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EQUALITY, "EXTRAORDINARY LAW," AND CRIMINAL JUSTICE: THE SOUTH CAROLINA EXPERIENCE, 1865-1866

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Recent reconstruction historiography has shown that the "radical" federal commitment to equal protection of the law was actually constitutionally conservative.[1] A state-centered federalism, as Daniel Flanigan observed, meant that "the central goal of the Civil Rights Act was to achieve equality for blacks under state law and force state officials to treat blacks fairly in the courts." [2] This orientation should not obscure however, the fact that if the southern states did not provide impartial treatment the federal government would take part.[3]

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[1] Michael Les Benedict, *A Compromise of Principal; Congressional Republicans and Reconstruction 1863-1869* (New York, 1974); Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861 to 1866* (Westport, Conn., 1976); Charles Fairman, *Reconstruction and Reunion 1864-88*, Part One (New York, 1971); and, Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (Boston, 1975).

[2] Daniel Flanigan, "The Criminal Law of Slavery and Freedom, 1800-1868" (Ph.D. diss., Rice University, 1973), p. 875.

[3] Under the Civil Rights Act of April 1866 anyone who deprived blacks of the basic rights guaranteed by the law, or subjected them to punishments different from whites by virtue of any law or custom would be guilty of a misdemeanor. Jurisdiction of such federal offenses was given to the federal district courts "exclusively of the courts of the several States." Anyone denied secured rights was allowed to remove their cause into the federal courts. Section 4 gave Freedmen's Bureau agents, among other federal officers, the responsibility to institute proceedings against those who violated the federal law. Under the second Freedmen's Bureau law, moreover, the bureau was authorized to establish its own courts to secure the rights of blacks. *U. S. Statutes at Large*, XIV, 27-29. A convenient source for the Freedmen's Bureau law is Walter Fleming, ed., *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational and Industrial, 1865 to 1906* (2 vols. New York, 1966), I, 321-26.

The initial substitutes for the civil courts of the southern states insofar as the freedmen were concerned, however, were not federal courts, but ad hoc military tribunals. The Freedmen's Bureau did not become active as a forum for criminal trials in South Carolina until 1866. As the jurist John Auchinloss Inglis ruefully described the situation in his district in August 1865: ". . . the commanding General of this Department has organized what he calls Provost Courts, consisting of three persons or less, and these courts take cognizance of, try & determine all sorts of causes & disputes. . . . We have no other administration of justice but this—and so far as I can understand, no law, but the notions of right & wrong which the officers composing these courts have." [4]

Those who have studied the military and the bureau's "judicial" activities, nevertheless, often have given them a guarded approval. Martin Abbott, for example, wrote in his study of the bureau in South Carolina that it "helped to define one of freedom's actualities for the former slaves" because of its mediation of petty disputes which "doubtless impressed upon many freedmen the rule of having their grievances redressed by appeal to an impartial authority." James Sefton, in his study of the federal military, concluded that "the generals were quick to proclaim whites and Negroes equal before the law and also quick to enforce that equality." And Harold Hyman noted that with "respect to legal life styles, except for black-code inequities, Bureau courts employed the forms of pleading, rules of decision, and criteria for evidence, testimony, and standing of litigants prescribed by the state where the Bureau unit was located." The conservative, state-centered orientation is clear, and the exception is all-important. The bureau, in short, introduced the notion of equality before the law into the southern legal structures at the same time that it worked within those structures. Finally, in one of the most recent studies of the bureau courts, James Oakes has argued that "few things stand out as positively in the records of the Freedmen's Bureau as the commitment of its agents to the principle of equal justice under law." [5]

[4] John Auchinloss Inglis to "My Dear Carrie," August 25, 1865, John A. Inglis Papers, Manuscript Division, Library of Congress.

[5] Martin Abbott, *The Freedmen's Bureau in South Carolina, 1865-1872* (Chapel Hill, 1967), p. 105; James E. Sefton, *The United States Army and Reconstruction, 1865-1877* (Baton Rouge, 1967), p. 44; Hyman, *A More Perfect Union*, p. 458; James Oakes, "A Failure of Vision: The Collapse of the

It is time to test such generalizations. Too often they rest upon tenuous assumptions that begin with "doubtless," or upon an examination of the general orders issued by military and bureau leaders. One reason for this, of course, is that a large percentage of recent reconstruction studies have concentrated on the formulation of federal policy. Another reason may be that the records of the military and Freedmen's Bureau courts are so lean that they may well be a despair to a scholar.[6] Still, it is possible to obtain some very valuable information from these records. The crimes for which people were indicted, and the punishments inflicted tell a great deal about the quality of justice administered in these courts, and about how well they fulfilled the commitment to equality before the law.

The military courts that were to carry out the federal policy were the provost courts, and the special military commissions. The most important for an understanding of the day-to-day administration of justice were the provost courts, and the focus of this article will be upon them. Under General Order #102 the provost courts in South Carolina, created during the summer of 1865, were limited by the punishments they could impose. They could levy fines up to $100, and sentence to imprisonment for two months. This was changed in January 1866 to six months imprisonment and $500 fines.[7] The courts employed common-law categories such as larceny and assault and battery, but they were not limited to these by the General Order. There were superior and circuit provost courts whose relationship was never clarified. The first was made up of one officer and one or two civilians, and the second of one or two civilians and one member of a superior court. The rules and forms

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Freedmen's Bureau Courts," *Civil War History* 25 (March, 1979): 67. On the other side see Vernon Lane Warton, *The Negro in Mississippi 1865-1890* (New York, 1965), p. 77, and Kenneth M. Stampp, *The Era of Reconstruction, 1865-1877* (New York, 1967), pp. 132-33.

