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Foreword

James W. Ely, Jr. and Terry Calvani***

Legal historians have long been aware of the interplay between regionalism and centralism. In 1950 J. Willard Hurst commented:

[u]nity and diversity have been a problem in United States legal history. The country is so big, and differs so in its sections, people, natural resources, local and regional traditions, that a diversity in legal institutions is entirely natural. Such differences developed. On the other hand, in the face of the obstacles to uniformity, it is remarkable how much the country, or at least large parts of it, have had a similar growth.¹

He continued: “[W]e must remember that we do not yet have the thorough studies of our general, regional, and local legal history that we must have if we are to see these conditions of likeness and unlikeness in their relation to each other.”²

Since Hurst made these observations American legal history has enjoyed a marked revival of academic interest. Most major law schools, and even a growing number of history departments, offer instruction in the field.³ Further, during the past decade both the quality and quantity of scholarship in the legal history of the United States have increased greatly.⁴ Still, Hurst’s call for greater atten-

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

2. *Id.* at 18-19.

3. Those interested in exploring the increase in offerings in American legal history in recent years should compare *Re, Legal History Courses in American Law Schools*, 13 *AM. U.L. REV.* 45 (1963), with Smith, *Report on the Teaching of Legal History in American Law Schools* (Nov. 20, 1973) and Bourguignon, *Report on the Teaching of Legal History in American Law Schools* (Nov. 20, 1976).

4. This scholarship includes general histories of American law, for example, L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* (1977); the judiciary, for example, R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* (1977); G. WHITE, *THE AMERICAN JUDICIAL TRADITION* (1976); and the effect of economic forces on legal institutions, for example, M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). Several quality biographies of important legal personalities also have been published, for example, L. BAKER, *JOHN MARSHALL: A LIFE IN LAW* (1974); G. DUNNE, *JUSTICE JOSEPH STORY AND THE*

tion to regional history has gone largely unanswered. In particular, the legal history of the South, arguably one of the Nation's most distinctive regions, has been neglected.

The absence of scholarly focus on the legal history of the South is all the more surprising given the significant attention devoted to other aspects of southern history in recent years. Professor C. Vann Woodward recently has noted the high quality of scholarship on the history of the South.⁵ Moreover, Woodward asserts that the study of the history of the South "has suddenly emerged in a position of central importance in national history."⁶ Professors Arthur Link and Rembert W. Patrick concur, stating that "[s]outhern historiography excels as well as exceeds that of any other region of the United States."⁷ On the other hand, given the relative novelty of professional legal history, perhaps it is too soon to expect the appearance of sophisticated regional studies and comparisons. Professor David Potter observed in 1968 that "the history of the South as a region . . . is largely a product of the last five decades."⁸ Only now that the field of legal history is attaining its majority can we perhaps expect the offspring of regional study.

While scholars have treated the careers of a few elite figures,⁹ the administration of criminal justice,¹⁰ the impact of the Revolu-

RISE OF THE SUPREME COURT (1970); W. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973); J. HOWARD, *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* (1968). There continues to be scholarship on the United States Supreme Court, for example, C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88* (1971); J. GOEBEL, *ANTECEDENTS AND BEGINNINGS TO 1801* (1971); C. SWISHER, *THE TANEY PERIOD 1836-64* (1974).

5. Woodward, *The Future of Southern History*, in *THE FUTURE OF HISTORY* 135, 136 (C. Delzell ed. 1977) [hereinafter cited as *Future of Southern History*]. Indeed, a comparison between the bibliographies contained in the first and second editions of C. WOODWARD, *ORIGINS OF THE NEW SOUTH* (1951, 2d ed. 1971) reveals some 311 titles discussed in the 1951 edition, while 1905 are mentioned in the 1971 edition.

6. *Future of Southern History*, *supra* note 5, at 138.

7. *WRITING SOUTHERN HISTORY: ESSAYS IN HISTORIOGRAPHY IN HONOR OF FLETCHER M. GREEN* vii (A. Link & R. Patrick eds. 1965).

8. D. POTTER, *THE SOUTH AND THE SECTIONAL CONFLICT* 3-16 (1968).

9. See, e.g., *THE PAPERS OF JAMES IREDELL* (D. Higginbotham ed. 1976); 1 *THE PAPERS OF JOHN MARSHALL, 1775-1788* (H. Johnson ed. 1974); 2 *THE PAPERS OF JOHN MARSHALL, 1788-1795* (C. Cullen & H. Johnson eds. 1977); Calvani, *The Early Professional Career of Howell Jackson*, 30 *VAND. L. REV.* 39 (1977); Eaton, *A Mirror of the Southern Colonial Lawyer: The Fee Books of Patrick Henry, Thomas Jefferson, and Waightstill Avery*, 8 *WM. & MARY Q.* 520 (1951); Hogue, *Nicholas Trott: Man of Law and Letters*, 76 *S.C. HIST. MAG.* 25 (1975); Ely, "You Will Discover How Loosely Business Is Transacted in the Courts of this State": The Legal Practice of Andrew Jackson (unpublished paper delivered on October 20, 1978, for American Society for Legal History) (on file with the *Vanderbilt Law Review*).

