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The Forgotten Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law

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THE FORGOTTEN LEGAL WORLD OF THOMAS RUFFIN: THE POWER OF PRESENTISM IN THE HISTORY OF SLAVE LAW*

LAURA F. EDWARDS**

This Article argues that our current focus on the views of Thomas Ruffin and other legal elites obscures key elements of North Carolina's legal past, particularly in regard to slave law. Legal elites favored the protection of individual rights, the creation and maintenance of a coherent, identifiable body of state law, centralization of legal authority at the state level, and a system that applied those laws uniformly throughout the state. History proved a particularly powerful weapon in achieving those ends. By collecting documents, creating archives, and writing history, legal elites created a powerful narrative that emphasized the development of a coherent body of state law based in the protection of rights. While that narrative served their purposes, it did not describe North Carolina's legal past. In the period between the Revolution and the Civil War, the state level was only one element, and not always the most salient one, in North Carolina's legal system. Local areas retained authority over most public offenses and adjudicated them through the interests of the peace, a legal concept that sought to maintain community order as it was defined in specific areas and one that did not rely on conceptions of individual rights. Given that context, Ruffin's decisions represented a new legal direction that applied individual rights to matters formally governed by the concept of the peace. Individual rights, moreover, transformed the nature of slaves' inequality, making it impossible for slaves to

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** Laura F. Edwards is Professor of History at Duke University. The author would like to thank Eric Muller and Sally Greene for the invitation to present this paper in the symposium "The Perils of Public Homage: *State v. Mann* and Thomas Ruffin in History and Memory." The insights of other participants at the symposium sharpened the analysis. Thanks also go to Brandon Dhande and the members of the North Carolina Law Review editorial staff for their work in translating the disciplinary practices of a historian into law review format.

make claims on the state at all. As this Article argues, the acceptance of the legal elites' view has contributed to a misreading of the state's legal past with two important implications. By accepting the legal elites' paradigm of individual rights and ignoring the dynamics of localized law, we: (1) assume that slaves were only passive victims in law, and (2) limit our own critical vision, by focusing our attention so narrowly on rights, even though North Carolina's legal past indicates that rights did not always promote equality. To the contrary, Thomas Ruffin and other legal reformers in this period used rights to promote inequality.

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INTRODUCTION

When I conjure up an image of Thomas Ruffin, I see a white-haired jurist sitting in a throne-like chair, clad in heavy robes, pondering the future of North Carolina law, and producing decisions that would affect the legal status of everyone in the state. After years of researching North Carolina legal culture, I know this image is inaccurate. To be sure, Ruffin did ponder the future of North Carolina law, and not just in regard to cases that he heard on the appellate court. Throughout his career, he worked hard to organize the state's legal system and systematize state law, a project that other state leaders supported. These state leaders, many of whom were professionally trained lawyers, saw law in scientific terms, as an internally consistent set of universally applicable principles, based primarily in the protection of rights, particularly the protection of property rights. To realize this vision, they favored a clearly defined, authoritative body of state law, overseen by a strong appellate court staffed by trained professionals. Sitting at the apex of the state's judicial pyramid, the appellate court would decide legal points in decisions to be enforced by lower levels of the system, which fell out in orderly layers beneath, descending from district courts to individual magistrates in local neighborhoods, with each level

subordinate to the one above. These reform efforts, however, were not fully realized in the antebellum period; the institutional context in which Ruffin worked for most of his life did not allow him a platform from which to pronounce on state law. In a very literal sense, he did not sit robed on a throne-like chair. His decisions, moreover, did not define the legal rules that everyone else in the state had to follow. Nonetheless, the image of the robed Ruffin—and everything that it implies about law and the legal system in this period—has a persistence that I cannot shake because that vision of law has so profoundly shaped our perception of the past.¹

1. The analysis in this piece is informed by different strands of scholarship that address state formation and historical practice. It takes seriously Benedict Anderson's notion of the nation as an "imagined" community, in the sense that the concept of a nation and attachment to it need to be created. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* (1983). That creation, moreover, is facilitated by histories that take the nation as its subject. Those insights also apply to individual states within the United States, particularly in the post-Revolutionary period. The process of naturalizing the work of state building in North Carolina and South Carolina is also similar to that described by political theorist Etienne Balibar. See Etienne Balibar, *The Nation Form: History and Ideology*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 86, 86–106 (Etienne Balibar & Immanuel Wallerstein eds., 1991). As he argues, nations require a history that obscures the work that went into creating them by making them appear rooted in nature. *Id.* at 86. Although Balibar emphasizes ethnicity and race in this context, the larger point about historical narratives is that they make nations appear as inevitable formations that arise naturally from what may, in fact, have had nothing to do with their development. *Id.* at 96. This piece also relies on the work of James Vernon and others in nineteenth-century British political history who explain exactly how those processes of nation building were obscured. In particular, this scholarship suggests the importance of exploring the broader cultural work accomplished through the political process: those debates and conflicts did not just have immediate material effects; they also created powerful narratives that legitimated particular political formations and shaped how people understood what politics was. See, e.g., JAMES VERNON, *POLITICS AND THE PEOPLE: A STUDY IN ENGLISH POLITICAL CULTURE, c. 1815–1867*, at 295–330 (1993); RE-READING THE CONSTITUTION: NEW NARRATIVES IN THE POLITICAL HISTORY OF ENGLAND'S LONG NINETEENTH CENTURY 179–229 (James Vernon ed., 1996) [hereinafter RE-READING THE CONSTITUTION]. Historical narratives linked to nation building were also deeply gendered in ways that not only marginalized women but also particular subjects and methods associated with them. BONNIE G. SMITH, *THE GENDER OF HISTORY: MEN, WOMEN, AND HISTORICAL PRACTICE* 146–56 (1998). Those gendered structures are still evident in the dismissal of local history as "particular" rather than "general" and "representative," the realm of "amateurs" and "antiquarians" rather than "professionals." Scholarship in Latin American history that explores alternate visions of "the state" and "the nation" provides the final element in this analysis. See, e.g., FLORENCIA E. MALLON, *PEASANT AND NATION: THE MAKING OF POSTCOLONIAL MEXICO AND PERU* 247–75 (1995); *EVERYDAY FORMS OF STATE FORMATION: REVOLUTION AND THE NEGOTIATION OF RULE IN MODERN MEXICO* 3–23 (Gilbert M. Joseph & Daniel Nugent eds., 1994). Focusing primarily on peasants in the postcolonial period, this work shifts the perspective away from political differences within and between western nations. In so doing, this work establishes an important corrective, reminding scholars of the United

Both the image and its persistence speak volumes about Ruffin and North Carolina's legal history, but not about what they purport to represent. They tell us less about law in this period than they do about the success of Ruffin and his cohort of state leaders, mostly professionally trained lawyers, in capturing history and shaping what we now think we know about that time. In addition to Thomas Ruffin, this group of state elite included such men as James Iredell, Sr., Joseph Gales, John Haywood, William Gaston, Archibald Murphey, Paul Cameron, David Swain, and James Iredell, Jr.² What united them was an intellectual stance, bounded by basic assumptions about law and the legal system. Reformers as a group tended to support the creation of a clearly defined, stable body of state law, centered around the protection of property rights and enforced by a strong appellate court at the apex of the judicial pyramid. Looking to government institutions at the state level as the proper locus of power, they acted as if that were the case even when it was not.

What we remember about this group of state leaders—what I will call the state elite—is largely a result of sources that these men, their families, and their friends created and preserved. These men worked as diligently and enthusiastically to impose order on the state's history as they did to systematize the state's law. More than that, they saw a direct connection between law and history. In this regard, North Carolina leaders participated in projects such as compiling documentary sources and crafting historical narratives linked to the liberal project of nation building. The state elite used the past that they constructed to affirm their vision of law and government, a vision in which legal authority resided at the state level and state law was standardized so that rights were uniformly defined and applied. Their voices acquired resonance over time, as historians relied on their archive and followed their lead. It is difficult to overstate the importance of this archive, which forms the source base on which scholars of the period now rely. These materials, however, provide a very particular, carefully constructed perspective on the past. The danger lies in taking that view as the only one. In so doing, we allow Ruffin and his cohort to take up so much room that we end up

States and western Europe that the liberal state, in the forms that it took in those nations, was not the only available alternative.

2. This group was much larger for the group of lawyers, planters, and businessmen in Ruffin's circle. See GAIL WILLIAMS O'BRIEN, *THE LEGAL FRATERNITY AND THE MAKING OF A NEW SOUTH COMMUNITY, 1848–1882*, at 79–92 (1986) (describing the specific roles that members of the legal community played in shaping the history of early North Carolina).

duplicating their perspectives, even in our efforts to critique them. When we begin with the image of the robed Ruffin, we not only miss aspects of the past that the state elite rejected or sought to obscure, but also construe key aspects of the past, including slavery, on the state elite's terms.³

This Article is divided into three Parts. The first Part reconstructs the institutional context of law in North Carolina between the Revolution and the Civil War. In this period, the state level was only one element, and not always the most salient one, in North Carolina's legal system. Local areas retained authority over most public offenses and adjudicated them through the interests of the peace, a legal concept that sought to maintain community order as it was defined in specific areas. The logic of the peace was directly at odds with the goals of legal reformers, who favored the protection of individual rights, the creation and maintenance of a coherent, identifiable body of state law, the centralization of legal authority at the state level, and a system that applied those laws uniformly throughout the state.

The second Part explores the efforts of those legal reformers—mostly professionally trained lawyers who served in state office—to achieve those ends. History proved a particularly powerful weapon.

3. This analysis is based on my forthcoming book, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (forthcoming 2009) (on file with the North Carolina Law Review) [hereinafter EDWARDS, *THE PEOPLE AND THEIR PEACE*]. See generally Laura F. Edwards, *Enslaved Women and the Law: The Paradoxes of Subordination in the Post-Revolutionary Carolinas*, 26 *SLAVERY & ABOLITION* 305 (2005) [hereinafter Edwards, *Enslaved Women and the Law*] (examining the effects of *State v. Mann* and other cases on the legal status of female slaves); Laura F. Edwards, *Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South*, 112 *AM. HIST. REV.* 365, 368 n.6 (2007) [hereinafter Edwards, *Status Without Rights*] (examining the system of public law governed by concepts of “the peace,” not rights). This Article is based on legal records and a range of other sources from both the local and state levels, primarily 1787 to 1840, but also extending into the 1850s. Materials from the local level are from Orange, Granville, and Chowan Counties. The research includes extensive runs of court documents from those areas. Unlike sampling, which abstracts cases from context, this intensive approach reveals information that is essential to understanding the underlying conflicts and their resolutions. Such an approach also allows insight into the ways that people defined law, in practice, in the years following the Revolution. That perspective is particularly important, since so many areas of law were left to local discretion in this period. The research then extends outward to other counties to include divorce, apprenticeship, poor house, and church records. At the state level, the materials cover: statutes, appellate decisions, and various published legal sources; state government documents such as governors' correspondence, legislative committee reports, pardons, and petitions; newspapers; and the diaries and letter collections of various leaders in state law and politics. Although this Article generalizes from these materials, the analysis is rooted in this archival research.

By collecting documents, creating archives, and writing history, state legal reformers created a powerful counter-narrative that emphasized the development of a coherent body of state law based in the protection of rights. While that narrative served their purposes, it did not accurately describe North Carolina's legal past. Not only did these legal reformers inflate the importance of law at the state level, the area of the legal system they oversaw and favored, but they also created the false impression that individual rights have always governed all legal matters. Nonetheless, their views have provided the basic foundation for legal histories of the state, because they resonate with current understandings of how law and the legal system work. The historical artifacts they left actually reinforce presentism—the baggage filled with our current assumptions that we carry with us and that undercut our ability to understand the past.

The final Part considers the implications of the legal reformers' narratives for our own historical narratives, focusing particularly on slave law. Placed within a legal context that includes localized law, Ruffin's decisions take on new meaning. They appear as legal innovations that applied individual rights to criminal issues involving slaves, which had been matters governed by the peace. The application of individual rights fundamentally transformed the nature of slaves' legal marginality by turning masters' authority into a right and slaves' subordination into the absence of rights. Once the possession of individual rights became the standard for legal protection, slaves had no basis for making claims of any kind in state law.⁴ As a result, they appear as passive victims, without any substantive role in the state's legal history. Their exclusion in these cases, however, represents only part of a much more complicated legal history in which slaves did feature in law and the state's legal history as more than just passive victims without rights. In this sense, legal reformers' erasure of localized law has immediate ramifications, contributing to a historical narrative in which slaves and other North Carolinians appear on the margins. Legal reformers' narrative also limits our own critical vision by focusing our attention so narrowly on rights, even though North Carolina's legal past indicates that rights did not always promote equality. To the contrary, Thomas Ruffin and other legal reformers in this period used rights to promote inequality.

4. See *infra* text accompanying notes 124–33.

I. THE IMPORTANCE OF LOCALISM IN EARLY NORTH CAROLINA

To reconstruct Thomas Ruffin's legal world, we must first peel away the layers of historical narrative and interpretation that have accumulated over two centuries. At the end of the Revolution, it was impossible for any white-haired, robed man to ponder North Carolina law, because there was no identifiable body of state law and no single entity charged with overseeing it. During the Revolution, North Carolina lawmakers decentralized the most important functions of government, drawing equally on Revolutionary ideology, established elements of Anglo-American law, and undercurrents of local political unrest.⁵ In the early republic and for much of the antebellum period, those changes placed a great deal of government business in local legal venues—not only circuit courts, but also magistrates' hearings, inquests, and other ad hoc forums.⁶ As a result, what we now identify as the state level was largely dependent on these local jurisdictions, particularly in the period between 1787 and the 1830s. Statutes, for instance, often responded to individual and local concerns and often had limited effect beyond the specific issue or area.⁷ Similarly,

5. The trend embraced a unique blend of Revolutionary ideology, the Anglo-American legal tradition, and the politics of the 1760s Regulator Movement. *See generally* Lars C. Golumbic, *Who Shall Dictate the Law?: Political Wrangling Between 'Whig' Lawyers and Backcountry Farmers in Revolutionary Era North Carolina*, 73 N.C. HIST. REV. 56 (1996) (examining how the natural law perspectives and aspirations of Whig lawyers conflicted with the informal practices of backcountry judges and legislators in North Carolina); Walter F. Pratt, Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129 (1986) (describing the importance of judges Thomas Ruffin and William Gaston to the early Supreme Court of North Carolina); James P. Whittenburg, *Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation*, 34 WM. & MARY Q. 215 (1977) (explaining that the North Carolina Regulation was motivated by differing conceptions of law as well as by perceived economic and political inferiority).

