1997

A Bibliography of Virginia Legal History Before 1900, Second Edition

William Hamilton Bryson

University of Richmond, HBryson@Richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications

Part of the Legal Writing and Research Commons

Recommended Citation


This Book is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
A BIBLIOGRAPHY OF VIRGINIA LEGAL HISTORY BEFORE 1900

Second Edition

by

WILLIAM HAMILTON BRYSON

William S. Hein & Co., Inc.
Buffalo, New York
1997
PREFACE

I would like to acknowledge the patience and kindness of the many librarians who have aided me in the course of the compiling of this work, in particular the members of the staffs of the Virginia Historical Society, the Library of Virginia, the University of Richmond, the College of William and Mary, and the University of Virginia and especially E. Lee Shepard and Margaret Cook. The editorial assistance of Sara B. Bearss was generously given and gratefully received. I hope that this bibliography may in return be of service to all of them. The Virginia section of Pimsleur's Checklists is printed here with the kind permission of the American Association of Law Libraries. The illustrative title pages are reproduced with the permission of the Library of Virginia.

W. H. Bryson

Richmond, Virginia
January 1, 1997
INTRODUCTION

Seventy-five years ago, legal history was well understood to be the study of the origins and development of the current law, both substantive and procedural. (The practicing lawyer needs both goals and methods.) Legal history dealt with the law of property, contracts, persons,1 torts, crimes, and actions so far as the last can be considered separately from the first five and their numerous subdivisions.

Recently, this field of study has been belittled as "lawyers' legal history," "legal formalism," and "old" legal history. It is necessary to consider these charges in order to explain the scope of this bibliography.

I

Morton J. Horwitz coined the expression "lawyer’s legal history" in an article entitled "The Conservative Tradition in the Writing of American Legal History."2 This article is an ideological attack on the political opinions of Roscoe Pound and James McClellan as expressed in their publications on legal history. Horwitz defines lawyer's legal history as "the study of legal doctrine . . . devoted to finding the origin of doctrines."3 Where this study deviates from Horwitz's political beliefs, it is said to be a "special blindness."4 Horwitz believes that "[t]he main thrust of lawyer’s legal history, then, is to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is."5

---

1 Including constitutional law.
3 Ibid., p. 276.
4 Ibid., p. 277.
5 Ibid., p. 281.
Although William E. Nelson has accepted the term "lawyers' legal history," he disagrees with Horwitz's denigration of Pound, James B. Ames, Christopher C. Langdell, and the others. Nelson uses the term "to apply only to work addressing current legal questions and not to work examining the origin of modern rules."

Although it is obvious that lawyers and academics can distort and fabricate legal history to support the positions of their clients or their personal political philosophies, it is not a foregone, preordained necessity. The mere addressing of current legal questions from a historical perspective does not force one to any particular political conclusion, as Nelson has pointed out. The discovery of the origin of a legal doctrine or the understanding of its development might as easily lead to the support of a poor person as a rich one, a Democrat as a Republican, a liberal as a conservative.

As an example, the historical explanation of Virginia constitutional law in A. E. Dick Howard’s “For the Common Benefit: Constitutional History in Virginia as a Casebook for the Modern Constitution Maker” in 1968 helped prepare the drafting and promulgation of the new constitution of Virginia in 1971.

An anonymous article in 1858 strongly advocated that the law be changed to make interested parties competent as witnesses. This proposal bore fruit eight years later in the form of a new statute.

Walter Wadlington considered the historical origins and development of the prohibition of interracial marriages in Virginia and concluded that, if there ever were a legal basis for the statutes forbidding such marriages, they were no longer justified. He advocated that the statutes be declared unconstitutional, and they did.

The Prudent Man Statute in 1778 was a result of the recommendation of Lewis Powell Jr., the Virginia attorney who had demonstrated significant historical background in the law.

