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Root and Branch: Contexts of Legal History in Alabama and the South

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ARTICLE

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BY PAUL PRUITT *

I. Introduction: Origins and Goals of Legal History

In October 1888, Frederic William Maitland delivered his first lecture as Downing Professor at Cambridge University.[1] Titled "Why the History of English Law Is Not Written," his speech was intended both to explain the undeveloped state of English legal history and to summon future scholars to the fray.[2] Certainly Maitland (1850-1906) did not doubt the significance of his special field.[3] "Legal documents . . . ," he said, "are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion."[4] Yet, such documents, including reports of cases and other proceedings, were neglected by English historians in the 1800s just as similar American documents are underused by many historians today, all despite the fact that the common law nations are remarkable for their preservation and orderly arrangement of legal records.[5]

Lawyers, to be sure, will say their work involves a good deal of ferreting through old, even ancient, books searching for the

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legislative history of a statute or for ruling caselaw. Maitland conceded this point, but felt such research could not yield the "best" types of history because of the fundamental difference between the objectives of a lawyer and the objectives of a historian.[6] Maitland observed, "[w]hat the lawyer wants is authority and the newer the better . . . ."[7] Then he added, "what the historian wants is evidence and the older the better."[8] The lawyer, in other words, is looking for results; the historian is looking to establish the context of past events. Successful lawyers are too busy to travel the many side paths that true historical research requires.[9] Most historians lack the technical knowledge to master what Maitland called "an extremely formal system of pleading and procedure," or to take in stride "a whole scheme of actions with repulsive names."[10]

Maitland believed that historians were obliged to present ideas in their proper context.[11] The "thoughts of men in the past . . ." he wrote, "must once more become thinkable to us."[12] Maitland provided an institutional framework for the study of early common law in his two-volume work, *History of English Law Before the Time of Edward I*, tracing, as he did so, concepts that had shaped the English approach to landholding and the legal status of persons.[13] Throughout his historical career, he served as a mainstay of the Selden Society, which, from 1887 to the present, has published more than one hundred volumes of original sources—court proceedings, plea rolls, cases, municipal documents, treatises, and other legal materials.[14] Maitland's work has served as the foundation for the creation of "legal history" as a field of study settled firmly, if awkwardly, among more conventional academic realms.[15]

In the United States, James Willard Hurst (1910-1997) took up Maitland's task by surveying legal institutions in his 1950 work, *The Growth of American Law*.[16] A few years later Hurst would argue, famously, that nineteenth-century American legal institutions were shaped to allow for rapid economic development.[17] Over the course of a long career at the University of Wisconsin, Hurst explored many connections between legal institutions and larger social forces.[18] Hurst's intellectual heirs have also produced volumes of rich historical literature.[19] Likewise, American historians, archivists, and librarians have made significant progress in assembling and cataloguing scarce legal documents

and making them accessible,[20] though such sources are probably more often cited in law review articles than in the writings of traditional academic historians.

II. Emergence of Southern Legal History

By the 1980s, scholars had begun to explore the intersection of legal and southern historical currents.[21] The sub-discipline of "southern legal history" continued to develop throughout the 1990s, often through analysis of economic, racial, or socio-historical themes.[22] Not surprisingly, considering its importance, the legal history of slavery has attracted several students whose work (in the best tradition of Maitland and Hurst) reflects both the impact of current historical trends and a thorough grounding in the evolution of legal doctrine.[23] In a larger sense, several writers have begun to trace the outlines of a regional jurisprudence deeply influenced both by the region's peculiar racial and economic institutions and by common law traditions of due process.[24]

State-specific works, however, vary greatly in scope and quality. Several southern states, including South Carolina, Georgia, and Mississippi, boast celebratory "bench and bar" histories written prior to the Second World War.[25] As late as the mid-twentieth century, few southern legal documents had been subjected to analysis—an important exception being the casenotes of Mississippi territorial Judge Thomas Rodney, published in an annotated edition by William Baskerville Hamilton in 1953.[26] Since then, as interest in southern legal history has grown, scholars in Louisiana, Florida, Arkansas, and Tennessee have produced survey histories that again, like the works of Maitland and Hurst, will blaze the path for more detailed scholarship.[27] Documentary publishing, however, continues to lag behind in the south. Only two southern states, North Carolina and Virginia, have benefited from the publication of early court reports and records (chiefly colonial) on an ambitious scale.[28]

III. Legal Historians in Alabama: Biography and Other Approaches

Legal history in Alabama got off to a promising start because most of the state's first historical authors were lawyers.[29] Thus, the historical-biographical writings of Willis Brewer and William Garrett, rightly regarded as original sources, are well-informed from the legal point of view.[30] The same, but even more emphatically, can be said for Joseph Glover Baldwin's semi-autobiographical classic, *The Flush Times of Alabama and Mississippi*.[31] Straightforward accounts of Alabama legal institutions, however, have always been few in number. Even today, the most accessible history of the court system is found in articles scattered throughout the four volumes of Thomas M. Owen's 1921 *History of Alabama and Dictionary of Alabama Biography*.[32] This sad state of affairs endures to this day, though by the 1940s the publishers of *The Alabama Lawyer* (an organ of the Alabama State Bar Association) began including essays about legal history in the publication; some of its contributors, especially attorney William H. Brantley of Birmingham, Alabama were soon making meaningful contributions.[33]

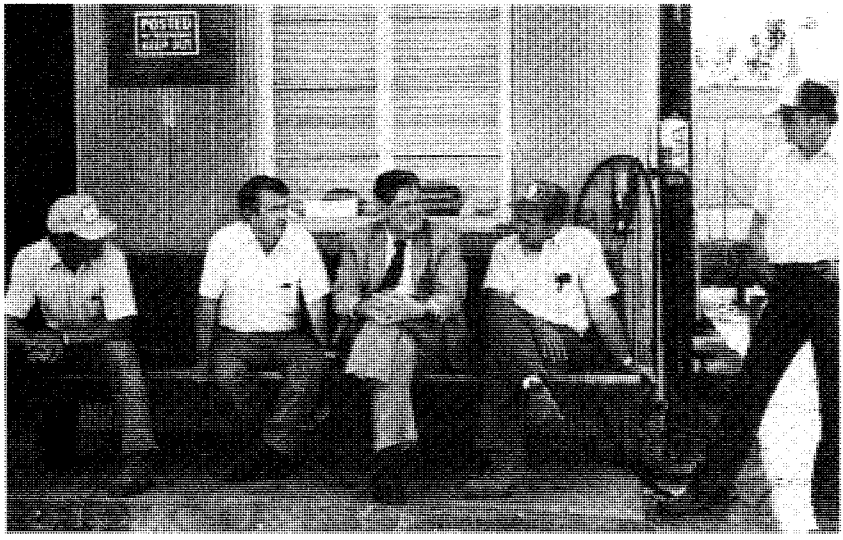
Brantley's most significant venture into legal history was his 1943 biography of nineteenth-century jurist George W. Stone,[34] a work heavily influenced by the "Dunning School" of pro-southern, states-rights history.[35] In this early biography, Brantley placed considerable emphasis on Stone's political (specifically his pro-southern) views and their impact on his legal career.[36] Subsequent biographers would apply the "life and times" formula with greater sophistication to legal figures of the mid-twentieth century, imparting many details of legal practice and unraveling complex issues in the service of political (or political-intellectual) history.[37]