6. *See* sources cited *supra* note 3.

7. The weakness of state government runs through much of the literature. For a general discussion emphasizing the lack of systematization at this level, see CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 3–22 (1981). For new work that emphasizes localism and, by implication, underscores the relative weakness of state government, see generally THE DEMOCRATIC EXPERIMENT (Meg Jacobs et al. eds., 2003); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 35–72 (2004); and WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1–17 (1996). South Carolina historians in particular have focused on the resulting dynamics of this institutional situation for that state, underscoring broader patterns that apply elsewhere. *See* LACY K. FORD, JR., *ORIGINS OF SOUTHERN RADICALISM: THE SOUTH CAROLINA UPCOUNTRY, 1800–1860*, at 99–214 (1988); RACHEL N. KLEIN, *UNIFICATION OF A SLAVE STATE: THE RISE OF THE PLANTER CLASS IN THE SOUTH CAROLINA BACKCOUNTRY, 1760–1808*, at 109–237 (1990).

appellate decisions resolved issues in particular cases without necessarily establishing an authoritative guide for other cases elsewhere in the state.⁸ Legislation and appellate decisions then accumulated piecemeal, full of inconsistencies and contradictions, without constituting a systematic body of state law.

In this system, local legal practice was not some quaint, folksy exception to a formalized, rational body of state law, as is commonly assumed. Local areas had jurisdiction over a wide range of business. The local system included the informal discussions and formal entreaties involved in passing local ordinances, requesting statutes applicable to specific areas, or obtaining pardons.⁹ It also included the grand jury presentments, trials, and other business conducted at circuit courts, which were held on regular schedules in regional towns and county seats.¹⁰ But those elements of the local system were only the most visible part of a system dominated by formal legal proceedings that took place in informal arenas. Magistrates' hearings, inquests, and other ad hoc legal forums occurred in places such as taverns, houses, and yards.¹¹ It was in all these informal, local legal arenas that southerners did the business of "keeping the peace," a well-established concept in Anglo-American law that referred to the institutional processes involved in maintaining social order. That order was expressed through the term "the peace," which represented the metaphorical public body, subordinating everyone (in varying ways) within a hierarchical system and emphasizing social order over individual rights.¹² Local decisions applied to specific issues in

8. For a discussion of the development of the jurisdiction of the court that came to be the appellate court in North Carolina, see William J. Adams, *Evolution of Law in North Carolina*, 2 N.C. L. REV. 133, 138-45 (1924); Golumbic, *supra* note 5, at 61-75; Atwell Campbell McIntosh, *The Jurisdiction of the North Carolina Supreme Court*, 5 N.C. L. REV. 5, 5-27 (1926); Pratt, Jr., *supra* note 5, at 133-42; Walter Parker Stacy, *Brief Review of the Supreme Court of North Carolina*, 4 N.C. L. REV. 115, 115-17 (1926); and George Stevenson, *Higher Court Records*, in NORTH CAROLINA RESEARCH: GENEALOGY AND LOCAL HISTORY 329, 329-44 (Helen F. M. Leary ed., 2d ed. 1996). For similar trends in other southern states, see KRAMER, *supra* note 7, at 158-64; F. THORNTON MILLER, *JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1829*, at 63-73 (1994); Donald Senese, *Building the Pyramid: The Growth and Development of the State Courts System in Antebellum South Carolina, 1800-1860*, 24 S.C. L. REV. 357, 357-62 (1972); and Christopher M. Curtis, *Jefferson's Chosen People: Legal and Political Conceptions of the Freehold in the Old Dominion from Revolution to Reform 56-93* (2002) (unpublished Ph.D. dissertation, Emory University) (on file with the North Carolina Law Review).

9. See sources cited *supra* note 3.

10. See sources cited *supra* note 3.

11. See sources cited *supra* note 3.

12. See EDWARDS, *THE PEOPLE AND THEIR PEACE*, *supra* note 3 (manuscript at 65). The dynamics of the local process are similar to those described in CYNTHIA HERRUP,

specific areas. The decision in a case of assault resolved *that* conflict instead of establishing or following precedent that applied to other assault cases. These decisions officially shared space with legislation and appellate decisions as central components of state law, because North Carolina government was relatively weak and delegated so much authority to local jurisdictions. North Carolina was not unique in this regard. Although historians have often associated “localism” with the South, this approach to law and government was not peculiarly “southern” at the time.¹³ As recent scholarship has emphasized, similar arrangements characterized both the theory and practice of law and government throughout the United States in the post-Revolutionary period.¹⁴

Not all areas of law were equally localized. The state elite experienced more success in systematizing and centralizing control over property law because of the history of this area of law. Property law, as developed in equity and common law, had been claimed by lawyers even before the Revolution.¹⁵ In colonial economies that looked outward to the Atlantic world, knowledge of property law was crucial to economic success. By the time of the Revolution, links to international markets resulted in the development of relatively sophisticated financial structures to assist in property exchange, capital formation, and the management of credit and debt.¹⁶ That was

THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND 193–206 (1987) (discussing the societal operation of the criminal law in the seventeenth, eighteenth, and nineteenth centuries). *See also* ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 87–89 (1989) (discussing how nineteenth-century courts handled breach of the peace cases in Philadelphia).

13. New trends in legal and political history have emphasized the importance of localism throughout the United States, suggesting that the South was not distinctive in this regard. *See* sources cited *supra* note 5. That scholarship dovetails with new work in southern history that emphasizes that southern states were not undeveloped compared to northern states—and therefore not uniquely local. *See* PETER BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH* 5–23 (1995); CHRISTOPHER WALDREP, *ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH, 1817–1880*, at 15–18 (1998).

14. *See* sources cited *supra* note 13.

15. For the pervasiveness of lawyers in the realm of property law—or civil law—in North Carolina, *see* generally Whittenburg, *supra* note 5. For the general point about the influence of lawyers in this area of law, *see* generally BRUCE MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987).

16. For a discussion of economic development in low country South Carolina, *see* generally PETER A. COCLANIS, *THE SHADOW OF A DREAM: ECONOMIC LIFE AND DEATH IN THE SOUTH CAROLINA LOW COUNTRY, 1670–1920* (1989).

true even in the North Carolina backcountry, which lagged behind coastal areas economically.¹⁷

The influence of professionalized law was pervasive enough that even ordinary economic transactions, such as the purchase of land, required the interposition of lawyers. Lawyers solidified their hold on property and commerce in the decades following the Revolution, given the unsettled state of the economy, the scarcity of cash and credit, and the uncertainty of land titles in North Carolina. The trend continued into the nineteenth century, largely because of the widespread use of notes, mortgages, and other instruments of debt as the primary means of economic exchange and capital formation. Over time, property law became even more professionalized, with standardized rules used by lawyers throughout the state.¹⁸ As such, it was more easily organized into a coherent body of law and centralized at the state level, because the legal practice had already moved in that direction. Indeed, the preponderance of property cases in circuit courts and the appellate level registered the relative inaccessibility of this area of law.

Local areas maintained authority over everything else—the broad, ambiguous area of public law, which included all crimes as well

17. Eastern North Carolina had a successful economy based in exports and international trade by the time of the Revolution, and growth continued for the next few decades. See Alice Barnwell Keith, *John Gray and Thomas Blount, Merchants, 1783–1800*, 25 N.C. HIST. REV. 194, 194–204 (1948); Whittenburg, *supra* note 5, at 224–28.

18. Civil suits constituted the great bulk of court business in most southern jurisdictions, including North Carolina. Edward Ayers estimates that there were about three or four civil cases for every criminal case in a typical southern court. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 32 (1984); see also ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 23 (2000) (discussing the large number of civil cases in southern courts involving the commercial law of slavery). Those patterns also characterized the courts in Granville County, Orange County, and Chowan County, as is evident from comparison of the record groups, Civil Action Papers, and Criminal Action Papers for the superior courts, on file in the North Carolina Office of Archives and History in Raleigh. See sources cited *supra* note 3. For Chowan County, for instance, there are 116 boxes of Civil Action Papers (including the related groups of Civil Actions Concerning Land and Civil Actions Concerning Timber) from 1730 to 1922 and thirty-eight boxes of Criminal Action Papers from 1720 to 1933. These records do not constitute a complete record of the superior courts' business, but they do give an accurate sense of general patterns. The importance of property law is also apparent in lawyers' practices, which are composed primarily of such matters. See William Gaston Papers (on file with the Southern Historical Collection ("SHC"), Wilson Library, The University of North Carolina at Chapel Hill) [hereinafter William Gaston Papers] (business related correspondence); Cameron Family Papers (on file with the SHC, Wilson Library, The University of North Carolina at Chapel Hill) (business related correspondence).

as a range of ill-defined offenses that disrupted the peace.¹⁹ This area of law was governed primarily by common law in its flexible, customary form, not its more formal variant. Magistrate's manuals, based in centuries-old English guides, were the primary legal reference, particularly for cases settled before they reached jury trials at circuit courts.²⁰ Neither statutes nor case law provided much direction, even for those inclined to look to these bodies for guidance, until the 1820s and 1830s. This area of law also remained less professionalized much longer than property law.²¹ Lawyers and judges who might have had formal training did not become involved in most public offenses, even serious felonies, until the final stages, when a case went to a jury trial at the circuit courts. Only a small fraction of these matters ever went to trial in circuit courts where lawyers worked.²²

19. See *infra* notes 67–68.

20. See generally JOHN HAYWOOD, *THE DUTY AND OFFICE OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, CONSTABLES, &C. ACCORDING TO THE LAWS OF THE STATE OF NORTH CAROLINA* (Raleigh, N.C., Boylan 1808) (providing the standard guide in North Carolina). Most states had such guides, usually published by private individuals and based in either MICHAEL DALTON, *THE COUNTRY JUSTICE* (London, Societie of Stationers 1622), or RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* (London, Strahan 1836). For discussion of the infrequency of minor criminal matters in circuit courts, where professionalized rules tended to dominate, see sources cited *supra* note 7 and *infra* note 21 and accompanying text.

21. Concerted efforts at the state level to clarify and regularize these areas of law were notably lacking until the 1820s and 1830s, largely because they were far less lucrative for lawyers and less important to state leaders, who were often lawyers as well. The books that lawyers used were short on detail in these areas. For books used in legal education, see Letter from Robert Williams to William Lenoir (July 30, 1799), in Lenoir Family Papers (on file with the SHC, Wilson Library, The University of North Carolina at Chapel Hill); Letter from William Rodman to William Gaston (July 6, 1830), in William Gaston Papers, *supra* note 18; Letter from John Bynum to William Gaston (July 9, 1834), in William Gaston Papers, *supra* note 18; and Letter from Tod R. Caldwell to Thomas Ruffin (Jan. 9, 1840), in 2 *THE PAPERS OF THOMAS RUFFIN 180–81* (J.G. de Roulhauc Hamilton ed., 1918). *Blackstone*, the fundamental text in post-Revolutionary legal education, had sections on crimes, but they lacked the specifics necessary to prosecute or adjudicate cases. Fines and punishments, when not established by statute, were left to the discretion of local courts and varied widely. The guidelines in *Blackstone* are representative of the lack of details in governing legal authorities read by aspiring lawyers. See generally 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1898) (on private wrongs); 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1898) (on public wrongs).

22. The generalizations about the local process are drawn from research in records on file with the North Carolina Office of Archives and History, Raleigh (Criminal Action Papers, Granville County (1790–1840); Criminal Actions Concerning Slaves and Free Persons of Color, Granville County (1800–1839); Superior Court Minutes, Granville County (1790–1840); Criminal Action Papers, Orange County (1787–1808); Superior Court Minutes, Orange County (1787–1840)). For further explication of the process, see generally Edwards, *Status Without Rights*, *supra* note 3; and Laura Edwards, *Law*,

In principle and practice, the localized legal system based the definition and administration of law in the protection of the "peace."²³ Localized law did not recognize distinctions between "law," "politics," "administration," or "custom" that later became important within governmental institutions, particularly at the state level. This system emphasized process over principle: each jurisdiction followed similar procedures in prosecuting cases but produced inconsistent rulings because they used legal authorities and precedents eclectically to restore order, as they defined it, in their own communities, aimed at restoring the peace. The peace represented a hierarchical order, which forced everyone into its patriarchal embrace and raised its collective interests over those of any given individual. The content of those collective interests remained purposefully vague because the peace was both governed and constituted by relationships and practices that varied from locality to locality. North Carolinians regularly called on the authority of the peace to resolve what they regarded as serious problems, drawing law into the entire range of personal conflicts and community disorders: wandering livestock and quarrelsome neighbors shared legal quarters with gamblers, drinkers, wife beaters, and even planters who committed offenses against their slaves.²⁴

All North Carolinians participated in the identification of offenses, the resolution of conflicts, and the definition of law. Even domestic dependents—wives, children, servants, and slaves, legally subordinated to their household heads—as well as others whose race, class, and gender marked them as subordinates—free blacks, unmarried free women, and poor whites—had direct access to localized law.²⁵ These groups also had some influence over the law, albeit through the relationships that subordinated them within families and communities, without any recognition of their individual rights. In theory, their subordination entailed connections to localized law: dependents accessed law through their specified places within the peace. Similarly, white patriarchs exercised domestic authority at the behest of the peace, not in their own right. When their actions disturbed the peace, through either their inadequate or their excessive use of authority, they experienced censure. Keeping

Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South, 65 J. S. HIST. 733, 737 n.7 (1999) [hereinafter Edwards, *Domestic Violence*].

23. See *supra* note 12 and accompanying text.

24. See EDWARDS, *THE PEOPLE AND THEIR PEACE*, *supra* note 3 (manuscript at 90–98, 102–11).

25. See *id.* (manuscript at 100–32).

the peace meant keeping everyone—from the lowest to the highest—in their appropriate places.²⁶

These local courts charged with keeping the peace focused on the resolution of highly personal, idiosyncratic disputes. Legal judgments rested on the situated knowledge of observers in local communities in which an individual's "credit," or reputation, was established through family and neighborly ties and was continually assessed through gossip networks. Local officials and juries judged the reliability of testimony based on an individual's credit as well as on impersonal, prescriptive markers of status, such as gender, race, age, or class. In this system, dependents' words could assume considerable legal authority. A slave's well-placed remarks about his master's financial difficulties or a wife's pointed complaints to neighbors when begging for essential supplies acquired resonance as they moved through local gossip networks.²⁷ Such information shaped the terms of legal matters before they even entered courtrooms. Dependents thus exercised influence in law without being able to change, or even challenge, their legal subordination. By the same logic, one person's experience was not transferable to another person of similar status (defined by such characteristics as gender, race, or class) or predictive of any other case's outcome. The result was a legal system composed of inconsistent local rulings that offered future courts various options rather than precedents; in public matters, there was no uniform "law" to which to appeal. These disparate outcomes coexisted as options and alternatives rather than contradictions requiring rationalization.

