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## Regionalism and American Legal History: The Southern Experience

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# Regionalism and American Legal History: The Southern Experience

James W. Ely, Jr.\* & David J. Bodenhamer\*\*

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## I. INTRODUCTION

Commentators surprisingly have failed to focus on the influence of regionalism in the development of American law. To be sure, numerous books and articles examine state law and its local application or explore the treatment by several states of a particular legal concept or category of laws. But attempts to define regional attitudes toward law or to analyze regional differences in legal practice are almost nonexistent. So foreign has the topic of regionalism been to scholarship in American legal history that Lawrence Friedman's acclaimed synthesis, *A History of American Law*,<sup>1</sup> contains no discussion of regionalism or its close relative, sectionalism. Even now, no comprehensive study treats the law of any region in the country, including the South, despite countless

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1. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973).

regional studies by scholars from many disciplines.<sup>2</sup>

This omission has not gone without notice. As early as 1950 James Willard Hurst called for greater attention to regional and state legal history.<sup>3</sup> In 1982 Hurst declared that "it is only within recent years that students of legal history have begun to explore ways in which legal doctrine and uses of law may have shaped or responded to sectional experiences and patterns different from or in tension with interests taking place on a national scale."<sup>4</sup> Still, many topics remain unexplored, and historians have not developed any central themes to guide a regional approach to legal history. The purpose of this Article is to make a modest beginning in this direction.

## II. AN INTERPRETIVE FRAMEWORK FOR THE STUDY OF REGIONALISM

What is the value of a regional perspective to the history of American law? Simply stated, generalizations made from regional patterns of legal organization and behavior are of greater comparative significance than generalizations drawn from community or national studies alone. A regional focus allows the scholar to identify more precisely that which is merely local and to control for its effects. Similarly, regional study offers a test of attitudes and behaviors that purport to be truly national. Regional examination will not necessarily contradict findings from local or national studies, but it can provide a useful framework in which local and national findings can be better understood.<sup>5</sup>

Regional analysis is by definition difficult to undertake. In large measure, the various and often ambiguous meanings given the term "region" or "regional" complicate the task. The United States, for example, has been subdivided according to historical

2. For a recent volume of essays treating various issues in Southern legal history, see *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* (D. Bodenhamer & J. Ely, eds. 1984) [hereinafter cited as *AMBIVALENT LEGACY*]. The Vanderbilt University School of Law sponsored a two day symposium on the region's legal history in 1978. See *Symposium on the Legal History of the South*, 32 *VAND. L. REV.* 1 (1979); see also Finkelman, *Exploring Southern Legal History*, 64 *N.C.L. REV.* 77 (1985); Sydnor, *The Southerner and the Laws*, 6 *J.S. HIST.* 3 (1940). Much of the analysis in this Article is inapplicable to Louisiana because of its French-Spanish heritage.

3. J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 18 (1950).

4. Hurst, *The State of Legal History*, 10 *REV. IN AM. HIST.* 292 (1982).

5. See Smith, *Analyzing Regional Social Systems*, in 2 *REGIONAL ANALYSIS: SOCIAL SYSTEMS* 3 (C. Smith, ed.) (1976); see also Redfield, *Societies and Cultures as Natural Systems*, 80 *J. ROYAL ANTHROPOLOGICAL INST.* 19-32 (1956).

settlement patterns, distribution of natural resources, cultural characteristics, social and economic problems, and administrative convenience, to list only a few criteria employed. Most frequently, historians have allowed topography, climate, state boundaries, and sectional or political movements to define regions. To be sure, there is more overlap to the several definitions than this bewildering array of schemes would suggest—for example, the South may or may not include the border states, but it never includes Illinois or Ohio. Still, an eclectic approach begs the essential question of what features or functions must exist in an area to justify its identification as a region. To be useful to legal historians, moreover, any definition must relate territorial space or location to the existence, attitudes, and behavior of population groups and institutions.<sup>6</sup>

This Article cannot settle these complex definitional issues; yet the failure to advance a comprehensive definition need not be inhibiting. For purposes of discussion, it might be useful to accept initially the common sociological use of region as a “homogeneous area with physical and cultural characteristics different from those of neighboring areas. . . . [one that] is sufficiently unified to have a consciousness of its customs and ideals and thus possesses a sense of identity distinct from the rest of the country.”<sup>7</sup> Although territorial integration remains an important variable in this definition, the key to identifying a region is not location but institutional and ethnic or cultural homogeneity. An analytical framework that moves from regional groups and institutions to region rather than vice versa dates to sociologist Howard Odum’s writings in the 1930s.<sup>8</sup> After its apparent demise in the 1950s, the concept of regional sociology has been resurrected as an analytical tool by John Shelton Reed, a prominent scholar of the modern South.<sup>9</sup>

Odum’s and Reed’s approach is not without problems. The existence of vigorous subcultures with stronger holds on members’

6. See Olsen, *Regional Social Systems: Linking Quantitative Analysis and Fieldwork*, in 2 REGIONAL ANALYSIS: SOCIAL SYSTEMS, *supra* note 5, at 21-35.

7. Vance, *Region*, 13 INT’L ENCYCLOPEDIA OF THE SOCIAL SCI. 377-78 (1968).

8. See, e.g., H. ODUM & H. MOORE, *AMERICAN REGIONALISM: A CULTURAL-HISTORICAL APPROACH TO NATIONAL INTEGRATION* (1938) [hereinafter cited as H. ODUM & H. MOORE]; H. ODUM, *SOUTHERN REGIONS OF THE UNITED STATES* (1936).

9. See, e.g. J. REED, *ONE SOUTH: AN ETHNIC APPROACH TO REGIONAL CULTURE* (1982) [hereinafter cited as J. REED, *ONE SOUTH*]; J. REED, *THE ENDURING SOUTH: SUBCULTURAL PERSISTENCE IN MASS SOCIETY* (1972). A different approach, focusing on areal distribution of governmental power, is explored in Maas, *Division of Powers: An Areal Analysis*, in *AREA AND POWER* 9-26 (A. Maas, ed. 1959).

allegiances than the dominant culture can cloud analysis of regionalism. Especially troublesome is the extent to which racial or ethnic minorities share the values or embrace the institutions of the larger group.<sup>10</sup> Indeed, the amelioristic and even paternalistic character of an earlier regional sociology led many scholars to abandon its largely descriptive approach in favor of more quantitative methods of analysis. Yet a properly sophisticated focus on cultural identification rather than geographical location offers at least one advantage: numerous contemporary and scholarly perceptions of cultural differences among people in different parts of the country exist. As Reed notes, the study of the perception of regional differences, regardless of their validity, is the meeting point for several scholarly disciplines.<sup>11</sup> A point of departure for future scholarship would be to test these perceptions. Because of common terminology and similar sources of data, legal history seems well positioned to lead these studies.

Although agreement concerning the existence and identification of regions or the proper focus for a regional study of law is necessary, other propositions appear equally important. First, regions are not static entities; rather, they exist in space and time, changing over the course of decades or centuries. Ray Allen Billington's reminder that the frontier was both a place and process is appropriate for the student of regionalism in American legal history.<sup>12</sup> New England was an ethnically and culturally homogeneous region from the colonial period to the 1840s, a fact recognized at the time and confirmed in countless studies since then. But no one argues that New England retained this cohesion during the great transatlantic migrations of the 1850s and beyond. The same argument could be made for the succession of "Wests" that emerged in the eighteenth and nineteenth centuries. The importance of regional change for legal historians seems clear: law properly may be labelled regional at certain times, for certain locations, and under certain circumstances, but not necessarily for all periods or all circumstances.

Second, sectionalism and regionalism are closely related concepts, but they are not synonymous. Although historians have used the terms interchangeably, social scientists have made an impor-

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10. Reed acknowledges these problems, but argues that even minorities share many regional characteristics of the dominant group. See J. REED, *ONE SOUTH*, *supra* note 9, at 13-14.

11. *Id.* at 14-27.

