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# Going Public: How The Government Assumed The Authority To Prosecute In The Southern United States

Jason Twede

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GOING PUBLIC: HOW THE GOVERNMENT ASSUMED THE AUTHORITY TO  
PROSECUTE IN THE SOUTHERN UNITED STATES

by

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This dissertation, submitted by Jason Twede in partial fulfillment of the requirements for the Degree of Doctor of Philosophy from the University of North Dakota, has been read by the Faculty Advisory Committee under whom the work has been done and is hereby approved.



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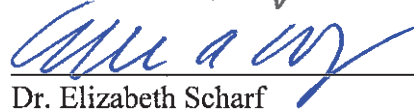
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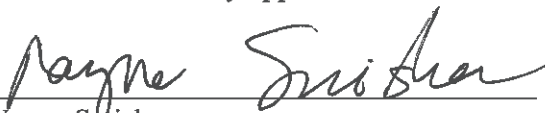


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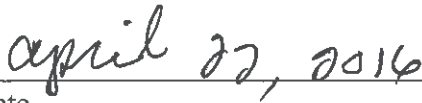
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Wayne Swisher

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Title            Going Public: How the Government Assumed the Authority to Prosecute  
                      in the Southern United States

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## TABLE OF CONTENTS

LIST OF FIGURES .....	vii
LIST OF TABLES .....	viii
ABSTRACT .....	ix
CHAPTER	
I. INTRODUCTION .....	1
II. PROSECUTORIAL DISCRETION .....	4
The Issue of Prosecutorial Discretion .....	4
Transparency .....	7
Private Prosecution as a Solution.....	8
Drawbacks with a Return to Private Prosecution .....	10
A Dearth of Information on the History of Private Prosecution.....	11
III. THE TRANSITION FROM PRIVATE PROSECUTION TO PUBLIC PROSECUTION .....	13
The History of Private Prosecution.....	13
Qualifying the Bounds of Private Prosecution.....	16
A Continuum of Control .....	19
Transition as a Process and not a Single Event.....	20
Determining Meaningful Areas of Control.....	25
Explaining the Transition.....	34

IV.	BENTHAM, MARX AND PROSECUTION.....	36
	Jeremy Bentham.....	37
	The Utilitarian Principle .....	39
	Bentham’s Proposed Prosecution Legislation .....	40
	Karl Marx’s Criticism of Bentham .....	46
	False Consciousness.....	49
	The Bourgeois Paradox.....	50
V.	SLAVERY .....	54
	Economic Explanations for a Shift to Public Prosecution .....	54
	What about the South? .....	57
	Slavery as an Economic Institution.....	58
	Georgia.....	59
	Social Classes in Georgia.....	60
	A Marxist Interpretation of the American Civil War.....	69
VI.	PROSECUTION AND ABOLITION SOCIETIES .....	78
	English Prosecution Societies .....	80
	Prosecution Societies in America .....	85
	Possible Threats to the Bourgeoisie .....	87
	The History of Abolition Societies .....	93
	The Varied Approaches of Abolition Societies .....	100
	Legal Activism.....	111
	The Twenty Year Window Draws to a Close .....	118
VII.	THE OLIGARCHY OF 300,000 .....	123

Appointment .....	123
Slave Ownership by Public Prosecutors .....	127
Political Careers of Public Prosecutors.....	132
Federal Public Prosecutors in Georgia.....	141
In Summary.....	145
VIII. PROSECUTIONS.....	146
Inconsiderate Prosecution .....	146
Slave Offenses in Georgia .....	148
Parallels to White-Collar Crime.....	164
Enforcement as the Issue .....	170
IX. CONCLUSION.....	172
BIBLIOGRAPHY.....	176
Works Cited .....	176
Cases Cited.....	198
Legislative Materials Cited.....	201
Data Sources Cited.....	207

## LIST OF FIGURES

Figure	Page
1. Chart of the Relationship between Urban Crime and Public Prosecution .....	89
2. Donations to the American Colonization Society.....	106
3. Donations to the American Colonization Society, Adjusted for Population .....	109
4. Timeline of Pertinent Slavery Legislation and Prosecution .....	120
5. Slave Ownership of Georgia State Public Prosecutors .....	129
6. Slave Ownership of Georgia Federal Public Prosecutors .....	143



## LIST OF TABLES

Figure	Page
1. Number of Slaves Owned by Georgia State Public Prosecutors .....	130
2. Number of Slaves Owned by Georgia Federal Public Prosecutors .....	144

## ABSTRACT

This research explores factors that may have influenced the transition from private prosecution to public prosecution in Georgia during the late-eighteenth century—a transition that eventually happened in every jurisdiction in the United States. There are numerous people, both inside and outside academia, who are calling for a change to the current system of prosecution in the United States. One possible change that is being advocated is a return to a system of private prosecution. Understanding the reasons the system changed from a system of private prosecution in the first instance is important when determining whether such a return is appropriate.

The little research that does exist in this area has focused on northern states. This research focuses on Georgia—a southern state—to determine if the factors that influenced the transition there were similar or dissimilar to those in the North. The nature of this research is primarily qualitative. Where the subject matter is historical, the primary method of data collection was through the compilation and analysis of historical documents. These include court records, census records, tax records, newspaper articles, personal correspondences, county histories and other histories.

The findings of this research indicate that slavery abolition societies' willingness and financial ability to prosecute slaveholders posed a threat to slaveholders that a system of private prosecution was not adequate to protect against. Public prosecution appears to have been initiated in Georgia—at least in part—to safeguard those slaveholder interests

by taking away the ability of private parties to prosecute and vesting that authority in an appointed government official—the public prosecutor. The method of appointing public prosecutors in Georgia from its inception in the late eighteenth century to the mid-nineteenth century appears to have been designed to create a corps of public prosecutors that were sympathetic to slaveholder interests. There is evidence to show that public prosecutors in Georgia during this time were in fact sympathetic to slaveholder interests and that they enforced the law in a way that favored slaveholders.

## CHAPTER 1

### INTRODUCTION

There are numerous people, both inside and outside academia, who are calling for a change to the current system of prosecution in the United States. One possible change that is being advocated is a return to a system of private prosecution—a system where private individuals can initiate and prosecute criminal cases instead of our current system where the government has a monopoly on the authority to prosecute criminal cases. Understanding the reasons the system changed from a system of private prosecution in the first instance is important when determining whether such a return is appropriate. It is hoped this research will contribute to that understanding.

The existing research on this particular topic is minimal. The little research that does exist has focused on the factors that may have influenced the transition of prosecution systems in the northern states. There appears to be no research focusing on this transition in the southern states. To help fill this void, this research focuses on one southern state—Georgia—and explores factors that may have influenced its transition from private prosecution to public prosecution during the late-eighteenth century.

Chapter 2 provides an overview of some of the problems with public prosecution in the United States today. This includes arguments that have been advanced for and against a return to a system of private prosecution in the United States.

When analyzing this shift from private prosecution to public prosecution, clarifying the distinction between the two systems is key. Chapter 3 details and explains the

differences between the two systems. As will be seen, the distinction is not as clear-cut as it is sometimes made to seem.

Among the arguments over a return to a system of private prosecution are claims from both sides that the opposing system advantages the rich. Under Marxist theory, the fact that the rich would benefit from both a system of private prosecution and a system of public prosecution would be expected; the law is said to exist specifically to benefit the rich (Engels, 1892). Thus, Marxist theory is utilized in this research to explain the shift from private to public prosecution. The focus of Chapter 4 will be to outline Marxist theory as it applies to systems of prosecution. Additionally, the work of Jeremy Bentham—one of the earliest social philosophers to write on the subject of systems of prosecution—is also detailed and compared and contrasted with Marxist theory.

In keeping with Marxist theory, this research focuses on the economic factors in Georgia that led it to switch from a system of private prosecution to a system of public prosecution. Chapter 5 details these economic factors. Slavery appears to be the most substantial economic factor that was in effect while this transition was taking place in Georgia, and thus the focus is primarily on how it could have played a role in the transition.

To show how the institution of slavery could have influenced the transition of systems of prosecution, it first must be determined what threats to slaveholder interests existed at the time of the transition, and whether those threats could be neutralized by making the transition. In the late eighteenth century when this transition was taking place, slavery abolition societies were making their mark in the United States. By pooling their resources, these abolition societies would have had the ability to privately prosecute slave owners and others for crimes committed against slaves—something the victimized slaves

in the cases clearly would not have had the ability to do. This threat appears to have prompted a transition to a system of public prosecution—a system where prosecutions would be permitted by the government only, and would thus foreclose the possibility of abolition societies prosecuting slave owners. This is discussed in Chapter 6.

In order for a transition to public prosecution to be responsive to the threats to slaveholders' interests posed by abolition societies, public prosecutors must have been inclined to protect those slaveholder interests. Chapter 7 analyzes the lives of Georgia's public prosecutors from the late eighteenth century to the eve of the Civil War. From the information gathered, it would appear that most of the public prosecutors of the time would have been sympathetic to slaveholder interests. In fact, most were slaveholders themselves, and it could certainly be argued that a situation existed where the fox was watching the henhouse.

While the biographical data on antebellum Georgia's public prosecutors suggests they would be sympathetic to slaveholder interests, it is still important to look at the actual cases that went through the criminal courts regarding slavery to see if the public prosecutors in fact did support those interests in their official capacities as public prosecutors. This is the focus of Chapter 8. From the records available, it does appear that the public prosecutors of antebellum Georgia did support these interests in their official capacities.

Chapter 9 summarizes the findings of the research. The impact of the findings is also discussed therein.

## CHAPTER 2

### PROSECUTORIAL DISCRETION

I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

Thomas Jefferson

#### **The Issue of Prosecutorial Discretion**

One of the defining characteristics of American prosecutors is the wide discretion that is afforded to them. They can decide who to charge with a crime, which crimes to charge someone with, and whether to offer a plea agreement to a person charged with a crime. There are other areas where they exercise discretion that may be less apparent. For example, while the judge ultimately decides what sentence to mete out, the prosecutor has the ability to influence that sentence through both sentencing recommendations offered to the judge and sentencing terms explicitly included as part of a plea agreement. Additionally, the decision to charge a person with a federal crime or an analogous state crime—a decision that can expose the person charged to a more onerous range of potential punishment—is another area where prosecutorial discretion can be exercised (Heller, 1997). This list is by no means exhaustive. Clearly, the influence of the prosecutor in criminal cases is substantial. It has been said that the prosecutor is the most powerful law

enforcement official in the criminal justice system (Alexander, 2011).

Despite claims that there is a need to vest this much power in the American prosecutor (Misner, 1996), the propriety of this arrangement is often called into question. Where the American prosecutor has ample opportunities to exercise discretion, the opportunities to abuse that discretion are likewise ample. Examples of such prosecutorial misconduct are not infrequent in the news. There is Andrew Thomas, former Maricopa County Attorney (Arizona), who was disbarred in 2012 along with one of his deputies, Lisa Aubuchon, for improperly using their authority as prosecutors for political gain, going so far as to file a complaint—all of the criminal charges of which were later shown to be unfounded—against a judge (*In the Matter of Members of the State Bar of Arizona*, 2012). Ken Anderson, former Williamson County District Attorney (Texas), surrendered his bar license and was sentenced to serve ten days in jail<sup>1</sup> on charges of criminal contempt in 2011 for a murder conviction he improperly secured back in 1987 (*In re Honorable Ken Anderson*, 2013; *In the Matter of Ken Anderson*, 2013). In 2006, Michael Nifong, former Durham County District Attorney (North Carolina), was disbarred for proceeding with a prosecution for sexual assault against several lacrosse players from Duke University after he had received evidence that indicated the allegations were not true (*North Carolina State Bar*, 2007). The term “Nifonged” has since been integrated into the street vernacular, used

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<sup>1</sup> While he was sentenced to 10 days, Anderson only served 5 days because he earned credit for the other 5 days by not being involved in any disciplinary matters while incarcerated (Osborn, 2013).



to denote when someone has been unjustly prosecuted (Anonymous, 2006).<sup>2</sup>

It is not just the media that find prosecutorial discretion to be problematic. Researchers have likewise found concerns with the current prosecutorial system. Perhaps the most frequent criticisms of the American prosecutor involve the disparate treatment of cases based on extralegal factors. A recurrent criticism is that prosecutors handle cases differently based on the race of the person charged (Davis, A., 1998; Miller and Wright, 2008; Radalet and Pierce, 1985; Smith and Levinson, 2012). However, research findings in this area have returned mixed results (Shermer and Johnson, 2010). Some have found that race plays a part in the outcome of a case, disadvantaging minorities (Bernstein, et al., 1977; Schanzenbach Yaeger, 2006; Spohn et al., 1987). Others were unable to find such a relationship (Albonetti, 1992; Kingsnorth et al., 1998). Others have actually found that race plays a part in the outcome of a case, but to the advantage of minorities (Holmes et al., 1987; Spohn et al., 1987; Wooldredge and Thistlewaite, 2004). It becomes questionable, then, whether a defendant's race negatively affects the outcome of his or her case. Even if it does, it has been questioned whether it is prosecutorial discretion that leads to that injustice (see Mellon et al., 1981).

Another extralegal factor that the American prosecutor is often accused of taking into consideration—one that often goes hand-in-hand with the race issue mentioned above—is the socioeconomic status of the person charged (Davis, P., 1989; Reiman and

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<sup>2</sup> This definition—along with several others for the term—can be found in the Urban Dictionary ([www.urbandictionary.com](http://www.urbandictionary.com))—a website designed to provide definitions of emerging street slang.

Leighton, 2013). There appears to be wide support for the notion that public prosecution favors the rich generally (Benson, 1986; Davis, P. 1989; Ellis, 2012; Krent, 1989; Reiman and Leighton, 2013; Steinberg, 1984). Specific claims include that white collar and similar crimes are systematically under-prosecuted (Davis, P., 1989), that politics influence prosecutorial decisions (Ellis, 2012; Krent, 1989), and that public prosecution can be used by governments to subjugate its citizenry (Benson, 1986).

### **Transparency**

Another criticism of American prosecutors is their lack of transparency to the public (Miller and Wright, 2008). Currently, there are no regulations requiring a prosecutor's office to disclose information on the decisions made within it, nor to even maintain such records for itself in-house.<sup>3</sup> While some prosecutor's offices will voluntarily keep that information (see Miller and Wright, 2008; Spohn et al., 1987) or allow researchers entrance to the office to gather such data (see Frohmann, 1997; Holmes et al., 1987), in most instances, that data simply does not exist. Hence, researchers are hindered in their ability to determine whether prosecutors are abusing their discretion in those instances. Where the decision to keep and share data lies within the discretion of the

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<sup>3</sup> Moley (1929) indicates that at the time of his writing, some states were beginning to require public prosecutors to publish reports of their work. However, Moley does not indicate which states those were, nor what information was required to be kept in those reports. In 1931, the National Commission on Law Observance and Enforcement recommended that prosecutorial offices keep records of their operations, though its report was unclear on whether those records were to be disclosed to the public.

prosecutor, the very fact that data is not forthcoming itself could be viewed as an abuse of discretion (see Miller and Wright, 2008). It is certainly not impossible for researchers to come by some data relating to prosecutors; court records are publicly available and can document some of the decision making processes of prosecutors. However, these records merely capture the public face that a prosecutor's office presents. Absent the consent of a prosecutor's office to have its internal workings researched and analyzed, those internal workings remain unknown.

When we look at some of the behaviors prosecutors are claimed to engage in that benefit the rich—systematically undercharging white collar crimes, political corruption and so forth—those activities are not ones that are likely to be made on a public court record. The decision to decline a case for charges, for example, is one of the areas where prosecutors are not required to provide an explanation for their decision. If a case is declined, no formal charges will issue, and thus no court record of the matter will exist. Thus, trying to gather direct data concerning case declination is difficult if not impossible.

### **Private Prosecution as a Solution**

One of the solutions proposed to address the abuse of prosecutorial discretion is a return to a system of private prosecution (Anonymous, 1955; Cardenas, 1986; Davis, P., 1989; Goldstein, 1982; Green, 1988; McCormack, 2004; O'Neill, 2010). Private prosecution refers to the ability of a private citizen—often the victim of the offense—to conduct a criminal prosecution. It differs from public prosecution—prosecution of a criminal case by the government. It is a system of public prosecution that predominates in the United States currently. The United States initially worked under a system of private prosecution, starting in the Colonial Period and stretching past the Revolution. It switched

to a system of public prosecution over time, though the exact time that happened is difficult—if not impossible—to pinpoint. There are several reasons this is so. First, each state and the federal government has its own system of prosecution. Accordingly, each jurisdiction switched to a system of public prosecution on its own time table. Second, when looking at a system of prosecution, it is not as simple as classifying it as solely private or public. There are numerous facets of prosecution—the ability to charge someone with a crime, the ability to dismiss a case, the ability to conduct the trial of a case and so forth. Not all these rights were necessarily divested from the public at the same time. In fact, there are some jurisdictions where aspects of private prosecution are still in effect.<sup>4</sup>

Where prosecution is multifaceted, there is not a consensus on what a return to private prosecution would look like. Some advocate a system of full private prosecution, where a citizen and not the government would have complete control of a prosecution from beginning to end (McCormack, 2004). At the opposite end of the spectrum, some advocate a system where a victim whose case was not charged could seek a declaratory judgment against a prosecutor's office (Green, 1988)—a remedy that leaves an aggrieved victim with a piece of paper saying the prosecutor's office should have charged the case and nothing more. Most recommendations fall somewhere in between, with private prosecution existing within a framework that would still include government oversight of such prosecutions either by the prosecutor's office or the court.

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<sup>4</sup> For example, there are some jurisdictions that allow private individuals to prosecute minor matters, with some restrictions. See Chapter 3 for further discussion.

### **Drawbacks with a Return to Private Prosecution**

Not everyone views a return to private prosecution as the solution. There are many who feel a return to a system of private prosecution would be improper (Bessler, 1994; Fairfax, 2009; Nichols, 2001; Sidman, 1976; Ward, 1972).<sup>5</sup> One of the primary complaints against private prosecution is the lack of impartiality required of private prosecutors (Bessler, 1994; Ward, 1972). Where the private prosecutor would generally be the victim of the crime in question, it is suggested this personal involvement would taint his or her ability to seek justice over vengeance. Based on this, some claim that a system allowing private prosecution is unethical and unconstitutional (Bessler, 1994; Sidman, 1976). Others do not see anything that would legally prevent a system of private prosecution per se, but still find the practice unadvisable (Fairfax, 2009).

This argument parallels the one against public prosecution. As was mentioned, those who advocate a return to private prosecution are quick to point out the extralegal biases that can inure under a system of public prosecution. Those who oppose private prosecution are also quick to point out the biases that can inure. Those biases—personal vengeance and so forth—appear to be distinct from those that can arise in a system of public prosecution. However, it would seem that extralegal factors such as race may also be considered by some private prosecutors in determining whether to bring charges against

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<sup>5</sup> Of these, several maintain that private prosecution is still firmly entrenched in the United States, and are thus more precisely against the continuance of private prosecution (Bessler, 1994; Nichols, 2001; Sidman, 1976; Ward, 1972). The existence of elements of private prosecution in the United States will be discussed more fully in Chapter 3.

someone (see Hart and Rennison, 2003; Xie and Lauritsen, 2012).

More similarities in the criticisms of the two systems exist. Just as public prosecution is said to disadvantage the poor, so it is said of private prosecution. In particular, under a system of private prosecution, the poor are unable to shoulder the costs of litigation, and are thus unable to seek redress for crimes committed against them (Bentham, 1790).<sup>6</sup>

### **A Dearth of Information on the History of Private Prosecution**

It is worth noting that nearly all the recommendations for and against a return to a system of private prosecution come from legal scholars, based on perceived policy benefits and purported legality of the practice. There has been no comprehensive evaluation of the history of private prosecution in the United States. Thus, we do not know exactly why the practice ceased. To that end, it feels like putting the cart before the horse to recommend or discourage a return to the practice without fully understanding it.

Additionally, even among the scant research that has been done, almost none of it has focused on the economic reasons for a shift from public prosecution to private prosecution.<sup>7</sup> In light of the numerous claims that public prosecution advantages the rich—and just as many claiming that private prosecution does the same—this seems like a glaring omission in the research.

Accordingly, the goal of this research is to provide an in-depth evaluation of the

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<sup>6</sup> See Chapter 4 for further discussion.

<sup>7</sup> See Chapter 5 for further discussion.

shift from private prosecution to public prosecution in one of the United States—Georgia<sup>8</sup>—with a focus on some of the economic factors that could have influenced it. It is hoped that this evaluation will aid in any future discussion on the system of prosecution that should prevail in the United States.

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<sup>8</sup> The reasons for picking Georgia as the focus of this research are discussed in Chapter 5.

## CHAPTER 3

### THE TRANSITION FROM PRIVATE PROSECUTION TO PUBLIC PROSECUTION

Beware letting a camel's nose in your tent, for his body will soon follow.

Arabian Proverb<sup>1</sup>

#### **The History of Private Prosecution**

Before discussing how the United States transitioned from a system of private prosecution to public prosecution, it is important to understand how private prosecution came into being in the first place. Private prosecution, simply put, is the prosecution of a criminal matter by a private individual as opposed to an individual working on behalf of the government. The history of how private prosecution originated is less simple.

A prosecution is “a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime” (Black, 1910, p. 958). Thus, for there to be any form of prosecution, a court of law must exist. Dispute resolution in the absence of a court of law leaves individuals to seek redress on their own for wrongs done to them (Ma, 2008).

It would be impossible to determine when the first courts of law existed, though there is evidence that Greece and China had some form of these courts in existence in the

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<sup>1</sup> While widely believed to be an Arabian proverb, its exact origin is uncertain (Nunberg, 2005).



fourth century BCE (Messick, 2002). The earliest courts we are aware of appear to have merely provided an official forum for the resolution of disputes (Ma, 2008). Thus, while the government provided the forum, individuals were still responsible for pursuing their grievances. Accordingly, the initial form of prosecution in these courts was private prosecution (see Klerman, 2001).<sup>2</sup>

In England, it would appear that courts of law were formed as early as the seventh century (Klerman, 2001). Initially, these courts do not appear to have made a strict distinction between criminal matters and civil matters (Benson, 1986; Klerman, 2001).<sup>3</sup> This can be seen in the types of punishments given to those convicted. The most common punishment was monetary compensation to the victim of the offense (Klerman, 2001)—not unlike a civil judgment today.<sup>4</sup> It was not until the thirteenth century that a split

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<sup>2</sup> Klerman (2001) indicates that pre-modern societies relied upon private prosecution.

<sup>3</sup> Benson (1986) indicates that the distinction between civil and criminal law evolved as a means to provide a larger area of operation for public prosecutors. The type of civil law referenced here should not be confused with the civil law system employed by several countries in continental Europe (Kress, 1976). “Civil law” in the United States simply refers to non-criminal law matters.

<sup>4</sup> We can also begin to see some evidence of socioeconomic status bias being built into the justice system at this time. This comes in the form of the wergild—a monetary payment to a deceased’s family in a homicide case (Klerman, 2001). The required payment varied depending on the social status of the deceased (Klerman, 2001).

occurred in the way prosecutions were handled in Europe (Ma, 2008; Van Caenegem, 1991). Until then, England and the rest of Europe had handled prosecution in much the same way, via a system private prosecution (Ma, 2008). It was during the thirteenth century that continental Europe generally switched to an inquisitorial system of prosecution that utilized government officials in the accusation process (Ma, 2008; Van Caenegem, 1991). England held to a system that used laymen in the accusation process (Ma, 2008; Plucknett, 1929; Van Caenegem, 1991). In other words, England maintained a system of private prosecution while continental Europe switched to a system of public prosecution.

The English courts of law still operated under this system of private prosecution when England began establishing colonies in America. As such, the English system of private prosecution made its way to the colonies. However, the English never sought uniformity in the way the colonial courts operated (Surrency, 1967). Thus, the colonial courts were left in some regards to adapt and evolve on their own (Surrency, 1967). Prosecution was one of the elements that evolved.<sup>5</sup>

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<sup>5</sup> The workings of grand juries and the type of court paperwork needed to charge someone with a crime are some of the other practices that evolved in the colonies (Chapin, 1983). Regarding charging documentation, there is one curious aspect that remained intact in the colonies that would appear to be built into the system for the purpose of fostering differential treatment of offenders based on their socioeconomic status. In England, the status or occupation of the accused was required to be placed on indictments (Chapin, 1983; Plucknett, 1929). As we will see in Chapter 8, a variation of this practice was continued in Georgia.

## Qualifying the Bounds of Private Prosecution

When discussing private prosecution, it is important to understand exactly what we mean when we use the term. Knowledge of how private prosecution initially operated is important to this understanding.

In the early days of the United States—before its establishment as its own country—a private party could initiate criminal charges against another person. As mentioned above, this is similar to how private prosecution operated in other countries. The private party that initiated criminal charges did not have to be the victim of the crime they sought to charge; a non-interested third party could also bring charges—usually a witness to the matter. This person was referred to as the prosecutor.<sup>6</sup> The motivation for the victim of a crime to bring charges seems self-evident. For non-interested parties, there was the possibility of receiving an award for prosecuting the case as motivation—what was referred to as a *qui tam* prosecution (Langbein, 1973). As we look at the evolution of prosecution in the United States, the distinction between victim-initiated private prosecution and third party-initiated private prosecution becomes important.

Another distinction that is important to make is that between victim-initiated private prosecution and what has been called outsourced prosecution (Fairfax, 2009; Grove, 2011;

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<sup>6</sup> Even after the establishment of public prosecutors in Georgia, charging documents would still list as “prosecutor” the person who provided the information for the complaint. The public prosecutor would be listed by their title—“attorney general” or “solicitor general.” The etymology is important to note, for the informant was not a prosecutor in the way the term is used today.

Nichols, 2001). Outsourced prosecutions are prosecutions that are contracted out to private attorneys by the public prosecutor, court, or some other government official having jurisdiction in the area in question. One type of outsourced prosecution are those cases prosecuted by a special prosecutor. A special prosecutor is appointed to handle one specific case. This could be done for a number of reasons. Conflicts of interests in the public prosecutor's office—such as a relative of an office employee being prosecuted for a crime—are perhaps one of the more common reasons. Another type of outsourced prosecution would be the contracting out of all prosecutorial functions for a given jurisdiction to a private attorney or law firm. This would be most commonly done in small jurisdictions, such as a small town that does not have the resources to cover the costs of employing a prosecutor's office directly.

While outsourced prosecutions are certainly covered by private attorneys, they would not truly be private prosecutions. Private prosecutions would be prosecutions where a private party would have the unfettered ability to choose to prosecute any case. With outsourced prosecutions, a private attorney can only prosecute those cases that the government allows them to prosecute. In reality, what we now refer to as outsourced prosecution resembles how many public prosecutors operated for several decades in the United States; many had their own private practice and were contracted out to do prosecutorial work by the local court.<sup>7</sup> Outsourced prosecution is really public prosecution

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<sup>7</sup> The Attorney General for the United States was allowed to engage in his own private practice until 1853 (National Commission on Law Observance and Enforcement, 1931). Hawaii and Oklahoma had statutes in the late-nineteenth century specifically prohibiting a

with a form slightly different from what we are currently accustomed to.

Lastly, it is important to look at the functions of a government officer as opposed to the title of that officer when determining whether that officer was in fact a public prosecutor. There have been a plethora of labels used throughout the states to refer to the public prosecutor.<sup>8</sup> Some of these titles were derived from officers that existed in other countries, but did not necessarily have the same functions as their counterparts in the United States. This was certainly true of the title Attorney General. The title appears to be borrowed from England. The English Attorney General was simply the king's attorney. While the English Attorney General did have some public prosecution functions, the officer was not engaged in the regular prosecution of criminal cases as we see the attorneys general from several states engaged in today. In fact, up through the twentieth century, it appears that attorneys general in the states had a primarily civil function (Moley, 1929). Thus, when we see certain colonies in America establishing the office of the attorney general, this does

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public prosecutor from representing a party in a case that arose from the same set of facts as a case he or she was prosecuting for the state, implicitly indicating that a public prosecutor could carry on additional work as an attorney as long as it did not conflict with his or her duties as a public prosecutor (see *Civil Laws of the Hawaiian Islands*, 1897; *Statutes of Oklahoma*, 1891b).

<sup>8</sup> Titles that have been used include: prosecuting attorney, county attorney, state's attorney, district attorney, circuit attorney, county solicitor, circuit solicitor, solicitor general, commonwealth's attorney, prosecutor of the pleas and attorney general (Moley, 1929; National Commission, 1931).

not necessarily mean they are establishing an office of public prosecution.<sup>9</sup>

### **A Continuum of Control**

When defining a system of prosecution as private or public, it is best to look at it less categorically (private or public) and more as a continuum of control. To what extent do public prosecutors have control over prosecutions in their jurisdiction? To what extent does a private party have the ability to control a prosecution? This will tell us more about the system of prosecution than simply assigning it the label “private” or “public.”

When determining where along the continuum of control a given system of prosecution rests, it is important to first look at each of the constituent parts of that system. For example, even though England was considered to employ a system of private prosecution at least through the late-nineteenth century, the system still contained elements where a government official had control over certain aspects of prosecutions. Specifically, the English Attorney General—an office created in the fifteenth century (Ma, 2008)—had the ability to dismiss any prosecution initially brought by a private party (Kress, 1976; Ma, 2008).<sup>10</sup> Additionally, in the sixteenth century, English justices of the peace were given the authority to act in a public prosecutorial role, being tasked with investigating crimes brought by private parties and giving them the authority to bind suspects over for trial

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<sup>9</sup> For example, Virginia established an office of the attorney general in 1643, Maryland in 1666 and New Hampshire in 1683 (Chitwood, 1905; Ma, 2008; Nichols, 2001).

<sup>10</sup> The rationale behind giving the English Attorney General this power appears to stem from the idea that all prosecutions were brought in the name of the king (Ma, 2008) and was simply an extension of the king’s power to pardon.

(Langbein, 1973; Ma, 2008). If we look at some of the countries of continental Europe that are typically labelled as employing public prosecution, their systems permit elements of private prosecution. In France, a private party can compel the government to prosecute a matter—whether the public prosecutor wants to or not—through the filing for restitution in the criminal court (Ma, 2008). In Germany, private parties can prosecute minor matters that do not concern public interests (Ma, 2008). They can also challenge in court the decision of a public prosecutor to not prosecute a case (Ma, 2008).

In the United States, there are many systems of prosecution that exist that are also hybrid systems, allowing aspects of private prosecution in limited circumstances. By looking at exactly which areas private parties are allowed to exercise control over a prosecution in those systems, we can then say where the system as a whole falls along the continuum of control.

### **Transition as a Process and not a Single Event**

As we can see, there is no specific date on which we can say public prosecution took over as the predominant form of prosecution in the United States. By looking at the issue as a continuum of control as discussed above, there will not be a specific date at which we could say any such change occurred. Further, this same evolutionary process is happening in 51 separate jurisdictions (50 states and federal). Where each jurisdiction's system has evolved differently, each jurisdiction will have moved along the continuum at different rates and will be at different locations along that continuum.

While the general trend from the time of colonization of the United States until the present has been to shift from private prosecution to public prosecution, not every change in a system of prosecution follows this trend. One example of this can be seen in the case

law of Wisconsin. The Wisconsin Supreme Court held in 1888 that a privately retained prosecutor could not assist the public prosecutor (*Biemel v. State*, 1888). However, subsequent to that case, the Wisconsin courts—in a separate matter—allowed a privately retained prosecutor to assist the public prosecutor (*Scheldberger v. State*, 1931). In a case that came after those two, the Wisconsin courts returned to their original holding that a privately retained prosecutor could not assist the public prosecutor (*State v. Scherr*, 1960). As we can see in this instance, the control legally allotted to private prosecutors appears to have fluctuated for a time in Wisconsin—or at least there was a lack of consensus as to exactly what level of control should be afforded to privately retained prosecutors.