[6] George R. Bentley, *A History of the Freedmen's Bureau* (Philadelphia, 1955), p. 251, fn. 52.

[7] GO 102 Department of the South, June 27, 1865 Orders, Record Group 94, National Archives. The order of General Daniel Sickles of January 1866 was also issued as a General Order of the Freedmen's Bureau and may be found in GO 5, Records of the Assistant Commissioner for the State of South Carolina, 1865-70, Orders and Circulars, Record Group 105, Bureau of Refugees, Freedmen, and Abandoned Lands, National Archives. (Hereafter the Record Group will be cited as RG, the National Archives as NA, and the bureau as BRFAL.)

of procedure to be followed in these courts were to be drawn up by each court and were to be "as simple as possible." All judgments were subject to revision by subdistrict and higher commanders, and appeals were allowed.[8]

The military commission, which had jurisdiction over more serious offenses, such as burglary or murder, was more centralized and procedurally regular as it operated under rules like those for military courts-martial. The judges were federal military personnel.[9]

With the establishment of civil courts under the provisional government it became necessary to define some jurisdictional boundaries within South Carolina. By an agreement reached between General Quincy A. Gillmore and provisional governor Benjamin F. Perry in September 1865, the provost courts were to have exclusive jurisdiction of all cases involving blacks, and the state courts would hear all other cases, with the exception of an occasional military commission trial.[10] A month later General Gillmore and Rufus Saxton, the Assistant Commissioner of the Freedmen's Bureau for South Carolina, had also worked out a compromise. Military courts would have jurisdiction over all cases involving blacks unless a bureau agent, who heard the complaint, was at too great a distance from the nearest federal military force.[11] These agreements left the military nearly supreme within the state in the matter of criminal justice for the black community.

From the summer of 1865 to October 1866, when all military cases were turned over to local courts after the adoption of a new state code,[12] the military then had jurisdiction of cases involving

[8] GO 102, Dept. South, June 27, 1865, Orders, RG 94, NA.

[9] Sefton, *The United States Army and Reconstruction*, p. 31. See also Lieber's Code, General Orders #100, "Instructions for the Government of Armies of the United States in the Field," *The Law of War: A Documentary History*, ed. Leon Friedman (2 vols., New York, 1972), I, pp. 158-164.

[10] Sefton, *The United States Army and Reconstruction*, p. 38.

[11] Ibid., pp. 48-49.

[12] The relationship between the military and the political leadership of South Carolina over the so-called Black Code can be glimpsed in the following sources: Benjamin F. Perry to Armistead Burt, Oct. 15, 1865, Benjamin F. Perry Papers, Duke University Library, Durham, N. C.; Daniel E. Sickles to James L. Orr, Jan. 11, 1866, and Orr to Sickles, Jan. 15, 1866, Daniel Sickles Papers, Duke University Librray; James L. Orr to Jonathan Worth (Governor of North Carolina), May 22, 1866, James L. Orr Papers, Duke University Library; and *House Executive Documents*, No. 1, 39th Cong., 2d Sess., p. 66.

blacks. After the passage of the second Freedmen's Bureau law in July 1866, bureau courts began to function more regularly in certain locales. By the early summer of 1866, however, the jurisdiction of these various courts was confused at best as President Johnson, who had declared the rebellion at an end in April, began to order the end of military trials for civilians.[13] Since civil courts, however, had no jurisdiction over black defendants until the end of 1866, no cases were brought into the federal courts under the Civil Rights Act during the year. Jurisdiction over criminal cases involving blacks, in the meantime, was solely in the hands of the military and the bureau. And in November 1866 the United States Supreme Court announced its judgment in the Milligan case, undermining trials by military commissions in areas where the civil courts were open. "The Constitution of the United States," Justice David Davis wrote, "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[14]

While the military and bureau courts retained jurisdiction of criminal cases involving blacks their test—implicit in the Thirteenth Amendment and explicit in the Freedmen's Bureau and Civil Rights Acts—was equality before the law. How well did these federal agencies fulfill this commitment? General O. O. Howard, the head of the Freedmen's Bureau, assessed the military courts as follows: "in the great majority of instances, the provost courts decided fairly; but there were some where the officers composing them had the infectious prejudice against the negro, and discriminated against his interest; they invariably meted out to those who abused him by extortion or violence, punishments too small

[13] Sefton, *The United States Army and Reconstruction,* Chapter 4; Bentley, *The Freedmen's Bureau,* pp. 162-63.

[14] The clash over military trials, and the interference of the military in the administration of the civil courts can be followed in: A. P. Aldrich to James L. Orr, Feb. 22, 1866, and Aldrich to Orr, Feb. 24, 1866, Gov. Orr-Letters Received, Box 1, Folders 46 and 49, South Carolina Department of Archives and History, Columbia (cited as SCDAH); William Henry Trescott to the Secretary of War, March 22, 1866, copy in Gov. Orr-Letters Received, Box 1, Folder 62, SCDAH; Francis Butler Simkins and Robert Hilliard Woody, *South Carolina During Reconstruction* (Gloucester, Mass., 1966), p. 58; John Hammond Moore, ed., *The Juhl Letters to the* Charleston Courier: *A View of the South, 1865-71* (Athens, Ga., 1974), p. 83; *In re Egan,* Fed. Case No. 4303 (June 22, 1866); and *Ex parte Milligan,* 4 Wallace 2 (1866).

and in no way commensurate with their offenses."[15] General Howard was probably quite correct as far as he went, but he neglected to evaluate the treatment given to black defendants, and that was a critical omission.