12. R. BILLINGTON, *AMERICA'S FRONTIER HERITAGE* 25 (1966).

tant distinction between them. Sectionalism is a political expression that may or may not occur in concert with regionalism, although sectional movements frequently stimulate the close identity with region that is essential for the development of regional culture.<sup>13</sup>

The antebellum South offers the best example of this distinction between sectionalism and regionalism. Although the crisis over slavery's advance prompted political unity in the form of southern confederacy, the notion of a unique, well-defined South prior to the Civil War is suspect. Important divisions were present among and within the slave-holding states. Older counties of tidewater Virginia and South Carolina shared little in common with settlements in the piedmont and mountains. Rice counties of coastal Georgia bore little resemblance to the frontier districts of Texas and Arkansas. The climate, economy, and social organization of the Upper South were markedly dissimilar from those in the Lower South. Whites in every state were fragmented along class lines. Great distances between areas, poor communication and transportation networks, and the pervasive localism of early nineteenth century society prevented the easy amelioration of these differences. Yet we speak casually of the antebellum South as a region because of the impact of sectionalism, a political force that in the aftermath of defeat proved to be a powerful stimulant to cultural unity.<sup>14</sup>

No clear line of demarcation exists between sectionalism and regionalism; yet making the distinction is important for legal historians, especially for students of southern legal history. For instance, attributing all developments in slave law from the 1820s to the political defense of the peculiar institution would be misleading. The work of Thomas D. Morris,<sup>15</sup> A.E. Keir Nash,<sup>16</sup> and, more

13. See H. ODUM & H. MOORE, *supra* note 8, at 35-51. The strength of sectionalism and its relationship to cultural values is demonstrated in R. BENSEL, *SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT* (1984).

14. The symbol of the Lost Cause and, in some ways, even the idea of a New South were expressions of and contributors to the notion of a separate Southern culture. See D. BILLINGS, *PLANTERS AND THE MAKING OF A "NEW SOUTH": CLASS, POLITICS, AND DEVELOPMENT IN NORTH CAROLINA, 1865-1900* (1979); P. GASTON, *THE NEW SOUTH CREED* (1970); R. OSTERWEIS, *THE MYTH OF THE LOST CAUSE, 1865-1900* (1973); J. WIENER, *SOCIAL ORIGINS OF THE NEW SOUTH: ALABAMA, 1860-1885* (1978).

15. See, e.g., Morris, "Society is not marked by punctuality in the payment of debts": *The Chattel Mortgages of Slaves*, in *AMBIVALENT LEGACY*, *supra* note 2, at 147-70; Morris, "As if the Injury was Effected by the Natural Elements of Air, or Fire": *Slave Wrongs and the Liability of Masters*, 16 L. & Soc. Rev. 569 (1982).

16. See, e.g., Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar*

recently, Tony Freyer<sup>17</sup> has demonstrated that judicial decisions and legislative enactments on this subject responded more to the internal dynamics of the slave system than to the need to defend the peculiar institution from outside attack. The first concern of many jurists and lawmakers was to rationalize the laws of slavery and to make them consistent with both the common-law heritage and popular government. Rationalization not only helped to strengthen the political defense of slavery, but also served to accommodate an aristocratic institution to the ideology and prejudices of the white democracy.<sup>18</sup> The point may be expressed simply: legal historians should not allow more dramatic political expressions of regionalism, such as sectionalism, to deflect their search for other values and attitudes that influenced the development of law in particular regions.

Third, regionalism in American history is part of a continuum of social organization that stretches from localism to nationalism. Regionalism cannot account for all legal change because other forces—some particular, others global—have an impact on law, even when regional identity and homogeneity appear to be strongest. Regionalism cannot be studied in isolation. Analysis of a single social segment will not illuminate the dynamics of a complex society. Historians must consider regionalism in the context of the larger society and in comparison with smaller, more local forms of group organization. Multiple loyalties, after all, are basic to social life in all but simple societies. Some loyalties will be to family, others to community, and still others to broader, more abstract groups, such as professions, corporations, or political parties.

In the colonial period, men and women did not lead the compartmentalized lives or assume the differentiated roles required of them in modern society; the bounds and standards of the local community framed their lives. Social change over the next two centuries eclipsed the community but did not eliminate it. New networks of relationships emerged, each coexisting with other social groups and each providing norms that formed a portion of the individual member's identity. Still, as Thomas Bender has argued, a great deal of continuity was present in this process of change.<sup>19</sup> For much of this time, probably until the late nineteenth or early

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*liar Institution*, 32 VAND. L. REV. 7 (1979).

17. See, e.g., Freyer, *Law and the Antebellum Southern Economy: An Interpretation*, in *AMBIVALENT LEGACY*, *supra* note 2, at 49-68.

18. See E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 25-26 (1972).

19. See T. BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* (1978).

twentieth century, the primary associational relationships in society were found in the personal contacts that marked local life.<sup>20</sup>

Undoubtedly, law was intimately connected to this process of social and economic change. In some areas, such as the development of market relationships, law facilitated new forms of organization, while in others, such as the labor movement, it was an obstacle to change. But even if the broad outlines are visible, we still know too little about the role of law in expanding the social and economic networks of the nineteenth and twentieth century United States. Numerous questions require answers. What role did law play in linking diverse communities to form regions and regional networks? How did law help people live simultaneously in radically different social worlds—one communal, others translocal, still others abstract and associational? How did law strengthen or weaken loyalties and relationships as people moved beyond the borders of their local communities? What legal accommodations emerged when different forms of organization espoused contradictory values and patterns of behavior? How much of this accommodation (or lack of it) can be attributed to regional character? These are important questions for anyone who studies the development of American law.

Other propositions and other questions doubtless can be used profitably in a regional approach to legal history. The items above are meant to be suggestive, not exhaustive. But more is needed for fruitful exploration than agreement on definitional issues or on the necessary questions for proper study. Some interpretative framework must shape our research. What follows is a preliminary effort at constructing a guide for future investigations.

A heavy emphasis on the experience of Wisconsin and more recently New England (*i.e.*, Massachusetts) has led many legal historians to overemphasize the degree of uniformity present in American law during the late eighteenth and nineteenth centuries.<sup>21</sup> Indeed, arguably, no well-defined American law existed, except perhaps in laws governing certain activities and parts of the marketplace. Even then law frequently responded to the pull of local and regional forces. In short, law from the colonial period at least through the nineteenth century was essentially local in focus and effect, a circumstance shrouded by two developments: the po-

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20. *See id.* at 58-120.

21. *E.g.*, M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).



litical success of the Supreme Court in creating a body of law that facilitated the emergence of a national market; and the triumph of the Union in the Civil War, accompanied by the transcendent rhetoric and symbols of national unity.

In searching for generalizations to describe the history of American law, scholars must recognize that the development of a truly national law depended on the economic and cultural integration of local communities into larger units, especially sub-regions and regions that may or may not have corresponded with political states. This uneven process of integration occurred first in the marketplace and was contingent on technological advances in transportation and communication and on the establishment of stable political relationships in the federal union.<sup>22</sup> The issues that dominated political debate throughout much of American history have been largely economic in nature. Developments in law, therefore, not surprisingly reflected an emerging political consensus favoring the creation of a national economy. Moreover, this consensus gradually weakened the highly particularistic forces of law and custom governing local markets. But the growth of an identifiable economic law did not lead to a parallel withering of local influence in other areas, such as family relations, crime, and treatment of the poor, at least until the federalization of these issues in the twentieth century.<sup>23</sup>

The common-law heritage reinforced the local tendencies of American law. Rules of decisionmaking that tied legal principles to case law and the wide discretion allowed jurists effectively muted much of the impetus toward centralization that might have come from a legal system so formally reliant on precedent. The provincial education of most judges and the use of popular methods to select them also tied the judiciary more closely to local and regional culture, especially in areas far removed from the nation's commercial and intellectual centers.<sup>24</sup> Finally, the nature and

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22. See S. BRUCHEY, *GROWTH OF THE MODERN AMERICAN ECONOMY* (1975); C. NETTELS, *THE EMERGENCE OF A NATIONAL MARKET ECONOMY, 1775-1815* (1962); D. NORTH, *GROWTH AND WELFARE IN THE AMERICAN PAST: A NEW ECONOMIC HISTORY* (1966); G. TAYLOR, *THE TRANSPORTATION REVOLUTION, 1815-1860* (1951); Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & Soc. Rev. 57 (1975).

23. Guides to the historiography of these areas are found in the following essays from *THE PROMISE OF AMERICAN HISTORY: PROGRESS AND PROSPECTS* (S. Kutler & S. Katz, eds. 1982): Ryan, *The Explosion of Family History*, 181-95; Freedman, *Sexuality in Nineteenth-Century America: Behavior, Ideology, and Politics*, 196-215; May, *Expanding the Past: Recent Scholarships on Women in Politics and Work*, 216-33.

24. See K. HALL, *THE POLITICS OF JUSTICE: FEDERAL JUDICIAL SELECTION AND THE SEC-*

structure of American federalism, with its emphasis on shared power, inhibited the fashioning of national law by reserving the exercise of ultimate authority in certain fields of law to state and local governments.<sup>25</sup>

Viewing all American law before the twentieth century as particularistic in origin or execution would be inaccurate, however. Several developments effectively bridged legal regionalism and prepared the way for national legal norms. Especially significant was general acceptance of republican ideology, notably its expression through written constitutions.<sup>26</sup> Equally important were treatise writers' attempts to synthesize the law;<sup>27</sup> early and continuing efforts at codification;<sup>28</sup> the growing professionalization of the bar, including the emergence of law schools;<sup>29</sup> and above all, the expanding influence of the federal appellate judiciary.<sup>30</sup> Extensive changes in mentalities, such as the spread of evangelical Christianity and the emergence during the Victorian era of new perspectives on marriage and family,<sup>31</sup> also provided fertile ground for common legal approaches to certain social issues.

