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## Military Justice in the South, 1865-1868: South Carolina as a Test Case

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# ARTICLES

## MILITARY JUSTICE IN THE SOUTH, 1865-1868: SOUTH CAROLINA AS A TEST CASE

THOMAS D. MORRIS\*

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### I. BACKGROUND

Doubtless it will seem quirky or even perverse to begin in the Scottish Highlands a century before the Civil War and Reconstruction in the United States. It did not seem so to Charles O’Conor, a prominent New York lawyer. He used the suppression of the Scots rebels of 1745 by the Duke of Cumberland’s army in his 1868 argument on behalf of Jefferson Davis, the former president of the Confederacy.<sup>1</sup> It was used on a motion to quash an indictment for high treason.<sup>2</sup>

American law in the mid-19th century was well rooted within an English legal heritage that provided rules and structure to the law of its former colonial possession.<sup>3</sup> That heritage, however, was sometimes considered only to be rejected

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\*Professor Emeritus of History, Portland State University, Portland, Oregon; Joseph C. Hostetler-Baker & Hostetler Distinguished Visiting Professor of Legal History, Cleveland State University, Cleveland-Marshall College of Law, Spring 2006. An earlier version of this Article entitled, *Blackstone and Bayonets: Military Tribunals in the Reconstruction South, 1865-1870*, was presented at Cleveland State University, Cleveland-Marshall College of Law, on April 11, 2006 as the Joseph C. Hostetler-Baker & Hostetler Distinguished Visiting Lecture.

<sup>1</sup>BRADLEY T. JOHNSON, REPORTS OF CASES DECIDED BY CHIEF JUSTICE CHASE IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FOURTH CIRCUIT 120-21 (Da Capo Press 1972) (1876).

<sup>2</sup>*See id.* at 84-85.

<sup>3</sup>It is pervasive in American case law, as well as in treatise writing. One example is a remark made by Associate Justice Stephen J. Field of the U.S. Supreme Court in the Slaughter-House Cases. “The common law of England,” he wrote, “is the basis of jurisprudence in America.” Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 104 (1873).

in favor of norms more consistent with American republicanism than with the interests of the social hierarchy of England. Whether cited as authority or as doctrine not applicable to American conditions, the fact remained that English law and English history remained strong influences in American courts.

O'Connor's reference was based on a volume published in 1761. It was on the Pleas of the Crown by Sir Michael Foster.<sup>4</sup> It included proceedings against the leaders of the Scots clans tried for high treason following their defeat at the battle of Culloden. The treatment was ruthless—wounded Highlanders were left on the field for days unattended, and those who fled were chased down and killed. Subsequently, the troops were used to scour the home areas of the rebels to eliminate them root and branch. Law was also used. Nearly 3,000 rebels were tried in special commission trials and 120 were put to death. Clan leaders were beheaded, their property seized. Lesser clan figures were sentenced to be hanged, beheaded, and disemboweled with the innards burned before their eyes.<sup>5</sup> This was well known to Americans who could know the gory history from Foster's work. If they did not read that source, they had an even more direct source because many of the Highlanders were transported to the North American colonies.<sup>6</sup> Whatever the source, Americans were determined to craft a fundamental law that would make the horrors in the Highlands an impossibility in the newly independent United States. Rights appearing in the Bill of Rights—especially in the 5th and 6th Amendments—were the result.<sup>7</sup> At least that was O'Connor's argument.

Those who believed in American exceptionalism then tried to escape "political justice." Chief Justice John Marshall captured the idea in *Marbury v. Madison*.<sup>8</sup> He loftily referred to the rule of "laws and not of men."<sup>9</sup> But, he still made a place for the cow-bird of politics. Questions in their nature political would not be considered by the justices.<sup>10</sup> Marshall's "political questions" doctrine has included a reluctance to challenge the executive during war.<sup>11</sup> Such reluctance has been subsumed under

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<sup>4</sup>MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 (London, E. and R. Brooke, 3d ed. 1792) (1761).

<sup>5</sup>GEOFFREY PLANK, REBELLION AND SAVAGERY: THE JACOBITE RISING OF 1745 AND THE BRITISH EMPIRE 53-76 (2006); W. A. SPECK, THE BUTCHER: THE DUKE OF CUMBERLAND AND THE SUPPRESSION OF THE 45, at 141-47 (1981). One of the most infamous executions of a clan leader was the beheading in the Tower of London of Lord Lovat, a seventy-eight year old man betrayed by his son. See TRIAL OF SIMON, LORD LOVAT OF THE '45, at 299 (David N. Mackay ed., 1911); see also PLANK, *supra*, at 75-76.

<sup>6</sup>PLANK, *supra* note 5, at 155-180.

<sup>7</sup>JOHNSON, *supra* note 1, at 121.

<sup>8</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>9</sup>*Id.* at 163.

<sup>10</sup>*Id.* at 166.

