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# ESSAYS ON PROBLEMS AND PROSPECTS IN SOUTHERN LEGAL HISTORY

## The Promises and Perils of Prosopography—Southern Style

*Kermit L. Hall\**

Justice Oliver Wendell Holmes, Jr., once urged historians to study the law because it offered a magic mirror whose reflections divulged fundamental social values.<sup>1</sup> Holmes' plea on behalf of the utility of legal history has relevance for southerners intrigued by the possibility of their historical distinctiveness. Without a basis of comparison, however, the search for southern exceptionalism becomes a quest after the arcane. As C. Vann Woodward observed, southern history ought to tell all Americans, not southerners alone, something about their common pasts. Woodward argued that attaining this goal was entirely feasible, since certain aspects of the southern past, such as slavery and race relations, have uniquely counterpointed broader national values.<sup>2</sup> The burden of joining these two subspecialties of American history—one legal and reflexive, the other regional and introspective—is to elaborate the distinctiveness of the southern legal past within the broader sweep of American legal history.

This task requires southern legal historians to evaluate carefully subject matter and methodology. Discovering who has administered southern legal institutions must claim an important place on the research agenda. If the South was distinctive, then the consequences of that uniqueness should be reflected, as Holmes suggested, in the composition of the bench and bar. Collective biography, or prosopography as it is more properly termed, is specially suited to this task.<sup>3</sup> It attacks two basic problems in historical inquiry: the roots of power and social structure. The method has gained wide acceptance among students of politics and society; it ought to find an increasing audience among legal historians who are

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 474 (1897).

2. C. WOODWARD, AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN THE NORTH-SOUTH DIALOGUE 3-12 (1971).

3. Stone, *Prosopography*, 100 DAEDALUS 46 (1971).

fascinated with the antecedents of lawyers and judges. Before legal historians of the South exploit the method, however, they could profitably pause to reflect on the promises and the perils of such a venture.<sup>4</sup>

Two schools of prosopography have developed in this century. The elite school has concentrated on relatively small groups such as state legislators, delegates to the federal constitutional convention, and justices of the Supreme Court.<sup>5</sup> By meticulously examining the records available on these individuals, collective biographers often have reconstructed the informal webs of commitment that bound men to action within seemingly impersonal institutions. The mass school, on the other hand, has relied on statistical methods and electronic data processing to probe the shared characteristics of large and often faceless groups for whom a minimum of records are available—mobs, slaves, or the citizenry. Vanderbilt University historian Frank L. Owsley and his students, for example, fashioned a provocative revisionist portrait of the yeoman middle class of the pre-Civil War South through aggregate analysis of the manuscript census.<sup>6</sup>

Analyzing the southern bench and bar will demand the best of both schools. An examination of lawyers and judges in one state over the relatively short period of a single decade requires the statistical and data handling techniques peculiar to the mass school. Lawyers and judges, however, were more likely than the plain folk of the South to have produced the valuable personal and public records that have provided the grist for the elite school.

Collective biography promises handsome dividends. By considering the entire legal community, historians will be prepared to generalize with authority and to test contemporary observations of the bench and bar. Pre-Civil War legal reformers, for example, regu-

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4. On the various applications of collective biography to American history, see Folsom, *The Collective Biography as a Research Tool*, 54 MID-AMERICA 108 (1972). For its application to lawyers and judges, see Hall, *240 Men: The Antebellum Lower Federal Judiciary, 1829-1861*, 29 VAND. L. REV. 1089 (1976); Nash, *The Philadelphia Bench and Bar, 1800-1860*, 7 COMP. STUD. SOC'Y & HIST. 203-20 (1965). A more impressionistic strategy is employed in Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306 (1968). On the need for a "new legal biography" founded on quantitative methods, see Botein, *Biography in Legal History*, 69 LAW LIB. J. 456 (1976).

5. See, e.g., Greene, *Foundations of Political Power in the Virginia Houses of Burgesses, 1720-1776*, 16 WM. & MARY Q. 485 (1959); Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959). The classic studies of the impact of elites are C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913) and C. MILLS, *THE POWER ELITE* (1956).

