been attributed to the migration of southerners. One writer has noted, "state homicide rates grade into one another in rough approximation to the extent to which Southerners have moved into mixed [North-South] states." R. GASTIL, *supra* note 145, at 116. Gastil notes that one reason for a decline in homicide rates may be that better medical care means victims who once would have died now live. *Id.* at 109. The increased accuracy and power of weapons, however, may undercut that theory. See Brown, *Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective*, 32 VAND. L. REV. 225, 226 (1979) (Several commentators "imply that at least with regard to violence there has been a southernization of America and that this trend has been basic to America's traditionally high homicide rate.").

154. Ely & Bodenhamer, *supra* note 58, at 17.

155. E. AYERS, *supra* note 56, at 276. Since the reimposition of the death penalty, virtually all executions have been in the South. As of August 1, 1985, nearly a third of all prisoners on death row were in two southern states—Florida (221 death row inmates) and Texas (211 death row inmates). Almost all of the 47 executions in the United States since 1977 have been in the South, with 13 executions in Florida and nine in Texas. N.Y. Times, Aug. 19, 1985, § 1, at 9, col. 1. According to the New York Times, "[s]outhern states have generally been more likely than others to impose the death penalty." *Id.*

Reverend Joseph B. Ingle, Director of the Southern Coalition on Jails, commented that, with the exception of six clemencies granted by Governor Bob Graham of Florida, "to the best of my knowledge, no other Southern governor has granted a single clemency in a capital case." Despite the six clemencies, Governor Graham "has also signed 108 death warrants, more than any governor in the history of the United States." July 5, 1985, Letter to the Editor from Reverend Joseph G. Ingle, *id.*, July 14, 1985, § 4, at E26, col. 4.

156. Hoffer, *Disorder and Deference: The Paradoxes of Criminal Justice in the Colonial Tidewater*, in AMBIVALENT LEGACY, *supra* note 4, at 187, 188.

157. *Id.* at 189-90.

158. See E. MORGAN, *supra* note 62, at 73-4.

harsh, even by seventeenth century standards. These laws fostered little compassion for human life. Under Dale's Laws the death penalty was available for almost any crime, including lying, sacrilege, blasphemy, taking food while weeding a garden, or killing chickens.¹⁵⁹ In 1624 Richard Barnes was sentenced to "have his arms broken, and his tongue bored through with a awl" for his "detracting speeches concerning the Governor" and similarly disrespectful statements about other leaders of the colony.¹⁶⁰ The court next ordered that he "pass through a guard of 40 men and [be] butted by every one of them, and att the head of the troope be kicked downe and footed out of the forte."¹⁶¹

Postcolonial criminal law may be one area in which clear doctrinal differences developed between the South and the rest of the Nation. "The South's historic subculture of violence and community tolerance of killing in personal disputes"¹⁶² made prosecutions of killers difficult. In *Grainger v. State*¹⁶³ John Catron, a justice of the Tennessee Supreme Court,¹⁶⁴ overturned the conviction of Grainger, who had killed an unarmed assailant. Catron asserted that if Grainger thought he was likely to be harmed severely by his assailant, then he acted in self-defense.¹⁶⁵ Grainger, described as a cowardly and timid man, had been chased to his cabin by Broach, a local bully. Grainger, with his back to the cabin wall, shot and killed Broach.¹⁶⁶ These facts suggest that the outcome in *Grainger* was reasonable.

Although the *Grainger* court may have reached a reasonable result, the *Grainger* precedent became "a gigantic loophole through which a guilty killer could be acquitted by pleading self-defense."¹⁶⁷ For the next half-century, hundreds of murderers in the South and Southwest escaped punishment by pleading self-defense in reliance on *Grainger*.¹⁶⁸ While the *Grainger* rule swept through the South, however, the New York Court of Appeals in *Shorter v. People*¹⁶⁹ explicitly rejected it. The New York court held that it was "not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury [could] say he had reasonable grounds for his belief."¹⁷⁰

159. *Id.* at 80. Dale's Laws refers to the martial law imposed by Sir Thomas Dale in colonial Virginia. See *infra* notes 214-16 and accompanying text.

160. MINUTES, *supra* note 74, at 14.

161. *Id.*

162. Brown, *supra* note 153, at 231.

163. 13 Tenn. 377, 5 Yer. 458 (1830).

164. Catron later served on the United States Supreme Court from 1837 to 1865.

165. Judge Catron stated:

If the jury had believed that Grainger was in danger of great bodily harm from Broach, or thought himself so, then the killing would have been in self-defense. But if he thought Broach intended to commit a battery upon him less violent, to prevent which he killed Broach, it was manslaughter.

Grainger, 13 Tenn. at 380, 5 Yer. at 462.

166. *Id.* at 378-79, 5 Yer. at 460-61.

167. Brown, *supra* note 153, at 232.

168. *Id.* at 237-38 (quoting *Ex Parte Wray*, 30 Miss. 673 (1856)).

169. 2 N.Y. 193 (1849).

170. *Id.* at 201.