Several biographies of Alabama's preeminent jurist Hugo L. Black—such as those by Virginia Hamilton,[38] Roger Newman,[39] and Steve Suitts[40]—use such techniques. Collectively and individually, they reveal Black's raw talent, energy, and determination to seize upon professional and political opportunities.[41] Just as importantly, they show how Black, through a remarkable process of self-education, transformed himself from an ambitious Klansman into a formidable defender of constitutional free-

dom.[42] Similarly, other writers have investigated the life and decisions of Frank M. Johnson, Jr. by tracing the events, fraught with tragedy and irony, that brought this Republican from north Alabama to the front lines of the civil rights movement.[43] Thus, as practiced in Alabama, legal biography has become a distinguished genre. At present, it is clear that scholars are turning back, Brantley-fashion, to reexamine the lives of nineteenth-century lawyers and judges.[44]

Apart from these biographers, various Alabama historians have shared the goal, promoted by Willard Hurst, of placing legal institutions in social and economic contexts.[45] In this respect, Malcolm C. McMillan's much-cited treatise, *Constitutional Development in Alabama: A Study in Politics, the Negro, and Sectionalism* (1955), has been a necessary and enduring book for lawyers, historians, and political scientists alike.[46] Likewise, Dan Carter's *Scottsboro: A Tragedy of the American South* (1969), justly famous for its narrative power and scope, is valuable to legal historians both for its survey of Alabama courts during the New Deal era and for its depiction of the opposing forces of racism and common law standards of fair play.[47] In a work written a few years later, Merlin Newton provides a snapshot of lawyers who suffered from eroded ideals.[48] Her *Armed With the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court* (1995) shows an inbred collection of attorneys and judges who have difficulty reconciling their notions of race, class, and gender to a venerable doctrine—freedom of religion.[49]

Overall, Alabama historians have touched upon many law-related topics, particularly those related to legal education and the history of the bench and bar.[50] What they have not attempted, as noted above, is a chronological overview of the state's legal history. Tony Freyer and Tim Dixon have published a groundbreaking study of Alabama's federal justice system, combining judicial biography, institutional history (including the development of a federal "courthouse culture"), and constitutional doctrines in the contexts of state and national history.[51] Yet of the two modern general surveys of Alabama history, neither attempts any systematic coverage of state courts.[52] This was probably not an intentional omission. Rather, it is a vindication of Maitland's perception that historians and lawyers tend not to think alike, and that the former lack legal consciousness.[53]



Senator Howell T. Heflin talking with Alabama farmers. Circa 1980s. Howell T. Heflin was Chief Justice of the Alabama Supreme Court from 1971 to 1977. Heflin was elected as a United States Senator from Alabama and served in that capacity from January 3, 1979 to January 3, 1997.

Photograph courtesy of the Howell Thomas Heflin Collection, Bounds Law Library, University of Alabama School of Law.

IV. A Four-Headed Beast: Alabama's Supreme Court and Legal Institutions

In the late 1990s, in part to fill gaps in the historical record, four historians began to write a survey of the state's legal history.[54] As of this Article's publication, the survey is presently in draft form titled *Alabama's Supreme Court and Legal Institutions: A History*.[55] It consists of six chapters organized by conventional historical periods, with alternating chapters analyzing legal institutions and the evolution of caselaw.[56] Two of the work's

authors, Tony Freyer and Paul Pruitt, published the work's last chapter as a historical article in the *Alabama Law Review*.[57] That piece deals with Alabama's twentieth-century legal profession, legal ethics, and the failure of Alabama courts to conform to national standards.[58] The article concludes with a discussion of important procedural and structural reforms put in place during the chief justiceship of Howell T. Heflin (1971-1977).[59]

Alabama's Supreme Court and Legal Institutions may not see print for years, but it is surely not giving too much away to confess that it must deal with tensions between two concepts of law—law as the possession of the self-contained, tradition-minded legal profession and law as a creature of the larger society.[60] The English medieval ancestors of Alabama's courts, and all common law courts since, have been famous for their dependence on custom and precedent.[61] Alabama's hierarchy of courts (from justice of the peace courts, to trial courts, to its state supreme court) is derived from English traditions and, until fairly recently, it employed both obscure legal ethics rules and pleading and procedure rules that had been passed down from medieval land disputes.[62]

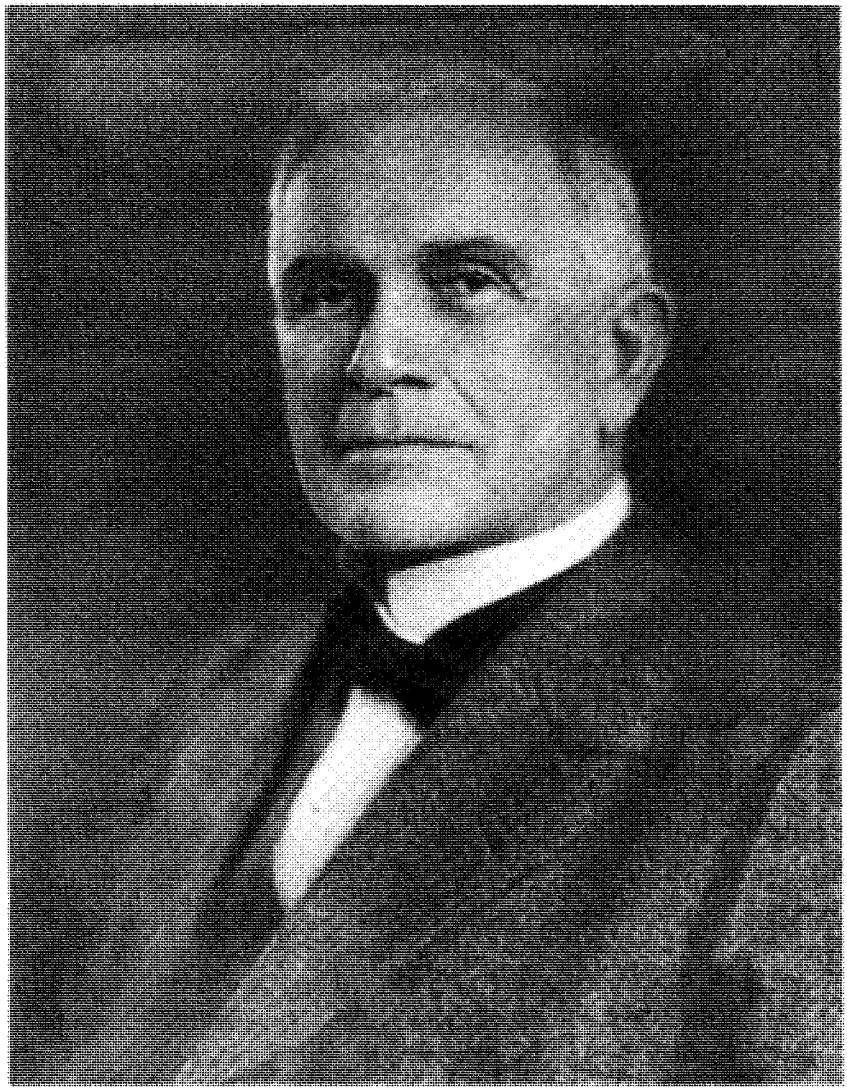
This "received" system was altered and modified, over the generation immediately following Alabama's 1819 statehood, by popular movements reflecting Jacksonian notions of freedom and democracy.[63] In institutional terms, these reforms culminated in an 1850 constitutional amendment that changed an important element of the judicial selection process.[64] Formerly, most judges had been chosen by vote of the legislature; but, following the amendment, circuit court judges (the state's trial courts) were to be popularly elected.[65] Similar reforms had already led to the establishment of a state penitentiary and the revision of penal laws, substituting imprisonment or fines for such common law punishments as branding and whipping. Other changes had eliminated rape, slave-stealing, robbery, burglary, counterfeiting, and forgery from the list of hanging offenses.[66]

