

# H-Net Reviews

in the Humanities & Social Sciences



**Peter W. Bardaglio.** *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South.* Chapel Hill: University of North Carolina Press, 1995. xxi + 348 pp. \$45.00 (cloth), ISBN 978-0-8078-2222-7.

**Reviewed by** Robert Kenzer (Department of History, University of Richmond)

**Published on** H-CivWar (September, 1996)

Every few years a new book comes along that pulls together disparate streams of historical inquiry. Peter W. Bardaglio's award-winning book, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, is such a work. Although many of Bardaglio's ideas previously have appeared in a number of articles, this book successfully gives them a fuller and more interrelated treatment.

The book's strength lies in Bardaglio's integration of the major findings in southern historical scholarship of the last twenty years—on family, gender, violence, honor, and patriarchy—within the framework of the region's legal developments during the nineteenth century. In addition, he identifies where the southern family stood in the eyes of the law compared to the rest of the nation. To make such interregional comparisons Bardaglio relies heavily on the findings of Michael Grossberg's *Governing the Hearth: Law and Family in Nineteenth-Century America* (1985).

The text is divided into two parts of nearly equal length. The three chapters of Part One, "The Days Beyond the Flood," trace the interrelationship of patriarchy, law, sex crimes, and child custody before the Civil War. The four chapters of Part Two, "After the Flood," pick up these same topics from 1865 through the end of the century. Not surprisingly, the central question posed is to what degree the war itself altered the relation between the family and the law in the South. Was there more continuity or change?

If this question seems all too familiar to students of the South, what truly marks the author's contribution is his work's impressive geographic and chronological

scope. Rather than focusing on a single or a limited number of southern states, he examines a century of state statutes and judicial decisions at the appellate level in the eleven states that comprised the Confederacy. Bardaglio points to the value of state statutes, which "allow us to ascertain how society thought its members ought to behave, and more specifically, they allow us to determine the social values and attitudes of the elite that made and shaped the law." Even more critical to his findings are the records of appellate courts, which "frequently interpret and flesh out the reasoning behind the statutes, thus clarifying the intentions of lawmakers" (p. xvii). In addition, although most general readers all too often find discussions of legal codes and court decisions tedious, Bardaglio's large geographical and chronological stage provides him with enough rich stories to make these topics come alive.

Bardaglio finds that even before the Civil War a "conflict between traditional patriarchal authority and state intervention" had begun in the South, just as it had in the rest of the nation. However, he argues that it was "more intense and drawn out in the South," where "slavery encouraged patriarchal control over the household, thereby hindering (but not preventing entirely) the development of individualism." As a result, "southern courts carved out a distinctive path, or at the very least, adapted innovations to their own purposes" (pp. 35-36).

The best documentation for this unique antebellum path is found in chapter 2, which describes how appellate court decisions and state statutes handled issues of incest, rape, and miscegenation. Southern judges, Bardaglio observes, "even when imposing criminal punishment, tended to emphasize the infrequent occurrence

of incestuous sexual assault, isolating men who undeniably exploited dependent females in their family and treating these males as deviants, rather than locating the source of incest behavior in the hierarchical nature of the household itself. In doing so, southern jurists helped to preserve the patriarchal ideal and minimize state intrusion in the private sphere” (p. 40). He demonstrates that the “limited legal protection that white women received against incestuous assault and rape rested less on a recognition of their rights as individuals than on their status as dependents” (p. 78). Indeed, the sole exception to the tendency to restrict state interference came, not surprisingly, with antimiscegenation law.

The one major “area of convergence between the North and South” in regard to family and the law was that of custody disputes between parents. However, even here, Bardaglio finds, “The majority of judges maintained ... that the state should step in when the father clearly misused his power or overlooked his responsibilities” (p. 89). Nevertheless, even in this area the pace of imposing “constraints on patriarchal actions” surely did not signify “overturning the judicial commitment to the superiority of paternal custody rights.” This is not a subjective observation, as Table 1 documents that before the end of the war appellate courts awarded child custody to fathers in 42 percent of cases compared to 38 percent to mothers and split custody or provided some other solution 21 percent of the time.

The tendency of southern jurists to reinforce rather than question traditional attitudes about patriarchy and family is also seen in nonparental claims in child custody cases. Whereas northern judges increasingly were following the doctrine of the welfare of the child, southerners continued to give emphasis to “the custody rights of ‘natural parents’ and the maintenance of biological families” (p. 99). Again Bardaglio provides quantitative evidence, finding that in nearly four out of five antebellum appellate court decisions custody was granted to parents rather than to third parties in such disputes. He also contends that this commitment to the primacy of blood ties rather than a more child-centered orientation caused southern states to follow far behind the rest of the nation in arriving at comprehensive adoption laws.