A brief written for partisan purposes history and be scholarly without partisanship. An academic researcher writing can put such work into perspective. Examples are Thomas Jefferson’s "The Marginal Sea: An Example of Virginia Constitutional Law" and Lewis Powell Jr., "The Marginal Sea: An Example of Virginia Constitutional Law".

The study of the origin of the law, in my opinion, a worthwhile endeavor, the law, a significant dimension. Was the law eternally valid or no longer valid, perhaps a cause for retention, change.

The reason professional lawyers write legal history is that they have a strong interest in the law that lay historians lack. The law that lay historians lack is the history and development of their law practice and how it relates to the practice today.

---


7 Ibid., pp. 185-200.

8 Ibid., p. 235, n. 1.


16 Appendix to Thomas Jefferson’s General Court of Virginia (Charlottesville, 1807).


18 Change is not necessarily improvement; it should outweigh dislocation.
Introduction

and concluded that, if there ever were valid reasons in the past for the statutes forbidding such relationships, they were no longer justified. He advocated that the courts declare the statutes to be unconstitutional, and they did.

The Prudent Man Statute was enacted in Virginia following the recommendation of Lewis F. Powell, Jr., in an article giving significant historical background.

A brief written for partisan purposes can include much legal history and be scholarly within the bounds of its legitimate partisanship. An academic researcher alert to the purposes of such writing can put such work to good non partisan use. Two examples are Thomas Jefferson's "Whether Christianity is a Part of the Common Law" and David Flaherty's "Virginia and the Marginal Sea: An Example of History in the Law."

The study of the origin and development of the law is, in my opinion, a worthwhile endeavor. It gives the reason for the law, a significant dimension. Whether the reason is good or bad, eternally valid or no longer viable, will be a matter of opinion; perhaps a cause for retention, perhaps the impetus for change.

The reason professional lawyers should be encouraged to write legal history is that they are trained in the technicalities of the law that lay historians lack; moreover, the daily experiences of their law practice give an insight that academics lack. The


16 Appendix to Thomas Jefferson, Reports of Cases Determined in the General Court of Virginia (Charlottesville, 1829), pp. 137–42; this was the substance of Jefferson’s argument in Godwin v. Lunan, Jeff. 96 (1771).


18 Change is not necessarily improvement; if change is to be made, progress should outweigh dislocation.
social historians and the political historians often appear to be blissfully ignorant of the practical, actual significance of minute technical legal distinctions upon which a lawsuit may stand or fall. The academic lawyer too often lacks an understanding of the subtle relationships of a lawyer and a judge, of a lawyer and his or her client on an individual level, the general relationships between the bar and the bench, and the legal profession and the general public. These are eternal problems whose solutions yet elude.

II

This approach to legal history has also been described as formalistic. As Frederick Schauer has pointed out, legal formalism is a loosely used term of denigration, a straw man created by the legal realists and their followers. Ernest J. Weinrib has recently looked behind the sneer of formalism to find a generally accepted definition: "[f]ormalism postulates that law is intelligible as an internally coherent phenomenon." Schauer goes on to argue that legal formalism is not necessarily "inexorable" and is not all bad and that "presumptive formalism" might even have some virtues. Weinrib states that "formalism, properly understood, is indispensable to our understanding of law." Formalism is "[t]he logical interdependence of the parts [of the law] to each other and to the whole." Formalism is the general stating of the law; for example, "the law of trespass." The other side of the coin of useful and philosophically just law is applied to achieve these ends. Judges totally ignore the social utility of some precedent, then they are ruled by feelings of utility and justice. Legal formalism and generality are often at odds in legal realism when carried to anarchy. Anarchy is not law.

Legal formalism is the study of law as a uniform system of principles. The stating and understanding of utility. If the law is not socially useful or not philosophically just, the law can be changed. The holder of sovereign legislative power can change the law at will. Sir Rupert Cross in his book *Precedent in English Law* (3d ed.; Oxford, 1979) has shown how judges bound in theory by the law can and do avoid injustice.