Localized law proved remarkably impervious to change. Not all members of the North Carolina state legislature were part of the group of professionally trained lawyers who favored legal reform. In the decades immediately following the Revolution, the North Carolina legislature enhanced local authority by extending magistrates' jurisdiction, especially over property issues involving debt. These measures, known as the "ten pound law" of 1785 and the "twenty pound law" of 1787, gave magistrates jurisdiction in all civil

26. The summary in this paragraph is drawn from records on file with the North Carolina Office of Archives and History, Raleigh (Criminal Action Papers, Granville County (1790–1840); Criminal Actions Concerning Slaves and Free Persons of Color, Granville County (1800–1839); Superior Court Minutes, Granville County (1790–1840); Criminal Action Papers, Orange County (1787–1808); Superior Court Minutes, Orange County (1787–1840)). For discussions of the range of offenses and the participation of domestic dependents and others without rights, see generally Edwards, *Status Without Rights*, *supra* note 3; and Edwards, *Domestic Violence*, *supra* note 22.

27. See sources cited *supra* note 18. For gossip and situated knowledge, see Edwards, *Enslaved Women and the Law*, *supra* note 3, at 305–23.

matters with damages up to twenty pounds.²⁸ They also gave magistrates jurisdiction in a wide range of criminal matters, except over the most serious offenses.²⁹ As a result, magistrates acquired significant legal discretion in debt cases as well as most public offenses and criminal issues. The process, in historian Lars C. Golumbic's apt description, allowed magistrates to "leave Blackstone and the perplexing body of common law behind and adjudicate simply, personally, and pragmatically."³⁰ The legislature underscored its intent through additional legislation that regulated attorney's fees, practice, and licensing.³¹ All these laws were widely reviled by professionally trained lawyers. "[M]y Passions," fumed one prominent lawyer, "[are] so agitated with the unbecoming means which had been used to cast a stigma upon the bar."³²

The state's lawyers, however, were unable to budge the legislature on the issue of magistrates' jurisdiction. Not only did the legislature slowly increase magistrates' jurisdiction after the "twenty pound law" of 1787, but it also added district courts to the system. In 1806, the legislature replaced the eight district courts with superior courts in each county. A key group of lawyers in the state elite opposed the change because it required those who wished to practice law as their sole profession to travel to each county for court instead of having business come to them at the district courthouse.³³ Adding injury to insult, the act also reduced the fees of the attorneys who practiced in the superior courts. "The prospect is dull to men of eminence," sulked Thomas Ruffin's friend Archibald Murphey.³⁴ "Under this System Genius will languish, enterprise grow feeble and Petit-fogging become fashionable."³⁵ "[H]ad not I expended so much money in making an establishment," he concluded bleakly, "I would break up and go to Nashville."³⁶ According to William Henry Hoyt, a historian writing in the early twentieth century, the act led to a legal

28. Golumbic, *supra* note 5, at 74, 77.

29. *Id.* at 73–77.

30. *Id.* at 74.

31. *Id.* at 73–77.

32. *Id.* at 78 (originals in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 132–33 (Griffith J. McRee ed., New York, D. Appleton & Co. 1858)).

33. 1 THE PAPERS OF ARCHIBALD D. MURPHEY 7 n.2 (William Henry Hoyt ed., 1914). Hoyt notes that opponents included Duncan Cameron, James Norwood, and William Duffy, all prominent lawyers in the legislature. *Id.*

34. *Id.* at 8 (quoting letter from Archibald D. Murphey to William Duffy (Jan. 6, 1806)).

35. *Id.*

36. *Id.*

exodus from the state.³⁷ Among the defectors was John Haywood, noted for his magistrate's manual and collection of statutes as well as his work on the bench and his training of a host of prominent lawyers.³⁸

Despite the emphasis on debt in legislative debates, the extension of magistrates' jurisdiction shaped the adjudication of public matters far more than it did property issues. In the area of property, the controversial "twenty pound law" allowed magistrates to structure creative debt settlements for farmers who lacked the currency demanded by creditors, but who were not without other economic resources.³⁹ Lawyers' complaints notwithstanding, it did not eliminate their role or the importance of professionalized property law in mediating most economic transactions. By contrast, the laws extending magistrates' jurisdiction solidified local control over the vast majority of public offenses, most of which never made it to the superior courts, where lawyers plied their trade.

Given this culture of localism, efforts to create a more powerful appellate court at the apex of the judicial structure had ambiguous results, particularly in the area of public law. The legislature did add an appeals court in 1799 that heard cases in both law and equity.⁴⁰ At first, however, this court was extremely limited in its authority. It was actually an extension of the district courts, composed of district judges who met after their circuits to discuss appeals. Nor did it have final authority over its cases and points of law or equity, at least initially.⁴¹ It was exactly what its name, the Court of Conference, implied: it functioned as an advisory body, which met after the district courts to allow judges to confer over appeals and particularly difficult cases.⁴² Its recommendations were returned with the cases to the district courts where the final decisions were rendered.⁴³ Legislators rejected other proposals to create a more powerful high court on the grounds that it would be too distant geographically from

37. *Id.* at 7 n.2.

38. *Id.*

39. Golumbic, *supra* note 5, at 78–79.

40. See WALTER CLARK, HISTORY OF THE SUPREME COURT OF NORTH CAROLINA 6–7 (1919) ("There was no appellate court until this one was created in 1799."); Adams, *supra* note 8, at 137–38.

41. See Adams, *supra* note 8, at 137–38; Stevenson, *supra* note 8, at 343.

42. See Stevenson, *supra* note 8, at 343.

43. See *id.*

most people, too expensive for them to make use of, and too concerned with the abstractions of law to render justice.⁴⁴

At issue were two distinct views of the legal system. Defending the unsuccessful 1799 reform measure to replace the Court of Conference with a stronger Court of Errors and Appeals, state legal luminary Samuel Johnston argued that such a court was necessary to “the due execution of the laws” by which the people “hold their liberty and property.”⁴⁵ “Under our present system,” he explained, “what is law at one place is not law at another. The opinions of Judges vary; and the decision of one Judge is disregarded by another.”⁴⁶ The situation made little sense to him, which was why he supported a central court, “which shall govern all the varying decisions which may be given in various parts of the State.”⁴⁷ Only then would “some security . . . be had for the due administration of Justice.”⁴⁸ The majority, however, saw no problem at all with the current system, despite its inconsistencies. As one representative argued, the “great end of law is to obtain justice for individuals, and therefore the administration of justice ought to be made as convenient to the citizens at large as possible.”⁴⁹ For him and others, the legal system was about resolving specific conflicts and achieving justice for those involved, not elaborating a uniform body of law that would hold everywhere, without attention to context. The facts of the case, not abstract points of law, were the central components of justice. Given that, he could not see “that this Judge of Appeal would be more likely to do justice than a Jury.”⁵⁰ So, in his view, why have a court of appeals at all?

The North Carolina legislature did eventually expand the authority of the Court of Conference, but the process was so convoluted that it is difficult to identify the decisive moment of change. In 1804, the North Carolina legislature made the Court of Conference a court of record. This change meant that the court functioned more like an appellate court in the sense that it could now

44. *See, e.g.*, RALEIGH REG., Dec. 10, 1799, at 1. (relaying the legislature’s debate regarding the creation of a higher court, and stating that the creation of this court will “remove it as far from [the people] as the state will admit of; and takes away the relief now afforded without substituting a better”).

45. *Id.* The debate was closely followed elsewhere in the state. *See, e.g.*, N.C. MERCURY & SALISBURY ADVERTISER, Dec. 26, 1799, at 2.

46. RALEIGH REG., Dec. 10, 1799, at 1.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

render decisions instead of just dispensing advice to district courts. It remains unclear, however, how that worked in practice.⁵¹ In 1806, the legislature renamed this body the “Supreme Court,” a change that some have identified as a turning point in the court’s history, though one with very limited results.⁵² Writing in 1912, historian William Henry Hoyt described it in this way: the court was “held twice a year at Raleigh by two or more of the Superior Court judges, to which were submitted, not appeals, but difficult or doubtful cases arising on the circuits.”⁵³ Those judges did not always reach consensus in each case. Even when they did, they still issued separate opinions and made no attempt to reconcile conflicting judgments on points of law.⁵⁴ This court was supreme in name only. Some commentators identify 1810 as the key date in the court’s history, for that was when the legislature approved the appointment of a chief justice to coordinate the different opinions of the judges.⁵⁵ But the legislature neglected to specify how the chief justice would be selected; as late as 1834, it was still being done by drawing lots (that year, Thomas Ruffin won).⁵⁶ Only in 1818 did the court become “supreme” in more than name, acquiring its own panel of judges and authority over points of law and equity.⁵⁷ It was an unexpected victory for reformers, who seemed a little taken aback. “This will surprise you as it has every one here,” wrote a delighted Archibald Murphey to Thomas Ruffin after the General Assembly’s vote.⁵⁸

51. See sources cited *supra* note 8.

52. See CLARK, *supra* note 40, at 7.

53. 1 THE PAPERS OF ARCHIBALD D. MURPHEY, *supra* note 33, at 7 n.2.

54. See generally *Thomeguex v. Bell*, 1 N.C. (Mart.) 64 (1794) (documenting two separate opinions and stating that the second opinion was “clearly of the contrary opinion,” without further explanation); *Tims v. Potter*, 1 N.C. (Mart.) 12 (1784) (articulating three distinct opinions from three judges, one of whom was absent and disagreed with the opinion).

55. See CLARK, *supra* note 40, at 7.

56. For more information on selecting the chief justice by drawing lots, see Letter from William Gaston to Robert Donaldson (Jan. 3, 1834), in William Gaston Papers, *supra* note 18.

57. See Stevenson, *supra* note 8, at 342–43.

58. Letter from Archibald D. Murphey to Thomas Ruffin (Dec. 3, 1818), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 21, at 211. The change provoked a flurry of correspondence. See Letter from Romulus M. Saunders to Thomas Ruffin (Dec. 17, 1818), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 21, at 212; Letter from James Mebane to Thomas Ruffin (Dec. 18, 1818), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 21, at 212–13; Letter from George E. Badger to Thomas Ruffin (Dec. 18, 1818), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 21, at 213; Letter from Duncan Cameron to Thomas Ruffin (Dec. 25, 1822), in 1 THE PAPERS OF THOMAS RUFFIN, *supra* note 21, at 273. For these changes, see generally sources cited *supra* note 8.

The commitment to localized law continued to undercut centralization into the 1830s. The legislature remained divided in its support for the appellate court—now called the Supreme Court. So the Supreme Court of North Carolina limped along after its creation in 1818, trying to acquire institutional legitimacy in an openly hostile environment.⁵⁹ Its critics launched measures to eviscerate it or to abolish it altogether in nearly every legislative session during the 1820s and into the 1830s.⁶⁰ Even some of the court's judges were less than enthusiastic and could not be bothered to attend regularly. The resulting backlog of cases further tarnished the court's reputation.⁶¹

By the 1830s the court was so unpopular that even its staunchest backers began to doubt its efficacy. When William Gaston took the bench in 1833, the court's supporters hoped that his reputation might help repair the damage.⁶² "[W]e think," wrote Governor David L.

59. Pratt, *supra* note 5, at 135 ("In the absence of substantial constitutional restraints on the legislature, the supreme court quickly became a target of attacks by democratic reformers.").

60. *Id.* ("No blend of democratic argument with remedies for relieving congestion could allay the fears of many politicians of the Whig or old Federalist school that each reform suggestion was motivated by a desire to abolish the supreme court altogether.").

61. The Supreme Court of North Carolina only barely survived repeated efforts to dismantle it. See RALEIGH REG., Dec. 17, 1819, at 2 (citing a bill that was proposed to reduce the salaries of state supreme court judges, a recurring effort meant to discourage the centralization and professionalization of the judiciary); RALEIGH REG., Dec. 8, 1820, at 2 (citing a proposed bill to reduce the salaries of state supreme court judges and to abolish the state supreme court); RALEIGH REG., Nov. 30, 1821, at 3 (citing proposed bill to limit the meetings of the supreme court to once a year, thereby limiting the authority of the court); RALEIGH REG., Dec. 26, 1823, at 2 (citing proposed bill to reduce the salaries of the state supreme court judges); RALEIGH REG., Nov. 26, 1824, at 2 (citing bill to completely abolish the supreme court); RALEIGH REG., Dec. 17, 1824, at 2 (mentioning bill to remove precedent-setting authority of supreme court); RALEIGH REG., Dec. 24, 1824, at 2 (citing bills to abolish the state supreme court); RALEIGH REG., Jan. 2, 1829, at 1 (detailing bill to establish an extra term to meet in Salisbury and other places throughout the state, which were efforts to recreate the old district system); RALEIGH REG., Jan. 23, 1829, at 1 (detailing bill to reduce the judges' salaries); RALEIGH REG., Nov. 26, 1829, at 2 (noting bill to abolish the supreme court and reestablish the conference court); RALEIGH REG., Nov. 25, 1830, at 2 (citing bill to have the court meet in other parts of the state); RALEIGH REG., Jan. 27, 1831, at 1 (detailing bill to reduce the judges' salaries); RALEIGH REG., Jan. 25, 1833, at 1 (detailing bills to reduce judges' salaries); RALEIGH REG., Nov. 26, 1833, at 3 (detailing bill to abolish the court); RALEIGH REG., Dec. 3, 1833 (detailing bill to replace the court with the old district system and a conference court); RALEIGH REG., Dec. 17, 1833, at 2 (citing bill to reduce judges' salaries). For a discussion of hostility toward the court, see generally Wythe Holt & James R. Perry, *Writs and Rights, "Clashings and Animosities": The First Confrontation Between Federal and State Jurisdictions*, 7 L. & HIST. REV. 89 (1989); and Pratt, *supra* note 5, at 137 (discussing the legislature's attempt to relieve the court of the "congestion" of equity cases by passing legislation that would limit equity cases).