An 1856 Mississippi case, *Ex parte Wray*,¹⁷¹ further separated northern and southern criminal law. Richard Maxwell Brown, in his essay on violence and southern legal history, asserts that *Wray* "blatantly expanded the common law doctrine of self-defense" and "in effect gave judicial approval to street-fight killing."¹⁷² Brown believes that *Wray* may have led to Mississippi's high homicide rate throughout the rest of the century.¹⁷³ The reasoning of the court in *Wray* was not followed in New York.¹⁷⁴ A careful analysis of nineteenth century American courts probably would demonstrate that *Grainger* and *Wray* were followed more in the South than in the North.

Another striking development in criminal law concerns the common-law doctrine of the "duty of retreat." Richard Maxwell Brown notes that "no state has exceeded Texas in its espousal of the stand-one's-ground doctrine" and in rejection of the duty to retreat doctrine.¹⁷⁵ In fact, the "stand-one's-ground" doctrine is sometimes called the "Texas rule" because only Texas has codified it.¹⁷⁶ Although the Model Penal Code explicitly rejects this doctrine,¹⁷⁷ a majority of states has adopted it.¹⁷⁸ With some irony Brown refers to the adoption of the "Texas rule" as "the Americanization of the common law of homicide."¹⁷⁹ Here then is at least one instance where southern doctrine has influenced national law.

In addition to differing crime rates and criminal law doctrine, the North and South differed in their enforcement of criminal laws and punishment of crime. Southern penal institutions differed from those in the North. The history of penal institutions is, for the nineteenth century, primarily a northern history.¹⁸⁰ The penitentiary movement began in the North with the Walnut Street prison in Philadelphia in 1790.¹⁸¹ This first wave of prison building was followed by a second, more dramatic wave led by New York and Pennsylvania.¹⁸² Much of the South followed their lead.¹⁸³

171. 30 Miss. 673 (1856).

172. Brown, *supra* note 153, at 233.

173. *Id.*

174. See *supra* note 169 and accompanying text.

175. Brown, *supra* note 153, at 246.

176. *Id.*

177. MODEL PENAL CODE § 3.04(2)(b)(ii) (Proposed Official Draft 1962) ("The use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . .").

178. *United States v. Peterson*, 483 F.2d 1222, 1235 (D.C. Cir.) (indicating that in "a majority of American jurisdictions, contrarily to the common law rule, one may stand his ground and use deadly force whenever it seems reasonably necessary to save himself."), *cert. denied*, 414 U.S. 1007 (1973). For examples of northern adoption of the "Texas rule," see *People v. Williams*, 56 Ill. App. 2d 159, 205 S.E.2d 749 (1965).

179. Brown, *supra* note 153, at 244.

180. E. AYERS, *supra* note 56, at 34-35.

181. *Id.* at 37-38; B. MCKELVEY, AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915, at 6-7 (1936).

182. E. AYERS, *supra* note 56, at 34.

183. *Id.* at 34-35. "In the 1820s New York and Pennsylvania began a movement that soon spread through the Northeast, and then over the next decade to many midwestern states." D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 79 (1971). The centerpieces of this movement were the massive penitentiaries at Cherry Hill,

The nineteenth century North, concerned about reforming criminals and protecting society, experienced a vibrant prison reform movement beginning in the 1830s.¹⁸⁴ The South, however, "from a penological point of view never really belonged to the Union."¹⁸⁵ As Edward Ayers has noted, the ante-bellum South never truly accepted penitentiaries and prisons, even though many southern states built them. Southern opposition to the system was strong, and in some states, like North Carolina, South Carolina, and Florida, no penitentiaries were built before the Civil War.¹⁸⁶ The North was willing to fund prisons, reformatories, special institutions for minors, and parole boards. The South, by contrast, initially was unwilling to spend money on prisons and reform, but the potential value of prison labor ultimately proved irresistible. Indeed, "[s]ickened at being forced to spend money on convicted felons, Virginia, Georgia, and Tennessee toyed with the idea of leasing their penitentiaries to businessmen in the late 1850s."¹⁸⁷ Although profits were certainly an incentive for the North's experimentation with prison labor, the main purpose was to reform prisoners.¹⁸⁸

In the ante-bellum period the use of prison labor in the South for manufacturing, agriculture, and mining led to the development and persistence of the chain gang, the prison farm, the convict lease system, and prison labor. Edward Ayers points out that "[t]he evolution of the convict lease system traces the contours of the evolving Southern economy in general."¹⁸⁹ Thus, the lease system connects southern criminal justice with the emergence of the New South economy. Although the South may have been hostile to corporations,¹⁹⁰ the penal system aided investors who sought cheap and certain labor.¹⁹¹

Pennsylvania, and Auburn, New York, and the Sing Sing prison outside New York City. These giant penitentiaries and the experiments in penology and reformation through incarceration attracted world-wide attention. B. MCKELVEY, *supra* note 181, at 16-17. David Rothman observes:

Tourists with no special interest in penology made sure to visit the institutions. Harriet Martineau, Frederick Marryat, and Basil Hall would no more have omitted this stop from their itinerary than they would have a southern plantation, a Lowell textile mill, or a frontier town. By the 1830s, the American penitentiary had become world famous.

D. ROTHMAN, *supra*, at 81. Another indication of the importance of these institutions is that Massachusetts' prison admission fee of \$.25 (about a quarter of a day's pay for a laborer) generated more than \$1,500 a year for the prison. M. HINDUS, *supra* note 37, at 169, 170 n.24.