Another example of this fluctuation can be seen in the early statutes of Connecticut. Connecticut is often regarded as the first state to explicitly call for the creation of a public prosecutor that had control over all criminal cases in the jurisdiction (Jacoby, 1980; Jacoby, 2010; Worrall, 2008). Connecticut’s statute of 1704 reads:

Henceforth there shall be in every county a sober, discreet and religious person appointed by the county courts, to be attorney for the Queen to prosecute and implead in the law all criminals and to do all other things necessary or convenient as an attorney to suppress vice and immorality.<sup>11</sup>

This statute appears to create a public prosecutor that has a monopoly on prosecutorial control. This can be seen specifically where the statute calls for the public prosecutor to prosecute “all criminals.” Explicit as this seems, Connecticut later changed their statute regarding prosecution. Connecticut’s statute of 1784 reads:

And it is further enacted by the authority aforesaid, that in each county in this State, there shall be one State Attorney, who shall prosecute, manage

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<sup>11</sup> Quoted in *Report on Prosecution* (National Commission on Law Observance and Enforcement, 1931). Older spelling of certain words was corrected to modern spelling.



and plead in the county where such attorney is appointed, in all matters proper for, and in behalf of the State (*Acts and Laws of the State of Connecticut*).

This later statute is less explicit than the former. It calls not for the public prosecutor to prosecute all criminal cases, but rather all cases “proper for, and in behalf of the State.” The wording is certainly ambiguous. It begs the question, what is proper for the state to prosecute? If we look at the wording through modern lenses—lenses that see every crime as a crime against society, and thus against the state—then this statute would be saying exactly what the first statute did, albeit in different words. However, the statute can also be read to mean that the public prosecutor could only prosecute cases where the state was directly involved—crimes such as theft of public funds, illegal taking of game and so forth. Such a system would take significantly less control away from private individuals to prosecute than the first statute.

It has been claimed that Connecticut has provided exclusive control over prosecutions to public prosecutors since 1730 (Pickett, 1926), essentially ignoring the ambiguity in the statutory language. In defense of this position, an opinion written by the Supreme Court of Errors of Connecticut is cited (*State v. Keena*, 1894), wherein the Court does hold that public prosecutors in Connecticut have had control over all prosecutions since 1730. Certainly, courts have the ability to interpret ambiguous statutory language and make that interpretation binding. However, the opinion in question was not written until 1894. Thus, for over a century, the ambiguity in the statutory language persisted.

Ambiguous statutory language is not unique to Connecticut. In fact, ambiguous statutory language is not the exception but the rule when reading early statutes regarding

public prosecution.<sup>12</sup> Where the language is so ambiguous, one cannot tell whether those

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<sup>12</sup> In addition to Connecticut, the following states had ambiguously worded statutes regarding the extent of control public prosecutors were to have over prosecutions: Arkansas – *Laws of Arkansas Territory* (1835); Colorado – *Revised Statutes of Colorado* (1868); Florida – *Manual or Digest of the Statute Law of the State of Florida* (1848); Illinois – *Revised Code of Laws of Illinois* (1827); Kansas – *Statutes of the Territory of Kansas* (1855); Kentucky – *Collection of all the Public and Permanent Acts of the General Assembly of Kentucky* (1802); Maine – *Laws of the State of Maine* (1830); Massachusetts – *Compendium and Digest of the Laws of Massachusetts* (1809); Michigan – *Laws of the Territory of Michigan* (1827); Minnesota – *Revised Statutes of the Territory of Minnesota* (1851); Missouri – *Digest of the Laws of Missouri Territory* (1818); Nevada – *Compiled Laws of the State of Nevada* (1873); New Hampshire – *Laws of the State of New Hampshire* (1830); North Carolina – *Revised Statutes of the State of North Carolina* (1837); North Dakota – *Revised Codes of the Territory of Dakota* (1877); Ohio – *Statutes of Ohio and of the Northwestern Territory* (1834); Oklahoma – *Statutes of Oklahoma* (1891a); Pennsylvania – *Digest of the Laws of Pennsylvania* (1852); South Dakota – *Revised Codes, State of South Dakota* (1903); Tennessee – *Statute Laws of the State of Tennessee* (1831); Virginia – *Code of Virginia* (1849); Wisconsin – *Statutes of the Territory of Wisconsin* (1839); Wyoming – *Compiled Laws of Wyoming* (1876). In the majority of these cases, the ambiguity hinges on the use of one of two pieces of phraseology. First, many statutes state it is the public prosecutor's duty to prosecute all cases in which the state is interested. What this meant is unclear. Certainly today, we would see the state as interested in all criminal

statutes were intended to establish a monopoly on prosecution for the public prosecutor or not. While some state courts provided some guidance on how to interpret those statutes,<sup>13</sup> most did not. As such, pinpointing when that control was wrested from private individuals becomes difficult.

Even if the statutes were crystal clear in their intent, the difficulty of the task of tracking the transition from private prosecution to public prosecution is further compounded by the fact that practice did not always follow law. There is indication that private prosecution continued in courts in New York (Ramsey, 2002), Massachusetts (Ireland, 1995) and Philadelphia (Steinberg, 1986)<sup>14</sup> well beyond the time it would have

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prosecutions. Whether this same interpretation inured back then is questionable. Second, many statutes state it is the public prosecutor's duty to prosecute all cases in which the state is a party. Again, if we were to look at this language today, the state is the party in all criminal prosecutions. However, back at the time these statutes were written, that interpretation did not necessarily apply.

<sup>13</sup> The Supreme Court of Michigan provided some specific guidance of their prosecution statute in *Meister v. People* (1875). In many cases, the guidance must be inferred. Specifically, if the court is deciding the issue of whether a privately retained attorney can assist the public prosecutor – as many courts did – there is an underlying assumption that a privately retained attorney does not have the ability to prosecute a case on their own, else there would be no issue.

<sup>14</sup> It appears that private prosecutions took place after Pennsylvania had a statute in place concerning the establishment of a public prosecutor. Steinberg (1986, p. 234-235) provides

been barred by law. There is also the possibility that many criminal cases are resolved outside of the criminal justice system by the individuals involved (O’Neill, 2010), and thus escape attention because there is no official record of the transactions.

Additionally, even in states where the direction of ceded prosecutorial control has always been towards the state, there is no specific sequence in which these aspects of control appear to be relieved from private parties and vested in the public prosecutor. An example of this can be seen with the states of New Jersey and Alabama. In New Jersey, private parties are currently able to prosecute cases in municipal court (*State v. Harris*, 1992). However, private parties are not able to initiate prosecutions for contempt without leave of the court (*In re Beuhrer*, 1967). Conversely, Alabama does appear to allow private parties to initiate prosecutions for contempt (*Ex parte Landry*, 2013) but has no provision allowing private parties to prosecute cases in municipal court. To further compound this issue, statutes and case law are often silent on a state’s position on these issues. Thus, for many jurisdictions, it becomes difficult to ascertain the sequence in which these aspects of control are divested from private individuals.

### **Determining Meaningful Areas of Control**

It is apparent that at present, private individuals have no meaningful control over prosecutions in the United States. This is not to say that private individuals do not have any control over some prosecutions in certain circumstances. However, in those few instances

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information indicating private prosecutions took place through 1853 and the Pennsylvania statute on public prosecution was in effect in 1850 (*Digest of the Laws of Pennsylvania*, 1852). However, the wording of the Pennsylvania statute is ambiguous, like many were.

where private individuals do have some ability to control a prosecution, the control they are afforded is generally subject to oversight by a public prosecutor or severely restricted. Inasmuch as this deprives private individuals of the ability to independently bring the full force of a criminal prosecution against an offender, the control private individuals currently have is not meaningful.

There was, of course, a time when private individuals in the United States had absolute control over prosecutions. Over time, that control was taken away from them and vested in public prosecutors, bit-by-bit. Some of the bits that were taken did not greatly affect the control that private individuals had over prosecutions. Thus, focusing on the history surrounding the taking of those bits is not as productive when trying to determine what brought about the transition to public prosecution. It is more beneficial to instead focus on the bits that took a significant amount of control from private individuals—the meaningful changes. To identify which changes in prosecutorial control were meaningful, it is also important to identify which changes were not meaningful.

### **Non-Meaningful Changes**

There are several common areas where the battle over the level of prosecutorial control has been waged in the United States, but the areas argued over are essentially meaningless in terms of prosecutorial control afforded to private individuals. One such area that receives frequent attention concerns the ability of a privately-retained attorney to assist the public prosecutor. This was a hot issue from the mid-nineteenth to early-twentieth

century. The supreme courts of several states wrote decisions on the issue.<sup>15</sup> The courts from a handful of states—Massachusetts, Michigan and Wisconsin—held that it was not permissible to allow a privately retained attorney to assist the public prosecutor. Six other

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<sup>15</sup> California - *People v. Turcott* (1884); Colorado - *La Shar v. People* (1924); Florida - *Thalheim v. State* (1896); Georgia - *Jackson v. State* (1923); Hawaii - *Territory v. Chong Chak Lai* (1909); Idaho - *People v. Biles* (1885); Illinois - *Hayner v. People* (1904); Indiana - *Siebert v. State* (1884); Iowa - *State v. Fitzgerald* (1878); Kansas - *State v. Wilson* (1880); Kentucky - *Price v. Caperton* (1864); Louisiana - *State v. Mangrum* (1883); Maine - *State v. Bartlett* (1909); Massachusetts - *Commonwealth v. Gibbs* (1855); Michigan - *Meister v. People* (1875); Minnesota - *State v. Rue* (1898); Mississippi - *State v. Byrd* (1835); Missouri - *State v. Robb* (1886); Montana - *State v. Tighe* (1903); Nebraska - *Polin v. State* (1883); North Dakota - *State v. Kent* (1895); Oklahoma - *Reed v. State* (1909); Tennessee - *Ex parte Gillespie* (1832); Texas - *Burkhard v. State* (1885); Utah - *People v. Tidwell* (1886); Vermont - *State v. Ward* (1889); Washington - *State v. State Bd. of Dental Examiners* (1908); West Virginia - *State v. Stafford* (1921); Wisconsin - *Biemel v. State* (1888). There are a handful of state supreme courts that heard cases on the issue later into the twentieth century: North Carolina - *State v. Page* (1974); South Carolina - *State v. Addis* (1972); South Dakota - *State v. Basham* (1969); Virginia - *Cantrell v. Commonwealth* (1985).

states have followed suit and banned the practice.<sup>16</sup> The Michigan Supreme Court provided the following basis for their holding:

It is impossible to account for the change in our statutes requiring the exclusive control of criminal procedure to be in the hands of public officers who are forbidden to receive pay or in any way become enlisted in the interests of private parties, unless we assume the law to have been designed to secure impartiality from all persons connected with criminal trials. ... [W]e must conclude that the legislature do not consider it proper to allow the course of the prosecuting officer during the trial to be exposed to the influence of the interests or passions of private prosecutors. His position is one involving a duty of impartiality not altogether unlike that of the judge himself (*Meister v. People*, 1875).

In short, those states that were against allowing privately retained prosecutors assisting public prosecutors saw the arrangement as one that could introduce bias into the proceedings, that bias stemming from the “passions” of the private prosecutor—or perhaps more appropriately, the passions of the people employing the private prosecutor. The majority of states that heard cases on this issue saw it the opposite way—allowing private prosecutors to assist public prosecutors was no problem at all. The Supreme Court of North Dakota—one of the states to so hold—justified its holding as follows:

Certainly, [the defendant] should not be heard to complaint of the zeal of the private counsel, if such counsel has not allowed his zeal to hurry him into error. The best mode of reaching the truth is by the strenuous contentions of opposing counsel, each animated by the conviction that the cause he has espoused is just. The public have some interests at stake in a criminal prosecution. May all the zeal be displayed on one side, and none be tolerated on the other? ... We think that the control of the public prosecutor over the proceedings is a sufficient guaranty that the accused will not be made the innocent victim of overzealous prosecution by private persons (*State v. Kent*, 1895).

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<sup>16</sup> California – *People v. Dehle* (2008); Georgia – Georgia Uniform Superior Court Rule 42.1 (1984); Minnesota – *State Ex Rel. Wild v. Otis* (1977); Missouri – *State v. Harrington* (1976); Nebraska – *Goldsberry v. State* (1912); New York – *People v. Robinson* (2010).

Unlike the Michigan Supreme Court, the North Dakota Supreme Court saw the zeal of private prosecutors as a benefit to the criminal justice system, not a detriment. This argument over zeal was the focal point for states deciding which way to go on this issue.

This ability of a privately retained attorney to assist the public prosecutor is sometimes conflated with a system of pure private prosecution (Bessler, 1994; Ward, 1972), and this conflation is followed by claims that private prosecution is in full force and effect in the United States. However, as was discussed above, the ability to assist a public prosecutor is but one aspect to look at along the continuum of prosecutorial control. When we analyze the holdings of these cases, it becomes clear that the amount of control private parties are really afforded is minimal. The cases are almost universal in their holding that a privately retained attorney may assist the public prosecutor only where the public prosecutor ultimately retains control of the prosecution. Thus, while there is some control afforded to private prosecutors in these jurisdictions, that control is only afforded to them if the public prosecutor allows it. In other words, the public prosecutor is in control of whether to divest prosecutorial control, which essentially results in no control being vested in the private party at all.

This is not the only area where private parties appear to be given some amount of control over prosecutions that really amounts to nothing. There are a few states that allow private individuals to prosecute minor offenses: New Hampshire, New Jersey and Rhode Island. In New Hampshire, a private prosecutor can prosecute any case that does not carry incarceration as a possible penalty (*State v. Martineau*, 2002). In Rhode Island, a private prosecutor can prosecute misdemeanors, but cannot seek a penalty of more than a year of incarceration or \$1,000 against the defendant (*Cronan ex rel. State v. Cronan*, 2001). In



New Jersey, a private prosecutor can prosecute matters in municipal court and does not appear to have an explicit restriction based on the type of penalty sought (*State v. Harris*, 1992). At first blush, it would appear that private individuals are afforded a fair amount of control over prosecutions, albeit over minor offenses. Even taking the penalty restrictions into account, this is still so; only New Hampshire has an outright restriction on seeking any incarceration. However, if we dig into the law in these states, the control that appears to be given to private individuals is nothing more than an illusion. In New Jersey, a private prosecutor can only prosecute a case with the consent of the public prosecutor. As we saw above, the private prosecutor only gains prosecutorial control if the public prosecutor grants it to them, which really amounts to no control being given at all. In New Hampshire and Rhode Island, while private prosecutors may prosecute cases, the public prosecutor ultimately has the right to dismiss those prosecutions. Again, the public prosecutor has the ultimate control over whether any of the cases proceed. Thus, any control a private prosecutor has there is minimal if not nonexistent.

Yet another example can be seen with the right of private individuals to prosecute criminal contempt charges. A criminal contempt charge arises when a person does not follow an order of the court. This could arise from both a civil case—such as a person not obeying the terms of a restraining order—or a criminal case—such as a person not reporting to jail to serve an ordered term of incarceration. The issue of private parties prosecuting contempt charges arises from contempt in civil cases. Unlike criminal cases that are now overseen by the government, civil cases are initiated by private parties. Thus, when a court's order is violated in a civil case, there is a private party that is just as interested as the court in seeing the order enforced. There are some state courts that allow

private parties to prosecute criminal contempt cases of this nature, though there are numerous caveats (Griffith and Larsen, (n.d.)). For example, most states that permit private parties to prosecute criminal contempt cases require that the private party not be the beneficiary of that court order, and also require that the private party be specifically appointed by the court before they are able to proceed with prosecution (Griffith and Larsen, (n.d.)).<sup>17</sup> Again, any right a private party has to prosecute is not inherent; permission must be obtained from the court. Further, in most jurisdictions, the party that would most want to initiate the prosecution is specifically precluded from doing so. In short, private individuals are provided no meaningful control of the prosecution of these cases. Despite the prosecution of criminal contempt being viewed as a private prosecution issue by some (O'Neill, 2010), it is arguably just another form of outsourced prosecution in most jurisdictions.

### **Meaningful Changes**

So what were the meaningful areas of control in prosecution that were divested from private individuals? There appears to be two: the right to file criminal charges and the right to dismiss criminal charges.<sup>18</sup>

Of these two rights, it was the right to dismiss criminal charges that was typically

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<sup>17</sup> There are some circumstances where private parties do not seem to be constrained by these restrictions (see *Ex parte Landry*, 2013).

<sup>18</sup> This is referring to the rights to file and dismiss charges outright in all criminal cases, not the limited ability to do so in misdemeanor cases as discussed above.

lost first.<sup>19</sup> This right was lost when offices of public prosecutors were first established to prosecute all crimes in a given jurisdiction.<sup>20</sup> The right to dismiss a case had not been unique to private individuals; prior to the establishment of a monopoly over the prosecution of crimes, government prosecutors had the concurrent ability to dismiss criminal charges (see Kress, 1976; Ma, 2008).<sup>21</sup> Thus, this transition was not a transfer of control from

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<sup>19</sup> As was mentioned above, the progression for each of the 51 jurisdictions is different, and it is possible that private individuals lost the right to charge cases in some jurisdictions before they lost the right to dismiss cases, or perhaps lost them at the same time. For example, the attorney general in New Hampshire was responsible for presenting all cases to the grand jury from the outset in 1683 (Ma, 2008).

<sup>20</sup> It has been said that the ability of justices of the peace to bind suspects and other relevant parties over for trial left private individuals in a position where they were deterred from dismissing a case if a justice of the peace chose to proceed with it (Langbein, 1973; Ma, 2008). Private individuals were not prohibited from dismissing a case, however. They would simply lose their posted bond if they did not attend court to provide the requisite evidence (Langbein, 1973).

<sup>21</sup> The English Attorney General had the ability to dismiss cases brought by private individuals (Kress, 1976; Ma, 2008). It appears that in the colonial days of Virginia, the attorneys general were appointed by the colonial governor and sometimes required the consent of the King of England (Chitwood, 1905). It seems likely this same practice would be followed in other English colonies, presumably granting the attorneys general in the colonies the same powers as the attorney general in England itself.

private individuals to the government, but simply a removal of control from private individuals.

The ability to dismiss a criminal case is meaningful because it gives the bearer of that authority the power to relieve the accused from state-imposed punishment. Without such control, private individuals have no ability to end a prosecution they no longer want to see go forward. Thus, the government alone has the power to decide whether someone will face a state-imposed punishment or not.

The right to bring criminal charges against someone is equally meaningful. Again, the right to bring criminal charges was not unique to private individuals; government attorneys had this concurrent right to initiate criminal charges just as much as any person had. Thus, this was another right taken away, not transferred.

At first blush, it may seem questionable why this type of control was important. Where the right to dismiss charges had already been fully assumed by the government, it could simply dismiss a prosecution it did not care for if a private individual filed charges. This would certainly relieve the accused of facing any state-imposed sanction. However, there are also informal sanctions from members of society that can come from simply being charged, such as damage to one's reputation.<sup>22</sup> If a private individual does not have the right to bring charges, they have no ability to impose that sanction on someone, either. There are some jurisdictions that allow the victim of a crime to challenge a public

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<sup>22</sup> Bentham (1780) referred to these types of punishments as moral punishments. In his proposed legislation regarding prosecution (1790), Bentham recognized that control over the right to bring charges was control over moral punishment.

prosecutor's decision to not charge a case (see Green, 1988).<sup>23</sup> Even with this ability, however, the decision to bring charges still lies with a government official—a judge—and not with the private individual. It is true that some jurisdictions allow a private individual to file a criminal complaint, but that right is usually restricted in some way.<sup>24</sup>

### **Explaining the Transition**

As can be seen, there are numerous factors at play when discussing the transition in the United States from a system of private prosecution to one of public prosecution. By properly viewing that transition as a continuum and not a single event, we can separate out these different factors instead of conflating them. Not every aspect of the transition to

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<sup>23</sup> These states include: Colorado (C.R.S.A. § 16-5-209); North Dakota (NDCC, § 11-16-06); and Pennsylvania (16 P.S. § 1409). As mentioned, this is a right afforded to crime victims in Germany as well (Ma, 2008).

<sup>24</sup> Georgia (Ga. Code Ann., § 17-4-40) requires that a hearing be held with the defendant present (or at least notified of the hearing) before a warrant will issue for a crime alleged by a private party. Ohio (R.C. § 2935.09) allows a private party to file an affidavit for the public prosecutor to review for charges, but does not allow the private party to file a complaint themselves. South Carolina (Code 1976 § 22-5-110) requires a courtesy summons to be sent to an accused party instead of a warrant upon complaint by a private party. Virginia (VA Code Ann. § 19.2-72) only allows a private party to file complaints for misdemeanors unless prior approval is obtained from the public prosecutor. Only Idaho appears to allow a private party to file a criminal complaint without restriction (*State v. Murphy*, 1978).

public prosecution involved the ceding of meaningful control, and thus not every aspect needs to be analyzed. By focusing on those areas where meaningful control was taken away from private individuals, a meaningful analysis of how the United States transitioned from a system of private prosecution to a system of public prosecution can be had.

## CHAPTER 4

### BENTHAM, MARX AND PROSECUTION

... [T]he principle, the end justifies the means, naturally raises the question: and what justifies the end?

Leon Trotsky

As was mentioned, both public and private prosecution have been criticized as benefitting the rich and disadvantaging the poor. Claims like this are not unique to laws regarding prosecution. The tenet that laws in general are in place to benefit the rich is a key component of Marxist theory (see Engels, 1892). Despite this theoretical fit, it does not appear that anyone has analyzed the transition from private prosecution to public prosecution from a Marxist perspective. The fact that Marx did not write anything specifically on systems of prosecution may explain why this is so.

Among social philosophers prior to the twentieth century, Jeremy Bentham appears to be one of the few to have written on the topic of private and public prosecution. This is likely due to the fact that he was from England—one of the few countries to employ private prosecution during the eighteenth and nineteenth centuries (Kress, 1976, p. 102).<sup>1</sup>

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<sup>1</sup> Most other European nations at the time practiced civil law, which operated with a public prosecutor. As Kress (1976) points out, this type of civil law should not be confused with the civil law of the United States—a term used to denote non-criminal law matters.

Bentham's attempts to complete a pannonion—an exhaustive code of law (Schofield, 1998)<sup>2</sup> of which prosecution would have been a part—may have also had an influence.

While Marx did not have much to say about prosecution, he had plenty to say about Bentham and his social thought—none of it positive. If we look at how Bentham analyzed prosecution and then refract that through Marx's criticisms of Bentham's social philosophy, we can gain a picture of what Marx's views on prosecution might have been.

### **Jeremy Bentham**

Jeremy Bentham was a philosopher who lived during the eighteenth and nineteenth centuries. His social philosophy was not limited to matters of crime, and thus it would be imprecise to refer to him strictly as a criminologist. Nonetheless, the impact of his work in the field of criminology is unmistakable. Systems of prosecution was one of the areas within the field of criminology upon which he wrote. Just as a number of contemporary criminologists have done (see Jacoby, 1980; Kress, 1976; Langbein, 1973; Ma, 2008; McDonald, 1979; Worrall, 2008), Bentham addressed how private and public prosecutions should coexist—or if they should coexist at all.

Bentham's writings on systems of prosecution took the form of proposed legislation (1790; 1843). Several modern scholars have done the same (Anonymous, 1955; Cardenas, 1986; Davis, 1989; Green, 1988; O'Neill, 2010). There is a key difference, however, between the model legislation drafted by Bentham and that drafted by modern scholars. As was mentioned in Chapter 3, the modern scholars that have weighed in on the propriety of

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<sup>2</sup> Bentham's extensive legislative efforts earned him the title—at least with some—“legislator of the world” (Schofield, 1998, p. 115).



private prosecution are generally legal scholars. As such, the principles they appeal to in constructing their legislation are legal ones such as constitutionality and legal ethicalness. Thus, while their proposed pieces of legislation are instructive on the nuances of those legal standards and how they apply to prosecution, they are of little value as guideposts in providing an explanation of the societal benefits and detriments of private prosecution. In writing his proposed legislation, Bentham (1790; 1843) adhered to utilitarianism as his guiding light. In doing so, he provided an explanation of the societal benefits and detriments of both private and public prosecution.

As was mentioned, in addition to legal scholars, there are contemporary criminologists who have also written on systems of prosecution. Their work also differs from Bentham's. Their analyses of systems of prosecution tend to be more historical than philosophical (see Jacoby, 1980; Kress, 1976; Langbein, 1973; Ma, 2008; McDonald, 1979; Worrall, 2008). Their work focuses more on what did happen than on what should happen. Bentham (1790; 1843) again adhered to utilitarianism in his proposals of the necessity of one system of prosecution over another. By using this philosophical framework, Bentham supplies a "why" to his proposals and not just a "what."

It is also worth noting that Bentham's works were in circulation during the time frame that many of the states in the United States were transitioning from a system of private prosecution to public prosecution—the late-eighteenth to mid-nineteenth century. Accordingly, it is possible his writings could have had an influence in the transition of prosecution systems in the United States.

For these reasons, understanding Bentham's writings on systems of prosecution—his proposed legislation in particular—can provide us with a broader understanding of why

the system of prosecution in the United States is the way it is. Utilitarianism imbues the work of Bentham. Further, it is one of the tenets—perhaps the main tenet—of the classical school of criminology. Accordingly, before analyzing Bentham’s proposed legislation, it would be wise to first look at Bentham’s view of utilitarianism.

### **The Utilitarian Principle**

Simply put, the utilitarian principle holds that actions should bring the greatest good to the greatest number of people in society. Bentham (1780) often spoke of the principle in terms of pleasure and pain; individuals seek to maximize the amount of pleasure they feel and to minimize the amount of pain they feel.

The utilitarian principle is concerned with society as a whole, and thus society’s overall happiness would be evaluated when determining whether a given course of action satisfied the principle or not. However, Bentham (1780) recognized the importance of the individual in an analysis of the utility of a course of action. Where society is simply a group of individuals, determining what is best for society as a whole will of necessity be dependent upon determining what is best for the individuals that compose that society.

This was particularly evident in Bentham’s view on punishments. Bentham saw utilitarianism at play among criminals. To deter crime, Bentham (1830) believed that society needed to make the pain one expected to incur by committing a crime outweigh the benefit one expected to derive from committing it. When forming punishments for criminal offenses, he believed this should be the guiding principle.

One of the factors Bentham (1830) saw as paramount to determining whether the expected pain of a punishment would outweigh the expected benefit of committing a crime was the certainty of punishment. If a punishment was uncertain, then an individual may

consider it worth the risk to commit a crime because there was a chance they could escape the punishment.

It is important to note that Bentham (1830) was more concerned with individuals' expectations of punishment rather than individuals actually being punished. An individual is not deterred from robbing another person by actually being imprisoned; imprisonment happens after the robbery and thus is unable to retroactively serve any deterrent effect. Rather, it is the threat of imprisonment in the future that can serve as a deterrent when an individual is deciding whether to commit a robbery.

This marks a shift in the way punishments were viewed. Punishment, according to Bentham (1830) and other classical theorists (e.g., Beccaria, 1764), was not to be punitive simply for the sake of being punitive. Rather, it was to be punitive to serve as a deterrent to future crimes—be those committed by the same person or by another. Thus, to create certainty of an expected punishment in society, that society needed to consistently enforce its laws.

### **Bentham's Proposed Prosecution Legislation**

To understand Bentham's proposed prosecution legislation, it is important to understand what the existing system of prosecution was in England at the time he wrote it. Bentham wrote two separate pieces of proposed legislation at separate times. The first was written in 1790, and the second was published in 1843. At both times, the criminal justice system in England operated under a system of pure private prosecution; it was not until 1879 when the Prosecution of Offenses Act (Summary Jurisdiction Acts, 1887) was passed that this system of pure private prosecution was abrogated. In both pieces of proposed legislation, Bentham advocated a prosecution system that utilized both private and public

prosecutors. Where private prosecution was the norm at the time of his writing, he was advocating a shift of control in the system of prosecution from private parties to the government.

### **First Piece of Proposed Legislation**

The first piece of proposed legislation was the more extensive of the two. In it, Bentham (1790) called for the creation of a public prosecutor—a position he referred to as the “pursuer-general.” Bentham delineated two duties for the public prosecutor. First, the public prosecutor was to oversee every private prosecution that took place. Second, the public prosecutor was to cover the prosecution of all cases where there was no private prosecutor covering the case. If a private party wanted to prosecute a case where a public prosecutor had already assumed that role, the private party would have to petition the court to be allowed to do so. It is unclear in the proposed legislation whether a private prosecutor would have to petition the court to stay on a case he or she initiated if a public prosecutor wished to take it over, or whether the public prosecutor would have to make such a petition.

While this is a hybrid system where both private and public prosecutors exist, it is clear that Bentham was in favor of vesting more control in public prosecutors than private ones. Nonetheless, he made it clear that both were needed. This need was centered on the concept of certainty in utilitarianism. Bentham (1790) believed that a system of prosecution that was purely private created too much uncertainty when it came to punishment. He believed that a system of prosecution that was purely public did the same.

There are several ways that a private prosecution system created uncertainty in Bentham’s (1790) eyes. Where a private individual would generally only prosecute a case when they had the unfortunate occasion to be the victim of a crime, they would be unskilled

in the art of prosecution—especially in relation to their public prosecutor counterparts. That lack of skill could lead to unwarranted acquittals, and this in turn would lessen the certainty of punishment for criminals. Also, the animosity that could develop between a criminal and their accuser may serve as a deterrent to the accuser when deciding whether to file criminal charges against the criminal. If no charges are filed, no punishment will be meted out, and thus the certainty of punishment is lessened.

Perhaps the biggest sources of uncertainty according to Bentham were the financial aspects of private prosecution. One of his concerns with private prosecution was collusion between the criminal and the accuser—collusion being some out-of-court settlement of the matter (Bentham, 1790). It was possible that an accuser could accept some sort of payment in exchange for not filing charges. If an accuser was amenable to such an arrangement, the accused could get off the hook. Where resolutions like these were possible, the certainty of punishment was again lessened. In fact, if the criminal was particularly wealthy and was willing and able to pay whatever cost to avoid prosecution, one could even go so far as to say that there was certainty in how the case would be resolved, and it certainly would not be via a formal punishment from the criminal justice system.

Another financial concern cut against the poor: the cost of litigation in general. If a victim could not afford to take an offender to court, then the offender went unpunished. In this case, there is certainty in what the criminal's punishment is going to be: absolutely nothing. This clearly thwarted the aims of the criminal justice system as envisioned by Bentham.

According to Bentham (1790), a system of pure public prosecution also created uncertainty. He noted that public prosecutors may lack the zeal to fully prosecute all their

cases, where their private counterparts would have a vested interest in seeing the case fully prosecuted. This lack of zeal could lead to unwarranted acquittals or undercharged indictments—both of which lessen the certainty of punishment a criminal will receive. As was discussed in the last chapter, this zeal was the focal point for some state supreme courts when determining whether privately retained attorneys should be allowed to assist the public prosecutor.<sup>3</sup> Bentham would apparently favor the states that held that zeal to be beneficial to the criminal justice system.

More uncertainty resulted from the public prosecutor's lack of direct involvement in the matter that was the subject of litigation. Bentham (1780) appeared to have no problem with the victim of a crime declining to pursue prosecution of their offender. This stems from Bentham's view of punishment as an evil in and of itself; if punishment could be avoided, the principle of utility dictated it should be avoided. Thus, if the victim of a crime chose not to pursue an action against their offender—if they consented to the mischief, as Bentham phrased it—punishment in that instance would be groundless. The greatest good would be to forbear on punishment where no one desired it. It is important to note that Bentham stated the consent must be freely given for the victim to decline to prosecute. For example, let us suppose that a man had fifty dollars taken from him. Let us consider two possible scenarios. In the first scenario, the man discovers his son took the money without asking, but has no problem with this after discovering what has happened. In the second, the man discovers his neighbor took the money, but does not prosecute because his neighbor has threatened to harm him if he does. In the former case, the consent

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<sup>3</sup> Florida – *Thalheim v. State* (1896); North Dakota - *State v. Kent* (1895).

would be genuine and there would be no crime. In the latter, it would not be genuine and there would be a crime. If there is a crime, a victim does not have a right to not report it nor to cut prosecution off before it is complete.