If the law is not socially useful or not philosophically just, the law can be changed. The holder of sovereign legislative power can change the law at will. Sir Rupert Cross in his book *Precedent in English Law* (3d ed.; Oxford, 1979) has shown how judges bound in theory by the law can and do avoid injustice.

25 Peter Stein’s description of the social utility of the law is formalism. The study of the history of the law suggests that the law grows. The law started as a particular rule in a dispute between two individuals. When enough acceptable principles or generalizations could be and were to be used, the law was formalism. The development of a body of law by the accumulation of individual cases and in a particular case, what to do with that body of law by one time-honored method.
Legal History before 1900

...historians often appear to be... the actual significance of minute... from... a lawsuit may stand or fall. A judge, a lawyer, and the legal profession and the problems whose solutions yet

...has also been described as... by the law; formalism is the law. The other side of the coin is that the law should be socially useful and philosophically just. Therefore, the law should be applied to achieve these ends. And indeed it is. However, if the judges totally ignore the settled law as established by legal precedent, then they are ruling according to their own personal feelings of utility and justice. If this is carried too far, then the predictability and generality of the law is lost. The concepts of legal realism when carried too far lead to particularity and then to anarchy. Anarchy is not law.

Legal formalism is the statement and classification of legal principles. The stating and arranging of the law is necessary to its understanding and utility. If the law is not arranged, it is not understood or certainly not as quickly understandable, nor is it serviceable. Arrangement leads to system and to order and to internal consistency. Thus utilitas is dependent upon and served by elegantia. Social utility is aided by legal formalism.

The study of the history of Roman law and English common law suggests that the law grew from individual determinations. The law started as a particularistic application of a sense of justice in a dispute between two individuals. The result was a precedent. When enough acceptable precedents had accumulated, then generalizations could be and were made. The generalization of the law is formalism. The development of the law is the continuing accumulation of individual precedents based on or guided by earlier cases, and it is the broadening of the general statements of the law. The more we have of the former, the better will be the latter, and vice versa.

---


26 Logische geschlossenheit, logical completeness.

27 This is not to say that a particular statement of the law is always correct. Jurists can and do err; the concept of stare decisis can be carried too far. Nor is it to say that the general law that is generally good always produces justice in a particular case; what to do when it does not is a separate issue.

28 A bad law is not made good by being fit into a logical classification. Perhaps it will stand out more clearly as bad leading to its removal from the body of law by one time-honored method or another.
A Bibliography of Virginia Legal History before 1900

The general definition of the law is the task of the scholars; its specific application is the duty of the practitioners, both judges and advocates. The scholars naturally emphasize *elegantia* and the practitioners *utilitas*. However, *utilitas* demands a consistency in the law; predictability is useful. And on the other hand, a legal theory that is beautifully logical but inapplicable or irrelevant to society is vain and silly.

Young scholars build on the work of their elders. Ideas are passed on by written and by oral means, and there is a continuum of legal scholarship from the Twelve Tables of ancient Rome to the present. Our understanding of the law has grown through the need to accommodate both theory and practice and to reconcile each to the other.

One of the dimensions of legal scholarship is legal history. In order to know what the law is, it is helpful to know what it was. The present is the product of the past. The mere knowledge of the change is instructive, and the understanding of the reason for the change is enlightening. If we know the failures of the past, we can avoid repeating them in the future. The successes of the past can be emulated and preserved. Thus, the study of the legal doctrines and practices of the past is to be encouraged.

As for jurisprudence, whatever one's philosophical approach to the law may be, it must be confirmed and validated by experience, and experience is history, whether ancient or recent. Law is a social phenomenon, not a mathematical abstraction.

The formal statement of the law is necessary for its analysis; this is one of the purposes of legal history. The question, next, is what are the sources of the law.

The Sources of the Law

A. Generally

The law in order to exist must be perceived. It cannot be followed or used if it is not known. In general, then, the law is what it is stated to be. The law is the formal statement of the law.