Of the provost court records examined there are complete ones for Orangeburg, and for the courts that sat in the Second Sub-District of the Eastern Military District of South Carolina. There are also a handful of cases from the provost courts that sat in Chester and Charleston. An article in the *New York Tribune* described the court that sat in Beaufort as a "secessionist" court, but the records of this tribunal are not readily available.[16]

Of fifty-nine white defendants who appeared before the Orangeburg court, fifty were indicted for crimes against persons: there were thirty-nine assault and battery cases, seven assault and battery with intent to kill, three simple assault, and one murder case. The victims, of course, were black. Even though murder was clearly a crime that would require a much higher punishment than any provost court was authorized to give, the Orangeburg court took jurisdiction of this case and found a verdict of "justifiable homicide."[17] Fourteen of the assault and battery cases ended with not guilty verdicts, were dismissed, or, in one case, "settled between parties."[18] Two whites found guilty of assault and battery were sentenced to pay five cents each.[19] Only two out of fifty defendants

[15] O. O. Howard, *Autobiography of Oliver Otis Howard, Major General United States Army* (2 vols., New York, 1907), II, p. 253.

[16] *New York Tribune*, Jan. 29, 1866.

[17] *U. S.* v. (the defendant's name in this case is unintelligible), RG 105, BRFAL, vol. 255, NA. Although the outer cover of this document suggests it is a list of complaints coming from the bureau sub-district of Edisto, the next page says "Orangeburg, S. C., Trials Provost Court." The contents show that it is a record of a provost court, and not a list of complaints, or a bureau court record. It is unclear why it was filed with the bureau records rather than the Army Continental Command records in the National Archives. This kind of confusion may be an additional reason why scholars have not studied the actual trials too often.

[18] Technically a criminal indictment cannot be "settled between the parties," which is one more indication of the fact that these courts followed a law all their own. *U. S.* v. *August Hagood* (Oct. 17, 1865), RG 105, BRFAL, vol. 255. Civil Actions were not brought, even in this court, in the name of the U. S.

[19] *U. S.* v. *James S. Hair; U. S.* v. *William Rice*, RG 105, BRFAL, vol. 255, NA.

in cases of crimes against persons were fined $100: one of them, in addition, received a one month sentence, the other the option of one month or the fine.[20]

The blacks charged with assault and battery, on the other side, did not fare as well. There were nine people, and one was found not guilty. Two of the eight convicted received sentences comparable to the whites (one was fined $5 and the other $5 or one week in jail). The remaining six defendants were all sentenced to a minimum of two months at hard labor. Two of these blacks were also placed on a bread and water diet, and two defendants, in addition to the two months, were sentenced to be tied up each day.

Most of the blacks of course were indicted for crimes against property rather than against the person, and some random sentences imposed by this court in such cases will make it clear that black defendants were not treated with even a semblance of equality. For the offense of larceny Kit was sentenced to two weeks hard labor on bread and water, and tied up each day by the legs and arms for six hours, Sundays excepted. In April 1866 Wesley, a horsethief, was sentenced to two months hard labor and to be tied up by his thumbs three times a week for two hours each day. If he was able to return the horse stolen he would be released, if he also paid the court costs of $20. There is no indication in the record that the horse was returned. In May 1866 Ben, who was found guilty of larceny, was sentenced to a one month term, to have one-half of his head shaved, and to stand on a barrel six hours every day for two weeks. That same month David Jamison, a black, found guilty of assault was sentenced to one month hard labor, to have one-half of his head shaved, and to stand in a barrel shirt two hours every day for one week.[21] One last case from the Orangeburg provost court perhaps will seal the point. This case provoked the exclamation of "astonishing" from the reviewing authority, even though the judgment was approved. The case arose in December 1865 and involved a white man who was indicted for assault and battery on a black woman. The verdict was not guilty (even though the reviewing officer felt the evidence sug-

[20] *U. S.* v. *S. M. Ayers, Jr.*; *U. S.* v. *Charles S. Bull*, RG 105, BRFAL, vol. 255, NA.

[21] *U. S.* v. *Kit*; *U. S.* v. *Wesley* (April 2, 1866); *U. S.* v. *Ben* (May 1, 1866); *U. S.* v. *David Jamison* (May 21, 1866), RG 105, BRFAL, vol. 255, NA. The dates of cases were not recorded in the earlier months.

gested guilt) and the provost court had then added that the woman should "be allowed two weeks to recover from her beating." [22]

The provost courts that sat in the Second Sub-District of the Eastern Military District also handed down some curious decisions, although they were not marked by the viciousness of the Orangeburg court. The first set of cases heard were brought by a black named Caesar against three whites whom he alleged had assaulted him on the streets of Timmonsville: one allegedly cut him with a knife, one hit him with a stick, and the other shot at him. The first defendant pled guilty without malicious intent and was sentenced to pay a fine of $35 or serve one month: he paid the fine the same day. The second defendant pled guilty without malicious intent and the judgment of the court was "not guilty of any crime." The last defendant was found not guilty.[23]

From August 1865 to October 1866 the courts in this district dealt with seventy-seven defendants: nineteen of these were whites, and of these nine were found not guilty. The remaining ten were all fined, or if they failed to pay the fine they were sentenced to a maximum of sixty days. The highest fine levied was $100. No one was sentenced to hard labor. One man was fined fifteen dollars for using threatening and abusive language, and shooting at a freedwoman. The largest fine was for receiving stolen cotton, and this was imposed on a nonresident of the district, a fact the court was careful to note.[24] Of fifty-eight black defendants fifteen were found not guilty or were discharged, but of these only three were in cases in which no other person was found guilty. A number of the black defendants received sentences of a period in confinement on bread and water (the highest was a month and a half), and several received jail terms of a month or two at hard labor. Only eight fines were imposed, and these were often in lieu of a term in jail. Nearly all the black defendants were indicted for crimes against property, and such crimes had always been punished more severely within the Anglo-American system of criminal justice than the lesser grade of crime against the person. Still, it is worth noting that no white was given a mandatory term in jail, all were fined regardless of the seriousness or

[22] *U. S.* v. *J. Whiteside* (Dec. 15, 1865), RG 105, BRFAL, vol. 255, NA.