This view on the right of a victim to decline to prosecute can create problems in a system of public prosecution. How is anyone going to be in a position to ascertain whether a victim legitimately consented to the harm they suffered? It appears Bentham was aware of this impracticality. He recognized that if a public prosecutor chose to prosecute a case contrary to the wishes of a victim, the victim always had the ability to change their account of what happened—honestly or dishonestly—thus making the prosecution a nullity. If the prosecution is made a nullity under dishonest circumstances—circumstances where the victim only consented to the wrong done due to coercion from the offender—then the certainty of punishment is lessened. This problem seems to be the corollary to the collusion issue with private prosecution.

The biggest problem Bentham (1790) saw with a system of pure public prosecution was the de facto ability to pardon that it granted to the public prosecutor. Where the public prosecutor would be in control of all prosecutions within their jurisdiction, they would have the ability in every case to choose which cases to proceed with and which cases to dismiss. A dismissal was equivalent to a pardon in Bentham's mind. In fact, Bentham saw the pardoning power of a public prosecutor as greater than the pardoning power of the king himself. A king could only pardon someone after—at a minimum—criminal charges had been brought against them. This would relieve that person of a political punishment—an official punishment meted out by the government. A public prosecutor, however, could make the decision to not charge a person with a crime to begin with. This not only relieved

that person of a political punishment, but it also relieved them of a moral punishment—a punishment unofficially meted out by society against a person, such as shunning. Vesting this level of power in one person could certainly lead to misuse of that power. If that power was misused and a person who should have been charged with a crime was not, the certainty of punishment was lessened.

### **Second Piece of Proposed Legislation**

Bentham's (1843) second piece of proposed legislation is similar to the first. There are two differences worth noting. First, Bentham gave concurrent jurisdiction to public prosecutors (called "Government Advocates" in this piece of legislation) to prosecute cases in which there was a private victim. In his first piece of legislation, it appeared that the public prosecutor would only get involved in this type of case when a private prosecutor had not gotten involved; the legislation was not terribly explicit on this point. In this second piece, Bentham makes it clear that a public prosecutor should have the potential authority to handle every case, the ultimate choice of who will handle the case to be made by a judge. This would shift even more control to public prosecutors than his first piece of proposed legislation.

Second, Bentham (1843) felt that the public prosecutor should be required to keep a journal of all his proceedings. This included confidential dealings with informants and with subordinates. Bentham recognized that these journals would not necessarily be made available to anyone. He did, however, note a handful of other government officials who should be provided copies of these journals. It would seem that with an increase of control shifted to public prosecutors, Bentham saw it necessary to provide additional checks on that control. Interestingly, some recent scholars have advocated this very thing (Davis, A.,



1998; Miller and Wright, 2008; National Commission on Law Observance and Enforcement, 1931).

In both pieces of proposed legislation, Bentham advocated a hybrid system of prosecution. He believed that having a hybrid system where both private and public prosecutors existed would help maintain certainty in the criminal justice system. He felt that private prosecutors would serve as a check on public prosecutors and vice versa. In this way, the uncertainty that would inure from vesting control completely on one side of the continuum or the other would be remedied.

### **Karl Marx's Criticism of Bentham**

Karl Marx was no admirer of Jeremy Bentham. He referred to Bentham as an “insipid, pedantic, leather-tongued oracle of the ordinary bourgeois intelligence of the nineteenth century” and a “genius in the way of bourgeois stupidity” (Marx, 1867, pp. 1752, 2765). As was mentioned, Marx did not have anything to say about systems of prosecution. Marx did, however, take umbrage with utilitarianism in general. Specifically, he said:

Applying [the principle of utility] to man, he that would criticize all human acts, movements, relations, etc., by the principle of utility, must first deal with human nature in general, and then with human nature as modified in each historical epoch. Bentham makes short work of it. With the driest naiveté he takes the modern shopkeeper, especially the English shopkeeper, as the normal man. Whatever is useful to this queer normal man, and to his world, is absolutely useful. This yard-measure, then, he applies to past, present, and future (Marx, 1867, p. 2764).

To understand fully why Marx abhorred Bentham's use of utilitarianism, it is necessary to understand the framework of Marx's social theory. According to Marx (1939; 1867), the key to understanding social life was the means of production and how people relate to it. The means of production refers to items required to produce goods—things

such as land, tools, facilities and so forth. In societies where private ownership of the means of production is permitted, a class system formed. One's class is defined by their relationship to the means of production. In capitalist societies, those who have ownership of the means of production are called the bourgeoisie, and those who do not and are thus forced to work for the bourgeoisie as wage laborers are called the proletariat.<sup>4</sup>

Marx was against capitalism because of the disadvantage it necessarily created for the proletariat and the class struggle it created in general. He was in favor of a communist society—one in which no one was able to have ownership of the means of production (Marx and Engels, 1848). Where class status was determined by one's relationship to the means of production, if no one could own the means of production, no one would have a defined class and thus a class system would cease to exist. Without a class system, there would accordingly be no class struggle.

Another pertinent part of Marxist theory came from his contemporary, Frederick Engels. Engels maintained that the law was designed to benefit the bourgeoisie:

[T]he law is sacred to the bourgeois, for it is his own composition, enacted with his consent, and for his benefit and protection. He knows that, even if an individual law should injure him, the whole fabric protects his interests; and more than all, the sanctity of the law, the sacredness of order as established by the active will of one part of society, and the passive acceptance of the other, is the strongest support of his social position (1892, p. 227).

In short, the law was simply a tool used to support the financial interests of the

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<sup>4</sup> Private ownership of the means of production and class struggle are not exclusive to capitalist societies in Marxist theory. For example, feudal and slave societies also fell prey to this system (Engels, 1902; Marx, 1867; Runkle, 1964).

bourgeoisie. Marx clearly viewed Bentham as one of the bourgeoisie. Thus, when Bentham endeavored to provide potential legislation—such as the prosecution legislation discussed above—Marx would expect that legislation to be designed to advance the interests of the bourgeoisie. Indeed, Marx’s criticism of Bentham’s version of utilitarianism was that it embraced the shopkeeper—the bourgeoisie<sup>5</sup>—as the standard by which utility should be judged. Essentially, what Marx was arguing was not so much that utilitarianism was wrong per se, but rather that Bentham and others like him were misapplying it. Interestingly, Bentham himself made this very criticism of the critics of utilitarianism. He said:

When a man attempts to combat the principle of utility, it is with reasons drawn, without his being aware of it, from that very principle itself. His arguments, if they prove anything, prove not that the principle is wrong, but that, according to the applications he supposes to be made of it, it is misapplied (1780, pp. 4-5).

This is exactly what Marx did. He took exception with Bentham’s use of the shopkeeper as the standard for judging utility. While he provides no substitute explicitly, it would seem that Marx would view the proletariat as the standard for judging utility.

Based on this line of argument, there are those who have argued that Marx was a utilitarian (Allen, 1973; see Schaff, 1963). There are others who have argued to the contrary (Brenkert, 1975; Brenkert, 1981; Hook, 1933; Kamenka, 1962). While there is disagreement over whether the totality of his works demonstrate an alignment with utilitarian thought, what can be agreed upon is that Marx saw the needs of the proletariat as paramount, and that the Communist Revolution would benefit everyone—or to put it in

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<sup>5</sup> Depending on the size of the shopkeeper’s operations, he or she could be viewed as bourgeoisie or petty bourgeoisie (Marx and Engels, 1848).

utilitarian terms, it would bring the greatest good to the greatest number.

Viewed in this light, the argument Marx had with Bentham was not so much over what theory to use, but rather whose needs to prioritize: bourgeoisie or proletariat—rich or poor. As was mentioned in Chapter 2, this same argument still persists when discussing systems of prosecution.

### **False Consciousness**

Another tenet of Marxist theory that has emerged is the concept of false consciousness. This term was never used by Marx himself, and Engels only used the term once in his writings (Marx and Engels, 1892-1895, p. 164).<sup>6</sup> It was later Marxist theorists that popularized the term and expounded its meaning (Lukacs, 1920; Marcuse, 1964). False consciousness refers to a set of beliefs held by an exploited class that not only justifies their exploitation, but also perpetuates it. By adopting this false consciousness, members of an exploited class are placated into inaction (Lukacs, 1920), thus postponing the Communist Revolution that Marx saw as inevitable.

The sources of this false consciousness can come from anywhere. One common source is religion. When Marx and religion are mentioned, the following quote comes to most peoples' minds:

Religion is the sigh of the oppressed creature, the heart of the heartless world and the soul of soulless conditions. It is the opium of the people (Marx, 1843, p. 131).

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<sup>6</sup> In certain translations, such as the one referenced, the term is translated as something other than “false consciousness;” in the translation referenced, the term is translated as “consciousness that is spurious.”

From this quote, we can see that Marx saw religion as the comforting false consciousness that made it tolerable for one to accept their lowered expectations from life. For Marx, religion also had another purpose. It covered up the irrationalities of the system of production (Kiernan, 1991; Marx, 1867). This, too, feeds the false consciousness of the people.

Just as the law is a tool of the bourgeoisie used to advance their interests, this false consciousness is likewise a tool. If the proletariat do not recognize their plight, they do not revolt. If they do not revolt, the status quo is maintained, leaving the financial interests of the bourgeoisie intact. These two tools—the law and false consciousness—can sometimes be one and the same; the law and its proffered justifications can compose part of an exploited class’s false consciousness.

### **The Bourgeois Paradox**

If the laws are truly designed to benefit the rich, then one would expect laws regarding prosecution to be no different. Indeed, one of the biggest arguments against a system of public prosecution is that it favors the rich. Specifically, under a system of public prosecution, white collar, political, and similar crimes are systematically under-prosecuted. Where the public prosecutor has a near monopoly on prosecutorial control, a private individual left aggrieved by a white collar criminal has little to no recourse to redress the crimes committed against them if a public prosecutor refuses to pursue charges.<sup>7</sup> It is true

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<sup>7</sup> It has been claimed that shareholders of a business have been successful in bringing those engaged in fraudulent activity within the business to justice (O’Neill, 2010). This claim lacks backing, however. It is true that the shareholders referenced were able to secure a

that private individuals do enjoy some modicum of prosecutorial control in some jurisdictions. However, the small amounts of prosecutorial control that are left to private individuals are simply not enough to redress this problem. In states where private prosecutors are allowed to assist in prosecutions, it is only allowed where the public prosecutor is on board with the decision. Thus, if a public prosecutor has already purposefully decided to decline a case, there is little chance they will allow a private prosecutor to assist in the case. In those states that do allow private individuals to fully prosecute matters, it is only for minor offenses. White-collar crimes are almost never minor offenses; they involve thousands if not millions of dollars, and would most certainly be classified as felonies, if charged. Thus, a private individual could not initiate those prosecutions on their own. Even if they could, the public prosecutor would still have the right to dismiss the case outright if they did not want it to proceed. Seeing this powerlessness that private individuals face, there are those who believe that reinstating private prosecution would help address this issue (Davis, P., 1989).

However, it must be remembered that the very argument advanced against public prosecution—that it favors the rich—was the argument advanced against private

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large civil judgement against the white-collar criminals in question, and that those white-collar criminals were convicted in a separate criminal matter. However, there is no indication that the shareholders themselves were able to prosecute the white-collar criminals, not influenced how those white-collar criminals were prosecuted. Shareholder attempts to privately prosecute a criminal case appear to be fruitless (see *Bauermeister v. Kor Xiong*, 2011).

prosecution. Bentham (1790) himself was against a system of pure private prosecution because the poor—who could not afford the costs of litigation—were left without recourse. There are others that feel the recent push for reinstating private prosecution is actually coming from corporations (Nichols, 2001), and thus a return to private prosecution should be resisted. At first blush, this seems possible. If a corporation was able to threaten those with whom it had a conflict with criminal prosecution, it would give it considerable leverage. However, this would also have been the case back when private prosecution first prevailed in the United States, and despite that benefit being available to corporations then, the system of prosecution changed to a predominantly public one nonetheless. Thus, if corporations are truly behind the recent push for reinstating private prosecution, it makes one wonder why they would advocate such a change if there were factors that weighed against utilizing such a system the first time around.

This is the paradox faced when trying to pinpoint why the system of prosecution in the United States changed from a system where private individuals primarily had control of prosecutions to one where the government primarily has control. If laws are set up to benefit the rich, then what compelled the United States to move from a system of private prosecution that advantaged the rich to a system of public prosecution that continues to benefit the rich? From the viewpoint of the bourgeoisie, why not follow the adage “if it’s not broken, don’t fix it?”

Assuming the laws are designed to benefit the rich, our task going forward, then, is not to determine who was given greater advantage by changing to a system of public prosecution—for the rich appear to be advantaged under both systems. Rather, the task is to determine what “broke” along the way, necessitating a change from a system of private

prosecution to one of public prosecution.



## CHAPTER 5

### SLAVERY

Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings.

Nelson Mandela

#### **Economic Explanations for a Shift to Public Prosecution**

There have been several scholars who have speculated as to the reason why the United States shifted to a system of public prosecution from private prosecution. Their explanations vary: private prosecution clashed with American Democratic ideals (Jacoby, 2010; O'Neill, 2010), the state was interested in even-handed justice (Robinson, 1968), private prosecution lacked a certain respect for individual rights (Anonymous, 1959), and the state was interested in more effective crime control (Ma, 2008). These factors certainly could have played some part in the process. However, these explanations paint an all-too-rosy picture of the transition, appealing to positively-phrased ideals of democracy, justice and efficiency. If the law is truly the tool of the rich to advance their interests, then these explanations—though likely unwittingly offered as such—feel like fodder for padding the false consciousness of the poor.

Another line of explanation points to the influence of other immigrant peoples on systems of prosecution. England did not have an official system of public prosecution until

1879 (Ma, 2008; Ramsey, 2002).<sup>1</sup> Where the United States had implemented a system of public prosecution prior to this, it is argued that the idea of public prosecution must have come from somewhere other than England (Robinson, 1968). Scotland, the Netherlands, Germany and France all had systems of public prosecution that were already in place during the American colonial period (Cardenas, 1986; Jacoby, 2010; Van Alstyne, 1952), and thus the customs of immigrants from those countries are argued to be the source of public prosecution in the United States.<sup>2</sup> These immigrants certainly could have introduced this idea to those in the United States, but this does not explain why the United States implemented that idea. Indeed, the idea of public prosecution existed in England centuries

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<sup>1</sup> Even with this system, private prosecutions were still common in England (Ma, 2008).

<sup>2</sup> Van Alstyne (1952) has argued that the Dutch *schout*—a type of public official—operated as a public prosecutor in New Netherland (an area that covered parts of present day Connecticut, New York, New Jersey, Pennsylvania and Delaware) and that this is what brought about the practice of public prosecution in those areas. However, while Van Alstyne established that the *schout* did prosecute cases, he did not establish that the *schout* exclusively prosecuted cases as opposed to prosecuting privately on a regular basis (Ramsey, 2002). One thing Van Alstyne notes but does not explore in depth is the fact that the *schout* had financial ties to the Dutch West India Company. If the *schout* did in fact have an influence on the emergence of public prosecution in parts of the United States, this economic influence on the origins of the office are certainly worth exploring. This is particularly so in light of this research, for the Dutch West India Company was involved in introducing slavery to America (see McManus, 1966).

before it was implemented there (Kress, 1976).<sup>3</sup> Thus, the mere fact that the idea exists among a people does not mean they implemented it. There still must be a reason for implementing that idea.

There are those who have provided economic speculations as to why the shift to public prosecution occurred in the United States. One such speculation is that the state took over prosecutions because they were interested in collecting the fines generated from criminal prosecutions (Plucknett, 1929; Robinson, 1968). This explanation, however, seems unlikely. It is true that private prosecutors did derive some financial benefit for undertaking a prosecution, but this benefit was not conferred to the exclusion of the state; the state still collected fines under such a system (Ma, 2008). It is certainly possible that the state missed out on fines from cases settled by private parties outside of court, and by having a public prosecutor assuring those cases were resolved in court, more fines would be forthcoming. It is questionable how much benefit this would actually derive for the state, however. The additional amount the state would receive in income from fines would have to be offset by the salary they paid to a public prosecutor to process the cases.

Another economic explanation is that an increase in urban crime that stemmed from industrialization necessitated a shift to public prosecution (Grove, 2011; Steinberg, 1984). Industrialization necessitated numerous changes in the law (Aumann, 1969), and it would be no stretch to say that systems of prosecution were one area to change on account of it. Thus, this explanation has a more feasible premise. It also falls in line with Marxist

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<sup>3</sup> As early as 1534, King Henry VIII proposed implementing a system of public prosecution, but the idea was ultimately rejected by Parliament (Kress, 1976).

theorizing. Industrialization was one of the key components of capitalism in the nineteenth century. Marx predicted that capitalism would lead to conflict between the proletariat and bourgeoisie. Urban crime—proletariat crime—would be expected where industrialization had a foothold. It is possible the bourgeoisie implemented public prosecution as a means to quell urban crime and prevent further revolt by the proletariat. This reasoning, however, is not used by those who propose this as an explanation. Rather, they state that private individuals did not wish to shoulder the cost of privately prosecuting the large number of individuals that were committing urban crime, and thus public prosecution had to be implemented to remedy the problem (Grove, 2011). This again makes the government seem overly-benevolent in stepping in and solving the problems of the working class, and sounds like more false consciousness fodder.

### **What about the South?**

Studying the effects of industrialization on laws regarding prosecution would seem pertinent in the North, where industrialization began to become an economic force during the same time laws regarding prosecution were changing. However, industrialization in the United States was for a long time—up until the time of the Civil War—generally limited to the Northern United States (see Preyer, 1971).<sup>4</sup>

This is not to say that a study of the effects of industrialization on laws regarding

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<sup>4</sup> There have been several theories advanced as to why industrialization lagged in the South. Many of these theories stress the economic advantages—real or believed—that led the South to follow an agrarian path instead of an industrial one in the nineteenth century (Preyer, 1971).

prosecution would not be a worthy endeavor, for it certainly would be. However, what little research has been done to determine why the United States shifted to a system of public prosecution has focused on the states in the North, such as New York (Ramsey, 2002; Van Alstyne, 1952) and Pennsylvania (Steinberg, 1984; Van Alstyne, 1952). Thus, it should not be surprising that the only major economic factor that has been identified in the research thus far is one that primarily affected the North. While further fleshing out research on the effects of industrialization is important, it is equally important to identify what economic factors influenced the rest of the country. This would be particularly important in the South, where no research has been conducted on this issue.

### **Slavery as an Economic Institution**

Slavery served as a major economic institution in the United States—especially the South—during the eighteenth and nineteenth centuries. Marx (1847) stated that slavery was, in some sense, as much a part of the bourgeoisie system as machinery was. The difference between slavery and wage labor, according to Marx (1939), was that the labor of slavery was directly forced and the labor derived from wage labor was indirectly forced.<sup>5</sup> Further, while wage laborers did not have control over the means of production, slaves were the means of production themselves (Marx, 1847, p. 111). Thus, slavery was even more onerous than wage labor.

It was during the eighteenth and nineteenth centuries—the same timeframe within which slavery prevailed in the United States—that several states were switching from

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<sup>5</sup> Accordingly, Marx (1939) referred to slavery as “direct slavery” and wage labor as “indirect slavery.”

systems of private prosecution to systems of public prosecution. If the rich truly influence the law to protect their interests, then it would stand to reason that slaveholders—men who would have to have been wealthy enough to purchase and care for slaves—would have influenced the laws in a way to protect their financial interests in slavery. Could laws regarding prosecution have been one of these areas of law that were affected?

### **Georgia**

If slavery—or more precisely, threats to it—did in fact have a role in bringing about a system of public prosecution, the best chance of seeing that role would be in a state where slavery was prevalent and where a shift along the continuum of control occurred within the timeframe when slavery was prevalent. Georgia meets both of these criteria.

As mentioned in Chapter 3, most of the statutes instituting a public prosecutor are vague and ambiguous. Some, however, are fairly explicit. Georgia explicitly vested control to prosecute all crimes in a public prosecutor. Its statute of 1799 reads:

... [I]t shall be [the Attorney General's] duty to prosecute all delinquents for crimes and other offences cognizable by the said courts, and all civil actions in which this State shall be concerned, and to give advice or opinion in writing to his excellency the governor, in questions of law in which the State may be interested (*Digest of the Laws of the State of Georgia*, 1800d).

Not only is Georgia one of the few states to explicitly vest control of all prosecutions to a public prosecutor, it is also one of the first states to do so; only New York and Vermont clearly established such offices earlier.<sup>6</sup> This makes Georgia the ideal case

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<sup>6</sup> Some have argued that Connecticut and Virginia also clearly vested control to prosecute all cases in a public prosecutor earlier than Georgia (Jacoby, 1980; Robinson, 1968, Worrall, 2008). However, the evidence supporting this is weak. Regarding Connecticut,

study for this issue. As such, it will be the focus of this research.

### **Social Classes in Georgia**

When analyzing how slavery could have led Georgia to transition from a system of private prosecution to a system of public prosecution from a Marxist perspective, noting the different social classes that existed in Georgia during the time of transition is important. In Marxist theory, there are four social classes: bourgeoisie, petty bourgeoisie, proletariat and lumpenproletariat. These classes can be seen in antebellum Georgia as well.

#### **Bourgeoisie: The Oligarchy of 300,000**

The bourgeoisie are the economically dominant class in society (Bottomore, 1991a; Marx and Engels, 1848). Generally speaking, they would be the “rich” that are referenced

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the vagueness of its statutory history was discussed in Chapter 3. Regarding Virginia, it seems the assertion that it instituted a system of public prosecution in the early-eighteenth century is premised on a statement indicating as much in the *Report on Prosecution* from the National Commission on Law Observance and Enforcement (1931). That report, however, provides no citation to any legal authority backing that assertion (Sidman, 1976). There is an indication that attorneys general were appointed in Virginia as early as 1643 (Chitwood, 1905). However, without any specific legal authority upon which to rely, there is nothing to indicate whether those attorneys general were to prosecute all cases, the cases in which the state was directly involved as a party, or something else entirely. An argument could also be made that North Carolina had a system of public prosecution in place as early as 1777, but the statute that would appear to establish that system is one of those that is ambiguous in its wording (*Revised Statutes of the State of North Carolina*, 1837).

by many in their criticisms of laws regarding prosecution.<sup>7</sup> In antebellum Georgia, it was slave owners running large-scale planting operations that composed this class (Brooks, 1913). These planters tended to run their operations on the fertile land along the Georgia coast (Knight, 1917). One Southern author of the time referred to the upper class as “respectable people, who live well and labor not at all” (Fitzhugh, 1857, p. 27).<sup>8</sup> Reading the following description of the lifestyle of the wealthy coastal slave owners, it is hard to disagree with this assessment:

These wealthy coast aristocrats owned extensive libraries, wore costly fabrics, planted on modern scientific principles, owned handsome family carriages in which they traveled in a sort of regal splendor, imported luxuries and dainties from abroad, and dispensed a hospitality whose counterpart was to be found only in the palaces of London. These lords of the Georgia lowlands educated their sons in Europe, stocked their wine-cellars with products of the rarest vintage, and gave even their humblest slaves a taste of life to which the greatest chief of the uplands was a total stranger (Knight, 1917, p. 431).<sup>9</sup>

Marx referred to these Southern slaveholders as the “Oligarchy of 300,000” (Marx

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<sup>7</sup> The petty bourgeoisie—discussed more below—could arguably fall into this class in certain circumstances as well.

<sup>8</sup> Fitzhugh (1847) was referring to the rich in Christian societies in general. Given the tenor of his book, this description was probably intended more for the capitalists of the North, but the sentiment fits equally well for the large Southern slave owner—a fact Fitzhugh may or may not have been cognizant of.

<sup>9</sup> The idea that the slaves of Southern slave owners lived better than many others in the United States is a recurring theme among Southern writers, as will be discussed in more detail below.



and Engels, 1861-1864). This figure of 300,000 appears to be the total number of slave owners in the South at the time Marx was writing.<sup>10</sup> For Georgia specifically, the number would, of course, be smaller. In 1860, there were about 118,000 slaveholding families in Georgia (Brooks, 1913), roughly 20% of all white families in Georgia.<sup>11</sup> Where it is unclear how Marx arrived at the figure of 300,000, it is equally unclear whether he intended the Oligarchy to refer to all Southern slaveholders or only those who owned many slaves. Given the description of the class system in antebellum Georgia (Brooks, 1913; Knight, 1917), it would appear that the latter would be the more appropriate group to be referenced. As Marx (1847) had indicated, slaves were the means of production in the South, and private ownership of those means is what distinguished the bourgeoisie.

It has been suggested by some that the cutoff for making one a large slave holder

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<sup>10</sup> It is not certain how Marx determines the number slave holders in the South to be 300,000, but it seems he may have roughly based the number on data from the U.S. Census. The 1850 U.S. Census lists the total number of slaveholding families in the United States—North and South included—at 347,725 (Rossiter, 1909). The number of slaveholding families listed for just southern states in 1850 was 213,790 (Rossiter, 1909). These numbers reference the number of slave holding families, and thus the number of actual individual slaveholders would be much more. One estimate from the time placed the number of southern slaveholders at over 2,000,000 (DeBow, 1961).

<sup>11</sup> The total number of white families in Georgia in 1860 was 591,550 (Brooks, 1913).

was owning at least 20 slaves (Brooks, 1913; Pessen, 1980).<sup>12</sup> There were only 6,363 families that fit into that category in Georgia in 1860 (Brooks, 1913), roughly just 1% of all white families in Georgia. As we can see, this group was composed of but a small portion of the population of Georgia.<sup>13</sup> Despite their small size, Marx indicated that this Oligarchy held control in the South (Marx and Engels, 1861-1864).

### **Petty Bourgeoisie: Small Slave Owners**

The petty bourgeoisie could best be described as the middle class (Bottomore, 1991c).<sup>14</sup> In Georgia, this group would have been composed of small slave owners (Brooks, 1913)—those who owned less than 20 slaves. These people lived in what was termed the “uplands” of Georgia—the area primarily around Wilkes County (Knight, 1917). These small slave owners were said to be mostly unprosperous (Brooks, 1913). They also appeared to be at odds with the Oligarchy (Knight, 1917).

Marx believed that the middle class would ultimately disappear, and that society

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<sup>12</sup> This was the maximum number of slaves that could be profitably managed by one overseer (Brooks, 1913). There are others (Menn, 1964; Williamson and Cain, (n.d.)) that have used 50 slaves as the cutoff. However, those that use that number as the cutoff seem to do so arbitrarily.

<sup>13</sup> The assessment that large plantations were not numerous in the South has been made by others as well (Pessen, 1980).

<sup>14</sup> The term “middle class” was used in different contexts by Marx and Engels, a reference to the petty bourgeoisie being but one of them (see Bottomore, 1991c; Engels, 1892; Marx and Engels, 1848). For purposes of this research, it will be used in that context.

would polarize to either the bourgeoisie or the proletariat (Marx and Engels, 1848). This seems to have occurred in the antebellum South. Those in the middle class were either able to ascend to the ranks of the Oligarchy or descended to the ranks of the proletariat (Weeks, 1896).<sup>15</sup> When faced with the prospect of joining the ranks of the proletariat in the South, many migrated west instead (Weeks, 1896).

### **Proletariat: Non-Slave Owners**

The proletariat are the working class (Bottomore, 1991d; Marx and Engels, 1848). Generally speaking, they would be the “poor” or “near-poor” that are referenced by many in their criticisms of laws regarding prosecution. In Georgia, this class was composed of non-slave holders (Brooks, 1913; Knight, 1917). This class included the great majority of free people in antebellum Georgia (Brooks, 1913). For those who could not afford slaves, there were but few options. One option was to become an overseer for a large slave owner with hopes of saving up enough money to one day buy their own slaves (Brooks, 1913). Another option was to run a small farm without the assistance of slave labor (Brooks, 1913). Were one to pick this option, one would have to spread west and south to find new

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<sup>15</sup> Weeks (1896) indicated there were non-slaveholders in the middle class of the antebellum South. Marx listed shopkeepers and artisans among the middle class (Marx and Engels, 1848), who would not necessarily have been slave owners in the antebellum South. One Southern writer indicated these same people would be in the middle class, referring to them as “professional and skillful respectable people” (Fitzhugh, 1857, p. 27).

Also, Weeks (1896) notes that, when faced with the prospect of joining the ranks of the proletariat in the South, many migrated west instead.

lands to work as the profitable lands on the coasts and other places was already owned and occupied by the Oligarchy and small slave owners (Brooks, 1913; Knight, 1917; Smith, 1985; Wood, 1984).<sup>16</sup>

### **Lumpenproletariat: Georgia Crackers**

The lumpenproletariat were derogatorily referred to by Marx as the “refuse of all classes” and an “undefined, dissolute, kicked-about mass” (Bottomore, 1991b; Marx, 1852, pg. 83).<sup>17</sup> According to Marx, the class was composed of beggars, vagabonds, pickpockets and other such people (Bottomore, 1991b; Marx, 1852). One Southern writer of the time gave a similar picture, calling it a class of beggars and swindlers who “live like gentlemen, without labor, on the labor of other people” (Fitzhugh, 1857, p. 27).<sup>18</sup>

Members of this class were often referred to as “Georgia Crackers.” The exact origin of the name is uncertain,<sup>19</sup> but it is clear that the term was used as an epithet to refer

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<sup>16</sup> Coastal rice plantations were more profitable than plantations growing sugar and cotton, though they did require more of a capital investment (Smith, 1985).

<sup>17</sup> Marx also refers the lumpenproletariat alternatively as the “slum-proletariat” (1852, pg. 83) and the “dangerous class” (Marx and Engels, 1848, p. 29).

<sup>18</sup> Fitzhugh (1857) did not refer to this class as the lumpenproletariat, but did describe them in the same way as Marx did the lumpenproletariat.

<sup>19</sup> One possible explanation for the origin of the term is that it came from the practice of cracking corn in which poor whites in Georgia participated (Anonymous, 1910) though there is some doubt as to this interpretation (Anonymous, (n.d.)a). Another explanation is that the work was derived from the Gaelic word *craic* meaning “idler” or “braggart”

to these people (Anonymous, (n.d.)a; Anonymous, 1910; Knight, 1917). It was said that these people were “a lawless set of rascals ... who often change[d] their places of abode” (Burrison, 2002; Anonymous, (n.d.)a)<sup>20</sup> and who “live[d] by hunting and plundering the industrious” (Anonymous, (n.d.)a).<sup>21</sup>

How these people came to be in their particular station was summarized as follows:

Yet another element of the small farmer class, discouraged by the continual encroachment of the planter, lacking industry and initiative to develop their own small farms, unwilling to work for wages in competition with slave labor, drifted into the pine barrens, waste places and mountains, and there led miserable lives (Brooks, 1913, p. 233).

While certainly poor, they were distinct from other non-slaveholders as they were not laborers. It was said that even the slaves looked upon these people with contempt (Brooks, 1913).<sup>22</sup> They were seen as the lowest of the low.

### **Slaves**

When discussing Marx’s views on slavery, it is important to distinguish his views on slavery in the United States from his views on slavery in general. In general, Marx viewed slave societies as separate and distinct from capitalist societies (Marx and Engels,

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(Anonymous, (n.d.)a; Knight, 1917). These are not the only possible explanations (see Burrison, 2002; Knight, 1917, pp. 432-433, fn. †).

