

**Chapter One:  
Excavating the Local State from Beneath the Layers of Southern History: Law and  
Governance in the Carolinas 1787-1830**

**\*\*Draft\*\***

**Laura F. Edwards  
History Department, Duke University**

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Note: This chapter is the first in my book about the changes in the way inequality operated in the post-Revolutionary and early antebellum South, 1787-1840. It focuses on the relationship of all domestic dependents to the developing post-Revolutionary “states” of North Carolina and South Carolina—which “states” in quotes, because the analysis focuses on the conflicts and ambiguities in the process of state formation. When I began the research, the intended subjects of the analysis were slaves, ordinary white women, propertyless families, and children in these two southern states. Yet, as the research developed, I found it necessary to move beyond the material on these people and to consider the context, namely the changing contours of the legal system and other governing institutions—although I had never imagined that I would ever do such work, which is not exactly on the cutting edge of current literature. That research, however, significantly altered my view of “state,” my basic understanding of the political terrain, and the dynamics of power in this period. Those insights, in turn, provide new ways of understanding how those on the margins used and influenced law—and what different that made in the development of inequality and the state.

## **Chapter One: Excavating the Local State from Beneath the Layers of Southern History: Law and Governance in the Carolinas 1787-1830**

It is easy to imagine Judge Elihu Hall Bay glaring down from the bench. He was sitting in a South Carolina district court, sometime in the early nineteenth century, listening to a case of domestic violence. According to an observer who recounted the incident, the judge was not pleased with what he was hearing. The husband's lawyer, reputed to be a native of Pennsylvania and a former Lutheran minister, argued that the common law gave husbands the right to use violence to discipline their wives. Judge Bay thought otherwise. "With some emphasis, and in his slight stuttering voice," the judge announced, that "there is no such law." The lawyer nonetheless picked up his argument and eventually arrived back at the same point. Judge Bay stopped him again. But the lawyer persisted. "Suppose," the lawyer is reported to have asked, "when you went home, you should find your wife in an unruly mood, and she should make an attack on you." According to the observer, this last rhetorical flourish exhausted what was left of the judge's patience. "Sir," he responded, stammering more because of his anger, "if y-you make that th-that sup-po-sition a-again, I-I w-will co-commit you for a-a con-tempt." In his charge, Judge Bay informed the jurors that "the common law was the perfection of reason, and notwithstanding the loose remarks of writers, there was no such principle in that law" as would allow a husband to beat his wife. They convicted the husband.<sup>1</sup>

This is what the law looked like in the Carolinas in the late eighteenth and early nineteenth centuries. In fact, "the law" is not the most accurate term in this context, because it summons up images of a unified set of rules applied by robed officials in formal arenas, usually in court houses with the requisite white paint and columns. People might manipulate "the law" and even attempt to capture control over it, but they could not alter its underlying rules, which existed as a defined body of knowledge, outside the context of their lives. The legal system in

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<sup>1</sup> John Belton O'Neill, Biographical Sketches of the Bench and Bar of South Carolina (Charleston: S. G. Courtenay & Co, Publishers, 1859), I: 56-57.

the post-Revolutionary Carolinas, however, was not so much about “the law” as “law,” a concept that still circulates in such phrases as “I’m taking this to law.” While “law” refers to a distinct process, it is less definitive than “the law.” In the case of wife beating, for instance, Judge Bay dispensed “law,” not “the law.” “Law,” moreover, was the point of the legal system—broadly defined, here, to mean both the institutions that administered law and the collective body of laws that informed the process.

The key to this system was the dispersal of authority within it, the one basic element that unified all of the other conflicting characteristics. The institutional structure was decentralized, so that law was defined and applied locally, with the primary goal of resolving specific conflicts involving particular individuals. More than that, the practice of law moved around promiscuously, emerging in places and out of interactions that historians now label as society, religion, culture, or politics, but not “the law.” Although often informal, the process was guided by rules. But those rules existed as a flexible set of principles, derived from a range of sources, including custom and local knowledge about the incidents in question and those involved as well as legal treatises, case law, and statutes. In many instances, there was no established rule that applied universally throughout the state in all like circumstances. There was no single directive, for instance, on the legal treatment of wife beating in South Carolina. When Judge Bay referred to the common law on this topic, he was referring to the expansive, unwritten common law tradition. He did not mean Sir William Blackstone’s well-known codification of it, which allowed for corporal punishment and did not constitute state law in any event. He certainly did not have particular statutes or appellate decisions in mind, because there were none. But the common law tradition in this archetypal form was more powerful than any treatise, decision, or statute within the state’s legal system: common law in this sense could trump any other rendering of an issue without ever acquiring a particular form. Bay used it in the wife beating case to dismiss Blackstone’s “loose remarks” on a husband’s disciplinary authority, which were the source for the unfortunate Pennsylvania-Lutheran-turned-South-Carolina lawyer. Yet the legal system in South Carolina accommodated Bay’s version of law on this point as well as

Blackstone's, which was accepted in other courtrooms. For much of the period between 1787 and 1840, there was no institutional means for reconciling conflicting versions of law on particular issues or elevating one version over the other. Such competing interpretations coexisted within the body of state law, defining its substance and range. What appear as inconsistencies in hindsight were accepted elements of the system then. Those inconsistencies actually constituted law at the time: they were the point, not deviations from it.

The chapter two turns to the operation of law, on the ground, in local areas. This first chapter, however, steps back from those localities to examine the broad outlines of the entire system, focusing on changes in its basic structure, which came from the states' general assemblies. The voices of a particular group—professionally trained lawyers who were prominent in state politics, whose networks reached outward to the national level, and who wished to dismantle legal localism—tend to dominate. This group looked to government institutions at the state level as the primary locus of power and acted as if that was the case, even when it was not. As a result, they focused their efforts there, while those committed to legal localism did not. This same group also authored the bulk of the archival records on law within state institutions. Many in this group joined their interest in law to a keen sense of history, infused by notions of objectivity and progress. They not only documented their own lives, but also collected the documents of others and even created archives, with the intent of leaving the “correct” version of the past to posterity. That version did not include the logic of legal localism, which represented what they were trying to overcome.

The second half of the book will turn to this group of professionally trained lawyers and consider their vision of law and the state in more detail. But these men are also crucial at this point in the analysis, in order to excavate and appreciate legal localism. As the late Perry Miller observed, “We take the success of the courts in defending their integrity so much for granted that we forget how in the early nineteenth century their champions believed they barely survived the gale.” Acknowledging the influence of these “champions” over both the archival records and the resulting historical narratives changes the basic categories of analysis. Such a perspective

suggests why legal localism appears as a transitory moment of little consequence in the historiography, when it is acknowledged at all. In a broader sense, it upends basic historiographical assumptions, revealing the artificiality of frameworks that categorize local matters in this period as historically marginal, while elevating the business of other state institutions as historically central. To the members of that small circle of state leaders with legal training, “the state” was government at one, single level: they defined the concept of “the state” narrowly and horizontally in terms of the legislative, judicial, and executive branches located at the state capitals, instead of broadly and vertically in terms of all the practices and institutions that governed the public order. That conflation of “the state” with particular parts of it, which much of current scholarship accepts, makes it difficult to imagine the concept in any other way. In the post-Revolutionary Carolinas, however, neither the state nor the operation of law within it functioned as many of these leaders wished. Contained within their most damning comments are the most compelling insights into legal localism and the most dramatic testimony to its centrality in state government.<sup>2</sup>

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<sup>2</sup> Perry Miller, The Life of the Mind in America: From the Revolution to the Civil War (New York: Harcourt, Brace, and World, 1965), 236. The analysis in this chapter also is informed by different strands of scholarship that address state formation and historical practice. It takes seriously Benedict Anderson’s notion of the nation as an “imagined” community, in the sense that the concept of a nation and attachment to it needs to be created. That creation, moreover, is facilitated by histories that take the nation as its subject. See Benedict Anderson, Imagined Communities: Reflections on the Origins and Spread of Nationalism (London: Verso, 1983). Those insights also apply to individual states within the United States, particularly in the context of the post-Revolutionary period where so much governing authority was delegated to states and where they functioned as entities similar to “the nation” in Anderson’s sense. The process of naturalizing the work of state building in North Carolina and South Carolina is also similar to that described by political theorist Etienne Balibar, “The Nation Form: History and Ideology,” in Etienne Balibar and Immanuel Wallerstein, Race, Nation, Class: Ambiguous Identities (London: Verso, 1991), 86-106. As he argues, nations require a history that not only obscures the work that went into making them, by making them appear rooted in nature. Although Balibar emphasizes ethnicity and race in this context, the larger point—about historical narratives that make nations appear as inevitable formations that arise naturally from what may, in fact, may have had nothing to do with their development—is applicable in the context of the post-Revolutionary Carolinas. This chapter also relies on the work of James Vernon and others in nineteenth century British political history, who explain exactly those processes of nation building that were obscured. In particular, this scholarship suggests the importance of exploring

## History and the Post-Revolutionary Legal System

Recently, southern historians who are not legal historians have discovered legal sources. They have used this material to great effect, using cases as a window not only on changes in the legal status of women, slaves, free blacks, and poor whites, but also on larger social and cultural currents outside the courtroom, including racial ideology, class tensions, gender relations, sectionalism between North and South, and the material circumstances of those on the social margins who otherwise left few traces of their lives behind.<sup>3</sup> But for all the interest in legal

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the broader cultural work accomplished through the political process: those debates and conflicts did not just have immediate material effects; they also created powerful narratives that legitimated particular political formations and shaped how people understood what politics was. See, for instance: James Vernon, Politics and the People: A Study in English Political Culture, c. 1815-1867 (Cambridge: Cambridge University Press, 1993); James Vernon, ed., Re-Reading the Constitution: New Narratives in the Political History of England Long Nineteenth Century (Cambridge: Cambridge University Press, 1996). As argued by Bonnie Smith, The Gender of History: Men, Women, and Historical Practice (Cambridge: Harvard University Press, 1998), the historical narratives linked to nation building were deeply gendered, in ways that not only marginalized women but also particular subjects and methods associated with them. Those gendered structures are still evident in the dismissal of local history as “particular” rather than “general” and “representative,” the realm of “amateurs” and “antiquarians” rather than “professionals.” Scholarship in Latin American history that explores alternate visions of “the state” and “the nation” provides the final element in this analysis. Focusing primarily on peasants in the postcolonial period, this work shifts the perspective away from political differences within and between western nations. In so doing, this work establishes an important corrective, reminding scholars of the U.S. and western Europe that the liberal state, in the forms that it took in those nations, was not the only available alternative. See, for instance: Florencia E. Mallon, Peasant and Nation: The Making of Postcolonial Mexico and Peru (Berkeley: University of California Press, 1995); Gilbert M. Joseph and Daniel Nugent, eds. Everyday Forms of State Formation: Revolution and the Negotiation of Rule in Modern Mexico (Durham: Duke University Press, 1994).

<sup>3</sup> See, for instance: Edward E. Baptist, Creating an Old South: Middle Florida's Plantation Frontier before the Civil War (Chapel Hill: University of North Carolina Press, 2002); Peter Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (Chapel Hill: University of North Carolina Press, 1995); Sharon Block, “Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America,” in Sex, Love, Race: Crossing Boundaries in North American History, Martha Hodes, ed. (New York: New York University Press, 1999), 141-63; Kathleen M. Brown, Good Wives, "Nasty Wenches," and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia (Chapel Hill: University of North Carolina Press, 1996); Victoria Bynum, Unruly Women: The Politics of Social and Sexual Control in the Old South (Chapel Hill: University of North Carolina Press, 1992); Kirsten Fischer, Suspect Relations: Sex, Race, and Resistance in Colonial North Carolina

sources, there has not been a corresponding scholarly rush to sort through the particularities of the system that produced those records. There are exceptions, among them Ariela Gross's compelling analysis of slave law, which begins by walking through court day and then continues to make legal institutions central to the analysis.<sup>4</sup> For the most part, though, southern historians—even those whose focus is on the region's legal history—tend to rely on legal sources without considering how they were created within the legal system. They look to the dynamics of cases and the implications of key statutes and decisions for insight into the past, not to structural changes in the institutions that created, disseminated, or applied those laws. Those issues form the assumed background against which the important, meaningful conflicts were played out, but which require no explanation themselves.

Southern historians' point of departure is the destination for many legal historians. Some of the most important recent scholarship in that field has emphasized the importance of fundamental conceptual shifts in the institutional operation of law. This body of scholarship, influenced by the work in Critical Legal Studies, approaches law as a distinct arena governed by

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(Ithaca: Cornell University Press, 2001); Martha Hodes, White Women, Black Men: Illicit Sex in the Nineteenth Century South (New Haven: Yale University Press, 1997); Walter Johnson, Soul by Soul: Life Inside the Antebellum Slave Market (Cambridge: Harvard University Press, 1999); Christopher Morris, Becoming Southern: The Evolution of a Way of Life, Warren County and Vicksburg, Mississippi, 1770-1860 (New York: Oxford University Press, 1995); Diane Miller Sommerville, "The Rape Myth in the Old South Reconsidered," Journal of Southern History 61 (August 1995): 481-518. I would include my own work in this category; although I drew heavily on legal sources in my first book, Gendered Strife and Confusion: The Political Culture of Reconstruction (Urbana: University of Illinois Press, 1997), it never occurred to me to consider how the legal system worked.

<sup>4</sup> Ariela Gross, Double Character: Slavery and Mastery in the Antebellum Southern Courtroom (Princeton: Princeton University Press, 2000). Also see: F. Thornton Miller, Juries and Judges versus the Law: Virginia's Provincial Legal Perspective, 1783-1829 (Charlottesville: University of Virginia Press, 1994); Christopher M. Curtis, "Jefferson's Chosen People: Legal and Political Conceptions of the Freehold in the Old Dominion from Revolution to Reform," Ph.D. dissertation, Emory University, 2002. Ariela Gross has a particularly insightful article on the recent use of legal sources by southern historians, arguing that this new work—what she calls a cultural approach to law—can result in a very different view of law and other structures of power, see: Ariela Gross, "Reflections on Law, Culture, and Slavery," in Winthrop D. Jordan, ed., Slavery and the American South (Jackson: University Press of Mississippi, 2003), 57-82.

a series of powerful practices and assumptions interior to the system itself. This view of law is not instrumentalist: neither the rules nor the institutions are tools that one group can capture and use to achieve a particular end. Rather, law plays an independent role, generating contradictions and complications apart from those who try to use it. Yet law is still connected to the society in which it operates, shaping the terms of debate over key issues and taking them in directions that even the most powerful could not have predicted. This body of scholarship has profound implications for how southern historians use legal sources and how they think about the relationship between law and society more generally. Much of it, however, has not made its way into the mainstream of southern history, because it does not attend to the South as a distinct region. The work nonetheless speaks directly to southern history on a conceptual level, highlighting significant, but largely unexplored issues in the region's past.<sup>5</sup>

In particular, the conclusions suggest that southern history as a field has taken too much for granted about the operation of law. The bulk of the archival materials on the legal system in the late eighteenth and early nineteenth centuries were produced by a group of lawyers and jurists who were promoting a particular reform agenda. Insights from legal history suggest the need to examine this group's discussions of law critically, as one particular expression in an ongoing debate about how law should work and what it should do. Yet southern historians have tended to take this one group's perspective as the authoritative expression of law: in a literal sense, this group of lawyers has become the voice of "the law" in the post-Revolutionary South. As a result, southern historians tend to assume that the legal system worked as this group of men

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<sup>5</sup> Ariela Gross's focus on legal institutions is a reflection of her training as both a legal historian and a southern historian. For other analyses, see: Cornelia Hughes Dayton, Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789 (Chapel Hill: University of North Carolina Press, 1995); Michael Grossberg, A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America (Cambridge: Cambridge University Press, 1996); Bruce Mann, Neighbors and Strangers: Law and Community in Early Connecticut (Chapel Hill: University of North Carolina Press, 1987); William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (Chapel Hill: University of North Carolina Press, 1996); Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic (New York: Cambridge University Press, 1993).