V. Further Issues of Alabama Legal History

The authors of *Alabama's Supreme Court and Legal Institutions* share with other members of the historical profession a fascination with the many intersections of law, society, and race—certainly with those embedded in the laws governing slavery.[67] The state's printed legal record contains rich sources for legal historians of slavery and related areas of study. Antebellum Alabama was a classic "slave society"; over and over, the state's lawmakers and judges affirmed their support of the institutions and laws of chattel slavery.[68] Yet judges versed in common law traditions of personal freedom and due process also understood that, in the words of John J. Ormond of the Alabama Supreme Court, "[t]he slave . . . is also a moral agent, a sentient being . . . capable of mental, as well as corporal suffering . . . ."[69] The statutory law regarding slavery fluctuated with the politics and fears of the times—though its harshness was mitigated, particularly after the adoption of Alabama's 1852 Slave Code, by measures attempting to provide enhanced security for slave families.[70]

Even though the outcome of the Civil War put an end to the evolution of the law of slavery, the evolving impact of race upon Alabama courts is a subject that state legal historians have obviously not finished studying; however, much has been accomplished with postbellum sources, including analyses of the Reconstruction-Era Black Code, the convict lease system, and the legal and economic realities of peonage.[71] What is needed now are studies based on printed and manuscript records of how race, class, and gender affected the operations of trial courts and appellate courts.[72] After all, "New South" lawyers and judges were required under the amended United States Constitution to make the leap from a frankly racist system of justice to one that attempted to provide equal rights to all parties.[73] Looking back with the advantage of hindsight, it is clear that they failed—as indicated by the fact that mid-twentieth-century judges were often willing to function as defenders of segregation, disenfranchisement, and the generalized regime of "white supremacy."[74] On the other hand, it would be enlightening to know more about the grassroots mechanisms by which certain attorneys secured justice for their African- American clients in ways that were true

to professional traditions and acceptable to the white community.[75]



Braxton Bragg Comer, Governor of Alabama from 1907 to 1911.
Photograph courtesy of the Alabama Department of Archives and History, Montgomery, Alabama.

At the current level of analysis, scholars can at least provide rough outlines of the ways in which race influenced the day-to-day operations of the courts and other legal institutions.[76] Perhaps legal historians have come closer to legitimate conclusions regarding another great topic of inquiry—namely, the Industrial Revolution.[77] The coming of heavy industry following the Civil War, together with the near-omnipresence of railroads, meant that lawyers and judges were forced to deal with further modifications to the common law, such as new doctrines of tort, liability, and labor relations.[78] Additionally, meeting the needs of New South clients seemed to call for increasing degrees of specialization in particular practice areas.[79] The postbellum bar was losing its antebellum unity, and relations among its members were marred by considerable hostility between corporate defense attorneys and plaintiff's attorneys, a rivalry that still resonates in the legal community today.[80]

Such divisions spread beyond the legal community, chiefly because of the unprecedented influence exerted by railroad lawyers, lobbyists, and officials.[81] Their control over markets, prices, and politics sparked some of the most heated controversies in Alabama's history. Of all the railroad battles fought in the press, at the ballot box, and in the courts, the most notable was the Regulatory War (1904-1914) waged by Braxton Bragg Comer (Governor, 1906-1910) and his followers against the L&N Railroad and its allies.[82] The modern-day legacies of these conflicts are many, the most obvious probably being the existence of such quasi-judicial bodies as the Public Service Commission, which is still the state's primary means of exerting its police power over large economic interests.[83]

VI. Lawyers' Mentality, Legal Records, and Primary Sources

The developments in Alabama—from Jacksonian democracy to the regulatory impulse of Progressivism—were affected by the increasing social awareness of the legal profession.[84] Lawyers, for their part, not only kept printed records of their accomplishments as lawmakers, but they did so in ways that reveal the slow yielding of legal tradition to public expectations.[85] In fact, the first three compilations of Alabama statutes, the "digests" published by Harry Toulmin (1823), John G. Aiken (1833), and

Clement C. Clay (1843), each took the form of a topical encyclopedia of enactments.[86] Because the digests are arranged chronologically, it is a simple matter to use them historically to examine the progression of legislation concerning topics such as crime and punishment or the rules and procedures governing the practice of law.[87]

The successor to the "digests," the 1852 Code of Alabama, was itself the product of a national movement (commencing with the passage in 1848 of New York's "Field Code") to codify, rather than merely compile, state statutes.[88] Under Governor Henry W. Collier's leadership, the Alabama Legislature commissioned former Alabama Supreme Court Justice John J. Ormond and two distinguished colleagues to rewrite and reorganize the state laws.[89] By allowing a handful of attorneys to play Justinian for the state, the lawmakers were quietly admitting that Jacksonian values of democratic simplicity could not be achieved without the legal elite's assistance. In this respect, the 1852 Code's enactment was a landmark event in Alabama history. Moreover, it was an event that has been repeated, at intervals of about twenty years, as the body of law has grown in volume.[90]

To be sure, the most valuable (but underused) sources of Alabama legal history are the reports and records of the state's appellate and trial courts.[91] Published appellate reports are readily available, chiefly in the form of the Alabama Reports.[92] They contain the solemn opinions, term after term, of the Alabama state court judges. Like all such reports, these contain narratives that testify to the kaleidoscope of human misadventure. Used in connection with case digests and other standard reference works, the reports reveal the precedents and procedures favored by various generations of legal professionals.[93] From both historical and human interest perspectives, the reports allow students to track the careers of particular judges, attorneys, and firms.

The records of Alabama trial courts pose a more difficult task for legal historians. Only a few libraries in Alabama possess substantial archival collections of these trial court documents (typically dockets, indices, and filings) that made up the records of nineteenth- and early twentieth-century courts of law and equity.[94] Researchers willing to search beyond library collections may visit county courthouses or ask permission to access

court records preserved by microfilming or, more recently, by digital imaging through a program initiated by the Alabama Administrative Office of Courts.[95] The dockets and filings present unrivaled opportunities for studying legal professionals at work, confirming, like nothing else, the central role of the bench and bar in many communities.