184. See B. MCKELVEY, *supra* note 181, at 16-21; D. ROTHMAN, *supra* note 183, at 81-82. The only southern resident to participate in the debate over prison reform was Francis Lieber, a German refugee on the faculty of the University of South Carolina. Lieber, an internationally respected legal scholar and penologist, also led the fight in South Carolina to create a penitentiary system to replace the local jails. Lieber's liberalism and antislavery sympathies probably made his support for a penitentiary system in South Carolina counterproductive. "The association of reform with abolitionism and Unionism" was "blamed for South Carolina's recalcitrance" in the prison reform issue. M. HINDUS, *supra* note 37, at 216. In the 1850s Lieber was forced to leave South Carolina because his views, especially those concerning slavery, were no longer tolerated at the University of South Carolina.

185. B. MCKELVEY, *supra* note 181, at 172.

186. E. AYERS, *supra* note 56, at 34-72.

187. *Id.* at 67.

188. M. HINDUS, *supra* note 37, at 165, 170.

189. E. AYERS, *supra* note 56, at 191.

190. See *supra* note 58.

191. The "lease system became a sort of mutual aid society of the new breed of capitalists and politicians of the white Democratic regimes of the New South" because officeholders were also the employers of convict labor. E. AYERS, *supra* note 56, at 195.

In 1879 E.C. Wines characterized the convict lease system—the practice of leasing prisoners to industrialists at a profit—in Georgia as “the destruction of the penitentiary system of imprisonment.”¹⁹² The penitentiary system “produces, or aims to produce, *penitence*,—sorrow for past offences, and an amended life in the future.”¹⁹³ This goal, however, could not be achieved in Georgia, where about twelve hundred prisoners were leased to companies that were free to treat prisoners as they wished.¹⁹⁴ Georgia collected about twenty-five dollars a year for each leased prisoner.¹⁹⁵ Florida had the “same lease system . . . as in Georgia,”¹⁹⁶ but it collected \$100 per year for each leased convict.¹⁹⁷ Similar penal conditions existed in the rest of the Deep South.¹⁹⁸ In Texas, Wines found that “the agencies of [prison] discipline [were] labor, the dungeon, the lash, and the stocks”¹⁹⁹ Conditions changed little in the first half of the twentieth century when southern states maintained large prison farms and some engaged in manufacturing and mining operations with convict labor.²⁰⁰

The North differed substantially from the South in its treatment of convicted criminals. Prison labor in Massachusetts was designed to reform the criminal, although it sometimes profited the state as well.²⁰¹ Prison labor and corporal punishment disappeared from Massachusetts by the Civil War.²⁰² As late as 1890, however, stocks and whipping posts could be found in southern jails. Furthermore, the chain gang, with its whips, dogs, guards, and chains, continued beyond the mid-twentieth century. The conclusions of Blake McKelvey’s pioneering study of a half century ago remain unchallenged.

[The South’s] halting developments looking toward a penitentiary system had been cut short by the Civil War, and the turmoil of reconstruction created social and economic problems and standards of cruelty that have since continued to vilify the penal practices of the South. While the northern prisoner may have grown pale and anemic gazing through the bars in the pale dusk of towering cell blocks, his southern brother dragged his chains through long years of hard labor, driven by brutal physical torture, oftentimes to his grave. A half-century was not sufficient to efface this institutional estrangement.²⁰³

Northerners thought, or at least wanted to believe, that their prisons could reform inmates. The South, however, imprisoned criminals to punish them and remove them from society. This difference may explain why the South seems to have used the pardon more frequently than the North. Pardons in the South

192. E.C. WINES, *THE STATE OF PRISONS AND OF CHILD-SAVING INSTITUTIONS IN THE CIVILIZED WORLD* 191 (1880).

193. *Id.*

194. *Id.* at 192.

195. *Id.*

196. *Id.* at 194.

197. *Id.* at 195.

198. *Id.* at 195-213.

199. *Id.* at 189.

200. F. HAYNES, *THE AMERICAN PRISON SYSTEM* 177-206 (1939).

201. See, e.g., M. HINDUS, *supra* note 37, at 164.

202. See *id.* at 173 (discussion of abolition of corporal punishment).

203. B. MCKELVEY, *supra* note 181, at 172.

were based on mercy, whereas parole in the North assumed reformation. Robert Ireland argues that Kentucky governors "became a court of last resort."²⁰⁴ Edward Ayers finds that governors were "besieged by petitions for pardon,"²⁰⁵ and apparently many were granted. Requests for pardons were also a problem for governors in the ante-bellum North, but the results were different. Rather than granting pardons wholesale as some southern states did, northern states experimented with various kinds of parole that led to the indeterminate sentence. Unlike the South, where pardon was strictly a political action, the North developed an administrative process for pardon and parole.²⁰⁶ The North was able to adopt pardon and parole earlier than the South in part because the North had no financial incentive to keep convicts incarcerated. Indeed, the incentive in the North was to reform prisoners and parole them. By the early twentieth century northern states were willing to spend resources on parole officers, boards of pardon, and other mechanisms to reward good behavior through early release.²⁰⁷ With chain gangs building roads, prison laborers supplying the state with coal and furniture, prison farms supplying food to some state institutions, and the prison lease system providing cash revenues, southern states were less interested in the early release of prisoners.