Testing this interpretative framework through its application to the legal history of various regions remains. The focus here will be on the South, arguably the most clearly identifiable region in American history. Although this treatment will attempt to demonstrate the impact of regional values on law, a few caveats are neces-

OND AMERICAN PARTY SYSTEM, 1829-1861 at 4 (1979); Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920*, in *AMBIVALENT LEGACY*, *supra* note 2, at 229-56.

25. See W. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* (1964).

26. See D. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1968).

27. See G. DARGO, *LAW IN THE NEW REPUBLIC: PUBLIC LAW AND THE PUBLIC ESTATE* 28-29 (1983); R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

28. See L. FRIEDMAN, *supra* note 1, at 351-55; P. MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 239-65 (1965); B. SCHWARTZ, *THE LAW IN AMERICA: A HISTORY* 71-75 (1974).

29. See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976); G. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840* (1979); R. STEVENS, *THE LAW SCHOOL: LEGAL EDUCATION IN AMERICA* (1983).

30. Biographies of leading lawyers and judges offer the best insights into the expanding role of the appellate judiciary. See, e.g., M. BAXTER, *ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION* (1984); M. BAXTER, *DANIEL WEBSTER AND THE SUPREME COURT* (1966); R. NEWMAYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* (1985); C. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, V. THE TANEY PERIOD* (1974); E. WHITE, *THE AMERICAN JUDICIAL TRADITION* (1976).

31. See M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

sary: the present Article represents a preliminary effort to examine the topic; comments are meant to be suggestive, not definitive. The Article is not comprehensive, nor are all important issues addressed. In particular, the Article contains no examination of the law of slavery, indisputably the most unique feature of southern law.<sup>32</sup> The omission is by design: an attempt to test the regional character of law by reference to slavery would be an exercise in tautological reasoning. Moreover, a rich literature already exists on the subject.<sup>33</sup> This omission does not imply that the study of slave law is without profit for students of regional law, but rather that other subjects may offer a better test of the general argument.

### III. EXAMPLES OF REGIONALISM'S IMPACT ON SOUTHERN LAW

Keenly disappointed when the South Carolina legislature defeated his proposal to establish a penitentiary, Benjamin F. Perry, a prominent lawmaker, wrote in 1849, "[W]e are a most conservative people, and opposed to all improvements in law, politics, morals and physics."<sup>34</sup> He added, "I am really surprised such a people should be in favor of Rail Roads—they ought to stick to the old fashioned road wagon."<sup>35</sup> Perry's judgment has been echoed all too readily by those historians who have studied the South's legal past. "A southern conservatism," Carl N. Degler maintains, "born of the need to defend slavery was manifest, too, in attitudes toward reform in general."<sup>36</sup>

These explanations, however, do not provide a sophisticated approach to exploring southern legal history. Southern lawmakers sometimes paid little deference to established principles and preferred innovation over adherence to the status quo. Moreover, generalizations about conservatism fail to consider adequately the pace of developments within topic areas or to appreciate that re-

32. For the impact of slavery and racial segregation in the development of a distinctive southern legal history, see Finkelman, *supra* note 2, at 88-101.

33. See authorities cited *infra* notes 113-15.

34. L. KIBLER, BENJAMIN F. PERRY, SOUTH CAROLINA UNIONIST 231 (1946).

35. *Id.*

36. C. DEGLER, PLACE OVER TIME: THE CONTINUITY OF SOUTHERN DISTINCTIVENESS 61 (1977). Michael S. Hindus recognizes that "conservatism as an explanation is unsatisfying," but treats South Carolina's resistance to legal change in terms of concern to uphold racial hegemony. M. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 219, 233 (1980) (emphasis in original). Likewise, Bertram Wyatt-Brown asserts that "worry that innovation of any kind might have implications for race control and stability" slowed change in domestic relations law. B. WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 262 (1982).

gional peculiarities may appear more boldly in one period than another. Conservatism, then, is an inadequate guide for understanding the unique dimensions of southern legal history.

Of course, differences between the South and other regions can be overstated.<sup>37</sup> In many respects legal growth in the South paralleled legal growth elsewhere in the nation. Yet the special social structure and economic arrangements of the South affected the evolution of law in important particulars. The challenge is to capture the interplay between regional identity and national legal norms. We propose to examine the impact of regionalism by taking a brief look at four areas of concern to legal historians—economic activity, the treatment of paupers, the administration of criminal justice, and the status of married women—between the Revolution and 1900. There is considerable evidence of regional distinctiveness in three of these fields, but a large degree of convergence with national patterns concerning the position of women.

#### A. *Economic Activity*

Despite a strong emphasis on agriculture in the region, southerners accepted much of the nineteenth century legal culture designed to enhance commercial enterprise.<sup>38</sup> Many southerners were engaged in banking, railroading, and other commercial ventures,<sup>39</sup> and it is not surprising that the law at least partially protected these economic interests. Consider the treatment of implied warranties in the sale of goods. South Carolina judges early adopted the civil-law rule “that a sound price requires a sound commodity,” reasoning that this principle encouraged “honesty and fair dealings.”<sup>40</sup> But the movement among southern jurisdictions was unmistakably in the other direction. The Alabama Supreme Court not only embraced caveat emptor but observed that the South Carolina decisions “certainly derive no support from the English common law.”<sup>41</sup>

The legal position of business corporations followed a similar pattern. In 1809 Judge Spencer Roane of Virginia asserted that corporations should be created only “in consideration of services to be rendered to the public” and indicated that legislation establish-

37. See generally Pessen, *How Different from Each Other Were the Antebellum North and South?*, 85 AM. HIST. REV. 1119 (1980).

38. See generally J. HURST, *supra* note 21.

39. C. DEGLER, *supra* note 36, at 52-54.

40. *Barnard v. Yates*, 10 S.C.L.(1 Nott. & McC.) 142 (1818).

41. *Ricks v. Dillahunty*, 8 Port. 133, 141 (Ala. 1828).

ing a corporation could be repealed.<sup>42</sup> This opinion suggested a precarious status for corporations, but the state's policy moved in a different direction. Although few antebellum Virginia decisions explored legislative power over corporations, respect for charter rights guided the state's course. Bruce Campbell has concluded that "Virginia judges consistently stated that the legislature could not violate private vested property rights, including those which grew out of an individual's association with a corporation."<sup>43</sup> Following *Trustees of Dartmouth College v. Woodard*,<sup>44</sup> moreover, southern judges rapidly embraced the contract theory of corporate charters. A Georgia court ruled that "private corporations cannot be deprived of their franchises but by a judicial judgment."<sup>45</sup> As late as 1872 the Alabama Supreme Court declared, "[T]he legislature can not alter or impair such a contract without the consent of the corporators, unless this power was reserved at the time it was made."<sup>46</sup> The court then proceeded to enjoin operation of a toll bridge within two miles of an existing bridge.

Like lawmakers elsewhere, southerners occasionally expressed misgivings about the doctrine treating corporate charters as irrevocable contracts. An Alabama court noted, "How far it comports with the policy of a State, whose government is Republican, to establish such Corporations, cannot be a subject of judicial investigation."<sup>47</sup> Indeed, state constitutions often were amended to provide that all laws organizing corporations were subject to alteration or repeal. Yet these measures indicated that lawmakers were of divided counsel on the nature of the corporate charter. The Tennessee Constitution of 1870 provided for the repeal of incorporation statutes but added that "no such alteration or repeal shall interfere with or divest rights which have become vested."<sup>48</sup> This ambiguous attitude hardly suggests a rigorous attack on the legal status of the business corporations.

Southern legislators enacted general incorporation measures to make the advantage of corporate enterprise widely available. Statutes governing the management of corporations and the rights of

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42. *Currie's Adm'rs v. Mutual Assurance Soc'y*, 14 Va. (4 Hen. & M.) 315, 347 (1809).

43. Campbell, *John Marshall, the Virginia Political Economy, and the Dartmouth College Decision*, 19 AM. J. LEGAL HIST. 40, 62 (1975).

44. 17 U.S. (4 Wheat.) 518 (1819).

45. *State v. Mayor and Aldermen*, 1 Ga. Rpts. Ann. 205, (Super. Ct. E.D. 1823).