[23] *Caesar* v. *James Hagie, Bryant C. Cash, and George B. Nettles* (Aug. 8, 1865), RG 393, Records of the Army Continental Commands, 1820-1920, vol. 103, NA. Hereafter the command reports will be cited as ACC.

[24] *U. S.* v. *Sidney Smith* (Dec. 2-4, 1865), RG 393, ACC, vol. 103, NA.

character of the offense, and several whites were indicted for crimes against property (only one was found guilty, however, and he was the nonresident). Though less abusive than the Orangeburg court, in other words, the courts in this sub-district were likewise discriminatory.

It is difficult to establish anything conclusively for the Chester or Charleston courts on the basis of the meager records available. In the Charleston district, where the provost judge was D. T. Corbin who later was a federal attorney for South Carolina during radical reconstruction, and the leading prosecutor of the Ku Klux Klan in 1871, whites and blacks may have been dealt with in a similar fashion. Joe Smith, for example, was sentenced to serve six months hard labor on the streets of the city and pay a fine of $500. He was a white man found guilty of burglary. Lewis Wilson, a black man, received precisely the same sentence a month later for stealing cows, and Jacob Small, also black, the same term but a lower fine for killing a mule valued at $300.[25] One point to be made about these cases is that the court was not implementing the law of South Carolina since burglary was a capital crime, while the other two were not.[26] This may point to discriminatory

[25] *U. S.* v. *Joe Smith* (Aug. 24, 1866); *U. S.* v. *Lewis Wilson* (Sept. 8, 1866); *U. S.* v. *Jacob Small* (Sept. 20, 1866), District Court 1866-77, two unsorted cartons, SCDAH. The military authorities who reviewed the case against Jacob Small (and their recommendation was approved by Robert Kingston Scott, who was the Assistant Commissioner of the Freedmen's Bureau and commander of federal troops in the state by that time) suggested that the defendant be required to make restitution for the value of the mule killed, in addition to his sentence. The provost judge, D. T. Corbin, who was legally trained, pointed out that this could not be done in a criminal case. It would require a separate civil action. In the Orangeburg court, on the other hand, a mixing of civil and criminal remedies was approved: see, for example, *U. S.* v. *Bill and Simmons* (March, 1866), RG 105, BRFAL, vol. 255, NA.

[26] Stealing a cow was a felony with benefit of clergy by the Black Code. *Statutes at Large of South Carolina,* XIII, 246-54. Killing a mule was made an indictable malicious trespass (earlier it had only been a civil wrong) in 1857, and this law was amended in 1861. This offense carried a fine and imprisonment at the discretion of the judge. *Statutes at Large of South Carolina.* XII. South Carolina's law on burglary rested on a 1576 English statute, James L. Petigru, *Report of the Commission on the Code* (Columbia, 1861), p. 605.

treatment, but this is unclear. The Chester court allows no comparison because all the cases found involved black defendants.[27]

Without doubt some of the provost courts in South Carolina were more discriminatory, capricious, and vicious than others. The court in Charleston under Corbin may have been one of the best in terms of treating defendants with a sense of equality, and the court in Orangeburg among the worst. The fact remains that it is impossible to conclude that these courts carried out their responsibility to treat all persons equally. Justice Davis announced a national norm to apply to "all classes of men, at all times, and under all circumstances," but for the blacks brought before the provost courts in South Carolina in 1865 and 1866 this remained, at best, an airy abstraction.

It is clear that the provost courts all too often embraced the "infectious prejudice" against blacks, but what about the bureau courts? General Howard's evaluation, after all, applied to the military courts and not to those under his own jurisdiction. Within some states whites charged that bureau agents always found in favor of blacks, and that "the color of the skin is treated as constituting the whole merit of every question." [28] Within South Carolina the bureau had less opportunity than in other states to involve itself in the administration of criminal justice because of the prominence of the provost court system that had emerged after the compromises of 1865. After passage of the second Freedmen's Bureau law in July 1866, which provided a clear federal statutory base, however, bureau courts occasionally were created in the state. It is possible to get a glimpse at least of the role of this federal agency insofar as the responsibility to secure equality is concerned.

A critical fact to note is that, unlike the provost courts, these courts were required to adopt the legal norms of the state in which they sat. General Howard had ordered all these courts to "follow the statute law of the State made for the government of white people under the same circumstances." [29] Not all courts, however, complied with Howard's order.

[27] *U. S.* v. *Price Cherry* (Oct. 12, 1866); *U. S.* v. *Sam Steward* (Oct. 12, 1866); *U. S.* v. *Taylor McCrea* (Oct. 12, 1866); *U. S.* v. *George Rufus* (Oct. 12, 1866), District Court, 1866-77, two unsorted cartons, SCDAH. The sentences were five months for the first two and three months for the second two. The first three were theft cases, and the last was assault and battery.

[28] Quoted in George Bentley, *Freedmen's Bureau*, p. 159.

[29] *House Executive Documents*, No. 1, 39th Cong., 2d Sess., p. 718.