After World War II most of the South abandoned the chain gang and the prison lease. Prison conditions, however, did not improve markedly. In a number of recent cases, federal courts have concluded that prison conditions in Arkansas,²⁰⁸ Alabama,²⁰⁹ Florida,²¹⁰ and Texas²¹¹ violated the constitutional prohibition against cruel and unusual punishment. Alabama refused to comply with the orders of the federal court, and that state's prison system was put into receivership.²¹²

Prisons, penitentiaries, parole boards, and special courts for children are not the only institutions that a legal system creates. The other kinds of legal institutions, both formal and informal, that developed in the South also deserve examination. A study of southern legal institutions and culture suggests other areas for research and exploration in the search for a southern legal history.

C. *Southern Legal Institutions and Legal Culture*

The South traditionally has had fewer formal institutions than the rest of

204. Ireland, *Law and Disorder in Nineteenth Century Kentucky*, 32 VAND. L. REV. 281, 295 (1979).

205. E. AYERS, *supra* note 56, at 63.

206. See, e.g., An Act in Relation to Pardons, 1849 N.Y. Laws 450; Chute, *The Development of Probation in the United States*, in PROBATION AND CRIMINAL JUSTICE 225-49 (S. Glueck ed. 1938).

207. F. HAYNES, *supra* note 200, at 335-65.

208. *Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194, 206 (8th Cir. 1974).

209. *Pugh v. Locke*, 406 F. Supp. 318, 328 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977).

210. *Miller v. Corson*, 563 F.2d 741, 748 (5th Cir. 1977).

211. See *Ruiz v. Estelle*, 679 F.2d 1115, *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (discussing cruel and unusual punishment); see also *Smith v. Sullivan*, 611 F.2d 1039 (5th Cir. 1980) (attacking conditions in El Paso jails).

212. *Newman v. Alabama*, 466 F. Supp. 628, 639 (M.D. Ala. 1979); see also *Henry v. Van Cleve*, 469 F.2d 687 (5th Cir. 1972) (attacking racial discrimination in Alabama prisons).

the Nation. While southerners may be noted for their formalities, the South has not been noted for its formalism. The South's lack of formalism affected its legal history in two ways. First, it led to the existence of fewer and weaker legal institutions than in the North;²¹³ second, it led to a legal culture that was less formal and less scholarly than that of the North.

The colonial South's development differed from that of New England, where formalism and legalism were more important and where other institutions and factors—churches, an emerging school system, close family ties, greater urbanization or at least shorter distances between farms and communities—led to social control. The lack of institutions²¹⁴ in the early South dictated that force, economic power, and deference govern. "Dale's Laws"²¹⁵ were necessary for Virginia's governance precisely because the colony was ungovernable except by martial law, which Sir Thomas Dale imposed.²¹⁶

Because there were so few institutions in the colonial South, the institutions that did develop became more important than their counterparts in other regions. The significance of the colonial South's county court system resulted from the absence of competing institutions. In colonial North Carolina the most important division of government was the county, and the "pivotal factor of the county administration . . . was the county court."²¹⁷ In colonial Virginia "there were few institutions that could maintain order and harmony in society";²¹⁸ thus, the colony's county courts may have been more important than similar institutions in the North because they could exert enough force to maintain order. The order established by the courts, however, was not maintained by "the rule of law" or by a community-wide acceptance of legal institutions. Rather, the power of the county courts rested on the importance of the men who ran them. As Peter Hoffer has noted, "the personnel of the county court bench gave local justice legitimacy and continuity."²¹⁹ Early Virginia developed a legal system that "depended upon the personal authority of the justices"; therefore, "the elevation of the influential planters to the local bench was sensible and expedient."²²⁰ North Carolina's magistrates were chosen in much the same way.²²¹ Indeed, Virginia set a pattern for justice and court administration that was followed throughout the South.²²²

The politics of the county courthouse—common to the South of the nineteenth and early twentieth centuries—have their roots in the seventeenth and eighteenth centuries. According to A.G. Roeber, "[b]etween the Restoration of

213. See P. WAGER, *COUNTY GOVERNMENT ACROSS THE NATION* 344-54 (1950).

214. See W. GUESS, *COUNTY GOVERNMENT IN COLONIAL NORTH CAROLINA* 14-16 (1911).

215. E. MORGAN, *supra* note 62, at 72-74; Konig, *Dale's Laws*, *supra* note 63.

216. The authority of a nobleman such as Dale was necessary to make the colonists work and survive. Konig, *Dale's Laws*, *supra* note 63.

217. W. GUESS, *supra* note 214, at 18.

218. Hoffer, *supra* note 156, at 197.

219. Hoffer, *Introduction to CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA* xviii (P. Hoffer & W. Scott eds. 1984).