Using these primary sources, scholars can write classical legal history by tracing an idea and its consequences (like Maitland) or examining the "fit" of legal institutions in the larger society (like Hurst).[96] In practice, as already noted, few such studies of Alabama legal history exist, although one thought-provoking example is Timothy Huebner's analysis of the "self-defense" decisions written by a nineteenth-century Alabama Supreme Court Chief Justice, George W. Stone.[97] Stone's career spanned the antebellum and postbellum worlds, and, in terms of politics and race relations, he was a man of his times.[98] Because Stone was intellectually conservative, it should not be surprising that his approach to homicide was shaped by common law doctrines.[99] Fatal affrays were common enough in the south, and self-defense was a common plea among survivors of such encounters.[100] However, common law jurisprudence tended to be skeptical of homicide in self-defense; it required a person under attack to retreat if possible and, in general, not to kill unless there was no alternative for self-preservation.[101]

Yet this common law skepticism toward self-defense was itself under attack, evidently because it did not conform to public sentiment in America.[102] By the late 1870s, several midwestern and southern states (most conspicuously Texas) had discarded the "duty to retreat" through a process of legal evolution that culminated in a 1921 affirmation of defensive killing written by United States Supreme Court Justice Oliver Wendell Holmes, Jr.[103] In Alabama, Chief Justice Stone paid no heed to changes outside his jurisdiction but continued to deplore the savagery and, in his opinion, the mistaken principles of honor that led some men to engage in fatal duels.[104] In Stone's mind, enforcement of the traditional law of self-defense allowed the Supreme Court to shape, by means of its power over trial courts, the public's behavior.[105] Judges and juries must learn, he wrote, that "willful and deliberate murder, may be committed during a . . . mutual rencontre; . . . the crime of murder is not

expunged from our statute book, nor retained only for the friendless or humble . . . ."[106] Until such time, he feared, "we may expect the carnival of the manslayer to be prolonged . . . ."[107]

Henry Watkins Collier, Governor of Alabama from 1849 to 1853.
Photograph courtesy of the Alabama Department of Archives and History, Montgomery, Alabama.

Thus, it is clear that the common law approach to crime was not entirely retrograde. Legal training and culture could influence public policy debates by promoting a type of conservative reformism through which elite lawyers sought to improve society (or at least achieve procedural justice) without threatening the fundamental arrangements of the status quo.[108] Of course, Stone's pet concern, homicide, is a matter of obvious interest to historians.[109] In order to show the pervasive importance of legal doctrine in Alabama history, it may be useful to examine a more obscure subject—the history of legal procedure.

Common law procedure was intended to provide a logical method by which points at issue could be revealed.[110] By the mid-nineteenth century, however, it had evolved into a system that moved Maitland to use such terms as "extremely formal" and "repulsive."[111] Crammed with Latinate evocations of historical actions and writs (for example, quo warranto, fieri facias, and replevin) and tied to a rigid choreography of attack and defense (declaration, plea; replication, rejoinder; surrejoinder, rebutter; surrebutter, and so on),[112] the science of pleading was correctly perceived in England and America as antiquated and needlessly complex.[113] In other words, common law procedure was a prime candidate for the attention of conservative legal reformers.

The authors of Alabama's 1852 Code took up the challenge, choosing to define pleading as "a succinct statement of the facts relied on" in a case.[114] Pleadings, they wrote, should be "as brief as is consistent with perspicuity"; they departed from lawyerly reverence for technicalities by declaring that "no objection can be allowed for defect of form, if facts are so presented" as to pose a "material issue in law or fact."[115] Thus far, the Alabama code was very much in the spirit of New York's celebrated Field Code.[116] The Alabama codifiers, however, had not incorporated that document's central and most revolutionary feature. They had not embraced the concept of a single "civil action," which in New York and other code-pleading states replaced the historic devices of law and equity.[117] Where the Field Code offered the promise of simplicity, the 1852 Code presented lists of forms (for actions and pleadings) in the hope that these would streamline the old way of doing business.[118]

The result was that the 1852 Code's procedural reform was chiefly an exhortation. In practice, trial court judges and lawyers

had little incentive to change their ways, and the handful of activist supreme court justices—like George W. Stone, who extolled the merits of the "civil action" before the state bar association in 1889—lacked the power to enforce sweeping changes.[119] In fact, Alabama's version of common law pleading and procedure, detailed over decades by interpretive decisions and supplementary legislation, proved to be the legal equivalent of Rasputin—difficult to kill. The system endured a 1915 reorganization of the courts, survived efforts to replace it with versions of the 1938 Federal Rules of Civil Procedure, and lingered on until 1973, when procedural reforms associated with Chief Justice Howell Heflin went into effect.[120]

If Alabama practice became, as one commentator put it, "a fertile field for the proliferation of the artifices of medieval procedure," one may ask—Why and for what purpose?[121] One set of best answers has nothing to do with the realm of things done (*i.e.*, things facilitated by pleading), but rather with the realm of things left undone due to the complexities of pleading. It is plain that the state's arcane, difficult regime magnified the importance of technical expertise, giving a larger than usual advantage to persons who could hire the best attorneys.[122] Consider the story of Hugo Black's first case, in which the future U.S. Supreme Court Justice represented a former prisoner against a steel company that had worked him (via the convict lease system) beyond his sentence.[123] Black won the case, overcoming a series of procedural traps and winning the admiration of the judge.[124] But an important point of the episode, which is easily overlooked, is that few novice attorneys *would* have prevailed; the working man, who could not have afforded a high-priced firm, was lucky to have been represented by a future U.S. Supreme Court Justice.

Little had changed fifty years later when the Alabama Supreme Court, by its insistence upon technicalities of form and pleading, played an important role in hindering the activities of the National Association for the Advancement of Colored People.[125] In such instances, Alabama's system of procedure functioned as the infrastructure of the status quo.[126] It is a simple matter to suggest the importance of pleading in the preservation of economic and social arrangements, just as it is reasonable to argue that racism, a powerful social and economic

force, surely had a distorting effect on Alabama's legal system.

Yet before definitive accounts can be written, students of southern and Alabama history must follow the examples of Maitland and Hurst in tracing the lifelines of legal doctrines and thus summoning the past lives of legal institutions.[127] Scholars can further this process by publishing editions of the types of documents mentioned above—scarce codes and digests, court dockets, and other unpublished records, as well as lawyers' notebooks, lectures given by legal educators, and other primary sources. Over the last nine years, the author of this Article and his colleague, David I. Durham, have made a start in this direction, with the backing of the University of Alabama School of Law.[128] As all interested parties begin to make the acquaintance of formerly obscure materials, a more complete image of the state's history will surely appear.

ENDNOTES

1. Frederic William Maitland, Why the History of English Law is Not Written, Inaugural Lecture of the Arts School of Cambridge (Oct. 15, 1888), *in* 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 480-97, 480 n.1 (H.A.L. Fisher ed., 1911).

2. *Id.* at 480-97.

3. *Id.* at 480.

4. *Id.* at 486.

5. *See* Paul M. Pruitt, Jr. & Penny Calhoun Gibson, *John Payne's Dream: A Brief History of the University of Alabama School of Law Library, 1887-1980, with Emphasis upon Collection-Building*, 15 J. LEGAL PROF. 5, 12 (1990). The decisions of appellate courts (national and state) in England, Canada, Australia, New Zealand, India, and the United States are printed and widely distributed, forming a basis of legal education in those countries. John C. Payne, a faculty member at the University of Alabama School of Law from 1947-1983, observed on many occasions that law was a "peculiarly book-centered study." *Id.*

6. MAITLAND, *supra* note 1, at 491.

7. *Id.*

8. *Id.*

9. *Id.* at 494.