6. F. OWSLEY, *PLAIN FOLK OF THE OLD SOUTH* (1949). For a more recent application of mass collective biography to a legal history topic, see E. MONKKONEN, *THE DANGEROUS CLASS: CRIME AND POVERTY IN COLUMBUS, OHIO, 1860-1885* (1975).

larly charged that lawyers received too much money for doing too little work.<sup>7</sup> A collective portrait of the bar of a single southern state during these years undoubtedly will disclose a wide range of incomes, with some lawyers earning no more than farmers. This data would place the criticisms of legal reformers in an altogether different perspective. Legal historians have assumed that significant differentiation existed in the ranks of the southern legal community, but they have made no attempt to collect the data that would explain the extent of and the reasons for these differences.<sup>8</sup> By identifying the comparative economic, social, and professional attributes of southern lawyers and judges, legal historians will contribute to the growing debate over the nature of legal change, especially in the pre-Civil War era. Morton J. Horwitz and his critics, most notably Randall Bridwell and Ralph U. Whitten, disagree over the role of lawyers and judges in promoting economic development. Neither instrumentalists, such as Horwitz, who stress the dynamic and adaptive role of the bench and bar, nor traditionalists, such as Bridwell and Whitten, who emphasize the formal and preservative role of judges and lawyers, have explained convincingly how the legal community came to identify with and articulate legal and jurisprudential beliefs. By charting the evolution in the social backgrounds, education, legal training, and nonlegal business activities of antebellum lawyers and judges, historians will better be able to link legal to social and political change.<sup>9</sup> One question is whether unique career patterns and economic commitments in the antebellum South prompted the legal community to sustain the slave economy. Eugene Genovese suggests that lawyers and judges provided a necessary legal basis for the morally bankrupt peculiar institution in a traditional, precapitalist economy.<sup>10</sup> In the debate over the instrumental nature of American law, detailed knowledge about the distinctive attributes of the southern bench and bar will suggest the extent to which they facilitated private economic wishes, as opposed to a formal and abstract commitment to the law, in making the law congruent with the felt needs of the slave power.

Students of southern power elites frequently have exploited collective biography. Grady McWhiney, Thomas B. Alexander, Burtom Folsom II, Herbert J. Doherty, Jr., Richard Beringer, and

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7. M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 32-58 (1976).

8. See generally L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 266-78 (1973).

9. See generally R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* (1977); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977).

10. E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 25-48 (1974).

Ralph Wooster, to name only a few, have analyzed party leaders, legislators, governors, and secession advocates.<sup>11</sup> Legal historians, however, generally have ignored the bench and bar.<sup>12</sup> The most significant work has been done by scholars whose interests usually diverge from the questions raised by the growing body of scholarship in American legal history. For example, Ralph Wooster has contributed, by examining the backgrounds of public officials in the upper and lower South, a valuable glimpse of the southern appeals court judiciary during the mid-nineteenth century.<sup>13</sup> Political scientists have produced valuable studies of interest to the legal historian. A. E. Keir Nash, Kenneth N. Vines, Emmet W. Bashful, and Jack W. Peltason have sharpened understanding of nineteenth- and twentieth-century state appellate and federal district court judges.<sup>14</sup>

These studies provide valuable descriptive building blocks, but substantive gaps and methodological deficiencies persist. The studies are chronologically fragmented; they offer scant information about the professional attributes of southern lawyers generally; and they reveal little about the impact of institutional change in the organization of the bench and bar on the careers of judges and lawyers. There is, for example, no analysis of the bar of a southern state comparable to Gerard Gawalt's pathbreaking examination of the late eighteenth- and early nineteenth-century bar of Massachusetts.<sup>15</sup>

Methodological inadequacies also abound in the existing studies. Ralph Wooster's useful characterization of the southern appel-

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11. H. DOHERTY, *THE WHIGS OF FLORIDA, 1845-1854* (1959); R. WOOSTER, *THE PEOPLE IN POWER: COURTHOUSE AND STATEHOUSE IN THE LOWER SOUTH, 1850-1860* (1969) [hereinafter cited as *THE PEOPLE IN POWER*]; R. WOOSTER, *POLITICIANS, PLANTERS, AND PLAIN FOLK: COURTHOUSE AND STATEHOUSE IN THE UPPER SOUTH, 1850-1860* (1975) [hereinafter cited as *POLITICIANS, PLANTERS, AND PLAIN FOLK*]; R. WOOSTER, *THE SECESSION CONVENTIONS OF THE SOUTH* (1962); Alexander, Carter, Lister, Oldshue, & Sandlin, *Who Were the Alabama Whigs?* 16 ALA. REV. 5 (1963); Beringer, *A Profile of the Members of the Confederate Congress*, 33 J.S. HIST. 518 (1967); Folsom, *The Politics of Elites: Prominence and Party in Davidson County, Tennessee, 1835-1861*, 39 J.S. HIST. 359 (1973); McWhiney, *Were the Whigs a Class Party in Alabama?*, 23 J.S. HIST. 510 (1957).

12. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 AM. J. LEGAL HIST. 145 (1973).

13. *THE PEOPLE IN POWER*, *supra* note 11, at 64-80; *POLITICIANS, PLANTERS, AND PLAIN FOLK*, *supra* note 11, at 79-96.

14. E. BASHFUL, *THE FLORIDA SUPREME COURT: A STUDY IN JUDICIAL SELECTION* (1958); J. PELTASON, *FIFTY-EIGHT LONELY MEN 3-29* (1961); Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197 (1970); Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970); Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337 (1964); Nash, *Negro Rights and Judicial Behavior in the Old South* (Sept. 1967) (unpublished Ph.D. dissertation, Harvard University).

15. Gawalt, *Massachusetts Legal Education in Transition, 1766-1840*, 17 AM. J. LEGAL HIST. 27 (1973); Gawalt, *Massachusetts Lawyers: A Historical Analysis of the Process of Professionalization, 1760-1840* (Ph.D. dissertation, Clark University, 1969).

late judiciary, for example, neglects to bring social theory to bear on his valuable data and offers no explanation of how the appellate judiciary fitted into the broad class structure of the South. The attempts of American historians who rely on prosopography to treat the social structure of the groups they study have been unconvincing and unimaginative. Studies of Abolitionists, Mugwumps, and Progressives have failed to place these individuals in any broader social context.<sup>16</sup> Historians frequently have tried through collective biography to argue that these individuals were motivated by status anxiety, but in doing so they have totally ignored the need to postulate empirically measurable criteria of class association. Collective biographers have refused to forge the various attributes of social class origin or position—wealth, family importance, marriage, political activism—into a coherent proposition that would weigh these various attributes of ascribed and attained social class position.<sup>17</sup> Inadequate data frequently have victimized the American historians engaged in elite prosopography. They have relied too often on readily available material in sources like the *Dictionary of American Biography* and the *National Cyclopaedia of American Biography*. The scope and accuracy of the sketches in these and comparable reference works restrict the ultimate credibility of any collective biography.<sup>18</sup> Southern legal prosopographers should gather the rich harvest of biographical material available in estate, tax, census, military, and family records—all sources familiar to the genealogist. Only a handful of American historians have tapped the unique family history sources available in the Genealogical Society Library of the Church of Jesus Christ of Latter-Day Saints in Salt Lake City, Utah.<sup>19</sup>

Undoubtedly, there are frustrations in the meticulous inquiry

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16. See, e.g., Folsom, *supra* note 4, at 118-20; Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966); Skotheim, *A Note on Historical Method: David Donald's "Toward A Reconsideration of Abolitionists,"* 25 J.S. HIST. 356 (1959); Stone, *supra* note 3, at 57-65.

17. Tagar, *Progressives, Conservatives and the Theory of the Status Revolution*, 48 MID-AMERICA 162 (1966).

18. A. NEVINS, *THE GATEWAY TO HISTORY* 131-32 (1938); A PHILADELPHIA PERSPECTIVE: *THE DIARY OF SIDNEY GEORGE FISHER* iii (N. Wainwright ed. 1967); Smith, *Cyclical, Secular, and Structural Changes in American Elite Composition*, 4 PERSPECTIVES AM. HIST. 351, 370 (1970).

19. Hays, *History and Genealogy: Patterns of Change and Prospects for Cooperation*, 7 J. NAT'L ARCHIVES 39 (1975). The superb Genealogical Library in Salt Lake City contains federal and state censuses, birth, death, marriage, tax, and probate records, published and unpublished genealogies, and state, county, and city histories. The availability of these materials in one library greatly facilitates the collection of biographical material. See Wimmer & Pope, *The Genealogical Society Library of Salt Lake City: A Source of Data for Economic and Social Historians*, 8 HIST. METHODS NEWSLETTER 51 (1975).

prosopography demands. The historians' time and resources to do research in the present are often outweighed by the inscrutability of the past. Doing critically acceptable collective biography feels a little like falling into quicksand; the more the researcher struggles conscientiously to find data, the deeper he sinks as a result of his own efforts. The vitality of the method, however, depends on the ability and willingness of the researcher to exploit a variety of sources, most of which are unavailable in academic or law school libraries. It is an iron rule of prosopography that a rich data base stimulates imaginative questions and insightful historical analysis.