said it should, not as it actually did.<sup>6</sup>

Legal reformers in North Carolina and South Carolina were members of a regional elite who moved within a national network that reached well beyond those two states. Their names grace many of the legal materials on which historians now rely and include such luminaries as: James Iredell, Sr., John Haywood, John Louis Taylor, Thomas Ruffin, Duncan Cameron, Thomas P. Devereux, William Duffy, William Gaston, James Iredell, Jr., David Swain and Archibald D. Murphey of North Carolina; Charles Pinckney, Charles Cotesworth Pinckney, William Loughton Smith, Aedanus Burke, Elihu Hall Bay, John Faucheraud Grimké, Thomas

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<sup>6</sup> Duplicating these reformers' criticisms, historians once routinely dismissed law and the legal process in the region as dysfunctional, backward, or both. Southern legal historians have devoted a great deal of space to rehabilitating the reputation of southern law and legal practitioners, beginning with Charles S. Sydnor, "The Southerner and the Laws," Journal of Southern History 6 (February 1940): 3-23. The issue is still an undercurrent in the scholarship, and helps explain why many southern legal historians have focused on those materials, authored by reformers, that portray law in that region as an orderly system with an intellectually consistent body of principles. The resulting work moved the field in important directions, establishing southern law as a legitimate topic in its own right. Yet, in responding to past debates, this work has also duplicated some of its underlying assumptions. See: Peter Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (Chapel Hill: University of North Carolina Press, 1995), esp. 5-23; David J. Bodenhamer and James W. Ely, Jr., eds., Ambivalent Legacy: A Legal History of the South (Jackson: University Press of Mississippi, 1984); Timothy S. Huebner, The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890 (Athens: University of Georgia Press, 1999); Thomas D. Morris, Southern Slavery and the Law, 1619-1860 (Chapel Hill: University of North Carolina Press, 1996); Judith K. Schafer, Slavery, Civil Law and the Supreme Court of Louisiana (Baton Rouge: Louisiana State University Press, 1994); Mark V. Tushnet, The American Law of Slavery, 1810-1860: Consideration of Humanity and Interest (Princeton: Princeton University Press, 1981); Christopher Waldrep, Roots of Disorder: Race and Criminal Justice in the American South, 1817-80 (Urbana: University of Illinois Press, 1998). The presumption, long held in southern history, that most matters involving slaves—and, by extensions, other domestic dependents—were resolved on the plantation or within the household accentuated the tendency. As a result, many southern historians looked everywhere but the legal system for answers to basic questions about power and inequality in the region. See, for instance: Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th Century American South (New York: Oxford University Press, 1984); Michael S. Hindus, Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina (Chapel Hill: University of North Carolina Press, 1980); Peter Kolchin, American Slavery, 1619-1877 (New York: Hill and Wang, 1993); Bertram Wyatt-Brown, Southern Honor: Ethics and Behavior in the Old South (New York: Oxford University Press, 1982).

Cooper, Langdon Cheves, Abram Blanding, David J. McCord, Henry William DeSaussure, and John Belton O’Neill in South Carolina. Many of these men were educated in the North, either at colleges such as Princeton or law schools. A few were educated in England, at the Inns of Court. But even those who trained in their own states had ties beyond the region, through their business, social, or political connections. What united them were basic assumptions about the legal system. They all tended to see law in scientific terms, as an internally consistent set of universally applicable principles—although they often disagreed bitterly on the specifics of those principles. They also favored a hierarchical institutional structure, with authority located in trained professionals at the top of the structure to ensure uniformity—although many still thought the system should be flexible enough to allow room to achieve justice in particular circumstances, at the lower levels of the system. The power of the judiciary relative to the legislature divided reformers throughout the period, particularly at the height of partisan conflict between Federalists and Jeffersonian Republicans before the War of 1812 and during the nullification crisis in South Carolina. So did the question of state’s rights, specifically their states’ authority relative to the nation.<sup>7</sup> Despite these differences, however, reformers as a group tended to support the creation of a clearly defined, definite body of state law, enforced by some body—usually a strong appellate court—at the apex of the judicial pyramid. That body would decide points of law in decisions that would be enforced by lower levels of the system, which fell out in orderly layers beneath, descending from district or superior courts to individual magistrates in local neighborhoods, with each level subordinate to the one above. Reformers had such confidence in this vision of the legal system that they described it in normative terms: since

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<sup>7</sup> Nullification in South Carolina provides the most interesting example of how agreement about law underlay bitter partisan differences. The leaders of nullification and unionism disagreed over the state’s relation to the nation, but they all still defined “the state” in terms of one level of government. Thomas Cooper and David J. McCord, for instance, advocated both states’ rights and the greater systematization of state law, particularly in matters involving slavery: the two projects were conjoined in their minds. See William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836 (New York: Harper & Row, 1966), esp. 316-321.

there was no other option, the system evolved naturally—if somewhat haltingly and fitfully—in this direction.

Reformers arrived at that conclusion by a decidedly Whiggish route. North Carolina newspaper editor and printer Joseph Gales, for instance, thoroughly conflated law and progress in the advertisement to his periodical, The Carolina Law Repository, announcing that it would keep “the Profession and the citizens in general . . . apprized of the progressive change and exposition of the law.”<sup>8</sup> Like Gales, reformers tended to see the past as prologue in a progressive journey that culminated in a legal system defined by their principles, which formed the essential groundwork for their post-Revolutionary states. That was the Revolution’s legacy, earned through sacrifice and sanctioned in blood.

Not surprisingly, reformers relied heavily on temporal metaphors, which characterized alternate versions of law as archaic relics of an illogical and unenlightened time. Some, like North Carolina’s Archibald Murphey, looked to that past optimistically, as a source of building blocks for future progress. Murphey, a prominent lawyer with a plantation in Orange County, served as a circuit court judge and a representative to the General Assembly. Like many in his circle, he dabbled in land speculation and other money-making schemes, including the short-lived North Carolina gold rush—although with considerably less success than others in his cohort. Murphey died broke, living on the charity of friends. If anything, though, it was his ebullient sense of optimism that brought him to that end. He carried that same enthusiasm into his political work, where his efforts for judicial reform, internal improvements, and education were outstripped only by his passion for history. “In no state,” Murphey wrote with the expansiveness that was his hallmark, “was a more early or effectual opposition made to the encroachments of power . . . or were the principles of civil liberty better understood, more ardently cherished, or more steadily defended.” Since then, “our legislature, our jurisprudence, and our institutions have kept pace with the improvements of the age.” In order for the state to continue this

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<sup>8</sup> 29 January 1813, Raleigh Register and North Carolina Weekly Advertiser.

progressive trajectory, Murphey concluded, it was imperative that legislature provide the means to collect and preserve its historical documents. Others viewed the past warily, seeing primarily defects that subsequent progress had overcome. Both positions, however, were compatible in that they resigned alternate versions of law to the dustbin of the past.<sup>9</sup>

Although evocative, reformers' temporal metaphors were chronologically inaccurate. Central elements of the decentralized legal system that they characterized as archaic had been established during the Revolution. Nor had the remnants of "chaos" been banished thereafter, with Revolutionary enlightenment replacing monarchical corruption in their states' legal systems. If anything, reformers from this period were far more successful in imposing their vision after the fact, crowding out the views of those who saw the legal system differently. Their efforts to achieve substantive reform took decades to achieve tangible results. In practice, they were not fully realized until after the Civil War, as part of the systematic reform of the region under the terms of the Congressional Reconstruction plan and the dramatic revision of state constitutions under Republican rule. The institution of capitalist labor relations and the extension of individual rights to former slaves required a hierarchical legal system, which construed law as a set of universal rules, consistently applied. Most reformers who lived through the Civil War era bitterly opposed the abolition of slavery, the Fourteenth and Fifteenth Amendments, and other changes that came with Republican rule. But their basic vision of law shared a great deal with that of Reconstruction-era Republicans. The changes to the legal system in this era duplicated reforms advocated since the end of the Revolution. Nor is it a coincidence that Democrats did not dismantle them when they took over after Reconstruction. That outcome, in turn, lent an air of inevitability to earlier calls for reform: if secessionists and unionists, slave holders and abolitionists, Democrats and Republicans could all agree, then the legal system's

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<sup>9</sup> A.D. Murphey, Memorial to the General Assembly of North Carolina, Regarding his Projected History of North Carolina, 1 January 1827, Archibald D. Murphey Papers, #533, folder 6, SHC. For a more wary view of the past, see John Belton O'Neill, Biographical Sketches of the Bench and Bar of South Carolina (Charleston: S. G. Courtenay & Co, Publishers, 1859), 2 vols.

trajectory must have been in the cards from the outset.<sup>10</sup>

Judge Elihu Hall Bay's decision in the wife-beating case that opened this chapter provides an alternative to the temporal metaphors. First, though, it is necessary to reconsider the source of the anecdote. In it, Judge Bay comes across as an eccentric relic, stuttering on about the common law tradition as the pinnacle of civilization and dismissing newfangled fads like Sir William Blackstone's Commentaries. But that impression owes to the man who related it, John Belton O'Neall, who was among those who wanted to replace "law" in South Carolina with a more centralized legal system and a systematized version of "the law." In fact, so did Elihu Hall Bay, although he was at odds with other reformers on some of the specific details—among which were Blackstone's views of wife beating and also women's property rights. Among other things, Bay published the first reports on common law decisions in the state of South Carolina, which collected existing case law with the intent of identifying authoritative decisions and creating a system that would operate through precedent. "Before his reports," O'Neall effused with genuine admiration, "all was chaos in our legal world." Yet, looking back on Bay's career from the 1850s, O'Neall found it perplexing. Unable to reconcile Bay's volumes with his decisions on the bench, O'Neall paused with puzzlement: although Bay's "purposes were just," he was "often mistaken." In that one observation, O'Neall captured what he and other reformers found so unacceptable about the logic of a system that incorporated conflicting versions of law and left the rest to local jurisdictions to sort out.<sup>11</sup>

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<sup>10</sup> Those accounts focusing on the development of the courts in both states usually note this. See, for instance: Donald Senese, "Building the Pyramid: The Growth and Development of the State Courts System of Antebellum South Carolina, 1800-1860," South Carolina Law Review 24 (1972): 357-89. William J. Adams, "Evolution of Law in North Carolina," North Carolina Law Review 2 (1923-24): 133-45; Atwell Campbell McIntosh, "The Jurisdiction of the North Carolina Supreme Court," North Carolina Law Review 5 (1926-27): 5-29; John V. Orth, "North Carolina Constitutional History," North Carolina Law Review 70 (1991-1992): 1759-87; Walter Parker Stacy, "Brief Review of the Supreme Court of North Carolina," North Carolina Law Review 4 (1925-1926): 115-17.

<sup>11</sup> John Belton O'Neall, Biographical Sketches of the Bench and Bar of South Carolina (Charleston: S. G. Courtenay & Co, Publishers, 1859), I: 54.

The central issue was that Bay could not be “mistaken”—at least, not in the way that O’Neill meant. The complications in Bay’s decisions—or mistakes, as O’Neill’s would term them—were actually accepted elements within legal system of the post-Revolutionary Carolinas. That system was not disorganized or ill conceived, striving toward a form it was meant to take and would eventually become. Nor was it a throwback to the past, stubbornly persisting in the wake of modernity’s irresistible transforming power. This legal system had its own logic, which structured the operation of law so effectively that it transcended the agency of any individual judge. Judge Bay, himself, may have wanted a more systematic approach that resembled “the law,” but the system was based in an open-ended conception of law and drew him into its logic, regardless of his personal preferences. That logic was a product of the time, combining elements from the early modern past with modern currents of political thought. Within this eclectic mix were Revolutionary calls for popular sovereignty, liberal notions of individual rights and limited government, republican fears of centralized authority, and early modern notions of law that mixed popular custom with formal legal authorities and that included a great deal of public business later relegated to other parts of government. Law in the post-Revolutionary Carolinas was neither good nor bad, new nor old: like Elihu Hall Bay, it was a mixture of them all.

That version of the past, however, is not particularly well represented in the sources. It was not just that reformers who advocated change were prolific, which they were. They also understood the importance of history and harnessed it to serve their own ends. In this regard, legal reformers in the Carolinas shared a great deal with other state and national leaders in their networks. As historian Joanne Freeman has argued, national leaders of the early republic developed an acute sense of the power they could wield through history. In Freeman’s account, the interest in history was an extension of the partisan political culture of the 1790s, which conflated personal reputation with party affiliation. Through the genre of history, these men justified their positions and vindicated their reputations after the fact.<sup>12</sup>

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<sup>12</sup> Joanne B. Freeman, Affairs of Honor: National Politics in the New Republic (New Haven: Yale, 2001), 263-88

If legal reformers in North Carolina and South Carolina are any indication, the interest in history became more pronounced over time. Men in their networks preserved their legacies by writing histories that featured themselves, their relatives, and their friends in starring roles. In 1827, for instance, Chief Justice John Marshall wrote to Archibald Murphey praising his biographical sketches “of the eminent men of North Carolina,” most of whom were lawyers or judges. “It was my happiness to be acquainted with those of whom you speak,” wrote Marshall, “and I think you have given to the character of each, its true coloring.”<sup>13</sup> Similar concerns led to a friendly correspondence between Alexander Hamilton’s son and William Gaston, an appellate court judge in North Carolina. Hamilton’s son, who was collecting his father’s correspondence and writing an historical biography, asked Gaston for documents or personal recollections as well as an account of North Carolina’s credit laws—presumably for background about his father’s monetary policies. Gaston was happy to comply.<sup>14</sup> The same was then done, in turn, for Archibald Murphey, William Gaston, and other leaders in both North Carolina and South Carolina. Requests related to such efforts peppered the papers of prominent reformers in both states, with results that now line the library shelves.<sup>15</sup> It is no accident that historians have more

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<sup>13</sup> Chief Justice John Marshall to Archibald D. Murphey, 6 October 1827, William Henry Hoyt, ed., The Papers of Archibald D. Murphey (Raleigh: Publications of the North Carolina Historical Commission, 1914), I: 365.

<sup>14</sup> William Gaston to John C. Hamilton, 1 August 1833, folder 57; William Gaston to John C. Hamilton, 30 August 1833, folder 58, SHC; John C. Hamilton to William Gaston, 27 September 1834, folder 64; all in box 4, William Gaston Papers, #272, SHC. The archival collections, which make up the earliest, core collections at state and university archives, became the foundation for published histories and documentary collections.

<sup>15</sup> For instance, William Gaston’s son-in-law, Robert Donaldson, wanted to collect and publish Gaston’s correspondence and writings while he was still alive, but Gaston declined. William Gaston to Robert Donaldson, 5 November 1832, William Gaston Papers, #272, box 4, folder 54, SHC. The Gaston family, though, did preserve their father’s papers, as did the friends and relatives of others in this group. For other examples of correspondence on the collection of documents and historical information, see for instance: Archibald D. Murphey to William Polk, 16 July 1819; Archibald D. Murphey to General Joseph Graham, 10 January 1821; Archibald D. Murphey to Colonel Ransom Sutherland, 8 March 1821; Archibald D. Murphey to General Joseph Graham, 20 July 1821; Allen J. Davie to Archibald D. Murphey, 17 January 1826; all in William Henry Hoyt, ed., The Papers of Archibald D. Murphey (Raleigh: Publications of the

information about those involved in government at the state and national levels than they do about other people. Nor is it an accident that those men's confidence about the importance of their interests, work, and lives still echos through the scholarship.

