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## Ambivalent Legacy: A Legal History of the South

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# BOOK REVIEW

AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH. Edited by David J. Bodenhamer and James W. Ely, Jr.: University Press of Mississippi, 1984. Pp. x, 266.

*Reviewed by Herbert A. Johnson\**

This volume of essays generated by a February 1983 conference at the University of Southern Mississippi represents a major step in the advancement of the legal history of the South.<sup>1</sup> Not only does the collection raise challenging questions concerning the history of law in the South, but it also presents outstanding examples of what can be accomplished when legal historians turn their attention to this region and the states that comprise it. Covering a broad geographical and topical range in individualistic fashion, the essays are, for the most part, well researched and written with clarity and style. This Review will address each of the four categories of essays chosen by the editors in structuring the work.

## I. LAW AND SOUTHERN HISTORY

A wide-ranging essay by the editors Bodenhamer and Ely presents a survey of the historical scholarship that supports the concept of a unique Southern history and thus justifies a study of "Southern legal history." According to Bodenhamer and Ely, the existence of slavery and a racial caste system in the antebellum South<sup>2</sup> creates unique dimensions in Southern legal history. A novel form of agrarianism based upon slave labor and the planta-

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1. Earlier anthologies include a collection of papers from a conference at Vanderbilt University School of Law in 1978, published in 32 VAND. L. REV. 1 (1979), and SOUTH CAROLINA LEGAL HISTORY: PROCEEDINGS OF THE REYNOLDS CONFERENCE (H. Johnson ed. 1980).

2. Ely & Bodenhamer, *Regionalism and the Legal History of the South*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 3-29 (D. Bodenhamer & J. Ely, Jr. eds. 1984) [hereinafter cited as AMBIVALENT LEGACY].

tion system inhibited commercial development in the early years of the Republic and imposed stability upon family life through non-recognition of divorce and sluggish recognition of married women's property rights.

Although many legal historians have viewed Southern courts and judges as supporters of the status quo, Bodenhamer and Ely suggest that more extensive biographical and jurisprudential study may well weaken this consensus.<sup>3</sup> Their call for revision also extends to the traditional historical view of Southern crime and violence. Bodenhamer and Ely point to evidence that even in slave trials Southern courts were more sensitive to demands for due process than previously has been thought. Furthermore, what has been viewed as typical Southern inefficiency in law enforcement actually may be a more widespread early American phenomenon. The editors demonstrate that Southern attitudes toward crime and its prosecution, which became much less tolerant with the years of Civil War and Reconstruction, imply that some anachronism exist in current views of antebellum Southern crime and violence.<sup>4</sup> On balance, however, Bodenhamer and Ely accept the regional characterization of the South and urge that the legal history of the South become a major focus of scholarly attention.

As a counterpoint, Lawrence M. Friedman posits the intriguing argument that Southern culture, if it ever did exist as a regional variant of American civilization, has so converged with general American culture that the two have become indistinguishable.<sup>5</sup> In the legal profession, he notes that "the South" may very well be the construct of condescending Northern attitudes that tend to overlook Southern contributions to jurisprudence. Indeed, Friedman implies that "the South" may have existed more strongly in the minds of Northern viewers than it did in the lives of those who actually resided in the South. Friedman sees the study of Southern legal history as a useful and necessary adjunct to similar studies of other regions, but his thesis rings clear—one must be wary of glib regional stereotypes and facile, but flawed, theories of causality in writing a legal history of the South.<sup>6</sup>

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3. *Id.* at 6.

4. *Id.* at 20-22.

5. Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY*, *supra* note 2, at 30-46.

6. See, for example, his comment that "[d]ifferences among regions tended to be differences in timing, pace, and manner, not differences in fundamentals." *Id.* at 42. Friedman has the advantage of having compiled the most extensive survey of nineteenth century

Friedman's discussion and the detailed essays that follow suggest a third approach to regionalism that is not represented in this collection. Although a national convergence in American culture may have taken place,<sup>7</sup> the existence of the federal system assures a substantial amount of locality in American law. Regional or national constructs of legal history are of value, but they should be built upon solid monographic work concerning the individual colonies and states. As Julius Goebel suggested four decades ago, one must consider the unique legal history of each state in order to avoid interpretative error.<sup>8</sup> Within the Southern region, for example, colonial Virginia's court system was founded upon the county court, while South Carolina's colonial courts were rigidly centralized until 1769. An attempt to introduce a county court system into South Carolina between 1799 and 1815 failed miserably. Regionalism, therefore, does not insure compatability, at least when one is studying legal history. As a result, scholars can study a legal history of the South, but it is unwise to search for a unitary Southern legal history.