220. *Id.*

221. See W. GUESS, *supra* note 214, at 23-24.

222. See P. WAGER, *supra* note 213, at 344.

the Stuart monarchy and the American Revolution, the Old Dominion developed a self-perpetuating county magistracy that dominated every aspect of the province's life through the structural mechanism of the county court."²²³ The development of strong county courts in colonial Virginia apparently was replicated by Kentucky in the nineteenth century. Robert Ireland has concluded that in ante-bellum Kentucky "[t]he county courts affected the people . . . more profoundly than any other governmental institution."²²⁴

The importance of local courts and local justice reinforced the tradition of localism that developed as part of the South's legal history. Localism also emerged because of the structure of southern slave and plantation society. Planters did not want to be bothered by institutions or centralized authorities. Because the planters were also the judges, the courts of the early South developed into unusually local institutions. Furthermore, the strictly limited jurisdiction of the more centralized courts in colonial Virginia allowed these local planters to administer justice as they saw fit. "In theory, the local courts were subordinate to the central courts of the colony,"²²⁵ but in practice the local courts did as they pleased, often controlling the litigation that would reach the centralized courts in Williamsburg.²²⁶

Southern colonial courts gained additional power because they often functioned as administrative and legislative bodies. The courts, acting as quasi-legislative bodies, helped create slavery through the sentencing of black indentured servants to lifetime servitude.²²⁷ This colonial heritage continued into the nineteenth and twentieth centuries. In nineteenth century Kentucky, for example, "the business of the county courts was substantial, encompassing executive, legislative, and judicial functions."²²⁸ The Kentucky county courts in that period levied taxes and oversaw the maintenance of roads and bridges.²²⁹ Although northern jurisdictions developed institutions and boards to provide for indi-

223. A. ROEBER, *supra* note 63, at xv.

224. R. IRELAND, *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* 171 (1972).

225. Hoffer, *supra* note 219, at xvii.

226. *Id.* at xviii.

227. See *supra* notes 74-78 and accompanying text. In the colonial South "the county government, in the hands of the justices of the peace, monopolized local government." J. FERRELL, *COUNTY GOVERNMENT IN NORTH CAROLINA* 3 (1963).

228. R. IRELAND, *supra* note 224, at 18. The Missouri Constitution of 1875 empowered Missouri county judges to "transact all county and such business as may be prescribed by law." MO. CONST. of 1875, art. VI, § 36. In North Carolina, the courts were described as follows:

[Until 1968, the] work of the Court of Pleas and Quarter Sessions was dual in nature. Although called a court—and it did perform judicial functions—it also had administrative duties. Thus, the justices were responsible for assessing and levying taxes; and they were charged with establishing and maintaining roads, bridges, and quarries; they granted licenses to taverns and controlled the prices charged for food; and they were responsible for the erection and control of mills. Through the powers of appointment . . . they supervised the work of the law enforcement officers, the administrative officers of the court, the surveyor, and the wardens of the poor. Taxes were collected by the sheriff [who was appointed by the court].

J. FERRELL, *supra* note 227, at 4. The Court of Pleas and Quarter Sessions was made up of justices of the peace appointed in each county. *Id.*

229. J. FERRELL, *supra* note 227, at 35-61.

gents,²³⁰ southern jurisdictions more often relied on the county courts to oversee the feeding and clothing of the poor.²³¹ Thus, in the ante-bellum period the job of "judge" was more than simply a judicial one. To date, remnants of this system survive in Kentucky,²³² and some southern county courts continue to function as county legislatures and county boards.²³³

The heritage of the colonial courts also affected the nature of the southern legal profession. Although lawyers have always been unpopular in Anglo-American culture,²³⁴ "the practice of law has been regarded as an attractive profession throughout the history of the South."²³⁵ Lawyers in the eighteenth century South apparently were respected more than their counterparts in New York or New England.²³⁶ The legal profession also may have been more attractive to young men on the rise in the South than in the North. In the colonial North divinity and commerce provided options for many bright and talented young men. For Southerners, these options were either less available or less attractive.

The attractiveness of the bar may explain why the South initially led the nation in two critical areas of legal culture: education and scholarship.²³⁷ The

230. See D. ROTHMAN, *supra* note 183, at 155-205.

231. See, e.g., R. IRELAND, *supra* note 224, at 24 ("[M]ost courts appear simply to have assigned to each poor person a responsible citizen of the community through whom funds were channeled.").

232. *Id.* at 174-75.

233. Harry Truman's career illustrates the many-faceted nature of county judges in the South. As presiding judge of the Jackson County Court, Truman became famous, not for his judicial decisions, but for his honest administration of public works projects. See A. STEINBERG, *THE MAN FROM MISSOURI: THE LIFE AND TIMES OF HARRY S. TRUMAN* 66-109 (1962). "Several states, mostly in the South, retain the word 'court' in the title [of the county's governing body] even though the body now possesses few, if any, of its historic functions as a court." P. WAGER, *supra* note 213, at 11.

234. Shakespeare's suggestion that all lawyers be killed, Henry the Sixth, Part II, Act IV, scene 2, line 70 ("But first thing we do, let's kill all the lawyers."), is just one of his many statements attacking lawyers. Shakespeare's popularity suggests that he appealed to the sentiments of the sixteenth century. Daniel Boorstin correctly observed that the "ancient English prejudice against lawyers secured new strength in America" where "distrust of lawyers became an institution." D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 197 (1958). Most of the seventeenth century American colonies prohibited the practice of law. See generally 1 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 27-29, 65-80 (1965) (discussing colonial attitudes towards lawyers and the regulation of legal practice by colonial legislatures). As Lawrence Friedman notes, "[i]f lawyers were an evil, they were . . . a necessary evil"; by the end of the seventeenth century they were allowed to practice law in most places. L. FRIEDMAN, *supra* note 37, at 83.

