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Ambivalent Legacy: A Legal History of the South

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AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH. Edited by David J. Bodenhamer and James W. Ely, Jr. Jackson, Miss.: University Press of Mississippi. 1984. Pp. x, 270. Cloth, \$20; paper, \$8.95.

When most people consider southern legal history, they think only of slavery and racial segregation and the legal issues that arose from those two phenomena. Few would dispute, however, that the South is a unique, albeit indistinctly defined,¹ region with a social, political, and cultural structure unlike that of any other section of the United States. Thus, it seems reasonable to suppose that the South has a legal tradition of its own as well. Yet, as David J. Bodenhamer² and James W. Ely, Jr.,³ the editors of *Ambivalent Legacy: A Legal History of the South*, point out, the legal history of the South has received little attention to date from scholars.⁴ Because only one region of the United States — New England — has been the subject of intensive study and research (p. vii), current interpretations of the legal history of the United States are based on an insufficient foundation. As the editors note, the development of a body of literature about the legal history of the South, as well as other regions, would offer “a valuable counterpoint for the understanding of the development of an American legal tradition” (p. vii).

1. As Ely and Bodenhamer point out:

The geographic borders of the South have always been imprecise. It is debatable whether there was a distinct South before the sectional crisis that preceded the Civil War; certainly that conflict did much to define our thinking about the area. A group of border states defies easy sectional analysis. Moreover, there have been important divisions within the region. The Tidewater counties of Virginia and South Carolina were settled communities when Texas and Arkansas were frontier districts. The economy and society of the Upper South were markedly dissimilar from those in the Lower South. Whites in the region were further fragmented along class and regional lines.

Pp. 3-4.

2. Associate Professor of History at the University of Southern Mississippi. Professor Bodenhamer is the author of several works on crime and criminal justice in pre-Civil War America, including *The Efficiency of Criminal Justice in the Antebellum South*, 3 CRIM. JUST. HIST. 81 (1983); and *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 (W. Fraser & W. Moore eds. 1981).

3. Professor of Law at Vanderbilt University. Professor Ely's previous works on southern legal history include THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976); *Charleston's Court of Wardens, 1783-1900: A Post-Revolutionary Experiment in Municipal Justice*, 27 S.C. L. REV. 645 (1976); and *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939 (1973).

4. P. vii. There have been numerous books, articles and symposia dealing with various aspects of southern legal tradition. See, e.g., *Symposium: Legal History of the South*, 32 VAND. L. REV. 1 (1979). Bodenhamer and Ely provide an excellent bibliography of these sources. Pp. 257-64. As they note, however, “no work considers the broad legal development of the region.” P. 257.

Ambivalent Legacy is an attempt to fill the void of scholarship on southern legal history. The book stems from a three-day Conference on the Legal History of the South held jointly by the University of Southern Mississippi and Vanderbilt University School of Law in February 1983. The editors compiled nine of the papers presented at the conference into this one volume, hoping that the result would shed light on "the relationship between southern law and the emergence of the regional economy, the nature of bench and bar in the South, the law of slavery and race in the southern past, and the impact of law on southern politics and society" (p. viii). The essays, written by a diverse group of professors of history and law,⁵ have been divided into four categories: "Law and Southern History" (pp. 1-46); "Law and the Southern Economy" (pp. 47-122); "Law and Race in Southern History" (pp. 123-84); and "Southern Courts, Bench and Bar" (pp. 185-255).

The first essay, "Regionalism and the Legal History of the South" (pp. 3-29), written by Ely and Bodenhamer themselves, establishes the underlying premise of the book — that the South is a separate region with a legal tradition distinct from that of the nation as a whole. Their caveat that "[t]he entire notion of a unique, well-identified southern region is suspect" (p. 3) is well-taken, however. Not only are the geographic borders of the South ill-defined,⁶ but the laws of the southern states themselves historically have been diverse:

Seaboard states, with their colonial past, clung tenaciously to traditional legal concepts and were less open to innovations. While most of the southern states adhered to English common law as the basis of their legal system, Texas and Louisiana followed in large measure the civil law inherited from their French-Spanish ancestry. Consequently, slack generalizations about southern law must be viewed with caution. [p. 4]

Southern states adhered to many national legal norms as well: "Southerners concurred with the central values of American legal culture: resistance to arbitrary power, popular sovereignty, and protection of private property" (p. 4).