10. *Id.* at 486.

11. *Id.* at 491, 493.

12. CHARLES H. HASKINS & FREDERIC WILLIAM MAITLAND, A HISTORICAL SKETCH OF LIBERTY AND EQUALITY: AS IDEALS OF ENGLISH POLITICAL PHILOSOPHY FROM THE TIME OF HOBBES TO THE TIME OF COLERIDGE 3 (2000).

13. SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I (Cambridge Univ. Press 1978) (1895). Pollock's contribution to this work was one chapter covering Anglo-Saxon Law. *Id.*

14. 1 SELECT PLEAS OF THE CROWN, A.D. 1200-1225 (F.W. Maitland ed., Bernard Quaritch 1888) for the first publication of the society and 108 HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION (M.J. Prichard ed., Selden Soc'y 1993) for a more recent publication. For the importance Maitland placed on such work, see MAITLAND, *supra* note 1, at 484, 496-97. *See also* NORMAN F. CANTOR, INVENTING THE MIDDLE AGES: THE LIVES, WORKS, AND IDEAS OF THE GREAT MEDIEVALISTS OF THE TWENTIETH CENTURY 48-78 (1991).

15. HASKINS, *supra* note 12, at 2-3.

16. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW-MAKERS (1950).

17. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

18. *See, e.g.*, HURST, *supra* notes 16-17.

19. *See, e.g.*, William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 LAW & HIST. REV. 97 (2000).

20. The category of "scarce documents" includes assemblages of rare publications, such as the multi-volume SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM (1700-1872) (Paul Finkelman ed., Garland Publ'g 1988); microfiche collections, such as UNITED STATES SUPREME COURT RECORDS AND BRIEFS (Cong. Info. Serv.); and such multi-volume, intensively edited compilations of texts as THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., St. Hist. Soc'y of Wis. 1976).

21. Three works in particular launched the academic study of southern legal history: EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH (1984); AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (David J. Bodenhamer & James W. Ely, Jr. eds., Univ. Press of Miss. 1984); AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit L. Hall & James W. Ely, Jr. eds., Univ. of Ga. Press 1989). It is also worth noting that Kermit L. Hall made available thousands of citations to works on the history of slavery, civil rights, disenfranchisement, and other traditionally law-related topics of southern history. KERMIT L. HALL, A COMPREHENSIVE BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY (1991).

22. *See, e.g.*, HAROLD D. WOODMAN, NEW SOUTH—NEW LAW: THE LEGAL FOUNDATIONS OF CREDIT AND LABOR RELATIONS IN THE POSTBELLUM AGRICULTURAL SOUTH (1995); LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH (Christopher Waldrep & Donald G. Nieman eds., Univ. of Ga. Press 2001). The latter work is part of a series, *Studies in the Legal History of the South*, published by the University of Georgia Press. For more information on the development of southern legal history as a sub-discipline, see the *Journal of Southern Legal History* and its predecessor, the *Georgia Journal of Southern Legal History*.

23. *See, e.g.*, JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA (1994); WILLIAM E. WIETHOFF, A PECULIAR HUMANISM: THE JUDICIAL ADVOCACY OF SLAVERY IN HIGH COURTS OF THE OLD SOUTH, 1820-1850 (1996); ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000); Alfred Laurence Brophy, The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise Through Civil War (May 17, 2001) (unpublished Ph.D. dissertation, Harvard University) (on file with the Furman Smith Law Library, Walter F. George School of Law, Mercer University).

24. *See, e.g.*, TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 (1999); SALLY HADDEN, *Judging Slavery: Thomas Ruffin and State v. Mann*, *in* LOCAL MATTERS, *supra* note 22, at 1; TIMOTHY S. HUEBNER, *The Roots of Fairness: State v. Caesar and Slave Justice in Antebellum North Carolina*, *in* LOCAL MATTERS, *supra* note 22, at 28; BRENT J. AUCOIN, A RIFT IN THE CLOUDS: RACE AND THE SOUTHERN FEDERAL JUDICIARY, 1900-1910 (2007); *see also* WIETHOFF, *supra* note 23.

25. *See, e.g.*, JOHN BELTON O'NEALL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA (S.G. Courtenay & Co. 1859); STEPHEN F. MILLER, THE BENCH AND BAR OF GEORGIA: MEMOIRS AND SKETCHES (J.B. Lippincott & Co. 1858); WARREN GRICE, THE GEORGIA BENCH AND BAR (1931); JAMES D. LYNCH, THE BENCH AND BAR OF MISSISSIPPI (E.J. Hale & Son 1881); DUNBAR ROWLAND, COURTS, JUDGES, AND LAWYERS OF MISSISSIPPI, 1798-1935 (1935). For a more recent example, see ROBERT R. WRIGHT, OLD SEEDS IN THE NEW LAND: HISTORY AND REMINISCENCES OF THE BAR OF ARKANSAS (2001).

26. WILLIAM BASKERVILLE HAMILTON, ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES (1953). Mississippi state archivist Dunbar Rowland (1864-1937) edited numerous volumes of provincial and territorial documents, a few of which were of a legal nature. *See, e.g.*, 1 THE MISSISSIPPI TERRITORIAL ARCHIVES 1798-1803: EXECUTIVE JOURNALS OF GOVERNOR WINTHROP SARGENT AND GOVERNOR WILLIAM CHARLES COLE CLAIBORNE (Dunbar Rowland ed., Press of Brandon Prtg. Co. 1905).

27. For Louisiana: IN SEARCH OF FUNDAMENTAL LAW: LOUISIANA'S CONSTITUTIONS, 1812-1974 (Warren F. Billings & Edward F. Haas eds., Ctr. for La. Stud. 1993); AN UNCOMMON EXPERIENCE: LAW AND JUDICIAL INSTITUTIONS IN LOUISIANA, 1803-2003 (Judith Kelleher Schafer & Warren M. Billings eds., Ctr. for La. Stud. 1997); and A LAW UNTO ITSELF?: ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY (Warren M. Billings & Mark F. Fernandez eds., La. St. Univ. Press 2001). For

Florida: WALTER W. MANLEY II, ET AL., THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821-1917 (1997); and KERMIT L. HALL & ERIC W. RISE, FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990 (1991). For Tennessee: A HISTORY OF THE TENNESSEE SUPREME COURT (James W. Ely, Jr. ed., Univ. of Tenn. Press 2002). For Arkansas: MORRIS S. ARNOLD, UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836 (1985).

28. The North Carolina State Department of Archives and History has sponsored several volumes. *See, e.g.*, NORTH CAROLINA HIGHER-COURT RECORDS 1697-1701 (Mattie Erma Edwards Parker, et al. eds., St. Dep't of Archives & Hist., 1971); NORTH CAROLINA HIGHER-COURT RECORDS 1702-1708 (William S. Price, Jr. ed., Dep't of Cultural Res. 1974); NORTH CAROLINA HIGHER-COURT MINUTES 1724-1730 (Robert J. Cain et al., eds., Dep't of Cultural Res. 1981). Virginia is blessed with little-known court reports, some of which have been edited by William Hamilton Bryson. *See, e.g.*, MISCELLANEOUS VIRGINIA LAW REPORTS 1784-1809: BEING THE REPORTS OF CHARLES LEE, JOHN BROWN, DAVID WATSON & DAVID YANCEY (W. Hamilton Bryson ed., Oceana Publ'ns, Inc. 1992); THE LAW REPORTS OF J. SINGLETON DIGGS OF LYNCHBURG, VIRGINIA (W.H. Bryson ed., 1997).