Deficient methods and inadequate data challenge the credibility of future collective biography.<sup>20</sup> Legal historians of the South must improve on the work of their predecessors through greater methodological rigor and more assiduous data collection. To do otherwise would perpetuate the collective biographers habit of subordinating incisive analysis to simple description. Prosopographers of the southern bench and bar can avoid this pitfall by concentrating on four issues: kinship, professionalism, class, and power.<sup>21</sup>

Historians of the South repeatedly have stressed the impact of family and kinship connections on society and politics.<sup>22</sup> Kinship has played a part in the construction of political groups and parties since at least the Middle Ages, although proponents of modernization theory argue that the growth of an industrial economy and impersonal, bureaucratic institutions during the nineteenth century diminished the salience of these informal and personal connections.<sup>23</sup> Collective portraits sensitive to the presence of kinship connections of the bench and bar could corroborate the assertion that the South lagged behind in the general movement toward political and economic modernization. Has the legal profession of the South traditionally been a closed enterprise in which only the sons and daughters of the socially prominent have gained access to the best law practices and firms? Have certain families dominated the bars of southern cities? Have judges been allied by family connec-

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20. Bogue, Clubb, McKibbin, & Traugott, *Members of the House of Representatives and the Processes of Modernization, 1789-1960*, 63 J. AM. HIST. 275 (1976).

21. See generally Westoff, Bressler, & Sagi, *The Concept of Social Mobility: An Empirical Inquiry*, 25 AM. SOC. REV. 375-85 (1960). The need for studies that integrate these variables is argued in Hammack, *Problems in the Historical Study of Power in the Cities and Towns of the United States, 1800-1960*, 83 AM. HIST. REV. 323 (1978).

22. See, e.g., R. BROWN, *MODERNIZATION: THE TRANSFORMATION OF AMERICAN LIFE, 1600-1865*, at 64-67, 170-73, 181-86 (1976).

23. E.g., Wolf, *Kinship, Friendship and Patron-Client Relations in Complex Societies*, in *THE SOCIAL ANTHROPOLOGY OF COMPLEX SOCIETIES* 12-18 (M. Banton ed. 1966). On modernization generally, see C. BLACK, *THE DYNAMICS OF MODERNIZATION: A STUDY IN COMPARATIVE HISTORY* (1966).

tion with other judges or officeholders? Have southern lawyers followed in the occupational footsteps of their fathers? By examining family and kinship, the legal historian can relate systematically the impact of informal and personal considerations on legal institutions. This will require the reconstitution of entire families, not just the examination of the lives of lawyers alone. It also will demand that legal historians reshape their training. The curriculums of history graduate schools and law schools usually ignore the skills necessary to do family research. The legal historian will have to learn from the genealogist.<sup>24</sup> Paradoxically, the genealogist knows the court records, with their wealth of biographical information, more intimately, albeit pedantically, than the legal historian.<sup>25</sup>

Professionalization is a crucial component of the process of modernization. A recurring theme in American history insists that the South was retrograde in the preparation of doctors, lawyers, and ministers, and in accepting the standards and institutional trappings of professionalization. This notion is reinforced by persistent arguments that antebellum lawyers on the southern frontier were crudely prepared to practice law.<sup>26</sup> This conclusion rests on fascinating but dubious reminiscences such as Joseph Glover Baldwin's *The Flush Times of Alabama and Mississippi*, which portrayed avaricious and often incompetent lawyers plundering the legal Eldorado of the South.<sup>27</sup> To enhance understanding of professionalization, the collective biographer must ask difficult questions. How were southern lawyers trained: in law schools, in the office of another lawyer, by themselves? In view of the success of such northern immigrants as John Charles Watrous of Texas, George Goldthwaite of Alabama, and Samuel Treat of Missouri, were these northerners better prepared and thus more successful than their southern born and trained counterparts? Was the level of legal training different for urban and rural lawyers? When did legal specialization become an integral part of the southern bar? With Daniel Calhoun's study of Davidson County, Tennessee, as a model, the prosopographer must search the courtroom records to understand shifts in the profes-

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24. THE AMERICAN FAMILY IN SOCIAL-HISTORICAL PERSPECTIVE (M. Gordon ed. 1973); Hays, *supra* note 19, at 40-41. But genealogies must be used with caution. See Main, *Probate Records as a Source for Early American History*, 32 WM. & MARY Q. 89, 95-97 (1975); Nichols, *The Genealogist and the Historian*, 14 PUBLICATIONS OF THE GENEALOGICAL SOC'Y OF PA. 1-2 (Oct. 1942) (copy on file with the *Vanderbilt Law Review*).