---

29 It is to be remembered that Bracton was a knowledgeable Romanist, and even countries such as Japan that had no European colonial connections have studied and accepted parts of European law, such as commercial law and international law.

---

29 In some jurisdictions, they are
Introduction

1. Legislative Sources of the Law

The supreme source of the law is a formal constitution that is intended to be the statement of the fundamental and ultimate law in force. Constitutions are usually the work of broad based conventions and are usually formally ratified by the people to be governed by it. Although such ratification is not necessary, it is considered helpful in obtaining broad and voluntary support for it as law.

Constitutions can be ignored, amended, or replaced with new (and, one hopes, better) ones. Constitutional ideas and principles are not always good nor above criticism; on the other hand, successful clauses have been copied from old by new constitutions and from one nation by others. Not only are constitutions printed but subsequently the debates and subsidiary documents of the constitutional conventions are published as well.

National and provincial legislatures enact statutes, and local governing boards and councils enact ordinances, within their political boundaries. Administrative agencies create law in the form of regulations. This legislative activity generates a substantial literature. At the end of each session of the legislature, there appears the Acts of Assembly, which are the chronological publication of the legislative enactments. Statute law in force is frequently compiled by subject into codes. The code can be abridged in various ways for the convenience of particular classes of user; a good example of this is the federal Internal Revenue

---

30 In some jurisdictions, they are called Statutes at Large.
I!I

16  A Bibliography of Virginia Legal History before 1900

Code. The various administrative agencies issue printed editions of their rules and regulations.

These legislative forms of law — constitutions, statutes, ordinances, and regulations — are statements of the law. They are subject to change by repeal by the legislative body that created it or by a superior one. The state legislature, for example, can declare a local ordinance to be void. Furthermore, a court can declare a statute to be void as violative of a superior constitutional law. (It would not be reasonable or logical for a legislature to make the ultimate determination of the constitutionality of its own statute. It must be presumed that its own statute was considered to be constitutional when it was enacted, or else it would not have been done.)

2. Judicial Sources of the Law

The primary function of legislative bodies is to declare the general law. The primary function of the law courts is to apply the general law to specific, individual situations. The courts, in the process of adjudication, state general principles of law and state the specific application of the law. Therefore, whether a judge is creative or not, adjudication states the law and is thus a source, whether original or not, of the law.

As with legislative bodies, there is a hierarchy of courts. Naturally, the statements of the higher courts will be accorded greater deference as to the validity of their statements of the law. However, all courts, appellate, trial, and administrative, are actively involved in the process of stating and restating the law, declaring what the unwritten common law is and what an act of legislation means.

The opinions of the judges are printed in books called reports of cases. The courts also publish their general rules of court, which dictate the procedure to be followed in the litigation of a particular matter. In addition to these professional books, accounts of notable trials have been published for popular consumption.

31 Of course, the legislature can enact a private bill, and the court can declare a general law to be invalid.

3. Legal Scholarship

Even though the word community has no official, opinions of legal scholars (academic or secondary scholarship, jurisprudence, the philosophy of law) are authoritative. Academic or secondary scholarship is concerned with the ultimate and fundamental laws — the principles of the substantive law, the enforceability of contracts, and so on. They expand the general rules of the courts, without which the specific application of the law is not possible. Finally, there are legal academics who are concerned with the statement and restatement of the law. In fact, the practitioners of the legal profession are the legal scholars who have brought the law into focus.

4. Legal Argument

The primary function of lawyers, is the statement of the law as known, and the unwritten law as declared by the courts. If the law is not known, it can be discussed and its criticism can lead to the change of the law.
gal History before 1900

agencies issue printed editions of — constitutions, statutes, and statements of the law. They are legislative bodies that created it into legislation, for example, can and. Furthermore, a court can see of a superior constitutional or logical for a legislature to see the constitutionality of its own statute was considered exted, or else it would not have

ntitative bodies is to declare the of the law courts is to apply the law. Therefore, whether a n states the law and is thus a the law. Here is a hierarchy of courts. gher courts will be accorded of their statements of the law. rial, and administrative, are stating and restating the law, ion law is and what an act of are printed in books called publish their general rules of o be followed in the litigation to these professional books, been published for popular

3. Legal Scholarship

Even though the work product of the legal academic community has no official, binding, or legal authority, the opinions of legal scholars (and of the general public) are statements of the law. The difference between a professor of law and a plowman is only one of education and experience.