235. Ely & Bodenhamer, *supra* note 58, at 15.

236. The comments of John Adams, before he became a lawyer, underscore the latent hostility to lawyers among the descendants of Puritans. Four months before he began his clerkship, John Adams wrote to a classmate at Harvard:

"Let us look upon a Lawyer. . . . In the beginning of Life we see him, fumbling and raking amidst the rubbish of Writs, indigments, Pleas, ejectments, enfiefd, illaterbration and 1000 other lignum Vitae words that have neither harmony nor meaning. When he gets into Business he often foments more quarrells than he composes, and enriches himself at the expense of impoverishing others more honest and deserving than himself. Besides the noise and bustle of Courts and the labour of inquiring into and pleading dry and difficult Cases, have very few Charms in my Eye."

1 *LEGAL PAPERS OF JOHN ADAMS* lii (K. Wroth & H. Zobel ed. 1965). Alexander Hamilton, always less verbose than Adams, expressed similar ambivalence about the morality of his chosen profession. In 1782 Hamilton wrote his friend Lafayette that he was "studying the art of fleecing my neighbours." 3 *THE PAPERS OF ALEXANDER HAMILTON* 192 (H. Syrett ed. 1962).

237. Southerners in the colonial period went to England for their legal training more often than

College of William and Mary appointed America's first law professor, George Wythe, in 1779. While "chairs in law at the colleges expanded rapidly" after the appointment of Wythe,²³⁸ the specific role of these law professors remains unclear. The one exception was at the University of Virginia, where "[l]aw teaching . . . was seen as an integral part of the undergraduate curriculum, designed to form the statesman, legislator, and judge no doubt of the appropriate Whig outlook."²³⁹ "[T]he 'Southern tradition' of law teaching was, in general, broader than the north's."²⁴⁰

Upon his retirement from William and Mary, George Wythe opened a proprietary law school in Richmond, but its success was marginal. Scores of proprietary law schools opened and closed in the early national and ante-bellum periods, but none achieved the fame of the Litchfield Law School in Connecticut, which dominated legal education until it closed in 1833. Coincidentally, it was at this time that Harvard Law School emerged as an important force in legal education. Some of the proprietary law schools, such as Judge Battle's school at Chapel Hill, North Carolina, survived by affiliating with state universities.²⁴¹ Although Battle's school at Chapel Hill attracted students from throughout the South, it never dominated legal education in the region.²⁴² North Carolina appointed a law professor in the 1840s, "but it was not until the 1870s that law students were even regarded as on par with 'real' undergraduates and not until the 1890s that the law professor was paid by salary rather than through student fees."²⁴³ By the end of the ante-bellum period the only national law school was at Harvard; southern legal education no longer competed with that of the North.

As in legal education, the South initially led the nation in legal scholarship, with the publication of St. George Tucker's edition of Blackstone. This volume was not simply an American printing of Blackstone, but an edition of Blackstone to fit American circumstances, needs, and constitutional developments.²⁴⁴

Whether this early lead had a permanent effect on southern legal culture remains unclear. By midcentury the South had been surpassed by the North in legal education and legal scholarship. Although he exaggerated southern hostility to legal technicalities, Daniel J. Boorstin accurately noted the lack of southern legal scholarship:

During the very years when a technical American legal system with its paraphernalia of law schools, printed judicial precedents, and professional textbooks was developing in New England, Southerners came more and more to live by unwritten law. Legal technicalities, the letter of the law, and the items in small print, they said, were for pettifogging

northerners. L. FRIEDMAN, *supra* note 37, at 84. This practice may have led to a better educated and more scholarly bar in the South in the colonial period.

238. R. STEVENS, *supra* note 42, at 4.

239. *Id.* at 5.

240. *Id.*

241. 2 A. CHROUST, *supra* note 234, at 215.

242. *Id.* at 209.

243. R. STEVENS, *supra* note 42, at 78.

244. See *supra* note 13 and accompanying text.

Yankees.²⁴⁵

In short, the striking thing about southern legal culture in the nineteenth century is how little of it there was.

Southern legal scholarship lagged behind the North throughout the nineteenth century. The region's best legal scholar, Francis Lieber, was a German refugee who was forced to leave South Carolina because of his antislavery convictions.²⁴⁶ Other legal scholars may have found little support for their work. Thomas R.R. Cobb, for example, felt it necessary to publish his treatise on slave law in Philadelphia as well as Savannah.²⁴⁷ Cobb merely followed the lead of St. George Tucker, who had published his American edition of *Blackstone's Commentaries* in Philadelphia.²⁴⁸ Also indicative of the corrosive effect of slavery on southern legal scholarship is the fact that Tucker published his proposal for the gradual abolition of slavery in the North.²⁴⁹ By midcentury there were few if any treatises produced in the South; the cutting edge of doctrinal change and intellectual curiosity was in the North.²⁵⁰ Thus, northern legal culture became dynamic while legal culture in the South stagnated. Southerners went north to study law at Litchfield²⁵¹ and Harvard, but northerners did not go south.