The interest in history was not confined to those working in law. Legal reformers, though, were particularly preoccupied with the collection of documents and the recognition of those collections as authoritative references on the past. Historians of Britain and western Europe have identified similar trends, in which the development of professional history and the creation of archives were part and parcel of the liberal project of nation building and the development of empires. Sanctioning those particular views of the state came, in part, through histories that were written as objective fact and archives that housed the proper facts. Aware of the intellectual trends in Europe, reformers in North Carolina and South Carolina consciously sought to duplicate them.<sup>16</sup> The archives and histories of European nations, for instance, provided the inspiration for Archibald Murphey's plans for a state archive and an eight-volume history of North Carolina, which he likened to Gibbon's Rise and Fall of the Roman Empire. "The history of each of the European nations has been long since written," he wrote in his request to the General Assembly for funding. Those general works combined with archival collections housed in public libraries facilitated further work, for "the writer of a particular or general history can resort to those libraries and there find materials for his work." North Carolina needed to follow that example if it hoped to keep up. In addition to collecting records

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North Carolina Historical Commission, 1914), I: 147-48, 191-94, 194-97, 211-13, 327-29. All of this material, which was housed in state and university archives that these same men and their families also supported, became the basis for later published collections, many of which are cited in this chapter.

<sup>16</sup> For links between the interest of European nations and their leaders in creating—and, in some cases, capturing existing archives—and larger expressions of national power, see: Bonnie Smith, The Gender of History: Men, Women, and Historical Practice (Cambridge: Harvard University Press, 1998), esp. 116-128; James Vernon, "Narrating the Constitution: The Discourse of 'the Real' and the Fantasies of Nineteenth-Century Constitutional History," in James Vernon, ed., Re-Reading the Constitution: New Narratives in the Political History of England's Long Nineteenth Century (Cambridge: Cambridge University Press, 1996), 204-29.

from the colonial and Revolutionary eras, Murphey also proposed the ongoing preservation and organization of all documents related to state business, especially those related to the legal system.<sup>17</sup>

Murphey's project was only the most ambitious of such efforts. Not only did legal reformers begin collecting material about law immediately following the Revolution, but they also pushed their general assemblies to revise and distribute a definitive body of state law.<sup>18</sup> The

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<sup>17</sup> A.D. Murphey, His Memorial to the General Assembly of North Carolina, Regarding his Projected History of North Carolina, 1 January 1827, Archibald D. Murphey Papers, #533, folder 6, SHC. William Gaston was a "counsellor" in the American Antiquarian Society; American Antiquarian Society to William Gaston, 4 February 1824, William Gaston Papers, #272, box 3, folder 35, SHC. He also corresponded with George Bancroft about their mutual interest in history; George Bancroft to William Gaston, 9 October 1837, William Gaston Papers, #272, box 5, folder 77, SHC. David L. Swain, who served as governor and president of the University of North Carolina, followed up on Murphey's archival project, see: David L. Swain, Report of the Hon. David L. Swain: On the Historical Agency for Procuring Documentary Evidence of the History of North-Carolina (Raleigh: Holden and Wilson, Printers to the State, 1858). Although Murphey never published his state history, the historical work of other legal reformers did make it to print. In addition to his Biographical Sketches of the Bench and Bar of South Carolina (Charleston: S. G. Courtenay & Co, Publishers, 1859), 2 vols, John Belton O'Neall published The Annals of Newberry: Historical, Biographical, and Anecdotal (Charleston, S. C.: S. G. Courtneay and Co., 1859). Also see: David L. Swain, Early Times in Raleigh: Addresses Delivered by the Hon. David L. Swain. . . . (Raleigh: Walters, Hughes, & Co., 1867); David L. Swain, British Invasion of North Carolina in 1776, Delivered Before the Historical Society of the University of North Carolina. . . . (N.P: n.p, 1853?); François-Xavier Martin, The History of North Carolina from the Earliest Time (New Orleans: A. T. Penniman, 1829); William Loughton Smith, A Comparative View of the Constitutions of the Several States with Each Other, and with that of the United States. . . . (Philadelphia: John Thompson, 1796). John Haywood, a prominent North Carolina lawyer and legal writer, wrote a history of Tennessee, after he relocated there: The Civil and Political History of the State of Tennessee: From its Earliest Settlement up to the 1796, Including the Boundaries of the State (Knoxville, Tenn.: Heiskell & Brown, 1823).

<sup>18</sup> One of the more enthusiastic collectors in North Carolina was printer François-Xavier Martin, who also published the North Carolina Gazette and who augmented collections issued by the legislature with his own compilations. Typical of his enthusiasm is an ad in his North Carolina Gazette, 8 February 1794, which announced the publication of his collection of private acts, which had been left out of Iredell's 1791 collection of statutes; Martin thought these too valuable to be lost. For the results of his work, see: A Collection of the Private Acts of the General Assembly of the State of North Carolin: From the Year 1715 to the year 1790. . . . (Newbern: F. X. Martin, 1794); The Acts of the General Assembly of the State of North Carolina: Passed During the Sessions Held in the Years 1791, 1792, 1793, and 1794 (Newbern: F. X. Martin, 1795); Public Acts of the General Assembly of North Carolina, Revised and Published Under the

North Carolina legislature did provide for the printing of statutes in pamphlet form following each session, and local newspapers often reprinted the results in their columns. But these annual updates were difficult to track down and to use, creating barriers that encouraged those with less invested in such references to dispense with them altogether. So reformers introduced legislation to produce easy-to-use, single-volume digests of the state's statutes. John Haywood's A Manual of the Laws of North Carolina, for instance, boasted accessibility in its subtitle, with "distinct heads in alphabetical order" and "references from one head to another." Prominent legal reformers also oversaw such projects, largely because it was they who pushed for them and who had the most invested in the idea. In 1791 James Iredell, Sr. put together the state's first collection. The legislature provided for periodic updates, including a revision in 1837, prepared by a committee of three, including James Iredell, Jr., who followed in his father's footsteps to bring the process full circle.<sup>19</sup>

North Carolina judges designated as court reporters began issuing decisions in state's higher courts in the late 1790s, about the time when key reformers were also promoting the

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Authority of the Legislature, by James Iredell; and Now Revised by François-Xavier Martin (Newbern: Martin & Ogden, 1804). Joseph Gale of the Raleigh Register took over where Martin left off. Not only did he seek out contracts to publish statutes and reports of court decisions, but he also covered the efforts of reformers in extremely positive terms. In 1813, he launched his own legal periodical, The Carolina Law Repository; see 29 January 1813, Raleigh Register and North Carolina Weekly Advertiser.

<sup>19</sup> After James Iredell's 1791 digest, John Haywood took over in 1801, with an edition that was subsequently updated in 1808, 1814, and 1819. The legislature provided for a new revision in 1821, which was updated by John L. Taylor in 1827. See: James Iredell, Laws of the State of North-Carolina: Published, According to Act of Assembly (Edenton: Hodge and Willis, Printers to the State, 1791). John Haywood, A Manual of the Laws of North Carolina . . . . (Raleigh: J. Gales, Printer to the State, 1801); the second, updated edition appeared in 1808, a third edition in 1814, and a fourth edition in 1819. Henry Potter, et al, Laws of the State of North Carolina: Including the Titles of Such Statutes and Parts of Statutes of Great Britain as Are in Force in the Said State (Raleigh: J. Gales, 1821). John L. Taylor, A Revisal of the Laws of the State of North Carolina: Passed from 1821-1825 (Raleigh: J. Gales, 1827); Frederick Nash, James Iredell, William H. Battle, The Revised Statutes of the State of North Carolina. . . . (Raleigh: Turner and Hughes, 1837). Subsequently, James Iredell, Jr. oversaw another updated digest as well: James Iredell, A New Digested manual of the Acts of the General Assembly of North Carolina (Raleigh: Seaton Gales, 1851).

creation of an appeals court with final authority of matters of law and equity. François-Xavier Martin, one of the state's most prolific printers of legal material, published notes in 1797 on selected decisions in the state's superior courts, which were then the highest level of the system. John L. Taylor, a superior court judge who also oversaw an update of the revised statutes, published a series of volumes on higher court decisions between 1798 to 1802. Between 1799 and 1806, John Haywood, another avid legal compiler, also put together another collection, reaching back to 1789 and then continuing up to 1806, at which point he relocated to Tennessee—where he continued his work as a legal compiler. Thereafter collections appeared occasionally, often spaced at wide intervals, when the appointed court reports found the time to put them together.<sup>20</sup> Later editing, however, created the impression of regularity and uniformity that was lacking at the time. In 1868, as part of the effort to institutionalize legal changes of the kind promoted by antebellum reformers, the North Carolina State Supreme Court renumbered all the previous volumes of reports from the higher courts consecutively. All the original records were

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<sup>20</sup> François-Xavier Martin, Notes of a Few Decisions in the Superior Courts of the State of North Carolina: And in the Circuit Court of the United States: for North-Carolina District (New Bern: François-Xavier Martin, 1797); John Louis Taylor, Cases Determined in the Superior Courts of Law and Equity of the State of North Carolina [1796-1802] (New Bern: Martin & Ogden, 1802); John Haywood, Reports of Cases Adjudged in the Superior Courts of Law and Equity of the State of North Carolina: From the Year 1789 to the Year [1806] (Halifax: Abraham Hodge, 1799-1806), 2 vols. Thereafter, reports appeared regularly, but at inconsistent intervals: Duncan Cameron and William Norwood, Reports of Cases Ruled and Determined by the Court of Conference of North Carolina (Raleigh: J. Gales, 1805); A. D. Murphey, Reports of Cases Argued and Adjudged in the Supreme Court of North Carolina: From the Year 1804 to the Year 1819 . . . Inclusive (Raleigh: J. Gales & Son, 1821-1826), 3 vols.; J. L. Taylor, Cases Adjudged in the Supreme Court of North Carolina from July Term 1816 to January Term 1818, Inclusive (Raleigh: J. Gales, 1818); Thomas Ruffin and Francis L. Hawks, Reports of Cases Argued and Adjudged in the Supreme Court of North Carolina: During the Years 1820 & 1821 [December Term 1825 & June Term 1826] (Raleigh: J. Gales & Son, 1823-1828), 4 vols.; Thomas P. Devereux, Cases Argued and Determined in the Supreme Court of North Carolina: From December Term 1826, to June term [1834] (Raleigh: J. Gales and Son, 1829-1836), 4 vols.; Thomas P. Devereux, Equity Cases Argued and Determined in the Supreme Court of North-Carolina (Raleigh: J. Gales and Son, 1831-1836), 2 vols.; Thomas P. Devereux and William H. Battle, Reports of Cases at Law Argued and Determined in the Supreme Court of North Carolina (Raleigh: Turner & Hughes; Philadelphia: P.H. Nicklin & T. Johnson, 1837-1840), 4 vols.

later housed together, as a single record group, in the state archives. The results merged together material from high courts that, in their various iterations, actually had different functions and powers. They also obscured differences in the authority and reach of earlier and later decisions, while also creating the appearance that reports of them had been issued regularly. One edition of the volume now designated as the first in the series of North Carolina reports, for instance, is a highly edited blend of Martin's notes, Taylor's volumes, what remained of the court records, the notes of William H. Battle, who was a judge and court reporter in the 1840s, and the annotations of Walter Clark, the Progressive Era lawyer who put the volume together.<sup>21</sup>

South Carolina reformers encountered more difficulty in this regard. The South Carolina legislature required appeals court judges to render their decision in writing in 1799.<sup>22</sup> Then, in 1811, it appointed a court reporter to collect those decisions into volumes for reference by the General Assembly in Columbia. The "citizens of this State," were also to "have access to the said books as freely as other books of record in any of the public offices of this State."<sup>23</sup> But the legislators did not provide for the regular dissemination of them. South Carolina reporters in the appeals courts of law and equity, including Elihu Hall Bay, Joseph Brevard, and Henry William DeSaussure, all published the results of their efforts. But the volumes appeared irregularly, at wide intervals. It was not until the 1820s that reports of law and equity cases were printed on a

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<sup>21</sup> The change is referred to in Charles C. Soule, The Lawyer's Reference Manual of Law Books and Citations (Boston: Soule and Bugbee, 1883): "By order of the Supreme Court, the reports from the adoption of the new constitution of 1868 (which abolished the distinction between actions at law and suits in equity) have been entitled simply 'North Carolina reports.' In calculating the number [63] of the first volume issued under this name, the latest edition of the early reports and of Winston have been taken as the standard, and the volumes have been counted as now bound, and not as originally published." It is also clearly stated in the edited volumes; see for instance, 1 N.C. (1778-1804).

<sup>22</sup> David J. McCord, The Statutes at Large of of South Carolina (Columbia, S. C.: A. S. Johnston, 1840), 7: 295

<sup>23</sup> David J. McCord, The Statutes at Large of of South Carolina (Columbia, S. C.: A. S. Johnston, 1840), 7: 312.

more consistent basis.<sup>24</sup> Others treatises and commentary in periodicals—such as John Belton O’Neill’s volume on slave law or David J. McCord’s and Abram Blanding’s The Carolina Law Journal—stepped into the breach and summarized law in key areas in an effort to keep lawyers abreast of current trends.<sup>25</sup>

The effort to create a compilation of South Carolina statutes ran aground in the 1790s amidst rancorous accusations about commissioners’ motives, with the implication that they had chosen selectively, interpreted liberally, and imposed their own views on the results. Ultimately the legislature rejected the very report it had commissioned.<sup>26</sup> Despite repeated efforts to rehabilitate the effort, Governor Thomas Bennett was still pleading with legislators in 1822 to revisit the task, pointing out that most of the district courts of the state did not have copies of the

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<sup>24</sup> The first reports of law cases, for instance, appeared in 1798 and, then, at irregular intervals after that: Elihu Hall Bay, Reports of Cases Argued and Determined in the Superior Courts of Law, in the State of South Carolina, Since the Revolution (Charles, S. C.: Elliott & Burd, 1798), 2 vols.; Elihu Hall Bay, Reports of Cases Argued and Determined in the Superior Courts of Law in the State of South Carolina, Since the Revolution [1783-1804] (New York: I. Riley, 1809-1811), 2 vols.; Joseph Brevard, Reports of Judicial Decisions in the State of South Carolina, from 1793 to 1816 (Charleston: W. Riley, 1839-1840), 3 vols. There were no reports on equity cases, until Henry William DeSaussure’s volumes, published between 1917-1819: Henry William DeSaussure, Reports of Cases Argued and Determined in the Court of Chancery of the State of South Carolina (Columbia, S. C.: Cline & Hines, 1817-1819), 4 vols. (covering cases from the Revolution to 1817). For the regularization of the publication of decisions in law and equity, see: South Carolina, Constitutional Court of Appeals, Reports of Cases Determined in the Constitutional Court of South-Carolina/ By the State Reporter (Columbia: Black & Sweeney, 1824); South Carolina, Court of Appeals, Reports of Equity Cases, Determined in the Court of Appeals, of the State of South Carolina, By the State Reporter (Columbia, S. C.: Black & Sweeney, 1825); South Carolina, Court of Appeals, Reports of Cases: Argued and Determined in the Court of Appeals of South Carolina: on Appeal from the Courts of Law, 1828-1832/ By H. Bailey (Charleston, A. E. Miller, 1833-1834).

<sup>25</sup> John Belton O’Neill, The Negro Law of South Carolina (Columbia, S.C., 1848). The Carolina Law Journal (1830-1831), APS Online, published key decision in the state appellate courts as well as essays that read like short treatises on particular legal questions.