62. Supporters of a strong appellate court saw the appointment of Gaston as key, and the resulting correspondence reveals a great deal about the problems they sought to

Swain, “*your* appointment to the Bench the only event which will preserve the Court and certainly the only event which can render it *worth* preserving.”⁶³ The court’s unpopularity, however, gave Gaston pause. “[T]he possibility that sooner or later these efforts of Demagogues may be successful,” he wrote, made him “exceedingly loth [sic] to place himself in so precarious a situation.”⁶⁴ Yet he agreed and a few months later found himself drawing lots with Thomas Ruffin to see who would become chief justice.⁶⁵ Their compatriot, Judge Joseph Daniel, did not participate; although he did not indicate why, he had no desire to take on the judicial mantle of chief justice.⁶⁶

Institutional power, even when attained, did not always translate into systemic change in legal practice or the logic of the law. To the extent that the state legislators and appellate court judges exercised their power, it was over property law. Until the 1820s, legislators and judges tended to leave governance over public matters to local jurisdictions and their idiosyncratic interpretations of common law.⁶⁷

resolve. See Letter from William Gaston to Hannah Manly (Dec. 31, 1832), in William Gaston Papers, *supra* note 18; Letter from T.P. Devereux to William Gaston (Aug. 15, 1833), in William Gaston Papers, *supra* note 18; Letter from William Gaston to T.P. Devereux (Aug. 19, 1833), in William Gaston Papers, *supra* note 18; Letter from Thomas Ruffin to William Gaston (Aug. 21, 1833), in William Gaston Papers, *supra* note 18; Letter from T.P. Devereux to William Gaston (Aug. 21, 1833), in William Gaston Papers, *supra* note 18; Letter from William Gaston to T.P. Devereux (Aug. 26, 1833), in William Gaston Papers, *supra* note 18; Letter from David Swain to William Gaston (Aug. 27, 1833), in William Gaston Papers, *supra* note 18; Letter from T.P. Devereux to William Gaston (Aug. 30, 1833), in William Gaston Papers, *supra* note 18; RALEIGH REG., Nov. 26, 1833, in William Gaston Papers, *supra* note 18; RALEIGH REG., Dec. 10, 1833, in William Gaston Papers, *supra* note 18; Letter from Joseph Hopkinson to William Gaston (Dec. 28, 1834), in William Gaston Papers, *supra* note 18 (referring to events in South Carolina); Letter from B.F. Perry to William Gaston (July 10, 1836), in William Gaston Papers, *supra* note 18 (referring also to events in South Carolina); see also 2 THE PAPERS OF THOMAS RUFFIN, *supra* note 21, at 92 n.1 (“I cannot restrain myself from saying that I cordially unite in the congratulations your friends will tender to you in the triumph which the lovers of virtue and the admirers of ability . . . will feel in the consolatory confidence in the stability of our institutions and the faithful administration of justice.”).

63. Letter from David Swain to William Gaston (Sept. 3, 1833), in William Gaston Papers, *supra* note 18.

64. Letter from William Gaston to Thomas Ruffin (Aug. 25, 1833), in William Gaston Papers, *supra* note 18.

65. Letter from William Gaston to Robert Donaldson (Jan. 3, 1834), in William Gaston Papers, *supra* note 18.

66. *Id.*

67. A brief glance at the North Carolina Reports indicates that the preponderance of appellate decisions dealt with property issues. The majority of statutes, which included private bills, dealt with property issues as well. Many of these cases involved slaves, in their status as property. See, e.g., *Gorham v. Wife*, 1 N.C. (Mart.) 3 (1780) (discussing

Statutes and appellate decisions mirrored changes at the local level when they dealt with crimes and other public offenses at all.⁶⁸

Attempting to navigate the legal terrain of the peace with the map of individual rights has led historians into dead ends and puzzling contradictions. Taking the ascendancy of the individualist legal paradigm for granted and focusing on statutes and appellate decisions, they have struggled to identify consistent patterns in the application of rights to marginalized members of the population.⁶⁹

whether a mother was entitled to any of her late child's inheritance, which included the father's slaves).

68. EDWARDS, *THE PEOPLE AND THEIR PEACE*, *supra* note 3 (manuscript at 229–38). The scholarship on state law is particularly revealing. Historians who have searched assiduously for systematic legal patterns in these early appellate records and statutes have found them frustratingly incoherent. See generally, THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860* (1996) (discussing the development of slave law). Some have thrown up their hands, accepting contemporary legal reformers' charges of incompetence and chaos. That conclusion is expressed in the title of Walter Johnson's review essay, although he does not see the contradictions as necessarily problematic. Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 L. & SOC. INQUIRY 405, 415, 417 (1997) ("State involvement in the daily relations of the master and slave, however, was infrequent and subject to local standards Local outrage was usually behind the rare state interventions in the business of brutal slaveholders."). The most generous interpretations characterize these early appellate decisions as rendering broad interpretations of the statutes. Actually, the records say more about the influence of localized law in the area of public law than they do about the statutes or the direction of legal developments at the state level. These opinions resulted from a system that not only allowed local jurisdictions considerable legal discretion in public matters but also subordinated the individual outcomes to the collective interests of the peace. *Id.*

69. The literature, for instance, continues to use rights as the standard to determine changes in slaves' status over time. See generally ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* (1992) (explaining that courts began recognizing certain defenses for slaves but also highlighting the limitations to this right); EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 25–49 (1974) (describing a slow convergence of rights given to slaves in the American South); MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878*, at 125–61 (1980) (arguing that trends in death sentences given to slaves demonstrate an increase in the rights of slaves); MORRIS, *supra* note 68 (comparing the legal statuses of slaves in different areas of the United States and throughout history using rights as the standard in all areas of law); JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* (1998) (arguing that rights were at odds with slavery and inevitably undermined it); PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705–1865*, at 66–91 (documenting the criminal trials and sentences of slaves) (1988); CHRISTOPHER WALDREP, *ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH, 1817–80* (1998) (distinguishing the ways in which slaves were punished, often informally, from the ways whites were treated, specifically in Vicksburg, Mississippi, with the assumption of rights the norm); Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537 (1974) (discussing the inconsistent manner in which slaves were treated and how the treatment was based on

But those institutions and that legal framework had yet to be fully elaborated, particularly in the area of criminal law. In the 1820s, the state elite began to extend that rubric, building on incremental changes in law generated at the state level within a reformed institutional structure that elevated state law over other bodies of law. But the extension of individual rights into the legal process—the trends that scholars have observed—was not the same thing as the extension of individual rights to those individuals who made up the population as a whole.

II. HOW THE STATE ELITE ATTEMPTED TO UNIFY STATE LAW

The story of legal localism was not one that the state elite told, largely because they wanted to discredit it and replace it. To those ends, they used rhetorical tropes common in the Revolution and described localism as an archaic holdover, which was—or would be—banished from the state as Revolutionary enlightenment replaced monarchical corruption.⁷⁰ While inaccurate, their accounts created a powerful story of progress that became the basis for later academic histories and that continues to shape current scholarship. In fact, the state elite were far more successful in imposing their vision after the fact, crowding out the views of those who saw the legal system

both the nature of the crime and the jurisdiction in which it took place); Arnold Edmund Keir Nash, *Negro Rights and Judicial Behavior in the Old South* (Sept. 1967) (unpublished Ph.D. dissertation, Harvard University) (on file with the North Carolina Law Review) (examining favorable treatment of slaves by several judges in the antebellum South).

70. Such statements and assumptions pervade the writing of the professional lawyers who also served at the state level. They routinely referred to the “chaos” of the legal past. Typical is William Gaston’s support of the 1818 bill that would establish North Carolina’s appellate court as an independent body with precedent-setting authority. “[T]here must be in every free community some Supreme Court of Judicature to decide conclusively on every question of Law, to compel all inferior tribunals to adhere to the same exposition of the public will, and to [make] . . . Civil Conduct permanent, uniform and universal.” *RALEIGH REG.*, Dec. 4, 1818. Without such a court, as had been the case in the past, “no individual can be certain that what is law to-day will be deemed law to-morrow [sic]; or that what is right in his neighbor may not be adjudged wrong in himself.” *Id.* Under such condition, Gaston continued, “property . . . [would] . . . become insecure, and liberty itself endangered by fluctuating and inconsistent adjudications.” *Id.* He ended with the metaphor of slavery, which had been central to the rhetoric of the Revolution and still carried considerable resonance, particularly in the slave South: “Miserable is that servitude where rights are ambiguous, and the law unknown.” *Id.* While speaking in the conditional—of what would happen—Gaston was actually referring to the situation in North Carolina and its immediate past. *Id.* (citing a report by the legislature subcommittee, chaired by William Gaston, on creating a separate appellate court with authority over law). For a general discussion of the issue and more examples, see *EDWARDS, THE PEOPLE AND THEIR PEACE*, *supra* note 3 (manuscript at 26–53).

differently. Their efforts to achieve substantive change in the legal system took decades to achieve tangible results. In practice, they were not fully realized until after the Civil War, as part of the systematic reform of the region under the terms of the Congressional Reconstruction plan and the dramatic revision of state constitutions under Republican rule.⁷¹ The institution of capitalist labor relations and the extension of individual rights to former slaves required a hierarchical legal system that construed law as a set of universal rules, consistently applied. Most reformers who lived through the Civil War era bitterly opposed the abolition of slavery, the Fourteenth and Fifteenth Amendments, and other changes that came with Republican rule.⁷² But their basic vision of law shared a great deal with that of Reconstruction-era Republicans. The changes to the legal system in this era instituted reforms advocated since the end of the Revolution. It is no coincidence that Democrats left them in place when they took over after Reconstruction.⁷³ That outcome, in turn, lent an air of inevitability to earlier calls for reform; if secessionists and unionists, slave holders and abolitionists, Democrats and Republicans could all agree, then the legal system's trajectory must have been set right from the beginning.

The state elite's prominence in the historical record owes as much to their own efforts at self-preservation as it does to their political importance. Their lives and work are easy to track because they left such an impressive trail of sources. Joining their interest in law to a keen sense of history, infused by notions of objectivity and progress, they documented their own lives, collected the documents of others, and created archives with the intent of leaving the "correct" version of the past to posterity.⁷⁴ Not only was the state elite prolific,

71. Thomas Ruffin provides one prominent example. The general point is that advocacy of a professionalized, rational view of law did not necessarily imply support for legal changes imposed by the Republican Party after the Civil War. Many secessionists and Conservative Democrats were professionally trained lawyers.

72. See PAUL D. ESCOTT, *MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA, 1850-1900*, at 136-70 (1985).

73. Those accounts focusing on the development of the court usually note that Democrats left these changes in place after they seized control of state government. See sources cited *supra* note 8.

74. The efforts of Carolina lawyers to collect historical documents, particularly legal documents, and to write history are discussed and documented in this section. For further discussion of these issues, see EDWARDS, *THE PEOPLE AND THEIR PEACE*, *supra* note 3 (manuscript at 26-53). The best illustration of their efforts is in the effect on subsequent historians, who relied on those materials and duplicated their presumptions, and who routinely dismissed law and the legal process in the region as dysfunctional, backward, or both. Southern legal historians have devoted a great deal of space to rehabilitating the reputation of southern law and legal practitioners, beginning with Charles S. Sydnor, *The*

but its members understood the importance of history and harnessed it to serve their own ends. In this regard, the state elite in North Carolina shared a great deal with the other state and national leaders in their networks. As historian Joanne Freeman has argued, national leaders of the early republic developed an acute sense of the power they could wield through the historical record.⁷⁵ In Freeman's account, the interest in history was an extension of the partisan political culture of the 1790s, which conflated personal reputation with party affiliation.⁷⁶ Through the genre of history, these men vindicated their reputations and justified their political views after the fact.

The state elite's version of history was decidedly Whiggish, often informed by Revolutionary idealism. Such was the experience of North Carolina printer Joseph Gales, whose publications consistently promoted legal reform.⁷⁷ Gales had been part of a radical group, based in Sheffield, England, that advocated constitutional reform in the 1780s and 1790s.⁷⁸ After war broke out between France and England in 1793, his organization came under suspicion, and Gales

Southerner and the Laws, 6 J. S. HIST. 3, 19–21 (1940) (explaining the source of legal attitudes among Southerners). The issue is still an undercurrent in the scholarship, and it helps explain why many southern legal historians have focused on those materials, authored by reformers, that portray law in that region as an orderly system with an intellectually consistent body of principles. The resulting work moved the field in important directions, establishing southern law as a legitimate topic in its own right. See sources cited *supra* note 13. Yet, in responding to past debates, this work has also duplicated some of its underlying assumptions. Most notable is the presumption, long held in southern history, that most matters involving slaves and, by extension, other domestic dependents, were resolved on the plantation or within the household. For examples of this approach, see generally AYERS, *supra* note 18; HINDUS, *supra* note 69; PETER KOLCHIN, *AMERICAN SLAVERY, 1619–1877* (1993); and BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* 362–401 (1982). As a result, many southern historians looked everywhere but the legal system for answers to basic questions about power and inequality in the region.

75. See JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* 263–88 (2001).

76. *Id.*

77. For the content and direction of Gales' politics, see 2 *DICTIONARY OF NORTH CAROLINA BIOGRAPHY* 265–67 (William S. Powell ed., 1979); W.H.G. Armytage, *The Editorial Experience of Joseph Gales, 1786–1794*, 28 N.C. HIST. REV. 332, 332–61 (1951); Seth Cotlar, *Joseph Gales and the Making of the Jeffersonian Middle Class*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 331–59 (James Horn et al. eds., 2002); and Clement Eaton, *Winifred and Joseph Gales: Liberals in the Old South*, 10 J. S. HIST. 461, 461–74 (1944). In addition to legal reform, Gales supported a range of other causes, including libraries, internal improvements, education, penal reform, and the American Colonization Society. Although opposed to slavery, he never supported abolition openly while he lived in the South.