<sup>20</sup> This statement was made by G. Cochrane in the 1760s in a letter to the earl of Dartmouth (Burrison, 2002; Anonymous, (n.d.)a).

<sup>21</sup> This statement was made by J. Habersham in 1904 in a letter (Anonymous, (n.d.)a).

<sup>22</sup> This is a further example of a Southern writer indicating that Southern slaves lived better than many others.

1848; Marx, 1867). This has led some to contend that the antebellum South was not a capitalist society (see Genovese, 1961; Moore, 1966; Runkle, 1964). Capitalism, however, is not rigidly defined (Pessen, 1980). As will be discussed below, Marx himself recognized the distinction between economic systems was blurred at times. Thus, the idea of slavery existing within a capitalist society is not an idea foreign to Marxist theory.

The question arises whether Marx would have viewed the South as a slave society with capitalist elements or a capitalist society with slave society elements.<sup>23</sup> Marx made statements that could lead to interpretations either way. Marx (1939) did note that slavery was possible within the bourgeois system of production, though he also stated that plantations operated under a capitalist mode of production only in a formal sense (1863). Regarding slavery in the United States, he also said that “[d]irect slavery is just as much the pivot of bourgeois industry as machinery” (Marx, 1847, p. 111).<sup>24</sup> This blurring of Marx’s otherwise strict classifications of societies is continued in his discussion of the events leading to the American Civil War. While the institution of slavery may have been troublesome to the continuity of Marx’s overall social philosophy, it is undeniable that Marx viewed slavery as an economic institution that had an impact on how society

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<sup>23</sup> Among those who view the antebellum South as being non-capitalist, there is recognition that the Southern system had capitalist elements (see Genovese, 1961; Moore, 1966).

<sup>24</sup> Marx specifies that his statements apply only to slavery in Suriname, Brazil and the Southern United States (Marx, 1847, p. 111). Marx indicates that the term “bourgeois” refers to “the class of modern [c]apitalists, owners of the means of social production and employers of wage-labour” (Marx and Engels, 1848, p. 12, fn \*).

operated.

Marx was not the only one to have difficulties fitting nineteenth-century slavery into their social philosophy. Bentham also struggled. For all the proposed legislation Bentham penned, he never did write any legislation regarding slavery. This is curious given Bentham's desire to draft his panomion. Slavery was certainly a major topic of his times. Thus, one would expect him to have included legislation on slavery in his panomion.

Though Bentham never drafted any proposed legislation regarding slavery, he did write on the subject. He has been criticized as holding an ambivalent-at-best view on the issue (Boralevi, 1984; Kelly, 1990; Long, 1977). For example, when Bentham did speak of slavery, he denounced it not for its moral repugnancy, but because a system of labor where employees were able to choose their employer was more beneficial (Long, 1977). This position is consistent with utilitarianism, and to be fair, he was at times fairly outspoken against slavery (Rosen, 2005). Nonetheless, his policy recommendations regarding slavery seem lukewarm. Specifically, he called for the gradual emancipation of slaves as opposed to an immediate emancipation because he believed that a gradual emancipation would be more beneficial to the slaves themselves. The idea that someone would be better off as a slave until law makers worked out the details for their beneficial transition into freedom hardly seems to conform to the utilitarian principle.<sup>25</sup> Certainly, the

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<sup>25</sup> Even if we were to only count 3/5<sup>th</sup> of the slave population—as the original U.S. Constitution did (U.S. Constitution, 1787) when determining apportionment of representatives and taxes—in determining what is the “greatest good for the greatest number,” it is still hard to fathom the continuation of slavery as fitting the utilitarian ideal.

political climate was such that an out-and-out call for the immediate abolition of slavery may have been unwise if he wished to maintain his influence and credibility. Nonetheless, by advocating such a position, the credibility of his social philosophy is called into question. It is quandaries like this that perhaps lead some to view Bentham as a great reformer, but a terrible philosopher (Geis, 1955).

Marx certainly viewed Bentham as terrible at both. Were we to view Bentham's rationales regarding slavery through Marxist eyes, the bourgeoisie taint could certainly be seen. The ones who would benefit from gradual emancipation would be the slaveholders who get to reap uncompensated labor from their slaves for a while longer. Additionally, the idea of "free labor" under capitalism is absolutely contrary to Marxist theory. Marx would see Bentham's advocacy of gradual emancipation as nothing more than encouraging a shift from directly forced labor to indirectly forced labor.

Despite the criticisms of Bentham's position on slavery by Marx and others, what cannot be denied is Bentham's recognition of slavery as an economic institution that had an impact on how society operated. The distinguishing feature between Marx and Bentham regarding slavery specifically is the same that exists between their social philosophies in general—whether the interests of the wealthy or the working class should be prioritized.

### **A Marxist Interpretation of the American Civil War**

Slavery is largely seen as the cause of the American Civil War. Marx saw this as the cause of the American Civil War as well (Marx and Engels, 1861-1864). He dismissed other reasons posited as the cause (Runkle, 1964). For example, he dismissed the states' rights argument outright; if the Confederacy truly cared about the rights of the states to choose their own laws, then it would have recognized the rights of the Border States to



choose their own course in the War (Marx and Engels, 1861-1864; Runkle, 1964).

By looking at Marx's analysis of the American Civil War, we can gain an understanding of how slavery affected institutions in general in the South that led to the War. This can then be used to understand what interests may have been served and purposes achieved by transitioning to a system of public prosecution, and how slavery may have necessitated this.

### **The Southern Antebellum Dream**

Marxist theory encounters several problems when trying to provide an explanation of the American Civil War. One such problem is that revolutions are seen to occur when the mode of production within a society becomes incompatible with the ideals of those people providing the production (Runkle, 1964). This did not happen in the American Civil War. The slaves did not revolt to overthrow the institution of slavery. This was accomplished by the North. This revolution came from outside the South, where Marxist theory maintains the revolution would have come from within the society (Runkle, 1964).

Marx's interpretation of the American Civil War did not focus on the slaves as the oppressed class. This is not to say that Marx did not view the slaves of the South as oppressed, for he certainly did.<sup>26</sup> Rather, for purposes of his analysis, he focused on the

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<sup>26</sup> An integral part of Marx's ideology is that slaves are oppressed (Marx and Engels, 1848). This certainly applied to the slaves of the South, as evidence by the following statement by Marx: "In the United States of North America, every independent movement of the workers was paralyzed so long as slavery disfigured a part of the Republic. Labor cannot emancipate itself in the white skin where in the black it is branded" (1867, p. 329). It is

plight of the poor white laborers in the South.<sup>27</sup>

It seems that Marx may have borrowed some of his ideas on the American Civil War from the American author Hinton Helper. Helper referred to Southern slaveholders as the “oligarchy” just as Marx later did (Helper, 1857, p. 42). Helper also detailed the problems that slavery created for the “poor whites” of the South (Helper, 1857, p. 43),<sup>28</sup> something Marx did in his writings (Marx and Engels, 1861-1864, p. 40, 41).<sup>29</sup> For Marx, the condition of these poor white laborers is what led to the American Civil War.

To understand Marx’s line of reasoning, it is important to understand the plight of these non-slaveholders. Helper detailed it quite nicely, and couched it in Marxist ideology if not precise Marxist language. Helper (1857) indicated that all legislation in place in the South was to the benefit of slaveholders. This same sentiment—that laws were in place to

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true that Marx (1847) wrote on the positive aspects of slavery, but these were the positive aspects from the viewpoint of those perpetuating slavery, not himself.

<sup>27</sup> The fact that Marx focused on the plight of poor white workers—the proletariat—as the impetus for the American Civil War instead of the plight of the slaves lends credence to the argument that Marx viewed the South as primarily a capitalist society.

<sup>28</sup> Helper also referred to them as “poor white trash” (Helper, 1857, p. 43). He places quotes around the term in his text, seeming to indicate the term is one Southern slaveholders would use in reference to southern non-slaveholders, not himself.

<sup>29</sup> Marx wrote the words “poor whites”—the exact words used by Helper—in parentheses in English after the German equivalent in his writings (Marx and Engels, 1861-1864, p. 40 fn. a).

benefit to bourgeoisie—was echoed by Engels (1892). Though not using the exact term, Helper also indicated that the non-slaveholders of the South had bought into the false consciousness of the slaveholders. Said he:

The lords of the lash are not only absolute masters of the blacks, who are bought and sold, and driven about like so many cattle, but they are also the oracles and arbiters of all non-slaveholding whites, whose freedom is merely nominal, and whose unparalleled illiteracy and degradation is purposely and fiendishly perpetuated. How little the "poor white trash," the great majority of the Southern people, know of the real condition of the country is, indeed, sadly astonishing ... . It is expected that the stupid and sequacious masses, the white victims of slavery, will believe, and, as a general thing, they do believe, whatever the slaveholders tell them; and thus it is that they are cajoled into the notion that they are the freest, happiest and most intelligent people in the world ... (Helper, 1857, pp. 43-45).

For Marx, it was the maintenance of this false consciousness that was paramount for Southern slaveholders. Just as Helper had noted, Marx saw that there were many more non-slaveholders in the South than slaveholders (Marx and Engels, 1861-1864). To keep them pacified, the slaveholders had to string them along with the prospect of becoming a slaveholder themselves one day (Marx and Engels, 1861-1864). For this to be possible, the expansion of slavery to new territories was necessary (Marx and Engels, 1861-1864).

According to Marx, the death knell for the expansion of slavery came with the election of Abraham Lincoln (Marx and Engels, 1861-1864). Perhaps sensing this, at least one Southern writer did his best to assuage the concerns of southern non-slaveholders and maintain the false consciousness (DeBow, 1861). In an article that reads like a rebuttal to Helper's writings, DeBow—a former U.S. Census employee—used statistics to advance the same arguments that Helper sought to defeat (DeBow, 1861). He stated that non-slaveholders were not viewed as inferiors in the South (DeBow, 1861). He also stated that all non-slaveholders knew that they would someday have the chance to be slaveholders

themselves, and that most large slaveholders started out the same way (DeBow, 1861). To top it off, he indicated that the sons of non-slaveholders had always been among the leaders of the South (DeBow, 1861).

It order to keep white workers pacified with their condition, the issue of race was played upon and emphasized by the Oligarchy. Said W.E.B. DuBois (1935, p. 680) of this:

The race element was emphasized in order that property holders could get the support of the majority of white laborers and make it more possible to exploit Negro labor. But the race philosophy came as a new and terrible thing to make labor unity or labor class-consciousness impossible. So long as the Southern white laborers could be induced to prefer poverty to equality with the Negro, just so long was a labor movement in the South made impossible.

Thus, despite the fact that both the black slave and the poor white worker suffered adverse labor conditions, the racism fostered by the Oligarchy prevented the poor whites from seeing their situation as analogous (DuBois, 1935). Thus, the poor whites that suffered under the economic system of slavery supported it nonetheless.

This false consciousness that was being perpetuated by Southern writers bears striking similarities to the ideal of the “American Dream” that gets perpetuated today. The American Dream is the idea that everyone in the United States has the opportunity to succeed and be prosperous through hard work. The reality is this rarely happens, and is just false consciousness spread to keep the masses complacent with their inability to transcend their situation (see Tyson, 2014). This is exactly what the antebellum Southern writers were doing. They told the masses that they had the opportunity to become slave owners themselves, when the reality was that few people were able to make this class change (Pessen, 1980). This ideal was, in comparable terms, the “Southern Antebellum Dream.” By perpetuating this Southern Antebellum Dream, Southern writers and others kept the

poor white laborers of the South complacent.

### **Comparing Slavery to Northern Capitalism**

Another approach taken by Southern writers was not so much to defend slavery in a vacuum, but to defend it by showing how the system was preferable to the system of industrial labor that existed in the North. DeBow (1861) used this line of argument in his writings as well. He claimed that non-slaveholding workers in the South earned more than their counterparts in the North, and that the working conditions of Southern white laborers were more favorable than working conditions in the North (DeBow, 1861).

There were also arguments advanced by Southern writers that were more Marxist in nature. Fitzhugh denounced the system of labor in the North as the “white slave trade” (Fitzhugh, 1857, p. 26). Fitzhugh goes on to describe the system of labor in the North from a Marxist perspective, though never invoked his name. He states that the capitalists of the North take advantage of their workers, leaving them a pittance to live on (Fitzhugh, 1857). He claimed that the slaves in the South had it better than the free laborers of the North (Fitzhugh, 1857). He recognized that slaves were compelled to labor under the system in the South, but at the end of the work day, slaves had all their needs—food, clothing, shelter—taken care of by their masters. The free laborers of the North did not have this luxury. They were certainly free to do as they pleased at the end of the work day in ways that slaves were not.<sup>30</sup> However, unlike slaves, they were never free of the burden of worrying about

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<sup>30</sup> Contrary to the image commonly portrayed, slaves were not always tied to the property of their owners like prisoners, and did have the ability to engage in a few unmonitored activities depending on the disposition of their master (see Cordle, 1952; Wood, 1984).

how to pay for their basic needs (Fitzhugh, 1857). As Fitzhugh put it, Southern slaveholders loved their slaves, but Northern capitalists hated their workers (Fitzhugh, 1857, p. 321).

Fitzhugh was certainly overstating his point when pointing out the benevolence of slaveholders. The atrocities visited upon slaves in the South are well-documented (see Fede, 1985). However, Fitzhugh seemed to understand the plight of the Northern laborer very well.<sup>31</sup> Fitzhugh also overshoots the mark in another of his observations. He noted that abolitionists had ulterior motives in advocating the abolition of slavery (Fitzhugh, 1857). However, he believed that motive was to institute communism in the United States (Fitzhugh, 1857).<sup>32</sup>

### **Economics and the War**

Marx also noted the ulterior motives of the abolitionists in the North (Marx and Engels, 1861-1864). Marx stated that the North had capitulated to the South for quite some time (Marx and Engels, 1861-1864)—since the time of the Revolution where numerous

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Urban slaves appear to have had more freedom than rural slaves (Genovese, 1961). All this being said, even for those slaves with more lenient masters, slaves were still slaves at the end of the day and subject to their masters, not to mention the strict slave laws of the states in which they lived.

<sup>31</sup> Labor unionists in the North made claims similar to Fitzhugh that slaves in many regards lived better lives than they did (Pessen, 1980).

<sup>32</sup> There is some irony in the fact that Fitzhugh makes a fairly accurate Marxist assessment of the situation in the North, yet viewed communism—the ultimate goal in Marxism—as the evil the North sought to spread.

concessions were made to the South for the sake of preserving the Union.<sup>33</sup> The Kansas-Nebraska Act (Statutes at Large and Treaties of the United States of America, 1855), which allowed newly-admitted states decide for themselves whether to permit slavery within their borders, was one concession. According to Marx (Marx and Engels, 1861-1864), this ability to spread slavery to more states was necessary for the survival of slavery in the South; without new markets for slaves, slaveholders of the South would have been unable to sell their surplus slaves and thus would have suffered economically (Runkle, 1964).<sup>34</sup> Additionally, if the domestic slave trade dried up, it would have been increasingly difficult for the Oligarchy to maintain the illusion of the Southern Antebellum Dream, which could have resulted in an uprising of the poor white workers of the South.

As Marx saw it, the American Civil War was not over the abolition of slavery per se, but rather over the issue of whether the North should be required to subject itself to the interests of the Oligarchy of 300,000 in the South (Marx and Engels, 1861-1864). Slavery was the foremost economic interest of the Oligarchy in the South, and thus it became the issue upon which this greater argument was waged. Others have made a similar assessment, stating that the War resulted because the North and South had “opposed but similarly selfish interests” (Pessen, 1980, p. 1148). There is credibility to this argument. However,

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<sup>33</sup> It seems that most of these concessions concerned slavery (see Logan, 1886). This included the 20 year window during which the international slave trade could not be prohibited—a matter that will be discussed in Chapter 6.

<sup>34</sup> The economics of the domestic slave trade in the antebellum United States will be discussed in Chapter 6.

by seeing the War as the result of incompatible economic interests, this explanation still falls prey to the initial criticism mentioned above: the fight against slavery as an economic system came from outside, not from the slaves themselves (Runkle, 1964), and thus would not fit neatly within a Marxist perspective.

The cause of the American Civil War, of course, is not our main focus. Our focus is on how slavery could have impacted the transition from private prosecution to public prosecution in the South. The fact that the overthrow of slavery did not occur strictly as Marx would have predicted does not mean the Southern Antebellum Dream was no less real and was no less of a concern to the Oligarchy. Thus, as we go forward and analyze how slavery could have impacted the transition in prosecutorial systems, our focus should include the plight of poor white laborers in the South along with the plight of the slaves themselves.



## CHAPTER 6

### PROSECUTION AND ABOLITION SOCIETIES

Alone we can do so little. Together we can do so much.

Helen Keller

To determine what may have necessitated the transition to public prosecution from private prosecution, it is important to evaluate the conditions under which a system of private prosecution advantaged the rich. If we recall, the primary way in which a system of private prosecution cut in favor of the rich was the cost of litigation (Bentham, 1790). In short, those who were wealthy could afford it, and those who were poor could not. If one were the victim of a crime and could not afford the costs of litigation, then there were no repercussions for the offender's actions. The rich, on the other hand, would be able to afford the costs of litigation, and the offender—presuming they were apprehended—would have to face the consequences of his or her actions under the law.

On its face, the advantage a system of private prosecution provided the rich is quite apparent. When the rich were the victims of crime, they were able to obtain justice. When the poor were victims of crime, they were unable to obtain justice. This creates a clear disparity in access to justice based on socioeconomic status. That being said, there is evidence to suggest that the poor were at times able to utilize the justice system even under a system of private prosecution. In nineteenth-century Pennsylvania, for example, there were complaints by grand jurors that the poor often brought frivolous cases before them to

be heard (Steinberg, 1984). Those grand jurors viewed the cases brought before them as “petty and unfounded” (Steinberg, 1984, p. 575), and viewed the accusers as just as guilty—if not more guilty—than the people they accused. In some instances, then, the poor engaged in private prosecution despite having limited means to do so (Steinberg, 1986). From the descriptions given, however, it appears that when the poor did engage in private prosecution, it was against others who were poor.

It is difficult to envision that the poor prosecuting the poor was of much concern to the rich. The financial interests of the rich would not have been affected by allowing such a practice to continue. The real advantage to the rich under a system of private prosecution, then, does not appear to come from the inability of the poor to prosecute at all. Rather, it would appear that the advantage to the rich would be that the poor could not effectively prosecute them. Where the rich had more financial means, they could outspend and outlast any prosecution brought against them by the poor. This would leave the rich open to victimize the poor to their hearts’ content without any fear of having to face the consequences of their actions under the law.

Where the advantage to the rich was the inability of the poor to match them dollar-for-dollar when covering the costs of litigation, if the poor had been able to match the costs of litigation in some way, that advantage would be negated. The simplest way in which the poor could have done this was by pooling their resources. While they may not have been able to match the resources of a member of the bourgeoisie by themselves, collectively the proletariat may have been able to put up a fight.

This idea sounds feasible in practice, but did this threat ever actually materialize? An evaluation of prosecution and abolition societies indicate that it may have.

## **English Prosecution Societies**

As early as 1693, there were groups of people in England who had joint agreements with each other to mutually bear the costs of litigation (Philips, 1989). If a person who made one of these joint agreements was the victim of a crime, the other members of the agreement would help cover the costs of that prosecution. These agreements were generally only for a limited period of time (Philips, 1989). While these types of agreements existed into the early-nineteenth century, formal societies that were organized for the same purpose began to emerge in the eighteenth century. The first documented prosecution society in England was organized in 1744 (Shubert, 1981).<sup>1</sup> A prosecution society was a group of people that joined together to assist in the prosecution of certain crimes.

Prosecution societies can be categorized into two groups: those that were victim-specific in their prosecutions and those that prosecuted moral ills. These will be discussed below.

### **Victim-Specific Prosecution Societies**

Victim-specific prosecution societies functioned as a means of prosecution insurance. Each member paid fees to the society (Shubert, 1981). In exchange, the society would cover the costs of prosecution for a member if they were the victim of a crime. This was similar to the joint prosecution agreements mentioned above.

Victim-specific societies were concerned with prosecuting offenses against specific

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<sup>1</sup> It is worth noting that these societies do not appear to have existed in other parts of the British Isles and colonies. It is possible that organizing a prosecution association may have been illegal in Scotland at the time (Hay, 1989).

victims, namely its members. The prosecution society organized in 1744 appears to have been organized for this purpose (Shubert, 1981). These societies prosecuted crimes that ranged from highway robbery and horse theft to vegetable theft and yarn embezzlement (King, 1989). There were a number of societies that had clauses in their organizing documents that indicated they would help non-members prosecute cases if the society saw fit, but these clauses were seldom utilized (Philips, 1989). The reality was that there were but a limited number of victim-specific societies that were interested in prosecuting crimes committed against members and non-members alike (Durstun, 2012; Philips, 1989).

### **Societies for the Regulation of Morals**

Societies that prosecuted moral ills were not victim-specific in their prosecutions because the crimes they prosecuted were victimless. As was discussed in Chapter 3, under a system of private prosecution, a private prosecutor did not have to be the victim of a crime; anyone who wanted to could step up and prosecute a case. These societies did this regularly with moral crimes.

Perhaps the most notable of these societies were those known as societies for the regulation of morals. While these societies were not prosecution societies in name, they were prosecution societies in function. They were organized to prosecute vice crimes, such as prostitution, gambling, swearing and Sabbath breaking (Dabhoiwala, 2007).

Societies for the regulation of morals first emerged around the same time as joint prosecution agreements. The first society was formed in 1689 to prosecute the owners and frequenters of brothels (Dabhoiwala, 2007). Around this same time, religious societies would take it upon themselves to prosecute immorality (Dabhoiwala, 2007). The year 1693 appears to be the first that a society for the regulation of morals was regularly active

(Dabhoiwala, 2007).

The financial benefit of membership in a victim-specific prosecution society is apparent, but the financial benefit of membership in a society for the regulation of morals is less so. Some prosecution societies offered rewards to members who provided information leading to the conviction of a criminal (Shubert, 1981). It seems that societies for the regulation of morals would do something similar. Many of the societies for the regulation of morals had a handful of salaried agents that would apprehend criminals (Dabhoiwala, 2007). However, for most members, there does not appear to have been any direct financial benefit.

### **Socioeconomic Status of Prosecution Society Members**

In terms of social class, the membership of prosecution societies was varied. The organizing documents of these associations tend to indicate that the societies were composed of members of the bourgeoisie (Philips, 1989).<sup>2</sup> It has been said (Shubert, 1981) that there was no apparent class bias when admitting members to these societies and that the only requirement for admission for most victim-specific societies was that the person seeking admittance have some property that they wished to protect by way of the society. That sole requirement, however, would seem to be the very thing that would exclude the proletariat—the largely unpropertied—from joining these societies. That being said, it is not impossible for the proletariat to own things, and they would presumably want to protect

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<sup>2</sup> The exact phraseology used to describe membership was “gentlemen, farmers and tradesmen” (Philips, 1989, p. 132), “gentlemen of the first rank and property” (Shubert, 1981, 28) or something similar.

those things as much as the bourgeoisie. For example, horses—while on the more expensive side—were still owned by those who were not wealthy (King, 1989). Horse theft could be costly to investigate and prosecute, but was worth the cost if the effort was successful (King, 1989). To help defray those potential costs, a less-wealthy horse owner may want to join a prosecution society. It does not appear the costs of membership would necessarily have been prohibitive (Philips, 1989).<sup>3</sup> It appears that the bulk of the active membership for several of these societies were lesser-propertied men and women like this (Dabhoiwala, 2007; Little and Sheffield, 1983; Philips, 1989). This notwithstanding, these societies were generally run by the rich (King, 1989).

A question here arises concerning the participation of the rich in these prosecution societies. If viewed solely as a mechanism to overcome a lack of resources, then their membership would make no sense. However, when viewed more broadly as a mechanism to make one's resources go farther, then it does make sense. The rich would presumably be interested in limiting expenses just as much as the poor. Additionally, there are examples of prosecution societies that were dominated by the rich and pursued interests that were solely those of the rich. The most notorious of these were game preservation societies (Shubert, 1981). During the eighteenth century, one could only take game if their estate was sufficiently large (Lecky, 1887).<sup>4</sup> Those wealthy enough to take game guarded the

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<sup>3</sup> Philips indicates that the costs of membership in these societies was “relatively cheap” (1989, p. 135).

<sup>4</sup> In order to take game, one had to own real property worth at least £100 (Lecky, 1887, p. 262). This comes out to roughly \$360,000 today (see Officer and Williamson, (n.d.)).

right to do so zealously (Shubert, 1981).

Just as important as the composition of the societies is the composition of the people they prosecuted. There is nothing to suggest that these societies were used by the poor as a means of prosecuting the rich. In fact, in many cases, it appears that the opposite was true. As mentioned above, wealthy land owners used game preservation societies to prosecute the poor who infringed on the exclusive right of the wealthy to take game (Shubert, 1981). Manufacturers and merchants used prosecution societies to prosecute their employees for embezzlement (Philips, 1989). Farmers used societies to prosecute people for theft of wood, fruit and vegetables (King, 1989).

Societies for the regulation of morals did attempt to prosecute the rich at times, but were largely unsuccessful (Dabhoiwala, 2007). It seems that some societies succumbed to the realization that they would be unable to prosecute the rich. Said one clergyman to these societies:

[S]ometimes the best rebuke that can be given some great men and superiors, is to let them see what is the just and deserved punishment of their own faults, by the punishment of inferiors, for the same things which they know themselves to be guilty of (Dabhoiwala, 2007, p. 310).

This and other types of false consciousness appear to have been adopted by these societies (Dabhoiwala, 2007), convincing themselves that the poor were the real problem and not the rich. So routine was the prosecution of the poor by societies for the regulation of morals that some people of the time said of one society that it should be renamed the “Society for Suppressing Vices of persons whose income does not exceed £500 per annum” (Hunt, 1999, p. 74).

It becomes apparent that early English prosecution societies were not used by the poor as a means to combat criminal victimization by the rich. It appears the societies were

more often used by the rich and middle-class, and that those prosecuted by these societies were mostly the poor. Accordingly, these early prosecution societies do not appear to have posed a threat to the wealthy. However, the emergence of the idea of pooling resources for the purpose of prosecuting a case that you would be less able to pursue individually ultimately proved problematic for them.

### **Prosecution Societies in America**

Where prosecution societies in England were prevalent around the same time the colonies were being established in America, it seems possible that the idea of prosecution societies would have come to America along with its immigrants. There does not appear to have been any societies that sprung up in the colonies that were specifically named prosecution societies. However, there were a handful of societies that were functionally prosecution societies. Anti-horse theft societies were plentiful (Little and Sheffield, 1983). Societies for the regulation of morals made their way to America as well (Dabhoiwala, 2007). There were other societies that arose that did not directly prosecute matters, but served as a voluntary oversight committee for the administration of justice in their cities, thus encouraging more criminal prosecutions by the public prosecutors (Moley, 1929).<sup>5</sup>

Just as prosecution societies occasionally sprang up for very specific purposes in England, so they did in America. An example of this can be seen in Georgia. The Beech Island Agricultural and Police Society was formed in the 1850's (Cordle, 1952). Local farmers were concerned with the lack of enforcement of laws concerning slaves and free

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<sup>5</sup> Such organizations existed in Baltimore, Chicago, Cleveland, Dallas and Los Angeles (Moley, 1929).



persons of color. They were afraid that this lack of law enforcement would lead to a slave uprising (Cordle, 1952). Thus, in addition to addressing local farming issues, the society was formed to assist in the enforcement of laws against slaves and free persons of color (Cordle, 1952).

There was another form of prosecution society that emerged in America: vigilante groups (Little and Sheffield, 1983). These were not prosecution societies in name, but in function. Like prosecution societies, vigilante groups were groups of people who banded together to address a perceived deficiency in the enforcement of the law (Little and Sheffield, 1983). Also like prosecution societies, the membership composition of vigilante groups tended to be the wealthy (Little and Sheffield, 1983). The key difference between vigilante groups and prosecution societies was that vigilante groups—in a bit of irony—often acted outside the law when enforcing the law (Little and Sheffield, 1983).

In drawing the parallel between prosecution societies and American vigilante groups, there is a distinction made between different types of vigilante groups (Little and Sheffield, 1983). There are those vigilante groups that had crime control as their main objective (Brown, 1975; Little and Sheffield, 1983). It is these groups that are said to operate like prosecution societies (Little and Sheffield, 1983). There are other vigilante groups whose motives were to control a certain social group (Brown, 1975; Little and Sheffield, 1983).<sup>6</sup> These are said to differ from prosecution societies (Little and Sheffield, 1983).

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<sup>6</sup> These social groups included racial minorities, religious minorities and “laboring men and labor leaders” among others (Brown, 1975; Little and Sheffield, 1983).

The distinction between crime-control vigilante groups and social-group-control vigilante groups is not as distinct as it is sometimes made to seem. Several vigilante groups sought to control another social group under the auspice of enforcing the law (Little and Sheffield, 1983). Conversely, there were other vigilante groups whose stated purpose was to enforce the law, but the way in which they did so additionally (and perhaps intentionally) controlled a social group.

Prosecution societies also fell prey to this murky distinction. As mentioned above, prosecution societies such as game preservation societies and manufacturer's societies enforced the law, but they specifically enforced it against the poor (Philips, 1989; Shubert, 1981). Even the example of the farming society in Georgia had the specific purpose of enforcing the law to prevent a suspected slave uprising (Cordle, 1952). While not always a stated purpose of prosecution societies, it appears the effect was social group control.

### **Possible Threats to the Bourgeoisie**

Just as it was in England, it appears that most American prosecution societies and similar groups were more often used by the rich and middle-class, and that those prosecuted by these societies were primarily the poor. Again, what is important is not so much that these societies were primarily used by the rich against the poor, but the fact that the practice of forming a society to accomplish something collectively that could not be accomplished individually existed in America. The key is to determine whether this practice was ever picked up on and used by the poor against the rich.

### **Labor Unions**

When talking about an organization where people join together to accomplish collectively what they are unable to achieve individually, it sounds like we are giving the

definition of a labor union.<sup>7</sup> In Marxist terms, labor unions are directly set up by the proletariat to protect their interests against the bourgeoisie. It would certainly appear that labor unions were one way in which the poor utilized this idea of society formation.

There is no evidence to suggest that labor unions took advantage of systems of private prosecution to prosecute employers in the nineteenth century. However, there are numerous instances of labor unions defending against prosecutions initiated against them by employers (Holt, 1984). In the early-nineteenth century, employers would prosecute members of labor unions for conspiracy to manipulate an economic system (Holt, 1984). This practice was successful for employers for decades.

In the 1840's, labor unions were eventually able to combat this line of argument and establish their right to form unions. The case of *Commonwealth v. Hunt* (1842) marks the first time a labor union was able to successfully defend a prosecution initiated against it by an employer. In other words, the employer in that case was unable to use private prosecution to his advantage.<sup>8</sup> Thus, while unions may not have posed a threat by actually

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<sup>7</sup> Merriam-Webster's defines a labor union as "an organization of workers formed to protect the rights and interests of its members" (Anonymous, (n.d.)e).

<sup>8</sup> It should be noted that Massachusetts—the state this case was prosecuted in—did have a statute in place that established a system of public prosecutors (*Compendium and Digest of the Laws of Massachusetts*, 1809), but the statute was ambiguous, as was mentioned in Chapter 3. It seems that in practice, prosecutions would be endorsed by the public prosecutor in Massachusetts, but a private party would still carry out the prosecution (Steinberg, 1984). It was not until 1849—seven years after the *Hunt* decision—that the



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**Figure 1: Chart of the Relationship between Urban Crime and Public Prosecution**

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filing prosecutions against employers, they posed a threat through their demonstrated ability to go toe-to-toe with employers in the criminal court system.