46. *Micou v. Tallassee Bridge Co.*, 47 Ala. 652, 656 (1872).

47. *Logwood v. President, Directors, Minor Rpts.* (Ala.) 23, 25 (1820).

48. TENN. CONST. of 1870 art. XI, § 8.

stockholders granted incorporators a large measure of autonomy in ordering the internal affairs of corporations.<sup>49</sup> Some pre-Civil War statutes imposed general liability on shareholders for corporate debts. In 1838, for instance, the South Carolina legislature mandated that stockholders of the Pendleton Manufacturing Company "shall be liable, individually, in case of the insolvency of the said company, to an amount equal to the amount of shares in said company which they may have respectively held, within one year of the failure of said company, over and above their original subscriptions."<sup>50</sup> But the trend was to curtail stockholder liability and thus encourage investment.<sup>51</sup> Southerners were as anxious as other Americans to use corporate enterprise.

In the late nineteenth century, business corporations, particularly those headquartered outside the South, became targets for the Populists and other agrarian political movements.<sup>52</sup> The fiery rhetoric of these groups, however, invariably outstripped the amount of genuine reform, and the business corporation emerged unscathed. In fact, consistent with New South ideology, many southerners were anxious to promote, not restrict, entrepreneurial activity.<sup>53</sup>

Despite this evidence of convergence with national legal norms, the region's debtor position markedly influenced the evolution of law in the South. The credit needs of an agricultural society and the capital intensive nature of slavery fastened indebtedness on many in the South. From the post-Revolutionary controversy in Virginia over the payment of British debts<sup>54</sup> to the late nineteenth century battles over repudiation of state obligations,<sup>55</sup> sensitivity

49. TENN. CODE of 1858, §§ 1474-97.

50. An Act to incorporate the Pendleton Manufacturing Company, Dec. 19, 1838, in 8 Cooper and McCord, *Statutes at Large of South Carolina* 463, 464 (10 vols. 1836-1841); see also An Act to incorporate the Washington Railroad Company . . . , Dec. 30, 1847, 1847 Ga. Laws 144, 147 (providing that "the private property of each stockholder, equal to the amount of his stock, shall be liable for the debts of the incorporation").

51. For instance, the GEORGIA CODE of 1845, ch. XIII, art. IV, § 112 provided for manufacturing companies that "[e]ach and every stockholder in such company shall be bound to said company, and to the creditors thereof, for the payment of the full amount of stock held by him or them . . . ." Tennessee likewise limited shareholder liability to situations in which the full amount of capital stock had not been paid. See TENN. CODE of 1858, § 1458 (manufacturing corporation), § 1478 (general private corporations).

52. See generally A. KIRWAN, *REVOLT OF THE REDNECKS: MISSISSIPPI POLITICS 1876-1925* (1951).

53. See GASTON, *supra* note 14, at 68-74.

54. See Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176 (1984).

55. See Orth, *The Virginia State Debt and the Judicial Power of the United States*,

to the plight of debtors uniquely characterized southern law and politics. As early as 1785 South Carolina's notorious Pine Barren Act warned, "[On] account of disappointments arising from the failure of crops, and from the exportation of specie. . . many citizens of this state are threatened with total ruin, by having their property seized for debt . . ." <sup>56</sup>

Stay laws, measures limiting imprisonment for debt and attachments, and homestead provisions found a consistently receptive climate throughout southern history. The North Carolina Constitution of 1776 declared that, absent fraud, a debtor "shall not be continued in prison, after delivering up, bona fide, all his estate real and personal, for use of his creditors."<sup>57</sup> Similarly, a Georgia statute of 1823 permitted imprisoned debtors to secure release by filing a schedule of their property.<sup>58</sup> An 1858 measure further curtailed arrest for debt in Georgia.<sup>59</sup> The idea of protecting a family home from the claims of creditors was adopted first in Texas and spread rapidly to other southern states.<sup>60</sup> In 1873 the North Carolina Supreme Court upheld that state's homestead exemption in sweeping language:

exemption laws are based upon "policy and humanity;" and they do not impair, but are paramount to debts. If under our circumstances our people are to be left without any exemptions, the policy of christian civilization is lost sight of, an [sic] we might almost as well return to the inhumanity of the Twelve Tables of the Roman law. . . .<sup>61</sup>

Moreover, most scholars agree that the married women's property acts—a topic to be treated at a later point—were designed largely to protect a wife's assets from her husband's creditors. Suzanne Lebsock aptly has noted that "in hard times a married-women's-property act became a significant new form of debtor relief."<sup>62</sup> Per-

in AMBIVALENT LEGACY, *supra* note 2, at 106-122; Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C.L. REV. 747 (1981).

56. An Act for Regulating Sales Under Executions; and for Other Purposes Therein Mentioned, Oct. 12, 1785, reprinted in 4 COOPER, STATUTES OF SOUTH CAROLINA 710-12 (1838). For more details on the Pine Barren Act, see Ely, *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939, 942-43 (1973).

57. N.C. CONST. of 1776, art. XXXIX.

58. An Act for the relief of Honest Debtors, Dec. 19, 1823, 1823 Ga. Laws 137.

59. An Act to abolish imprisonment for debt, on certain conditions herein set forth, Dec. 11, 1858, no. 51, 1858 Ga. Laws.

60. McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 SW. HIST. Q. 369, 369 (1983).

61. *Garrett v. Chesire*, 69 N.C. 396, 405 (1873).

62. Lebsock, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. S. HIST. 195, 202 (1977).

haps it is no coincidence that Mississippi initiated the movement to enact this legislation in 1839<sup>63</sup> and that many other southern states rapidly followed suit.<sup>64</sup>

A second consequence of the South's debtor status was a reluctance to levy taxes for public projects. Southern state governments were low-budget operations, and any proposal for sizeable public revenue faced certain opposition. Part of the antebellum controversy over the construction of prisons, for instance, reflected concern over their cost.<sup>65</sup> Civil War destruction and a perceived bad experience with Reconstruction indebtedness reinforced this anti-tax attitude in the late nineteenth century. The prevailing political climate in turn limited the range of options available to southern legislators. James Willard Hurst has argued that the allocation of resources is a major legislative responsibility. "The power to tax," he observed, "is inherently a power to direct allocation of a part of community economic resources."<sup>66</sup> Yet southerners felt compelled either to rely on private resources or to forego public services and internal improvements. Another glance at prison history may prove instructive. The emphasis on making prisons pay and on using convicts for road work or contract labor tells a good deal about budgetary constraints in the region. The postbellum convict lease system was seen initially as an expedient way to avoid the need to construct expensive new prisons.<sup>67</sup> Likewise, the concern about indebtedness was manifest in state constitutional provisions that placed rigid limits on incurring obligations and prohibited legislatures from purchasing corporate stock. For instance, the Texas Constitution of 1845 provided that "the State shall not be part owner of the stock or property belonging to any corporation."<sup>68</sup>

Economic growth thus would be encouraged without resort to general taxation, a decision with immense consequences for southern society. Lawmakers placed a premium on mustering private resources and talent to meet public needs. Local inhabitants often

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63. An Act for the protection and preservation of the rights and property of married women, Feb. 15, 1839, ch. 26, 1839 Miss. Laws 920.

64. *E.g.*, TEX. CONST. of 1845, art. VII, § 19 (providing in part: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property.").

65. E. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY SOUTH* 64-69 (1984).

66. J. HURST, *supra* note 21, at 61.

67. *See* E. AYERS, *supra* note 65, at 189, 196.

68. TEX. CONST. of 1845, art. VII, § 31.



were expected to bear the cost of internal improvements, but forced labor rather than a tax levy was frequently the legislative formula. Compulsory road work was common. The Tennessee Code of 1858 provided, "All free male persons and all slaves. . .are bound to work on the public roads."<sup>69</sup> Although the desire to hold down taxes was natural in a cash-scarce economy, this policy was destined to have a lasting impact as the South adjusted to new forms of industry and transportation in the nineteenth century. The southern policy stands in marked contrast to that of the Northeast, where state governments early turned to public revenue as a resource to promote economic growth.<sup>70</sup>

In addition to debt consciousness, the vested rights doctrine continued to influence southern law well into the nineteenth century. Owners of state-granted franchises for mills and ferries were protected against competition and interference. Thus, the Virginia Court of Appeals invalidated a state law that required mill owners to erect locks for improving river navigation.<sup>71</sup> The court stressed that "mills have at all times been considered great public conveniences and benefits, and as such, taken under the protection, encouragement and regulation of the Laws . . ."<sup>72</sup> Similarly, licensed ferries were granted exclusive rights and were secured against both competing ferries and bridges.<sup>73</sup> In 1829, for example, the Alabama Supreme Court enjoined the operation of a free bridge that was destroying the profits of a ferry operator.<sup>74</sup> The court reasoned that the ferryman was entitled to protection of his monopoly profit in exchange for maintaining a public ferry.<sup>75</sup> Throughout the nineteenth century Arkansas courts also treated ferry and bridge franchises as vested rights.<sup>76</sup> This notion that established interests should be safeguarded at the expense of innovation was more harmonious with the needs of an ordered society that experienced a slow rate of technological change. Judges well

69. TENN. CODE of 1858, tit. 8, ch. 5, § 1194. Other southern states also relied on conscripted labor to maintain roadways. *E.g.*, N.C. CODE of 1855, ch. 101, § 9; A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 506, 508 (1843).