## II. LAW AND THE SOUTHERN ECONOMY

Three essays treat the role of law in the development of the Southern economy from the 1830s to the early twentieth century. Tony A. Freyer demonstrates that the law shaped business relations before the Civil War by favoring large planters with extensive slave holdings and by ensuring their continued dominance in economic and political power.<sup>9</sup> Freyer theorizes that the formal and informal techniques employed to ease the predicament of free blacks and other debtors simply were methods to insure cohesiveness in society and lower class deference in politics. Personal relations typified Southern commerce, according to Freyer, and resulted in a great dependence upon the unlimited liability of partners in mercantile firms and the meager use of the corporate entity.<sup>10</sup>

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American law in his *A HISTORY OF AMERICAN LAW* (1973). Therefore, his comments on regionalism are particularly apt.

7. Friedman suggests a convergence of Southern culture into American culture. Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY*, *supra* note 2, at 43.

8. J. GOEBEL, JR. & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* xxiv, xxx-xxxii, xxxv (1944).

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

10. *Id.* at 55-58.

Carrying forward the chronological history, Harry N. Scheiber's essay concentrates on the postbellum years and provides a picture of a South beleaguered by Northern economic imperialism and utilizing the remnants of states' rights to fight off Northern creditors.<sup>11</sup> The exercise of diversity jurisdiction by federal courts and the activities of equitable receivers in bankruptcy appointed by those tribunals became onerous reminders of Northern economic dominance. Scheiber points out, however, that Southern political and business leaders could have done much more to lift Southern economic life from the stagnation that characterized it in the late nineteenth century. Southern sources have misled historians who have accepted the claim that the South's poor economic condition was due solely to Northern exploitation. To the contrary, Scheiber concludes that federalism in the late nineteenth century left ample room for the Southern states to take a more positive course. Lack of political will, not Northern exploitation, caused economic depression in the South.<sup>12</sup>

The final essay in this group, by John V. Orth, also suggests that the Southern states enjoyed economic freedom but used it irresponsibly.<sup>13</sup> Orth's essay, an in depth study of Virginia's repudiation of her pre-War and post-War debt, describes the convoluted struggle between the Commonwealth of Virginia and her creditors between 1870 and 1920. In addition to providing an excellent view of state bond issuance in the reconstructed South, Orth demonstrates the extent to which the United States Supreme Court permitted the states to repudiate their bonded indebtedness.<sup>14</sup> Although Virginia's debt experience was different from that of other Southern states,<sup>15</sup> this difference should not deter legal historians from a more complete investigation of the economic aspects of lax constitutional law enforcement in the "Gilded Age."

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11. Scheiber, *Federalism, the Southern Regional Economy, and Public Policy Since 1865*, in *AMBIVALENT LEGACY*, *supra* note 2, at 69-105.

12. *Id.* at 86. Scheiber, however, is quick to point out that the New Deal conferred substantial advantages on the South, which now benefits greatly from the federal system. *Id.* at 92-97.

13. Orth, *The Virginia State Debt and the Judicial Power of the United States*, in *AMBIVALENT LEGACY*, *supra* note 2, at 106-22.

14. Orth indicates that the Supreme Court revived state sovereignty based upon new interpretations of the eleventh amendment. Virginia, however, had foregone protections she might otherwise have claimed because she made the interest on her bonded indebtedness acceptable in payment of taxes. The federal courts, therefore, did not have to enforce payment; Virginia bondholders could tender their coupons and wait to be sued for nonpayment of taxes. *Id.* at 116.

15. *See supra* note 14.

Taken as a whole, these essays demonstrate the rich lode of new viewpoints available to historians who explore the causal relationships between law and economics. Attention to Southern law must address the region's interrelated dependence upon agriculture and the institution of slavery. As Lawrence Friedman<sup>16</sup> points out, however, studying the South will give us a new perspective on the national scene.<sup>17</sup> Additionally, although legal scholars have studied law and economics in the post-War South for several years, they certainly would profit by applying these techniques directly to the history of law in all of the United States.