<sup>11</sup>Political questions have broken down as a tool of constitutional interpretation. One significant step came in *Baker v. Carr*, 369 U.S. 186 (1962), where the court adopted the notion that the right to vote was a constitutionally protected right through the equal

the notion of “state necessity,” that is, that the continued existence of the state depends on deviation from ordinary law. Deviations are often defended by the notions of emergency or necessity. Sometimes this means military trials of civilians, and in some states the ordinary civil courts will do.

It is an especially dangerous moment when political justice coexists with or gives meaning to the notion of the rule of law. Rule of law is appealing, but it is deceptive. The idea has not been confined within the boundaries of a definition. The problem of the definition of the rule of law has been intertwined with the question of the definition of sovereignty, and with the question of the sovereign, the possessor of sovereignty. At bottom, the problem concerns the source of legitimacy of a legal order. Carl Schmitt, a brilliant German scholar, claimed that he who “decides the exception” is the sovereign.<sup>12</sup> Tragically, it was a definition the Nazis found congenial. The fluidity of the notion of rule of law has created considerable skepticism, even while it remains a breakwater against arbitrary, capricious rule.

John Philip Reid, no opponent of the notion of liberty under law, for instance, opened his study of the idea of the rule of law with a warning that the subject was filled with “jurisprudential ambiguity and the treacherous underfooting [sic] of imprecise definition.”<sup>13</sup> Brian Tamanaha has also noted that it is an idea with many meanings and that today there is a “marked deterioration of the rule of law in the West” alongside the “ever-present danger of becoming rule by judges and lawyers.”<sup>14</sup>

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protection clause of the 14th Amendment. It infused republicanism with a heavy dose of democracy, eventually spurring the popular principle of “one man one vote.” See *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (“[A]ll who participate in the election are to have an equal vote”). A good illustration of the earlier deference when the question appeared to be political is reflected in a remark made by Associate Justice David Davis in *Ex parte Milligan*, 71 U. S. (4 Wall.) 2, 109 (1866). “During the late wicked rebellion,” he wrote, “the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question.” *Id.* at 109. Although he claimed that “rights” were involved, he allowed the violence of war to set them aside temporarily. Legal reasoning might well lack sufficient authority during the distemper of war. “The question before the court was profoundly significant—it involved “the very framework of the government and the fundamental principles of American liberty.” *Id.* One of those “principles” he framed in a powerful voice: “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” *Id.* at 120-21.

<sup>12</sup>NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* 15 (2003).

<sup>13</sup>JOHN PHILLIP REID, *THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 3 (2004).

<sup>14</sup>BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 4-5 (2004). There is a huge body of literature on the notion of the rule of law. The theoretical issues can be approached through *THE RULE OF LAW* (Robert Paul Wolff ed., 1971), *BLANDINE KRIEGEL, THE STATE AND THE RULE OF LAW* (Thomas Pavel & Mark Lilla eds., Marc A LePain & Jeffrey C. Cohen trans., 1995), and *RONALD A. CASS, THE RULE OF LAW IN AMERICA* (2001). Studies into the historical experience people have had with the notion can begin profitably in 17th century England. Once again, the literature is large, but the reader can start with JAMES

Moreover, the prospect of rule by judges is not always welcome. An example is Latin America, “where the judiciary is [often] seen as “sympathetic to the propertied elite.”<sup>15</sup> Among the most ominous historical examples would be the political trials in Weimar Germany. The pro-Hitlerian trials were a prelude to the crude trials in the *Volksgerrichtshof* (the National Socialist People’s Courts).<sup>16</sup>

One of the most blatant uses of law for political purposes in Britain before the American Civil War were the trials of Irish nationalists. The trial of Robert Emmet (a case cited in American cases during Reconstruction) will serve as an example. His trial in Dublin in 1803 followed a bumbled attempt to establish an independent Ireland. The English Attorney General made an opening statement so full of antirevolutionary invective it could have been written by Edmund Burke, the brilliant English conservative.<sup>17</sup> The Attorney General claimed that the crime of high treason was aggravated in Emmet’s case “[w]hen we consider the state of Europe, and the lamentable consequences which the French revolution has already brought upon it.”<sup>18</sup> The times were filled with “social disease.” Perhaps in “former periods,” he continued, “some allowance might be made for the heated imaginations of enthusiasts; perhaps an extravagant love of liberty might for a moment supersede a rational understanding . . . . But sad experience has taught us, that modern revolution is not the road to liberty.”<sup>19</sup> Mr. Plunkett, co-prosecutor, picked up the gauntlet for the Crown and added, “Liberty and equality are dangerous names to make use of.”<sup>20</sup> “[I]f properly understood,” he continued,

they mean enjoyment of personal freedom under the equal protection of the laws . . . . But in the cant of modern philosophy . . . the ennobling distinctions of man’s nature are all thrown aside . . . . He is taught not to startle at putting to death a fellow creature, if it be represented as a mode of contributing to the good of all.<sup>21</sup>

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S. HART, JR., *THE RULE OF LAW 1603-1660: CROWNS, COURTS AND JUDGES* (2003), and CHRISTOPHER HILL, *LIBERTY AGAINST THE LAW: SOME SEVENTEENTH-CENTURY CONTROVERSIES* (1996).