Southern conservatism persisted in the ante-bellum period, and the failure to produce law teachers and scholars continued. The South's smaller pool of potential students may have discouraged the founding of law schools, but the lack of a strong tradition of education in the South also had its effects. Furthermore, the energies of leading southerners in the ante-bellum period were directed to politics and the defense of slavery. Law teaching was not a high priority for the leading legal minds of the South. The fate of the Lumpkin Law School in Georgia is illustrative. The founder of the Lumpkin Law School in Georgia, Joseph P. Lumpkin, was a former chief justice of the Georgia Supreme Court. The school opened its doors in October 1859. A key to the school's success was Thomas R.R. Cobb, Lumpkin's son-in-law, the reporter for the Georgia Supreme Court and one of the South's pre-eminent legal theorists. In

245. D. BOORSTIN, *supra* note 113, at 199.

246. See *supra* note 184. In the period before 1840 a number of other books dealing directly with southern law were published in the North. They included J. GRIMKÉ, *THE SOUTH CAROLINA JUSTICE OF THE PEACE* (Philadelphia 2d ed. 1796), J. LOMOX, *DIGEST OF THE LAWS OF REAL PROPERTY IN VIRGINIA* (Philadelphia 1839) (three volume work), and W. SCHLEY, *DIGEST OF ENGLISH STATUTES IN FORCE IN THE STATE OF GEORGIA* (Philadelphia 1826).

247. T.R.R. COBB, *supra* note 115.

248. BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (S. Tucker ed. Philadelphia 1803).

249. S. TUCKER, A DISSERTATION ON SLAVERY WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA (Philadelphia 1796).

250. Jenni Parrish in her article, Parrish, *Law Books and Legal Publishing in America 1760-1840*, 72 L. LIBRARY J. 355 (1979), has compiled an exhaustive list of 565 law books published in the United States between 1760 and 1840. Of these 565 books, only 74 were published in the South.

251. Cf. R. STEVENS, *supra* note 42, at 3-4 (indicating Litchfield attracted students from throughout the United States). John C. Calhoun may have been Litchfield's most famous graduate. Students from all over the Union attended Litchfield, including 70 Georgians, 45 South Carolinians, and "a fair number" from Virginia, Kentucky, North Carolina, and Louisiana. 2 A. CHROUST, *supra* note 234, at 214. There is no indication that northern students attended southern proprietary law schools.

1860 Cobb wrote Georgia Congressman Alexander Stephens that "No office can draw me away from the 'Lumpkin Law School' until it becomes a 'fixed fact'."²⁵² Within a year, however, Cobb would join Stephens in forming the Confederacy. As Cobb's biographer notes: "Unfortunately, his dedication to the cause of disunion was stronger than" his dedication to the law school.²⁵³ Throughout 1860 and early 1861 Cobb neglected his teaching for secessionist politics. By April 1861 the Lumpkin Law School was defunct.²⁵⁴

The slower development of southern law schools persisted into the twentieth century. In one survey only six southern law schools ranked in the top forty, but sixteen ranked in the bottom forty.²⁵⁵ In addition, legal education is dominated by professors who were trained at northern law schools.²⁵⁶

The underdevelopment of law schools in the South may explain why southern judges were less educated than their mid-western counterparts.²⁵⁷ Southern conservatism helps explain why southern judges stayed in office longer than judges in other regions.²⁵⁸ In colonial North Carolina the royal governor "seems to have made his appointments [of county judges] from the prominent individuals of the county, particularly those who were active in the militia, the vestry and the local and provincial courts."²⁵⁹ Kermit Hall's study of the southern judiciary suggests that the personal and class nature of politics and law in the South continued into the twentieth century. "Southern politics and society combined to fashion a distinctive judicial culture. The values of that culture emphasized independence, prior education and training, provincialism, deference to authority, and respect for ties of blood and marriage."²⁶⁰ The judges of Hall's nineteenth century South were similar to the county judges of Peter Hoffer's eighteenth century South. In both periods judges were usually planters whose economic power and familial connections made them community leaders. Hall's analysis also may help to explain why little legal innovation came from the southern benches. "For better or worse the southern appellate judiciary was less the creature of a particular method of selection and more the image of the social order it served."²⁶¹

Mary K. Tachau's work on Kentucky's federal courts supports the conclusion that southern justice was often based on personalities, family ties, and prestige. The judges on the federal bench in Kentucky were "men whose families or whose own reputations were known personally to the presidents who appointed

252. W. McCASH, *supra* note 35, at 129.

253. *Id.*

254. *Id.* The school was later resurrected as the University of Georgia School of Law.

255. J. GORMAN, *THE GORMAN REPORT: A RATING OF GRADUATE AND PROFESSIONAL PROGRAMS IN AMERICAN AND INTERNATIONAL UNIVERSITIES* 71-75 (1973).

256. See R. STEVENS, *supra* note 42, at 287 n.83.

257. See Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920*, in *AMBIVALENT LEGACY*, *supra* note 4, at 250.

258. *Id.* at 242.