78. See Cotlar, *supra* note 77, at 331–33.

was forced to leave the country to avoid arrest for treason.⁷⁹ He resettled in Philadelphia, where he resumed his trade and aligned himself with the Jeffersonian Republicans.⁸⁰ Impressed with his work, the North Carolina congressional delegation approached him in 1798, hoping to lure him to the state to promote the party's cause there.⁸¹ He did, setting up the *Raleigh Register*, which he eventually passed on to his youngest son, Weston.⁸² Gales believed that the collection and distribution of facts would achieve progressive change. One of his particular interests was the law, which he saw as the necessary foundation for the new republic.⁸³ Not only did he support reforms to centralize and systematize state law in the *Raleigh Register*, but he also played a direct role in that effort by providing carefully rendered volumes preserving legislative proceedings, constitutional debates, statutes, and appellate decisions.⁸⁴ His periodical, *The Carolina Law Repository*, launched in 1813, thoroughly conflated legal reform and progress, promising to keep "the Profession, and the citizens in general . . . apprized of the progressive change and exposition of the law."⁸⁵

Like Gales, other legal reformers in the state elite tended to see the past as prologue in a progressive journey that culminated in a legal system defined by their principles, forming the essential groundwork for their post-Revolutionary states. That was the Revolution's legacy, earned through sacrifice and sanctioned in blood. Relying heavily on temporal metaphors, legal reformers characterized alternative versions of law as archaic relics of an illogical and unenlightened time.⁸⁶ Some, like Thomas Ruffin's good friend, Archibald Murphey, looked to the past as a source of building blocks for future progress.⁸⁷ Murphey, a prominent lawyer with a plantation in Orange County, known for his quick and creative intellect, served as a circuit court judge and a representative to the

79. *See id.*

80. *See id.* at 340–41.

81. *See id.* at 343–44.

82. *See id.* at 347–50.

83. *See id.* at 349.

84. For biographical background on Gales, including support for all the facts regarding his life in England, Philadelphia, and North Carolina, see sources cited *supra* note 77.

85. RALEIGH REG., Jan. 29, 1813, at 4.

86. *See* sources cited *supra* note 70.

87. Archibald D. Murphey, His Memorial to the General Assembly of North Carolina, Regarding His Projected History of North Carolina (Jan. 1, 1827), in Archibald D. Murphey Papers (on file with the SHC, Wilson Library, The University of North Carolina at Chapel Hill).

General Assembly. Like many of his friends, he dabbled in land speculation and other money-making schemes, including the short-lived North Carolina gold rush, although with much less success than others. Murphey died broke, living on the charity of friends. Yet it was his ebullient sense of optimism that brought him to that end. He carried that enthusiasm into his political work, where his efforts for judicial reform, internal improvements, and education were outstripped only by his passion for history.⁸⁸ “[I]n no state,” Murphey wrote with the expansiveness that was his hallmark, “was a more early or effectual opposition made to the encroachments of power . . . [or] were the principles of civil liberty better understood, more ardently cherished, or more steadily defended.”⁸⁹ Since then, “our legislature, our jurisprudence, and our institutions have kept pace with the improvements of the age.”⁹⁰ In order for the state to continue this progressive trajectory, Murphey concluded, it was imperative that the legislature provide the means to collect and preserve its historical documents. Murphey’s view, however, was not universal. Others viewed the past warily, seeing it primarily in terms of defects that subsequent progress had overcome. Both positions, however, resigned alternate versions of law to the dustbin of the past.

The state elite then wrote these views into their legal records and narratives, shaping the historical record on which scholars now rely. The number of reform-minded North Carolina lawyers in this group who wrote history is remarkable. Joseph Gales’s project, “History of the Proceedings and Debates of the Early Sessions of Congress,” is but one example of this phenomenon.⁹¹ Like Gales, many wrote for a

88. For a description of Murphey’s life, see generally R. D. W. CONNOR, STUDIES IN NORTH CAROLINA HISTORY NO. 3: ANTE-BELLUM BUILDERS OF NORTH CAROLINA 34–62 (N.C. Coll. For Women 1923) (1914); 1 THE PAPERS OF ARCHIBALD D. MURPHEY, *supra* note 33; and HERBERT SNIPES TURNER, THE DREAMER ARCHIBALD DEBOW MURPHEY, 1777–1832 (1971).

89. Murphey, *supra* note 87, at 9.

90. *Id.*

91. See generally FRANÇOIS-XAVIER MARTIN, THE HISTORY OF NORTH CAROLINA FROM THE EARLIEST PERIOD, at v (New Orleans, A. T. Penniman & Co. 1829) (writing on a “historical inquiry into the discovery, settlement and improvement of the country . . . on the shores of which the English made their first attempt toward colonization”); DAVID L. SWAIN, BRITISH INVASION OF NORTH CAROLINA IN 1776: A LECTURE, DELIVERED BEFORE THE HISTORICAL SOCIETY OF THE UNIVERSITY OF NORTH CAROLINA, FRIDAY, APRIL 1ST, 1853, BY HON. DAVID L. SWAIN (1853) (discussing the historical significance of the time period of the British invasion and “the subsequent career of [Governor] Martin”); DAVID L. SWAIN, EARLY TIMES IN RALEIGH: ADDRESSES DELIVERED BY THE HON. DAVID L. SWAIN, LL.D. AT THE DEDICATION OF TUCKER HALL, AND ON THE OCCASION OF THE COMPLETION OF THE MONUMENT TO JACOB JOHNSON (Raleigh, N.C., Walters, Hughes, & Co. 1867) (narrating the author’s interest in

national, not just a regional, audience, with the goal of preserving their legacies by writing narratives that featured themselves, their relatives, and their friends in starring roles.⁹² In 1827, for instance, Chief Justice John Marshall, of the United States Supreme Court, wrote to Archibald Murphey, praising his biographical sketches “of the eminent men of North Carolina,” most of whom were lawyers or judges.⁹³ “It was my happiness to be acquainted with those of whom you speak,” wrote Marshall, “and I think you have given to the character of each, its true coloring.”⁹⁴ Similar concerns led to a friendly correspondence between Alexander Hamilton’s son and William Gaston, who sat on the North Carolina appellate court with Ruffin. Hamilton’s son, who was collecting his father’s correspondence and writing a biography, asked Gaston for documents or personal recollections as well as an account of North Carolina’s credit laws, presumably for background about his father’s monetary policies.⁹⁵ Gaston was happy to comply. The lives of

the early history of Raleigh, North Carolina, through tributes to important historical events, public figures, and political changes). John Haywood, a prominent North Carolina lawyer and legal writer who relocated to Tennessee, wrote about the “memorable achievements of the eminent men of Tennessee” in *THE CIVIL AND POLITICAL HISTORY OF THE STATE OF TENNESSEE FROM ITS EARLIEST SETTLEMENT UP TO THE YEAR 1796; INCLUDING THE BOUNDARIES OF THE STATE* (Knoxville, Tenn., Heiskell & Brown 1823).

92. Examples of these narratives can be found in sources cited *supra* note 88.

93. Letter from Chief Justice John Marshall to Archibald D. Murphey (Oct. 6, 1827), in 1 *THE PAPERS OF ARCHIBALD D. MURPHEY*, *supra* note 33, at 365–66.

94. *Id.*

95. Letter from William Gaston to John C. Hamilton (Aug. 1, 1833), in William Gaston Papers, *supra* note 18; Letter from William Gaston to John C. Hamilton (Aug. 30, 1833), in William Gaston Papers, *supra* note 18; Letter from John C. Hamilton to William Gaston (Sept. 27, 1834), in William Gaston Papers, *supra* note 18. William Gaston’s son-in-law, Robert Donaldson, wanted to collect and publish Gaston’s correspondence and writings while he was still alive, but Gaston declined. Letter from William Gaston to Robert Donaldson (Nov. 5, 1832), in William Gaston Papers, *supra* note 18. Gaston’s family members, though, did preserve their father’s papers, as did the friends and relatives of others in this group. For other examples of correspondence on the collection of documents and historical information, see Letter from Archibald D. Murphey to Colonel William Polk (July 16, 1819), in 1 *THE PAPERS OF ARCHIBALD D. MURPHEY*, *supra* note 33, at 147–48; Letter from Archibald D. Murphey to General Joseph Graham (Jan. 10, 1821), in 1 *THE PAPERS OF ARCHIBALD D. MURPHEY*, *supra* note 33, at 191–94; Letter from Archibald D. Murphey to Colonel Ransom Sutherland (Mar. 8, 1821), in 1 *THE PAPERS OF ARCHIBALD D. MURPHEY*, *supra* note 33, at 194–97; Letter from Archibald D. Murphey to General Joseph Graham (July 20, 1821), in 1 *THE PAPERS OF ARCHIBALD D. MURPHEY*, *supra* note 33, at 211–13; and Letter from Allen J. Davie to Archibald D. Murphey (Jan. 17, 1826), in 1 *THE PAPERS OF ARCHIBALD D. MURPHEY*, *supra* note 33, at 327–29. All of this material, which was housed in state and university archives that these same men and their families also supported, became the basis for later published collections, many of which are cited in this Article.

Archibald Murphey and William Gaston, as well as Thomas Ruffin and other members of the state elite, were meticulously documented in turn.⁹⁶ It is no accident that historians have more information about those involved in government at the state and national levels than they do about people who were active in local communities. Nor is it an accident that those men's confidence about the importance of their interests, work, and lives echoes through the scholarship.

The state elite were also preoccupied with the collection of documents and the recognition of those collections as authoritative references on the past. Historians of Britain and Western Europe have identified similar trends, in which the development of professional history and the creation of archives were part and parcel of the liberal project of nation building and the development of empires.⁹⁷ Aware of the intellectual developments in Europe, North Carolina's state elite consciously sought to duplicate them, but at both the state and national level.⁹⁸ The archives and histories of European nations provided the inspiration for Archibald Murphey's plans for a state archive and an eight-volume history of North Carolina, which he grandiosely likened to Gibbon's *Rise and Fall of the Roman Empire*.⁹⁹ "The history of each of the European nations has been long since written," he wrote in his request to the General

96. See generally 1–2 THE PAPERS OF ARCHIBALD D. MURPHEY, *supra* note 33 (documenting collections of correspondence and other papers important to the life of Archibald D. Murphey); 1–2 THE PAPERS OF THOMAS RUFFIN, *supra* note 21 (documenting, in multiple volumes, collections of correspondence and other papers important to the life of Thomas Ruffin). William Gaston does not have a published collection of his papers, but they were collected and housed at the Southern Historical Collection, as were those of Thomas Ruffin.

97. North Carolina leaders were following European nations and their leaders in creating—and, in some cases, capturing—existing archives and larger expressions of national—or in the case of North Carolina, state—power. See SMITH, *supra* note 1, at 116–28; James Vernon, *Narrating the Constitution: The Discourse of "the Real" and the Fantasies of Nineteenth-Century Constitutional History*, in RE-READING THE CONSTITUTION, *supra* note 1, at 204–06.

98. William Gaston was a "counsellor" in the American Antiquarian Society. Letter from American Antiquarian Society to William Gaston (Feb. 4, 1824), in William Gaston Papers, *supra* note 18. He also corresponded with George Bancroft about their mutual interest in history. Letter from George Bancroft to William Gaston (Oct. 9, 1837), in William Gaston Papers, *supra* note 18. David L. Swain, who served as governor and president of the University of North Carolina, followed up on Murphey's archival project described below. See generally DAVID L. SWAIN, REPORT OF THE HON. DAVID L. SWAIN, LL.D., ON THE HISTORICAL AGENCY FOR PROCURING DOCUMENTARY EVIDENCE OF THE HISTORY OF NORTH-CAROLINA (Raleigh, N.C., Holden & Wilson 1857) (discussing the concerted efforts undertaken to accurately account for historical events relating to North Carolina).

99. Murphey, *supra* note 87.

Assembly for funding.¹⁰⁰ North Carolina needed to follow their example if it hoped to keep up. In addition to collecting records from the colonial and Revolutionary eras, Murphey proposed the ongoing preservation and organization of all documents related to state business, especially those related to the legal system.¹⁰¹

Murphey's project was ambitious, but not unusual. Legal reformers in other states also began collecting documents related to law and colonial governance immediately following the Revolution.¹⁰² As reformers realized, historical documentation was crucial to the task of creating a definite, systematic body of state law. It was impossible to identify a specific corpus of laws as the official expression of the state without a supporting body of historical documents to legitimize and perpetuate it. The materials, if they existed at all, were either in British archives or in private hands.¹⁰³

Most states, for instance, entered the post-Revolutionary period with a complete record of colonial statutes.¹⁰⁴ Like legislatures elsewhere, the North Carolina legislature provided for the printing of statutes in pamphlet form following each session, and local newspapers often reprinted the results in their columns. But, like legislatures elsewhere, the North Carolina General Assembly had not archived the laws it passed.¹⁰⁵ In Virginia, St. George Tucker failed in his efforts to obtain a full set of session laws. "Few gentlemen, even of the [legal] profession," he declared in 1803, "have ever been able to boast of possessing a *complete* collection of its laws."¹⁰⁶ Persisting, Tucker managed to pull together an updated version of Blackstone's *Commentaries* specifically for Virginia, meshing Blackstone's version of common law with Virginia case law and statutes.¹⁰⁷

100. *Id.*

101. See *supra* notes 77–79 and accompanying text.

102. For the general trend of collecting legal materials, see COOK, *supra* note 7, at 6–7. Virginia's post-Revolutionary statute collection is one example. See, e.g., ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT (Windham, Conn., John Byrne 1795); ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND ITS LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, at iv (Philadelphia, William Young Birch & Abraham Small 1803).

103. Archibald Murphey made the point in his effort to get the state legislature to fund a history of North Carolina. See Murphey, *supra* note 87.

104. See COOK, *supra* note 7, at 6–7.

105. The absence of such materials was why North Carolina lawyers and editors put together private editions. See *infra* notes 108–10.

106. TUCKER, *supra* note 102, at iv.

107. See *id.* at iii–xviii.

The difficulties in tracking down and using statutes created barriers that encouraged those with less invested in these references to dispense with them altogether. So reformers produced easy-to-use, single-volume digests of North Carolina's statutes. John Haywood's *A Manual of the Laws of North Carolina*, for instance, boasted accessibility in its subtitle, with "distinct heads, in alphabetical order" and "references from one head to another."¹⁰⁸ Prominent members of the state elite oversaw such projects, largely because it was they who pushed for them and who had the most invested in the idea. In 1791, James Iredell, Sr., who became a U.S. Supreme Court justice, put together the state's first collection.¹⁰⁹ The legislature provided for new editions periodically, including a revisal in 1837, prepared by a committee of three, including James Iredell, Jr., who followed in his father's footsteps.¹¹⁰

If anything, ascertaining the current state of case law was even more difficult than compiling statutes. Since judges did not routinely write down their decisions or keep them when they did, opinions from the colonial as well as the post-Revolutionary courts often had to be reconstructed long after the fact.¹¹¹ François-Xavier Martin, one of the state's most prolific printers of legal material, published notes in

108. JOHN HAYWOOD, *A MANUAL OF THE LAWS OF NORTH CAROLINA: ARRANGED UNDER DISTINCT HEADS, IN ALPHABETICAL ORDER WITH REFERENCES FROM ONE HEAD TO ANOTHER, WHEN A SUBJECT IS MENTIONED IN ANY OTHER PART OF THE BOOK THAN UNDER THE DISTINCT HEAD TO WHICH IT BELONGS* (Raleigh, N.C., J. Gales 1801).