10. See, e.g., A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* (1930); J. WILLIAMS, *VOGUES IN VILLAINY: CRIME AND RETRIBUTION IN ANTEBELLUM SOUTH CAROLINA* (1959); Hindus, *The Contours of Crime and Justice in Massachusetts and South Carolina, 1767-1878*, 21 *AM. J. LEGAL HIST.* 212 (1977); Saunders, *Crime and Punishment in Early National America: Richmond, Virginia, 1784-1820*, 86 *VA. MAG. HIST. & BIO.* 33 (1978).

tion on the legal order,¹¹ the workings of the judicial system,¹² and the sensitive area of race relations,¹³ such work has been sporadic, and many topics remain unexplored.¹⁴ More serious is the absence of any central theses to guide the investigation of southern legal history. In the hope of giving some direction for a regional approach to the legal past of the South, Vanderbilt Law School, with the generous assistance of the University Research Council, sponsored a two-day Symposium on this important topic in the spring of 1978 and invited leading scholars to participate. Principal papers by Richard Maxwell Brown, Maxwell H. Bloomfield, Robert M. Ireland, A. E. Keir Nash, and Robert J. Haws and Michael V. Namorato discussed diverse aspects of southern legal history.

One theme that several scholars have found characteristic of the South is the prevalence and acceptance of violence as a means of conflict resolution within the region. The code duello, the vigilante regulators, the lynchings, and the Klan are sometimes seen as manifestations of this tradition. Accordingly, we invited Professor Richard Maxwell Brown, Beaman Professor of Northwest and Pacific History at the University of Oregon and a noted authority on violence in American history,¹⁵ to keynote the Symposium. In his

11. See Cullen, *Completing the Revisal of the Laws in Post-Revolutionary Virginia*, 82 VA. MAG. HIST. & BIO. 84 (1974); Ely, *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939 (1973); Ely, *Law in a Republican Society: Continuity and Change in the Legal System of Post-Revolutionary America*, in PERSPECTIVES ON REVOLUTION AND EVOLUTION (R. Preston ed. forthcoming 1979); Harrison, *A Study of the Earliest Reported Decisions of the South Carolina Courts of Law*, 16 AM. J. LEGAL HIST. 51 (1972); Nolan, *The Effects of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969 (1976).

12. See R. IRELAND, *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* (1972); P. MCCAIN, *THE COUNTY COURT IN NORTH CAROLINA BEFORE 1750* (1954); M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816* (1978); *THE VIRGINIA LAW REPORTERS BEFORE 1880* (W. Bryson ed. 1977); Bridwell, *Mr. Nicholas Trott and the South Carolina Vice Admiralty Court: An Essay on Procedural Reform and Colonial Politics*, 28 S.C. L. REV. 181 (1976); Ely, *Charleston's Court of Wardens, 1783-1800: A Post-Revolutionary Experiment in Municipal Justice*, 27 S.C. L. REV. 645 (1976).

13. D. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969); C. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* (1976); Ely, *Negro Demonstrations and the Law: Danville as a Test Case*, 27 VAND. L. REV. 927 (1974).

14. The treatment of substantive law has been incomplete. See, e.g., D. CALHOUN, *PROFESSIONAL LIVES IN AMERICA: STRUCTURE AND ASPIRATION, 1750-1850*, at 59-87 (1965); W. HAMILTON, *ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES* (1953); *SOUTH CAROLINA LEGAL HISTORY* (H. Johnson ed. forthcoming 1979); Bowler, *Cared Whores and White Shrouded Apologies: Slander in the County Courts of Seventeenth-Century Virginia*, 85 VA. MAG. HIST. & BIO. 411 (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).

15. See R. BROWN, *THE SOUTH CAROLINA REGULATORS* (1963); R. BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975); AMERICAN VIOLENCE

Article, entitled "Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective," Professor Brown argues that the incidence of violence in the South was greater than other regions, and that this violence in large measure was attributable to peculiarities in the criminal law of many southern states, specifically the "stand-your-own-ground-rule," which permitted victims of physical violence to avoid the common law duty to retreat.