<sup>26</sup> John Belton O’Neill, Biographical Sketches of the Bench and Bar of South Carolina (Charleston: S. G. Courtenay & Co, Publishers, 1859), I: 31-42. Also see: The Pennsylvania Packet and Daily Advertiser, 23 June 1789, Aedanus Burke Papers, SCL.

current state statutes, let alone guidance on which ones were in force.<sup>27</sup> That request went nowhere: the first volume of revised statutes did not appear until 1836.<sup>28</sup> Undeterred, reformers collected material and published their own compilations privately, attaching their names to the volumes. John Faucheraud Grimké published his collection of statutes in 1790 and Joseph Brevard followed with another version in 1814. In 1831, The Carolina Law Journal published a list of the acts passed between 1813 and 1830, noting that “there is no digest of the acts of our legislature since Brevard’s,” except as they “published at the close of the session of the legislature at which they were past.” By “publish,” though, the editors meant that the acts were made available to the public.<sup>29</sup> Yet these privately issued compilations of statutes could provide suggestions for interpretation, but they did not actually have the authority to elevate one element of law over another.

All these projects of collecting and editing were labor intensive, because most of the material was in private hands. The legislatures of North Carolina and South Carolina, like most colonial legislatures, had not published or archived either their session laws or the decisions of their courts. Statutes had been issued in pamphlet form or printed by newspapers, and were saved by interested individuals. Complete runs were rare. In Virginia, for instance, St. George Tucker failed in his efforts to obtain a full set of session laws. “Few gentlemen, even of the

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<sup>27</sup> Charleston Courier, 30 November 1822.

<sup>28</sup> The act was passed in 1835; see Thomas Cooper’s preface to the, The Statutes at Large of South Carolina; Edited, Under Authority of the Legislature (Columbia, S. C.: A. S. Johnston, 1839), I: iii-xiii. These were completed and updated annually: Thomas Cooper and David J. McCord, The Statutes at Large of South Carolina (Columbia, S.C.: A.S. Johnston, 1836-1898); volumes 1-10, edited by Cooper and McCord, contained compilations of existing statutes and thereafter the updates were issued by the secretaries of state.

<sup>29</sup> Quotes from “A Digested Index of the Acts of Assembly from 1813 to 1830 Inclusive,” Carolina Law Journal (1830-1831); April 1831: 1, 4; APS Online, p. 461; for the list, see pp. 461-492. John Faucheraud Grimké, The Public Laws of the State of South-Carolina: From Its First Establishment as a British Province Down to the Year 1790, Inclusive. . . . (Philadelphia: R. Aitken & Son, 1790); Joseph Brevard, An Alphabetical Digest of the Public Statute Law of South-Carolina (Charleston, S.C.: J. Hoff, 1814), 3 vols.

profession,” he declared in 1803, “have ever been able to boast of possessing a complete collection of its laws.” Tucker nonetheless pulled together an updated version of Blackstone’s Commentaries specifically for Virginia, meshing Blackstone’s version of common law with Virginia case law and statutes.<sup>30</sup> Nor was the problem confined to the South. Samuel Alinson ran into similar difficulties when he tried to compile New Jersey’s statutes in 1776.<sup>31</sup> Case law was another matter altogether. Since judges did not routinely write down their decisions or keep them when they did, opinions from the colonial as well as the post-Revolutionary courts often had to be reconstructed after the fact. That problem continued even after legislation appointed reporters, charged with keeping track of court business. When Thomas Ruffin took over for a term as North Carolina court reporter in 1820, Archibald Murphey warned him about the difficulty of getting written opinions from judges. “I told Judge Henderson, it was essential to the Character of the Court that he should write more Opinions,” chided Murphey. Unfortunately for the less vigilant Leonard Henderson, Murphey had no intention of letting the matter go. He promised Ruffin to follow up and write Henderson again.<sup>32</sup>

The resulting volumes of statute and case law were not just compilations of facts. They had a point: not only did they force existing laws into a unitary body, but they also created the impression of orderly progress over time—or, in those volumes that began by chiding their predecessors for their sloppiness, they posited a point at which such orderly progress began.

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<sup>30</sup> For references to Tucker, see Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (Westport, Conn.: Greenwood Press, 1981), 6. The quote about Tucker’s frustrations with cataloging Virginia law is from the introduction to his version of Blackstone; see Sir William Blackstone, Blackstone's Commentaries: With Notes of References to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia, St. George Tucker, ed., 5 vols. (Philadelphia: William Young and Abraham Small, 1803), I: iv.

<sup>31</sup> For Alinson, see Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (Westport, Conn.: Greenwood Press, 1981), 6.

<sup>32</sup> Archibald D. Murphey to Thomas Ruffin, 4 August 1820, William Henry Hoyt, ed., The Papers of Archibald D. Murphey (Raleigh: Publications of the North Carolina Historical Commission, 1914), I: 169-70; quote from 170.

Typical were the remarks of John Faucheraud Grimké, who explained that his 1790 compilation of statutes was intended to bring order to the “profound confusion and Sibylline obscurity” of South Carolina law, the bedlam of which had lowered its citizens to “the condition of a slave.”<sup>33</sup> In 1836, Thomas Cooper began his revisal, which had been sanctioned by the general assembly, with similarly disparaging remarks about Grimké’s work, which Cooper thought characterized by “a latitude” that had been “exercised too loosely” and that he “dare not follow.”<sup>34</sup> Order had a price. These collections, even those sanctioned by the state legislatures, were all penned with a heavy editorial hand, containing only selected material. They elevated certain statutes or decisions as authoritative legal guides, even when competing ones still existed. The selection and organization, combined with accompanying annotations, smoothed over the contradictions by presenting statutes and cases as a logical development of particular ideas over time, artificially deriving consensus and certainty from a legal culture that actually led in multiple, often conflicting directions.

The results projected order on a past that was anything but orderly, when it came to law. More than that, they projected a particular order, framed in terms of the concerns of those in the immediate present who wrote the volumes. In particular, the compilations that reached backward in time created unitary bodies of law that did not actually reflect law then or the trajectory of law thereafter. It was not until legislatures made key changes in the structure of the legal system, of which these compilations were a part, that the legal systems in North Carolina and South Carolina provided a way to reconcile judges’ conflicting decisions or try to elevate one decision over another as “the” law that should guide future cases. It was not until state legislatures updated and reconciled their statutes and issued edited reports of decisions in law

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<sup>33</sup> Quote from Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (Westport, Conn.: Greenwood Press, 1981), 5; original in John Faucheraud Grimké, ed., The Public Laws of the State of South Carolina . . ., 2 vols. (Windham, Conn.: John Byrne, 1795-96), 1:1.

<sup>34</sup> Quote from Thomas Cooper, ed., The Statutes at Large of South Carolina, Edited, Under Authority of the Legislature (Columbia, S. C.: A. S. Johnston, 1836), I: iv.

and equity that those contradictions were eliminated. In fact, all the variations and conflicts that these volumes tried to explain away were all part of state law. These compilations—even those commissioned by the legislatures—could only do so much at this time: they tried to create an authoritative version of “the law” within legal systems where that had not really been possible and where, at least to a certain extent, it was still difficult, even in the 1830s and 1840s.

### **The Legal System behind the History**

Although historians now look to these materials to describe “the law,” they are better understood as attempts to realize change in law along those lines, rather than reflections of law. Nor did reformers’ vision represent the only available historical path. In fact, after breaking with England, lawmakers in both North Carolina and South Carolina structured the institutions of their states not only to keep legal authority in local hands, but also to place major decisions about public governance in local areas. Both colonies kept the basic court structure that was already in place, on paper: tripartite systems on the British model, with magistrates serving as at the first level, county courts at the next, and six circuit courts at the final level.<sup>35</sup> As in the British model, magistrates and county courts also dealt with a range of business that later moved to other areas of governance: overseeing poor relief and other matters of social welfare; regulating issues relating to the morals of both individuals and the larger community; setting weights and measures; levying and collecting taxes; attending to matters of local defense; and trying all but the most serious of civil and criminal matters. Of course, comparing the operation of colonial courts with those in post-Revolutionary period is a difficult proposition. Like many things about British rule in North America, the courts in the Carolinas had not always functioned according to

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<sup>35</sup> George Stevenson, “Higher Court Records,” in North Carolina Research: Genealogy and Local History, Helen F. M. Leary, ed., (Raleigh: North Carolina Genealogical Society, 1996), 331-44; Donald Senese, “Building the Pyramid: The Growth and Development of the State Courts System of Antebellum South Carolina, 1800-1860,” South Carolina Law Review 24 (1972): 357-89.

plan—when there was a plan.<sup>36</sup> The question is further complicated by the fact that the courts functioned even more sporadically during the war.

More important than any specific change, though, were the long term effects on the way law operated within this institutional structure. In North Carolina, for instance, delegates from Orange and Mecklenburg Counties had come to the state constitutional convention with instructions to follow a radical view of popular sovereignty: “Political power is of two kinds, one principal and superior, the other derived and inferior. . . . The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.”<sup>37</sup> Such a view had profound implications for the way that law operated, even without significant alteration of the system’s institutional structure. The colonial courts only appeared to be without an apex: the crown’s sovereignty had always been implied, although not always asserted. By the end of the colonial period, the crown had begun to do just that, entering into legal matters in the Carolinas and other colonies as part of its larger effort to shore up imperial control. Revolutionaries in the Carolinas eliminated that top level when they separated from Britain. As a result, their judicial structures no longer had the apexes they once had. Circuit courts now sat at the top of the institutional hierarchy. Co-equal and independent from each other, they exemplified a system in which authority over the definition of law was radically decentralized.

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<sup>36</sup> For the complications in the courts in these two colonies, see for instance: Kirsten Fischer, Suspect Relations: Sex, Race, and Resistance in Colonial North Carolina (Ithaca: Cornell University Press, 2001); Marjoleine Kars, Breaking Loose Together: The Regulator Rebellion in Pre-Revolutionary North Carolina (Chapel Hill: University of North Carolina Press, 2002); Rachel N. Klein, Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760-1808 (Chapel Hill: University of North Carolina Press, 1990); Donna J. Spindel, Crime and Society in North Carolina, 1663-1776 (Baton Rouge: Louisiana State University Press, 1989).

<sup>37</sup> Quoted in Lars C. Golumbic, “Who Shall Dictate the Law? Political Wrangling Between ‘Whig’ Lawyers and Backcountry Farmers in Revolutionary Era North Carolina,” North Carolina Historical Review 73 (1996): 67; original in William L. Saunders, ed., The Colonial Records of North Carolina, 10 vols. (Raleigh: State of North Carolina, 1886-1890), 10: 870a-b.

This situation owed a great deal to Revolutionary ideology, specifically the notion that sovereignty no longer radiated from the top, down, through the King. The state's Declaration of Rights then placed the Mecklenburg delegates charge—that “the principal supreme power is possessed by the people at large—at the center of state's new government. The first section announced, “That all political Power is vested in and derived from the people only.” The second section clarified what was meant by political power, defining it broadly by locating sovereignty over law and other matters of public governance in the people, who “have sole and exclusive Right of regulating the internal Government and Police thereof.” Those sentiments were then reflected in the state constitution, which went into great detail about the structure and responsibilities of the legislative branch, but did not establish the judiciary as an independent branch of the government.<sup>38</sup> After the Revolution, in 1798, Charles Pinckney explained the logic well in an address as governor of South Carolina. “It does not appear to me,” he argued, “that the same reasons exist in this country for giving such astonishing powers to the Judges as in England.”<sup>39</sup> He then elaborated, combining elements of republican notions of participatory government with liberal conceptions of individual sovereignty. The operation of law in a monarchical government, Pinckney explained, was fundamentally different than it was in a republic. The discretionary power of England's judiciary derived from the monarch's sovereign authority, which judges were bound to represent and protect. In a republic, the people delegated authority to different branches of government, but sovereignty remained with them, even in matters of law. Giving a single judge too much authority would lead inevitably to corruption

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<sup>38</sup> Quotes from the Declaration of Rights, passed in 17 December 1776, in William S. Powell, James K. Huhta, and Thomas J. Farnham, eds., The Regulators in North Carolina: A Documentary History, 1759-1776 (Raleigh: State Department of Archives and History, 1971), 552; see 555-62 for the 1776 state constitution.

<sup>39</sup> Quoted in Donald Senese, "Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina, 1800-1860," 24 South Carolina Law Review (1972): 357; from Governor Charles Pinckney, Message of 26 November 1798, SCDAH.

within the legal system and the erosion of liberty.<sup>40</sup>

Even so, the Carolinas' post-colonial court systems perpetuated British legal traditions as much as they departed from them, although not all of those elements were the most recent trends in Anglo-American law. Decentralization had characterized the early modern English legal system, which provided the framework for legal institutions and legal culture in colonial North Carolina and South Carolina. Early modern England had multiple legal arenas, with their own distinct bodies of law and overlapping jurisdictions. The system was highly localized in many respects. Criminal law, for instance, depended on people in local areas to identify offenses and on local officials to prosecute them, a situation that meant popular notions of justice and order permeated the system at its most basic level. British magistrates and county courts also handled most of the business of governance. By the late 1700s, political upheaval in England and changes in the intellectual culture resulted in the elevation of common law over other bodies of law, the professionalization of legal culture, and the systematization of law.<sup>41</sup> Those changes were evident in the Carolinas, as they were in other colonies, creating a group of lawyers who saw law and the legal system in those terms.<sup>42</sup> Yet the Revolution allowed waning elements of

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<sup>40</sup> Governor Charles Pinckney, Message of 26 November 1798. Also see Donald Senese, "Building the Pyramid: The Growth and Development of the State Courts System of Antebellum South Carolina, 1800-1860," South Carolina Law Review 24 (1972): 358-59.

<sup>41</sup> The literature on early modern English law is vast. But for these points, in particular, see: J. H. Baker, The Law's Two Bodies: Some Evidential Problems in English Legal History (New York: Oxford University Press, 2001); Amy Louise Erickson, Women and Property in Early Modern England (New York: Routledge, 1993); Laura Gowing, Domestic Dangers: Women, Words, and Sex in Early Modern London (Oxford: Clarendon Press, 1996); Cynthia B. Herrup, The Common Peace: Participation and the Criminal Law in Seventeenth-Century England (New York: Cambridge University Press, 1987); Barbara Shapiro, "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence (Berkeley: University of California Press, 1991); Keith Wrightson, "Two Concepts of Order: Justices, Constables, and Jurymen in Seventeenth-Century England," in John Brewer and John Styles, eds., An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries (New Brunswick: Rutgers University Press, 1980), 21-46.

<sup>42</sup> For discussions of parallels between the colonies and England in legal matters, particularly professionalization of its practice and systematization of its content, see: Bradley Chapin, Criminal Justice in Colonial America, 1606-1660 (Athens: University of Georgia Press, 1983);

early modern Anglo-American legal culture a new context in which to flourish.

Colonial conflicts, particularly the Regulator movements of the 1760s, also left their imprint on the post-colonial legal system. In both North Carolina and South Carolina, Regulators came from middling farm families in the newly settled back country—the middle and western areas of the colonies. Although the substantive issues were debt and the instability of their land titles, those concerns involved criticisms of the legal system, because that was the arena that oversaw such matters. In South Carolina, Regulators protested the centralization of the courts in Charleston, a situation that forced colonists in the back country to travel great distances for minor, routine legal matters or to forgo access to legal venues altogether. A central concern was the absence of legitimate legal systems within their communities. As they saw it, that situation threatened to destroy the very fabric of life. In North Carolina, the issue was also centralization, although within certain legal officials, not in geographic jurisdiction. Yet, as in South Carolina, North Carolina Regulators did not wish to overthrow law or even fundamentally alter it. To the contrary, law occupied a crucial place in their vision of well ordered communities. The problem, they maintained, lay in the operation of the legal system, which made it inaccessible and unresponsive to local concerns.<sup>43</sup>

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Cornelia Hughes Dayton, Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789 (Chapel Hill: University of North Carolina Press, 1995); Bruce Mann, Neighbors and Strangers: Law and Community in Early Connecticut (Chapel Hill: University of North Carolina Press, 1987); Lawrence M. Friedman, Crime and Punishment in American History (New York: Basic Books, 1993), 19-58; A. G. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810 (Chapel Hill: University of North Carolina Press, 1981). Although the bulk of the literature emphasizes those changes, other work points out the importance of continuity in the conception of law and its application, see: James Horn, Adapting to a New World: English Society in the Seventeenth-Century Chesapeake (Chapel Hill: University of North Carolina Press, 1994); John K. Nelson, A Blessed Company: Parishes, Parsons, and Parishioners in Anglican Virginia, 1690-1776 (Chapel Hill: University of North Carolina Press, 2001).