109. See JAMES IREDELL, *LAWS OF THE STATE OF NORTH-CAROLINA: PUBLISHED, ACCORDING TO ACT OF ASSEMBLY* (Edenton, N.C., Hodge & Willis 1791).

110. After James Iredell's 1791 digest, John Haywood published an edition in 1801 that was subsequently updated in 1808, 1814, and 1819. The legislature provided for a new revisal published in 1821, which was updated by John L. Taylor in 1827. See JOHN L. TAYLOR ET AL., *LAWS OF THE STATE OF NORTH-CAROLINA: INCLUDING THE TITLES OF SUCH STATUTES AND PARTS OF STATUTES OF GREAT BRITAIN AS ARE IN FORCE IN SAID STATE* (Raleigh, N.C., J. Gales 1821); JOHN L. TAYLOR, *A REVISAL OF THE LAWS OF THE STATE OF NORTH-CAROLINA: PASSED FROM 1821–1825 WITH MARGINAL NOTES AND REFERENCES* (Raleigh, N.C., J. Gales 1827); FREDERICK NASH ET AL., *THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA PASSED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1836–7* (Raleigh, N.C., Turner & Hughes 1837). Subsequently, James Iredell, Jr., oversaw another updated digest. See JAMES IREDELL, *A NEW DIGESTED MANUAL OF THE ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA FROM THE YEAR 1838 TO THE YEAR 1850, INCLUSIVE* (Raleigh, N.C., Seaton Gales 1851).

111. The legislature provided for the appointment of a court reporter in 1818. See *RALEIGH REG.*, Jan. 1, 1819, at 1. Until then, the documenting and collecting of judges' opinions was done more informally. Some judges recorded and some did not, as is clear from later discussions about the need to publish decisions. See 1 *THE PAPERS OF ARCHIBALD D. MURPHEY*, *supra* note 33, at 169–70 (recounting Archibald Murphey's admonitions to Judge Thomas Ruffin in 1820 to write out more of his decisions).

1797 on selected decisions in the state's superior courts, then the highest level of the system.¹¹² John L. Taylor, a superior court judge who oversaw a compilation of the revised statutes, published a series of volumes on higher court decisions between 1798 and 1802.¹¹³ Between 1799 and 1806, John Haywood, another avid legal compiler, put together an additional collection.¹¹⁴ Thereafter, collections continued to appear irregularly, often at wide intervals, when the appointed court reporters found the time to put them together.¹¹⁵

112. See, e.g., FRANÇOIS-XAVIER MARTIN, NOTES OF A FEW DECISIONS IN THE SUPERIOR COURTS OF THE STATE OF NORTH CAROLINA AND IN THE CIRCUIT COURT OF THE UNITED STATES FOR NORTH-CAROLINA DISTRICT (Newbern, N.C., Winston & Stewart 1797). The enthusiasm and reach of François-Xavier Martin's efforts was typical. A printer, lawyer, and French émigré, Martin published the *North-Carolina Gazette* and augmented collections issued by the legislature with his own compilations. For background on Martin, see 4 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, *supra* note 77, at 225. Typical of his enthusiasm is an ad in his *North-Carolina Gazette* that announced the publication of his collection of private acts, which had been left out of Iredell's 1791 collection of statutes; Martin thought these too valuable to be lost. See *Subscription for a Publication of the Private Acts of the General Assembly of North-Carolina*, NORTH-CAROLINA GAZETTE, Feb. 8, 1794, at 1. For the results of his work, see generally A COLLECTION OF THE PRIVATE ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA FROM THE YEAR 1715 TO THE YEAR 1790 (Newbern, N.C., François-Xavier Martin ed., 1794); THE ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA: PASSED DURING THE SESSIONS HELD IN THE YEARS 1791, 1792, 1793, AND 1794 (Newbern, N.C., François-Xavier Martin ed., 1795); and JAMES IREDELL, PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA (Newbern, N.C., Martin & Ogden ed., 1804).

113. See JOHN LOUIS TAYLOR, CASES DETERMINED IN THE SUPERIOR COURTS OF LAW AND EQUITY OF THE STATE OF NORTH CAROLINA (Newbern, N.C., Martin & Ogden 1802).

114. See JOHN HAYWOOD, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURTS OF LAW AND EQUITY OF THE STATE OF NORTH-CAROLINA: FROM THE YEAR 1789 TO THE YEAR 1806 (Halifax, N.C., Abraham Hodge 1806).

115. See, e.g., DUNCAN CAMERON & WILLIAM NORWOOD, REPORTS OF CASES RULED AND DETERMINED BY THE COURT OF CONFERENCE OF NORTH CAROLINA (Raleigh, N.C., J. Gales 1805); 1-3 ARCHIBALD D. MURPHEY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF NORTH CAROLINA: FROM THE YEAR 1804 TO THE YEAR 1819, INCLUSIVE (Raleigh, N.C., J. Gales & Son 1821-1826); JOHN LOUIS TAYLOR, CASES ADJUDGED IN THE SUPREME COURT OF NORTH CAROLINA FROM JULY TERM 1816 TO JANUARY TERM 1818, INCLUSIVE (Raleigh, N.C., J. Gales 1818); 1-4 THOMAS RUFFIN & FRANCIS L. HAWKS, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF NORTH CAROLINA: DURING THE YEARS 1820 & 1821 (Raleigh, N.C., J. Gales & Son 1823-1828); 1-4 THOMAS P. DEVEREUX, CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NORTH CAROLINA: FROM DECEMBER TERM 1826, TO JUNE TERM 1834 (Raleigh, N.C., J. Gales and Son 1829-1836); 1-2 THOMAS P. DEVEREUX, EQUITY CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NORTH-CAROLINA (Raleigh, N.C., J. Gales and Son 1831-1836); 1-4 THOMAS P. DEVEREUX & WILLIAM H. BATTLE, REPORTS OF CASES AT LAW ARGUED AND DETERMINED IN THE SUPREME COURT OF NORTH CAROLINA (Raleigh, N.C., P. H. Nicklin & T. Johnson 1837-1840).

When Thomas Ruffin took over for a term as North Carolina court reporter in 1820, Archibald Murphey warned him about the difficulty of getting written opinions from judges.¹¹⁶ “I told Judge Henderson, it *was essential* to the Character of the Court that he should write more Opinions,” chided Murphey.¹¹⁷ Unfortunately for the less vigilant Leonard Henderson, Murphey had no intention of letting the matter go; he promised Ruffin to follow up and write Henderson again.¹¹⁸ Like Murphey, Ruffin proved to be a reliable, thorough reporter who took particular care in writing out his own opinions—much more so than many other jurists. In fact, Ruffin’s attention to this task explains why his opinions became so influential, both outside the state and, later, as precedents within the body of North Carolina law. He made sure to leave his thoughts on paper for posterity, where other jurists did not.

The resulting volumes of appellate decisions were not just compilations of facts. These volumes forced existing laws into a unitary body, creating the impression of orderly progress over time—or, at least, identifying a point at which such orderly process began. Order had a price. These collections, even when sanctioned by the state legislatures, were all penned with a heavy editorial hand. They contained selected material and elevated certain statutes and decisions as authoritative legal guides when competing ones still existed. The selection and organization, combined with accompanying annotations, smoothed over the contradictions by presenting statutes and cases as a logical development of particular ideas over time, artificially deriving consensus and certainty from a legal culture that actually led in multiple, often conflicting directions. That order was framed in terms of the concerns of those in the immediate present who wrote the volumes. Not until legislatures made key changes in the structure of the legal system, of which these compilations were a part, did the legal system in North Carolina provide a way to reconcile judges’ conflicting decisions or to elevate one decision over another as “the” law that should guide future cases.¹¹⁹ These contradictions were not eliminated until state legislatures revised and reconciled their statutes and issued edited

116. Letter from Archibald D. Murphey to Thomas Ruffin (Aug. 4, 1820), in 1 THE PAPERS OF ARCHIBALD D. MURPHEY, *supra* note 33, at 169–70. The letter indicates that Ruffin was taking over this role. *Id.*

117. *Id.* at 170.

118. *Id.*

119. See *supra* note 8 and accompanying text (noting the institutional changes in the legal system that created an appellate court with precedent setting power and elevated that court over local jurisdiction).

reports of decisions in law and equity.¹²⁰ In fact, all the variations and conflicts that these volumes tried to explain away were part of state law. These compilations tried to create an authoritative version of the law within legal systems where no such version actually existed.

Later editing conducted by members of the state elite contributed to the illusion of regularity and uniformity. In 1868, as part of the effort to institutionalize legal changes of the kind promoted by antebellum reformers, the Supreme Court of North Carolina renumbered all the previous volumes of reports from the higher courts consecutively.¹²¹ All the original records were later housed together, as a single record group, in the state archives.¹²² The results merged material from high courts that, in their various iterations, actually had different functions and powers. This merging obscured differences in the authority and reach of earlier and later decisions, while also creating the appearance that reports of decisions had been issued regularly. One edition of the volume now designated as the first in the series of North Carolina reports, for instance, is a highly edited blend of Martin's notes, Taylor's volumes, what remained of the court records, the notes of William H. Battle, who was a judge and court reporter in the 1840s, and the annotations of Walter Clark, the Progressive Era lawyer who put the volume together.¹²³

III. THE IMPACT OF LOCALISM AND UNIFICATION ON SLAVE LAW

Acknowledging the state elite's influence over both the archival records and the resulting historical narratives changes the basic categories of analysis. This perspective upends basic historiographical assumptions, revealing the artificiality of frameworks that categorize local matters in this period as historically marginal while elevating the business of other state institutions as

120. See *supra* notes 108–10 and accompanying text (referring to institutional changes that resulted from legislative collection and revision of statutes).

121. See CHARLES C. SOULE, *THE LAWYER'S REFERENCE MANUAL OF LAW BOOKS AND CITATIONS* 47 (Boston, Soule & Bugbee 1883) ("By order of the Supreme Court, the reports from the time of the adoption of the new Constitution of 1868 (which abolished the distinction between actions at law and suits in equity) have been entitled simply 'North Carolina reports.' In calculating the number [63] of the first volume issued under this name, the latest edition of the early reports and of Winston have been taken as the standard, and the volumes have been counted as now bound, and not as originally published."). It is also clearly stated in the edited volumes. See, e.g., *Preface*, 1 N.C. 5, 5 (1778–1804).

122. State Supreme Court Records, Original Records, North Carolina Office of Archives and History, Raleigh.

123. *Preface*, 1 N.C. 5, 5 (1778–1804).

central. More importantly, it reveals the logic that governed most public offenses, which were matters that covered an incredibly wide range of issues, most of which were handled at the local level. Localized law determined public offenses through the collective interests of the peace, not the logic of individual rights.¹²⁴ The peace not only gave people without rights—notably slaves—a place within the legal system, but also allowed legal officials to recognize those people's interests without altering their legal status.¹²⁵ It was this logic, and the legal practices it supported, that the state elite hoped to discredit and replace.

The peace was inclusive only in the sense that it was an equal opportunity enforcer, enclosing everyone in its patriarchal embrace and raising its collective interests over those of any given individual. Yet it was precisely because the patriarchal peace combined rigid hierarchy with coercive inclusion that subordinates, even slaves, could play active roles in the system. They could trump the authority of their immediate patriarchs by appealing to the higher patriarchal authority of the peace.¹²⁶ Slaves, free blacks, and white wives and children who could not testify, for instance, could and did give information that initiated cases and shaped their outcome.¹²⁷ Even when they could not prosecute cases in their own names, they made complaints that resulted in prosecutions and convictions for their injuries. In such instances, subordinates did not use the law in their own right.¹²⁸ When legal officials acted on such information and complaints, they did so by invoking the larger interests of the peace.

124. Magistrate's manuals, the legal source most in use at the local level, judged offenses through the logic of the "peace." See, e.g., HAYWOOD, *supra* note 20, at 115.

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

126. Typical was John Haywood's North Carolina magistrate's manual, published in 1808, which identified the "peace" as "a quiet and harmless behavior towards the government, and all the citizens under its protection." HAYWOOD, *supra* note 20, at 191. The substitution of "citizen" for "subject" was more a Revolutionary flourish than a substantive change, since the manual explicitly included domestic dependents and other subordinate groups, including free blacks and slaves, within the peace; not only were they accountable to law, but they were also under its protection. Separate entries in justices' manuals covered every conceivable legal category of people, including wives, widows, women, children, wards, students, free blacks, slaves, Indians, and servants. While including all those people within the peace, the entries also made the hierarchical structure abundantly clear, by focusing on the restrictions unique to those in each legal category.

127. For more discussion of this, see Edwards, *Enslaved Women and the Law*, *supra* note 3, at 314–16; and Edwards, *Status Without Rights*, *supra* note 3, at 373–76.

128. See Edwards, *Enslaved Women and the Law*, *supra* note 3, at 314–16; Edwards, *Status Without Rights*, *supra* note 3, at 373–76. Magistrate's manuals also allowed subordinates to provide information about public offenses and court officials to intercede on their behalf. The dynamics described in this paragraph are drawn from the sources cited in note 20.

The source of the information was irrelevant if the peace was threatened. Those dynamics were particularly evident in cases involving injured subordinates, including slaves, who were unable to prosecute in their own names. Although the injury was to a specific individual, officials prosecuted by making the legal offense the theoretical damage to the peace, in its guise as the metaphorical public body. The injured peace thus replaced the actual victim and prosecuted the case. At issue was who could act in law. The metaphorical public body could do so when the actual, corporal bodies of subordinates could not. This legal form erased injured subordinates only in theory. In practice, they still remained central because the damage to the public body was done through their flesh and blood. Always present, yet unacknowledged, this convenient legal fiction allowed subordinates a central role in the legal order, without disturbing the hierarchies that also defined it.¹²⁹

For those outside the tight circles of local knowledge that shaped these cases, the outcomes can seem arbitrary. The substance of the peace always remained slippery—and purposefully so—defined as it was in specific areas, at distinct moments in time, and through the particular relationships of the people there. In those contexts, local officials sometimes used the peace to intercede on behalf of subordinates, even slaves.¹³⁰ The concept thus accounts for an array of cases in local courts—such as cases against white men for incest, child abuse, wife-beating, and violence against slaves as well as acquittals of accused slaves—that have mystified scholars because they seem at odds with the racial, class, and gender hierarchies that defined social relations at the time.¹³¹ At other times, though, local officials used the peace either to look the other way or to legitimize vigilante violence against the accused, a practice to which those on the social margins, particularly slaves, were vulnerable.¹³² Why did

129. For the dynamics and logic of these cases, see Edwards, *Enslaved Women and the Law*, *supra* note 3, at 314–16; and Edwards, *Status Without Rights*, *supra* note 3, at 373–76.