The most complete record of a bureau court is of the one that sat at Monck's Corner, and, if it is any fair index, General Howard's assessment should have been applied to the courts under his administration as well as to the military. One black man, to take an instance, was found guilty of stabbing another black. He was sentenced to have his guns confiscated (nothing was said about a knife), and to serve eight days at hard labor with a log on his left leg.[30] In July 1866 another black was found guilty of the crime of "absence without leave from plantation and insolence." She was sentenced to hard labor, three hours daily (Sunday excepted) for three weeks under the direction of the planter for whom she worked, after she finished her daily tasks. "Insolence," incidentally, was not a crime that a white could commit: it was an offense that grew out of the master-slave relationship.[31] The record of this bureau court then hardly shines much brighter than that of the Orangeburg provost court. It is difficult to share, without serious qualification, Abbott's view that the bureau contributed to "freedom's actualities" because it impressed on blacks the rule of having grievances dealt with by "appeal to an impartial authority." Still, there is ample evidence to suggest that blacks frequently turned to the bureau with their complaints, and that they looked upon it generally as a security against local whites.[32] The point is that "freedom's actualities" did not always mean equality of treatment by an "impartial authority."

Despite the fact that these federal agencies, especially the provost courts, often dealt quite leniently with whites, and harshly with blacks, and despite the fact that southern whites on occasion were allowed to hold a provost court without the presence of a federal officer,[33] not all whites were pleased with them. The general focus of their opposition was upon the fact that they were outside institutions interfering in the normal political and legal affairs of the state.[34] Others were somewhat more pragmatic. In

[30] *U. S.* v. *Proilleau*, RG 105, BRFAL, vol. 239, NA.

[31] *U. S.* v. *Jenny*, RG 105, BRFAL, vol. 239, NA: *Ex parte Boylston* 2 Strobhart 41 (1847).

[32] Bentley, *The Freedmen's Bureau*, Chapter 11; Abbott, *The Bureau in South Carolina*, Chapter 7.

[33] Hammond, ed., *Juhl Letters*, p. 104.

[34] See, for example, Josephine L. Webster, *The Operation of the Freedmen's Bureau in South Carolina*, Smith College Studies in History (1916), I, pp. 67-165; Sefton, *The United States Army and Reconstruction*, Chapter 2.

February 1866, for example, Jane Pringle, a planter of Georgetown District wrote to General Sickles that: "If some more summary punishment is not divised in these cases than a case before a Provost Court, how in the name of Heaven are we to cultivate our fields? Of what earthly benefit is it to us that the men who should be laboring are thrown into prison, they can't till the land there and I assure you that a prison life is rather a pleasure to a negro than a punishment, since they are fed without working." Her solution to the problem was not the removal of the military, it was that "there should be military posts at small distances for instant relief and instead of a tedious law process the punishment should be double labor on the land. A few cases of this kind would remedy the evil. Whereas now the idea of Georgetown and a law case is a positive frolic and inducement to offend." [35]

Planters as often as not benefited from the interference of the military and the bureau in the former's relations with the working force on their plantations. As James L. Roark has shown, the interests of the planters and the political leaders were not always the same. The planter's primary interest after 1865 was economic restoration, and they were determined to hold their plantations together in the face of the destruction of the old labor system.[36] If the federal agencies in their communities could or would help so much the better.

A sense of the fact that planters need have no deep fear of the military in particular may be derived from the preamble to an order issued by General Daniel Sickles in January 1866 that declared "all laws shall alike be applicable to all inhabitants." Sickles had replaced General Gillmore as head of the military in the state. It reads as follows: "To the end that civil rights and immunities may be enjoyed, that kindly relations among the inhabitants of the State may be established, that the rights of the employer and the free laborer respectively may be defined, that the soil may be cultivated and the system of free labor undertaken, that the owners of estates may be secure in the possession of their lands and tenements, that persons able and willing to work may have employment, that idleness and vagrancy may be discountenanced . . . the following regulations are established." [37]

[35] Quoted in George C. Rogers, Jr., *The History of Georgetown County, South Carolina* (Columbia, 1970), p. 433.

[36] Roark, *Masters Without Slaves*, passim.

[37] See fn. 7.

It has long been recognized of course that the military and the bureau worked with whites, as well as the black laborers, to aid in economic recovery.[38] Many regions, after all, had been economically devastated by war, and it was only logical that economic restoration would be one of the primary concerns of everyone. It is also clear that the bureau in particular did a great deal to protect blacks from entering into unduly oppressive labor contracts with planters, and attempted to protect them from abuse once they had made contracts. Clearly, this was imperative if the "labor question" was to be resolved within the framework of equality which had become the new constitutional norm.

Theory and practice, however, did not always coincide, as the records of the provost and bureau courts clearly show. One of the clearest expressions of the way all of this worked is in a letter to the *New York Tribune* from one of its special correspondents, dated March 6, 1866.[39] While riding through the countryside (this was not in South Carolina) the correspondent came on some blacks working in a field one of whom he recognized as having been at the local bureau headquarters. "He had been put in jail on bread and water, for leaving his place on the plantation, and at the time I saw him had just been released, on promising to go back and fill out his contract." He had originally left the plantation because the quarters he had been given were in a bad condition and he thought the planter had thereby breached the contract so that he was free to leave. The bureau agent thought otherwise, and said that if it had been he should have talked to the planter first, and then to the bureau before leaving. At the time he was sentenced the bureau agent had "requested" that the planter fix the quarters.

Within South Carolina, the Tribune's special correspondent reported in December 1865 that there was a sharp conflict between the military and the bureau. Many regular army officers, he wrote, were "disgusted with, and entirely opposed to the Freedmen's Bureau and its work, and believe the negroes should be compelled to make and fulfill contracts." [40] By July 1866 an order was issued by the military, to be read in the black churches in the coastal region of the state, that emphasized that vagrancy and

[38] John S. Reynolds, *Reconstruction in South Carolina, 1865-1877* (New York, 1905, reprinted 1969), p. 4.

[39] *New York Tribune*, March 6, 1866.