70. *See generally* O. HANDLIN & M. HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS 1774-1861 (rev. ed. 1969).

71. *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245 (1828).

72. *Id.* at 262-63.

73. *E.g.*, *Beard v. Long*, 2 N.C. (Car. L. Rep.) 167 (1815); *Long v. Beard*, 7 N.C. (3 Mur.) 57 (1819).

74. *Gates v. McDaniel*, 2 Stew. 211 (Ala. 1829).

75. *Id.* at 213.

76. *See* Dougan, *The Doctrine of Creative Destruction: Ferry and Bridge Law in Arkansas*, 39 ARK. HIST. Q. 136, 139-50 (1980).

may have reasoned that the best way to encourage economic development was to protect existing capital investment.

Thus, even the area of economic activity, in which national legal norms first appeared, could not escape the tug of regional values. Southern lawmakers were often more intent on conserving landed wealth than fostering commerce. Indeed, Tony Freyer has contended that "southern law served to maintain social equilibrium at the expense of economic development," and thus contributed to the outbreak of the Civil War.<sup>77</sup>

### B. Poor Relief

Despite repeated calls for a view of history from the bottom, surprisingly little investigation of the poor laws in the South has emerged.<sup>78</sup> The southern colonies, like those in the North, inherited the English poor laws.<sup>79</sup> To oversimplify, these measures obligated each locality to provide for its own poor, while placing penalties on able-bodied vagrants. Each locality was authorized to remove indigent strangers and transient poor to the place of their legal settlement. County or city officials decided who was eligible for poor relief and what form of assistance should be adopted.<sup>80</sup>

Notwithstanding this common legal heritage, the actual administration of the poor laws in the South diverged from that in northeastern states. The Revolution produced relatively little change in southern relief practices. Jurisdictions in the region largely adhered to traditional English techniques, which emphasized localism, outrelief, and apprenticeship of poor orphans.<sup>81</sup> Northeastern states, on the other hand, increasingly embraced bureaucratic and institutional solutions. As David J. Rothman ob-

77. Freyer, *Law and the Antebellum Southern Economy: An Interpretation*, in *AMBIVALENT LEGACY*, *supra* note 2, at 64.

78. For the administration of poor relief in the South, see R. BROWN, *PUBLIC POOR RELIEF IN NORTH CAROLINA* (1928); Ely, "There are few subjects in political economy of greater difficulty": *The Poor Laws of the Antebellum South*, 1985 A.B.F. RES. J. 849; B. BELLOWS, *Tempering the Wind: the Southern Response to Urban Poverty, 1850-1865* (1983) (Ph.D. dissertation, Univ. of South Carolina).

79. See Ely, *Patterns of Statutory Enactment in South Carolina, 1720-1770*, in *SOUTH CAROLINA LEGAL HISTORY* 74 (H. Johnson, ed. 1980); Mackey, *The Operation of the English Old Poor Law in Colonial Virginia*, 73 VA. MAG. HIST. & BIOGRAPHY 29 (1965).

80. For a discussion of the English poor laws, see D. MARSHALL, *THE ENGLISH POOR IN THE EIGHTEENTH CENTURY* (1926); J. POYNTER, *SOCIETY AND PAUPERISM: ENGLISH IDEAS ON POOR RELIEF, 1795-1834* (1969); Ely, *The Eighteenth-Century Poor Laws in the West Riding of Yorkshire*, 30 AM. J. LEGAL HIST. 1 (1986).

81. See Ely, *Poor Laws of the Post-Revolutionary South, 1776-1800*, 21 TULSA L.J. 1, 1-22 (1985).

served, nineteenth century reformers saw "the poor [as] a social problem, a potential source of unrest and the proper object of a reform movement."<sup>82</sup> Confinement in a poorhouse became the standard form of relief in many northern communities.<sup>83</sup> These findings, however, have scant application to the South. Indeed, southern leaders remained complacent about the problems of dependency. Several factors explain this difference.

The most obvious factor was the institution of slavery. Until the Civil War, many potential objects of relief were within the bonds of the peculiar institution. Masters were required to care for aged or ill slaves.<sup>84</sup> Second, the South did not receive a heavy influx of immigrants after 1800.<sup>85</sup> Hence, the region did not face the arrival of thousands of poor immigrants and was spared the crisis over pauperism that so disturbed northern commentators.

Third, the South was predominately rural.<sup>86</sup> The English poor laws had been devised for the needs of an agricultural society. Slavery helped to fasten a plantation economy on the South that fostered an environment in which traditional relief techniques could function relatively well. The usual pattern was a series of state laws that merely authorized local authorities to take appropriate actions to relieve the poor. A Virginia statute was typical: "Any person to be provided for or assisted by an overseer or overseers, may either be kept at the place of general reception, or be supported or assisted elsewhere, as he or they may deem best. . . ."<sup>87</sup> Consequently, much discretion was vested in county and city officials, with virtually no supervision by state government.<sup>88</sup>

Fourth, in contrast to officials in the Northeast, southerners early abandoned any serious attempt to enforce the law of settlement. High population mobility undercut the ability of local officials to exclude transients. Moreover, expensive removal proceedings directed against the wandering poor were no longer cost

82. D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 156 (1971).

83. *See id.* at 180-236; *see also* P. CLEMENT, *WELFARE AND THE POOR IN THE NINETEENTH-CENTURY CITY: PHILADELPHIA, 1800-1854*, at 82-117 (1985).

84. The relationship between slavery and poor relief is examined in Ely, *supra* note 78, at 861.

85. *See* C. DEGLER, *supra* note 36, at 17-22; D. WARD, *CITIES AND IMMIGRANTS: A GEOGRAPHY OF CHANGE IN NINETEENTH-CENTURY AMERICA* 62 (1971).

86. *See* C. DEGLER, *supra* note 36, at 14-17.

87. VA. CODE of 1849, tit. 16, ch. 51, § 20.

88. *See* Ely, *supra* note 78, at 861.

effective.<sup>89</sup>

Last, there was little sustained debate over the causes of poverty or techniques for its elimination. Perhaps this lack of discussion reflects either southern skepticism over the possibility of reform or the influence of evangelical Christianity.<sup>90</sup> Certainly the South never produced anything similar to the Yates Report of 1824 in New York.<sup>91</sup> One consequence was that the South pursued a policy of institutionalizing the poor with less rigor and consistency than did the North. To be sure, there were poorhouses in Dixie—largely asylums for the elderly and sick. Yet outdoor relief, whereby paupers received supplemental benefits while remaining at home, was prevalent. Willingness to accept admission to the local poorhouse never became the exclusive test for relief. Indeed, some rural counties never maintained a poorhouse while others did so haphazardly. If any overriding motive guided southern officials, it was that poor relief should be furnished with the least possible cost to taxpayers.<sup>92</sup> Unlike northern reformers, southerners did not see the poor as a threat, but rather as a natural part of the social order.<sup>93</sup> Less interested in reform of paupers and unconcerned about social control of the poor, southerners were content to adopt an essentially pragmatic approach to relief.

This sketch of poor law administration suggests several conclusions about southern society. Pauperism was not perceived as a major problem in the South. In his *Sociology for the South*, George Fitzhugh boasted that the region had “but few in our jails, and fewer in our poor houses.”<sup>94</sup> Many rural southerners lived at a subsistence level, but the problem of dependency was less urgent

89. See *id.* at 862.

90. See C. EATON, *THE MIND OF THE OLD SOUTH*, 158-61, 165-67 (1964); A. LOVELAND, *SOUTHERN EVANGELICALS AND THE SOCIAL ORDER, 1800-1860*, at 167-71 (1980).

91. In 1823, the New York legislature directed John Yates, the Secretary of State, to investigate the administration of poor relief. The resulting Yates Report was one of the most systematic and influential early studies of this topic. Yates, *Report of the Secretary of State in 1824 on the Relief and Settlement of the Poor*, in *THE ALMSHOUSE EXPERIENCE* 937 (D. Rothman ed. 1971) [hereinafter cited as *Yates Report*].

