

Prison and Plantation

*Crime, Justice, and Authority
in Massachusetts and South Carolina,
1767-1878*



*by
Michael Stephen Hindus*
Studies in Legal History

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For Lynne

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Cambridge, Massachusetts
October 1978

M.S.H.

Abbreviations

BPDS	Boston Prison Discipline Society
MBSC	Massachusetts Board of State Charities
MHS	Massachusetts Historical Society
SCA	South Carolina Department of Archives and History
SCHS	South Carolina Historical Society
SCL	South Caroliniana Library
SCMF	Spartanburg District Court of Magistrates and Freeholders
<i>Statutes at Large</i>	Thomas Cooper and David McCord, eds., <i>The Statutes at Large of South Carolina</i> (Columbia, S.C., 1836–73)

Introduction

The modern criminal justice system developed in America during the nineteenth century. Many of the institutions and practices that are now familiar to us, such as police forces, prisons, indeterminate sentencing, parole, and probation, had their origins in that century. Some parts of the story are well known. We have studies of the growth of urban police, of the rise of the penitentiary, of legal and penal reform, and of the dangerous class itself.¹ But we have few studies of the criminal justice system *as a system*.² And we have none that attempts to place this system within the context of a locality's social and legal history.

Although histories of individual components of the criminal justice system are useful, we must remember that the pieces were meant to fit together. It would be pointless, for example, to study prisons without knowing something about criminal statutes, capital punishment, sentencing discretion, police, and the courts. Similarly, it would be futile to study crime without knowing something about the legal tradition and legal culture of the locality and the social tensions that produce both crime and the means of repressing and punishing it. Whether disjointed, incoherent, or well integrated, elements of the criminal justice system functioned as a system—and those components can best be understood by looking at the systemic results. This study integrates the various elements of the criminal justice system and describes their interaction during this formative period.

During the century from the Revolution to the Gilded Age, an era of great social change, American society diversified, perhaps to a greater extent than in any subsequent period in American history. The English domination of colonial society was strained and diluted by successive waves of immigration. The nonwhite segment of the

1. James Richardson, *The New York Police and Urban Police in the United States*; Roger Lane, *Policing the City*; David J. Rothman, *The Discovery of the Asylum*; W. David Lewis, *From Newgate to Dannemora*; Richard Ellis, *The Jeffersonian Crisis*; Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776–1876*; Eric H. Monkkenon, *The Dangerous Class*.

2. Ironically, one of the few state studies for this period is for South Carolina, Jack Kenny Williams, *Vogues in Villainy*. Aside from its frequently laudatory and anecdotal approach to the South Carolina criminal justice system, this study by intent left out blacks. An older study of unusual value is Howell M. Henry, *The Police Control of the Slave in South Carolina*.

population was proportionately greater than at any other time. And, unlike any other period of American history, the nineteenth century witnessed the flourishing of two highly sophisticated systems of production. While the Northeast was experiencing rapid industrialization and urbanization, the South refined its plantation system with significant economic success.

But why belabor the apparently obvious? Quite simply, because in order to understand the relationship between crime, justice, and society in nineteenth-century America, it is necessary to look at more than one type of society. To appreciate the uniqueness of certain developments in the Northeast, for example, we need to know not merely what preceded them, but also what was happening elsewhere.

From the revolutionary era to Reconstruction, the most important regions of the country were the North and the South. United in independence, they became the protagonists in the bloodiest organized conflict this nation has experienced, a fact that alone demands comparative analysis. But such comparative history is rare. David Rothman, in his penetrating study, *The Discovery of the Asylum*, reduced the South to a footnote.³ But Rothman's dismissal was not unique; on the contrary, he was acting in a time-honored tradition. Almost a century and a half before, in their classic report on the penitentiary system of the United States, Gustave de Beaumont and Alexis de Tocqueville did exactly the same thing.⁴ The one comparative study in the literature on crime and law is transatlantic.⁵

It is easy to see why historians of crime, justice, and law should have slighted the South. Steeped in a northeastern experience that almost seems normative, the historian searches in vain for the southern counterparts. In crime and law, the external contrasts cannot be ignored. Few southern states had penitentiaries that would be recognizable to the northern traveler or scholar. The vast network of reform societies, with their widely circulated annual reports, often tumultuous meetings, and distinct evangelical fervor, simply did not exist below Mason and Dixon's symbolic boundary. Accustomed to a different political style, legislatures—and particularly the one in South Carolina—failed to produce the reams of documents pertaining to penal matters that were a staple in the

3. Rothman, *Discovery*, p. 328.

4. Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France*, p. 12n. This note was written by Francis Lieber, as editor and translator, but the authors made the same point in the text (p. 15).