<sup>43</sup> For analyses that emphasize the centrality of law to the Regulators demands, see: Rachel N. Klein, Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760-1808 (Chapel Hill: University of North Carolina Press, 1990), especially 47-77; James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation," William and Mary Quarterly 34 (April 1977): 215-238. Also

These issues resonated in two registers. In an immediate and material sense, the Regulators achieved recognition of their specific grievances, which included the stabilization of land titles and debt collection, more equitable representation of the back country in political matters, and a more accessible legal system. In the 1760s, South Carolina's Regulators secured measures that created more district courts in the back country and gave the area more representation in the colonial legislature. In North Carolina, where the political distance between the Regulators and the colonial elite was more pronounced, the movement went down in bloody defeat. In the wake of that debacle, though, political leaders in North Carolina quietly began addressing some of the Regulators' concerns. If anything, the Revolution and its aftermath magnified some of the Regulators' grievances as well as their political leverage. Questions about debt, in particular, would continue to characterize political debate after the Revolution in both states, contributing among other things to the crisis that culminated in the collapse of the Confederacy and the adoption of the U.S. Constitution.<sup>44</sup>

Underlying the immediate, material concerns were broader cultural differences about the operation of law that extended beyond those directly involved in Regulation. The line of cleavage was not so much between rich and poor as it was between those who looked inward to their own neighborhoods and those who looked outward across the Atlantic. Many Carolina

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see: Mark Haddon Jones, "Herman Husband: Millenarian, Carolina Regulator, and Whiskey Rebel," Ph.D. diss., Northern Illinois University, 1983; Marjoleine Kars, Breaking Loose Together: The Regulator Rebellion in Pre-Revolutionary North Carolina (Chapel Hill: University of North Carolina Press, 2002); Marvin L. Michael Kay, "The North Carolina Regulation, 1766-1776: A Class Conflict," in Alfred F. Young, ed., The American Revolution (DeKalb: Northern Illinois University Press, 1976), 71-123.

<sup>44</sup> For the continuation of the issues that had characterized the Regulation in the Carolinas, see: Lars C. Golumbic, "Who Shall Dictate the Law? Political Wrangling Between 'Whig' Lawyers and Backcountry Farmers in Revolutionary Era North Carolina," North Carolina Historical Review 73 (1996): 56-82; Rachel N. Klein, Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760-1808 (Chapel Hill: University of North Carolina Press, 1990). The issues in the Carolinas were similar to those elsewhere, including Shays's Rebellion in Massachusetts, leading many national leaders to support the creation of a stronger national government, with the U.S. Constitution.

farmers—even those who were prosperous and owned slaves—lived in communities where most of life's business was done on a face to face basis. Economic transactions were negotiated orally, sealed with a handshake, backed by the word of the participants, and informed more by a sense of moral order rooted in popular evangelical Protestantism than by the calculus of capital. Such agreements rested on a direct knowledge of those involved, in a culture where people expected to know each other and to encounter each other frequently. Given that context, people measured the legal system's success in terms of its ability to respond to the particularities of each individual circumstance, valuing flexibility over consistency. For them, law was the means to a just outcome in daily life: it was an indeterminate collection of malleable principles that could guide the resolution of conflicts toward a result that best fit the circumstances of those involved and the needs of the community.<sup>45</sup>

That view of law made little sense in the world of the colonial elite whose commercial and cultural networks reached beyond their immediate communities to other North American colonies, the Caribbean, Africa, Britain, and the other national powers of Western Europe. Although clustered along the coast in cities such as New Bern, Edenton, and Charleston, they had begun to move into the back country during the 1760s, setting up business and coming into conflict with other residents there. The members of this cosmopolitan colonial elite tended to define law in terms of universal, immutable principles that existed outside of social context. Preferably, those principles should be stated clearly in writing and upheld consistently, regardless of those involved. Their protection, moreover, constituted the rationale of the legal system. Such a view of law was crucial in doing business across long distances. The coastal elite's strong cultural and intellectual ties to Britain, in particular, also disposed them to see law

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<sup>45</sup> These differences are identified as one of the underlying issues in the North Carolina Regulation a brilliant article by James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation," William and Mary Quarterly 34 (April 1977): 215-238. Also see Marjoleine Kars, Breaking Loose Together: The Regulator Rebellion in Pre-Revolutionary North Carolina (Chapel Hill: University of North Carolina Press, 2002).

as a profession that required mastery of a specific body of knowledge. Many had a university education, sometimes in England, and had trained with prominent lawyers, dutifully duplicating the English experience by poring over Blackstone, Coke, and Bacon.<sup>46</sup> I “had some conversation about Blackstone,” North Carolina’s James Iredell noted happily in his diary in 1772. “No one,” he added with the admiration of a true devotee, “can possibly read . . . [Blackstone] . . . without infinite Pleasure & Improvement.”<sup>47</sup> But this opponent of the Regulators and future U.S. Supreme Court justice mis-spoke, revealing in his enthusiastic certainty the intensely personal character of his reflections.

As James Iredell well knew, Regulators wished to keep law out of the clutches of professionally trained lawyers who read Blackstone on a regular basis. Lawyers, wrote famous North Carolina Regulator leader Hermon Husband, were the “greatest Burden and Bane of Society.”<sup>48</sup> They turned law into arcane rules known only to them, which they could manipulate at will to the detriment of everyone else, while charging high fees as the price of such obfuscation. “So great is the Lawyer’s Art,” scoffed Husband, “that he would Wire-draw reason

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<sup>46</sup> James P. Whittenburg, “Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation,” William and Mary Quarterly 34 (April 1977): 215-238. His observations, with regard to the cosmopolitan elite’s version of law, are also noted in: A. G. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810 (Chapel Hill: University of North Carolina Press, 1981); F. Thornton Miller, Juries and Judges versus the Law: Virginia’s Provincial Legal Perspective, 1783-1829 (Charlottesville: University of Virginia Press, 1994); Christopher M. Curtis, “Jefferson’s Chosen People: Legal and Political Conceptions of the Freehold in the Old Dominion from Revolution to Reform,” Ph.D. dissertation, Emory University, 2002.

<sup>47</sup> Don Higginbotham, ed., The Papers of James Iredell (Raleigh: Division of Archives and History, 1976), 1: 194; for the range Iredell’s reading in law, see 1: 56; Iredell embarked on his second reading of Blackstone in 1772, 1: 220n35. Like many lawyers of his generation, he saw Blackstone as the stylistic representation of order, not just a reference for the content of law; for this point, see Perry Miller, The Life of the Mind in America: From the Revolution to the Civil War (New York: Harcourt, Brace, and World, 1965), 117-55.

<sup>48</sup> Quoted in James P. Whittenburg, “Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation,” William and Mary Quarterly 34 (April 1977): 236; original in William K. Boyd, Some Eighteenth Century Tracts Concerning North Carolina (Raleigh: Edwards and Broughton, 1927), 291.

from the most sacred Truth, and make a Libel of the Lord's Prayer."<sup>49</sup> That not only made "Justice costly," but also "hard to come at." A petition signed by 250 free men in Anson County, echoed Husband's critique. "Instead Servants for the country's use," they wrote, lawyers had "become a nuisance, as the business of the people is often transacted without the least degree of fairness, the intention of the law evaded, exorbitant fees extorted, and the sufferers left to mourn under their oppression."<sup>50</sup> At issue was authority over law, as Husband also made clear, "We must make these men subject to the laws or they will enslave the whole community."<sup>51</sup> By "the laws," though, Husband meant something very different than Iredell's well worn copies of Blackstone.

The coastal elite found imperial efforts to centralize law even more troubling than the Regulators' attempts to keep it local. In addition to the well-known issues of taxation, trade, and political representation, imperial authorities also began to involve themselves in other matters that colonists had come to see as their purview. When the British empire began to make its presence in the North American colonies known in the 1760s, it trod particularly hard on the toes of the Carolinas' colonial elite, many of whom became Revolutionary leaders. Like Patriots elsewhere, those in the Carolinas' maintained that assertions of imperial authority undermined local control over law and other questions of governance that they saw as falling within their own purview. "Our property at your disposal, our lives and liberties at your discretion, we are

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<sup>49</sup> Quoted in James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation," William and Mary Quarterly 34 (April 1977): 236; original in Archibald Henderson, "Hermon Husband's Continuation of the Impartial Relation," North Carolina Historical Review 18 (1941): 62-63.

<sup>50</sup> Quoted in James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation," William and Mary Quarterly 34 (April 1977): 236; original in William K. Boyd, Some Eighteenth Century Tracts Concerning North Carolina (Raleigh: Edwards and Broughton, 1927), 417.

<sup>51</sup> Quoted in James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation," William and Mary Quarterly 34 (April 1977): 236; original in William K. Boyd, Some Eighteenth Century Tracts Concerning North Carolina (Raleigh: Edwards and Broughton, 1927), 343.

subject at any time to whatever arbitrary laws your Parliament may think fit to send us,” wrote James Iredell, in 1774, oblivious to the fact that he was now making the same case for local control of law as the Regulators he had dismissed as a bunch of hooligans just a few years earlier. “In the name of God,” he fumed, “what is our condition.”<sup>52</sup> Particularly problematic to the Carolinas’ elite were imperial interventions in slavery, which accompanied the empire’s efforts to extend its reach into colonial affairs. As recent work suggests, concerns about that situation solidified many elite southerners’ support for the Patriot cause.<sup>53</sup>

This conflicted backdrop informed the decentralized legal systems that emerged from the Revolutionary era. Those who supported the system did so for different reasons, not all of which were comparable, let alone compatible. Some saw it as the realization of hard fought claims dating back to Regulation. Some saw local control, which invested sovereignty over law in the people, as a central component of the Revolution’s ideological experiment. Some saw it merely as a means of solidifying their authority in their own bailiwicks, particularly their own plantations. Some saw it as the necessary cost of pacifying their own political opponents and unifying support for the Revolution within their own colonies. And some saw it in terms of some combination thereof. After all, the Regulation cast a long shadow over the Revolution. As Whig leaders who had been opposed to the Regulation movement became Revolutionary leaders

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<sup>52</sup> Don Higginbotham, ed., The Papers of James Iredell (Raleigh: Division of Archives and History, 1976), 1: 254.

<sup>53</sup> Although Britain never tried to include slaves as subjects within the empire as comprehensively as either the French or the Spanish, it did try to do so in the late colonial period, as part of the effort to consolidate the empire. That produced conflict between British officials and colonists, who were unwilling to cede de facto authority over their slaves to the crown’s representatives. See Christopher L. Brown, “Empire without Slaves: British Concepts of Emancipation in the Age of the American Revolution,” William and Mary Quarterly 56 (April 1999): 273-306; Jeffrey Robert Young, Domesticating Slavery: The Master Class in Georgia and South Carolina, 1670-1837 (Chapel Hill: University of North Carolina Press, 1999); Woody Holton, Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia (Chapel Hill: University of North Carolina press, 1999). For similar conflicts elsewhere in the British Empire, see: Thomas C. Holt, The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain (Baltimore: Johns Hopkins University Press, 1992).

in the Carolinas, many Regulators and their sympathizers thought long and hard before deciding which side to join. Although some did join the Patriots, others maintained a critical distance, as reluctant Revolutionaries, if not outright loyalists during the War.<sup>54</sup>

Once the Revolution was over that loose coalition fell apart. In 1798, when Governor Charles Pinckney was advocating limitations on the judiciary's power, based on the sovereignty of the people, he actually did so with a very different vision of law than the delegates from Mecklenburg County, North Carolina, which had been a hotbed of Regulator activity—although they too identified the people as sovereign. In Pinckney's view, the people might be the abstract source for the law, but the mechanics would still be handled by their chosen representatives in the legislative branch, with proper attention to established legal authorities. By contrast, the Mecklenberg delegates believed that the people should define and administer most areas of law themselves. State leaders, like Pinckney, who favored a more professional and scientific approach to law began working to realize their vision of law, harnessing Revolutionary rhetoric of a legal system based in the sovereignty of the people to do so.

Those in this group agreed on fundamental elements in the legal system, even when they often disagreed about how best to realize them in practice. In practice, common assumptions about law structured even their most bitter of partisan differences over the legal system. Take the differences between the North Carolina's James Iredell and South Carolina's Charles Pinckney. Iredell, a staunch Federalist, reflected the position of his party on the independence of the judiciary. "In a Republic," according to Iredell, "the Law is superior to any or all Individuals, and the Constitution, superior even to the Legislature, and of which the Judges are the guardians and protectors."<sup>55</sup> Pinckney, who served his state in various capacities, including two terms as

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<sup>54</sup> Marjoleine Kars, Breaking Loose Together: The Regulator Rebellion in Pre-Revolutionary North Carolina (Chapel Hill: University of North Carolina Press, 2002), 206-14; Rachel N. Klein, Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760-1808 (Chapel Hill: University of North Carolina Press, 1990), 78-108.

<sup>55</sup> Quoted in Don Higginbotham, ed., The Papers of James Iredell (Raleigh: Division of Archives and History, 1976), 1: xc.

governor, was a Federalist turned Jeffersonian Republican. Reflecting the position of his new party, Pinckney opposed granting unchecked authority to the judiciary. He saw the legislature, with its elected representatives, as the branch that should express the people's sovereign authority over law. Yet, given their views of law as a consistent set of universal principles, both men were wary of direct local control of law. As governor in 1798, for instance, Pinckney proposed changes that would have limited the legal authority of both judges and local communities.<sup>56</sup> While circuit court judge in North Carolina, Iredell complained constantly of those without legal training, from the meddlesome demands of community members who subverted the legal process in an effort to realize their views of justice; the "silly harangues of pettifogging" lawyers who emphasized customary notions of justice and not the rules laid out in law books; and the ineptitude of judges who lacked knowledge of the appropriate legal authorities.<sup>57</sup> Among the two parties' leadership, the disagreement was over the balance of powers between the judicial and legislative branches. Outside that small circle, the point of conflict was over local control of law: Pinckney's attempt to limit the power of the judiciary and Iredell's efforts to extend it both removed authority over law from local areas. On that score, both men were in a decided minority, at least within their own states.

### **The Courts and the Content of Law**

Perhaps the most dramatic evidence of the commitment to local control over law is the post-Revolutionary legal system's imperviousness to change. In both North Carolina and South

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<sup>56</sup> After first extolling the power of juries over judges as the sovereign expression of the people's control over law, Pinckney then advised the legislature establish set criminal penalties. Such a measure would limit not only judges, but also juries which often made recommendations about punishments. See Donald Senese, "Building the Pyramid: The Growth and Development of the State Courts System of Antebellum South Carolina, 1800-1860," South Carolina Law Review 24 (1972): 357-59; original in Governor Charles Pinckney, message dated 28 November 1798, SCDAH. For the role of juries in sentencing, see: John Drayton to the Judges of the Courts of Law in South Carolina, 1 February 1800, John Drayton Papers, SCL.

<sup>57</sup> See Don Higginbotham, ed., The Papers of James Iredell (Raleigh: Division of Archives and History, 1976), 1: lxxviii-lxxix; quote from 2: 115-17.

Carolina, the legislatures made liberal use of their authority to alter their states' legal systems, throwing them into such states of flux that the details can be difficult to follow, let alone fathom.<sup>58</sup> Yet local areas still retained considerable authority over law, even in the face of changes that took elements of the legal system in other directions.