[40] *New York Tribune*, Jan. 9, 1866; see also, William Henry Trescott to James L. Orr, Jan. 1, 1866, Orr—Letters Received, Box 1, Folder 22, SCDAH.

idleness would not be allowed. Freedmen deserting their jobs were to be arrested and put to work on the public roads, and plantation owners were told to report workers not fulfilling their contracts. An "island prison", moreover, was to be established for vagrants where they were to work from sunrise to sunset. Children of freedmen who did not fulfill their contracts, finally, would be bound "to such persons as will take care of them and learn them the habits of industry." [41] Julius J. Fleming, special correspondent of the *Charleston Courier*, commented on this order that "It would have been still better had it come sooner. Unless such an order is enforced, starvation and ruin must ensue. The planters uniformly report that the freedmen are not doing more than half work and that in a very careless and unsatisfactory manner. The consequence is the crops are injured materially for the want of work . . . . In some neighborhoods the Negroes are committing sad depredations, killing the stock, even including milch cattle, breaking into barns and smoke houses, and carrying off everything eatable." [42]

As Fleming's remarks suggest "breach of contract" was often linked with other illicit behavior. In June 1866, for example, Peter was found guilty of assault and breach of contract before the Orangeburg provost court. He was sentenced to two months hard labor. He also had to forfeit his portion of the crop, and he was discharged from the plantataion.[43] In Darlington a black was indicted in August 1866 for vagrancy, because he had no visible means of support and, the court added, had "failed to contract" for the year. He was acquitted. Four other blacks were found guilty of "breach of contract and theft" before the same court earlier in the month, and sentenced to sixty days at hard labor.[44]

The army officers who complained of the bureau in 1865 would have been much happier with the Monck's Corner court after July 1866 because it heard far more cases of "breach of contract" than any provost court. Twenty-five people were brought before the court for such offenses as "breach of contract", "refusing to work as agreed", "breach of contract and theft", "absence from work without leave", or, as in one case, a black was kept for two days under a charge that he was "impudent and too lazy to do his

[41] Hammond, *Juhl Letters*, p. 103n.

[42] Ibid., p. 103-104.

[43] *U. S.* v. *Peter* (June 12, 1866), RG 105, BRFAL, vol. 255, NA.

[44] *U. S.* v. *Jonas Dargan* (Aug. 29, 1866); *U. S.* v. *Virgin, Menter, Aaron and Rose* (Aug. 18, 1866), RG 393, ACC, vol. 103, NA.

work." Nineteen of the twenty-five were blacks. Most of the cases involving whites were marked "settled". The most severe judgment against a white ordered a man "to give the people" one-half of the crop, and this may just as well be viewed as a civil rather than a criminal case. At the end of this judgment the bureau officer added, "Mean fellow is Murray."

One of the most severe sentences imposed on a black was in a case mentioned earlier: it was for the offense of absence without leave from the plantation and insolence. She was sentenced to hard labor three hours daily, except Sunday, for three weeks under the direction of the planter for whom she worked after she finished her daily tasks. Most of the cases were marked "settled," or "dismissed from the plantation." So it is clear that being dismissed was not simply a civil remedy for breach of contract; this same court imposed this sentence on a black in a larceny case. The person had been "convicted of having stolen five times." [45]

The Monck's Corner court was not unique, other bureau agents operated in a similar fashion. On June 5, 1866, O. M. Saxton of Darlington, for example, complained to the resident bureau agent that the freedmen on his plantation were not working well. He was told "to visit his plantation, four miles from the town, talk with the freedmen upon the subject and if not successful in causing a more diligent performance of their duties then they are to (be) brought to these Headquarters for treatment." Later in the month "Mr. Muldro was authorized to inform January that any attempt on his part to break his contract without good reasons . . . would be followed by arrest." [46]

Despite the fact that General Sickles had warned that vagrancy would not be allowed, and that General Howard had authorized the use of state vagrancy statutes made for whites,[47] this crime showed up infrequently on the dockets. In all the provost and bureau court records examined there were only two indictments: one in which a black had "failed to contract" for the year, and that case ended in an acquittal, and one in which four blacks

[45] Case of David Murray (Oct. 6, 1866); Case of Eliza Moultrie (Aug. 28, 1866), RG 105, BRFAL, vol. 239, NA.

[46] Bureau Memorandum Book (Darlington), Entries for June 5, 1866, and June 18, 1866, RG 105, BRFAL, vol. 181, NA.

[47] Circular Letter, from O. O. Howard to Assistant Commissioners, Oct. 4, 1865, in file marked "Justice," RG 105, BRFAL, Miscellaneous Records, 1865-71, NA.

were indicted for vagrancy and theft, and that case never came to trial.[48] Probably because of the success of the efforts of the military and bureau to get blacks to contract for 1866 there was little need to use this particular legal threat.

Why did these federal agencies resort to the criminal law at all in the area of labor relations? This is the important question. The legal side of the destruction of the master-slave relationship was the substitution of relationships built upon the contractual notion; and this was a vital part of the Republican free labor ideology which was based upon a theory that Eric Foner has called the "doctrine of the harmony of interests." [49] This meant that the fundamental interests of capital and labor were identical. Regrettably, according to General Charles Howard, Southern whites did not intend to allow a real free labor system. On the matter of negotiating contracts, for example, he said that whites "did give him [the freedman] a certain appearance of fairness in contracting, but they threw about him so many compulsory regulations in the matter of making contracts, and in the fulfillment of contracts, and in all the business of the plantation, that it virtually amounted to the same thing as depriving him of the power of making free contracts, as you understand it." [50] Recently William McFeely has argued that the contracts negotiated by the bureau did virtually the same thing, that they pleased the planters, and were really "charters for an involuntary labor system dressed in liberty of contract." Harold Hyman, on the other side, observed that "in all states contemporary labor law favored employers under Dickensian "master-servant" categories." The point is that "Freedmen's Bureau labor contracts tipped on customary legal, not racial, pivots." [51]

Clearly, contemporary labor law did favor employers. The so-called "fellow-servant" rule, for example, shifted the economic

[48] *U. S.* v. *Jonas Dargan* (Aug. 29, 1866), RG 393, ACC, vol. 103; *U. S.* v. *John Montgomery, David, Collins, and Archy,* RG 105, BRFAL, vol. 239, NA.