5. Wilbur Miller, *Cops and Bobbies*.

North. And when southerners did write about crime and justice, it was frequently to deny the value of northern solutions and institutions to this different region.

The absence of familiar turf is further confounded by the presence in the South of one decidedly unfamiliar institution—that is, of course, slavery. Slavery altered all relationships based on class and authority, relationships that are critical to the legal and criminal justice systems. Slavery made it ideologically difficult to acknowledge the existence of a white criminal class and to legislate for its control (or for its benefit, for that matter). Blacks, who by southern ideology fit the requirements of a criminal class, were as slaves already confined for life in an institution that deprived them of their liberty. This effect of slavery was vital to the development and understanding of southern justice.

Slavery has made it easy for historians to conclude that the region lacked the complex structures of authority and justice that were emerging in the North in the nineteenth century to become the prototype for America. But obviously this is far from the case—it simply means that we must use a different focus to understand crime, justice, and authority in the South, a focus that is not dependent on northern normative notions. If there were no penitentiaries in South Carolina, we have to consider the ways in which slavery and deference perhaps eliminated the need for this sort of control.

Before we can begin this comparative enterprise, therefore, we must understand how to identify these functional equivalents and what consequences, if any, flow from these apparent dissimilarities. A functional alternative is obviously not an exact substitute, but rather an arrangement in the social structure that appears to serve a similar purpose in society. The most obvious are the plantation for the penitentiary, slaves for the criminal class. But there are others that are as striking. Police forces are an example. If Charleston did not rush to establish a Boston-style professional police force, it was in part because the object of such surveillance and control was the black population; all whites, by virtue of their skin, had “police power” over all blacks.

Functional alternatives existed in other areas of life less directly touched by slavery. For a certain class of whites, dueling was a more satisfactory way of settling grievances than was the legal system. In parts of rural South Carolina, the competency of the courts was diminished as if to promote the use of informal means of dispute settlement. Vigilantism replaced formal law enforcement in the backcountry and supplemented slave control in the years of racial tension before the secession crisis. These equations do not imply

that such alternatives were superior to formal institutions of law and justice; rather, they show that societies tend to develop mechanisms for achieving a certain degree of order and providing for dispute resolution.

In order to appreciate these alternatives, however, we must use a comparative approach. Monographs in social, cultural, and economic history have made implicit comparisons between North and South. Studies of slavery have compared the bondsman's condition to that of the northern worker; studies of free blacks have compared their status to that of slaves. The economies of the two regions have been contrasted in an attempt to find an economic interpretation of the Civil War. But most of the literature to date has been comparative in an indirect sense; that is, contrasting material is usually left to notes or parenthetically included as a point of interest. There are no studies, for example, that spend equal time on northern workers and southern slaves. No one has done for social history what William R. Taylor tried to do for cultural and intellectual history.⁶

If external criteria are to be determinative, then a comparison between these two particular states becomes extraordinarily elusive. In the area of legal and penal reform, for example, few northern states were as innovative as Massachusetts, few southern states as recalcitrant as South Carolina. Massachusetts, therefore, cannot represent the typical northern state, nor South Carolina the typical southern state. But, in making a regional comparison, regional patterns are evident. The building of prisons and the proliferation of reform groups characterized the Northeast. Similarly, slavery, plantation justice and slave codes, a high number of capital offenses, and difficulty in obtaining divorce characterized southern states. Factories, cities, and immigrants typified the North; slaves and farms the South. Obviously, states, unlike towns and cities, are too distinctive for any one to serve as a prototype. But regional trends and characteristics can be identified. We can use these two states to show how two distinct systems of criminal justice evolved in the United States, and we can go one step further. We can take these outward, striking contrasts and see whether the actual functions and purposes of law in each society were as different as we may at first glance suspect.

While the most important contrasts in the study are the regional ones, significant changes occurred over the century. During this time, the Massachusetts penal system evolved, with police forces, a state prison, and legal revision. Even South Carolina was not static.

6. William R. Taylor, *Cavalier and Yankee*.

By the Civil War, the state had reduced the number of capital offenses, begun court reorganization, and reformed somewhat the system of trying slaves. Nevertheless, the most striking contrasts are not the ones over time, but the ones between the two states, both at the beginning and at the end of the period studied.