Nevertheless, the South's peculiar social structure did forge a unique set of attitudes toward the law. Bodenhamer and Ely find that "[a]mong the differences which define the southern legal heritage has been an unusual degree of attention to matters of race and caste, a rural culture, a hierarchical society, and a pervasive localism" (p. 4). Ely and Bodenhamer examine these characteristics in the context of five areas: slavery and the racial caste system, inhibition of commercial development, personal status, the judicial system, and violence and

5. The following professors contributed to the book: James W. Ely, Jr., David J. Bodenhamer, Lawrence M. Friedman, Tony A. Freyer, Harry N. Scheiber, John V. Orth, Philip J. Schwarz, Thomas D. Morris, Mark V. Tushnet, Peter C. Hoffer, A.G. Roeber, and Kermit L. Hall.

6. See note 1. *supra*.

crime. Their brief sketch of the themes of southern legal history presents the reader with the background necessary to place the topics of the book's essays in their proper historical and social contexts. This introduction provides the only broad view of southern legal history in the entire book.

The diverse essays that follow it, though limited in scope, often present interesting and untraditional viewpoints. For example, Professor Philip J. Schwarz⁷ essay, entitled "Forging the Shackles: The Development of Virginia's Criminal Code for Slaves" (pp. 125-46), focuses not on the actions of the law and the courts, but rather on the actions of the slaves themselves in perpetuating the institution of slavery. Schwarz argues that in creating a penal code for slaves, lawmakers were reacting not merely to "the threat that some slaves presented to slavery," but also to "the threat certain slaves presented to life, limb, or property" (p. 126). Schwarz asserts that

[t]he white supremacist, pro-slavery ideology of the masters was not sufficient to cause the perpetuation of the slave code and courts over nearly two centuries. The actions of a significant number of slaves — especially as perceived by many white legislators and judges — also influenced the creation and modification of the slave court system. [p. 126]

He argues that although most slave crimes are properly characterized as "political behavior," *i.e.*, as conscious resistance to slavery, some originated "from self-interested motives, irrationality, or impulse" (p. 127). Nevertheless, white authorities tended to perceive *all* slave crimes as "political" in nature, and responded by strengthening the laws that preserved the institution of slavery.

While Schwarz acknowledges the role that "white supremacist ideology" and the desire to preserve the institution of slavery played in perpetuating and sustaining oppressive slave codes and courts (p. 139), he argues that "[s]cholars need to complete their analysis of this process of legal development . . . with a comparative explanation of how the purposeful behavior of a significant number of rebellious slaves led white authorities in Virginia and elsewhere to create and develop special statutes and institutions for slaves" (p. 139). He concludes that "[i]ronically, even those slaves who acted irrationally or without any intention of challenging slavery or the authorities of the slave society of Virginia ended up threatening slavery as well as property or people" (p. 139) and thus helped to create the laws designed to keep them in their subjugated state.

In his essay entitled "Law and the Antebellum Southern Economy: An Interpretation" (pp. 49-68), Professor Tony A. Freyer⁸ examines the political economy of the antebellum South to determine "the degree to which 'slaveocracy interests' and democratic policies influ-

7. Associate Professor of History at Virginia Commonwealth University.

8. Associate Professor of History at the University of Alabama in Tuscaloosa.

enced governmental politics [and] the extent to which these policies differed from those fashioned outside the South" (p. 49). Freyer argues that although southern society was marked by great disparities in both political power and wealth, "southern courts and legislatures helped preserve social equilibrium through a proportionate distribution of goods and services from large propertied classes to small or nonpropertied classes" (p. 50). Southern law recognized that in order to preserve the power of the wealthy planters, divergent class interests also had to be accommodated. Property law was the vehicle chosen to accomplish this end (p. 63). Property rights were granted to small property holders in return for their support of a slave regime that ultimately benefited the wealthiest and most powerful planters and merchants. In addition, the law of eminent domain and women's property rights encouraged the distribution of resources to less powerful interests. This redistribution of resources "did not diminish the slaveholders' power as much as it sustained it by containing social-class conflict, by fostering acceptance of the value of slavery as the basis of wealth, and by encouraging interclass, socio-political association" (p. 64).