In the decades immediately following the Revolution, the legislatures in both states further localized the legal system by widening its institutional base. South Carolina's 1785 Court Act moved jurisdiction over a broad range of civil and criminal matters from the state's six district courts to thirty-four county courts. Those changes moved the bulk of court business to the new county courts, which oversaw all debt cases up to £20, other civil cases with damages up to £50, and criminal cases that did not involve corporal punishment.<sup>59</sup> The immediate impetus for the creation of more courts was the post-Revolutionary economic crisis and escalating conflicts over debt collection. But the new system also placed magistrates, mainly local elites without legal training, at the center of the legal system, giving them extensive discretion over the interpretation and application of law. That aspect of the system is what critics singled out as the most offensive part of what they saw as a disastrous experiment. "It was," wrote one detractor, "too much dependent upon ignorant and rough men for its enforcement." As a result, it was marked by "mistakes, prejudices and gross errors" instead of the accurate, objective, and reasoned pursuit of the law.<sup>60</sup> Such complaints, however, obscured the system's actual popularity, particularly in the back country, where many appreciated a legal system that did not

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<sup>58</sup> In both North Carolina and South Carolina, the courts had been created through statute, not the state constitutions. Although the principle of judicial independence obtained in theory, the courts were dependent on the legislatures in practice.

<sup>59</sup> Thomas Cooper and David J. McCord, eds., Statutes of South Carolina, (Columbia, S. C., 1840), 7: 211-42.

<sup>60</sup> Quotes from R. W. Gibbes, "Early History of the Judiciary of South Carolina," in John Belton O'Neill, Biographical Sketches of the Bench and Bar in South Carolina (Charleston: S. G. Courtenay and Co., 1859), I: x.

depend on lawyers or officials with formal legal training.<sup>61</sup>

The North Carolina legislature also enhanced local authority over law in the decades following the Revolution. Debate initially revolved around extending the jurisdiction of magistrates, which had been among the Regulators' key demands. These measures—known as the “ten pound law” of 1785 and the “twenty pound law” of 1787—gave magistrates jurisdiction in all civil matters with damages up to £20 and in a wide range of criminal matters, except the most serious offenses. More than that, magistrates acquired significant legal discretion. The laws, in historian Lars C. Golumbic's apt description, allowed magistrates to “leave Blackstone and the perplexing body of common law behind and adjudicate simply, personally, and pragmatically.”<sup>62</sup> The legislature underscored its intent through additional measures that regulated attorney's fees, practice, and licensing. All these laws were widely reviled by professionally trained lawyers. “[M]y Passions,” fumed James Iredell's friend William Hooper, are “agitated with the unbecoming means which had been used to cast a stigma upon the bar.”<sup>63</sup>

The state's lawyers were unable to budge the legislature on the issue of magistrates' jurisdiction. Not only did the legislature slowly increase magistrates' jurisdiction after the “twenty pound law” of 1787, but it also added district courts, moving by increments toward the system that South Carolina had enacted in 1785. Then, in 1806, the legislature replaced the eight district courts with superior courts in each county. A key group of lawyers in the legislature opposed the change, because it required those who wished to practice law as their sole profession

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<sup>61</sup> Rachel N. Klein, Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760-1808 (Chapel Hill: University of North Carolina Press, 1990), 135-42.

<sup>62</sup> Lars C. Golumbic, “Who Shall Dictate the Law? Political Wrangling Between ‘Whig’ Lawyers and Backcountry Farmers in Revolutionary Era North Carolina,” North Carolina Historical Review 73 (1996), 74.

<sup>63</sup> Quoted in Lars C. Golumbic, “Who Shall Dictate the Law? Political Wrangling Between ‘Whig’ Lawyers and Backcountry Farmers in Revolutionary Era North Carolina,” North Carolina Historical Review 73 (1996), 78; original in Griffith J. McRee, Life and Correspondence of James Iredell, 2 vols. (New York: D. Appleton and Company, 1857-1858) 2: 132-33.

to travel to each county for court, instead of having business come to them at the district court house. Adding insult to injury, the act also reduced the fees of the attorneys who practiced in the superior courts. “The prospect is dull to men of eminence,” sulked Archibald Murphey in a letter to his mentor William Duffy, who had led the opposition to the measure in the legislature. The future as Murphey saw it was bleak: “Under this System Genius will languish, enterprise grow feeble and Petit-fogging become fashionable.” “Had not I expended so much money in making an establishment,” he concluded, “I would break up and go to Nashville.” According to one historian writing in the early twentieth century, the act did lead to something of legal exodus from the state. Among the defectors were John Haywood, noted for his collection of statutes as well as his work on the bench and his training of a host of prominent lawyers. William Duffy apparently considered relocating as well, although he did not end up doing so.<sup>64</sup>

Even reforms that did centralize the system on paper ran afoul of the opposition in practice. Such was the fate of the 1799 overhaul of South Carolina’s courts. The legislature did scrap the county court system, following the advice of Aedanus Burke and John Faucheraud Grimké, two professionally trained lawyers who were avid proponents of legal reform and who had been appointed to a sub-committee to revise the state’s legal system after the Revolution. Yet legislators only went so far down the path laid out by the reformers. The major change was that the new district courts were run by judges, who were appointed by the legislature and who usually had legal training. In the same breath, however, the legislature also affirmed the basic principle of localism, replacing the thirty-four county courts with twenty-eight districts courts—a difference so minor it hardly seemed worth the effort.<sup>65</sup>

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<sup>64</sup> Quote from Archibald D. Murphey to William Duffy, 6 January 1806, William Henry Hoyt, ed., The Papers of Archibald D. Murphey (Raleigh: Publications of the North Carolina Historical Commission, 1914), I: 8; for discussion of the effects of the law, see 7-9n2.

<sup>65</sup> Donald Senese, "Building the Pyramid: The Growth and Development of the State Courts System of Antebellum South Carolina, 1800-1860," South Carolina Law Review 24 (1972): 357-89; Thomas Cooper and David J. McCord, eds., Statutes of South Carolina, (Columbia, S. C., 1840), 7: 290-300.

If judges with legal training now had an established place in the courts, they were still working in local areas, where communities could still control significant parts of the legal process, as we will see in more detail in the next chapter. In particular, judges operated in a context where people in local communities expected to participate actively in the entire system. Friends and relatives of those involved who could make their wishes known, did so, mobilizing support and exerting considerable pressure on the court. Those not directly involved in a case often weighed in as well, out of a sense of proprietary interest as members of the affected community. The 1811 grand jury presentment in Greenville District, South Carolina is suggestive of the context in which judges worked. The jurors presented “the Legislature an address of thanks, for having appointed the Hon. Abraham Nott, who they commended for filling “the good old maxim of common law”: “It is not enough that a Judge does justice but he ought likewise to give general satisfaction.” “That good old maxim,” the jurors believed, had “been realized in the conduct of the honourable Judge, and witnessed by the experience of the people.”<sup>66</sup> Judges were expected to give satisfaction to the people, and they referred to such expectations frequently. Those who failed in this regard found their terms unbearably miserable.

Even more stunning, in terms of the sheer ambiguity of the results, were efforts to create more powerful appellate courts at the apex of the judicial structure. South Carolina’s 1790 constitution created a Constitutional Court of Appeals, which heard appeals from common law courts. There was no similar appeals court for cases in equity, until 1808. North Carolina added a similar high court in 1799, which heard cases in both law and equity. These courts, however, were extremely limited in their authority. The high courts were actually extensions of the district courts, composed as they were of district judges who met after their circuits to discuss appeals. Although the South Carolina appeals courts did have final authority over their cases and points of law or equity, its North Carolina counterpart did not, at least initially. It was a Court of Conference, which met after the district courts to allow judges to confer over appeals and

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<sup>66</sup> Charleston Courier, 29 May 1811.

particularly difficult cases. The Court of Conference, however, functioned as an advisory body, making recommendations that were returned with the cases to the district courts where the final decisions were rendered. Legislators rejected other proposals to create a more powerful high court on the grounds that it would too distant geographically from most people, too expensive for them to make use of, and too concerned with the abstractions of law to render justice.<sup>67</sup>

At issue were two distinct views of the legal system that echoed those from the Regulator period. Defending the unsuccessful 1799 reform measure to replace the Court of Conference with a stronger Court of Errors and Appeals, James Iredell's close associate Samuel Johnston argued that such a court was necessary to "the due execution of the laws" by which the people "hold their liberty and property." "Under our present system," he explained, "what is law at one place is not law at another. The opinions of Judges vary; and the decision of one Judge is disregarded by another." The situation made little sense to him, which was why he supported a central court "which shall govern all the varying decisions which may be given in various parts of the State." Only then, would "some security . . . be had for the due administration of justice." The majority, however, saw no problem at all with the current system. As Representative Irwin argued, the "great end of law is to obtain justice for individuals, and therefore the administration of justice ought to be made as convenient to the citizens at large as possible." For Irwin and others, the legal system was about resolving specific conflicts and achieving justice for those involved, not elaborating a uniform body of law that would hold everywhere, without attention to context. The facts of the case were the central components of justice, not abstract points of law.

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<sup>67</sup> For South Carolina, see: Donald Senese, "Building the Pyramid: The Growth and Development of the State Courts System of Antebellum South Carolina, 1800-1860," South Carolina Law Review 24 (1972): 357-89. For North Carolina, see: William J. Adams, "Evolution of Law in North Carolina," North Carolina Law Review 2 (1923-24): 133-45; Atwell Campbell McIntosh, "The Jurisdiction of the North Carolina Supreme Court," North Carolina Law Review 5 (1926-27): 5-29; John V. Orth, "North Carolina Constitutional History," North Carolina Law Review 70 (1991-1992): 1759-87; Walter Parker Stacy, "Brief Review of the Supreme Court of North Carolina," North Carolina Law Review 4 (1925-1926): 115-17; George Stevenson, "Higher Court Records," in North Carolina Research: Genealogy and Local History, Helen F. M. Leary, ed. (Raleigh: North Carolina Genealogical Society, 1996), 331-44.

Given that, he could not see “that this Judge of Appeal would be more likely to do justice than a Jury.” So why have one at all?<sup>68</sup>

The North Carolina legislature did expand the authority of the Court of Conference, but the process was so convoluted that it can be difficult to identify the decisive moment of change. In 1804, the North Carolina legislature made the Court of Conference a court of record, which turned it something more like an appellate court in the sense that it could now render decisions, instead of just dispensing advice to district courts, although it is somewhat unclear how that worked in practice. In 1806, the legislature renamed the body the “Supreme Court,” a change that some have identified as a turning point in the court’s history, but one with very limited results. Writing in 1912, historian William Henry Hoyt described it in this way: the court was “held twice a year at Raleigh by two or more of the Superior Court judges, to which were submitted, not appeals, but difficult or doubtful cases arising on the circuits.”<sup>69</sup> Those judges did not always reach consensus in each case. Even when they did, they still issued separate opinions and made no attempt to reconcile conflicting judgments on points of law. The court, in other words, was supreme in name only. That is why some commentators identify 1810 as the key date in the court’s history, for that was when the legislature approved the appointment of a Chief Justice to coordinate the different opinions of the justices. Of course, the legislature neglected to specify how the Chief Justice would be selected. As late as 1834, it was still being done by drawing lots—that year, Thomas Ruffin won.<sup>70</sup> Only in 1818 did the court become “supreme” in more than name, acquiring its own panel of judges and authority over points of law and equity. It was an unexpected victory for reformers, who seemed a little taken aback. “This,” wrote a

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<sup>68</sup> Quote from Raleigh Register and North Carolina Weekly Advertiser, 10 December 1799. The debate was closely followed elsewhere in the state; see for instance, North Carolina Mercury and Salisbury Advertiser, 26 December 1799.

<sup>69</sup> William Henry Hoyt, ed., The Papers of Archibald D. Murphey (Raleigh: Publications of the North Carolina Historical Commission, 1914), I: 7n2.

<sup>70</sup> William Gaston to Robert Donaldson, 3 January 1834, William Gaston Papers, #272, box 4, folder 61, SHC.

delighted Archibald Murphey to Thomas Ruffin after the general assembly's vote, "will surprise you as it has every one here."<sup>71</sup>

Although South Carolina's appellate courts had more authority from the outset, they met with more opposition thereafter. The creation of a two, parallel appeals courts—one for common law and one for equity—militated against the notion of a single, authoritative court that defined "the law" of the state. The two courts issued conflicting decisions on similar issues, a situation complicated by legal loyalties to either the common law or equity. Where equity's defenders, such as James L. Petigru, characterized it as the very best of the English legal tradition, proponents of common law criticized equity for muddying the legal waters and undercutting the legitimacy of the entire system. Governor John Lyde Wilson, for instance, once likened equity court to the French Directory, a five-headed monster that would destroy the state if nothing were done to stop it.<sup>72</sup> In 1824, reformers finally convinced the legislature to abolish the parallel system, creating a single appeals court with its own panel of judges who heard cases in both law and equity. The number of equity judges were reduced at the same time. But commitment to this system proved superficial. Backlash followed in the wake of the nullification crisis, when

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<sup>71</sup> Quote from Archibald D. Murphey to Thomas Ruffin, 3 December 1818, in J. G. de Roulhac Hamilton, ed., The Papers of Thomas Ruffin (Raleigh: Edwards and Broughton, 1918), I: 211. The change provoked a flurry of correspondence, as it constituted a major change of considerable interest: Romulus M. Saunders to Thomas Ruffin, 17 December 1818, I: 212; James Mebane to Thomas Ruffin, 18 December 1818, I: 212-13; George E. Badger to Thomas Ruffin, 18 December 1818, I: 213; Duncan Cameron to Thomas Ruffin, 25 December 1822, I: 273; Hamilton, ed., The Papers of Thomas Ruffin. For these changes, see: William J. Adams, "Evolution of Law in North Carolina," North Carolina Law Review 2 (1923-24): 133-45; Atwell Campbell McIntosh, "The Jurisdiction of the North Carolina Supreme Court," North Carolina Law Review 5 (1926-27): 5-29; John V. Orth, "North Carolina Constitutional History," North Carolina Law Review 70 (1991-1992): 1759-87; Walter Parker Stacy, "Brief Review of the Supreme Court of North Carolina," North Carolina Law Review 4 (1925-1926): 115-17; George Stevenson, "Higher Court Records," in North Carolina Research: Genealogy and Local History, Helen F. M. Leary, ed. (Raleigh: North Carolina Genealogical Society, 1996), 331-44.

<sup>72</sup> The reference is from Donald Senese, "Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina, 1800-1860," 24 South Carolina Law Review (1972): 365.

the appeals court issued a particularly unpopular ruling. The question was over the validity of a loyalty oath, required of all those holding public office, which demanded allegiance to the state over the Union. Although the immediate issues were states' rights and the Union, the authority of the judiciary was also at stake. When the appellate court, led by Justices John Belton O'Neall and David Johnson declared the loyalty oath unconstitutional, civil unrest broke out. The legislature retaliated against the appellate court by abolishing the entire court system in 1835 and reestablishing the structure in place before the changes of 1824, with all the attendant ambiguities. Now, however, those ambiguities were heightened by recent events, which undercut the authority of the appellate courts. Legislators then added a Court of Errors. Although charged with overseeing constitutional issues and reconciling differences between decisions in law and equity, the court's authority was ill defined and its mandate was even less clear. In 1847, David Johnson, who was then governor, pleaded for the creation of single, independent high court, with clearly defined duties, but to no avail, until 1859, right before the outbreak of the Civil War. Fittingly, John Belton O'Neall was installed as Chief Justice.<sup>73</sup> Yet, as the selection of Chief Justice suggests, the court's authority was still stronger on paper and in the minds of its supporters than it was in practice.