With this comparative approach, we can trace the development of criminal justice in American history, place the criminal justice system in the context of both the social structure and the legal system, and contrast crucial developments in crime, law, and justice for an urbanizing, industrializing free state and a rural slave state. These contrasts permeated every aspect of life in the two states. But we should not let contrast turn into stereotype. Both states were common law jurisdictions and ostensibly followed the rule of law, a collection of post-Enlightenment principles proclaiming universality of laws, procedural rights, and neutral judges. If formal adherence to the rule of law was mechanically maintained in each state, however, little illumination would be gained by a comparative study. But such concepts are ideal types. The legal systems in both Massachusetts and South Carolina were far from ideal, and we can find elements of both traditional and bureaucratic justice present in each of them. But traditional authority played a greater role in the legal system of South Carolina than in Massachusetts, in part because of slavery, in part because of the state's historical legal culture, and in part because it seemed to be well suited to that particular society. Actual operation of a legal system is, of course, more important than the formal ideals it may espouse.

There are, as I have indicated, different ways of exercising authority in a society. By studying the legal system, I have chosen to emphasize the formal, bureaucratic system of law and authority that seemed suitable to the emerging modern state which Massachusetts with its complex economy and diverse population was becoming in the nineteenth century. But, although it clearly is easy to contrast these two states on the basis of differences in their economic and social structures, this study is concerned less with those contrasts *per se* than with the suitability of each legal system for its particular society. To this end, we must consider the importance of elements of customary law. In contrast to the impersonal, virtually autonomous, bureaucratic authority, customary authority is personal and individualistic. Rigid norms yield to an intricate if less articulated system based on personal contact, on relative positions in the status hierarchy, and on certain immediate and frequently symbolic needs to be served.

Although we find that many obvious and external symbols of

bureaucratic authority were present in Massachusetts and lacking in South Carolina, our interpretation cannot be complete until we have considered what alternate forms of authority flourished in South Carolina instead. As important as the key structural and institutional contrasts revealed in this study is the discovery that in many ways, the legal system that developed in each society was not only well suited to the particular needs of that society, but also, and less obviously, served the same functional ends.

The historical study of crime is of special importance. Criminal laws are enacted to embody, preserve, and enforce societal values. Punishment indicates the importance of the preservation of those norms. There are other ways in which society registers disapproval of behavior. Churches in colonial New England disciplined and excommunicated violators of religious norms. Artisan guilds and merchant organizations policed their professional codes. Parents punished children (and occasionally each other), and communities ostracized those who overstepped certain boundaries.

But the criminal sanction is unique. Criminal laws are intended to embody the most general norms of a society, whereas the other sanctions are parochial (in the case of the church), limited in scope (as in business and commerce), or local (families and neighborhoods). Furthermore, violators of the criminal law are dealt with by the institutions that, in theory at least, represent the entire collective will of a society. Therefore, the criminal justice system is intended to deal with those offenses that are both so significant that the other forms of control and sanction are not sufficiently effective and so threatening that the entire resources of the state may be marshaled against them.

The history of crime and justice is also part of legal history, and the findings here are compatible with the major synthesis of nineteenth-century legal history. This synthesis stresses the relationship between law and the economy that helped pave the way for large-scale commercial and industrial development.⁷ The same values that the legal system endorsed for the sake of economic growth—certainty, predictability, and rationality—can be found in the criminal justice system of Massachusetts. In South Carolina, where a different economy demanded only that the legal order protect the slave system, these economic goals were not incorporated into the criminal justice system. On the other hand, the legal system of the South was a major linchpin of the slaveholding regime.

7. The best-known formulation of this view is J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States*.

The most influential book in legal history in recent years has described a transformation of American law in roughly the same years covered by this current study.⁸ Looking at every state, Morton Horwitz suggests that this transformation was a national phenomenon; local variations are noted, but are not considered significant. Even within this majestic and stimulating scope, however, we can note that South Carolina stands out as an aberration and Massachusetts as perhaps the norm. Although this study does not concern doctrine, it is noteworthy that while Massachusetts under Joseph Story and Lemuel Shaw forged the synthesis of law and economic growth, an interpretation of South Carolina doctrine remains more complex. Although its commercial decisions were in the vanguard of American law, South Carolina maintained a medieval marriage and property law, out of step with the rest of the country, but compatible with the dynastic aspirations of its leading planters.

Massachusetts and South Carolina are natural cases to use in order to illustrate regional differences. Both were founded as colonies in the seventeenth century, and their legal histories are indigenous. By the nineteenth century, however, they symbolized totally different ways of life. In fact, on the eve of secession, the two states seemed to have had almost their own private civil war. When Samuel Hoar arrived in Charleston from Massachusetts to attempt to mediate the dispute over the Negro Seaman's Acts, he was hounded out of town under the threat of personal violence. And certainly it was no accident that a senator from Massachusetts so incensed a congressman from South Carolina that the latter felt driven to caning his adversary to insensibility. When South Carolinians deplored the anarchy of the North, their favorite examples were the burning of the convent and the rescue of fugitive slaves, both chapters in the Bay State's history. The southerners lumped these two events together, but in Massachusetts they were viewed quite differently. The burning of the convent was a capitulation to bigotry, superstition, and fear, but the fugitive slave rescues represented the triumph of liberty.