29. *See* PHILIP D. BEIDLER, FIRST BOOKS: THE PRINTED WORD AND CULTURAL FORMATION IN EARLY ALABAMA 23-31, 87-101 (1999).

30. *E.g.*, W. BREWER, ALABAMA: HER HISTORY, RESOURCES, WAR RECORD, AND PUBLIC MEN, FROM 1540 TO 1872 (Barrett & Brown 1872); WILLIAM GARRETT, REMINISCENCES OF PUBLIC MEN IN ALABAMA FOR THIRTY YEARS (Plantation Publ'g Co. Press, 1872).

31. JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES (D. Appleton & Co. 1853).

32. *See, e.g.*, 3 THOMAS M. OWEN, HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 427-29 (1921) (defining "courts"); *see also id.* at 368-80 (defining "constitutions and conventions"). For an earlier effort, see Thomas H. Clark, *Judicial History, in* 2 MEMORIAL RECORD OF ALABAMA: A CONCISE ACCOUNT OF THE STATE'S POLITICAL, MILITARY, PROFESSIONAL AND INDUSTRIAL PROGRESS, TOGETHER WITH PERSONAL MEMOIRS OF MANY OF ITS PEOPLE 141-57 (Brant & Fuller 1893).

33. *See, e.g.*, W. H. Brantley, Jr., *Our Law Books (1819-1865)*, 3 ALA. LAW. 363 (1942). Historian Peter A. Brannon also contributed several articles. *See, e.g.*, W. H. Brantley, Jr., *Law and Courts in Pioneer Alabama*, 6 ALA. LAW. 390 (1945).

34. WILLIAM H. BRANTLEY, CHIEF JUSTICE STONE OF ALABAMA (1943). Brantley's other notable titles were: WILLIAM H. BRANTLEY, THREE CAPITALS: A BOOK ABOUT THE FIRST THREE CAPITALS OF ALABAMA ST. STEPHENS, HUNTSVILLE & CAHAWBA (Univ. of Ala. Press 1976) (1947); WILLIAM H. BRANTLEY, BANKING IN ALABAMA 1816-1860 (1961). William H. Brantley's private library is housed, together with drafts of his work and other papers, at Samford University's Special Collections Department.

35. Named for Columbia University Professor William A. Dunning, this viewpoint dominated southern history for decades. *See generally* David Donald, *Introduction to the Torchbook Edition, in* WILLIAM A. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION vii-xvi (1897) (1969). One of Dunning's foremost disciples was Walter L. Fleming, whose *Civil War and Reconstruction in Alabama* (1905) is still the only full-length survey of those periods in the state.

36. *See* BRANTLEY, CHIEF JUSTICE STONE, *supra* note 34, at 110-41.

37. *See infra* notes 38-40, 43-44.

38. VIRGINIA VAN DER VEER HAMILTON, HUGO BLACK: THE ALABAMA YEARS (1972).

39. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994) (exemplifying a definitive biography of Black).

40. STEVE SUITTS, HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND HIS EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION (2005). *See also* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR (1996).

41. *See, e.g.*, SUITTS, *supra* note 40, at 101.

42. NEWMAN, *supra* note 39, at 239-44.

43. *See, e.g.*, TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981); FRANK SIKORA, THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. (1992); JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS (1993); DEFENDING CONSTITUTIONAL RIGHTS (Tony A. Freyer ed., Univ. of Ga. Press 2001).

44. *See, e.g.*, ROBERT SAUNDERS, JR., JOHN ARCHIBALD CAMPBELL, SOUTHERN MODERATE, 1811-1889 (1997); Joel D. Kitchens, *E.W. Peck: Alabama's First Scalawag Chief Justice*, 54 ALA. REV. 3 (2001); DAVID I. DURHAM, A SOUTHERN MODERATE IN RADICAL TIMES: HENRY WASHINGTON HILLIARD, 1808-1892 (2008).

45. *See, e.g.*, HURST, *supra* notes 16-17.

46. MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM (1955). An edition published in 1978 by the Reprint Company (Spartanburg, South Carolina) is in constant demand at the University of Alabama's Bounds Law Library. For a recent work similarly exploring the intersection of constitutional law and racial themes, see Robert Volney Riser II, Prelude to the Movement: Disfranchisement in Alabama's 1901 Constitution and the Anti-Disfranchisement Cases (2005) (unpublished Ph.D. dissertation, University of Alabama) (on file with Gorgas Library, University of Alabama).

47. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969). For citations to other books in which racial and legal themes overlap, see *infra* note 71.

48. MERLIN OWEN NEWTON, ARMED WITH THE CONSTITUTION: JEHOVAH'S WITNESSES IN ALABAMA AND THE U.S. SUPREME COURT, 1939-1946 (1995).

49. *Id.*

50. *See, e.g.*, DAVID J. LANGUM & HOWARD P. WALTHALL, FROM MAVERICK TO MAINSTREAM: CUMBERLAND LAW SCHOOL, 1847-1997 (1997); PAT BOYD RUMORE, LAWYERS IN A NEW SOUTH CITY: A HISTORY OF THE LEGAL PROFESSION IN BIRMINGHAM (Alison Glascock ed., Ass'n Publ'g Co. 2000).

51. TONY FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA, 1820-1994 (1995).

52. *See generally* ALBERT BURTON MOORE, HISTORY OF ALABAMA (Ala. Book Store 1951) (1934); WILLIAM WARREN ROGERS ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE (1994); *see also* VIRGINIA VAN DER VEER HAMILTON, ALABAMA: A BICENTENNIAL HISTORY (1977); ROBERT J. FRYE, THE ALABAMA SUPREME COURT: AN INSTITUTIONAL VIEW (1969) (containing a fair amount of historical coverage but essentially being a work of political science).

53. MAITLAND, *supra* note 1, at 491.

54. TONY A. FREYER, PAUL M. PRUITT, JR., TIMOTHY W. DIXON & HOWARD P. WALTHALL, ALABAMA'S SUPREME COURT AND LEGAL INSTITUTIONS: A HISTORY (forthcoming). The Alabama State Law Library commissioned this work in 1997. Copies are on file at the Alabama State Law Library and at the Bounds Law Library. As of Winter 2008-2009, R. Volney Riser has agreed to take part in this still-ongoing project!

55. *Id.*

56. *Id.*

57. Tony A. Freyer & Paul M. Pruitt, Jr., *Reaction and Reform: Transforming the Judiciary Under Alabama's Constitution, 1901-1975*, 53 ALA. L. REV. 77 (2001).

58. *Id.*

59. *Id.* at 119-32. *See also* JOHN HAYMAN & CLARA RUTH HAYMAN, A JUDGE IN THE SENATE: HOWELL HEFLIN'S CAREER OF POLITICS AND PRINCIPLE (2001).