Even in North Carolina, the commitment to localized law undercut the move toward greater centralization. The legislature remained divided in its support for the new appellate court. So the North Carolina State Supreme Court limped along after its creation in 1818, trying to acquire institutional legitimacy in an openly hostile environment. Its critics launched measures to eviscerate it or to abolish it altogether in nearly every legislative session during the 1820s and 1830s. Even some of the court's justices were less than enthusiastic—which was not

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<sup>73</sup> Donald Senese, "Building the Pyramid: The Growth and Development of the State Courts System of Antebellum South Carolina, 1800-1860," South Carolina Law Review 24 (1972): 357-89; Thomas Cooper and David J. McCord, The Statutes at Large of South Carolina: Containing the Acts Relating to Charleston, Courts, Slaves, and Rivers (Columbia, S.C., 1840), vol. 7, 163-342. For a critique of the court system, as it was established in 1835, see: "The Judiciary System of South Carolina," 2 Southern Quarterly Review (November, 1850).

particularly surprising, since they were appointed by the court's legislative critics. Because some of its justices could not be bothered with regular attendance, the court met irregularly until the mid-1830s. The resulting backlog of cases further tarnished the court's reputation, which was not particularly lustrous to begin with.<sup>74</sup> In fact, the court was so unpopular by the 1830s that even its staunchest supporters began to doubt its efficacy. When William Gaston took the bench in 1833 the court's supporters hoped that his reputation might help repair the damage and begged him to consider the appointment for that reason. "We think," wrote Governor David L. Swain, that "your appointment to the Bench the only event which will preserve the Court and certainly the only event which can render it worth preserving."<sup>75</sup> The court's unpopularity, however, gave Gaston pause. "The possibility that sooner or later these efforts of Demagogues may be successful," he wrote, made him "exceedingly loth [sic] to place himself in so precarious a situation."<sup>76</sup> Yet he agreed and a few months later found himself drawing lots with Thomas

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<sup>74</sup> The North Carolina State Supreme Court only barely survived repeated efforts to dismantle it, see: Raleigh Register, 17 December 1819 (a bill to reduce the salaries of state supreme court judges, a recurring effort meant to discourage the centralization and professionalization of the judiciary); 8 December 1820 (to reduce the salaries of state supreme court judges and to abolish the state supreme court); 30 November 1821 (to limit the meetings of the supreme court to once a year, thereby limiting the authority of the court); 26 December 1823 (to reduce the salaries of the state supreme court judges); 26 November 1824, 17 December 1824, 24 December 1824 (to abolish the state supreme court); 2 January 1829 (to establish an extra term to meet in Salisbury and other places throughout the state, which were efforts to re-create the old district system); 23 January 1829 (to reduce the judges' salaries); 26 November 1829 (to abolish the supreme court and reestablish the conference court); 25 November 1830 (to have the court meet in other parts of the state); 6 January 1831 (to reduce the judges' salaries); 18 January 1833, 25 January 1833 (to reduce judges' salaries); 26 November 1833 (to abolish the court); 3 December 1833 (to replace the court with the old district system and a conference court); 17 December 1833 (to reduce judges' salaries). Also see: Wythe Holt and James R. Perry, "Writs and Rights, 'Clashings and Animosity': The First Confrontation Between Federal and State Jurisdictions," Law and History Review 7 (1989): 89-120; Walter F. Pratt, Jr., "The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges," Law and History Review 4 (1986): 129-59.

<sup>75</sup> David Swain to William Gaston, 3 September 1833, William Gaston Papers, #272, box 4, folder 59, SHC.

<sup>76</sup> Quote from William Gaston to Thomas Ruffin, 25 August 1833, box 4, folder 58, William Gaston Papers, #272, SHC. Supporters of a strong appellate court saw the appointment of

Ruffin to see who would be Chief Justice. Their compatriot, Justice Daniel, did not participate: although he did not indicate why, he had no desire to take on the judicial mantle of Chief Justice.<sup>77</sup>

The efforts to create a hierarchical court system and regularize its operation necessarily involved the content of law. The issue not just who would apply the body of laws, although that was certainly an element. It was also a matter of how that body of laws would be defined. “The democratic power of these states is systematically organized and arrayed against the Judiciary, as a political body,” wrote one irate South Carolina Federalist in 1803, in the heady aftermath of the French Revolution and the onset of hostilities with Britain. “It may be, however” the writer continued, “that the spirit which dictates those acts of hostility to the Judiciary, extends its views still farther, and looks with jealous malignity at the laws themselves.”<sup>78</sup> Although the editorialist missed the mark in positing a grand plot of Francophile democrats to overthrow the government, he grasped the essential connection between the institutional structures of the legal system and the content of law.

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Gaston as key and the resulting correspondence reveals a great deal about the problems they sought to resolve, see: William Gaston to Hannah Manly, 31 December 1832, box 4, folder 54; T.P. Devereux to William Gaston, 15 August 1833, box 4, folder 57; William Gaston to T.P. Devereux, 19 August 1833, box 4, folder 57; Thomas Ruffin to William Gaston, 21 August 1833, box 4, folder 58; T.P. Devereux to William Gaston, 21 August 1833, box 4, folder 58; William Gaston to T.P. Devereux, 26 August 1833, box 4, folder 58; David Swain to William Gaston, 27 August 1833, box 4, folder 58; T.P. Devereux to William Gaston, 30 August 1833, box 4, folder 58; Attempt to Destroy Supreme Court, 26 November 1833, from the Raleigh Register, box 4, folder 60; Attempt to Destroy Supreme Court, 10 December 1833, from the Raleigh Register, box 4, folder 60; Joseph Hopkinson to William Gaston, 28 December 1834, box 5, folder 67 (this letter refers to events in South Carolina as well); B.F. Perry to William Gaston, 10 July 1836, box 5, folder 73 (this letter actually refers to South Carolina as well); all in William Gaston Papers, #272, SHC. Thomas Ruffin to William Gaston, 25 August 1833, J. G. de Roulhac Hamilton, ed., The Papers of Thomas Ruffin (Raleigh: Edwards and Broughton, 1918), II: 92-96.

<sup>77</sup> William Gaston to Robert Donaldson, 3 January 1834, William Gaston Papers, #272, box 4, folder 61, SHC.

<sup>78</sup> Charleston Courier, 18 June 1803.

William Gaston made the same connection in less conspiratorial terms when introducing the 1818 bill that would establish North Carolina's appellate court as an independent body with precedent setting authority, "There must be in every free community some Supreme Court of Judicature to decide conclusively on every question of Law, to compel all inferior tribunals to adhere to the same exposition of the public will, and to [make] . . . Civil Conduct permanent, uniform and universal." Without such a court, "an individual can not be certain what is law to-day will be deemed law to-morrow; or that what is right in his neighbor may not be adjudged wrong in himself." That meant that "property . . . [would] . . . become insecure, and liberty itself endangered by fluctuating and inconsistent adjudications." He ended with the metaphor of slavery, which had been central to the rhetoric of the Revolution and which still carried considerable resonance, particularly in the slave South: "Miserable is that servitude where rights are ambiguous, and the law unknown."<sup>79</sup> In this court, a select group of trained professionals would preserve liberty by tending to the abstractions of law. Thomas P. Devereux threw that same point back at Gaston in the 1833, when the future of North Carolina's appellate court hung in the balance. "We never can do without a Supreme Court of some kind," wrote Devereux, hoping to convince Gaston to serve on it, because "the business of the circuits in our widely extended country never can be done consistently."<sup>80</sup> For lawyers like Devereux and Gaston, liberty and justice depended on consistency, uniformity, and universality within the body of state law. That required a designated court to iron out the contradictions, clean up the mistakes, and clarify the ambiguities that proliferated in the district courts to produce "the law" that applied everywhere in the state. For them, law that was only interpreted and administered locally was no law at all.<sup>81</sup>

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<sup>79</sup> Quote from Raleigh Register, 4 December 1818 (report by the legislature subcommittee, chaired by William Gaston, on creating a separate appellate court with authority over law).

<sup>80</sup> T.P. Devereux to William Gaston, 21 August 1833, box 4, folder 58, William Gaston Papers, #272, SHC.

<sup>81</sup> This same argument, linking the need for uniformity in law to liberty appeared repeatedly in reformers' efforts to centralize and systematize law in the post-Revolutionary period. Joseph

What professionally trained lawyers valued was what others deplored. As they saw it, the centralization of legal authority that reformers advocated would remove law from the people and tend toward corruption. But more than that, centralization would take power over law's content away from the very people with the necessary knowledge to make informed judgments about justice in their communities. They saw law as principles with multiple valences. Legal principles, moreover, were a means, not an end: they were valuable insofar as they helped achieve liberty, but they did not constitute liberty. Imposing inflexible rules would turn law into tyranny, by privileging the abstractions of law at the expense of the lived experience of justice.<sup>82</sup>

That vision of law comes through most clearly in petitions to governors for pardons. Requests for pardons expressed a view of law that merged legal principles with a particularistic view of justice. The reasons for pardons were as varied as individuals involved. The defendant was a young man who made an unwise choice because of his youthful inexperience. But he had learned his lesson and would now make a valuable citizen, if his sentence was commuted. The defendant was old and could not sustain the punishment. The defendant had an innocent family which depended on him and would suffer needlessly, should the punishment be carried out. The

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Gales, editor of the Raleigh Register, tended to print articles and series promoting such a view of law, see: 3 September 1804, 24 September 1804, and 1 October 1804 (a series of articles advocating, among other things, the rationalization of property law and the criminal code); 13 December 1810 (address of Governor John Tyler of Virginia critiquing the judicial system in that state); 21 November 1817 (Governor John Branch's address to the legislature); 5 December 1817 (report of the legislative subcommittee, chaired by Bartlett Yancey, on creating a separate appellate court); 19 December 1817 (speech by Abner Nash advocating reform of the criminal code and the creation of a penitentiary); 6 March 1818 (an article critical of the inconsistencies resulting from current common law practices); 24 December 1824 (speech by J.A. Hill against the act to abolish the state supreme court).

<sup>82</sup> In Law, Labor, and Ideology in the Early American Republic (New York: Cambridge University Press, 1993). Christopher Tomlins makes the same point relative to laborers and the development of labor law. Invoking the notion of "police," which located legal authority within community, some labor leaders argued that decisions about the economic development and the distribution of resources and labor should be openly debated and determined through democratic means that included a range of community members. They opposed the notion that such matters belong in the courts, where judges interpreted the issues through contract law and imposed them from above.

offense was exceptional and would not be repeated, since the defendant had otherwise been hardworking and upstanding. Therefore no punishment was necessary. The offense was mitigated by circumstances beyond the defendant's control, and did not merit punishment. And so it went. Petitioners usually acknowledged the defendants' guilt. For the purposes of the petition, they also acknowledged the necessity of recognizing the offense in the abstract. But that may have been a convention, for the benefit of the governor, rather a reflection of their own views of law. For their reasoning tended turn back on itself in ways that undercut their commitment to those abstract principles. In particular, petitioners' views of how law should be applied were linked to the circumstances and the individuals involved, which caused them to distinguish degrees of criminality and guilt that other conceptions of law did not recognize. Petitioners also assumed that their word, as people with direct knowledge of those involved, had enough legal weight to counter the outcome in the case.<sup>83</sup>

All those differences are apparent in the responses of two North Carolina governors who were advocates of legal reform—James Iredell, Jr. who served in the late 1820s and Governor David J. Swain, who served in the early 1830s. Both generally refused pardons, giving lengthy explanations for their denials. Petitions, they explained, were not enough to establish the basis of a pardon, since local knowledge could never be a substitute for the objectivity of the law. Even with the appropriate evidence—submitted by judges, regarding the miscarriage of the law and legal process—they granted few pardons. As they maintained, justice could only be realized by maintaining the abstractions of law and applying them consistently to everyone, without exception.<sup>84</sup>

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<sup>83</sup> This analysis is based on about 650 letters and petitions related to pardon requests to North Carolina governors, from 1787 through 1845. This correspondence is in two different record groups, Governors' Papers and the Governors' Letter Books, vols. 6-36, NCDAH. Although only governors had pardoning power, many petitions were directed to the general assembly as well. Although I did make thorough search of these, they can be found scattered amongst the petitions in Session Records of the General Assembly, NCDAH

<sup>84</sup> For Iredell, see, for example: Denial of Pardon of Thomas Denby, 3 March 1828, pp. 28-29; Denial of Pardon for Nathaniel Clark, 19 May 1828, p. 63; Denial of Pardon for James Cotton,

The position of governors Swain and Iredell did not make them particularly popular. The context in both popular culture and the developing legal institutions tended to favor the side of localism, even after greater systematization was introduced. In this regard, reformers had a point: more than anything, ambiguity characterized both statute and case law in the immediate post-Revolutionary period. Once state legislators agreed that state law needed more definition and systematization, the job still took a great deal of time and effort. Then, the efforts only accomplished so much. Even after statutes were cleaned up and collated, for instance, they still covered only a smattering of legal issues. Like other states, North and South Carolina made common law operative in areas not covered by statute. Although many professionally trained lawyers relied on body of established legal authorities on common law, including Blackstone, the common law tradition was capacious enough to allow for considerable ambiguity. The decentralized court structure then accentuated that ambiguity, by allowing for multiple interpretations of common law rules—like those of Elihu Hall Bay on wife beating.

The slave law provides an excellent illustration of the situation. Although referred to as “codes,” the slave statutes in North Carolina and South Carolina did not constitute a comprehensive body of law, as did French and Spanish slave codes.<sup>85</sup> Colonial assemblies had

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19 May 1828, p. 64; Denial of Pardon for Henry Hedgepeth, 20 May 1828, p. 67; all in vol. 27, Governors’ Letter Books, NCDAH. For Swain, see, for example: Denial of Pardon to Robert Potter, 1 May 1833, pp. 64-65; David Swain to Henry Potter, Regarding the Denial of Pardon of Benjamin Seaborn, May 1834, pp. 204-205; David Swain to J. W. Capers and others, Regarding the Pardon of Benjamin Seaborn, 30 May 1834, pp. 208-210; all in vol. 30, Governors’ Letter Books, NCDAH. In an effort to control the pardoning process, Governor John Drayton made a similar appeal for requests to be documented, although he allowed more latitude for juries to recommend sentencing; John Drayton to the Judges of the Courts of Law in South Carolina, 1 February 1800, John Drayton Papers, SCL

<sup>85</sup> Colonial slave “codes” were simply collections of statutes thought necessary for the governance of slaves at that time; they did not attempt to control all aspects of the master/slave relation. For analyses that emphasize the ad hoc, incomplete nature of colonial statutes relating to slavery, see: Christopher L. Brown, “Empire without Slaves: British Concepts of Emancipation in the Age of the American Revolution,” *William and Mary Quarterly* 56 (April 1999): 273-306; Jonathan Bush, “Free to Enslave: The Foundations of Colonial American Slave Law,” *Yale Journal of Law and the Humanities* 5 (1993): 417-70; Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989); William M. Wiecek, “The Statutory Law

established and defined slavery on an ad hoc basis. Neither colony, moreover, had defined slaves' basic relationship to law: were they subjects within the legal order or were they outside it? Unable to evade that question after the Revolution, lawmakers in the two states tackled it from different directions. In North Carolina, they applied common law to slaves in all areas not covered by statute, resolving the immediate question by bringing slaves into the existing legal order and providing a body of law that could apply to them. Yet, in so doing, legislators applied an existing body of law to establish slaves' relationship to law, not to alter their legal status relative to free people. South Carolina's lawmakers determined slaves' legal position through statutes alone, situation that produced more ambiguities, given that the statutes were not collected or widely circulated for so long.<sup>86</sup>

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of Slavery and Race in the Thirteen Mainland Colonies of British America," William and Mary Quarterly 34 (April 1977): 258-280. For an example of the ambiguity of these statutes, in a common law regime, see Don Higginbotham and William S. Price, Jr., "Was it Murder for a White Man to Kill a Slave? Chief Justice Martin Howard Condemns the Peculiar Institution in North Carolina," William and Mary Quarterly 36 (October 1979): 593-601.