The differences between the two states were very real in terms of population, ethnicity, and culture. Massachusetts was the most heavily urbanized state in the country; South Carolina was one of the most rural. But even that contrast only touches the surface. Both states had major cities that were regional centers. But in addition Massachusetts had several lesser cities of considerable importance, such as Worcester, Salem, New Bedford, and Fall River. In South

8. Morton J. Horwitz, *The Transformation of American Law, 1780-1860*.

Carolina, beyond Charleston, there was only Columbia, a sleepy college town that was also the state capital. Columbia had 8,069 residents in 1860; Massachusetts had eighteen places with at least that population.

Massachusetts was also one of the major magnets for foreign and domestic migrants. In 1860, 21 percent of the population was foreign-born and 35 percent was born outside the state. South Carolina, by contrast, was no magnet at all. Only 3 percent of the white population was foreign-born; 8 percent were born out of state, and the most salient fact about the state's migration trends was that native South Carolinians were leaving in huge numbers. Of course, the ethnic component of the state's population was far less significant than its racial makeup. South Carolina was 59 percent black in 1860; no other state had that large a proportion. Individual districts were up to 86 percent black. In Massachusetts, by contrast, less than 1 percent of the population was black.

The economies of the two states were very different. Historically a commercial center, Massachusetts became the American prototype for industrialization. The labor system at Lowell attracted almost as many visitors as did the state's prisons. South Carolina, by contrast, had some of the most highly developed forms of plantation organization, and slavery, too, attracted the inquisitive visitor.

The two states can be contrasted culturally as well. In Massachusetts, Horace Mann established a uniform statewide system of public education. South Carolina had no free school system at all, although there were small state educational subsidies to the districts. Formal education in South Carolina was a class-based privilege. Massachusetts was a hotbed of agitation for all sorts of social issues; South Carolina had virtually no social reform societies. Yet, Nullification and secession galvanized the state into action. South Carolina citizens were the only ones in the Union who did not vote for presidential electors; the legislature chose the electors and the governor as well. With no opportunity for choice, South Carolina spawned no competing political parties.

In short, despite their common participation in the growing nation, despite their common English tradition, despite their unity in the relatively recent struggle for independence, it is obvious that South Carolina and Massachusetts were different in ways that were not merely cosmetic but fundamental.

Criminal justice evolved differently in the two states for three reasons: tradition, economic and social development, and slavery. From the days of Puritan holy watching in the seventeenth century, law played a significant role in the lives of Massachusetts citizens.

Much of colonial South Carolina, by contrast, was a frontier society, where alternatives to formal authority had to be found. These traditions influenced subsequent developments in both states, causing Massachusetts authority to remain activist, while South Carolina valued a *laissez-faire* approach. This traditional pattern was suited not so much to the backcountry (where the extreme lack of formal authority led to the Regulator rebellion in the 1760s) but to the plantation areas where aristocrats could live like manor lords.

Tradition, evolving from conditions of settlement as well as from the ideas of those who settled each colony, explains why divergences between Massachusetts and South Carolina are clear even in the colonial era, preceding the massive social changes of the nineteenth century. For example, by the Revolution, South Carolina had ten times as many capital offenses in its criminal code as did Massachusetts. Massachusetts had been gradually (if slowly) revising its seventeenth-century Mosaic code, but South Carolina had already shown great reluctance to alter its 1712 penal code. Each state had a frontier rebellion over courts, the Regulators in South Carolina (1766–67) and Shays's Rebellion in Massachusetts (1785). But while the South Carolina protesters demanded more courts to tame the backcountry, the Massachusetts rebels wanted to stem the oppressive encroachment of centralized authority into the Berkshires. Each state's legal heritages, then, were significant in shaping their subsequent legal histories.

A second reason why criminal justice evolved differently can be found in the contrasting needs of the new economic order in Massachusetts and of the South Carolina plantation. The manorial authority of the planter was supported, not superseded, by the state. An ideology of deference—whether it be among whites or across races—obviated the need for meticulous legal regulation of the affairs of society. In Massachusetts, by contrast, the pace of social change outstripped the ability of traditional mechanisms of control and order. Family, church, and community proved inadequate guardians of virtue and morals in an increasingly transient and anonymous society. State authority was exercised on behalf of capital and property. A laboring class of immigrants and migrants required the inculcation of the new factory-inspired values of hard work, self-control, and self-denial.

The impersonal and complex society produced by social and economic change had to deal with deviance on a large-scale basis. Criminal justice had to be routinized. Institutional controls—permanent, universalistic, and dependable—were seen as the only way to keep the lid on crime and disorder.