130. See Edwards, *Enslaved Women and the Law*, *supra* note 3, at 314–16; Edwards, *Status Without Rights*, *supra* note 3, at 373–76; see also EDWARDS, *THE PEOPLE AND THEIR PEACE*, *supra* note 3 (manuscript at 105–07).

131. For examples of scholarship that address the existence of cases where white leaders at the local and state level supported unlikely defendants—slaves, free blacks, poor whites, and poor women of both races without strong family ties—see DIANE MILLER SOMMERVILLE, *RAPE AND RACE IN THE NINETEENTH-CENTURY SOUTH* 95, 132, 180–81 (2004); and Peter Bardaglio, *Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart,"* 60 J. S. HIST. 749, 749–72 (1994).

132. The scholarship that establishes the harsh discipline meted out to slaves, in particular, is extensive. See, e.g., AYERS, *supra* note 18, at 102–03, 133, 155; HINDUS, *supra* note 69, at xix, xxvii, 34. For the difficulties faced by poor women of both races in

whites occasionally rally to the defense of certain slaves? Why did they ignore the offenses against certain white men? The answers lie less in the abstractions of race, gender, class, or rights and more in the networks of personalized information that made up the peace and that are now lost to the historical record.¹³³

Whatever the outcome, these complaints did not alter the legal status of the individuals involved. Local officials considered complaints on a case-by-case basis, righting specific wrongs done to the metaphorical public body, without extending or denying rights to any category of individuals. The interests of the peace thus drew unique boundaries around each case, circumscribing the legal implications for the rights and status of the people involved. The individual rights of those involved were not at issue; it was the good order of the peace that governed the cases. Acting on behalf of the peace, local officials could follow up on the complaints of one white wife or one enslaved woman. They could undercut the domestic authority of one husband or one master. But those circumstantial assessments did not translate into universal statements about the rights of all wives, all slaves, all husbands, or all masters in all like conditions. That was because such cases were about the peace, not the rights of the individuals involved. The logic emphasized the collective order rather than specific individuals within it. In the name

the legal system, see VICTORIA BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH* 1–4 (1992).

133. *See supra* note 26 and accompanying text. The concept of credit was crucial to deliberations about who would receive consideration in the legal system and who would not. External indices of social status—such as gender, race, age, and property—all figured prominently in establishing credit, just as they had for centuries in the legal culture of both England and continental Europe. But they provided only the starting point. What determined any given individual's credit was specific knowledge about that person, disseminated through the exchange of gossip among those who knew them. The personal and impersonal aspects of credit worked together, creating a unique balance in each instance. That was why local courts routinely included testimony about the reputations of witnesses as well as defendants and victims, if their information was crucial to the case. Such character witnesses were believed necessary to establish the reliability of key accounts, a practice that suggests the personal connotations of credit. Who someone was, at a very personal level, was essential in evaluating what they said in court—and determining the implications and consequences of what they were judged to have done. Credit, then, carried over into the legal evaluation of other kinds of information. For examples of the functioning of credit within the legal process, see LAURA GOWING, *DOMESTIC DANGERS: WOMEN, WORDS, AND SEX IN EARLY MODERN LONDON* 50–52, 232–62 (1996); and CYNTHIA B. HERRUP, *A HOUSE IN GROSS DISORDER: SEX, LAW, AND THE 2ND EARL OF CASTLEHAVEN* 78–80, 110–11 (1999). *See also* BARBARA SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 6–12, 114–85 (1991) (explaining the use of credit in evaluating testimony).

of the peace, subordinates could move out from under the legal purview of their household heads and acquire a more direct relationship to the legal system.¹³⁴

Until the 1820s, state lawmakers tended to affirm local practice and its expansive use of the peace, at least in the area of public law. Even statutory changes in slave law followed this pattern, with legislators affirming the extension of the peace to slaves in certain instances. In 1791, the North Carolina legislature made the willful killing of a slave murder unless it resulted from moderate correction, legal discretion that was allowed household heads over all their dependents.¹³⁵ The statute's preamble drew heavily on Revolutionary language, declaring that the previous "distinction of criminality between the murder of a white person and one who is equally an [sic] human creature, but merely of a different complexion, is disgraceful to humanity and degrading in the highest degree to the laws and principles of a free, christian, and enlightened country."¹³⁶ In 1817, the legislature extended the peace further, making the crime of manslaughter applicable to instances in which the victim was a slave.¹³⁷ These statutes, however, affirmed rather than modified local practice, which already applied common law precepts to cases involving slaves.¹³⁸ Even acts that granted slaves procedural rights tended to buttress local practice, by easing the difficulties of trying slaves and cases involving slaves in a system where process was so important.

The early appellate court also followed local practice in key respects. The central issue in *State v. Boon*,¹³⁹ an 1801 appellate ruling that criticized the 1791 statute criminalizing the killing of slaves

134. The analysis in this paragraph is based not only on local court records, *see supra* note 26, but also on the relationship between those cases and state appellate decisions:

The legal implications of local cases were confined to the cases at hand, a situation that reform-minded state lawmakers tried to remedy throughout the period between the Revolution and the Civil War in a number of ways: by abolishing courts of conference, which reviewed problematic cases, offered suggestions, and then returned them to the district courts; by replacing it with an appellate court; by strengthening the appellate court's power to set precedent; and by elevating both appellate decisions and statutes as a single consistent, authoritative body of law that applied throughout the state.

Edwards, *Status Without Rights*, *supra* note 3, at 385 n.44.

135. HAYWOOD, *supra* note 108, at 530–31, 543.

136. *Id.* at 530.

137. 1817 N.C. Sess. Laws 18–19.

138. *See* sources cited *supra* note 13.

139. 1 N.C. (Tay) 191 (1801), *superseded by statute*, Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76 (codified as amended at N.C. GEN. STAT. § 14-17 (2007)).

as too ambiguous to enforce, was not *whether* slaves were included in the peace, but *how* that was accomplished in the theoretical terms of law.¹⁴⁰ Judge Hall argued that common law protections that applied to other subjects did not automatically extend to slaves. Drawing a connection between common law and the peace, he reasoned that slaves lived under the dominion of their masters, not under that of the peace, because slavery did not exist within common law.¹⁴¹ For slaves to be brought into the peace, common law protections had to be enacted through statute.¹⁴² As Hall saw it, the problem in this case was that the 1791 statute was too vague to accomplish that goal.¹⁴³

While agreeing with Hall on the inadequacy of the statute, Judge John Louis Taylor took the opportunity to advocate the criminalization of violence against slaves in broader, more general terms. "What is the definition of murder," he wrote, but "[t]he unlawful killing of a reasonable creature within the peace of the State, with malice aforethought?"¹⁴⁴ "A slave is a reasonable creature," he continued, "may be within the peace, and is under the protection of the State, and may become the victim of preconceived malice."¹⁴⁵ Judge Samuel Johnston went further, arguing that the murder of a slave was more "atrocious and barbarous . . . than killing a person who is free, and on an equal footing."¹⁴⁶ "It is an evidence of a most depraved and cruel disposition to murder one so much in your power that he is incapable of making resistance, even in his own defense"¹⁴⁷ In such incidents, the legal system needed to step in, discipline the offender, and restore order. Significantly, the judges who were most outspoken in their defense of slaves' interests couched their arguments in terms of slaves' place within the peace, not their rights as individuals.¹⁴⁸

The influence of the peace, as defined in localized law, also explains many apparent legal anomalies at the state level. Consider the 1798 case of *State v. Weaver*,¹⁴⁹ which appears in John Haywood's compilation of early North Carolina appellate decisions. *Weaver* granted masters exactly the kind of latitude that judges questioned in

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 193.

144. *Id.* at 199.

145. *Id.*

146. *Id.* at 198.

147. *Id.*

148. *Id.*

149. 3 N.C. (2 Hayw.) 54 (1798) (per curiam).

Boon, although none of the opinions in *Boon* mentioned it, even to dismiss it.¹⁵⁰ The decision in *Weaver* began with an analogy between free servants and slaves: “[I]f a free servant refuses to obey . . . and the master endeavor to exact obedience by force, and the servant offers to resist by force . . . and the master kills, it is not murder, nor even manslaughter, but justifiable [homicide].”¹⁵¹ A master’s use of force was “much more . . . justifiable” when directed against slaves, who were more completely subordinated than free servants.¹⁵²

The legal context of the 1790s, however, shaped the meaning and limited the applicability of the *Weaver* opinion. At that time, the North Carolina appellate court was still a court of conference, which advised judges in local jurisdictions on especially difficult cases; it did not lay down rules that justices elsewhere were supposed to follow in other cases.¹⁵³ Moreover, the published opinion in *Weaver* was not really a decision at all, even though it later passed as precedent. Rather, the text seems to have been jury instructions given by John Haywood, the compiler, who was then a district judge.¹⁵⁴ It did not involve the rights of all masters and all slaves, as Haywood’s presentation of the case implied, but the use of force by a specific master, Mr. Scott, against a specific slave, Lewis.¹⁵⁵ Following Judge Haywood’s instruction, the jury acquitted Scott.¹⁵⁶ At the time, given the discretionary power of localized law, Scott’s use of force was contingent, based in local context and exercised on behalf of the peace.

In the 1820s, after legal institutions at the state level had acquired more authority, legislators and jurists began importing the logic of property law into public matters. In so doing, they replaced subjects of the peace, with their distinctive personalities and entangling relationships, with the theoretically uniform bodies of rights-bearing individuals. From that point, they moved outward, using the rights of these abstract individuals to redefine the peace. When reformers and state-level jurists invoked the peace, they meant not the inclusive domain occupied by the idiosyncratic and interconnected subjects of previous generations and localized law, but a collectivity composed of theoretically autonomous, rights-bearing

150. *Id.* at 78; *Boon*, 1 N.C. (Tay.) at 195–200.

151. *Weaver*, 3 N.C. (2 Hayw.) at 54.

152. *Id.*

153. *See supra* text accompanying notes 40–44.

154. *See Weaver*, 3 N.C. (2 Hayw.) at 54.

155. *See id.* at 54–55.

156. *Id.*; MORRIS, *supra* note 68, at 161–81.

individuals who owned property. The possession of rights, construed as a form of property, became the primary route to the legal protections of the peace.

The results of this conversion are strikingly apparent in matters of interpersonal violence involving subordinates, particularly slaves. In these cases, state lawmakers treated the legal protections traditionally granted to all subjects under the peace as rights. Once construed as rights, judges began refusing those protections to domestic dependents on the basis that they would endanger husbands' and masters' domestic authority.¹⁵⁷ The legal effect was to privatize domestic relations by uprooting household heads' authority from its place within the peace and turning it into a right that legally recognized individuals exercised over their property. All domestic dependents were repositioned as the subjects of their household heads, instead of subjects of the peace.¹⁵⁸ But the implications were most dramatic for slaves, the most marginalized of subjects and the least able to summon the protections of the peace.

The 1823 case of *State v. Reed*,¹⁵⁹ which involved a white man convicted of manslaughter for killing a slave, captures the essence of this transition. *Reed* recapitulated the major questions in the earlier 1801 case, *State v. Boon*: whether slaves were part of the peace, and whether fatal violence against them could be tried under common law. Two of the three judges in *Reed*, John Louis Taylor and John Hall, had also issued opinions in *Boon*.¹⁶⁰ In 1823, though, they sat on the newly constituted Supreme Court of North Carolina, composed of three judges who only heard appeals, instead of the North Carolina Court of Conference, which had included all the judges who tried cases in district courts.¹⁶¹ Both Taylor and Hall wrote short opinions reaffirming their decisions in *Boon*,¹⁶² taking different positions on how to include slaves within the peace.¹⁶³ Hall placed slaves outside the bounds of the peace and common law unless the legislature

157. See, e.g., *State v. Mann*, 13 N.C. (2 Dev.) 263, 265–66 (1829); *State v. Reed*, 9 N.C. (2 Hawks) 454, 456 (1823).

158. See EDWARDS, THE PEOPLE AND THEIR PEACE, *supra* note 3 (manuscript at 238–44).

159. 9 N.C. (2 Hawks) 454 (1823).

160. See *State v. Boon*, 1 N.C. (Tay.) 191, 191, 199 (1801).

161. For the institutional structure of the court, see sources cited *supra* note 8.

162. See *Reed*, 9 N.C. (2 Hawks) at 455–56.

163. See *Boon*, 1 N.C. (Tay.) at 197–98.

specified otherwise.¹⁶⁴ Taylor, who assumed slaves' position within the peace, thought common law applicable to them.¹⁶⁵

Although Judge Leonard Henderson sided with Taylor in *Reed*, his opinion cast the issue differently by raising the question of whether slaves' position as property severed their ties to the peace and their access to the protections of the state, be it through common law or statute. "That a slave is a reasonable, or, more properly, a human being, is not, I suppose, denied," wrote Henderson.¹⁶⁶ "But it is said that, being property, he is not within the protection of the law"¹⁶⁷ After stating the hypothetical that slaves' position as property excluded them from all legal protections, Henderson rejected it, but only in regard to fatal violence because, no one, not even masters, had power over slaves' lives.¹⁶⁸ Henderson indicated in his opinion that there is no law in North Carolina, or any other state, "by which the *life* of a slave is placed at the disposal of his master."¹⁶⁹ Even so, Henderson conceded that masters' property rights shielded them from legal intervention in every other respect: the law "vested in the master the absolute and uncontrolled right to the services of the slave, and the means of enforcing those services" ¹⁷⁰ In those areas, "the law has nothing to do" with and will not "interfere upon the ground that the State's rights, and not the master's, have been violated."¹⁷¹ Property rights privatized the institution of slavery.