### III. LAW AND RACE IN SOUTHERN HISTORY

The three essays in this section present the most controversial, and regrettably, the most uneven portion of the collection. Philip J. Schwarz addresses the difficult task of assessing the factors that shaped Virginia's criminal code for slaves.<sup>18</sup> Schwarz points out that the attitudes and behavior of both slaves and their masters molded the Virginia slave code. Slave crime was "either politically motivated or had a political impact,"<sup>19</sup> and thus, to a large degree, slaves were punished for their responses to oppressive control by the white establishment. Noting the heavy predominance of theft by slaves, Schwarz insists that this was a mark of resistance to white authority. Schwarz also points to the growing severity of the slave code in the years immediately preceding the Civil War. Unquestionably, patterns of slave behavior that challenged the existing order of law and plantation discipline would generate harsh responses in the punitive law. In the absence of more convincing evidence, however, the conclusion that the behavior itself was a mark of political protest is difficult to accept. As Schwarz himself is willing to admit, a slave's attack upon his master might be caused by anger, by an attempt to gain freedom, or by vengeance. To view such an attack as a death-defying political statement seems dubious. At the very least, Schwarz' interpretation needs a stronger psychological and evidentiary basis.<sup>20</sup>

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16. See *supra* notes 5-6 and accompanying text.

17. Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY*, *supra* note 2, at 33.

18. Schwarz, *Forging the Shackles: The Development of Virginia's Criminal Code for Slaves*, in *AMBIVALENT LEGACY*, *supra* note 2, at 125-46.

19. *Id.* at 127.

20. Schwarz' analysis harks back to the dated but pioneering work of Herbert Aptheker. H. APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* (1943). A much more satisfactory

Thomas D. Morris' essay on the chattel mortgage of slaves is a much more convincing piece of historical scholarship.<sup>21</sup> Tracing the development of the law of chattel mortgages and conditional sales, Morris shows the extent to which Southern judges vacillated between a commercial view of this form of security and a paternalistic and humane application of equitable principles. His discussion indicates that the conflict between growing commercial emphasis upon private property and liberty of contract on the one hand, and the traditional doctrines of just bargain and fair price on the other perplexed nineteenth century judges.<sup>22</sup> Morris also shows the great effect that slavery had upon the development of Southern law in the area of secured transactions. He provides, therefore, a starting point for a comparative study of chattel mortgages and conditional sales contracts in other regions less influenced by slavery. The completion of such a parallel study would greatly enhance our understanding of the concept of private property in nineteenth century America.

Moving from slavery to the school desegregation activities of the NAACP, Mark V. Tushnet's essay discusses not race but litigation strategy.<sup>23</sup> Tushnet provides a careful and precise analysis of the conflicting pressures on the NAACP as it altered its strategy in the 1950s and began a program of litigation designed to end segregation in American elementary and secondary schools. Tushnet also provides one of the best descriptions available of the policy decisions antecedent to *Brown v. Board of Education*.<sup>24</sup> He goes on to suggest, however, that the NAACP lawyers should have abandoned individualistic arguments and stressed the "communitarian" goal of the need to strengthen the black community.<sup>25</sup> This historical hindsight does little to enhance his analysis, and it unnecessarily criticizes Thurgood Marshall and Charles Hamilton Houston for not embracing in the 1950s the convoluted logic of contempo-

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and plausible Marxist interpretation of the dynamics of slavery is that of Eugene Genovese. E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974).

21. 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.

22. Data provided by Morris challenges the broad and generalized conclusions of Morton Horwitz concerning the formalism in nineteenth century American business law. *Id.* at 164; M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 266 (1977).

23. Tushnet, *Organizing Civil Rights Litigation: The NAACP's Experience*, in *AMBIVALENT LEGACY*, *supra* note 2, at 171-84.

24. 347 U.S. 483 (1954).

25. Tushnet, *Organizing Civil Rights Litigation: The NAACP's Experience*, in *AMBIVALENT LEGACY*, *supra* note 2, at 179-81.

rary "affirmative action" and "positive discrimination" jurisprudence. Lawyers design their strategies foremost to win cases, not to spin out innovative legal doctrine. Historians do not benefit the study of legal history by such second guessing of past generations.

#### IV. SOUTHERN COURTS, BENCH, AND BAR

This section on the institutional structure of law—its courts, judges, and the bar—touches on the more traditional areas of legal history in innovative ways. Peter C. Hoffer, fresh from editing the criminal court records of colonial Richmond County, Virginia, poses the interesting question of why this rural county had a higher crime rate than colonial cities with a much more heterogeneous population.<sup>26</sup> Examining the incidence of slave crime, Hoffer notes that black slaves in Richmond County commonly were accused of thefts of necessity (food and clothing) and rarely of rebellion.<sup>27</sup> In addition, county leaders attributed the bulk of criminal activity in Virginia's Richmond County to free laborers, servants, and poor freeholders who had committed crimes and misdemeanors in the other colonies. The presence of a large number of slaves and the fear that they and poor free laborers would commit crime are, in Hoffer's opinion, the reasons why the authorities were so diligent in ferreting out and prosecuting criminal offenses. The result of this diligence, according to Hoffer, was a sharply elevated rate of indictments and other prosecutions.