60. FREYER ET AL., ALABAMA'S SUPREME COURT, *supra* note 54.

61. These patterns dated to the thirteenth century at least, when the work associated with Henry of Bracton (*De Legibus et Consuetudinibus Angliae*) noted that of all lands, "England alone uses unwritten law and custom." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 19 (George E. Woodbine ed., Samuel E. Thorne trans., Belknap Press 1968).

62. For example, a statute dating to Mississippi Territorial times, but still in effect in the 1830s, declared that "[e]very other felony, misdemeanor, or offence whatsoever" not covered by an act of the legislature "shall be punished as heretofore by the common law." HARRY TOULMIN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA, CONTAINING THE STATUTES AND RESOLUTIONS IN FORCE AT THE END OF THE GENERAL ASSEMBLY IN JANUARY, 1823, at 214 § 45 (J & J Harper Printers 1823); *see also id.* at 453-86 (for entries under the heading "Judicial Proceedings at Common Law"); JOHN G. AIKIN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA, CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY, IN JANUARY, 1833, at 107 n.1 § 35 (Alexander Towan 1833).

63. For the Jacksonian approach to social and political problems (specifically, in contradistinction to the attitudes of Whig Party leaders), see LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 101-44 (1989).

64. *See infra* note 65.

65. *Id.* The laws pertaining to judges and courts had undergone several changes prior to 1850. Under the 1819 constitution, judges had served indefinite ("good behavior") terms, and the supreme court had consisted of the circuit (trial court) judges assembled en banc. A constitutional amendment in 1830 established six-year terms for judges, and a legislative act in 1833 established a three-man supreme court. The 1850 amendment exempted supreme court judges and judges of

chancery (equity) courts from popular election. Popular election of all judges dates back to the "Radical" 1868 constitution. *See* ALA. CONST. art. V, § 13 (amended 1830) [hereinafter 1852 CODE]; MCMILLAN, *supra* note 46, at 40-41, 64-67, 149-50. For more on chancery law, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985).

66. TOULMIN, *supra* note 62, at 206-16 (for common law criminal punishments); C.C. CLAY, DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY, IN FEBRUARY, 1843, at 395-476 (Marmaduke J. Slade 1843) (containing the reformed Penal Code of 1841). *See also* Paul M. Pruitt, Jr., *An Antebellum Law Reformer: Passages in the Life of Benjamin F. Porter*, 11 GULF COAST HIST. REV. 23, 28-37 (1995); ROBERT DAVID WARD & WILLIAM WARREN ROGERS, ALABAMA'S RESPONSE TO THE PENITENTIARY MOVEMENT, 1829-1865 (2003) (discussing the establishment of a state penitentiary in Wetumka, Alabama).

67. *See* JUDITH KELLEHER SCHAFFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA (1994); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 (1996).

68. On this trend generally, see J. MILLS THORNTON III, POLITICS AND POWER IN A SLAVE SOCIETY: ALABAMA 1800-1860 (1978).

69. Wheat v. Croom, 7 Ala. 349, 350 (1845); 7 REPORTS OF CASES AT LAW AND IN EQUITY, ARGUED AND ADJUDGED IN THE SUPREME COURT OF ALABAMA 349-50 (Marmaduke J. Slade 1839). *See* WIETHOFF, *supra* note 23, at 63-69.

70. *Compare* CLAY, *supra* note 66, at 419-20 (§§ 14-20), 431 (§ 1), 472-76 §§ 1-28, 539-48, *and* 1852 CODE, *supra* note 65, at 237-43, 390-93 (for provisions against the breakup of families), 392 (§§ 2056-2057). *See also* Clay, *supra* note 66, at 543 (§ 24) for a law against teaching slaves or free blacks to read and write. The compilers of the 1852 CODE dropped this provision.

71. *See, e.g.*, PETER KOLCHIN, FIRST FREEDOM: THE RESPONSES OF ALABAMA'S BLACKS TO EMANCIPATION AND RECONSTRUCTION (1972); MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865-1900 (2000); PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1901-1969, at 43-81 (1972).

72. *E.g.*, PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995) (setting a pattern for gender studies).

73. For the abolition of slavery (and therefore the dismantling of laws that supported the slave regime), see U.S. CONST. amend. 13. For requirements of due process and equal rights under the law, see U.S. CONST. amend. 14. For an overview of the former racist system, see MORRIS, *supra* note 67.

74. *See, e.g., Reaction and Reform, supra* note 57, at 103-06 (discussing the legal defense of white supremacy).

75. One such interesting individual was Thomas Goode Jones, who was a Civil War hero, a celebrated lawyer for the L&N Railroad, author of the Alabama State Bar Association's Code of Legal Ethics in 1887, Governor from 1890-1894, and federal judge from 1901-1914. AUCOIN, *supra* note 24, at 52-54. Jones was a conservative Democrat. *Id.* Certainly he was an advocate of white supremacy and (with reservations) favored the disenfranchisement of blacks and poor whites. *Id.* at 54. Yet he was also a consistent opponent of oppressive contract labor laws and of Alabama's infamous convict lease system. *Id.* at 55. As a judge, Jones was instrumental in exposing and prosecuting peon-masters. *Id.*; Paul M. Pruitt, Jr., *Thomas Goode Jones: Personal Code of a Public Man, in* CAROL RICE ANDREWS ET AL., GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 65 (Univ. of Ala. Press 2003).

76. *See* FRIEDMAN, *supra* note 65, at 467-87.

77. *Id.*

78. For these developments on the national level, see *id.* at 467-87.

79. For these developments across the south, see WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH (1999).

80. FREYER & DIXON, *supra* note 51, at 72-73, 90 (discussing the role played in this conflict by the Alabama State Bar Association).

81. THOMAS, *supra* note 79, at 89-90, 105, 164-97.

82. *See* JAMES F. DOSTER, RAILROADS IN ALABAMA POLITICS, 1875-1914 (1957) (giving an overview of the period, especially the Comer-L&N fights). *See also* Kenneth R. Johnson, *The Troy Case: A Fight Against Discriminatory Freight Rates*, 22 ALA. REV. 175 (1969).

83. The Public Service Commission is a descendant of the state Railroad Commission. *See* OWEN, *supra* note 32, at 1152, 1155-58.

84. *See* HURST, *supra* note 16, at 15-19, 335-38.

85. Generally, for the conquest of common law orthodoxy by a more socially aware jurisprudence, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL

ORTHODOXY (1992).

86. *See* TOULMIN, *supra* note 62; AIKEN, *supra* note 62; CLAY, *supra* note 66. Today, the term "digest" refers to one of several topical encyclopedias of case law.

87. For changes in caselaw, see *supra* note 65. For changes in the regulation of lawyers (statutes passed from 1807 to 1841), see CLAY, *supra* note 66, at 64-67.

88. FRIEDMAN, *supra* note 65, at 391-98. The New York Code was named for its chief codifier, David Dudley Field. *Id.*

89. *See supra* text accompanying note 62. For legislative approval, see 1852 CODE, *supra* note 65, at iii.