<sup>86</sup> In both states, state legislators' efforts to clarify slaves' legal status actually opened up more questions than they resolved. Those determinations occupied both state legislators and the courts, at all levels, until emancipation. North Carolina lawmakers, in particular, continually struggled with the difficulties of meshing existing, often ambiguous statutes with a common law regime that did not specifically apply to slaves. That opened a series of troubling questions about slaves' status in law. For instance, did the right to trial by jury extend to them? Could slaves claim the common law right to self-defense? Did a master's discipline ever become murder, as it did for other domestic dependents? Lawmakers at the state level continually wrestled with these issues. Particularly in the immediate post-Revolutionary period, they did apply a more generous definition of common law rights to slaves and even to consider granting them constitutionally defined rights as members of the public order. For cases that centered on these issues, see: State v. Weaver, 2 Haywood 54 (1798); State v. Hall 1 N.C. 150 (1799); State v. Boon, 1 N.C. 169 (1801); State v. Reed 9 N.C. 454 (1823). North Carolina statutory changes also reflected similar concerns, making the willful killing of a slave murder unless done in resisting or under moderate correction in 1791 (Haywood, Manuel of the Laws of North Carolina, 2:141); extending trial by jury to them (Laws of 1793, chapter 5); giving the right of appeal to slaves at all levels of the system (Laws of 1807, chapter 10); making manslaughter a crime against slaves (Session Laws of North Carolina, 1817, 18-19). But these rights were undercut by decisions that clearly differentiated slaves from other free people on the basis of race, which became one vector in determining who possessed individual rights and who did not. North Carolina's application of common law to slaves was unusual, but the logic that structured the legal status of slaves was not. South Carolina also drew heavily on the same common law

In this context, vast areas of law fell to local areas not just for interpretation, but for its actual definition. Consider the treatment of slave violence in Kershaw District, South Carolina. Early South Carolina statutes did allow for the prosecution of masters and other whites for such acts, but subsequent acts muddied the waters and clarification did not come from either the legislature or the appellate court until late in the antebellum period. When local legal officials faced with cases of violence against slaves, it was neither practical nor feasible for them to wait for direction from elsewhere in the legal system. Tellingly, though, they did not even bother asking. Instead, they took it upon themselves to interpret the statutes. Those interpretations resulted in the periodic prosecution of whites for violence against slaves, assault as well as manslaughter and murder—even though historians’ readings of statute and case law would suggest that such cases should not exist. Kershaw District even occasionally prosecuted masters, when violence resulted in a slave’s death.<sup>87</sup>

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principles for domestic dependents in its statutes and the interpretation of them, which opened similar kinds of questions. The traces of common law logic in South Carolina slave law are also apparent in John Belton O’Neill, The Negro Law of South Carolina (Columbia, S.C., 1848). Lawmakers at the state level, however, did not keep pace with all the ambiguities in slave law; in the case of higher courts, they could not clarify these issues, until they had the authority to do so. As a result, the bulk of this legal work fell to local jurisdictions in the decades following the Revolution.

<sup>87</sup> For the cases, see: State v. Samuel Nettles, 1806 (assault of a slave by a master); State v. Davis Cooper, 1808 (murder of a slave by a third party); State v. Thomas English and William Hammonds, 1808-1809 (murder of a slave by a master and another third party); State v. Samuel Coates, 1809 (murder of a slave by a third party); State v. John Havis, 1819 (murder of a slave by a master); State v. Robert Thompson, 1818 (murder of a slave by a third party); State v. James Barfield, Jr. and James Barfield, Sr., 1818 (murder of a slave by third parties); State v. Ephraim Stratford, Joiner Middleton, and Douglas Minton, 1820 (murder of a slave by third parties); State v. Robert Bell, John Bell, and Andrew Hood, 1821 (murder of a slave by third parties); all in Court of General Sessions, Indictments, Kershaw District, South Carolina Department of Archives and History (SCDAH). State v. John Brown, 1797 (assault of a slave, whether Brown is the master or a third party is not stated); County and Intermediate Court, Sessions Docket, Kershaw District, SCDAH. The treatment of slave killings at the local level was distinctly at odds with the trajectory of the issue in the statutes and appellate courts. Before 1821, the South Carolina high court occasionally gave a broad interpretation of the law to allow for manslaughter charges, because of a 1740 statute that included "undue correction" along with "heat of passion" within manslaughter. In 1821, the legislature criminalized the murder of a slave and killing "in the heat of passion," but omitted the offense of killing by "undue correction." The appellate

Like Judge Elihu Hall Bay, local officials and community members of Kershaw District looked to common law, in its open-ended sense as an adaptable set of principles. Of course, neither officials nor community members left an explanation of their logic—a fact that, while frustrating, underscores the operation of assumptions about law as a means to resolve particular conflicts, rather than an end in itself. But the statement of the offense on the forms and the manner of prosecution indicates that local officials were using the longstanding common law practice of prosecuting violent acts on the basis of the harm done to the public order. The process was outlined clearly in justice's manuals from both the colonial and post-Revolutionary period. As other historians have noted, those manuals were the most available and widely used legal references. If local officials worked from any reference at all, it was usually those manuals. The public order, sometimes called the public peace or the peace of the state, was defined as the collective interests of all those included within the public order. The concept was purposefully ambiguous to allow for discretion in defining and prosecuting crime. Among other things, that ambiguity enabled legal officials to proceed with criminal prosecution in a wide range of matters, as long as they identified a threat to the public peace or damage to the public body. In

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court interpreted that omission to mean that those offenses were no longer crimes, although it reversed itself in 1839. In 1841, an act criminalized excessive punishment of a slave, without sufficient provocation. In the 1840s and 1850s, the appellate court began construing the statutes limiting a masters' abuse of slaves to third parties as well. For the interpretation of the 1821 statute, see State v. Raines, 3 McCord 315 (S.C., 1826), the implications of which made it nearly impossible to secure a conviction against any white for killing a slave. The court later reversed itself; arguing the "undue correction" was covered by "heat of passion" in the 1821 statute; State v. Gaffney, Rice 431 (S.C., 1839); State v. Fleming, 2 Strob. 464 (S.C., 1848); State v. Motley et al., 7 Rich. 327 (S.C., 1854). The appellate court extended its statute prohibiting masters' excessive abuse of slaves to third parties, although the application was limited and still allowed "justified" violence: State v. Wilson, Cheves (Law, 1839-40), 163 (S.C., 1840); State v. Boozer, 5 Strob. 22 (S.C. 1850); State v. Harlan, 5 Rich. 471 (S.C. 1852). These decisions were an extension of the logic previously applied in civil cases, which allowed masters damages when third parties abused slaves without justification; the appellate court never recognized the assault of slaves as a criminal offense in common law, see: State v. Maner, 2 Hill 355 (S.C., 1834); White v. Chambers, 2 Bay 71 (S.C., 1796); Witsell v. Earnest, 1 N. and McC. 183 (S.C. 1818); Richardson v. Dukes, 4 McCord 93 (S.C. 1827); Grimké v. Houseman, 1 McMull. 132 (S.C., 1841); Caldwell ads. Langford, 1 McMull. 277 (S.C., 1841).

particular, it allowed them to turn offenses into crimes that they would not otherwise have been able to prosecute as such: not only violence against slaves, but also wife beating, child abuse, and other public disturbances that did not result in property damage or an injury to a specific individual. In all these cases, the offense to one became an offense to all: victims acquired legal visibility through their connections to the public order, not as individuals whose rights had been violated.<sup>88</sup> One Kershaw District overseer accused of killing a slave, for instance, tried to define his offense as civil matter, which involved only the specific individuals involved and not the larger public order. In the initial hearing, he offered to pay out damages as he would in a civil case, reimbursing the master for cost of the slave, instead of standing trial on criminal charges of murder. The offer, however, was refused. In this instance, local officials—perhaps influenced by the slave’s master or those who witnessed the event—thought his actions to be more serious. They had larger ramifications that could not be rectified through compensation, alone. The overseer had to answer to the larger public for his actions as well. In making this call, local officials were defining the actual content of law through their creative interpretation of existing rules.<sup>89</sup>

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<sup>88</sup> See the sections on the treatment of various crimes, peace bonds, slaves, wives, and children in: William Simpson, The Practical Justice of the Peace and Parish-Officer, of His Majesty’s Province of South-Carolina (Charleston, 1761); John Haywood, The Duty and Office of Justices of the Peace, Sheriffs, Coroners, Constables, &c. According to the Laws of the State of North Carolina (Raleigh: 1808); John Faucheraud Grimké, The South Carolina Justice of the Peace (Philadelphia, 1788). These echo the logic in English guides, such as The Compleat Justice: Being an Exact and Compendious Collection Out of Such as have Treated of the Office of Justices of the Peace, but Principally Out of Mr. Lambert, Mr. Crompton, and Mr. Dalton (London, 1667) as well as the concepts laid out in Sir William Blackstone, Commentaries on the Laws of England (rpt. ed.; Chicago: University of Chicago Press, 1979), vol. 4, on public wrongs.

<sup>89</sup> State v. Robert Thompson, 1818, Court of General Sessions, Indictments, Kershaw District, SCDAH. For the cases, see: State v. Samuel Nettles, 1806 (assault of a slave by a master); State v. Davis Cooper, 1808 (murder of a slave by a third party); State v. Thomas English and William Hammonds, 1808-1809 (murder of a slave by a master and another third party); State v. Samuel Coates, 1809 (murder of a slave by a third party); State v. John Havis, 1819 (murder of a slave by a master); State v. Robert Thompson, 1818 (murder of a slave by a third party); State v. James Barfield, Jr. and James Barfield, Sr., 1818 (murder of a slave by third parties); State v. Ephraim Stratford, Joiner Middleton, and Douglas Minton, 1820 (murder of a slave by third parties); State

That did not mean that local officials in Kershaw District treated every case of violence against slaves in the same way. To the contrary, the discretion allowed in legal localism resulted in multiple outcomes, as the next chapter will show, swinging from considered mercy to arbitrary vengeance. While making prosecuting some offenses against slaves as crimes and incorporating them into the public order, legal localism could also have the opposite effect, sanctioning brutal violence against slaves in the name of the public order as well. Consistency, however, was not the point. Nor was the protection of individuals' rights, abstracted from the larger community. Every case was its own, particular event. But, as the rest of this section will show, legal localism

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v. Robert Bell, John Bell, and Andrew Hood, 1821 (murder of a slave by third parties); all in Court of General Sessions, Indictments, Kershaw District, South Carolina Department of Archives and History (SCDAH). State v. John Brown, 1797 (assault of a slave, whether Brown is the master or a third party is not stated); County and Intermediate Court, Sessions Docket, Kershaw District, SCDAH. The treatment of slave killings at the local level was distinctly at odds with the trajectory of the issue in the statutes and appellate courts. Before 1821, the South Carolina high court occasionally gave a broad interpretation of the law to allow for manslaughter charges, because of a 1740 statute that included "undue correction" along with "heat of passion" within manslaughter. In 1821, the legislature criminalized the murder of a slave and killing "in the heat of passion," but omitted the offense of killing by "undue correction." The appellate court interpreted that omission to mean that those offenses were no longer crimes, although it reversed itself in 1839. In 1841, an act criminalized excessive punishment of a slave, without sufficient provocation. In the 1840s and 1850s, the appellate court began construing the statutes limiting a masters' abuse of slaves to third parties as well. For the interpretation of the 1821 statute, see State v. Raines, 3 McCord 315 (S.C., 1826), the implications of which made it nearly impossible to secure a conviction against any white for killing a slave. The court later reversed itself, arguing the "undue correction" was covered by "heat of passion" in the 1821 statute; State v. Gaffney, Rice 431 (S.C., 1839); State v. Fleming, 2 Strob. 464 (S.C., 1848); State v. Motley et al., 7 Rich. 327 (S.C., 1854). The appellate court extended its statute prohibiting masters' excessive abuse of slaves to third parties, although the application was limited and still allowed "justified" violence: State v. Wilson, Cheves (Law, 1839-40), 163 (S.C., 1840); State v. Boozer, 5 Strob. 22 (S.C. 1850); State v. Harlan, 5 Rich. 471 (S.C. 1852). These decisions were an extension of the logic previously applied in civil cases, which allowed masters damages when third parties abused slaves without justification; the appellate court never recognized the assault of slaves as a criminal offense in common law, see: State v. Maner, 2 Hill 355 (S.C., 1834); White v. Chambers, 2 Bay 71 (S.C., 1796); Witsell v. Earnest, 1 N. and McC. 183 (S.C. 1818); Richardson v. Dukes, 4 McCord 93 (S.C. 1827); Grimké v. Houseman, 1 McM. 132 (S.C., 1841); Caldwell ads. Langford, 1 McM. 277 (S.C., 1841). Also see Thomas D. Morris, Southern Slavery and the Law, 1619-1860 (Chapel Hill: University of North Carolina Press, 1996), 201-2.

did not include or exclude systematically and it did not draw rigid distinctions between “the law” and the wide range of customary practices outside it. That combination—of intense particularism in its approach to individual people and its expansive corporatism in its approach to what constituted law—allowed people without the full range of civil and political rights places within the legal system where they could make their interests known.

Local jurisdictions would continue to operate as if they could define law for most of the period between 1787 and 1840. They did so not from ignorance or even defiance, but from a continuing commitment to a view of law that allowed for multiple outcomes. Even after changes that centralized legal authority at higher levels of the legal system, local jurisdictions still retained considerable discretion because so many points of law remained unsettled. By the 1840s, the expectation in both states was that the lower levels of the court system were subordinate to the appellate courts. Even so, it would be a mistake to overstate the power of appellate decisions. In the early 1830s, reformers in North Carolina were still trying to establish their vision of the law and the legal system, but were, as yet, uncertain of the outcome. “Much is to be feared from the circuit court judges who act [three words illegible] against it,” wrote T. P. Devereux in 1833 when it seemed that the court’s future depended on Gaston’s nomination. If anything, the appellate courts’ position in South Carolina became more unsettled over time, given the nullifiers’ animosity and the way a radical vision of states’ rights militated against all centralized government authority, even within their own state. At the same moment when North Carolina’s appellate court was finally acquiring some legitimacy in the late 1830s, South Carolina’s nullifiers were dismantling the judicial system in their state. That legacy left its mark, even when the appellate courts’ were reestablished. Still, it was not that the higher courts’ decisions carried no authority or consequence by the 1830s. They did. But reading back the legal authority that appellate courts ultimately acquired invests their decisions with far more significance than they actually had for most of the period between the Revolution and the Civil

War.<sup>90</sup>

North Carolina's and South Carolina's higher courts could neither represent nor impose a unitary definition of "the" law for much of the post-Revolutionary period, because so many people, including other legal officials, did not see law in that way. Reformers' principles had yet to displace other conceptions of what law was and how it should be determined. Given the ways this localized view of law had been built into the very structures of the legal system, it would be difficult to displace completely. The next chapter will focus on its local operation, focusing more particularly on those people—namely white women, slaves, and children—who do not usually figure prominently in the history of law and politics.

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<sup>90</sup> Quote from T.P. Devereux to William Gaston, 21 August 1833, box 4, folder 58, William Gaston Papers, #272, SHC. State v. Mann again provides an excellent example, for it did not constitute the last word on violence against slaves and the court modified it in subsequent decisions. For a general discussion, see: Thomas D. Morris, Southern Slavery and the Law, 1619-1860 (Chapel Hill: University of North Carolina Press, 1996), 161-208.