Turning to the lack of jury trials in the Richmond County criminal trial records, Hoffer questions the view that the military origin of early Virginia law made colonists reluctant to resort to jury trial.<sup>28</sup> He sees this waiver of jury trial rather as an effort on the part of accused persons to maintain their position within the county. With few institutions available in colonial Virginia for social control, the county justices were almost as concerned that the accused simply submit to the justices' authority as they were with the outcome of the case. Accordingly, asserts Hoffer, the justices afforded lenient treatment to those who quietly submitted to the courts' authority, and only a handful of accused were willing to risk offending the county justices or the local grand juries by chal-

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26. Hoffer, *Disorder and Deference: The Paradoxes of Criminal Justice in the Colonial Tidewater*, in *AMBIVALENT LEGACY*, *supra* note 2, at 187-201.

27. *Cf. supra* notes 18-20 and accompanying text (Schwarz suggests that slave crime was often "politically motivated").

28. Hoffer, *Disorder and Deference: The Paradox of Criminal Justice in the Colonial Tidewater*, in *AMBIVALENT LEGACY*, *supra* note 2, at 186-99.

lenging their decisions before a petit jury. This explanation is plausible, but so is the theory advanced earlier in this collection of essays by Lawrence Friedman: trial was a much less complex matter in a legal system that was dominated by lay judges and juries, and these lay courts reserved full due process treatment for only the most significant offenses.<sup>29</sup>

A.G. Roeber's study of German emigrants to colonial Maryland, Virginia, and Pennsylvania examines the degree to which past experience with informal resolution of disputes in Germany, coupled with a Lutheran antipathy to secular law and the legal profession, kept Germans from positions at the bar and on the bench.<sup>30</sup> Among Germans, only the Moravians of North Carolina appear to have exerted pressure for representation on the local county courts. The royal government considered Moravian jurists to be particularly loyal at a time when most German settlers were found in the ranks of the Regulator movement. Roeber's carefully researched and well-reasoned essay brings the techniques of ethnic history and prosopography to bear upon the legal profession. In so doing the essay provides a very useful viewpoint concerning variant attitudes toward courts and law held by settlers of foreign background or of unique religious belief. Like any study of its length, Roeber's essay raises a number of questions for future research.<sup>31</sup> The essay also suggests that the legal profession in each jurisdiction must be studied carefully for its representative character and its religious and ethnic composition.

A good example of such a work is Kermit L. Hall's essay on the effect of the introduction of judicial election on the judicial personnel of the Southern states.<sup>32</sup> Hall concludes that members of the Southern judiciary, in general, were not substantially different from their Northern counterparts; they did, however, exhibit provincialism in their higher education and legal training because

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29. Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY*, *supra* note 2, at 36-38.

30. Roeber, "He read it to me from a book of English law": *Germans, Bench, and Bar in the Colonial South, 1715-1770*, in *AMBIVALENT LEGACY*, *supra* note 2, at 202-28.

31. The essay describes German attempts to isolate themselves and colonial courts. It would be helpful to know whether in areas in which individual initiative was determinative, (such as in drafting wills, negotiating contracts, apportioning family lands), German customs prevailed. How did English-oriented courts deal with German customs; were they received into local law to support deviant commercial practices, to serve as evidence of unusual property dispositions, or to mitigate offenses known to English but not to German law?

32. 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 229-55.

most did not leave the South for these purposes. Although more Southern judges tended to fit into familial patterns of judicial "office-holding" than did Midwestern judges, this is attributable more to the decline of the two party system in the Restoration South than to the advent of judicial election.

#### V. CONCLUSION

This extremely worthwhile collection of essays will provide good reading for students of Southern history and for all who have an interest in the history of American law. *Ambivalent Legacy* succeeds admirably in directing attention to the growing volume of work on legal history of the South and in providing a good working bibliography on law in the Southern states. Bodenhamer and Ely are to be commended for convening the meeting that generated these essays and for their selection of the scholars to participate in the endeavor.