The statement of the law by an academic will be given the consideration that it deserves. Some academic statements of the law are, in fact, accorded great weight, and some are considered to be authoritative.

Academic or secondary legal authority has its own hierarchy. Jurisprudence, the philosophy of law, is the statement of the ultimate and fundamental law. Legal writers also set forth the principles of the substantive law — for example, the rules governing the enforceability of contracts, the definitions of crimes and torts, and so on. They expound upon the procedural law of the courts, without which the substantive law could not be put into effect. Finally, there are legal scholars who edit and publish the primary statements of the law, the statutes of the legislatures and the judgments of the courts. These humble editors make feasible the statement and restatement of the law by all of the others. In fact, the practitioners of the law value the various classes of legal scholarship in inverse order from the academic scholars of the law.

The legal academics are an important part of both the statement and of the restatement of the law. Their treatises on the law help bring it into focus. The explanations of the statutory law and the unwritten law as declared by the courts are statements of the law. If the law is not stated and agreed upon, then the administration of the law deteriorates into the personal whim of the individual judge. The statement of the law in the secondary legal literature makes it possible to know the law. If the law is known, it can be discussed and criticized. Academic and public criticism can lead to the change or restatement of the law.

4. Legal Argument

The primary function of the practitioners of the law, the lawyers, is the statement of the law in arguments made on behalf of their clients. This class of legal statement is at the lower end of the scale because the lawyer's duty is to represent his client's position so long as it is a plausible one. The lawyer in the
courtroom is a partisan stating his client's legal positions, which are not necessarily his own. However, the legal dialogue in the courtroom between opposing counsel is very useful in guiding the impartial judge in his statement of the law as it applies to the parties in court. The practicalities of the current situation of the courts in America are that the lawyers usually have much more time to study the applicable law than does the judge. Thus, the research and scholarship of the lawyers, though partisan, is vital to the process of stating the law in the individual case.

The written arguments presented to appellate courts in the lawyers' briefs are usually required to be printed. They are not widely available, but they are preserved in the archives of the courts and in some academic law libraries. They are frequently interesting and useful.

5. Divine Revelation

Divine revelation of the law is a possible source of the law. The giving of the Ten Commandments to Moses is an example. The authority of such law is unassailable. The problem with divine revelation is the credibility of the person claiming to be God's messenger; it, then, is a question of belief in God and in the prophet. Even Jesus warned of false prophets.

In conclusion, it is interesting to note that in the historical statement and development of the law, it has been done over time in the reverse order from that just given. First came the law said by the priests to have been given by God, then the law was presented by the elders of the community, then it was stated by the judges as officials of the king or of the state, then enacted by the legislators as official representatives of the people, and finally promulgated by constitutional conventions acting as superlegislatures.

III

This approach is presently called "old" legal history. "New" legal history is the study of the relationships between law and society. "New" legal history focuses on the law and vice versa rather than an understanding of the law by itself.

The interactions between law and society are fascinating study. However, it is a two-way street; law has an effect on society as well as society has an effect on the law. By understanding the history of the courts, we can see the influence of social developments rather than a separate study of the courts. What is often referred to as "nuts and bolts" legal history is the study of society without understanding legal history. This is a necessary precondition. In fact, most "old" legal history was studied with the knowledge of social developments rather than a separate study of the courts. What is often referred to as "new" legal history is actually history with little or no discussion of the history of the law. Those who study law and society will understand the role of the courts and the statement of the technical problems in society.