Without doubt the "peculiar institution" of slavery has provided historians of the South with ample opportunities for scholarly study and reflection. The pathbreaking scholarship of Ulrich B. Phillips¹⁶ and the subsequent criticism of Phillips by Stanley M. Elkins¹⁷ and Kenneth M. Stampp¹⁸ are all well-known classics. Work by Eugene Genovese¹⁹ and David Brion Davis,²⁰ the controversial cliometrics of Robert Fogel and Stanley Engerman,²¹ and the comparative studies of Herbert Klein²² and Carl Degler²³ represent more recent scholarship in this area. In recent years the law of slavery has increasingly claimed the attention of historians.²⁴ Pro-

(R. Brown ed. 1970); Brown, *Legal and Behavioral Perspectives on American Vigilantism*, 5 PERSPECTIVES AM. HIST. 93 (1971).

16. U. PHILLIPS, *AMERICAN NEGRO SLAVERY* (1918).

17. S. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (rev. 3d ed. 1976).

18. K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

19. E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974).

20. D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* (1975).

21. R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974).

22. H. KLEIN, *SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA* (1967).

23. C. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* (1971).

24. See, e.g., Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J.S. HIST. 537 (1974); Hindus, *Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina*, 63 J. AM. HIST. 575 (1976); Howington, "Not in the Condition of a Horse or an Ox": Ford v. Ford, *The Law of Testamentary Manumission and the Tennessee Courts's Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249 (1975); Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970); Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197 (1970); Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neall*, 21 S.C. L. REV. 141 (1968); Nash, *The Texas Supreme Court and the Trial Rights of Blacks, 1845-1860*, 58 J. AM. HIST. 622 (1971); Stealey, *The Responsibilities and Liabilities of the Bailee of Slave Labor in Virginia*, 12 AM. J. LEGAL HIST. 336 (1968); Tushnet, *The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy*, 10 LAW & SOC'Y REV. 119 (1975). See also S. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* (1970); R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); L. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

fessor Keir Nash's Article on the legal aspects of the peculiar institution is a significant contribution to our understanding of this important topic. In "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," Professor Nash first summarizes existing interpretations of the law of slavery and finds them wanting. He then undertakes a three-state comparison of judicial attitudes toward manumission.

No Symposium devoted to the law of a particular region would be complete without substantial focus on the bench and bar. While examination of the professions generally has not been a well-developed field, the Articles by Professors Maxwell Bloomfield and Robert Ireland on the bar and bench respectively provide considerable insight into the professional lives of southern lawyers and judges. Professor Bloomfield, long a student of the American bar,²⁵ discusses the Texas bar during the nineteenth century. Professor Ireland's Article, "Law and Disorder in Nineteenth-Century Kentucky," explores the role of the judiciary and its relation to other participants in the judicial process in enforcing law and discouraging disorder in nineteenth-century Kentucky.

As any lawyer well knows, the vast bulk of legal business never reaches the appellate courts. Yet, for too long legal historians have concentrated their efforts on the appellate state and federal courts to the neglect of the trial level tribunals. In the concluding principal Article, "Race, Property Rights, and the Economic Consequences of Reconstruction: A Case Study," Professors Robert J. Haws and Michael V. Namorato explore the business of the lower courts of Mississippi. While other scholars have focused on the tension between economic reconstruction and the dictates of the national government, Haws and Namorato urge that the state judicial system proved to be the most effective organ of government in achieving a more stable political, economic, and social environment while satisfying federally imposed requirements. Professors Dennis R. Nolan, Mary K. B. Tachau, and Robert H. Jones offered formal Comments, which follow each of the principal Articles.

The Symposium concluded with a panel discussion on "Problems and Prospects in Southern Legal History." Panelists Carl Pierce, Charles T. Cullen, Randall Bridwell, and Kermit L. Hall led the discussion about future study of regional history. The Essays of Professors Hall and Cullen are included in this volume. Hall explores the important uses of collective biography in southern

25. See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976); Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 *AM. J. LEGAL HIST.* 306 (1968).

legal history in his Essay, "The Promises and Perils of Prosopography—Southern Style." Hall, an eminent prosopographer,²⁶ urges that the collective biography provides an important insight into the power and social structure of the legal establishment. Professor Cullen's Essay, "St. George Tucker, John Marshall, and Constitutionalism in the Post-Revolutionary South," examines the views of these important southerners in the evolution of American constitutional thought. This conference, the first on the legal history of this region, hopefully will prompt greater attention to the South among legal historians.

26. K. HALL, *THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND AMERICAN PARTY SYSTEM, 1829-1861* (forthcoming 1979); Hall, *240 Men: The Antebellum Lower Federal Judiciary, 1829-1861*, 29 VAND. L. REV. 1089 (1976).