259. P. MCCAIN, *THE COUNTY COURT IN NORTH CAROLINA BEFORE 1750*, at 24 (1954).

260. K. HALL, *supra* note 5, at 251.

261. *Id.* at 252.

them.”²⁶² The presidents understood that only men from the right kind of families could become leaders on the bench, especially in a state that treated the federal courts with unusual hostility.²⁶³ Tachau credits Judge Harry Innes with making the system work because of his prestige and personality. But family ties helped. The appointment of Thomas Todd of Kentucky to the United States Supreme Court made the circuit run even better because “Todd was respected and popular in Kentucky” and, equally as important, he “was a younger cousin of Judge Innes and had been his student and protégé.”²⁶⁴

A social and legal system that depended on family ties and personalities helped define legal culture in the South. Moreover, social and legal order itself thrived on localism. Southern localism sometimes emerged as hostility toward the federal government, the ultimate outcome of which was secession. When this constitutional theory was demolished by the inexorable arguments of Generals Grant and Sherman,²⁶⁵ it reemerged as a less militaristic, but no less militant, theory of states’ rights. Southern arguments for states’ rights and localism have helped shape American constitutional law, despite the fact that these theories have rarely persuaded the United States Supreme Court.²⁶⁶

Southern localism has not been directed at the federal government alone. It also has produced xenophobia toward other states and their citizens. The antebellum crisis led southern jurists to denounce northern legislatures, courts, and citizens. In *Mitchell v. Wells*²⁶⁷ the Mississippi High Court of Errors and Appeals refused to allow a black resident of Ohio to recover a legacy from her deceased former owner, who had voluntarily manumitted her in Ohio.²⁶⁸ The Mississippi court asserted that Ohio was “forgetful of her constitutional obligations to the whole race, and afflicted with a *negro-mania*, which inclines her to *descend*, rather than elevate herself in the scale of humanity” because of Ohio’s willingness to allow the emancipation of slaves within the state.²⁶⁹ Hostility toward other states continued after the Civil War. John V. Orth’s essay on the Virginia state debt indicates the lengths to which one state was willing to go to avoid paying its obligations.²⁷⁰ Southern localism also produced intra-south disputes. For example, in 1847 a Georgia legislator opposed a proposal to build a railroad from central Georgia to Charleston, South Carolina, declaring that he “hoped to live long enough to see an impassable gulf or Chinese Wall between Georgia and South Carolina, that we may be forever separated from her arro-

262. M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816*, at 15-16 (1978).

263. The main cause of the hostility was the use of federal courts to enforce federal taxes on whiskey. *Id.* at 23-25.

264. *Id.* at 27.

265. See H. HYMAN & W. WIECEK, *supra* note 27, at 203-78; W. McFEELY, *GRANT: A BIOGRAPHY* (1980).

266. Two cases in which the Supreme Court was not persuaded by states’ rights arguments are *Cooper v. Aaron*, 358 U.S. 1 (1958), and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

267. 37 Miss. 235 (1859).

268. Nancy Wells was the daughter as well as the slave of her master. *Id.* at 236-37.

269. *Id.* at 262-63 (emphasis added).

270. Orth, *The Virginia State Debt and the Judicial Power of the United States, 1870-1920*, in *AMBIVALENT LEGACY*, *supra* note 4, at 106.

gant meddlers [sic]."²⁷¹

Most of all, the localism of southern legal history perpetuated the fundamental institutions of the South: slavery and racial discrimination. Localism reflected a belief that no one—not the King in the colonial period, not the abolitionists in the ante-bellum period, and not the federal government after Reconstruction—should interfere with the institutions of the South. Southern legal institutions, like so much else in the region, were geared to defend the “cornerstone” of the society—slavery and the subsequent subordination of blacks.²⁷²

V. TOWARDS A SOUTHERN LEGAL HISTORY

Crime, violence, prisons, local courts, legal education, institutional resistance to change, laws concerning divorce and child custody, and the nature of the southern bench are all fruitful avenues in the search for a distinctive southern legal history. Southern judges and lawyers need biographers. The relationship between legal doctrine in the South and in the North must be explored. Future investigations will show that certain areas of southern legal history mirrored developments in the North. Scholars, however, will find many areas of legal history that are distinctly southern. Because the law of a region reflects the culture of that region, scholars will find a distinctive southern legal history to the extent that the culture of the South has diverged from the rest of the nation.

The culture of professionalism may have fewer regional distinctions. Southern lawyers were perhaps more aware of national trends than other southerners. Some southern lawyers, especially in the twentieth century, may have felt greater kinship with lawyers of other regions than with laymen of their own region. In studying the legal profession, however, scholars must be aware of those distinctively southern issues that prevented lawyers, judges, and law makers in the South from parting company with their neighbors.

Most importantly scholars must be attuned to those areas of southern legal history in which the law and legal institutions were used to protect or deny equality. A study of the areas of law that do not involve equality and race may lead to a southern legal history that can be unified with that of the rest of the Nation. But when race is an issue—and in southern history it may be an issue when least expected—Americans may discover the emergence of a truly distinctive southern legal history. By understanding that legal heritage, lawyers, judges, legislators, scholars, and voters may be able to use the law to preserve and extend equality and to escape the burdens of the South's legal past.

271. Scheiber, *Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion*, 23 WM. & MARY L. REV. 625, 641 (1982).

272. At the Confederate Constitutional convention slavery was referred to as the “cornerstone” of the Confederacy. C. LEE, *THE CONFEDERATE CONSTITUTIONS* 110 (1963).