This bibliography focuses not only as a matter of leading the reader to understand history, but also as a matter of bibliographic completeness. "Old" history has no meaningful boundaries; "new" history can include the study of law and society without a legal perspective. In this bibliography, I have focused upon the law, I have included legal records, note Harold B. Gill, J.

32 Exodus 20.

33 Matthew 7:15.


35 The so-called "antiquarian" approach is of much value for many future researchers, and it is important to study the history of legal records, note Harold B. Gill, J.

36 For an example of the importance of legal records, note Harold B. Gill, J.
client's legal positions, which ver, the legal dialogue in the of the current situation of the yers usually have much more an does the judge. Thus, the yers, though partisan, is vital the individual case. tated to appellate courts in the d to be printed. They are not served in the archives of the libraries. They are frequently s a possible source of the law. ents to Moses is an example. aible. The problem with divine person claiming to be God's of belief in God and in the e prophets.

g to note that in the historical law, it has been done over time given. First came the law said n by God, then the law was immunity, then it was stated by r of the state, then enacted by tives of the people, and finally mentions acting as superlegisla-

cled "old" legal history. "New" relationships between law and

society. "New" legal history focuses on the external influences on the law and vice versa rather than on the statement and understanding of the law by itself and its internal consistency.34

The interactions between law and society are indeed a fascinating study. However, it requires an understanding of the law as well as society. And by use of the word law here, I mean the abstract legal doctrines of tort, contract, negotiable instruments, property, and so forth, what Joseph H. Smith often referred to as "nuts and bolts" law.35 One cannot write about law and society without understanding the law. Thus, the "old" legal history is a necessary precondition to the "new" legal history.36 In fact, most "old" legal history was and is written with an eye on social developments rather than an emphasis on them. Regrettably, much "new" legal history is actually social, economic, or political history with little or no discussion of legal developments, that is, the history of the law. Those scholars who are interested in the study of law and society will encourage and support research into and the statement of the technicalities of legal doctrine at different periods in the past.

This bibliography focuses on the "old" legal history not only as a matter of leading the user to fundamental research but also as a matter of bibliographical practicality. The "new" legal history has no meaningful boundaries. The study of law and society can include the study of almost everything; society includes every aspect of human conduct, and the law touches almost every aspect of society. In order to keep this bibliography focused upon the law, I have limited it to items whose primary


35 The so-called "antiquarian" approach to law furnishes the building blocks for many future researchers, and it is less likely to be motivated and tainted by the author's preconceptions and political purposes.

36 For an example of the importance of understanding the "nuts and bolts" of legal records, note Harold B. Gill, Jr., and George M. Curtis III, "Virginia's Colonial Probate Policies and the Preconditions for Economic History," VMHB 87 (1979): 68–73.
focus is the law itself, and I have not included items whose primary focus is the influence of the law. 37

The history of the basic legal principles of tort, contract, and property law in the seventeenth and eighteenth centuries has not yet been investigated and described. 38 There has been a beginning to the history of criminal law and of law courts in Virginia. Family law, property law, and commercial law are relevant to social and economic history, but as far as Virginia history is concerned, these subjects have been neglected.

IV

The truly important question is why should one study the legal history of Virginia — that is, Virginia as opposed to America, not as opposed to North Carolina or Maryland. Aside from the federal law of the United States, there was little or no American law before the twentieth century and the successes of a few items of “uniform” legislation, most notably the Uniform Commercial Code. For the nineteenth century and earlier, the notion of American law is only an academic generalization. Actual law that is binding and in force is the law of the individual and specific state plus federal law. The statement of the law of a single state has a validity that the generalization of American legal ideas necessarily lacks. This is not to discourage the study of general American law but rather to encourage the investigation of state-specific law on which the general American law studies must ultimately be based.

The difficulty of state-oriented legal history is caused by academic politics. An expert in the history of a single state is at a distinct disadvantage in getting employment at a university in another state. Moreover, a scholar who specializes in the history of his or her own state is often belittled as parochial. Furthermore, there is the serious problem of sectional jealousies, and stereotypes thinking rather than evidence informs too much writing that attempts to pass as American can be solved, American legal history needs Virginia. Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states. Virginia was one of the first states to 1861. The legal culture of Virginia was one of the first states.