Subsequent cases followed that logic, with Thomas Ruffin's decisions providing some of the most famous and the most graphic examples. Ruffin is rarely placed in the vanguard of change, particularly change that expanded the legal reach of individual rights. His decisions can be interpreted as those of a paternalist who defended slavery and marriage as organic relationships defined through the reciprocal obligations of master and slave, husband and wife.¹⁷² That is partly because of the success of the state elite in

164. See *id.* at 199.

165. *Id.*

166. *Reed*, 9 N.C. (2 Hawks) at 455.

167. *Id.*

168. See *id.* at 445–56.

169. *Id.* at 456.

170. *Id.*

171. *Id.*

172. See GENOVESE, *supra* note 69, at 25–49. Genovese also discusses the link between slavery and other domestic relations of subordination that grounded the paternalistic ethic. *Id.* at 70–75. Drawing on that framework, historians tended to see Ruffin's decisions on slavery—and *State v. Mann* in particular—as exemplary of Ruffin's paternalism and his embrace of an organic view of marriage based in status rather than contract. See BARDAGLIO, *supra* note 13, at 63–64; BYNUM, *supra* note 132, at 69–71.

preserving their vision of the legal system and characterizing it as the inevitable outcome of venerable traditions rooted in the past. Ruffin also cultivated that association with a mythic past in his opinions by using historically resonant analogies to legitimize legal change. By nineteenth-century standards, though, Ruffin was a thoroughly modern jurist, a Whig who saw individual initiative, the unfettered control of property, and economic development as the key to the nation's future and whose decisions in matters of property reflected those commitments. In his decisions on marriage and slavery, much-cited by historians, Ruffin remade those status relations by infusing them with the logic of property rights.¹⁷³

Ruffin's commitment to property rights guided his most infamous ruling in 1829 in *State v. Mann*.¹⁷⁴ Those concerns led him to define the defendant, John Mann, as a master, even though he only hired, rather than owned, Lydia, the injured slave.¹⁷⁵ As Ruffin saw it, property rights trumped status and placed hirers, whose authority over slaves was established through a contract giving them temporary property rights, in the same position as owners, whose authority could be rooted in the status relationship of master and slave.¹⁷⁶ Although this aspect of the decision has received a great deal of scholarly attention, the legal practice of granting hirers the authority of masters was well established: in the 1798 case of *State v. Weaver*, for instance, both the district court and the state court of conference treated the defendant, a slave hirer, as if he were a master.¹⁷⁷ More novel was the way Ruffin departed from the logic of status, forcing the relationship between master and slave or hirer and slave into the zero-sum equation of competing individual rights. In one of his most notorious pronouncements, Ruffin declared that "[t]he power of the master must be absolute to render the submission of the slave perfect."¹⁷⁸ By making the power of a master absolute, Ruffin turned it into an individual right, rather than the product of a status relationship

173. See TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890*, at 130-59 (1999). Ruffin's political positions are apparent in his published, collected correspondences. See generally 1 *THE PAPERS OF THOMAS RUFFIN*, *supra* note 21 (collecting assorted papers sent from and addressed to Thomas Ruffin).

174. 13 N.C. (2 Dev.) 263 (1829).

175. See *id.* at 264-65.

176. *Id.* at 265 ("In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in a relation to both rights and duties, is, for the time being, the owner.").

177. *State v. Weaver*, 3 N.C. (2 Hayw.) 54, 55 (1797) (per curiam).

178. *Mann*, 13 N.C. (2 Dev.) at 266.

extended at the behest of the peace with the intent of maintaining public order. In removing an individual master's authority from its place within the peace, Ruffin also freed it from legal contingency and regulation. It became absolute, akin to other property rights that the state was bound to protect. By implication, legal intervention on behalf of Lydia might jeopardize the rights of all masters. "The danger would be great, indeed," Ruffin concluded, "if the tribunals of justice should be called on to graduate the punishment appropriate to every temper and every dereliction of menial duty."¹⁷⁹ The universal basis of the property rights held by masters limited the jurisdiction of the state over their conduct toward slaves.

Ten years later, in *State v. Hoover*,¹⁸⁰ Ruffin seemed to backtrack from this extreme position.¹⁸¹ In this 1839 opinion, Ruffin argued that a master's authority was not so complete that he could take a slave's life at will.¹⁸² But he still interpreted status relations through the lens of individual rights, just as he had in *Mann*. He began by reiterating the central point in *Mann*, that a master's authority to "lawfully punish his slave" was a right that "must, in general, be left to his own judgment and humanity, and cannot be judicially questioned."¹⁸³ The difference in the *Hoover* case, according to Ruffin, was that violence had become so chronic and so brutal that it ceased to be punishment.¹⁸⁴ "They are barbarities" that "do not belong to a state of civilization," so they "cannot be fairly attributed to an intention to correct or to chastise."¹⁸⁵ Ruffin did not need to appeal to the peace to justify legal intervention, because his argument hinged on the contention that John Hoover had ceased to act as a master should in his relationship with the slave Mira.¹⁸⁶ Therefore, his authority over Mira was no longer a right that the law was bound to protect.¹⁸⁷ The court could punish him as a man who committed murder rather than a

179. *Id.* at 267.

180. 20 N.C. (3 & 4 Dev. & Bat.) 500 (1839) (per curiam).

181. See *Mann*, 13 N.C. (2 Dev.) at 263; *State v. Walker*, 4 N.C. (Car. L. Rep.) 662, 667-69 (1817); *Weaver*, 3 N.C. (2 Hayw.) at 55. For an alternative interpretation of these cases, see MORRIS, *supra* note 68, at 174-79. The racial ideology of elite white southerners, some of whom were certain that African Americans' racial makeup kept them from feeling pain in the same way as whites, reinforced legal practice. See Elizabeth B. Clark, "The Sacred Rights of the Weak": Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 J. AM. HIST. 463, 473-75 (1995).

182. *Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) at 503.

183. *Id.*

184. *Id.* at 504-05.

185. *Id.* at 503-04.

186. *Id.*

187. *Id.*

master whose rights the court compromised.¹⁸⁸ That ruling applied to other masters only in extreme circumstances, when their exercise of authority took on the character of torture and placed them outside the role of the master.¹⁸⁹ Otherwise, the state would protect property rights by staying out of the master-slave relation as it had done in *State v. Mann*.

The appellate court then extended these principles to cases where the parties were not in the same household, explicitly turning a prerogative of status into a right possessed by all white men. In case after case, judges gave wide latitude to white men who used force against slaves.¹⁹⁰ These decisions all turned on the rights of the white male defendants and focused on the provocation offered by the enslaved victim.¹⁹¹ If those actions were sufficiently damaging, then the defendant had the right to respond with violence without bearing criminal responsibility for his acts.¹⁹² The standard was very different in cases involving free white men, where provocation consisted only in “actual threats of violence, such as drawing a knife within striking range.”¹⁹³ For slaves, appellate courts defined provocation broadly: insults, disobedience, or threatening gestures proved sufficient to justify free white men’s use of physical force. The court laid out the conclusion in *State v. Tackett*¹⁹⁴ in 1820:

It exists in the nature of things that, where slavery prevails, the relation between a white man and a slave differs from that which subsists between free persons; and . . . the homicide of a slave may be extenuated by acts which would not produce a legal provocation if done by a white person.¹⁹⁵

This same standard also applied to assault, as the court explained in *State v. Hale*¹⁹⁶ in 1823: “[E]very battery on a slave is not indictable, because the person making it may have matter of excuse or

188. *Id.*

189. *Id.*

190. See, e.g., *State v. Cæsar*, 31 N.C. (9 Ired.) 391 (1849); *State v. Hale*, 9 N.C. (2 Hawks) 582 (1823); *State v. Tackett*, 8 N.C. (1 Hawks) 210 (1820), *overruled by* *State v. Watson*, 287 N.C. 147, 214 S.E.2d 85 (1975); see also Edwards, *Domestic Violence*, *supra* note 22, at 758–60.

191. See *Cæsar*, 31 N.C. (9 Ired.) at 402–06; *Hale*, 9 N.C. (2 Hawks) at 586; *Tackett*, 8 N.C. (1 Hawks) at 216.

192. See Edwards, *Domestic Violence*, *supra* note 22, at 763–64.

193. *Id.* at 763.

194. 8 N.C. (1 Hawks) 210 (1820).

195. *Id.* at 217; see also Edwards, *Domestic Violence*, *supra* note 22, at 763–64 (“The definition of provocation was broader in altercations involving wives and slaves.”).

196. 9 N.C. (2 Hawks) 582 (1823).

justification, which would be no defense for committing a battery on a free person. Each case of this sort must, in a great degree, depend on its own circumstances.”¹⁹⁷ *Hale* affirmed local practice that allowed assaults against slaves to be tried as criminal offenses to the peace. Yet here, as elsewhere, the court invoked the peace to limit the conduct of slaves and to protect the rights of white men who might be wrongly accused of criminal offenses for battering slaves.

The imposition of this model created a legal world of stark dichotomies with moral and ethical implications that even its staunchest supporters found difficult to handle. Chief Justice Ruffin’s 1847 discussion of the legal limits of self-defense in *State v. Cæsar*¹⁹⁸ is particularly suggestive. The slave, Cæsar, used violence to defend his life from a brutal attack by a white man. The question was whether his actions were legally justified. Ruffin wrote a long, tortured decision, trying to work himself out of the legal bind imposed by the logic of individual rights.¹⁹⁹ He began by arguing that violence, in the form of corporal punishment, was integral to all domestic dependents’ subordination.²⁰⁰ By extension, he reasoned, the law assumed that domestic dependents responded to violence differently than did free white men.²⁰¹ It also judged their violent acts by different standards. A child who killed a parent while being punished, for instance, was guilty of murder because the act could only be seen as “a malignant and diabolical spirit of vengeance.”²⁰² Ruffin then extended this logic to cover slaves’ dealings with all free people. “It is a just conclusion of reason when a slave kills a white man for a battery . . . that the act did not flow from . . . uncontrollable resentment, but from a bad heart . . .”²⁰³ Then Ruffin revealed how dangerous domestic dependents’ violent acts were to his understanding of public order. In his words, slaves with “bad hearts” were “intent upon the assertion of an equality, social and personal, with the white, and bent on mortal mischief in support of the assertion.”²⁰⁴ Wives, whose domestic status also followed them beyond the household, could be substituted for slaves. Their evil intent would be the “assertion of an equality, social and personal,” with men.²⁰⁵ If the court sanctioned their use of

197. *Id.* at 582.

198. 31 N.C. (9 Ired.) 391 (1849).

199. *Id.* at 412–28 (Ruffin, C.J., dissenting).

200. *See id.* at 421.

201. *See id.* at 423.

202. *Id.* at 422.

203. *Id.* at 424.

204. *Id.*

205. *Id.*

violence, that would grant them equality and the rights that status implied. Ruffin, however, could not go where the logic led him, even though he refused to abandon it completely. He sanctioned Cæsar's actions, dissenting from the majority and going against the grain of his own rulings.²⁰⁶ Yet, as he also explained, his decision did not endanger masters' property rights or extend rights to slaves.²⁰⁷ That was because slaves' acts of self-defense were "natural" responses exhibited by all animals when their lives were endangered, not the expression of rights that they would be in legally empowered individuals.²⁰⁸

CONCLUSION

The impressive documentary record and the compelling narratives left by Ruffin and his cohort obscure the fact that state law constituted just one of many options in a complicated legal landscape, even in the period between 1820 and 1860. To place our emphasis at that one level, using state law to stand in for North Carolina law, is to misconstrue the past. We end up anachronistically imposing the logic of individual rights on public offenses that were actually governed by a very different vision of the peace. We miss the pervasiveness of individual rights at the state level, because existing narratives precondition us to interpret state law as an expression of established traditions and hide alternatives in localized law that would highlight the novelty of trends in that body of law.

More importantly, we duplicate state leaders' insidious forms of elitism, racism, and sexism; we see the law as the domain of the professionally trained elite and its primary purpose as protecting the interests of those with rights. That view inaccurately marginalizes all ordinary North Carolinians—white and black, slave and free, men and women—who actually played active roles in maintaining the peace within the state's localized legal system. It also encourages us to view slaves and all those without the full array of rights in terms of the theoretical legal subordination posited by state law. That body of

206. See *id.* at 425–28. "Ruffin was actually dissenting from the majority opinion written by [Judge] Richmond Pearson, but his point was that the rule Pearson laid out in this instance was unnecessary because the common law already allowed for the resolution of such cases." Edwards, *Domestic Violence*, *supra* note 22, at 766 n.46; see also *State v. Will*, 18 N.C. (1 Dev. & Bat.) 121, 121 (1834) (recognizing that the case, although exceptional in many respects, also conforms to the general rule of self-defense as a "natural" reaction). The same logic shaped the adjudication of slave violence in South Carolina. See Edwards, *Domestic Violence*, *supra* note 22, at 758–67.

207. *Cæsar*, 31 N.C. (9 Ired.) at 427–28.

208. *Id.*

law, as it emerged in the decades after 1820, focused on rights bearing individuals, namely free white men who owned property. Those without rights were marginalized in this body of law, and necessarily so since they had no way to make claims on the legal system and the legal system could not recognize their claims without changing their legal status. Their actions did not translate into legal agency, within the terms of this system. Nor did their complaints find purchase in the system, particularly if they involved the rights bearing individuals who were their heads of household. State law categorized all domestic dependents' complaints about their patriarchs' exercise of unlimited, arbitrary power as "private" and "personal" and, thus, outside its purview. State law also privatized actions, particularly violent actions, committed by domestic dependents against their household heads, casting such acts as isolated incidents, the product of evil and demented minds, not of legitimate complaints or systemic problems with the South's social structure. Free white men's actions were legally different. When white men complained about the women, slaves, and other subordinates in their lives, the state intervened to uphold their rights and to set precedents involving other citizens' rights as well. The terms of state law thus direct us to see slaves and other domestic dependents in particular roles. In fact, the terms of state law tend to erase these people, as people, altogether.

The terms of state law also raise questions about individual rights. Thomas Ruffin's legal world, even its defense of slavery, was firmly connected to broader, national currents. Like lawmakers elsewhere in the nation, North Carolina's elite created a legal system based around rights and extended them broadly among white men, at least at the state level. Those rights sanctioned white men's power over their dependents by freeing patriarchal authority from the legal oversight of the peace. In North Carolina, though, the presence of slavery shaped the definition and use of rights, resulting in a much broader conceptions of white men's rights and the state's responsibility in upholding them. In this regard, North Carolina's legal history sheds light beyond the region, underscoring the importance of political context in shaping the meanings given to rights—and those meanings matter as much as people's access to rights.