As noted earlier, there are those who have pointed to industrialization as a possible trigger for the transition from private prosecution to public prosecution (Steinberg, 1984). As the argument goes, industrialization brought with it more urban crime, and private prosecution was unable to handle that level of crime effectively. Thus, public prosecution was instituted to address that growing concern.

Looking at that explanation from a Marxist perspective, the outcome would be the same, but the flow of causation would look different. Instead of urban crime bringing about the establishment of public prosecution, the two elements would be spuriously related (see Figure 1). Industrialization in a capitalist economy would have brought about urban

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Massachusetts courts first mentioned in dicta that private parties could not assist a public prosecutor (*Commonwealth v. Williams*, 1849) and not until 1855 that it was officially so held (*Commonwealth v. Gibbs*, 1855).

crime—crime committed by the proletariat as a means of revolt and as an effect of their suffering. Industrialization would also have brought about labor unions—a more unified form of revolt by the proletariat—and labor unions would have necessitated the establishment of public prosecution by the bourgeoisie to protect their interests against prosecution by labor unions with their collectively-pooled resources.

Labor unions emerged as industrialization progressed. As was discussed previously, the South lagged in terms of industrialization (Preyer, 1971). Even where industry did exist in the South, it appears that slave labor was often used in the factories (Dew, 1974; Pessen, 1980; Starobin, 1970).<sup>9</sup> The activities of slaves were significantly more restricted than those of poor white laborers. Citizens in Georgia could legally disperse any gathering of slaves and physically punish those slaves without a trial to ascertain whether those slaves had actually committed a crime (Digest of the Laws of the State of Georgia, 1837c). It was also a crime to teach a slave to read or write (Digest of the Laws of the State of Georgia, 1837d). Slaves would have had almost no way to gather to discuss the formation of a union, let alone draft the appropriate documents to form one. White factory workers of the South could certainly have unionized, but as mentioned in Chapter

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<sup>9</sup> One southern senator, explaining in 1832 why industry did not flourish in the South, said the following; “Slaves are too improvident, too incapable of that minute, constant, delicate attention, and that persevering industry which are essential to manufacturing establishments” (Logan, 1886, p. 25). In practice, however, it is clear that slave owners had no problem using their slaves for factory work (see Dew, 1974; Pessen, 1980; Starobin, 1970).

5, the false consciousness preached by Southern slaveholders regarding white laborers' superiority to slaves staved off any meaningful realization by Southern white laborers of their plight. Thus, while the formation of labor unions could have been the impetus for the establishment of public prosecution in the North, it seems unlikely this would have been the case in the South. Instead, we must look for other organizations that may have threatened the economic institution of the South—slavery.

### **Slavery Abolition Societies**

Slavery abolition societies existed in the United States through the end of the eighteenth century into the nineteenth century. Like labor unions, they gathered to accomplish collectively what they may not have been able to accomplish individually—namely the abolishment of slavery. Abolition societies were distinct from labor unions, however, in that the members of the abolition societies did not receive any direct personal gain from their efforts.

The distinction between labor unions and abolition societies is the exact difference between victim-specific prosecution societies and societies for the reformation of morals. Victim-specific prosecution societies were set up by their members to benefit their members. Labor unions are set up the same way. Societies for the reformation of morals were set up to rid society of social ills. Abolition societies were set up to rid society of one specific social ill: slavery.

As will be seen more below, the tactics used by abolition societies were quite similar to those used by societies for the reformation of morals. The motivation of both societies appears to be the same as well. The motivation for societies for the reformation of morals was based in providentialism (Hunt, 1999). They believed that civilizations in

which immorality was rampant were likely to suffer the wrath of God (Hunt, 1999).<sup>10</sup> This same sentiment existed among abolitionists. Said one United States congressman of the time: “Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a country” (Blake, 1859, p. 397).<sup>11</sup> While this motivation seems to have its basis in religious false consciousness, it is noteworthy that the stated motivation for both types of organizations is similar.

Criticisms of both societies were likewise similar. Members of societies for the regulation of morals were commonly criticized as hypocrites (Dabhoiwala, 2007). These criticisms were not without basis. There is indication that at least one high-ranking leader of a society for the regulation of morals was a well-known adulterer, but his society did nothing about it (Dabhoiwala, 2007). Members of slavery abolition societies were also criticized as being hypocrites. As was mentioned in Chapter 5, several Southerners accused Northern abolitionists of treating their white workers worse than Southerners treated their slaves. Said one of these Southerners to Northern abolitionists: “Set your miscalled free laborers actually free, by giving them enough property or capital to live on, and then call on us at the South to free our negroes” (Fitzhugh, 1857, p. 325).

There is another similarity between societies for the reformation of morals and abolition societies. Societies for the reformation of morals focused on vice crimes, all of which had no legally-defined victims. Some abolition societies arguably viewed slavery as

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<sup>10</sup> The Great Fire of London in 1666 was seen by the members of some of these societies as proof of this (Hunt, 1999).

<sup>11</sup> It was Mr. Mason from Virginia that made this statement.

a victimless crime as well. To be clear, many abolition societies were outspoken on how slavery degraded the slaves involved (see Randazzo, 2005). However, the actions of the societies were at times contrary to these proclamations by the societies. For example, despite endorsing the eradication of slavery for the purpose of achieving equal rights for mankind (see Randazzo, 2005), the Pennsylvania Abolition Society did not allow African Americans to be members until the 1830s (Rosenfeld, 2005). Also, one tactic employed by several abolition societies was to send liberated slaves back to Africa. While the rationale for doing so was to put the freed slaves in a better situation (African Repository, 1826, Vol. 1), other abolition societies were skeptical and saw colonization as a ploy for slaveholders to promote the expulsion of freed slaves from the United States (Weeks, 1896). This is a hard claim to deny when one of the early proponents of sending slaves back to Africa said of liberated slaves that “[w]e should be cleared of them” (African Repository, 1826, Vol. 1 p. 2). These actions make it appear that for some abolitionists, the abolition of slavery was less about helping the slaves and more about getting rid of slavery which incidentally happened to benefit the slaves.

### **The History of Abolition Societies**

To understand how abolition societies may have been viewed as a threat to slaveholders and how a transition to public prosecution could have quelled that threat, a look at the history of slavery and the abolition movement is needed.

#### **Slavery in Colonial Georgia**

When the colony of Georgia was first established in 1732, its charter prohibited slavery (Gray and Wood, 1976). This was done at the insistence of James Edward Oglethorpe—the colony’s founder—and the remainder of the colony’s trustees (Gray and



Wood, 1976). Despite their overtures of benevolence (see Stevens, 1847), Oglethorpe's and the trustees' reasons for prohibiting slavery appear to have been more strategic, both in terms of the economy and safety. The colony originally intended to establish a system silk and wine manufacturing, and it was believed that whites were more suited to that type of work than blacks (Stevens, 1847). There were also concerns that if the colony were saturated with slaves, it would leave the colony vulnerable to attacks from the Spanish, Native Americans, and from the slaves themselves (Gray and Wood, 1976; Stephens, 1847). Oglethorpe clearly had no moral aversion to slavery; not only did he own slaves in South Carolina,<sup>12</sup> but he was also Deputy Governor of the Royal African Company—a consortium engaged in the African slave trade (Stephens, 1847).

It did not take long for some of the citizens of the colony to complain about the lack of slave labor. The reasons proposed for the unrest of these citizens is varied. Some have indicated these malcontents were simply lazy (Wood, 1974). Others point to the fact that Georgians had a hard time keeping pace financially with South Carolinian contemporaries who were permitted to employ slave labor (Baker, 1965; Jones, 1992; Stevens, 1847). Perhaps the most prevalent argument advanced is that the land could not be worked by white laborers and had to be worked by African workers. It was claimed by some of these citizens that the climate was impossible for those with white skin to work in, and thus slave labor was necessary for the colony to survive (Gray and Wood, 1976). This led one Georgian of the time to claim that “negroes are as essentially necessary to the cultivation

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<sup>12</sup> Oglethorpe owned a plantation in Parachucla, just 40 miles north of Savannah (Stevens, 1847).

of Georgia, as axes, hoes, or any other utensil of agriculture” (Wood, 1974, p. 36).<sup>13</sup>

The trustees eventually relented, and slavery was permitted in Georgia in 1751 (Wood, 1984).

### **Abolition and the Revolution**

A frequent refrain during American Revolution was that “all men are created equal.” The hypocrisy of a nation making such a proclamation yet still permitting slavery was apparent to many (Wood, 1984). Even in Georgia where the interest in maintaining slavery was high, this sentiment existed (Wood, 1984).<sup>14</sup> Some states began to outlaw slavery, or greatly curtail its reach.<sup>15</sup>

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<sup>13</sup> This statement was made by Thomas Stevens, the son of the Secretary of the Colony of Georgia (Wood, 1974). The statement is reminiscent of the statement made by Marx that slavery was as much a part of the mode of production in the South as machinery was in the North (1847, p. 111).

<sup>14</sup> One group led by Lachlan McIntosh called for the abolition of slavery, though McIntosh did not free his own slaves and later went on to defend the institution of slavery himself (Wood, 1984). Thus, while there is evidence that anti-slavery sentiment existed in Georgia around the time of the Revolution, it would appear that the expression of that sentiment may have been insincere and calculated to assist another endeavor—namely the Revolution (Wood, 1984).

<sup>15</sup> Vermont banned slavery outright in its constitution in 1777 (*Laws of the State of Vermont*, 1808). Pennsylvania called for the gradual abolition of slavery in 1780 (Rosenfeld, 2005). Slavery was legally ended in Massachusetts in 1783 through the Quock

By the time the United States Constitutional Convention met in 1787, slavery had become a potentially divisive issue between the southern states and northern states. Dissolution of the union of states loomed as a possibility (Blake, 1859).<sup>16</sup> The union persevered, but it did so by means of various concessions to the South involving slavery (Logan, 1886). Among those concessions was a provision that provided that the United States could take no action for the subsequent 20 years to outlaw slavery (Blake, 1859; Logan, 1886).

### **The Religious Society of Friends and the Growth of Abolition Societies**

The Religious Society of Friends—or Quakers, as they are commonly known—denounced slavery as early as 1675 (Weeks, 1896). However, it was not until the eve of the American Revolution (1773) that the first council of Quakers—located in New England—officially required all members to free their slaves (Rappleye, 2006). Other Quaker councils soon followed suit (see Baker, 1965).<sup>17</sup> The Quakers became active in opposing slavery.

The first abolition society—the Society for the Relief of Free Negroes Unlawfully Kept in Bondage—was organized in Pennsylvania in 1775 (Randazzo, 2005; Rappleye,

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Walker case, though slaves were still sold within the state for several years following the case (Turner, 1970).

<sup>16</sup> The representatives from Georgia and South Carolina stated they would not adopt a constitution if it prohibited the slave trade (Blake, 1859).

<sup>17</sup> At the yearly meeting in North Carolina in 1774, the same was required of Quakers there.

2006; Rosenfeld, 2005). The original ten members were all Quakers (Rosenfeld, 2005). The initial goal of the society—as its original name suggests—was to provide free legal aid to those free persons of color who were illegally enslaved (Rosenfeld, 2005). At first, the society was unable to fully engage in this work on account of the American Revolution (Rosenfeld, 2005).<sup>18</sup> It was not until after the American Revolution—nine years later—that the society was able to regroup (Rosenfeld, 2005).

When the society did regroup in 1784, its membership expanded, included many non-Quaker members (Rosenfeld, 2005). The society was still primarily composed of Quakers, however (Randazzo, 2005; Rosenfeld, 2005). In 1787, the society changed its name to the Pennsylvania Society for Promoting the Abolition of Slavery and the Relief of Free Negroes Unlawfully Held in Bondage (Rosenfeld, 2005). This change in name reflected a change in goals for the society. Clearly, it still aimed to assist those free persons of color that were illegally enslaved, but they added to that the aim of abolishing slavery in general. Additionally, where the society originally had a local focus in their efforts (e.g. Philadelphia), the reconstituted society broadened their focus to press for abolition “wherever the miseries and vices of slavery exist” (Rosenfeld, 2005, p. 81).

The Pennsylvania Society soon inspired other abolitionist societies to form. These societies were organized in Connecticut, New York, New Jersey, Delaware, Maryland and Virginia (Randazzo, 2005). The primary mechanism by which these societies tried to advance their goals was through legal activism (Rosenfeld, 2005). As mentioned above,

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<sup>18</sup> The society was only able to pursue six cases of wrongful enslavement before the American Revolution (Rosenfeld, 2005).

this took the form of legal actions on behalf of illegally enslaved free persons of color. It also took the form of pursuing legislative change. Numerous petitions were sent to legislatures, both of the states and of the federal government (Blake, 1859; Randazzo, 2005; Rappleye, 2006). These efforts were not immediately effective. Petitions appear to have fallen on deaf ears in several states (Randazzo, 2005; Rappleye, 2006). Other state legislatures took some action, but nothing that resulted in legislation to prohibit or limit slavery (Randazzo, 2005).<sup>19</sup> Success was initially limited at the federal level as well. As was mentioned, the United States Congress passed a law in 1787 that prohibited it from passing any law to abolish slavery until 1808 (Blake, 1859; Logan, 1886). This did not stop abolitionists from trying to persuade the United States Congress to do otherwise. In 1790, following a flood of petitions from Quakers, the United States Congress issued a report delineating its powers in relation to the regulation of slavery during the 20 year hiatus that had been previously agreed to (Randazzo, 2005). The report emerged after a contentious debate in Congress. It was argued by some in Congress that any call for the abolition of slavery in any regard was unconstitutional (Arthur and Carpenter, 1858). Sedition was threatened by some Southern representatives (Arthur and Carpenter, 1858). The debate, however, still continued. The nuances of what was permissible for Congress to do in

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<sup>19</sup> In 1794, the Connecticut House of Representatives passed a bill to abolish slavery, but the bill was not ultimately passed as it could not obtain a majority of support in the legislative council (Randazzo, 2005). On the eve of the Revolution, Massachusetts also considered several abolition bills, but they were ultimately tabled and disregarded (Rappleye, 2006).

regards to slavery were explored. For example, while the inability to restrict slavery in the existing states of the union seemed fairly agreed upon, the ability to restrict slavery in states that would be admitted in the future was an open question (Arthur and Carpenter, 1858). A vote was taken to determine whether a committee should be formed to determine exactly what powers Congress had regarding slavery. Despite all the delegates present from Georgia and South Carolina voting against the measure, it was agreed that such a committee should be formed (Arthur and Carpenter, 1858).

Once organized, the committee issued a report on Congress's authority regarding slavery. While recognizing it did not have the power to outlaw slavery until 1808, the report also recognized three powers the Congress had in relation to slavery (Randazzo, 2005). The report maintained that Congress could prohibit Americans from supplying other countries with African slaves, prohibit foreigners from outfitting slave ships in American ports, and regulate the treatment of slaves on ships bringing them to America (Randazzo, 2005). The report was merely that—a report. As such, it was not legally binding (Randazzo, 2005). However, the report seemed to encourage abolitionists to continue sending petitions to the federal legislature in hopes something more would happen (Randazzo, 2005).

While Northern Quakers struggled to persuade the nation to abolish slavery, Southern Quakers had their own problems. Southern Quakers were faced with a dilemma. The tenets of their faith prohibited the owning of slaves, and yet the heavy use of slave labor in the South made it difficult if not impossible to compete economically with the other citizens of the region (Baker, 1965).

In Georgia, there was one colony of Quakers that lived in Wrightsborough (Baker, 1965). Faced with the dilemma mentioned above, a large number of Quakers moved from

Georgia and headed west to Ohio and Indiana (Baker, 1965; Weeks, 1896). This exodus was complete by 1806 (Baker, 1965). Others simply renounced their faith and remained in Georgia (Baker, 1965). Thus, there was no large body of Quakers dedicated to abolition in Georgia during this time.

It has been claimed that roughly one-hundred abolition societies existed in the South at their peak in the 1820's (Phillips, 1937). This would certainly depend on how broadly the "South" is defined. There were certainly abolition societies in Maryland and Virginia, for example (see Randazzo, 2005), but these are often considered Border States instead of southern states when it comes to discussions on slavery. There are certain types of abolition societies that may have existed to some extent in Georgia, but it is doubtful that any abolition societies modeled after the Quaker-initiated societies existed there.<sup>20</sup>

### **The Varied Approaches of Abolition Societies**

There were numerous types of abolition societies that existed, and the approaches these societies took to combat slavery were likewise numerous (Phillips, 1937). By analyzing the approaches these societies took, we can determine which approaches could have posed a threat to slaveholding interests such that a transition to public prosecution was necessary to protect those interests.

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<sup>20</sup> A list of delegates that attended the abolitionist society convention in 1794 is available, and the only states showing delegates attending are Connecticut, New York, New Jersey, Pennsylvania, Delaware and Maryland (Randazzo, 2005). Delegates from Virginia were not present, but asked that the Pennsylvania society represent them (Randazzo, 2005).

## **Gradual Emancipation versus Immediate Emancipation**

One area on which abolitionists differed was on whether the immediate emancipation of slaves should be sought, or their gradual emancipation. While immediate emancipation was called for by some such as the National Anti-Slavery Society (Blake, 1859), gradual emancipation seemed to be the popular stance in the early days of abolition (see Randazzo, 2005).<sup>21</sup> To what extent abolitionists really thought this approach was best or whether they were capitulating to Southern sensitivities is unknown. As the years went on, the moderate voices in the slavery discussion were drowned out by those at the extremes (Philips, 1937). Thus, those calling for gradual emancipation were overshadowed by those demanding immediate emancipation. This crescendoed into the American Civil War.

It is easy to see how a call for immediate emancipation would concern the South more than a call for gradual emancipation. However, while this concern may be important in determining why the Civil War occurred, it does not seem to be important in determining why Georgia transitioned to a system of public prosecution. First off, Georgia and other southern states transitioned to a system of public prosecution in the late-eighteenth and early-nineteenth centuries. During this time, the stance of abolition societies still tended to be for gradual emancipation.<sup>22</sup> Thus, an increased call for immediate emancipation does

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<sup>21</sup> Bentham was among those that called for the gradual emancipation of slaves (Long, 1977).

<sup>22</sup> The Pennsylvania Abolition Society's strategy was a gradualist one that attempted to attack slavery without agitating the political establishment (Newman, 2002; Rosenfeld,



not appear to be the impetus. Additionally, whether emancipation should be gradual or immediate would have bearing legislatively, but not judicially. Thus, changing systems of prosecution would not remedy any problems that would have arisen from an increased demand for immediate emancipation.

### **Pamphlet Distribution**

Several societies distributed pamphlets detailing the evils of slavery in the South (Blake, 1859; Rosenfeld, 2005). This was a tactic used by many of the societies for the regulation of morals in England (Dabhoiwala, 2007; Hunt, 1999). The contention resulting from this methodology can best be shown from a segment of an address to the public given by the Anti-Slavery Society:

We are charged with sending incendiary publications to the south. If by the term *incendiary* is meant publications containing arguments and facts to prove slavery to be a moral and political evil, and that duty and policy require its immediate abolition, the charge is true. But if this charge is used to imply publications encouraging insurrection, and designed to excite the slaves to break their fetters, the charge is utterly and unequivocally false (Blake, 1859, p. 505-506).

The spreading of literature denouncing slavery was of concern to the South. Laws were passed in Georgia prohibiting the distribution of seditious writings for fear of slave insurrection.<sup>23</sup> It appears the Anti-Slavery Society was aware of this, as they tried to

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2005). The society said the following about their efforts in 1790: “We dare not flatter ourselves with anything more than a very gradual work” (Newman, 2002, p. 41).

<sup>23</sup> These laws first appear in Georgia’s penal code of 1817 (*Compilation of the Laws of Georgia*, 1821c). A more explicit version of the law—one that seems clearly targeted at the actions of these abolition societies, took effect in 1833 (*Digest of the Laws of the State*

address this concern in the public address above.

It is true that societies that engaged in pamphlet distribution would be engaging in behavior that Georgia would have considered criminal. However, those people were just as prosecutable by slave holders under a system of private prosecution as they would have been by a government official under a system of public prosecution. Thus, it is doubtful that this behavior necessitated a transition from private prosecution to public prosecution.

### **Manumission**

Manumission is the act of freeing one's slaves. Manumission societies existed in the late-eighteenth century—before Georgia instituted a system of public prosecution. Known manumission societies existed in New York, North Carolina, Tennessee and Virginia (Randazzo, 2005; Sowle, 1965; Weeks, 1896; African Repository, 1829, Vol. 4).

At first blush, this tactic would not seem to cause any heartache to Southern slave owners. If a society called for individuals to personally make the decision to manumit their slaves, that would not appear to have any direct impact on those who chose not to manumit

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*of Georgia, 1837a*). It reads: “If any person shall bring, introduce or circulate, or cause to be brought, introduced, or circulated, or aid, or assist, or be in any manner instrumental in bringing, introducing or circulating within this State, any printed or written paper, pamphlet, or circular, for the purpose of exciting insurrection, revolt, conspiracy or resistance, on the part of the slaves, negroes, or free persons of color in this State, against the citizens of this State or any part of them; such person so offending shall be guilty of a high misdemeanor, and on conviction shall be punished with death.” The 1817 statute also carried death as a penalty for its violation.

their slaves.

Georgia was concerned with the practice, however. Georgia prohibited the practice of manumission (*Compilation of the Laws of Georgia*, 1821d). The concern was not that slave owners would be forced into manumitting their own slaves. Rather, the concern was that having a large number of free persons of color<sup>24</sup> living in a community would be “dangerous to the safety of free citizens of this state, and destructive of the comfort and happiness of the slave population thereof” (*Compilation of the Laws of Georgia*, 1821d, p. 811). One possible interpretation of this wording is that slaveholders were afraid that a large number of manumitted slaves in the state would incite a slave revolt. However, there is another possible interpretation—one that could have had an influence on the system of prosecution in Georgia. The ability of the poor to pool resources to prosecute an offender who is rich would certainly pose a threat to the rich. Slaves did not have income to pool. Thus, no matter how many slaves got together to pool their resources, those resources would still amount to zero. However, a free person of color had the ability to earn money—scant as it might be. Thus, the potential was there to pool resources if enough slaves

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<sup>24</sup> Georgia considered manumitted slaves as improperly freed, and thus considered them as separate from free persons of color, at least for purposes of this statute (*Compilation of the Laws of Georgia*, 1821d, p. 811). However, the statute goes on to prohibit free persons of color from entering the state, seeming to indicate that any free person of color within the state posed a threat.

were freed, and those pooled resources could have been used to prosecute a rich offender.<sup>25</sup> This certainly could have had an impact on the transition to public prosecution.

### **Colonization**

Another popular strategy of abolitionists was colonization. Colonization involved sending freed slaves back to Africa. This was done by the American Colonization Society and its branches. The American Colonization Society went further than just sending freed slaves back to Africa. It helped establish a new colony there—Liberia—in 1822 (African Repository, 1826, Vol. 1).<sup>26</sup>

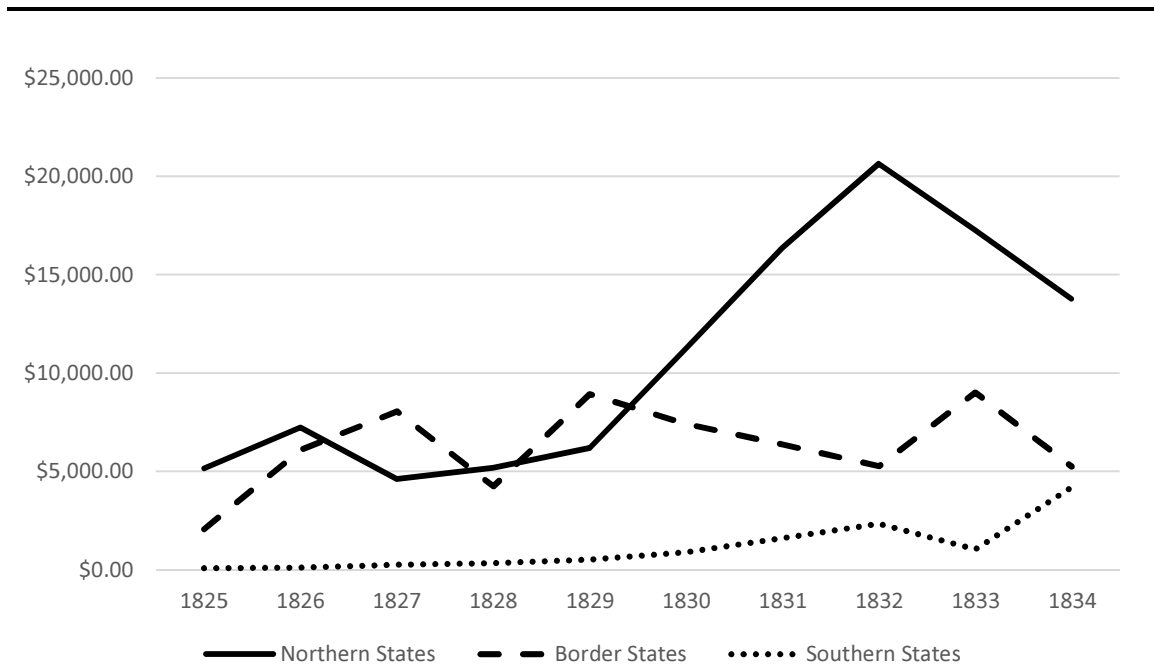
The American Colonization Society was founded in 1816 (Blake, 1859). Where Georgia initiated a system of public prosecution in 1799, this particular society would not have had a direct influence on Georgia switching systems of prosecution. However, the idea of colonization had been around in America at least since 1784 (Rappleye, 2006). For a time, the idea of colonization seems to have enjoyed support in Georgia (Phillips, 1902). Indeed, one of the first vice presidents of the American Colonization Society was William H. Crawford, a prominent Georgia politician (Blake, 1859).<sup>27</sup> However, that support

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<sup>25</sup> The types of slave-related offenses that a slaveholder could be prosecuted for will be discussed in Chapter 7.

<sup>26</sup> English colonization societies had attempted the same with Sierra Leone in 1787 (Blake, 1859).

<sup>27</sup> William H. Crawford was a United States senator, and served as President *pro tempore* of the Senate during his tenure (Northern, 1910). He also served as Minister to France, Secretary of War and Secretary of the Treasury (Northern, 1910). His family was also



**Figure 2: Donations to the American Colonization Society<sup>28</sup>**

prominent politically in Georgia. He was second cousin to George Walker Crawford (Northern, 1910)—one of Georgia’s public prosecutors that will be discussed in Chapter 7.

<sup>28</sup> The data was obtained from the African Repository (African Repository and Colonial Journal, 1826-1827; African Repository and Colonial Journal, 1828-1836)—a journal of the American Colonization Society that ran its first volume in 1825. The statistics obtained from the journals are rough. There are numerous donations that could not be attributed to a specific state. In many cases, the state of residence of the donor is not listed. In many instances, simply a city of residence is provided. Where the city is well-known enough that the state of residence can be inferred (e.g. Boston), the donation can be attributed to that state. Where the city name is one that exists in multiple states (e.g. Lee), the donation

seemed to wane when the idea of colonization became enmeshed with the idea of emancipation in general (Phillips, 1902).<sup>29</sup>

The benefits of colonization to Southern slave holders seem apparent. It remedied the problems posed by manumission: freed slaves would not be around to incite a slave revolt, nor would they be around to pool their resources together to prosecute the Oligarchy. This sentiment is reflected in a donation made to the American Colonization Society, where the donor indicated he would donate \$10 for every slave transported to Africa from his home town (African Repository, 1826, Vol. 1). Those in favor of slavery may not have been able to prevent others from freeing their slaves in every instance, but they could put their money behind an effort to remove free persons of color from the United States. It is this very thing that prevented other manumission societies from joining the American Colonization Society (Weeks, 1896). Many members of manumission societies rightly saw colonization as a ploy by slaveholders to rid America of free persons of color.

There were pros and cons for both abolitionists and slaveholders with colonization. At first blush, it seems as though it could have served as a middle ground for the two sides. If we look at the financial support provided to the American Colonization Society, it would appear this may have been the case. If we look at the money donated by people in Southern

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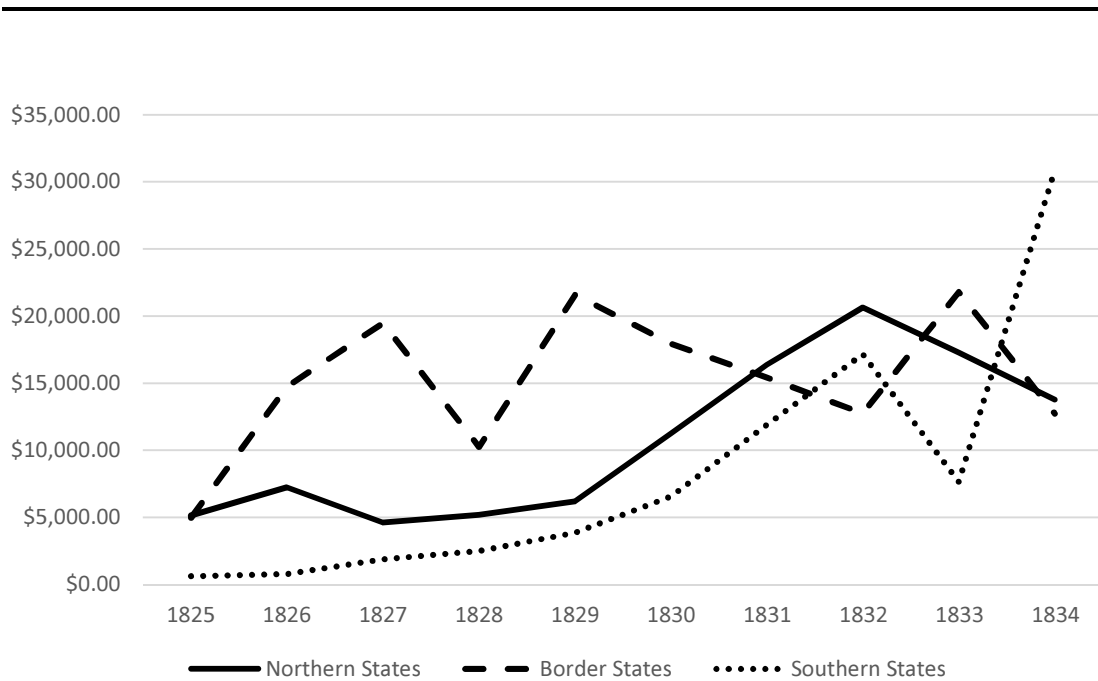
cannot be attributed to a specific state. Additionally, there were occasionally missing or illegible donations.

<sup>29</sup> Phillips (1902) indicates that support waned when the American Colonization Society adopted “emancipation propaganda.”

states compared to Northern states and Border States,<sup>30</sup> we can see that the South's donations generally paled in comparison (see Figure 2). For the first four years for which donation data is available, the South donated next to nothing. Donations increased over the next six years, though still fell short of the donations made by the Northern and Border

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<sup>30</sup> “Border States” is a term from the American Civil War. It refers to slave states that did not secede from the United States. Some of these states (Delaware, Kentucky, Maryland and Missouri) never seceded from the United States, and some states (Arkansas, North Carolina, Tennessee and Virginia) did not initially secede with the rest of the slave states, but did later on. Once they seceded, they generally ceased being referred to as Border States (Heidler and Heidler, 2002). Marx (Marx and Engels, 1861-1864) indicated that all eight of these states were never really slave states as both slave labor and free labor existed side by side in these jurisdictions. Because of the similarity of their economic systems, for purposes of analyzing the contributions made to the American Colonization Society, all eight of these states are considered Border States. However, Arkansas is not included in the data as there were no donations made from citizens of Arkansas (it was not admitted as a state until 1836—two years after the end of the timeframe analyzed here). Additionally, contributions made from citizens in Washington, D.C. are also counted with the Border States, as Washington, D.C. was sandwiched between two Border States—Virginia and Maryland. The Northern States are: Connecticut, Illinois, Indiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Vermont. The Southern States are: Alabama, Florida, Georgia, Louisiana, Mississippi and South Carolina.