25. Hays, *supra* note 19, at 40-41.

26. L. FRIEDMAN, *supra* note 8, at 142-44.

27. J. BALDWIN, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI, A SERIES OF SKETCHES* (1899).



sional conduct of the bar.<sup>28</sup> He must count participation in cases and tally won and loss records.

Class problems have fascinated the southern historical imagination, in part because slavery and its post-Civil War shadow apparently abetted the maintenance of a traditional deferential social order. In such a social order lawyers and judges from the upper class seemingly would play a preservative role. The emergence of an open class structure predicated on merit is considered an important concomitant of modernization. Historians often have concluded that the South was slow to open the door to social advancement through acquisition of a profession. W. J. Cash effectively demolished the mythological trilogy of black folk, poor whites, and old families, but the social origins and positions of lawyers remain unknown.<sup>29</sup> Have southern lawyers, especially the most successful and prominent, been drawn from the upper classes of southern society? Or has the legal profession in the South historically provided a kind of social escalator that promoted talent (white talent, of course) regardless of social origins? If legal historians of the South expect to fashion a "total history of the law," then they must examine the social structure of the bench and bar.<sup>30</sup>

Class is inextricably linked to the exercise of power. The ability to bring about change short of revolution depends significantly on the control of formally organized political and economic institutions. The influence of the southern bar undoubtedly extended beyond the courtroom—but how far beyond? Lawyers were uniquely prepared for public service as legislators and governors, and for private service as financial advisors, directors, and presidents of commercial and manufacturing concerns. But how significant were these advantages in an agrarian economy? The data gathered by Ralph Wooster on the occupational composition of the pre-Civil War legislatures suggest caution in concluding that lawyers have always dominated the southern political universe. Wooster discovered that over fifty percent of the legislators in most southern states were professional agriculturalists. In comparison with their total numbers in southern society, lawyers were not dramatically over-represented in these legislative bodies; they shared power with other important elements of southern society.<sup>31</sup> Did lawyers in the ante-

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28. D. CALHOUN, *PROFESSIONAL LIVES IN AMERICA, STRUCTURE AND ASPIRATION, 1750-1850*, at 59-65, 77-87 (1965).

29. W. CASH, *THE MIND OF THE SOUTH* (1941).

30. Hindus & Jones, *The Social History of American Law: What It Is and Where to Begin* (October 23, 1976) (paper presented at the 1976 meeting of the American Society for Legal History) (copy on file with the *Vanderbilt Law Review*).

31. *THE PEOPLE IN POWER*, *supra* note 11, at 35; *POLITICIANS, PLANTERS, AND PLAIN FOLK*,

bellum years play a subsidiary political role to agriculturalists? Did judicial service in southern state courts offer a unique outlet for the ambitions of southern lawyers unable to secure a seat in the statehouse? If lawyers played a subsidiary role to agriculturalists, did this role change in the post-Civil War era? Did a new and more politically active and business-minded bar rise along with the New South?

By accepting at the outset the necessity of analyzing kinship, professionalism, class, and power, southern legal historians will be better prepared than their counterparts in other areas of American history to exploit the promise of collective biography. Nonetheless, two additional perils await. First, regardless of sophisticated social theory, imaginative questions, and thorough research, missing records and contradictory evidence will plague the prosopographer. The consequences often will be time-consuming and intractable frustrations. Like the lawyers and judges he studies, the collective biographer of the southern bench and bar will have to labor in the world of the possible and the available.

Second, meaningful collective biography demands comparison. Unfortunately, legal historians know little about the bench and bar, as a whole, outside of the South.<sup>32</sup> Analysis of southern lawyers and judges has no greater priority, nor any greater potential scholarly reward, than examination of lawyers and judges in, for example, the Old Northwest. As a revitalized subspeciality in American history, legal history ought to shun further balkanization—or, perhaps more appropriately, New Englandization. Southern legal historians can contribute by simultaneously analyzing the bench and bar above and below the Mason-Dixon line. If they do otherwise, they will be like the proverbial blind man attempting to describe an elephant. They may well discover a trunk or a tail without ever encountering the enormous middle ground in between. Lured by the distinctive, they will miss a common national legal tradition. Holmes' magic mirror will reflect provincial introspectiveness rather than a comparable regional distinctiveness with the promise, in Woodward's sense, of counterpointing the fundamental values of the American legal system.

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*supra* note 11, at 34. The place of lawyers in southern society is also discussed by Sellers, *Who Were the Southern Whigs?*, 59 AM. HIST. REV. 335 (1954). On the need to study power and professionalism, see generally Hammack, *supra* note 21.

32. See, e.g., J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN AMERICA* 40-52, 62-73 (1976).