[49] Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York, 1970), pp. 19-20.

[50] Testimony of Brig. Gen. Charles H. Howard, Jan. 31, 1866, *Report of the Joint Committee on Reconstruction* (Washington, 1866), III, p. 36.

[51] William S. McFeely, *Yankee Stepfather: General O. O. Howard and the Freedmen* (New Haven, 1968), p. 149; Hyman, *A More Perfect Union,* p. 418.

burden of industrial accidents to the working class.[52] But labor law generally did not treat breach of contract as a criminal offense,[53] and this is exactly what now occurred in the South. There was no real precedent in any state legal system for this radical departure in labor law. Dickens aside, the fact that the mass of workers were black did condition the contractual relationship in the South.

But, why did the federal military and bureau personnel accept the need for compulsion? At least two factors probably were involved. First of all, the way many northerners viewed the former slaves was often like that of the young Boston teacher who worked in South Carolina's Sea Islands: slavery, he remarked, had left a "race of stunted, misshapen children." [54] In December 1866 Robert Kingston Scott, at that time the head of the bureau in South Carolina and later governor of the state under radical reconstruction, issued a circular letter "To the Landlords and Laborers of the State of South Carolina." His advice to the blacks was that,

> It is incumbent upon you to show to the world that you are worthy of the freedom which your country has bestowed upon you. To this end it behooves you to labor industriously: to lead a strictly honest and virtuous life; to abide faithfully by the obligations of the contract you enter into; to be honest and truthful in all your transactions, to observe the sanctity of the marriage relations and by every means in your power to secure education to yourselves and your children. It is your duty to treat your employer with courtesy and respect and to obey his lawful orders; and it will be for your interest to so conduct yourselves as to deserve his respect and regard.[55]

Wholly devoid of white, middle-class virtues, the freedmen needed to be taught to accept and respect them, even if that required coercion. It was paternalist and racist at the same time, but it was

[52] An excellent account of mid-19th century labor law is in Leonard Levy, *The Law Of The Commonwealth and Chief Justice Shaw: The Evolution Of American Law, 1830-1860,* (New York, 1957), Chapters 10 and 11.

[53] Daniel A. Novak, *The Wheel of Servitude: Black Forced Labor After Slavery* (Lexington, Ky., 1978), p. 8.

[54] Willie Lee Rose, *Rehearsal For Reconstruction: The Port Royal Experiment* (New York, 1967), p. 140.

[55] Circular Letter, Dec. 26, 1866, Records of the Assistant Commissioner, Orders and Circulars, BRFAL, NA.

not the sort of racism that held blacks inherently inferior, and a people that would *never* labor except under the watchful eyes of whites. There were others of course who shared the more open and virulent racism of the southerners, if the punishments handed down in the military and bureau courts are a fair gauge. This may well reflect the common phenomenon of occupation forces adopting the attitudes of the conquered such as occurred in Germany and Japan after World War II: or, it may simply reflect the racism that permeated northern communities.

A second factor was the free labor ideology itself, an ideology defined for Republicans by the doctrine of the "harmony of interests." It was a conservative economic philosophy which rested upon a deep faith in the idea of equality of opportunity: but this very faith was an abstrction that clouded over the very real class differences between the black work-force and the white property-holders. Robert Kingston Scott embraced fully the free labor ideology. He began his circular letter with the observation that "the principle that the interests of capital and labor are identical" had been too often forgotten by "both contracting parties" during the year. Fair contracts should be drafted, and once entered they should be respected. His advice to the blacks has already been noted. To the landholders he wrote that "it certainly is for the interest of the planter to practically acknowledge the freedom of the laborer in its fullest sense as guaranteed by law." Federal policy-makers like Scott often brought to their task the intellectual baggage of a paternalist racism and a conservative economic philosophy that obscured the real needs and interests of the black workers. With the best of intentions this was a fatal combination that led to a willingness to accept the idea that compulsion might be needed to teach the blacks the basic values of a free labor system. This was a strong portent of one of the ultimate grounds of failure of radical Republicanism: as David Montgomery has argued, radical Republicanism broke over the demands of labor for more than an abstract equality before the law.[56] The "harmony of interests" in short provided no answer to class conflict. In the South this ideological problem was magnified by the color of the primary work-force.

Whatever weight these various factors might have had it is impossible to say with any precision; but, it is clear that many

[56] David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862-1872* (New York, 1967).

within the bureau and the military shared an "infectious prejudice" against the former slaves, and they accepted the notion that some force, including the use of the criminal law, was necessary to get the blacks to labor. This combination was tragic. It was tragic for its impact upon the blacks, and because it undermined the free labor ideology, and corrupted the notion of equality.

ALEXANDER GILLON IN HAVANA, "THIS VERY FRIENDLY PORT"

AILEEN MOORE TOPPING *

In late August of 1778 the three South Carolina warships *Notre Dame, Alliance,* and *Medley* approached the harbor of Havana flying distress flags. Aboard the vessels were Alexander Gillon, newly appointed commodore of the navy of South Carolina, and thirteen other officers, among them John Joyner, William Robertson, and John McQueen, the three captains who were destined to command three war frigates which Gillon was to have built in France. The *Alliance* and the *Medley* carried cargoes of indigo to be sold in Europe to defray the cost of the three new frigates.