**Figure 3: Donations to the American Colonization Society, Adjusted for Population<sup>31</sup>**

States.

We must bear in mind, however, that the population in these three regions were vastly different. The free population of the Border States was roughly three times that of the South, and the free population of the North was roughly seven times that of the South.<sup>32</sup> When adjusted for this population difference, a different picture emerges. We can see that

<sup>31</sup> The dollar amounts for the Border States and Southern states were increased to project what the donation amounts would have been if the populations in those regions were equal to that of the Northern states, assuming the per capita donation rate would have been the same.

<sup>32</sup> Based on the U.S. Census of 1830 (Clerk of the House of Representatives, 1832), the free population for the Northern states was 7,006,792. For the Border States, it was 2,889,431. For the South, it was 953,396.



for the first six years, the Border States were big supporters of colonization (see Figure 3). We can also see that support for colonization in the South increased over time, eclipsing both the Border States and the North at the end of the ten years.

These numbers are interesting in light of some of the political discussion going on during this same timeframe in Georgia. In 1827, the Georgia Senate passed a resolution objecting to the U.S. legislature appropriating money to the American Colonization Society. Said they:

At the first establishment of the Colonization Society, whatever may have been intended or avowed as its object, your committee believe that they can say with truth, that the general impression in the Southern States as to that object was, that it was limited to the removal beyond the United States of the then free people of color and their descendants, and none others. Under this impression it at once received the sanction and the countenance of many of the humane, the wise, and patriotic, among us. Auxiliary societies were formed in our own State, and the numbers, the influence, and resources of the society were daily increased. It is now ascertained that this impression was false, and its officers and your committee believe the society itself now boldly and fearlessly avow that its object is, and ever has been, to remove the whole colored population of the Union to another land (Compilation of the Laws of the State of Georgia, 1831b).

It is clear that the Georgia Senate did not approve of the objectives of the American Colonization Society, and that they saw the Society as a threat to slaveholder interests. They give the impression that Georgia citizens were initially duped into supporting the Society, and did not support it anymore. However, from the figures above, we can see that support for the Society was increasing at this time.<sup>33</sup> The fact that Georgia citizens appeared

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<sup>33</sup> The figures show donation trends for the South in general. Donations for Georgia generally increased along the same trajectory as the South as a whole, reaching over \$1,000 at its high point in 1832.

to increasingly support a cause that lawmakers clearly opposed could have been concerning to slaveholders. This must be tempered, however, with a realization of how little was still being donated to the American Colonization Society. Over the ten years in question, Georgia only donated \$2,151.

Even if support for colonization was cause for concern, instituting a system of public prosecution would not remedy any problems caused by that support. The American Colonization Society did not seek criminal prosecutions in order to send freed slaves to Africa. They sought funds. As is evidenced in the quote from the Georgia Senate, there were those that believed the intent of the American Colonization Society was to send all slaves in the United States to the colony established in Africa. However, this perceived threat was of the American Colonization Society, not of colonization itself. Colonization in no wise involved the criminal justice system, and thus any change in system of prosecution would have had no effect on colonization efforts.

### **Legal Activism**

Of all the factors that could have influenced Georgia to transition from a system of private prosecution to a system of public prosecution, the legal activism of some abolition societies would appear to be the most influential. Abolition societies were active in petitioning state legislatures to prohibit or limit slavery (see Randazzo, 2005; Rappleye, 2006; Rosenfeld, 2005). This again was a tactic used by societies for the regulation of

morals in England.<sup>34</sup> When it came to petitioning the federal legislature, there was a divide. Several societies had no problem petitioning the federal legislature to pass laws prohibiting or limiting slavery. Several of the Quaker-founded abolition societies had no problem petitioning the federal government for anti-slavery legislation even during the 20 year window where the United States Congress was prohibited from outlawing slavery in the states (see Randazzo, 2005; Rappleye, 2006). However, many societies did not think the United States Congress had the ability to regulate slavery, even after that 20 year window had lapsed. The National Anti-Slavery Society fell into this camp (Blake, 1859).<sup>35</sup> Other abolitionists were against petitioning the federal government for fear of disrupting the delicate political situation between the North and South and endangering the Union (Rappleye, 2006; Rosenfeld, 2005).<sup>36</sup> Thus, for many societies, legislative action was pursued at the state level.

At first blush, it would seem that abolitionists would not have raised too much

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<sup>34</sup> Early on, these societies did not seek—at least not successfully—legislative change. However, it appears that later on, this became a tactic often used by these societies (Hunt, 1999).

<sup>35</sup> They did clarify that the federal government would have the ability to prohibit slavery in Washington, D.C. (Blake, 1859).

<sup>36</sup> Benjamin Franklin was one of those that did not wish to stir up controversy. He does not appear to have opposed the practice of submitting petitions in general, but on at least one occasion, he refused to submit a petition from the Pennsylvania Abolition Society—of which he was president—because he found it to be too controversial (Rosenfeld, 2005).

concern by seeking legislative change at the state level. Many of the arguments from the South in the United States Congress advocated essentially this point, that the states should have the ultimate decision whether to prohibit slavery or not (see Blake, 1859). Thus, if Georgia wanted to maintain slavery, it could. It is worth noting that according to Marx (Marx and Engels, 1861-1864), restriction of slavery in outside markets would ultimately cause its extinction in the South as the South would have no buyers for their surplus slaves. Thus, legislative efforts in states outside of the South could have posed a threat to slaveholders in the South. This threat, however, would have had no effect on what happened in the judiciary. Additionally, this threat would have come from outside jurisdictions over which Georgia and other states of the South would have had no control. Accordingly, instituting a system of public prosecution in those states would not have had any effect on this threat.

While many abolition societies shied away from pursuing legislative change at the federal level, not all did. Some were able to persuade the United States legislature to pass a bill regulating slavery in advance of the expiration of the 20 year window agreed upon at the Constitutional Convention in 1787. This was the Slave Trade Act of 1794 (*Public Statutes at Large of the United States, Vol. 1, 1848*). By looking at the legal actions taken under these laws, we can see the threat posed to Southern slaveholder interests.

### **John and Moses Brown**

An illustration of the impact the Slave Trade Act of 1794 had is best shown through

the story of John and Moses Brown.<sup>37</sup> John and Moses were brothers who lived in Rhode Island from the mid-eighteenth to early-nineteenth century. They came from a family of merchants, and one that was involved in the slave trade at various times (Rappleye, 2006; Thompson, 1962). The family's first venture into the slave trade was catastrophic. Over half of the slaves purchased on the voyage—109 in all—had died during the return voyage (Rappleye, 2006). While this surely was difficult for the entire family from an economic standpoint, it was also morally difficult for Moses (Rappleye, 2006; Thompson, 1962). This experience with slavery, among others, eventually led Moses to sever ties with the family business and join the Quakers (Rappleye, 2006).

Moses took an active role in combating slavery. Not only did he free his own slaves (Jones, 1892; Thompson, 1962), but he also fought to free illegally enslaved free persons of color (Rappleye, 2006). He helped found an abolition society in Rhode Island (Jones, 1892; Rappleye, 2006). He pushed for legislation to abolish slavery in Rhode Island as well (Rappleye, 2006; Thompson, 1962). This put him at odds with members of his family who were still involved in the slave trade (Rappleye, 2006). He found himself most at odds with his brother John. The two appear to have disagreed regularly on the topic. They argued about the propriety of the slave trade through personal correspondences (Rappleye, 2006).

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<sup>37</sup> The John Brown mentioned here should not be confused with the militant abolitionist John Brown who was involved in anti-slavery attacks in Kansas and was ultimately apprehended and sentenced to death for his anti-slavery attacks in Virginia (Oates, 1970). The John Brown mentioned here lived in Rhode Island and, along with his brother Moses, was one of the founders of Brown University (Rappleye, 2006).

At times, this argument found its way into the local newspaper (Rappleye, 2006; Thompson, 1962).<sup>38</sup>

Prior to the United States Slave Trade Act of 1794, some of the states passed legislation limiting slavery (Finkelman, 2009; Rappleye, 2006). Rhode Island was one of those states, and Moses was instrumental in seeing the legislation passed (Rappleye, 2006; Thompson, 1962).<sup>39</sup> Massachusetts had out-and-out abolished slavery by this time (Arthur and Carpenter, 1858; Rappleye, 2006). It was there in Massachusetts that the first prosecution for violation of slave trade laws in the United States was held (Rappleye, 2006; Thomas, 1997). While the offense took place in Massachusetts, at least one of the slave traders being prosecuted—Caleb Gardner—was from Rhode Island (Rappleye, 2006). Accordingly, the abolition society from Rhode Island was asked to come to Massachusetts to prosecute the matter, which they did (Rappleye, 2006). Despite efforts to bribe and threaten witnesses, Gardner was convicted of violating the Massachusetts law (Rappleye, 2006; Thomas, 1997). This was the first prosecution of a slave trader that Moses was involved in, but it would not be the last.

Moses's efforts to eradicate slavery were not limited to the New England area. He

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<sup>38</sup> The argument in the newspaper started with both brothers initially using pseudonyms (Rappleye, 2006; Thompson, 1962).

<sup>39</sup> Rhode Island called for a system of gradual emancipation. Other states that did the same were Pennsylvania, Connecticut and New Hampshire (Arthur and Carpenter, 1858). Rhode Island additionally passed legislation that prohibited aspects of the slave trade (Rappleye, 2006).

was also instrumental in seeing the United States Slave Trade Act passed. He, along with several others, submitted a petition to the United States Congress asking for the abolition of the slave trade (Jones, 1892; Rappleye, 2006). He also lobbied against the slave trade in Philadelphia around the time the vote on the issue was to be taken up (Rappleye, 2006). The efforts of Moses and others paid off, and the United States Congress passed the Slave Trade Act of 1794.

The Act prohibited two things in particular. First, it prohibited anyone from outfitting or otherwise preparing a ship for the purpose of engaging in the slave trade with a foreign country (*Public Statutes at Large of the United States, Vol. 1, 1848*). Second, it prohibited the actual taking on board of slaves obtained in the international slave trade (*Public Statutes at Large of the United States, Vol. 1, 1848*).

Of note is that the Act prohibited the international slave trade; the domestic trade remained untouched as per the compromise reached in 1787. Those advocating the Act said it was intended to regulate the slave trade in the North and not the South (Rappleye, 2006). It was emphasized that this Act was to curtail the slave trade with the West Indies (modern day Haiti) and not impinge any interests in slaves currently held (Rappleye, 2006). The plain language of the Act made it clear that the interests in slaves currently held would not be affected. There is also anecdotal evidence to indicate that the international slave trade was engaged in more heavily by the North than the South (Donnan, 1935).<sup>40</sup> Indeed,

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<sup>40</sup> One Southern newspaper editorialist made the observation that, at one given point, there was five ships from the North at a particular foreign slave port—two from Rhode Island,

Georgia has laws in place in 1798 prohibiting the importation of all foreign slaves into the state (*Digest of the Laws of the State of Georgia*, 1800c).<sup>41</sup> This may explain why the Act passed without much opposition from the South despite being within the 20 year window that had be agreed upon in 1787.<sup>42</sup>

The first person to be convicted under the Act was none other than John Brown (Rappleye, 2006). He was prosecuted by the abolition society of which his brother Moses was a part (Rappleye, 2006; Thompson, 1962). The nature of the prosecution is important to note. This was a federal law, and thus would be heard by a federal court. The federal system at this time had established a system of public prosecutors (*Acts Passed at a Congress of the United States of America*, 1791). However, the Slave Trade Act of 1794 included provisions that indicated a portion of the fine received from a successful prosecution should be given to the person who prosecuted the case. When dividing up the

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two from Pennsylvania and one from Massachusetts—and only one from the South—South Carolina (Donnan, 1935).

<sup>41</sup> Georgia did pass a law in 1793 to prohibit slave importation from some select places such as the West Indies (Haiti), the Bahamas and Florida (*Digest of the Laws of the State of Georgia*, 1800c). This was likely reactionary to the Haitian Revolution going on at the time (see Ott, 1973). Importation of slaves from Africa was not prohibited by this law. It was not until 1798 that Georgia prohibited in its constitution (*Digest of the Laws of the State of Georgia*, 1800a) the importation of foreign slaves from any place.

<sup>42</sup> Prohibition of the international slave trade also yielded economic benefits to slave owners. These benefits will be discussed more in Chapter 8.



fine, it stated that the fine should be divided as follows:

... one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same (*Public Statutes at Large of the United States, Vol. 1, 1848*).

It appears that the prosecutor referred to in the statute is not the public prosecutor. The public prosecutor and the United States should be one and the same in this instance, and yet the Act specifies that the fine should be split between the two, indicating the two are separate and distinct entities. In John Brown's case, a district attorney was in charge of the actual prosecution in the court house (Rappleye, 2006). However, prior to the trial, it appears that John tried to convince the abolition society—Moses in particular—to forbear on bringing the prosecution (Brown, 1797; Rappleye, 2006). This seems to indicate that a private party that brought an action—in this case, the abolition society—still had some ability, or at least some practical input—on whether a prosecution proceeded. Thus, while in word the ultimate authority to dismiss a prosecution was in the hands of the federal public prosecutor, in reality, the private party that complained of the offense appears to have had some control over that decision.

It appears that Moses may have been reluctant to proceed with the prosecution, but John's indignant attitude towards the matter left little option (Rappleye, 2006; Thompson, 1962). John was prosecuted and convicted in August of 1797 (Rappleye, 2006).

### **The Twenty Year Window Draws to a Close**

It became clear that abolition societies were willing to prosecute cases against those participating in slavery—even their own family members if necessary. True, there were ways that offenders escaped or minimized punishment under the law. Under the Slave Trade Act of 1794, those convicted had their ship forfeited (*Public Statutes at Large of the*

*United States, Vol. 1, 1848*). Tactics were devised to circumvent this. Some slave traders would sell their ships at foreign ports as part of their voyage so the ship could not be seized by the government upon their return (DuBois, 1904b).<sup>43</sup> Others, after having their ships seized as part of a criminal proceeding, would rig the government auction of their ship and arrange to have an agent buy it back at a low price (Rappleye, 2006). Occasionally, violence was used to assure this happened (Rappleye, 2006).<sup>44</sup> Even though these methods had been employed, the willingness of people to pursue prosecutions of slave traders—especially abolitionist societies—had been made clear.

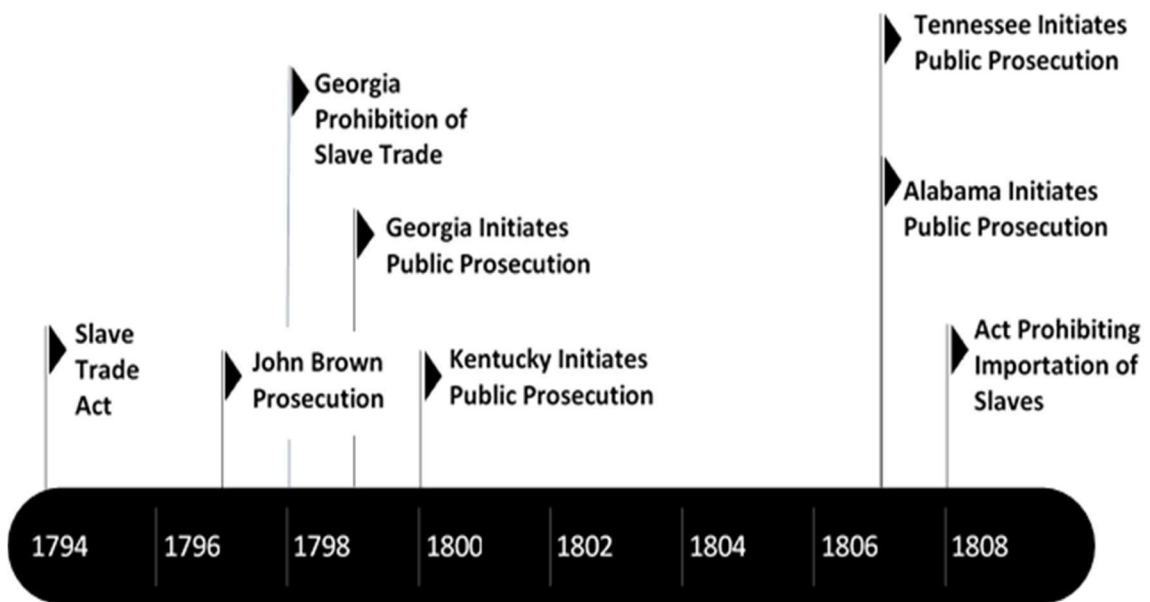
Where the Slave Trade Act of 1794 was a federal law, it could be enforced in any state of the United States. Thus, even in Southern states that may not have passed their own laws prohibiting slavery, those involved in the slave trade in those states could still be reached by federal laws. This could certainly have been a cause for concern for those in the South that were involved in or benefitted from the slave trade.

If we look at the times that states in the South instituted a system of public prosecution (see Figure 4), we can see a distinct trend. Many of the states—Georgia,

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<sup>43</sup> This tactic seems similar to modern day drug couriers who transport their product in rental cars to avoid having their personal property seized by the government.

<sup>44</sup> In one instance in Rhode Island, a convicted slave trader caught wind of a ploy by the government to have their own agent attend an auction to drive the price of the seized ship higher. The slaver trader had the agent kidnapped and dropped off on a shore two miles outside of town, thus causing him to miss the appointed time for the auction (Rappleye, 2006).



**Figure 4: Timeline of Pertinent Slavery Legislation and Prosecution**

Kentucky, Alabama and Tennessee—initiated a system of public prosecution after the federal Slave Trade Act of 1794 was passed but before the 20 year window during which the slave trade could not be addressed.<sup>45</sup> Tennessee and Alabama made the switch on the eve of the expiration of the 20 year window.

Instituting a system of public prosecution would not seem to be directly reactionary to this threat. As mentioned above, Georgia implemented legislation substantially similar to the Slave Trade Act just four years after the federal Act was passed (*Digest of the Laws of the State of Georgia*, 1800a). The fact that this legislation exists is some indication that slave holders in Georgia were not as concerned with the slave trade as they were with the

<sup>45</sup> As soon as the 20 year window expired, the Act Prohibiting Importation of Slaves was passed.

legality of slavery in general. Even if the international slave trade was of concern to them, instituting a state-level system of public prosecution would have no effect on the federal system. Federally, a system of public prosecution has already been initiated (*Acts Passed at a Congress of the United States of America, 1791*), but the states had no direct input into who was appointed to those positions.<sup>46</sup>

Instituting a system of public prosecution was indirectly reactionary to the threat posed by prosecutions from abolition societies. It was not that the Slave Trade Act of 1794 itself posed a threat to Southern slave holder interests. Rather, the willingness of abolition societies to prosecute those involved with slavery—both at the federal and state level—posed the problem. While the John Brown case may have been a significant case for the abolition societies, the bigger threat to slave holders would seem to be the potential of being prosecuted for other crimes at the state level—assaulting slaves, murdering slaves, and so forth. As mentioned before, the Quaker sentiment that inspired the abolition movement in the North was not present in Georgia; most Quakers either left the state or left their religion as the two were not compatible (Baker, 1965; Weeks, 1896). Thus, there were not many resident abolitionists in Georgia. However, the abolition societies of the North had shown their willingness to pursue legal action outside of their states of origin

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<sup>46</sup> This notwithstanding, the district attorneys appointed in Georgia in that time frame did appear to have interests in the institution of slavery (see Executive Office for United States Attorneys, 1989). Also, while Georgia did not have direct input into who was appointed as a federal public prosecutor in Georgia, they did have some indirect influence on the process. All this will be discussed more in Chapter 7.

(see Rappleye, 2006). The fear may have been that it was only a matter of time before they ventured south.

## CHAPTER 7

### THE OLIGARCHY OF 300,000

... [T]he oppressed are allowed once every few years to decide which particular representatives of the oppressing class shall represent and repress them ... .

Karl Marx<sup>1</sup>

#### **Appointment**

In order for a system of public prosecution to be a solution to the problems slaveholders encountered with private prosecution, the Oligarchy would have needed the power to decide who would be public prosecutors. If they did not have that power, then it would have been possible for someone who did not share their interests—or perhaps even someone hostile to their interests—to assume the office and create even more problems for them.

This was accomplished through the appointment system in place in Georgia through

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<sup>1</sup> This recounting of Marx's words was given by Vladimir Lenin (Lenin, 1918). Marx's wording was that people were able to decide "once in three or six years which member of the ruling class was to misrepresent the people in Parliament" (1872a). Other translations have the word "misrepresent" as simply "represent" (1872b).

1855.<sup>2</sup> Under that system, the public prosecutors for Georgia were appointed by the legislature of the state (Georgia Constitution, 1798). In order to qualify for the appointment, a person would have to be able to post a bond. When public prosecutors were first established in Georgia in 1799, the bond amount was \$5,000 (Digest of the Laws of the State of Georgia, 1800d). That would come out to be just shy of \$100,000 today.<sup>3</sup> This amount was increased to \$20,000 in 1828 (Compilation of the Laws of the State of Georgia, 1831a)—\$512,000 today.<sup>4</sup> Thus, unless someone had \$20,000 in disposable income available to post bond, they could not be a public prosecutor in Georgia.

On its face, there was a reason for requiring a bond. Public prosecutors were responsible for collecting fines from defendants in court and remitting those fines to the

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<sup>2</sup> Georgia switched to a system of elected public prosecutors in 1855 (Acts of the General Assembly of the State of Georgia, 1856). There are certainly ways in which the rich can influence the electoral process to assure their interests are represented (see Ellis, 2012). However, where the system of elected public prosecutors was instituted in Georgia at the very tail end of the time period in question, attention will be paid here to the appointment system.

<sup>3</sup> The amount in 2014 would be \$99,300. This calculation is derived from the website [www.measuringworth.com](http://www.measuringworth.com), a site operated by professors from several universities, both in the United States and out. The site is devoted to providing reliable historical data to the public concerning economic measures. The \$99,300 would be a conservative measure (Officer and Williamson, (n.d.)).

<sup>4</sup> This was calculated using the same method mentioned in the footnote above.

governor (see *Compilation of the Laws of Georgia, 1821e*). The bond served as a form of insurance should those funds ever go missing. The increase in bond from \$5,000 to \$20,000 could be seen as a reaction to such a scenario. Prior to 1828, Bedney Franklin—one of the public prosecutors in Georgia—passed away either while in office or shortly thereafter. On account of this, thousands of dollars of fines went missing (*Compilation of the Laws of Georgia, 1821e*). Subsequently appointed public prosecutors were able to account for and recover much of this money. However, there was still a large amount missing—roughly \$20,000.<sup>5</sup>

There is another function the bond served. It only permitted the rich to be public prosecutors. Where wealth in the South during this time in large part corresponded with slave ownership, the bond would seem to permit only slave owners—or at least those wealthy enough to purchase slaves—to be public prosecutors. Thus, it would appear that the bond requirement served to assure that only those with interests in slavery would be able to assume the office of public prosecutor.

Looking at the costs of slave ownership bear this out. The cost of a slave between the 1830's and 1850's was about \$300 to \$500 per slave (Smith, 1985; Williamson and Cain, (n.d.)).<sup>6</sup> The cost of owning a plantation was likewise expensive. A large plantation

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<sup>5</sup> The total amount in question—as far as the legislature could ascertain—was \$177,909.64. Franklin had paid over \$69,332.94. His successor, Seaborn Jones, was able to find and pay over \$88,129.85. This leaves \$20,446.85 unaccounted for (*Compilation of the Laws of Georgia, 1821e*).

<sup>6</sup> Smith (1985) indicates that in the 1830's and 1840's, the cost of a slave ranged from \$300



could cost upwards of \$100,000 (Smith, 1985; Williamson and Cain, (n.d.)).<sup>7</sup> Even the holdings of smaller slave owners represented a decent investment. Those who owned between 10 and 49 slaves had an average estate value of \$17,000 (Williamson and Cain, (n.d.)). While the exact amount this would equate to in present-day currency is debatable,<sup>8</sup> we need only compare it to the required bond amount to see exactly how that requirement essentially limited appointment to the office to those who were slaveholders or wealthy enough to be slave holders. Even the average wealth of a smaller slave owner would be insufficient to foot the \$20,000 bond amount. To shed even more light on how unattainable the office of public prosecutor would have been to the average citizen, one need look no farther than the average annual income in 1850 of \$110 (Williamson and Cain, (n.d.)).

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to \$500 in Georgia. Williamson and Cain (n.d.) indicate that the average price of a slave in 1850 was \$400 in the South, and that price fluctuated based on attributes of a given slave, such as age, sex, physical impairment, or whether the slave was an artisan.

<sup>7</sup> Smith (1985) indicates that the costal rice plantations in the 1830's and 1840's represented a capital investment between \$50,000 and \$100,000. Williamson and Cain (n.d.) indicate that in 1860, the average worth of an estate in the South with 50 or more slaves was \$72,000. The average worth for those with 100 or more slaves was \$160,000 and the average worth for those with 500 or more slaves was \$957,000.

<sup>8</sup> There are numerous ways in which relative value over time can be calculated, and those values can differ greatly (see Officer and Williamson, (n.d.); Williamson and Cain (n.d.)).

## Slave Ownership by Public Prosecutors

As was mentioned, in order to afford the bond of \$20,000 to become a public prosecutor, one would have to have been a slave owner or wealthy enough to be one. In order to determine whether antebellum Georgia's public prosecutors were sympathetic to slave owner interests, determining whether those prosecutors were slave owners themselves—not simply wealthy enough to be one—becomes important.

Slave ownership for the time period in question (1795-1855) can be determined from federal census records and Georgia tax records.<sup>9</sup> Slave ownership information for 106 Georgia public prosecutors was obtained.<sup>10</sup> Of those 106 public prosecutors, 87 (82%)

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<sup>9</sup> The census and tax records accessed to obtain this information were: Georgia, Property Tax Digests, 1793-1892; United States Census, 1820; United States Census, 1830; United States Census, 1840; United States Census (Slave Schedule), 1850.

<sup>10</sup> A fairly comprehensive list of Georgia's public prosecutors was obtained from Stephen F. Miller's *The Bench and Bar of Georgia* (1858b). While the author portrays the list as being complete, other records indicate there were a handful of public prosecutors that would have served during the time period in question that were not included on the list (see Anonymous, 1942; Jones and Dutcher, 1890; Northern, 1910; Sartain, 1972; Whitfield County History Commission, 1936). There were a number of public prosecutors listed (47) for which no slave ownership information could be determined, either because no record existed or the name of the public prosecutor was so common that it was difficult to determine which of the existing records referred to that public prosecutor. Those 47 were: George D. Anderson, Jack Brown, Henry George Caldwell, John Campbell, Peter Johnston

owned at least one slave (see Figure 5 and Table 1).

As was mentioned in Chapter 5, owning 20 slaves has been considered by some (Brooks, 1913; Pessen, 1980) to be the cutoff between being a large slave holder and a small slave holder, and thus one way of determining a dividing line between the bourgeoisie and petty bourgeoisie in antebellum Georgia.<sup>11</sup> When we break out public

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Carnes, Daniel Chandler, Alpheus Colvert, Thomas M. Daniel, Richard O. Davidson, William K. DeGraffenreid, Augustus C. Ferrell, Nathaniel G. Foster, Hamlin Freeman, James Gardner, John Gibson, Thomas C. Hackett, Samuel Hall, Dennis T. Hammond, Augustin H. Hansell, Benjamin F. Harris, James W. Harris, Upton J. Heath, John W. Hooper, John U. Horne, William A. Lofton, Thomas D. Mitchell, Uriah G. Mitchell, Franklin A. Nisbet, Richard W. Owens, William Phillips, Pitt F. D. Scarborough, Albert G. Semmes, Edward T. Sheftall, William G. Smith, R. M. Stell, John B. Stewart, Samuel P. Thurmond, Turner H. Trippe, Peter Lawrence Van Allen, Dickerson W. Walker, Robert Walker, John H. Watson, Thomas F. Wells, William W. Wiggins, Milton Williams, John J. Word and John S. Wynn. The highest number of slaves that a public prosecutor owned at any point in their life is the number used for these statistics.

<sup>11</sup> There are others (Menn, 1964; Williamson and Cain, (n.d.)) that have used 50 slaves as the cutoff. However, those that use that number as the cutoff seem to do so arbitrarily, where those who use the 20 slave cutoff provide some reasoning for using that number—20 was the maximum number of slaves that could be profitably managed by one overseer (Brooks, 1913).



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**Figure 5: Slave Ownership of Georgia State Public Prosecutors**

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prosecutors into these groups, we find that there were only 22 public prosecutors (21%) that owned 20 or more slaves. The majority of public prosecutors that owned slaves—65 total (61%)—owned less than 20. Thus, it would appear that the majority of Georgia’s public prosecutors would have fallen into the petty bourgeoisie class. This is consistent with Marxist theory. Being a prosecutor may have required too much work for a capitalist, and was likely not profitable enough for a capitalist to take on the task. It is thus fitting work for the petty bourgeoisie.

What is to be made of the 19 public prosecutors that did not own a single slave? While just a fraction of the total of public prosecutors for which data is available (18%), that fraction is not inconsequential. If roughly one out of every five prosecutors did not

**Table 1: Number of Slaves Owned by Georgia State Public Prosecutors**

Alexander M. Allen	2	John M. Ashurst	7	Samuel A. Bailey	13
George T. Bartlett	14	Robert Augustus Beall	41	Henry L. Benning	23
John MacPherson Berrien	122	James N. Bethune	3	Logan E. Bleckley	0
Nathaniel P. Bond	4	James L. Brown	6	William Bellinger Bulloch	38
Duncan G. Campbell	0	James P. H. Campbell	0	Thomas U. P. Charlton	5
Edward D. Chisolm	14	Gibson Clark	0	Howell Cobb	2
Thomas W. Cobb	35	Alexander H. Cooper	0	Mark A. Cooper	22
George W. Crawford	34	John Mitchell Dooly	15	John Wesley Evans	2
Robert A. Evans	4	William Ezzard	6	John J.R. Flournoy	25
John Forsyth	7	Bedney Franklin	7	Roger Lawson Gamble	42
Lucius J. Gartrell	13	William P. Gaulden	17	George A. Gordon	0
Bernard E. Habersham	0	Benjamin F. Hardeman	2	Edward J. Harden	7
Zachariah Harman	5	Kinchen L. Harralson	7	Julian Hartridge	0
John A. Heard	16	Micajah Henley	5	Charles S. Henry	1
Edward Y. Hill	15	Junius Hillyer	0	Cicero Holt	2*
Thaddeus G. Holt	6	John H. Howard	8	William H. Hull	0
Isaiah T. Irwin	191	Joseph W. Jackson	29	Charles Jones Jenkins	9
Richard Jones	0	Seaborn Jones	2	George W. Jordan	23
Yelverton P. King	7	Noel B. Knight	0	William Law	62
Allen Lawhon	18	John L. Lewis	6	Young J. Long	13
Peter Early Love	19	John H. Lumpkin	18	John Lyon	25
Archibald Martin	2	Rufus W. McCune	0	Charles James McDonald	14
William R. McLaws	3	Stephen F. Miller	0	David Brydie Mitchell	18
Theodorick W. Montford	6	Gabriel Nash	1	John C. Nicoll	11
William J. Patterson	0	William J. Peeples	3	Joseph S. Pelot	5
William C. Perkins	2	James L. Pierce	1	Washington Poe	8
Alexander Pope	41	Thomas Porter	1	Augustus Reese	17
Adam A. Robinson	7	Alpheus M. Rogers	0	Adam G. Saffold	69
Thomas P. Saffold	35	Frederick H. Sanford	0	Nathan G. Sayre	14
John T. Shewmake	0	Henry Lightfoot Sims	2	Richard L. Sims	3
Green W. Smith	27	James H. Starke	4	Ebenezer Starnes	7
William Henry Stiles	62	Thaddeus Sturgis	2	Edward F. Tattnell	53
Mial M. Tidwell	7	John W. H. Underwood	124	John Elliott Ward	5
Lott Warren	7	John B. Weems	0	William P. White	19
Richard Henry Wilde	5	Charles J. Williams	5	Augustin S. Wingfield	55
George Woodruff	10				

\*Owned at least 2 slaves

represent slaveholder interests, it would not seem that the system of public prosecution initiated fully safeguarded slaveholder interests.