92. See Ely, *supra* note 78 at 851.

93. For example, an overseer of the poor for the City of Richmond declared:

That the poor of every community, are as integral and component parts thereof, as the members of individual families are, of those to which they belong, is I think a position which will not be denied. Thence it follows as a correlative that every civilized society is bound from the nature of its compact, to offer aid and assistance to all of this description, within their bounds.

*Yates Report*, *supra* note 91, at 1106.

94. G. FITZHUGH, *SOCIOLOGY FOR THE SOUTH OR THE FAILURE OF FREE SOCIETY* 253 (1854) (reprint 1965).

below the Mason-Dixon line. Certainly southerners did not devote the time and energy to the problems of poverty that they directed to the defense of slavery, the debate over prisons, or the search for capital investment.

Although starting from a common legal base, southern practice diverged from that in the North. Different social conditions produced circumstances in which seemingly little need for experimentation or radical change existed. Moreover, unlike the law governing the marketplace no pressure arose for national uniformity in the treatment of dependents. Hence, southerners simply relied on traditional poor relief practices throughout the nineteenth century.

### C. Criminal Justice

Despite its importance in bringing fuller understanding of southern culture, historians generally have failed to study the region's criminal process. Nowhere is this neglect more pronounced than in the statutory and common law that defined criminal behavior. Available scholarship, however, tends to refute the traditional view of the South as a region with primitive, unenlightened penal codes. From the colonial period at least to the Civil War, southern legislators and jurists joined with reformers elsewhere to rid the law of the vast number of crimes and harsh punishments of seventeenth century England. Criminal law in the colonial South was more derivative from English precedent, more heavily influenced by local interpretation, and less reliant on Biblical injunction than criminal law in the Puritan colonies.<sup>95</sup>

The tenets of revolutionary republicanism demanded a limitation on the power of the state, thus stimulating criminal law reform throughout the new nation, including the South. Heavily influenced by eighteenth century rationalism, the writings of Montesquieu and Cesare Beccaria, and the codification efforts of Edward Livingston, southern legislators by the 1820s had drafted criminal codes that rivaled those of northern jurisdictions.<sup>96</sup> Geor-

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95. See B. CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660*, at 5-22 (1983).

96. See generally L. FRIEDMAN, *supra* note 1, at 248-64; A. NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 451-65* (1924). For reforms in Virginia, see Cullen, *Completing the Revisal of Laws in Post-Revolutionary Virginia*, 82 VA. MAG. HIST. & BIOGRAPHY 84, 84-99 (1974); Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 L. & HIST. REV. 53, 53-85 (1983). See also Lyons, *Louisiana and the Livingston Criminal Codes*, 15 LA. HIST. 243, 243-72 (1974); McCash, *Thomas Cobb and the Codification of Georgia Law*, 62 GA. HIST. Q. 9, 9-23 (1978).

gia's code of 1816 was the first successful codification of criminal law in the new republic.<sup>97</sup> Incorporating the "principles of leniency and moderation which should distinguish the republican above all other political institutions,"<sup>98</sup> it sharply reduced the number of statutory crimes and punishments prescribed for their violation. Capital crimes for whites were limited to treason, murder, arson, and rape of a minor. Imprisonment in a state penitentiary—originally created for the reformation of the individual miscreant—became the norm for most other serious crimes.<sup>99</sup>

The nineteenth century penitentiary movement, especially its New England expression, has received considerable scholarly attention. Less well known is its development in the Old South. Southern prisons stemmed from a commitment to penitent reform and republican values. In practice, these institutions housed the same sort of inmates—white, immigrant, property offenders from urbanizing areas. As one historian of antebellum Southern criminal justice noted, "The major differences between penitentiaries in the South and the rest of America. . . lay only in the ambitious dreams and rhetoric of Northern reformers."<sup>100</sup> Only after the Civil War did this symbol of state authority give way to the demons of racism and poverty embodied in the convict lease system.<sup>101</sup>

Criminal procedures also conformed closely to the due process requirements of state and federal bills of rights, at least as interpreted by nineteenth century judges and commentators.<sup>102</sup> Recent studies of local trial courts, moreover, reveal that patterns of prosecution, conviction, and sentencing paralleled those found in non-southern jurisdictions with similar demographic and economic characteristics.<sup>103</sup> Most criminal actions concerned petty offenses,

97. See Surrency, *The First American Criminal Code: The Georgia Code of 1816*, 63 GA. HIST. Q. 420, 420-34 (1979).

98. An Act to reform the Penal Code of this State, and to adapt the same to the Penitentiary System, Dec. 19, 1816, 1816 Ga. Laws 142.

99. *Id.*

100. E. AYERS, *supra* note 65, at 70.

101. *See id.* at 34-72.

102. For a valuable study of an earlier period, see Billings, *Pleading, Procedure, and Practice: The Meaning of Due Process of Law in Seventeenth Century Virginia*, 47 J. S. HIST. 569-84 (1981).

103. See Bodenhamer, *The Efficiency of Criminal Justice in the Antebellum South*, 3 CRIM. JUSTICE HIST. 88-89 (1983) [hereinafter cited as Bodenhamer, *Efficiency*]; Bodenhamer, *Law and Disorder in the Old South: The Situation in Georgia, 1830-1860*, in FROM THE OLD SOUTH TO THE NEW: ESSAYS IN THE TRANSITIONAL SOUTH 109-19 (W. Fraser & W. Moore, eds. 1981). For nonsouthern jurisdictions, see Ferdinand, *The Criminal Patterns of Boston since 1849*, 73 AM. J. SOC. 84-99 (1967); Lane, *Crime and Criminal Statistics in Nineteenth-Century Massachusetts*, 2 J. SOC. HIST. 156-63 (1968).

with theft and other property offenses appearing regularly on court dockets. Crimes against persons also were frequently prosecuted; some studies have shown that almost four of every ten indictments involved either petty or serious acts of personal violence.<sup>104</sup> Here, the South deserved its reputation as a violent region, although the prosecution of violent crime was a central concern of the legal system.<sup>105</sup>

In one area of criminal law, statutory prohibitions of immorality, the South differed from the North. Laws against adultery, fornication, intemperance, and gambling remained prominent in southern codes long after northern legislatures had shifted attention to property and economic crimes. Official regulation of immoral conduct, reflecting widely shared religious and social values, continued to be a feature of the criminal law in southern states.<sup>106</sup> Legislation proscribed commercial and recreational activities on Sunday.<sup>107</sup> Sexual offenses, such as the use of obscene language in the presence of a female<sup>108</sup> and seduction,<sup>109</sup> were prosecuted regularly. Judges were most likely to punish blatant disregard of community values.<sup>110</sup> Recognizing that an occasional act of adultery might not be punishable, the Alabama Supreme Court stressed that a pattern of adultery "must become open and notorious," and thus supported a conviction.<sup>111</sup> In contrast to the heterogeneous Northeast, the relatively homogeneous white population in the South and the influence of evangelical Christianity shaped common attitudes toward immoral behavior. Thus, Prohibition and

104. See E. AYERS, *supra* note 65, at 115-16; Bodenhamer, *Efficiency*, *supra* note 103, at 83-87; Saunders, *Crime and Punishment in Early National America: Richmond, Virginia, 1784-1820*, 86 VA. MAG. HIST. & BIOGRAPHY 33-44 (1978).

105. See M. HINDUS, *supra*, note 36; Gastil, *Homicide and a Regional Culture of Violence*, 36 AM. SOC. REV. 412-27 (1971); Hackney, *Southern Violence*, 74 AM. HIST. REV. 906-25 (1969); Smith, *Southern Violence Reconsidered: Arson as Protest in Black-Belt Georgia, 1865-1910*, 51 J. S. HIST. 527 (1985).

106. The 1861 Georgia Penal Code listed 37 "offences against the Public Morality, Health, Police, and Decency," ranging from adultery, fornication, and open lewdness to gambling and miscegenation. R.H. CLARK, T.R.R. COBB & D. IRWIN, *CODE OF STATE OF GEORGIA* 859-68 (1861); see also CHAPIN, *supra* note 95, at 8-13; Bodenhamer, *Law and Disorder in the Old South*, *supra* note 103, at 113-14; Preyer, *supra* note 96, at 53-85; Spindel & Thomas, *Crime and Society in North Carolina, 1663-1740*, 49 J.S. HIST. 223, 231 (1983).

107. See DIGEST OF THE LAWS OF ALABAMA, *supra* note 69, at 592.

108. See *Pierce v. State*, 53 Ga. 365 (1874).

109. See *Hausenfluck v. Commonwealth*, 85 Va. 702 (1889).

110. A British historian of the Old South sees the attempt to legislate morality as part of a general concern for respectability. See B. COLLINS, *WHITE SOCIETY IN THE ANTEBELLUM SOUTH* 163-69 (1985).