90. The 1852 Code was a one-volume work. The current Code of Alabama, 1975 boasts more than thirty volumes.

91. The *Alabama Reports* contain the opinions of the Alabama Supreme Court. Decisions of the Alabama Supreme Court, as well as the decisions of the state's intermediate appellate courts, the Alabama Court of Criminal Appeals and the Alabama Court of Civil Appeals, are also accessible via the *Southeastern Reporter* and *Southeastern Reporter, Second Series.* Briefs, dockets, and other records pertaining to reported decisions are on file at the Alabama State Law Library in Montgomery.

92. *See id.*

93. For topical legal research on Alabama law, see the first and second editions of *West's Alabama Digest. See generally* WEST'S ALABAMA DIGEST: COVERING CASES FROM STATE AND FEDERAL COURTS (1936-1993) and WEST'S ALABAMA DIGEST 2D: COVERING CASES FROM STATE AND FEDERAL COURTS (1993-present).

94. These facilities include the William S. Hoole Special Collections Library at the University of Alabama (Marengo County) and the University of South Alabama Archives (Mobile County).

95. At present, the latter program is not intended for public access, but rather for use by the judiciary. For further information, contact the Administrative Office of Courts in Montgomery, Alabama.

96. *See generally* MAITLAND, *supra* note 1; HURST, *supra* notes 16-17.

97. HUEBNER, SOUTHERN JUDICIAL TRADITION, *supra* note 24, at 160-85.

98. *Id.* at 160.

99. *Id.* at 178-80.

100. *Id.* at 177-78.

101. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 181-88 (Univ. of Chicago Press 1979) (1769). *See also* HUEBNER, SOUTHERN JUDICIAL TRADITION, *supra* note 24, at 177, 180.

102. HUEBNER, SOUTHERN JUDICIAL TRADITION, *supra* note 24, at 178.

103. *Id.* at 177-78, 181. For Holmes's opinion on failure to retreat, see *Brown v. United States*, 256 U.S. 335, 343 (1921).

104. HUEBNER, SOUTHERN JUDICIAL TRADITION, *supra* note 24, at 178-79. It is clear that Stone was a prominent exception to the ethos described in BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH (1982).

105. *See* HUEBNER, SOUTHERN JUDICIAL TRADITION, *supra* note 24, at 179.

106. *Id.* (quoting *Ex parte Nettles*, 58 Ala. 268, 274-75 (1877)).

107. *Id.* at 179-80 (quoting *Nettles*, 58 Ala. at 274-75).

108. *See* Pruitt, *Thomas Goode Jones*, *supra* note 75, for the career of Thomas Goode Jones. It is possible to view Jones (as well as non-lawyers Edgar Gardner Murphy, Booker T. Washington, and Julia Tutwiler) as a conservative reformer in the manner described. It is also possible to view the judicial careers of Hugo Black and Frank Johnson in somewhat the same way, since both men tended toward a strict interpretation of constitutional and procedural rights.

109. HUEBNER, SOUTHERN JUDICIAL TRADITION, *supra* note 24, at 177-79.

110. BENJAMIN J. SHIPMAN & HENRY WINTHROP BALLANTINE, HANDBOOK OF COMMON-LAW PLEADING 5 (3d ed., West Publ'g Co. 1923) (quoting Sir William Jones).

111. MAITLAND, *supra* note 1, at 486.

112. For these terms, see BLACK'S LAW DICTIONARY 495, 755, 1309, 1417, 1432, 1452, 1463-64, 1613 (4th ed. 1968). *See also* BENJAMIN J. SHIPMAN & HENRY WINTHROP BALLANTINE, HANDBOOK OF COMMON-LAW PLEADING (3d ed., West 1923) (containing a survey of this complex subject).

113. *See* MAITLAND, *supra* note 1, at 486. To add to the complexity, England and many of the United States also maintained courts of equity, often called chancery courts. These courts had jurisdiction over people, not over things. Injunctions were one of the courts' chief weapons. For comments on both systems of practice, see FRIEDMAN, *supra* note 65, at 392-93, 396-97, 398, 403. For chancery courts in Alabama, see 1852 CODE, *supra* note 65, at 171 (§§ 602-606).

114. 1852 CODE, *supra* note 65, at 418-21.

115. 1852 CODE, *supra* note 65, at 418 (§ 2227), 419-20 (§ 2236), 421 (§ 2256).

116. FRIEDMAN, *supra* note 65.

117. *Id.* at 392. It is worth noting that the Field Code abolished all distinctions between law and equity. *Id.*

118. For preservation of common law pleading patterns in Alabama, see 1852 CODE, *supra* note 65, at 421 (§§ 2249-2256). For forms analogous to several of the old forms of actions, see *id.* at 446-47 (§ 2422). For forms of pleading matched to specific situations, see *id.* at 551-57.

119. *See* Chief Justice George W. Stone, Address at the Twelfth Annual Meeting of the Alabama State Bar Association, Judicial Reform (Dec. 1887), *in* PROCEEDINGS OF THE TWELFTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 114, 120 (Brown Prtg. Co. 1888). Founded in 1878, the Alabama State Bar Association was an elite group whose members included a number of procedural reformers. *See* FREYER & DIXON, *supra* note 51, at 70-76.

120. Freyer & Pruitt, *supra* note 57, at 95-99, 106-22. *See* M. LEIGH HARRISON, ALABAMA PLEADING BEFORE 1973 (1974).

121. Thomas E. Skinner, *Stagnation or Modernization: Alabama's Procedural Crisis*, 32 ALA. LAW. 138, 140 (1971). Skinner's remark was directed specifically at equity practice. *Id.*

122. *Id.*

123. HAMILTON, *supra* note 38, at 32-33; NEWMAN, *supra* note 39, at 27-28; TONY FREYER, HUGO L. BLACK AND THE DILEMMA OF AMERICAN LIBERALISM 22 (Oscar Handlin ed., Scott, Foresman 1990). This case probably was tried in 1908 or 1909.

124. HAMILTON, *supra* note 38, at 33; NEWMAN, *supra* note 39, at 28.

125. *See* Freyer & Pruitt, *supra* note 57, at 102-06.

126. *Id.* at 102.

127. *See, e.g.*, MAITLAND, *supra* note 1; HURST, *supra* note 16.

128. Since 2001, the University of Alabama School of Law has published a series called the *Occasional Publications of the Bounds Law Library*. To date, the series includes Wade Keyes, Introductory Lecture *in Wade Keyes' Introductory Lecture to the Montgomery Law School* (Mar. 1860) (2001); THE PRIVATE LIFE OF A NEW SOUTH LAWYER: STEPHENS CROOM'S 1875-1876 JOURNAL (2002); GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION (2003) (with lead essay by Carol Rice Andrews); PAUL M. PRUITT, JR. & DAVID I. DURHAM, COMMONPLACE BOOKS OF LAW: A

SELECTION OF LAW-RELATED NOTEBOOKS: FROM THE SEVENTEENTH CENTURY TO THE MID-TWENTIETH CENTURY (2005) (containing contributions by Tony Allan Freyer and Timothy W. Dixon); and DAVID I. DURHAM & PAUL M. PRUITT, JR., A JOURNEY IN BRAZIL: HENRY WASHINGTON HILLIARD AND THE BRAZILIAN ANTI-SLAVERY SOCIETY (2008).