It is important to look at the source from which this data is derived. The data for 14 of those 19 prosecutors was obtained from tax records. Tax records do not necessarily denote what a person owned. It simply denotes what a person was taxed for. It appears that slave tax evasion happened with some regularity in antebellum Georgia. The Georgia Archives (n.d.) indicate that slave owners along the Savannah River would remove their slaves to the South Carolina side of the river when it came time for taxes to avoid Georgia's higher tax rate. A possible example of this can be seen with one public prosecutor. William Henry Stiles prosecuted in Georgia's Eastern Circuit in the 1830's. He lived in Chatham County—a county along the Savannah River. In 1840, his federal census records indicate he owned 62 slaves. A decade later in 1850, his Georgia tax records indicate he did not own any slaves.<sup>12</sup> While it is certainly possible that he dispossessed himself of all of his slaves within the course of ten years, it seems highly unlikely given the monetary investment and social prestige it represented. Another example is that of Cicero Holt—a public prosecutor from Franklin County which also bordered the Savannah River. In the early 1820's, his tax records indicate he did not own any slaves. In his will from 1830, however, he gives the executors of his estate “full and discretionary powers to hire out my Negroes” (Georgia, Wills and Probate Records, 1742-1992).<sup>13</sup> Again, he could have

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<sup>12</sup> As mentioned above, the highest number of slaves that a public prosecutor could be shown to have owned is the number used for the statistics herein. Thus, William Henry Stiles is not counted as one of the 14 prosecutors whose tax records indicate they owned no slaves.

<sup>13</sup> Where Cicero Holt's will indicates some slave ownership, he was counted as owning

amassed all his slaves in the seven years between 1823 and 1830. However, given the information above, it is probable that he moved his slaves to South Carolina at tax time to avoid taxes. Of the 14 public prosecutors whose tax records indicated they owned no slaves, 5 of them owned land along the Savannah River at the time of taxation.

Even if we assume the 5 public prosecutors mentioned above did in fact own slaves despite their tax records indicating to the contrary, we are still left with 14 prosecutors that did not own any slaves. It is possible that some of these 14 prosecutors owned slaves at some point after the tax or census records were recorded. However, we have no evidence of this. Slave ownership is not necessarily what we are interested in measuring, however. It is simply one way for us to measure what we are really interested in measuring: whether the public prosecutors of antebellum Georgia were apt to support slaveholder interests. Thus, by using other measures, we can further determine if this was the case.

### **Political Careers of Public Prosecutors**

For many public prosecutors in antebellum Georgia, a stint as solicitor or attorney general was just one of many offices held in their political careers. Thirty-one were superior court judges;<sup>14</sup> six were justices of the Supreme Court of Georgia—one of which was chief

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between 1 and 19 slaves in the statistics herein. Just as with William Henry Stiles, Cicero Holt is not counted as one of the 14 prosecutors whose tax records indicate they owned no slaves.

<sup>14</sup> They were: George D. Anderson, John M. Berrien, Robert M. Charlton, Thomas U.P. Charlton, Thomas W. Cobb, William H. Crawford, William Davies, John Mitchell Dooly, William Ezzard, Roger Lawson Gamble, Augustin Harris Hansell, Edward Y. Hill, Junius

justice;<sup>15</sup> at least nine were members of the Georgia House of Representatives;<sup>16</sup> at least

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Hillyer, Thaddeus Goode Holt, John W. Hooper, Henry R. Jackson, Joseph W. Jackson, William Law, Peter Early Love, John Henry Lumpkin, Charles J. McDonald, David Brydie Mitchell, John C. Nicoll, William C. Perkins, Adam G. Saffold, Nathan C. Sayre, James H. Starke, Ebenezer Starnes, Turner H. Trippe, Robert Walker and Lott Warren (Miller, 1858b).

<sup>15</sup> They were: Henry L. Benning, Logan E. Bleckley, Samuel Hall, Charles Jones Jenkins, Charles James McDonald and Ebenezer Starnes. Logan E. Bleckley was a chief justice (Supreme Court of Georgia, (n.d.)).

<sup>16</sup> Unlike some other government agencies, the Georgia House of Representatives does not have a list of every former member available to the public. The best source locatable was *Political Graveyard*—a website devoted to providing biographical information for U.S. politicians. Where they are compiling this information on an ongoing basis, their list of members of the Georgia House of Representatives may be incomplete. Thus, it is possible that more public prosecutors were members of the House of Representatives as some point. The public prosecutors that were members of the Georgia House of Representatives include: William Bellinger Bulloch, Robert M. Charlton, George Walker Crawford, Nathaniel Greene Foster, Lucius J. Gartrell, Julian Hartridge, Joseph W. Jackson, John Henry Lumpkin and David Brydie Mitchell (Anonymous, (n.d.)b).



eleven were members of the Georgia Senate;<sup>17</sup> and six were governor of Georgia.<sup>18</sup> Several were involved in federal politics as well. Twenty-one were members of the U.S. House of Representatives;<sup>19</sup> five were members of the U.S. Senate;<sup>20</sup> and two served in the president's cabinet—George W. Crawford as Secretary of War for President Taylor and

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<sup>17</sup> Like the Georgia House of Representatives, the Georgia Senate does not have a list of every former member available to the public. *Political Graveyard* was again referenced to obtain this information. The public prosecutors that were members of the Georgia Senate include: John M. Berrien, William Bellinger Bulloch, William Davies, John Mitchell Dooly, William Ezzard, Nathaniel Greene Foster, Roger Lawson Gamble, Thomas C. Hackett, Joseph W. Jackson, Charles Jones Jenkins and John Troup Shewmake (Anonymous, (n.d.)c).

<sup>18</sup> They were: Howell Cobb, George W. Crawford, John Forsyth, Charles J. Jenkins, Charles J. McDonald and David Brydie Mitchell (Cook, 1995).

<sup>19</sup> They were: Howell Cobb, Mark Anthony Cooper, George Walker Crawford, John Forsyth, Nathaniel Greene Foster, Roger Lawson Gamble, Lucius Jeremiah Gartrell, Richard Wylly Habersham, Thomas C. Hackett, Julian Hartridge, Junius Hillyer, Joseph Webber Jackson, Seaborn Jones, Peter Early Love, John Henry Lumpkin, John Calhoun Nicholls, William Henry Stiles, Edward Fenwick Tattnall, John William Henderson Underwood, Lott Warren and Richard Henry Wilde (United States House of Representatives, (n.d.)).

<sup>20</sup> They were: John MacPherson Berrien, William Bellinger Bulloch, Robert M. Charlton, Thomas W. Cobb and John Forsyth (United States Senate, (n.d.)).

John Forsyth as Secretary of State for President Jackson (Cook, 1995). The subsequent political acts of these public prosecutors can give us some insight into their dispositions towards slaveholder interests.

### **Judicial Opinions**

There were several cases involving slavery that passed through the courts of antebellum Georgia. One issue that seemed to arise with some regularity concerned the manumission of slaves. As was mentioned in Chapter 6, manumission was commonly attempted through the will of a slave owner. Georgia passed laws to curtail this practice, making any manumission sought through a will void (see *Compilation of the Laws of Georgia*, 1821d; *Digest of the Laws of the State of Georgia*, 1822). The only way a slave could be manumitted was through an application approved by the state legislature (*Digest of the Laws of the State of Georgia*, 1822). Despite this, several slave owners still attempted to manumit their slaves via their wills. This appears to have often led to litigation in court. From the existing opinions rendered in county courts of the time, there are two such cases that were heard by judges that were former public prosecutors.<sup>21</sup> Both ruled in conformity with the law and prohibited the attempted manumissions (*Roser v. Marlow and Edwards*, 1838; *Spencer v. Negroes Amy and Thomas*, 1838). More noteworthy than the actual holdings of the cases are the comments about slaves made in the later of the two opinions. The former public prosecutor referred to free persons of color as “indolent” and said they were “lazy, mischievous and corrupt, without any master to urge them to exertion, and scarcely any motive to make it” (*Roser v. Marlow and Edwards*, 1838, p. 548). He also

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<sup>21</sup> They were: Robert M. Charlton and Thomas U.P. Charlton.

went on to express the dangerous conditions created when too many slaves were manumitted (Roser v. Marlow and Edwards, 1838, p. 548).

The Supreme Court of Georgia also had occasion to take up manumission cases. One of particular interest is *Adams v. Bass* (1855). In that case, a slaveholder included a provision in his will that directed that land should be purchased in Indiana or Illinois with the proceeds of his estate, and that all his slaves should be relocated to that property. The word “manumission” never appeared in decedent’s will, nor anything equivalent thereto. However, where both Indiana and Illinois prohibited slavery at the time, the effect of carrying out the will would be the emancipation of the slaves in question. The Court stretched the law to construe the will as being violative of Georgia’s manumission laws. Concurring in the decision, Justice Starnes—a former public prosecutor—said the following regarding the manumission of slaves:

I, myself, doubt the policy of permitting free persons of color to be sent into the Northern and Western States of this Union, to increase the number of paupers and aid in swelling the abolition chorus by their votes and voices (Adams v. Bass, 1855, p. 146).<sup>22</sup>

Justice Benning—another former public prosecutor—wrote a dissenting opinion in the case. In it, he attacked the informal position taken by some courts to hold valid wills like the one being considered in the instant case. Even those wills that wished to have their

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<sup>22</sup> Where the Fifteenth Amendment of the U.S. Constitution prohibiting discrimination in voting was not ratified until 1870, this reference to free persons of color adding votes to the abolitionist cause must have been referring to the increased representation Northern states would receive in the federal legislature by means of the 3/5ths clause in the U.S. Constitution.

slaves sent to Liberia via the Colonization Society were invalid, he stated.

While slavery was ultimately abolished, cases subsequent to abolition can also reveal the attitudes former public prosecutors had regarding African Americans in general. Such is the case in *Croom v. State* (1890). In that case, Croom—a slave—was charged with murder for killing a white man who came into Croom’s house while armed, and told Croom “you are mine” or possibly “you are my meat.” The man was an officer who had come to arrest Croom, but did not have a warrant for Croom nor identified himself as an officer to Croom. Croom’s defense was not only that he did not know the man was an officer, but that Croom knew the man had been involved in the killing of another African American not long before this encounter, and had possibly been involved in the killing of two others. Justice Bleckley—a former prosecutor—ruled in favor of Croom and ordered a new trial based on the trial court’s biased presentation of the charges to the jury, though he later upheld Croom’s conviction after the retrial (*Croom v. State*, 1892). More interesting than Justice Bleckley’s holding in that case is a statement made in his decision. Regarding African Americans, he said:

That negroes are more prone to entertain unfounded fears of white men than white men are of negroes is a fact too well known to admit of question ...  
(*Croon v. State*, 1890).

In light of what we know today about Southern slavery and life for African Americans in the South following the abolishment of slavery, this statement seems ludicrous. It does give us insight, however, into how a former prosecutor viewed former slaves.

### **Legislative Votes**

There were several legislative acts that former public prosecutors in Georgia were

involved in. If we look at the federal level, one of the more controversial pieces of legislation regarding slavery was the Kansas-Nebraska Act. The Act left each state to decide for itself whether to permit slavery or not. This was of advantage to the slaveholding states of the South, as this provided the opportunity to have slavery legalized in more states than had previously been possible. Junius Hillyer—the one former public prosecutor serving in the United States House of Representatives at the time the Act was passed—voted in favor of it (Congressional Globe, 1854).

There were legislative acts of interest at the state level as well. Pardons for capital offenses in antebellum Georgia had to be granted by the state legislature. In 1824, the senate took up the application for pardon for a man convicted of murdering a slave of another.<sup>23</sup> They voted overwhelmingly to pardon the man—47 in favor of pardon, 6 opposed (Journal of the Senate of the State of Georgia, 1824). Among those who voted in favor of pardoning the man was William Davies—the one former public prosecutor in the senate at the time.

Not all legislative acts by former public prosecutors supported slaveholder interests. As was mentioned, if a person in antebellum Georgia wished to manumit their slaves, they had to make application to the state legislature. One such application was considered by the senate in 1827. All three of the senators that had been former public prosecutors voted in favor of manumission (Journal of the Senate of the State of Georgia, 1828).<sup>24</sup>

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<sup>23</sup> This case will be discussed further in Chapter 8.

<sup>24</sup> They were: William Davies, William Ezzard and Roger Lawson Gamble.

## **David Brydie Mitchell**

In 1817, David Brydie Mitchell was appointed United States Indian agent to the Creek Nation (Shingleton, 1973). This position appears to have been ambassadorial. This is evidenced by the fact that, during his tenure, Mitchell negotiated a treaty between the United States the Creek Nation (Cook, 1995). While serving in the capacity of agent to the Creek Nation, Mitchell was implicated in a scheme wherein slaves were imported into the United States in violation of the Act Prohibiting Importation of Slaves of 1808 (see Public Statutes at Large of the United States, 1850; Shingleton, 1973).

Mitchell's involvement and culpability in the incident are a matter of debate (see Cook, 1995; Mitchell, 1821; Northern, 1910; Shingleton, 1973). Shingleton (1973) provides an account of the accusations against him. A privateer had captured a Spanish ship taking slaves to Havana, and took the slaves to Amelia Island off the northeast coast of Florida. The slaves were there purchased and moved in two groups to the agency of the Creek Nation. Mitchell was ultimately made aware of the first group of slaves coming through the agency. Mitchell told the merchant's agent that he ought to move the slaves along out of United States territory before Mitchell took "official cognizance" of the slaves. In short, Mitchell appeared to look the other way while slaves were illegally imported in or through the United States in violation of the law.

Things only got worse for Mitchell. The second group of slaves came through the agency a month later. Other U.S. officials were made aware of this second group and made arrangements to have those slaves seized. They discovered that Mitchell was aware that several slaves from the second group had been allowed to leave the agency without being properly seized. As these other officials made efforts to round up the illegally introduced

slaves, they found 15 of them working on Mitchell's property, being hidden by his son in the woods when authorities arrived looking for them.

Not everyone agrees with the account of the incident that Shingleton has provided. Mitchell himself was adamant that he was innocent of any wrongdoing and published a book defending his actions in the matter (1821). The charges against Mitchell have been referred to as "trumped up" (Cook, 1995, p. 83-84). Said another of Mitchell's involvement:

Like nearly every man connected with the Indians in an official capacity in those troublous years his conduct was sharply criticized, but nothing was shown detrimental to his character (Northern, 1910, p. 186).

This statement is technically true. Mitchell was investigated by federal prosecutors for his involvement in this matter and was not prosecuted (Shingleton, 1973). However, he avoided criminal prosecution as the statute of limitations had expired before prosecutors were able to file charges (Shingleton, 1973). However, while Mitchell was able to escape criminal conviction for his conduct, he was dismissed as agent to the Creek Nation based on his actions in this incident (Shingleton, 1973).

### **Secession Convention**

In 1861, Georgia seceded from the United States. Secession stemmed from the slavery issue (see Journal of the Public and Secret Proceedings of the Convention of the People of Georgia, 1861a; Phillips, 1937). Among the delegates at the Secession Convention for Georgia, seven public prosecutors were present.<sup>25</sup> Of those seven, only one

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<sup>25</sup> They were: George W. Crawford, Augustus Harris Hansell, Washington Poe, Thomas P. Saffold, Richard Sims, Mial M. Tidwell and Turner H. Trippe (Journal of the Public and

—Turner H. Trippe—voted against secession (Journal of the Public and Secret Proceedings of the Convention of the People of Georgia, 1861b). Another former Georgia public prosecutor—Howell Cobb—was the President of the Congress of the Confederate States of America (Journal of the Public and Secret Proceedings of the Convention of the People of Georgia, 1861c).

### **Charles Jones Jenkins**

Charles Jones Jenkins was a former Georgia public prosecutor that served as governor of the state following the Civil War. He opposed the extension of civil rights to former slaves and opposed Reconstruction (Cook, 1995). He also opposed ratification of the Fourteenth Amendment—the amendment granting equal protection (Cook, 1995). He was ultimately removed from office over this issue when he refused to pay the mandated cost of \$40,000 to the U.S. government for holding a convention in Georgia to incorporate the Fourteenth Amendment into the Georgia Constitution (Cook, 1995). Upon removal, Jenkins took \$400,000 of state funds with him, along with executive records and the seal of the Executive Department of the State of Georgia (Cook, 1995). He returned all these items two years later (Cook, 1995).

### **Federal Public Prosecutors in Georgia**

In addition to public prosecutors for the state of Georgia, there were also federal public prosecutors in antebellum Georgia. As was mentioned in Chapter 6, these prosecutors would have been responsible for enforcing federal slave laws in the state of Georgia. Unlike state public prosecutors, federal public prosecutors were not appointed by

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Secret Proceedings of the Convention of the People of Georgia, 1861b).



the state legislature. They were appointed by the President of the United States.<sup>26</sup> Thus, at first blush, one would not necessarily expect those federal public prosecutors to be sympathetic to slaveholder interests the same way one would expect Georgia state public prosecutors to be. However, as will be seen below, this is not the case.

Records for 16 federal public prosecutors in antebellum Georgia were found.<sup>27</sup> Of those, 13 (81%) owned at least one slave (see Figure 6 and Table 2); four of them (25%) owned 20 or more slaves; and only three (19%) owned no slaves.<sup>28</sup> In short, the percentage of slave-owning public prosecutors appears nearly the same at both the state and federal level. In fact, six of those federal prosecutors were also prosecutors for the state of Georgia at some point (see Table 2).

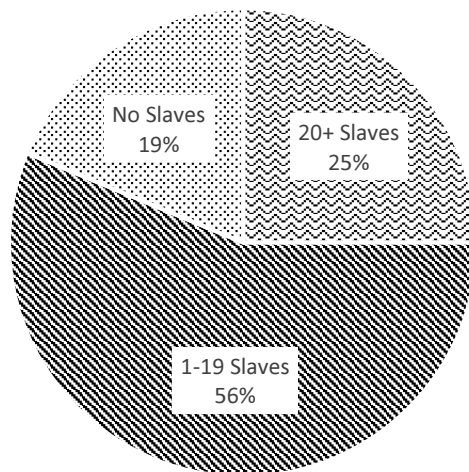
To understand why this was the case, we must go back to the first Continental Congress. One of the compromises struck there between the North and the South was the three-fifths clause of the Constitution (Art. I, Sect. 2). The clause provided that slaves

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<sup>26</sup> The Judiciary Act of 1789 (Acts Passed at a Congress of the United States of America, 1791) simply provided for the appointment of U.S. district attorneys without specifying who was to appoint them. This left the president with the authority to appoint them (Federal Judicial Center, (n.d.)).

<sup>27</sup> A list of federal public prosecutors for Georgia was obtained from the Executive Office for U.S. Attorneys (1989). Census and tax records were again used to determine slave ownership. From the list, there were 5 prosecutors for which no records could be found.

<sup>28</sup> The records indicating these three prosecutors did not own any slaves are tax records from Chatham County—a county along the Savannah River.



**Figure 6: Slave Ownership of Georgia Federal Public Prosecutors**

would be counted as three-fifths of a person for purposes of representation. This gave the South a political advantage in the House of Representatives where the number of representatives from each state was based on that state's population. Additionally, the number of representatives from each state in the House of Representatives and the Senate is used to calculate the number of electoral votes each state is permitted to cast for President of the United States (Wills, 2005). Thus, by including three-fifths of the slave population when determining representation, the South had an added advantage when it came to determining who would be president. Indeed, this setup appears to have won Thomas Jefferson the election over John Adams (Wills, 2005).<sup>29</sup> It seemed to have served the South

<sup>29</sup> John Adams would have won the popular vote, but Jefferson received eight more electoral votes than he did. In that election, twelve of the electoral votes would have existed

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**Table 2: Number of Slaves Owned by Georgia Federal Public Prosecutors**

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William Bellinger Bullock*	38	Robert M. Charlton	3
Solomon Cohen	22	Alexander Drysdale	1
William Davies	19	Joseph Ganahl	0
George A. Gordon*	0	Hamilton Gouper	112
Richard W. Habersham	4	Henry R. Jackson	7
Matthew H. McAllister	3	David Brydie Mitchell*	18
George S. Owens	0	William Henry Stiles*	62
John Elliot Ward*	5	George Woodruff*	10

\*These individuals also served as state public prosecutors in Georgia

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in presidential elections in general; between the Revolution and the Civil War, the office of President was held by slaveholders for roughly 50 of those 72 years (Davis, 2001). Even many of those presidents who were not slaveholders capitulated to slaveholding interests (Davis, 2001).<sup>30</sup> It all appears to be part of a larger pattern of sentiment in the North that accepted the existence of slavery in the South and were angered by those who agitated against it (Pessen, 1980). Based on this, it is not difficult to see why federal public prosecutors in Georgia would also have been sympathetic to slaveholder interests.

While less direct than the \$20,000 bond requirement, the three-fifths clause of the Constitution appears to have served the same function—to assure that the public prosecutors operating in Georgia would be sympathetic to slaveholder interests.

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based on a calculation of three-fifths of the Southern slave population (Wills, 2005).

<sup>30</sup> Van Buren sought to circumvent judicial process to send captives from the slave ship Amistad to Cuba—where death certainly awaited (Davis, 2001). Fillmore signed the Fugitive Slave Act into Law (Davis, 2001). Pierce signed the Kansas-Nebraska Act (Statutes at Large and Treaties of the United States of America, 1855).

## **In Summary**

The system for appointing public prosecutors in antebellum Georgia served as a means of assuring public prosecutors would be sympathetic to slaveholder interests. Over 80% of antebellum Georgia's public prosecutors owned slaves. The actions of many of these public prosecutors further indicates their sympathy to slaveholder interests. It is true that there were a fraction of public prosecutors that did not own slaves. It is also true that there were individual actions by some public prosecutors subsequent to their service as public prosecutors that appear to be in opposition to slaveholder interests. We must remember, however, that these two things are not what we are ultimately trying to measure. Slave ownership by Georgia's public prosecutors is but one factor that can be used to determine whether those public prosecutors were sympathetic to slaveholder interests. The same applies to the actions of those public prosecutors in their later political careers. To determine whether the transition to public prosecution in antebellum Georgia was reactionary to the threat posed by abolition societies, sympathy to slaveholder interests is only important to the extent that sympathy translated into an actual advantage to slaveholders in the criminal justice system. Thus, analyzing the actual prosecutions undertaken by these public prosecutors becomes key.

CHAPTER 8  
PROSECUTIONS

Laws, like sausages, cease to inspire respect in proportion as we know how they are made . . . .

John Godfrey Saxe

**Inconsiderate Prosecution**

Among the reasons cited for the transition from private prosecution to public prosecution in the United States, perhaps one of the most interesting is that the transition occurred to prevent “inconsiderate prosecutions” (Goodnow, 1905; Sidman, 1976). The term “inconsiderate prosecution” is not frequently used, and its meaning is not elaborated upon by those who have used it (Goodnow, 1905; Sidman, 1976).<sup>1</sup> The term could be conflated to be synonymous with “malicious prosecution”—a prosecution initiated out of ill-will and without probable cause to support it (Black, 1910, p. 751).<sup>2</sup> However, it has also been used in a way that appears to be distinct from malicious

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<sup>1</sup> Goodnow (1905) was the first to use the term, and provided no definition for it. Sidman (1976) merely quotes Goodnow and provides no interpretation of the term.

<sup>2</sup> There is another legal term—“temere litigare”—that would appear to translate from Latin as “inconsiderate litigation” (Black, 1910, p. 1140). It is also defined as the baseless pursuit of a case, albeit a civil case (Black, 1910, p. 1140).

prosecution (Michigan State Board, 1882).<sup>3</sup>

If we dissect the term and interpret it literally, a clearer meaning of the term emerges. To be “inconsiderate” means to act without regard to the rights or feelings of others (Anonymous, (n.d.)d). While frivolous and malicious activity could certainly be inconsiderate, inconsiderate behavior is much broader than that. For example, consider a situation where a man is traveling over the posted speed limit because he is trying to rush his pregnant wife to the hospital. Let us suppose a police officer pulled the man over and gave him a speeding ticket. The prosecution of that speeding ticket would not be frivolous or malicious as there are clearly grounds to show the man violated the law and there is no apparent ill-will on the part of the officer. Given the circumstances, however, we would likely be inclined to say that such a prosecution was inconsiderate.

It would appear that the term “inconsiderate prosecution” is referring to those types of prosecutions—ones that are not frivolous, but are viewed as lacking due regard to the situation of the person charged. When preventing inconsiderate prosecutions is cited as a reason for the transition from private prosecution to public prosecution, the question then arises “inconsiderate to whom?”

Under Marxist theory, that answer is simple: the bourgeoisie. If the bourgeoisie faced the prospect of prosecutions that were supported by probable cause, it would be expected that some change would be effectuated in the law to prevent that from occurring.

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<sup>3</sup> In this report, the Board lists several evils it is designed to protect youth from. In that list, “frivolous charges” and “inconsiderate prosecution” are listed as separate evils (Michigan State Board, 1882, p. 131).

In the South, some of these prospective prosecutions would take the form of offenses committed against slaves. An analysis of how these offenses were prosecuted—or not prosecuted—after the implementation of public prosecution can show us how a system of public prosecution appears to have protected slaveholders from punishment for committing offenses against slaves.

### **Slave Offenses in Georgia**

When talking about slave offenses, they can be broken down into two categories: offenses regarding the slave trade and offenses regarding the domestic treatment of slaves. Among the offenses regarding the domestic treatment of slaves, there are two categories as well: offenses where the slave is a party but not considered to be a victim and offenses where the slave is a victim.

#### **Slave Trade Offenses**

Slave trade offenses involve the importation of slaves to the United States from Africa and other locations. As mentioned previously, several bills had been passed by the United States legislature regarding slavery—the Slave Trade Acts of 1794 and 1807 in particular (Public Statutes at Large of the United States, 1848; Public Statutes at Large of the United States, 1850). Georgia also had its own law in place prohibiting the slave trade in 1798 (Digest of the Laws of the State of Georgia, 1800e).<sup>4</sup>

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<sup>4</sup> The law did permit those immigrating to Georgia to bring slaves with them that they previously held (Digest of the Laws of the State of Georgia, 1800e). In 1793, Georgia had partially restricted the international slave trade by prohibiting the importation of slaves from certain areas such as Florida or the islands of the Caribbean (Digest of the Laws of

Georgia's prohibition on the slave trade was not well-enforced (DuBois, 1904b). The enforcement of its federal counterpart in Georgia seems likewise abysmal (Anonymous, 1918).<sup>5</sup> Slave owners in Georgia would not have been directly able to prevent the passage of federal laws prohibiting the slave trade. However, it would be expected that they would have had the ability to prevent the passage of slave trade laws at the state level. Where these laws were not generally enforced, there appears to have been no practical effect on those engaged in the slave trade in Georgia. It leaves us to wonder why the laws existed in Georgia at all.

One reason cited for the passage of slave trade laws in Georgia was the fear of slave revolution that existed in the South (DuBois, 1904b). The Haitian Revolution was in full swing when the passage of the law took place, and slave owners in Georgia could certainly have been leery of over-populating their state with slaves and facing the same problem (DuBois, 1904b).<sup>6</sup>

While perhaps not an initial reason for passing the laws, another benefit arose that made keeping the laws in place profitable for slaveholders. By having the importation of slaves prohibited, the only source of new slaves in the United States was the current slave

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the State of Georgia, 1800c). It was not until 1798, though, that African slave importation was prohibited.

<sup>5</sup> When prosecutions were attempted against slave ship owners, they usually did not result in conviction (Anonymous, 1918).

<sup>6</sup> This same concern existed when the trustees first established the colony of Georgia and prohibited slavery outright (Gray and Wood, 1976).



owners themselves. This was not always a viable economic strategy for slave owners. In colonial Georgia, the male-to-female ratio among slaves imported from Africa was roughly two-thirds male, one-third female (Heuman and Walvin, 2003). This made it impossible for slave owners to maintain a steady slave population over time let alone increase the population without importation of new slaves from Africa (Heuman and Walvin, 2003). It was not until the mid-eighteenth century that the colonies were able to maintain a steady slave population domestically without importation (Heuman and Walvin, 2003).

The issue of profiting from producing slaves domestically was present at the Continental Congress in 1787. The prohibition of slavery outright was discussed, as was the possibility of merely prohibiting the international slave trade (Blake, 1859). Prohibition of the international slave trade was advocated by Virginia and Maryland (Blake, 1859). Others at the convention were quick to point out the economic benefit those states would reap from such a policy.<sup>7</sup> Where Virginia and Maryland had an abundance of slaves at that time, not only would those states be able to sustain their slave population without importation, but they also would have an edge in the slave market as they were the states with an excess of slaves to sell (Blake, 1859; Rossiter, 1909). Georgia and South Carolina would have been at a distinct disadvantage had such a policy been implemented at that time, and both states made it clear they would not adopt the Constitution if that policy was implemented (Blake, 1859). In fact, it seems that the twenty year window during which the slave trade could not be prohibited was an agreement made for the purpose of allowing the

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<sup>7</sup> Those who spoke on the issue were the delegates from Georgia and South Carolina as well as a Mr. Ellsworth, a representative from Connecticut (Blake, 1859).

Southern states to increase their slave population. Of that twenty year window, a committee of the Georgia Senate said this:

That the people of the South, at the time of the adoption of the constitution, considered not only the retention, but the increase of the slave population, to be all important to the welfare and interest of their States, is manifest from a reservation in that instrument itself, which, it cannot be doubted, was inserted on their express requisition (Compilation of the Laws of the State of Georgia, 1831b).

That slave owners saw the perpetuation of the slave population as important is apparent. To what extent slave owners focused on that economic aspect of slavery is less apparent. There are those that claim that some slave owners had part of their operations setup to focus on the breeding and selling of slaves (Gutman, 1975; Hacker, 1940; Sutch, 1975). Others are adamant that no such thing occurred (Fogel and Engerman, 1974; Linden, 1941). Those who insist this did not happen do not claim that slave owners did not profit from selling slaves. Rather, they claim that slave owners did not set up plantations for the express purpose of breeding slaves (Fogel and Engerman, 1974; Linden, 1941).<sup>8</sup> Whether intentional slave breeding occurred or not, the fact that slave owners profited from selling slaves domestically is not disputed. In fact, it appears that selling slaves was in some instances the most profitable venture slave owners were involved in, leading one Georgian

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<sup>8</sup> Fogel and Engerman (1974) do indicate that slave fertility was encouraged through positive economic incentives, but state that no evidence exists to substantiate the existence of “stud plantations.” Linden’s (1941) argument is similar in that it is simply a rebuttal of the claim that large slave owners intentionally bought more female slaves for the purpose of slave breeding.

to refer to the rearing of slaves as “the leading industry of the South” (Gutman, 1975, p. 97; Reed, 1906, p. 156).<sup>9</sup>

Because slave owners stood to profit greatly from selling slaves domestically, it comes as no surprise they would not oppose a ban on the international slave trade. While this may not have been the reason for passing the law in the first instance, it would appear to be a reason for its continuation. It is also important to note that of the parties that could be charged with a crime for being involved in the slave trade, it was the ship’s crew—not its owner—that were treated as the most criminal (Anonymous, 1918).<sup>10</sup> Thus, the wealthy that were involved in the international slave trade not only reaped the benefit of loose enforcement of the slave trade laws (DuBois, 1904b), but the brunt of the culpability was heaped against their employees instead of themselves.