111. *Collins v. State*, 14 Ala. 608, 610 (1848).

other moral crusades found ready reception in the South; the region's legal system had a long history of attempting to regulate morality.<sup>112</sup>

Antebellum reforms in the statutory criminal law did not reach one important group, slaves; moreover, the application of criminal law reforms to free blacks was uncertain and idiosyncratic. Separate laws for slaves prescribed different courts, fewer procedural safeguards for defendants, and harsher punishment upon conviction.<sup>113</sup> In addition, enforcement of misdemeanors and even some felonies often was left to owners or overseers.<sup>114</sup> But trial and punishment of criminal slaves did not always fall outside the legal system, nor was their treatment totally at the whim of the master. Justice at the local level varied widely, depending upon the locale, the ratio of blacks to whites, and the nature of the crime. But historians probably have overestimated the degree of discretionary justice attendant on slave trials. There was a surprisingly high regard for due process in slave trials in the lower courts and on appellate review.<sup>115</sup> This result should not suggest that the white South was wedded to the concept of equal rights before the law for slaves, but rather that the application of due process in these cases satisfied the formal requirements of legal culture without jeopardizing white control over blacks. For instance, procedural safeguards for slaves and free blacks were at a premium whenever black violence threatened the status quo.<sup>116</sup>

The abolition of slavery and an increased level of violence that followed the Civil War caused dramatic changes in southern criminal law. Special codes for blacks disappeared, and the regular courts handled the prosecutions of crimes by blacks. The law, how-

112. See Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY*, *supra* note 2, at 38-41.

113. For a typical slave code, see *Penal Code for Slaves and Free Blacks* in R.H. CLARK, T.R.R. COBB & D. IRWIN, *supra* note 106, at 916-23. See also Schwarz, *Forging the Shackles: The Development of Virginia's Criminal Code for Slaves*, in *AMBIVALENT LEGACY*, *supra* note 2, at 125-46.

114. See J. BLASSINGAMER, *THE SLAVE COMMUNITY: PLANTATION LIFE IN ANTE-BELLUM SOUTH* 162-66 (1972); E. GENOVESE, *supra* note 18, at 25-49; L. OWENS, *THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH* 70-75 (1976); K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 141-91 (1956).

115. For an extensive review and critique of recent scholarship on this subject, see Nash, *supra* note 16. See also Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 *J. S. HIST.* 537, 537-64 (1974); Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 *VA. L. REV.* 64, 64-100 (1970). For a different view, see Hindus, *Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina*, 63 *J. AM. HIST.* 575, 575-99 (1976).

116. See S. OATES, *THE FIRES OF JUBILEE: NAT TURNER'S FIERCE REBELLION* (1975).



ever, did not suddenly become colorblind. A breakdown of the folkways and the plantation system that had kept the races separate produced late nineteenth century revisions in criminal law to punish violations of racial separation, although most of the prohibitions were classed as misdemeanors rather than felonies.<sup>117</sup> Soon the population of southern prisons became largely black, which facilitated the emergence of the convict lease system.<sup>118</sup> Extralegal actions, especially lynching and whitecapping, were used for more serious violations of racial and moral order.<sup>119</sup>

Several themes dominate the history of criminal law in the South before 1900: a willingness to employ extralegal force, use of the judicial system to govern race relations, and a continuing interest in crimes against morality. Although these elements give a distinct cast to southern criminal law, the Civil War was an important turning point. Before the War, legislators and jurists were generally open to reform, and criminal law for whites was evolving in much the same pattern as elsewhere in the nation. The sectional conflict halted this process and criminal law in the South became a regressive force. Thus, the regional focus of southern criminal law grew more intense by the end of the nineteenth century.

#### D. Status of Married Women

The stereotype of the South as a patriarchal society that greatly restricted the role of married women recently has been reinforced in Wyatt-Brown's *Southern Honor*. Wyatt-Brown contends that "[t]he legal system was of little practical use" for unhappy wives and asserts that "divorce pleas initiated in a woman's behalf gained only rare sympathy or success."<sup>120</sup> The evidence does not support this dire interpretation. Rather, the legal system, both through legislation and judicial decisions, made a series of moves that steadily improved the legal status of southern wives.

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117. See C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 12-29, 97-109 (3d rev. ed. 1974); C. WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913*, at 209-12 (1951).

118. See E. AYERS, *supra* note 65, at 185-222; see also Bayliss, *The Arkansas State Penitentiary under Democratic Control, 1874-1896*, 34 *ARK. HIST. Q.* 195, 195-213 (1975); Shelden, *From Slave to Caste Society: Penal Changes in Tennessee, 1830-1915*, 38 *TENN. HIST. Q.* 462, 462-78 (1979).

119. See J. HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* (1979); J. NALL, *THE TOBACCO NIGHT RIDERS OF KENTUCKY AND TENNESSEE, 1905-1909*, (1939); Holmes, *Whitecapping: Agrarian Violence in Mississippi, 1902-1906*, 35 *J. S. HIST.*, 165, 165-85 (1969); Holmes, *Whitecapping in Late Nineteenth-Century Georgia*, in *FROM THE OLD SOUTH TO THE NEW*, *supra* note 105, at 121-32.

120. B. WYATT-BROWN, *supra* note 36, at 281, 283.

First, there was an early readiness to recognize the separate property interests of a married woman. Courts of equity, both in England and the United States, upheld a variety of trust and contractual arrangements for a separate estate in favor of wives.<sup>121</sup> Marylynn Salmon has argued that southern states were, in fact, more generous in this regard than their counterparts to the north.<sup>122</sup> Suzanne Lebsock has demonstrated that after 1820 the use of separate estates increased markedly among wives in Petersburg, Virginia.<sup>123</sup>

The motive behind the married women's property acts was to protect family assets from the claims of the husband's creditors, but the effect was to grant important property rights to wives. Indeed, one South Carolina judge declared in 1819, "I never could see any good reason why [married women] should not retain all their interest in personal as well as real estate."<sup>124</sup> Lawmakers also extended the rights of married women in new forms of property. A Georgia statute of 1861 allowed a wife to deposit her own earnings, not to exceed \$1000, in a savings bank and to control this sum as if she were unmarried.<sup>125</sup> This legislation was particularly significant because it primarily benefited less affluent women.

In addition, southern legislators granted *feme sole* status to married women, enabling them to make contracts, institute lawsuits, and dispose of property by deed or will. Even a cursory glance at Alabama or Georgia statutes, for example, confirms the prevalence of this practice.<sup>126</sup> Georgia encouraged the business activity of widows and *femes sole* by abolishing imprisonment for debt for these women in 1847.<sup>127</sup>

121. See M. BEARD, *WOMEN AS FORCE IN HISTORY: A STUDY IN TRADITIONS AND REALITIES* (1946); R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 126-55 (1930).

122. See Salmon, *Women and Property in South Carolina: The Evidence from Marriage Settlements*, 39 WM. & MARY Q. 655 (3d ser. 1982).

123. See S. LEB SOCK, *FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860*, at 60-61 (1984).

124. *Sturgineger v. Hannah*, 11 S.C.L. (2 Nott & McC.) 147, 149 (1819).

125. An Act to authorize Married Women to deposit money in any Savings Bank or Institution now Chartered . . . , Dec. 16, 1861, no. 12, 1861 Ga. Laws 23.

126. See, e.g. An Act for the relief of Milly Sampel, Jan. 13, 1844, no. 79, 1843-44 Ala. Laws 47; An Act to vest in Frances Gleason, wife of Charles Gleason, certain rights and privileges therein named, and for other purposes, Jan. 15, 1846, no. 339, 1845-46 Ala. Laws 227; An Act for the relief of Angelique E. Levy, wife of Isaac Levy, of Richmond County, Feb. 9, 1854, no. 460, 1853-54 Ga. Laws 527; An Act for the relief of Jennet Smith, of the County of Houston, and Milcah Lettman, of the City of Augusta, and Lemira M. Pattillo, of the County of Cobb, Feb. 18, 1854, no. 464, 1853-54 Ga. Laws 529.