Though this accommodation did solidify the slavery system which provided the basis of the southern economy, it did so at the cost of economic development: "[C]onsiderations involving the preservation of social and political stability were given priority over developmental efficiencies associated with corporations" (p. 64). Thus, while in the North the legal process served to foster corporate interests and economic development, "southern law served to maintain social equilibrium at the expense of economic development, which in no small measure helped bring about a tragic Civil War" (p. 64).

The essays in *Ambivalent Legacy* are, in general, well-written, informative, and provocative. Yet the book as a whole does little to define the southern legal tradition or to place the South's experience into the broader picture of American law. Except for the editors' descriptive essay on the legal history of the South as a region (pp. 3-29), the essays tend to be narrowly focused and parochial; note, for example, Professor A.G. Roeber's⁹ essay on the impact of German immigrants on the bar and judiciary of the colonial South (pp. 202-28), or Professor Thomas D. Morris'¹⁰ essay on the chattel mortgages of slaves (pp. 147-70). Even those authors who do attempt to relate their topics to a larger picture often fall short. For example, in his essay "The Virginia State Debt and the Judicial Power of the United States, 1870-1920" (pp. 106-22), Professor John V. Orth¹¹ promises to show how, "[i]n the course of [Virginia's post-war] legal battles [to repudiate

9. Assistant Professor of History at Lawrence University, Wisconsin.

10. Professor of History at Portland State University, Oregon.

11. Professor of Law at the University of North Carolina at Chapel Hill.

its antebellum and Reconstructionist Era debt,] the United States Supreme Court determined the nature of the judicial power of the United States" (p. 106). What he actually provides, however, is a descriptive account of the lawsuits arising from Virginia's attempt to evade its debt obligations. The reader is left to draw her own conclusions about the impact that these events had on shaping the judicial power of the federal courts.

Upon completing the book, the reader is left feeling vaguely disappointed and unsatisfied — or, in a word, ambivalent. Though the essays individually have merit, the editors made no apparent attempt to tie the essays together into a cohesive package. For example, Part III on law and race in southern history contains essays by Professor Schwarz on Virginia's criminal code for slaves, Professor Morris on the law of chattel mortgages for slaves and Professor Mark V. Tushnet¹² on the NAACP's experience in organizing civil rights litigation. While each of these essays is interesting and informative in its own right, taken as a whole they do not provide a unified view of the role of slavery and racial segregation in southern legal history.

To be fair, the editors admit that "[t]he essays in this volume do not attempt to be comprehensive or definitive. The paucity of published work on southern law, and the vastness of the research which remains to be done, dampens enthusiasm for such a project" (p. viii). And indeed, these essays do make a valuable contribution to the scant body of literature available on southern legal history. However, the editors do not deliver what their title promised — a legal history of the South. Bodenhamer and Ely complain in the Preface that

[a]lthough historians have not totally ignored the legal history of the South, much of the existing work has been sporadic, uneven in quality, and marked by traditional questions and techniques of investigation. Many topics remain unexplored. More serious is the lack of central themes to guide the investigation of southern legal history. [p. vii]

Unfortunately, they themselves have continued this poor tradition by providing no unifying themes to guide their reader.

Bodenhamer and Ely assert that "an examination of southern law and legal behavior offers an opportunity to locate important values of the region, to gauge whether those values are traditional or modern, and to discover the extent to which they parallel attitudes found in other sections of the country" (p. vii). *Ambivalent Legacy* is not the comprehensive and cohesive treatment of the southern legal tradition needed to accomplish these laudable objectives. However, the book is sure to "stimulate interest in the legal history of the South" (p. ix) and

12. Professor of Law at Georgetown University Law Center.

so to provide an impetus for further research and exploration of that region's unique legal structure.

— *Lynda J. Oswald*