If southern states were much more hesitant than the North to alter the relationship between the family and the law, “[t]he pressures of wartime, defeat, and the collapse of slavery,” as well as the “expansion of the market relations” (pp. 132, 137), Bardaglio explains, “accelerated the transformation of southern family life and the legal

system that increasingly regulated the household. Instead of organic hierarchy, the contract became the central metaphor for structuring relations between members of the household, and the state assumed a growing responsibility for supervising these relations” (p. 137).

Despite what may appear to be clear support for the presence of change over continuity in the New South, Bardaglio believes that, in fact, “profound economic and political alterations with a strong undertow of cultural continuity ... set the South off from the rest of the country even as the region entered the main currents of national development. Change shaped and defined the forces of persistence, while these forces, in turn, shaped and defined the process of transformation” (p. 176).

The most evident area in which the link between change and continuity can be seen, according to Bardaglio, is the increased share of child custody cases between 1866 and 1900 in which appellate courts awarded custody to mothers (nearly half, compared to slightly more than a third for the fathers) or to third parties rather than to natural parents (an identical percentage). While southern jurists surely were increasingly influenced in altering the law by such concepts as the “tender years doctrine” and the “best interests of the child,” Bardaglio does not believe that these changes were as great a departure as they might seem initially. For example, he finds that “granting married women custody rights to their children on the basis of their special capacity as mothers to provide nurture did not challenge gender roles in the larger society.” The change in custody laws, therefore, “undermined as much as they strengthened the notion of equality” (p. 148). Similarly, the shift toward third parties’ gaining custody over children came about largely because of the “greater success of kinfolk” in the courts. This meant that “blood connection between the child and child rearer still played a crucial role in the outcome of custody struggles” (p. 150).

The maintenance of “class and racial hierarchies” in the “legal treatment” of miscegenation and rape also demonstrates, according to Bardaglio, how even when the postwar South encountered “changed circumstances” they relied on tradition (p. 189). “Following the defeat of the Confederacy, a rising concern about the impact of emancipation on private life and public order gave added significance to the racial restrictions and led to the forging of a sturdy new legal rationale” for bans on interracial marriage and sex. He shows how “special procedural rules that applied only to black defendants on trial for the rape or attempted rape of white women and girls” were

developed in southern courts and that “negative stereotypes that underscored their inferior positions” hindered poor white and black women from gaining justice. Further, even in cases of incest “the continued commitment to the patriarchal ideal” prevailed in the region (p. 211).

Bardaglio concludes his study by noting that while the “South entered the mainstream of American legal development by the end of the nineteenth century,” it did so “in a way that preserved its distinctiveness” (p. 227). “Like political Reconstruction, in other words, the legacy of domestic Reconstruction has been mixed” (p. 227).

A particularly attractive feature of the book is the detailed set of endnotes, which describe the scholarship on topics such as patriarchy and gender. This placement allows Bardaglio to keep his story front and center and to note important distinctions between individual states that otherwise might break the flow of the text. Further, the University of North Carolina Press has been particularly generous in allowing Bardaglio not only to include

unusually lengthy endnotes, but to exceed what has become the rather standard restriction of 100 endnotes per chapter.

The only shortcoming of the work, but one that is not the fault of the author, is the lack of comparable interregional quantitative analysis. The book’s tables document changes in the share of appellate court decisions awarding mothers and third parties child custody before and after the war, but they do not clarify how the pace of these changes compared to the rest of the nation. Perhaps Bardaglio’s study will stimulate further scholarship in these areas and thereby provide such comparisons.

Copyright (c) 1996 by H-Net, all rights reserved. This work may be copied for non-profit educational use if proper credit is given to the author and the list. For other permission, please contact <H-Net@h-net.msu.edu>. [The book review editor for H-CivWar is Daniel E. Sutherland <dsutherl@comp.uark.edu>].

If there is additional discussion of this review, you may access it through the network, at:

<https://networks.h-net.org/h-civwar>

**Citation:** Robert Kenzer. Review of Bardaglio, Peter W., *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*. H-CivWar, H-Net Reviews. September, 1996.

**URL:** <http://www.h-net.org/reviews/showrev.php?id=590>

Copyright © 1996 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication, originating list, and H-Net: Humanities & Social Sciences Online. For any other proposed use, contact the Reviews editorial staff at [hbooks@mail.h-net.org](mailto:hbooks@mail.h-net.org).