Works of general American law can be found in bibliographical works: Kermit L. Hall, The Magic Mirror (New York, 1989) p. vii: “The technical history of substantive law . . . remains to be done, and surely we would know a good deal more about American legal culture if we had a better understanding of the law’s technical [workings].” Nelson and Reid, Literature of American Legal History, p. 257: “The first task of historians is to accumulate factual data from the past.”

37 This distinction is easy to state but difficult to apply.

38 Kermit L. Hall, The Magic Mirror (New York, 1989) p. vii: “The technical history of substantive law . . . remains to be done, and surely we would know a good deal more about American legal culture if we had a better understanding of the law’s technical [workings].” Nelson and Reid, Literature of American Legal History, p. 257: “The first task of historians is to accumulate factual data from the past.”

39 An example is noted by Paul University Legal Education," Wm.
Introduction

21

writing that attempts to pass as scholarship. Until these problems can be solved, American legal history will continue to be retarded.

In spite of these problems, the significance of Virginia in American legal history needs to be considered. Before 1800, Virginia was the largest, wealthiest, and most populous colony and state. Virginia was one of the more politically significant states up to 1861. The legal culture of Virginia produced dominant national figures such as Thomas Jefferson, John Marshall, and James Monroe. The first two United States attorneys general, Edmund Randolph (1790–1794) and Charles Lee (1795–1801), were Virginians, as were Supreme Court justices John Blair, Jr. (1789–1796), Bushrod Washington (1798–1829), Philip Pendleton Barbour (1836–1841), and Peter Vivian Daniel (1841–1860). One could also mention George Wythe, Edmund Pendleton, Peyton Randolph, St. George Tucker, William Wirt, John Tyler, Abel Parker Upshur, and Conway Robinson, who were trained to the Virginia bar, and George Washington, James Madison, and George Mason, who were not but who served actively in the Virginia legislature. All of these persons were significant figures in the development of American law as well as Virginia legal history. To ignore Virginia legal history is to miss a significant aspect of the development of American legal history at the inception of the United States.


V

It is axiomatic that sound history must be based on primary source materials. The popular historian's imagination is usually found to be politically and socially biased by the next generation of scholars. An intimate familiarity with the court records, reports, and statutes is a precondition to successful legal history. In spite of significant losses of Virginia legal records over the

centuries, much legal source material remains and awaits attention. As one would expect, the statutes are the most easily found. Thanks to William Waller Hening, the colonial statutes were printed before the loss of the manuscript copies.\(^{40}\) Equal credit for the publication of the old Virginia acts is due to Thomas Jefferson, first for having collected and preserved the manuscripts and second for having supplied the political influence to accomplish their printing at the public expense. (Much gratitude is owed also to the Jamestown Foundation, which has reprinted these thirteen volumes on good paper.) Recently discovered colonial Virginia statutes have also been published.\(^{41}\) The Virginia Acts of Assembly have been printed immediately following each session of the General Assembly since 1732.

All of the known reports of Virginia case law have been published, with the exception of St. George Tucker's reports, which are currently being prepared for the press by Charles T. Cullen.\(^{43}\) It is especially to be regretted that manuscript reports of cases compiled by William Hopkins (d. 1734), John Randolph (d. 1784), John Brown (d. 1810), and John Marshall (d. 1835) have been lost before being published.\(^{42}\)

Many original Virginia records have survived from the courts.\(^{43}\) This material was more carefully preserved than other records because it is the legal foundation of property titles and rights. Most of the order books from the older periods have been microfilmed, but the loose papers have not been. Even though microfilm copies of the older court order books are generally available, the importance of having scholarly printed editions of order books cannot be overestimated. From a genealogist's viewpoint, the loose papers have been more carefully searched by legal genealogists. And we can regret that printed extracts omit the legal context, which is crucial for understanding the validity of secondary historical claims.