In addition to a letter of introduction from Rawlins Lowndes, governor of South Carolina, Commodore Gillon carried a letter of recommendation from Juan de Miralles, a Spanish merchant of Havana who had spent three months in Charleston before going on to the seat of the Continental Congress as an unofficial agent of the Spanish government.[1]

* A resident of Orange Park, Florida, Mrs. Topping has done extensive research in the national archives of Spain.

[1] Rawlins Lowndes to His Excellency the Governor, 10 July 1778, Archivo General de Indias, Seville, Spain, Papeles Procedentes de Cuba, legajo 1301 (hereinafter cited as AGI:Cuba, followed by the legajo number). It reads: "Sir, The State of South Carolina have instructed their Commodore Alexander Gillon Esq. to proceed to France, on a very Important Service, and he takes with him several other Officers of our Navy: He may find it necessary, in order to avoid the Enemy, and to prosecute his Voyage with greater Safety, to call at the Havannah, or some other Friendly Port: I am therefore, in such case, in behalf of the State, to crave the Assistance, Countenance and Protection of the Governor of the Place: where he may find it convenient to put in. . . ."

Juan de Miralles to Diego Josef Navarro, 14 April 1778, ibid., reads: "I have learned that Mr. Alexander Gillon, commodore of the navy of this province, must go to France, where he will have built three armed frigates, which he will command to guard these coasts and to protect their commerce. Although his own worth and splendid qualities sufficiently recommend him to Your Excellency, it has seemed to me that in return for his many kindnesses during my stay here I should request that you do me the favor of supplying anything he may require, for which I shall be much obliged."

Not long before Gillon's arrival in the Cuban port, the governor of Havana, Diego Josef Navarro, had acknowledged receipt of a royal order sent to him by Josef de Gálvez, minister of the Indies, which authorized him to assist the North American colonists who were at war with Great Britain, if he were asked in the name of the Continental Congress to do so.[2]

From Havana the South Carolina officers proceeded to Europe, but because of various vicissitudes they were unable to have three war frigates built there. However, Commodore Gillon leased from the Chevalier de Luxembourg for a period of three years a fine new frigate, which he renamed the *South Carolina*.[3]

After Spain declared war against England on 21 June 1779, a Spanish fleet commanded by Admiral Solano cooperated with the French fleet of Admiral de Grasse to make of the Caribbean an important theatre of war during the final years of the American Revolution. At the request of Juan Manuel de Cagigal, who had succeeded Navarro as governor of Havana, Gillon transported on the *South Carolina* some of the troops commanded by Cagigal and thus assisted him in a successful expedition against Providence in the Bahama Islands in May 1782. Later that year the *South Carolina* was damaged. Soon after the frigate was repaired in Philadelphia, she put out to sea under the command of Captain Joyner, and was captured by the British.

The story of three of Commodore Gillon's sojourns in Havana is told in the following documents selected from a number of related letters and reports found in the Papeles Procedentes de Cuba.

[2] Josef de Gálvez to Navarro, El Pardo, 27 March 1778, Confidential, AGI: Cuba 1290: "As it may happen that in the name of or by order of the Congress of the North American colonies there is presented to you a request for some assistance of money, the King orders me to command you with the greatest secrecy and caution, that in this case you summon the Intendant, and being alone with him, you show him this order, so that by virtue of it, and as if you were doing it on your own account for the purpose of cultivating a good relationship with the new United States, you supply to them secretly as much as fifty thousand dollars."

[3] For information about this ship see Edward McCrady, *The History of South Carolina in the American Revolution, 1775-1780* (New York, 1901) pp. 216-220; D. E. Huger Smith, "The Luxembourg Claims," this *Magazine*, 10: 92-115: and David Duncan Wallace, *South Carolina, A Short History*, 1520-1948 (Columbia, 1961) pp. 284-285, 327.

Alexander Gillon to Diego Josef Navarro, Havana, 1 September 1778 [4] (in Spanish).

The letter I sent Your Excellency the other day will have informed you in part about the business which the government of South Carolina has authorized me to transact, and in the visits I have been able to make to Your Excellency you were pleased to add and to admit to the conference Captain Don Gabriel Anistizabal, who commands one of His Catholic Majesty's warships, when you desired more proof of my authority. Only necessity could justify in the eyes of those who have employed me the demonstration to which I consented in that instance, for I consider the honor of the country I represent and the position I occupy to be offended by the implied doubt of my governor's letter and of my veracity. Nevertheless, Sir, I hope that the situation in which I find myself may be relieved by the demonstration I provided of the confidence which my country deposits in me, and that by meriting Your Excellency's confidence I removed the obstacles which have delayed your answers to my petitions, which I take the liberty of repeating.

Necessity, not choice, caused my arrival at this island, for when I left Carolina I intended to proceed to France on the sloop *Medley*. But the *Medley's* slow rate of speed, because of not being watertight, and an unforeseen accident which occurred, compelled me to seek here the same indulgence which your Court has repeatedly manifested to Americans of the South in the ports of Europe, admitting our warships for overhauling and allowing them to dispose of their prizes, permitting to their merchants the purchase and sale of everything they wished, and to their officers and passengers freedom to go ashore, and even allowing publicly the importation and sale of tobacco. Last March my ship enjoyed those privileges in the ports of Santo Domingo and Puerto Rico. In America we admit every kind of person from your dominions, and we grant them the same liberties which the natives enjoy. We

[4] This and the next seven letters: AGI:Cuba 1301, in Spanish. Some of Gillon's letters are found both in the original English and in Spanish translations, others, only in Spanish. His letters written in 1778 appear to be autograph; those written in 1782 appear to have been dictated to an aide. The English letters have been copied verbatim, retaining errors in spelling which appear in the 1778 letters. In translating from Spanish translations, no attempt has been made to imitate Gillon's spelling or syntax. Salutation and conclusion have been copied in full only in two autograph letters.