While the continuance of this law certainly benefitted the rich, it did create other problems for them. Slave owners were able to maintain a monopoly on the supply of slaves and drive up the price, and this made it more difficult for non-slave owners to buy their own slaves (Hacker, 1940) and achieve the Southern Antebellum Dream. As discussed, slave owners had to concern themselves with maintaining the placation of this group of poor whites to maintain their way of life. As the increased cost of slaves made slave ownership increasingly improbable, the false consciousness of the Southern Antebellum

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<sup>9</sup> This statement was made by John C. Reed. The full quote is: “Really the leading industry of the south was slave rearing. The profit was in keeping the slaves healthy and rapidly multiplying” (Reed, 1906, p. 156).

<sup>10</sup> This was said of the federal slave trade law.

Dream faded. It has been claimed that this led the non-slave owners of the South to push for secession from the United States in an attempt to reopen the slave trade to lower slave prices (Hacker, 1940). Under Marxist theory, such a revolt by the lower class would come to be expected when that class tired of the economic repression they faced. However, it seems doubtful that it was the lower class that pushed for secession. The Confederate Constitution clearly prohibited the international slave trade as much as the laws of the United States had. It read:

The importation of negroes of the African race from any foreign country other than the slaveholding States or Territories of the United States of America, is hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same (Compilation of the Messages and Papers of the Confederacy, 1905b).<sup>11</sup>

Where the international slave trade was prohibited in the Confederacy, it seems unlikely that the issue of reopening the international slave trade prompted non-slave owners to revolt and push for secession. As Marx (Marx and Engels, 1861-1864) had mentioned, it seems that the need to expand slavery to new territories and keep alive the Southern Antebellum Dream for non-slave owners was the driving force. That being said, it is within the realm of possibility that the issue of reopening the slave trade could have also been used to assuage the lowered expectations of the non-slave owners. While the Confederate Constitution prohibited the international slave trade, it was silent on whether individual states within the Confederacy could reopen that trade (Hacker, 1940). Thus, the possibility of a reopened slave trade and its attendant lower slave costs could have strung

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<sup>11</sup> The provisional Confederate Constitution likewise prohibited the international slave trade (Compilation of the Messages and Papers of the Confederacy, 1905a).

the non-slave owners along just as much as the possibility of expanding slavery to new territories.

### **Offenses where Slave is not Considered to be a Victim**

Georgia has several laws regulating the conduct of other people in relation to slaves. The majority of these statutes appear to have had the purpose of protecting a slave owner's slaves from others. This is most apparent in the crime of slave theft. Where slaves were considered valuable pieces of property, the theft of one would be treated just as seriously—if not more so—as the theft of any other property. While it may be the offense most obviously instituted to protect slaveholder interests, it was not the crime involving slaves that was most frequently charged.

The offense most frequently charged in regards to slaves was the furnishing of liquor to a slave. The law technically applied to everyone—including slave owners (Digest of the Laws of the State of Georgia, 1837b). However, the statute specifically excluded from criminal liability slave owners that provided liquor “as they may believe is for the benefit of such slave or slaves” (Digest of the Laws of the State of Georgia, 1837b). It seems that providing liquor to slaves was commonly done by owners.<sup>12</sup> If slaves were not out-and-out prohibited from consuming alcohol, one has to wonder why the prohibition existed. If we are looking at protecting slaveholder interests, it is certainly possible that the consumption of alcohol by slaves—when unregulated by the owners—was believed to

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<sup>12</sup> Smith (1985) provides a list of items purchased by one slave owner for slave maintenance, and liquor is among the items. There is also mention of a Gen. Blackshear that manufactured wine and occasionally provided spirits to his slaves (Miller, 1858a).

diminish productivity.

Another commonly charged offense was illegally trading with a slave. If someone were to trade goods or money with a slave, they could only do it if the slave had a note from their master indicating that the slave was authorized to conduct such business (Digest of the Laws of the State of Georgia, 1837b). The concern was that slaves could take the property of their owner without permission, sell it to someone else and then keep the money. This law was designed to protect slaveholders against such a thing happening.

In that same vein, gambling with slaves was also prohibited (Acts of the General Assembly of the State of Georgia, 1838). Where slaves could not own property, if a slave did have anything of worth with which to gamble, it would have had to have been stolen from their owner or someone else. Thus, this law sought to prevent the loss of slave owner property. It also appears that the motivation of the statute may have been to deepen the racial divide among the lower class, for not only was gambling with slaves prohibited, but also gambling with free persons of color (Acts of the General Assembly of the State of Georgia, 1838).<sup>13</sup>

There were also a few laws that appear to have been moral regulatory offenses. For example, one person was charged with dancing with a slave on the Sabbath (Grand jury minutes, Clarke County, Georgia, 1814-1868). One grand jury was presented a case where a slave owner was accused of employing a slave on the Sabbath, but the jury did not indict.

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<sup>13</sup> As had been mentioned in Chapter 5, maintaining a racial divide among the lower class prevented any unified effort by poor whites and poor blacks to revolt against their economic oppression (DuBois, 1935).

## Offenses where Slave is a Victim

There were only a handful of crimes in antebellum Georgia wherein a slave could be considered a victim. Where slaves could not own property, it was legally impossible for them to be the victim of a property crime. Georgia did recognize slaves as victims in two type of crimes against their person: murder and assault.<sup>14</sup> Where they were considered property themselves, the fact that a slave could be the victim of these crimes under the law seems curious. It is understandable that a slave owner would want people who murdered or assaulted that slave owner's slave to be prosecuted for damaging their property. However, Georgia's laws also prohibited slave owners from murdering or excessively assaulting their own slaves. The statutes read as follows:

... [I]f any person or persons shall willfully murder his own slave, or the slave of any other person, every such person shall, upon conviction thereof by the oath of two witnesses, be adjudged guilty of felony ... (*Digest of the Laws of the State of Georgia*, 1800b).

Any person (except the owner) beating, whipping or wounding a slave ... without sufficient cause or provocation being first given by such slave ... may be indicted ... (*Compilation of the Laws of Georgia*, 1821a).

Any owner or owners of a slave or slaves, who shall cruelly treat such slave or slaves, by unnecessary and excessive whippings, by withholding proper

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<sup>14</sup> The one crime against the person that is conspicuously absent from the state laws of the time is rape. This perhaps comes from the difference in detriment a slave suffered if they were the victim of rape as opposed to murder or assault. If a slave was murdered or assaulted, the owner of that slave lost the productivity of that slave. If a female slave was raped, productivity was not necessarily lost. On the contrary, if the rape resulted in pregnancy, the slave owner would have just gained another slave that could be raised and sold.

food and sustenance, by requiring greater labor from such slave or slaves than he, she or they are able to perform, by not affording proper clothing, whereby the health of such slave or slaves may be injured and impaired; every such owner or owners shall, upon sufficient information being laid before the grand jury, be by said grand jury presented, whereupon it shall be the duty of the attorney or solicitor general, to prosecute said owner or owners ... (*Compilation of the Laws of Georgia*, 1821b).

The language including slave owners within the purview of these laws is explicit.

The murder statute specifically prohibits the murder of one's own slaves. The assault statutes draw more of a distinction. There are separate statutes for assaulting one's own slaves and the slaves of another. A person could be convicted of assaulting the slave of another by assaulting them in any fashion without adequate provocation being given by that slave. On the contrary, one could only be convicted of assaulting one's own slave if the assault was "unnecessary or excessive" (*Compilation of the Laws of Georgia*, 1821b).

There are two points worth making on the statute proscribing the assault of one's own slaves. First, the statute proscribed more than just the assault of one's slaves. It also proscribed the cruel treatment of one's slaves, such as withholding food and clothing from a slave or overworking a slave. This would seem to expose slave owners to criminal liability for a wider array of behaviors than a non-slave owner. However, the statute contains language at the end that the other assault statute does not. This leads to the second point. The statute explicitly states that the public prosecutor is to prosecute any infractions of the statute. Where Georgia's law already provided that public prosecutors were to prosecute all criminal matters (*Digest of the Laws of the State of Georgia*, 1800d), the inclusion of this language seems redundant. The argument could be made that the language was included at the end of the criminal statute as a formality to reinforce the fact that criminal cases were to be prosecuted by public prosecutors. However, the statute



proscribing the assault of the slaves of others includes no such language.

The distinction may hinge on the use of the word “prosecution.” When looking at the criminal complaints from this timeframe in Georgia, there are two people listed at the bottom: the attorney or solicitor general (what we refer to now as the public prosecutor) and the prosecutor. They were not one in the same. The prosecutors of these criminal complaints appear to be the informant on the case—be that the victim or someone else. This does not mean they actually prosecuted the case as we use the term today. It simply indicates that the word “prosecute” was used in a different way then than we use it today. That being said, the distinction between the two assault statutes becomes clearer. If someone were to assault the slave of another, the owner of that slave would have an incentive to initiate a criminal action against the offender. They would thus be listed as the prosecutor on the criminal complaint and perhaps even assist in the prosecution of the case. If someone assaulted one of their own slaves, however, pinpointing who would have an interest in initiating a criminal action is more difficult. Clearly the owner of the slaves would have no interest in informing on him or herself. Other slave owners would not have an interest per se, as they would not want to punish a slave owner for the same conduct they themselves may be involved in. The only people who would appear to be against the cruel treatment of slaves and would be willing to bring criminal charges for such conduct would be an abolitionist. By requiring the public prosecutor to prosecute matters where someone is accused of assaulting their own slave, abolitionists would be essentially excluded from involvement in the prosecution process beyond perhaps bringing an initial complaint.

This is what the law held, but what the law said and how the law was enforced are

two entirely different things. Thus, while Georgia's statutes explicitly proscribed slave owners from murdering and assaulting their own slaves, it is important to determine whether these statutes were ever enforced in practice.

From the trial court records obtained,<sup>15</sup> there were 3 cases found involving the murder of a slave, and 18 found involving the assault of a slave.<sup>16</sup> In all 18 cases of assault,

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<sup>15</sup> The court records analyzed here were obtained from the following sources: Criminal court minutes, Screven County, Georgia, 1830-1866; Criminal docket book, Morgan County, Georgia, 1836-1849; Criminal minutes, Floyd County, Georgia, 1858-1913; Criminal proceedings, Bryan County, Georgia, 1833-1853; Evidence of criminal court, Warren County, Georgia, 1839-1876; Grand jury minutes, Clarke County, Georgia, 1814-1868; Grand Jury minutes, Hall County Georgia, 1856-1873; Grand jury minutes, Pickens County, Georgia, 1854-1885; Grand jury presentments, Camden County, Georgia, 1797-1858; Grand jury presentments, Decatur County, Georgia, 1844-1877; Minutes of criminal proceedings, Lincoln County, Georgia, 1816-1880; Proceedings of the Superior Court in criminal cases, Montgomery County, Georgia, 1830-1850; Superior Court records of criminal cases, Fayette County, Georgia, 1833-1882. Court records in Georgia from the timeframe in question appear incomplete at times (there are large time periods for which records cannot be located). This is likely due to the numerous courthouse disasters (e.g. fires, etc.) that have happened in Georgia over the last two centuries, wherein records may have been damaged (Graham, 2013).

<sup>16</sup> It can be determined which cases involved slaves as victims because indictments in antebellum Georgia, similar to early indictments in England, required the social status of

the defendant was not the owner of the slave assaulted. There is not a single example that was found where a slave owner was charged for assaulting their own slaves.

In addition to the 3 cases of slave murder found for which trial court records exist, 6 additional cases were found among opinions delivered by the appellate courts (Bailey v. State, 1856; Camp v. State, 1858; Cox v. State, 1861; Jordan v. State, 1857; Martin v. State, 1858; Neal v. Farmer, 1851) and one other was found in legislative records (Journal of the Senate of the State of Georgia, 1824). While the outcomes of these 10 cases are more mixed than the assault cases, a similar theme of slaveholder protection can be seen.

Of the 10 cases, 7 of them involved people killing the slaves of someone else. Of those 7, not all resulted in conviction. In one case, the grand jury was presented a case wherein three men were accused of killing the slave of another. The grand jury only indicted one of the three men, and that man was later found not guilty at trial (Criminal court minutes, Screven County, Georgia, 1830-1866).<sup>17</sup> In another case, it does not appear the offender was ever charged with a crime. The only way we are aware of the case is that the owner of the slave sued the offender civilly to recover the expenses of the lost slave (Neal v. Farmer, 1851). Among those convicted, one had his conviction reversed on appeal

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the parties involved be listed (Chapin, 1983; Plucknett, 1929). In England, this applied only to the accused. In antebellum Georgia, any time a slave was a party in a criminal proceeding, their status as a slave appears to be mentioned.

<sup>17</sup> William Bennett was the individual indicted but acquitted. The two others that were not indicted were William Barton and William Smith.

(Cox v. State, 1861)<sup>18</sup> and another was pardoned (Journal of the Senate of the State of Georgia, 1824).<sup>19</sup> As far as can be told, the convictions of the other three who killed the slaves of someone else were undisturbed.

The cases of those who murdered their own slaves have similar dispositions. Of these three cases, one was found not guilty at trial (Grand jury minutes, Clarke County, Georgia, 1814-1868).<sup>20</sup> The other two—Pierce Bailey and Green Martin—had their cases reversed by the appellate court (Bailey v. State, 1856; Martin v. State, 1858). Green Martin was retried upon the reversal and was subsequently acquitted (Green Martin, 1858).

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<sup>18</sup> It is possible that Thomas W. Cox was retried after his case was reversed, but this seems unlikely. His case was reversed by the Georgia Supreme Court in 1861 (Cox v. State) and a local newspaper lists him as being employed as a butcher in 1865 (Anonymous, 1865). The fact that he was employed indicates he was not incarcerated, and thus likely not convicted of the crime after its reversal.

<sup>19</sup> Thomas Franklin Hall was pardoned in 1824 (Journal of the Senate of the State of Georgia, 1824). While state senate records do indicate that Hall was pardoned for murdering a slave, it does not indicate whether that slave was his or the slave of another. A local newspaper from the same time indicates it was a slave of another (Anonymous, 1824). It is unclear whether Hall was pardoned only as to the death penalty or to all penalties against him for the murder. It was reported that Hall tried to escape from custody the next year while being transported to the penitentiary (Anonymous, 1825b), though he had also been prosecuted for burglary earlier that month (Anonymous, 1825a).

<sup>20</sup> The person acquitted was Jesse Flippen.

Records were unable to be found indicating the ultimate outcome of Pierce Bailey's case.<sup>21</sup> Thus, the last indication we have is that no conviction stood on his case. In short, two of the people who killed their own slaves escaped conviction and the third possibly escaped conviction.

We, of course, know that all of those that were accused of murdering their own slaves were slave owners. What about those who were accused of killing the slave of another? Records of slave ownership exist for some of those accused of killing the slave of another.<sup>22</sup> Two of the individuals whose convictions stood—Newton Camp and Randal S. Jordan—did not own any slaves (Georgia, Property Tax Digests, 1793-1892). William Neal—the person whose case was only charged civilly and never criminally—owned 14 (United States Census (Slave Schedule), 1850). While this is certainly a small sample size, we can see differential treatment of those who murdered the slaves of others based on their slave ownership status.

It appears that in antebellum South Carolina, similar patterns were present in

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<sup>21</sup> Bailey's case was taken up by the Georgia Supreme Court a second time (Bailey v. State, 1858). The Court ruled against Bailey in that case, though the issue the Court was considering was a pretrial issue on the retrial, not an issue concerning an ultimate finding of guilt.

<sup>22</sup> Slave ownership records were not able to be found for Thomas W. Cox (Cox v. State), John G. Gallehone (Superior Court records of criminal cases, Fayette County, Georgia, 1833-1882), William Bennett, William Barton and William Smith (Criminal court minutes, Screven County, Georgia, 1830-1866).

regards to punishment for those who murdered slaves. The conviction rate for the murder of slaves in South Carolina appears to have been low—only about 22% (Hindus, 1980). The indication is that those cases of slave murder that resulted in conviction were often committed by men of low social standing (Hindus, 1980, p. 134). There were some cases in South Carolina where the convictions against those who murdered their own slaves stood. However, the ones that stood appeared to be particularly atrocious (Hindus, 1980). One slave owner was convicted for beating his young boy slave—between six and eight years old—to death (State v. Bradley, 1855). Another ordered one of his slaves to kill the slave owner's wife, and once the slave had done that, the owner killed the slave (State v. Posey, 1849). Another, upon recovering one of his runaway slaves, shot the slave with a shotgun while the slave had his hands bound behind his back and was further bound to another runaway slave, all of them being in a small boat (State v. Taylor, 1823). The slave owner was also dishonest and abusive towards the witnesses to the crime and others who tried to care for the slave subsequent to the shooting (State v. Taylor, 1823).

We can see by this data that while Georgia did proscribe the assault and murder of slaves by the owners of those slaves, it does not appear to have been enforced strictly if at all. Additionally, while everyone was prohibited from murdering slaves, there appears to have been differential treatment of slave murders based on their slave ownership status. It also appears that similar trends may have existed in other Southern states. This partial treatment of slave owners in the criminal justice system is precisely what slave owners would have been aiming for. It appears that initiating a system of public prosecution had its desired effect.

## Parallels to White-Collar Crime

If we look at present day white-collar crime, the same problem exists as with the slave statutes of antebellum Georgia. By looking at the similarities between the two, we can see more specifically how public prosecution is able to benefit the bourgeoisie. We can also see that what happened in antebellum Georgia was not an isolated incident of public prosecution being used to benefit the bourgeoisie.

Defining white-collar crime can be a tricky matter. One of the first definitions of white-collar crime was provided by Edward Sutherland. He defined white-collar crime “approximately as a crime committed by a person of respectability and high social status in the course of his occupation” (1949, p. 9).

This definition has been the subject of much debate (Barnett, 2000). Among the definitions of white-collar crime, there are those that define it in terms of the type of offender and those that define it in terms of the type of crime (Barnett, 2000).<sup>23</sup> These definitions become pertinent when it comes to research in the area. Use of a definition that is offender-centric in research has the benefit of accurately depicting the population being researched. However, operationalizing “respectability” and “high social status” (Sutherland, 1949, p. 9) can prove tricky (see Geis, 1991). Some have operationalized this in terms of whether a subject had a college education or not (Hagan, et. Al, 1980). Others

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<sup>23</sup> Barnett (2000) also notes that some define white-collar crime in terms of organizational culture.

have operationalized this in terms of occupation (Wheeler, et. al, 1982).<sup>24</sup> Neither seems to fully capture what is intended by Sutherland's (1949) definition (Geis, 1991).

This may be why a crime-centric definition of white-collar crime is often used. It is the type of definition the Federal Bureau of Investigations has opted to use (Barnett, 2000) as well as others (Schanzenbach and Yaeger, 2006). Even with a crime-centric definition, however, there is debate on exactly what crimes should be included in the definition (Barnett, 2000).<sup>25</sup> The bigger drawback, however, is the loss of specificity to the population we truly wish to know about—those who are respectable and have high social status (Sutherland, 1949).

Where large data sets on crime generally do not track data on an offender's socioeconomic status, income, occupation or similar variables, working with a crime-centric definition of white-collar crime becomes the easier option.<sup>26</sup> Thus, just as Georgia

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<sup>24</sup> The authors of this study used a scale from previous research (Duncan, 1961) that computed a socioeconomic index for occupations based on U.S. Census data and National Opinion Research Center (NORC) data.

<sup>25</sup> Some focus on solely economic crimes, while others expand the definition to include corporate crimes such as environmental law violations, health and safety law violations, and so forth (Barnett, 2000).

<sup>26</sup> The Uniform Crime Reports (UCR)—perhaps the most comprehensive data set on crime in the United States—does not track this data at all, making it impossible to research white-collar crime from an offender-centric definition using the data (Barnett, 2000). The Office of Policy Analysis keeps data on cases sentenced in federal court, and for a three year



statutes regulating the behavior of citizens in regards to slaves were broad enough to cover activities engaged in by people other than the owners of those slaves, so is the crime-centric definition of white-collar crime broad enough to cover activities engaged in by those who do not fit in the category of “high social status” (Sutherland, 1949, p. 9). Likewise, just as simply looking at the number of people prosecuted under Georgia’s slave statutes without looking at the individual offenders in those cases can give the false impression that Georgia regulated violent behavior of slave owners against their slaves, so can looking at white-collar crime statistics without looking at the individual offenders in those cases give us a false impression that those of high social status are regulated by statutes prohibiting white-collar crime.

### **Statistics on White-Collar Crime**

To see how distant the perceived socioeconomic status of white-collar criminals is from reality, we need look no farther than the available data on the matter. As was mentioned, data on the socioeconomic status of offenders is often difficult to come by. However, for the fiscal years 1991-1992 to 1993-1994, the United States Sentencing

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period (1991-1992 fiscal year to 1993-1994 fiscal year) did record information on offender income in their data sets (Schanzenbach and Yaeger, 2006). The recording of that data ceased because the Office deemed the data—gleaned from pre-sentence reports—too unreliable (Schanzenbach and Yaeger, 2006).

Commission kept track of the yearly income of convicted defendants.<sup>27</sup> Accordingly, we can explore income trends among federal white-collar criminals—as crime-centrally defined by the federal government<sup>28</sup>—in that time frame.

In the three year period, there were just over 22,000 people convicted of white-collar crimes in federal court. Of this 22,000, there were 4,548 (just over 20%) that had no income at all. The median income was \$13,500—right at the federal poverty level for the time.<sup>29</sup> The picture painted by these statistics of who is convicted of white-collar crimes is

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<sup>27</sup> The data was gathered from pre-sentence reports. It is unclear whether the reported income is an offender's income at the time of arrest or at the time the pre-sentence report was prepared prior to sentencing.

<sup>28</sup> Under the UCR's Summary Reporting System, white-collar crime includes fraud, forgery/counterfeiting and embezzlement (Barnett, 2000). It also has a catchall provision to try to capture the wide array of crimes that could be classified as white-collar crimes based on the other circumstances of the case, but using this provision to accurately identify all other white-collar crimes has proven difficult (Barnett, 2000). Other researchers have extended the list of white-collar crimes to include bribery, tax offenses and money laundering (Schanzenback and Yaeger, 2006). For purposes of this research, this list of six crimes will be included.

<sup>29</sup> This is based on the poverty level for a family of four. The poverty level as determined by the U.S. Department of Health & Human Services was: 1991 - 13,400; 1992 - \$13,900; 1993 - \$14,350; 1994 - \$14,800 (Office of the Assistant Secretary for Planning and Evaluation, 2015). The poverty threshold as determined by U.S. Census Bureau for the

vastly different from Sutherland's (1949) criminal of high socioeconomic status.

If we look only at the crimes specifically enumerated by the UCR's Summary Reporting System as white-collar crimes, the issues are only exacerbated. The mean and median income for those committing fraud and embezzlement is close to that for white-collar crimes in general when looking at those crimes individually. For forgery/counterfeiting, however, the mean and median income are quite a bit lower (the mean is roughly \$13,000 lower). Conversely, the mean and median income for bribery and tax offenses—two of the crimes not specifically enumerated by the UCR's Summary Reporting System as white-collar crimes—are quite a bit higher (the mean is roughly \$12,000 higher for bribery, \$25,000 higher for tax offenses).

### **Broad Statutory Language**

The process of defining white-collar crime is further confounded by the language of the actual statutes prohibiting behaviors that are considered white-collar crimes. An excellent example is the federal forgery/counterfeiting statutes. As was stated, the average income of convicted forgers and counterfeiters was a fair amount less than the average income of white-collar criminals in general. The statutory language may reveal why. It reads:

Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both (18 U.S. Code § 471).

The term "obligation" is defined broadly. It includes Federal Reserve notes, gold

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same time frame was: 1991 - \$13,924; 1992 - \$14,335; 1993 - \$14,763; 1994 - \$15,141

(United States Census Bureau, (n.d.)).

certificates, certificates of deposit and treasury notes (18 U.S. Code § 8)—items we would likely only envision someone of high socioeconomic status being in a position to forge or counterfeit. However, the term “obligation” is also defined to include checks (18 U.S. Code § 8). Thus, the person who attempts to pass a forged check—something people of any socioeconomic status would be in a position to do—has violated this statute just as much as a person forging treasury notes.

Another statutory development that further confounds the definition of white-collar crimes is that of consolidated theft statutes. A consolidated theft statute is a statute that reduces many or all the possible types of theft (larceny, theft, embezzlement, shoplifting, etc.) to one single statute for theft in general. An example of this can be seen in the Model Penal Code:<sup>30</sup>

Conduct denominated theft in this Article constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a different manner in the indictment or information ... (Model Penal Code § 223.1(1)).

Several states have implemented some form of a consolidated theft statute (Torcia, 2015). The purpose of consolidation is to simplify the pleading of theft cases (Torcia, 2015). However, by implementing a consolidated theft statute, the distinctions between different types of theft can be lost. This can be important when trying to determine whether a particular theft is a white-collar crime or not. One type of theft associated with white-collar crime is embezzlement. Embezzlement is “the fraudulent appropriation of property

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<sup>30</sup> The Model Penal Code is a code of model legislation developed by the American Law Institute.

by a person to whom it has been entrusted” (Black, 1910, p. 418). Embezzlement will generally arise in the course of someone’s employment, where they are employed to take care of the funds of another. This would include a banker stealing the money from customer accounts, attorneys stealing money from client trust funds, and so forth. When the distinction between embezzlement and other types of theft is erased, the ability to separate out white-collar thefts becomes more difficult.

Even in those jurisdictions where embezzlement is still maintained as its own offense, however, it still faces the problem of being broadly defined. As stated above, embezzlement is the appropriation of property that has been entrusted to someone (Embezzlement, 1910). While this can include bankers and lawyers, it can also include cashiers taking small cash from the till.

### **Enforcement as the Issue**

For both offenses committed against slaves in antebellum Georgia and federal white-collar crimes committed within the past 25 years, the bourgeoisie appear to benefit not from the law itself, for in both instances, the law as written prohibited the rich from engaging in the criminal behavior in question. Rather, it is through enforcement of the law—or the lack thereof—that the bourgeoisie appear to be benefitted. Under a system of public prosecution, enforcement of the law is in the hands of a select few government officials as opposed to private individuals. For the bourgeoisie, this would make gaining control of the enforcement of the law much easier. It is perhaps this aspect of public prosecution that prompted its introduction.

The written law cannot be said to be devoid of benefit to the bourgeoisie, however. As we can see, the fact that there are laws on the books that prohibit the bourgeoisie—be

they an antebellum slave owner or a modern wealthy businessperson—from engaging in the criminal behavior in question can provide a false sense of comfort to the public that this type of behavior is being stopped, when the reality may be something different.

## CHAPTER 9

### CONCLUSION

One of the saddest lessons of history is this: If we've been bamboozled long enough, we tend to reject any evidence of the bamboozle. We're no longer interested in finding out the truth. The bamboozle has captured us. It's simply too painful to acknowledge, even to ourselves, that we've been taken.

Carl Sagan

The picture we get of public prosecution in antebellum Georgia is one in which public prosecution protected the interests of slaveholders. While the protection of slaveholder interests may not have been the sole reason that public prosecution was initiated in Georgia, it certainly appears to be one of the primary reasons.

Public prosecution did not work in a vacuum to protect the interests of slaveholders in Georgia. Under Marxism, we would not necessarily expect it to operate in a vacuum.

Revisiting a statement by Engels illustrates this point:

[T]he law is sacred to the bourgeois, for it is his own composition, enacted with his consent, and for his benefit and protection. He knows that, even if an individual law should injure him, the whole fabric protects his interests; and more than all, the sanctity of the law, the sacredness of order as established by the active will of one part of society, and the passive acceptance of the other, is the strongest support of his social position (1892, p. 227).

As we can see, there were a handful of laws in place in Georgia in the early-nineteenth century (e.g. those that prohibited slave owners from murdering and assaulting slaves) that injured the interests of slaveholders. However, the whole fabric of the law

supported these interests. The key part of that fabric was public prosecution. The law requiring the posting of a hefty bond in order to be appointed a public prosecutor assured that only the wealthy or their chosen representatives would be public prosecutors. The large majority of those public prosecutors were slave owners—something that would have been expected in the South where slave ownership was nearly synonymous with wealth. Most importantly, we can see that the laws that appeared to injure slaveholder interests were rarely if ever enforced by public prosecutors against slaveholders. With public prosecution in place, slaveholders did not have to fear prosecution from abolitionists that pooled their resources.

This overall pattern of not enforcing laws against slaveholders was not entirely reliant upon public prosecution. Certainly appellate judges played a part in overturning the convictions of some slave owners, and the legislature was responsible for pardoning the murder of at least one slave. Jurors—who by law could only be white men—played their part as well, acquitting and convicting along lines of slave ownership. All of these threads were woven together to form the fabric that protected the interests of slaveholders in Georgia. Public prosecution would simply appear to be the primary thread of that fabric.

It seems doubtful that this pattern would have been unique to Georgia among Southern states. There is some indication that South Carolina’s pattern of law enforcement against slaveholders was similar to Georgia’s (see Hindus, 1980). From this research, we can also see how the South in its entirety was able to use the 3/5ths clause of the U.S. Constitution to assure federal public prosecutors that supported slaveholder interests were appointed in their states.



Other research on law enforcement in general supports the conclusion that the interests of slaveholders influenced the look of law enforcement agencies. There are those that have pointed out how slave patrols of the South appear to have been a precursor to the police in the South (see DuBois, 1904a; Reichel, 1988).

While the financial interests being protected in the South were not the same as in the North, states from both regions transitioned to public prosecution. As mentioned, labor unions may have caused the same problems for industrialists in the North that abolitionists caused for slaveholders in the South (see Figure 1). While the complexities of combating urban crime have been cited as a reason for the transition to public prosecution (Grove, 2011; Steinberg, 1984), it seems unlikely that this factor encouraged the transition to public prosecution in the South where industrialization and urbanization lagged. The common factor between the transition to public prosecution in the North and South is the threat of prosecution from a group pooling their resources.

That commonality is not unique to the pre-Civil War United States. There are similar threats to the interests of the wealthy in the United States today. Labor unions continue to have the ability of pool their resources, and corporate shareholders have that same ability. Public prosecution shields the wealthy from private prosecution by these groups. Thus, while the financial interests that slaveholders of the South were trying to protect with public prosecution have been long since abolished, the financial interests of the modern-day bourgeoisie are still being served by public prosecution. Evidence of this is seen in the similarity in law enforcement patterns between antebellum slave laws in Georgia and white-collar crimes today.

Where does this leave us? Should the United States return to a system of private prosecution because public prosecution has undesirable origins? If we recall, private prosecution also served the interests of the rich. Recognizing that both public and private prosecution advantage the rich, it may be tempting to say the correct answer lies somewhere in the middle. This was the approach that Bentham took (see 1790; 1843). However, we must remember that our current system of prosecution—while predominantly on the public prosecution side of the continuum of control—is still a hybrid system. If the answer is somewhere in between public and private prosecution, exactly where in the middle is it?

The findings of this research do not provide us guidance on what system of prosecution should operate in the United States. Such was not the intent. What the findings do provide is evidence of how in the context of prosecution in the United States, the bourgeoisie have used the law to protect their interests. If there is any benefit this research can provide to the ongoing debate on prosecution in the United States, it is the realization that no matter what changes are made to the existing laws concerning prosecution, the bourgeoisie, under the current economic system, will certainly have their hands in their making. Armed with that knowledge, perhaps we can learn from this example from history to be more conscious of class-biased prosecution and moderate its inequities.

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