\(^{40}\) William Waller Hening, comp., *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619* 13 vols., (Richmond and other cities, 1809–23).


remains and awaits attention. It is due to Thomas Jefferson that the manuscripts and colonial statutes were preserved and awaited attention. Much gratitude is owed also to John Randolph (d. 1835) and John Marshall (d. 1835) have reprinted these thirteen discovered colonial Virginia case law have been for the press by Charles T. Washington, D.C., 1954). The following are the only order books available to date. The following are the only ones available to date. The following are the only ones available to date.


Mary Rawlings, ed. “Albemarle County Court, Order Book 1744/45,” *Papers of the Albemarle County Historical Society*, 5 (1945): 7–35. [This is a transcription of pages 1–10 of the Order Book followed by some miscellaneous extracts.]


It is a pity that the Virginia legal records have not been as carefully searched by legal historians as they have been by genealogists. And we can regret that the genealogists’ numerous printed extracts omit the legal details that are, of course, useless to family history but are crucial to legal history. The continued publishing of Virginia legal records must be encouraged and supported; the high quality of legal history depends on it. The validity of secondary historical literature depends on the accessibility of the primary sources.

44 It is for this reason that the published extracts of legal records are not included in this bibliography.
Conclusion

If American legal history is to be sound scholarship, it must take Virginia legal history into account. However, Virginia legal history has been largely neglected. Only a small amount of court record material from the colonial period has been printed. Much more needs to be done before seventeenth- and eighteenth-century legal history can be properly written. Although primary sources in the form of statutes and reports from the period following Independence are in print and available, they have not been worked into analytical descriptions of the development of the fundamental principles of law: property, contracts, torts, crime, family law, and so forth. Until the law is well known, the relationships of law and society will remain imperfectly understood.

This bibliography amply demonstrates the sparseness of Virginia legal history. Very few of the entries were written in order to chronicle the legal past. What is presented here is printed secondary data from which the legal history of Virginia can be written. This lack of historical writing on the subject is unfortunate, especially because, in my opinion, the law is more the products of past experience, history, than of abstract logic. To understand the modern law, we need to appreciate its antecedents. The purpose of this bibliography, then, is to facilitate the writing of legal history. Perhaps it should have been entitled “A Bibliography for Legal Historians.”

Many of the entries refer to articles and books that were written before 1900 and were never intended to be historical treatments of their subjects but rather to be commentaries on the contemporary law. These are, of course, historical sources for the modern writer. The other major type of entry is biographical sketches, usually obituaries, of judges and lawyers. Obituaries in newspapers have not been included. The periodical sources have been searched through the last 1995 issues.

The legal historian lives with two problems that defy satisfactory solution. These are, of course, “How far does the law extend?” and “When does history stop?” The law touches all aspects of human existence, but some practical limits must be found for this bibliography. Therefore, I have taken the more traditional and restricted view and have limited the scope to the common and statute law, its administration by the bench and the bar, and its study by teachers and their students. As to the second problem, it may be that the present is but a moment between the past and the future. This still leaves a burden on the conscientious draftsman who has drawn the line at 1900. There are years to deal with. Finally, some federal law and with lawyers as Thomas Jefferson, or perhaps Marshall, except for a few years, and on some days, more than on others. There is outside of the stated scope it to be the thirteenth roll of...
Legal History before 1900

Introduction

To be sound scholarship, it must count. However, Virginia legal history before 1900. Only a small amount of court period has been printed. Much sixteenth- and eighteenth-century remains. Although primary sources from the period following available, they have not been sources of the development of the property, contracts, torts, crime, the law is well known, the will remain imperfectly under-

The compiling of this bibliography has extended over many years, and on some days, I was in a more expansive frame of mind than on others. Therefore, if any entry might appear to be outside of the stated scope of this work, the reader may consider it to be the thirteenth roll of the baker's dozen.