127. An Act to abolish imprisonment for Debt, so far as relates to widows and feme soles, Dec. 28, 1847 Ga. Laws 112.

At a time when the availability of divorce generally was perceived as a benefit to ill-treated wives, southern jurisdictions recognized divorce and granted a large number to women.<sup>128</sup> Historians should not be deceived by the conservative position of South Carolina and Virginia on divorce,<sup>129</sup> for it was not typical of the region. The Tennessee legislature, in contrast, granted an absolute divorce in 1797, only one year after statehood was achieved.<sup>130</sup> In 1799 the legislature enacted a general statute authorizing the courts to decree absolute divorce for impotence, bigamy, adultery, and desertion.<sup>131</sup> One recent study concludes that "the striking feature of Tennessee's divorce history from 1796 to 1860 was the assertion and expansion of the wife's legal prerogatives against an unfit husband."<sup>132</sup>

Divorce became increasingly available throughout the nineteenth century. Southern lawmakers steadily liberalized the statutory grounds for divorce. Moreover, the definition of "cruelty"—a subject of special interest to women—was judicially expanded beyond physical maltreatment to include threats and mental duress.<sup>133</sup> A recent study of divorce cases decided by the Tennessee Supreme Court and selected circuit courts between 1810 and 1860 demonstrates that Tennessee women took advantage of the opportunity to end unhappy unions.<sup>134</sup> Women instituted most divorce

128. See Censer, "Smiling Through Her Tears": Ante-Bellum Southern Women and Divorce, 25 AM. J. LEG. HIST. 24 (1981); see also Note, *Early Statutory and Common Law of Divorce in North Carolina*, 41 N.C.L. REV. 604 (1963).

129. South Carolina did not recognize absolute divorce until 1948. Ely and Bodenhamer, *Regionalism and the Legal History of the South*, in *AMBIVALENT LEGACY*, *supra* note 2, at 10. For the situation in Virginia, see S. LEBSOCK, *supra* note 123, at 68-69.

130. An Act to divorce David Caldwell from his wife, Elizabeth, Oct. 20, 1797, ch. XXXII, PRIVATE ACTS PASSED AT THE FIRST SESSION OF THE SECOND GENERAL ASSEMBLY OF THE STATE OF TENNESSEE 143 (1797).

131. An Act concerning divorces, Oct. 26, 1799, in 2 E. SCOTT LAWS OF THE STATE OF TENNESSEE 645-648 (2 vols. 1821).

132. Goodheart, Hanks, & Johnson, "An Act for the Relief of Females . . .": Divorce and the Changing Legal Status of Women in Tennessee, 1796-1860, (pt. 1), 44 TENN. HIST. Q. 318, 320 (1985).

133. See Censer, *supra* note 128, at 28-35.

134. See Goodheart, Hanks, & Johnson, (pt.1), *supra* note 132, at 329; (pt. 2), 44 TENN. HIST. Q. 402, 404-10 (1985). In addition, the Tennessee Superior Court of Law and Equity granted several divorces between 1800 and 1810, when the Supreme Court was created. See Ely, *Andrew Jackson as Tennessee State Court Judge, 1798-1804*, 40 TENN. HIST. Q. 144 (1981).

A survey by the authors of Tennessee Supreme Court decisions between 1865 and 1900 establishes that unhappy wives continued to seek and obtain divorces more frequently than husbands.

suits and wives gained divorce at a higher rate than husbands.<sup>135</sup> Southern courts also began awarding alimony to alleviate the financial hardships of wives.<sup>136</sup>

Southern courts or legislatures, however, did not grant divorce casually. Most judges no doubt would have agreed with an 1847 Alabama Supreme Court decision, which declared, "Marriage is the most important of all the social relations."<sup>137</sup> Judges everywhere in the nineteenth century scrutinized the facts in support of a divorce petition carefully and denied some applications that might seem meritorious today. Despite occasional harsh decisions and judicial rhetoric about the sanctity of marriage, the trend to a more liberal divorce policy is unmistakably clear. Indeed, judicial criticism of divorce may have masked its increased availability. Anxious to save "families and society from the direful consequences of indiscriminate dissolution of the bonds of matrimony," the Tennessee Supreme Court in 1858 decried "the loose administration of the law of divorce, which has obtained in some of the courts."<sup>138</sup> Similarly, the divorce rate in antebellum Alabama increased markedly.<sup>139</sup> Contrary to arguments by other scholars,<sup>140</sup> divorce was not rare throughout the South.

Finally, southern courts encouraged a significant change in the law by sometimes awarding custody of children to the mother. Under English common law the father was the natural guardian of the children, and neither absolute divorce nor mistreatment of the children interrupted his rights.<sup>141</sup> As early as 1839 the North Carolina legislature authorized courts to "commit the custody and tuition of such child or children, either to father or mother, as the court may think the interest of the child or children shall re-

135. The Tennessee legislature retained a concurrent jurisdiction over divorce until 1836. Wives were also strikingly successful in this forum. More than two-thirds of legislative divorces (counting absolute and bed and board divorces together) were granted to women. See Goodheart, Hanks & Johnson (pt. 2), *supra* note 134, at 402-03.

136. Censer, *supra* note 128, at 40-42.

137. *Moyler v. Moyler*, 11 Ala. 620, 623 (1847).

138. *Rutledge v. Rutledge*, 37 Tenn. 554, 558-59 (1858).

139. J. THORNTON, *POLITICS AND POWER IN A SLAVE SOCIETY: ALABAMA, 1800-1860*, 306-07 (1974).

140. See C. CLINTON, *PLANTATION MISTRESS: WOMAN'S WORLD IN THE OLD SOUTH* 79 (1982); W. TAYLOR, *CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER* 166 (1961); see also Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 652 (1984) (suggesting that southern states granted fewer divorces in the 19th century).

141. See Censer, *supra* note 128, at 43.

quire."<sup>142</sup> Although the pattern of decisions was hardly uniform, even this tentative step by southern judges and lawmakers was a significant alteration of the common law.

At least to some extent, law, in Lawrence Friedman's phrase, is "a mirror of society."<sup>143</sup> Thus, the legal position of wives in the antebellum South indicates a steady amelioration of their position. Indeed, law may have lagged behind changing social attitudes. This lag in turn calls into question notions of unbridled male domination.

Despite the alleged conservatism of southern lawmakers, they were prepared to enter the sensitive field of domestic relations and to attempt to bring law into conformity with social reality. When one considers that the southern colonies had inherited a sacramental view of marriage from English law,<sup>144</sup> their degree of innovation in this field was greater than that in many northern states. Our view of hidebound judges and legislators may need some revision. Indeed, a marked similarity existed between marriage law reform in the South and national trends.<sup>145</sup> The widespread Victorian idea that marriage should be based on mutual respect and affection between spouses was instrumental in reshaping the law. Regional differences here seem little more than a matter of pace and degree.

#### IV. CONCLUSION

Although not the only influence, regionalism was an important determinant in shaping southern law before 1900. The pull of regional forces—indebtedness, agriculture, race, defeat—left an unmistakable imprint on legal developments. Yet the need for further investigation is obvious. Scholars must refine an approach to regional study and seek to apply it to other topic areas. A regional focus, for instance, might sharpen our understanding of testamen-

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142. An Act concerning infant children whose parents shall be divorced, Jan. 7, 1839, ch. XVI, 1838-1839 N.C. Laws 27.

143. L. FRIEDMAN, *supra* note 1, at 10.

144. See N. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 40-41 (1962).

145. See Basch, *The Victorian Compromise: Divorce in New York City, 1787-1870* (unpublished paper presented at 1985 annual meeting of the Organization of American Historians). As in Tennessee, the majority of divorce plaintiffs in 19th century New York City were women. See *id.* at 24-25.

tary dispositions,<sup>146</sup> the evolution of the bench<sup>147</sup> and bar,<sup>148</sup> and the law governing real property and torts. Now is the time for scholars to turn their attention to regional studies of American law.

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146. For the findings of one scholar concerning inheritance patterns among North Carolina elite families, see J. CENSER, *NORTH CAROLINA PLANTERS AND THEIR CHILDREN, 1800-1860*, 104-18 (1984).

147. See M. LANG, *DEFENDER OF THE FAITH: THE HIGH COURT OF MISSISSIPPI, 1817-1875*, (1977); Ely, "That no office whatever be held during life or good behavior": *Judicial Impeachments and the Struggle for Democracy in South Carolina*, 30 *VAND. L. REV.* 167 (1977); Pratt, *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 *L. & HIST. REV.* 129 (1986); Senese, *Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina, 1800-1860*, 24 *S.C.L. REV.* 357 (1972).

148. See M. LANDON, *THE HONOR AND DIGNITY OF THE PROFESSION: A HISTORY OF THE MISSISSIPPI STATE BAR, 1906-1976*, (1979); Bloomfield, *The Texas Bar in the Nineteenth Century*, 32 *VAND. L. REV.* 261 (1979); Ely, *The Legal Practice of Andrew Jackson*, 38 *TENN. HIST. Q.* 421, (1979); Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 *VA. L. REV.* 969, (1976); Shepard, *Breaking Into the Profession: Establishing a Law Practice in Antebellum Virginia*, 48 *J. S. HIST.* 393 (1982).