<sup>15</sup>TAMANAH, *supra* note 14, at 125.

<sup>16</sup>H. W. KOCH, *IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER’S GERMANY 51-66* (1989); *see also* INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (1991); NIKOLAUS WACHSMANN, *HITLER’S PRISONS: LEGAL TERROR IN NAZI GERMANY* (2004).

<sup>17</sup>*See* EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790).

<sup>18</sup>*Proceedings on the Trial of Robert Emmet Esq. for High Treason, in 28 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783*, at 1097, 1111 (Thomas Jones Howell ed., London, T.C. Hansard for Longman et al. 1820).

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 1167.

<sup>21</sup>*Id.*

The jurors found Emmet guilty without leaving the jury box and he was executed the next day.<sup>22</sup>

One final sample of a British imperial case is one cited often in Military Commission trials in the South after the Civil War. This was the case of the Reverend John Smith executed in Demerara in the early 1820s after a trial by a military tribunal for allegedly advising slaves to revolt.<sup>23</sup> In this trial, leading questions were allowed.<sup>24</sup> This case was soundly condemned in a Parliamentary debate in 1824, which, in turn, was cited in Reconstruction era cases.

From the savage suppression of the Highlanders to the death of the Reverend Smith, such deviations from English common law were defended in the name of “state necessity.” W. F. Finlason, a leading commentator on martial law began with the observation that “[f]rom times coeval with the very origin of our liberties” the Crown had exercised the right to wage war and “exercise its severities, against rebels.”<sup>25</sup> His work, *Commentaries upon Martial Law*, was written in response to executions in Jamaica that occurred in 1865 after an alleged insurrection in Morant Bay. He was, in general, a supporter of necessary deviation from ordinary rules of law in the face of insurrection.<sup>26</sup>

Others were more critical, such as Frederic Harrison, who wrote a number of letters to the *London Daily News* about what he found on the island. Martial law, he

<sup>22</sup>*Id.* at 1177.

<sup>23</sup>THE LONDON MISSIONARY SOCIETY’S REPORT OF THE PROCEEDINGS AGAINST THE LATE REV. J. SMITH, OF DEMERARA 2 (Negro Univ. Press 1969) (1824) (detailing the prosecution of Rev. Smith, Minister of the Gospel, who was tried under Martial Law); 2 SPEECHES OF HENRY LORD BROUGHAM, UPON QUESTIONS RELATING TO PUBLIC RIGHTS, DUTIES, AND INTERESTS; WITH HISTORICAL INTRODUCTIONS, AND A CRITICAL DISSERTATION UPON THE ELOQUENCE OF THE ANCIENTS (Edinburgh, Adam & Charles Black 1838); *see also* EMILIA VIOTTI DA COSTA, CROWNS OF GLORY, TEARS OF BLOOD: THE DEMERARA SLAVE REBELLION OF 1823, at 252 (1994) (claiming that “there is plenty of evidence that the trial was staged to convict the missionary”).

<sup>24</sup>Many examples of leading questions are seen throughout the report of the law. *See* THE LONDON MISSIONARY SOCIETY’S REPORT, *supra* note 23, at 9, 11, 18, 21, 51, 57, 61, 93, 96-97, 99, 102, 113, 116, 118, 121, 126-27, 131.

<sup>25</sup>W. F. FINLASON, COMMENTARIES UPON MARTIAL LAW, WITH SPECIAL REFERENCE TO ITS REGULATION AND RESTRAINT; WITH AN INTRODUCTION, CONTAINING COMMENTS UPON THE CHARGE OF THE LORD CHIEF JUSTICE IN THE JAMAICA CASE 1 (London, Stevens and Sons, 1867).

<sup>26</sup>*Id.* at 18-19. He asserted that a declaration of martial law could only be justified by necessity . . . yet that when declared by supreme authority, it had legal existence; and that the lawfulness of individual acts in the execution of it, depended on the principle of authority; and that, therefore, all acts done within the declared district, under military orders, were legal, at all events, if done honestly; and that, in particular as regarded trials by court-martial, it was enough if they were governed, not by the formal rules of common law trials, but by the substantial principles of natural justice.

*Id.*

wrote, was but “mob law” or “lynch law.”<sup>27</sup> Some islanders, he even suggested, argued that martial law had “always been known in the island . . . as a time of legal license, a period for the lawful putting to death of black men by white.”<sup>28</sup>

The use of martial law was part of a constitutional and legal crisis within the Anglo-American world of the mid-19th century, a crisis that framed the struggle to end racial slavery and all the “badges of servitude.”<sup>29</sup> The constitutional crisis in the United States involved a bitter struggle over the expansion of slavery to the territory acquired in the war with Mexico.<sup>30</sup> It also involved hostile state laws that affected slaveowners traveling through the free states of the North and the increasingly contentious relationship between the federal fugitive slave laws and personal liberty laws of the Northern states.<sup>31</sup> Comity was broken down as the country moved toward war.

When Confederates fired on Fort Sumter, and the country bloodied itself in one of the worst cases of carnage of the century, martial law often moved along with the armies. What exactly was martial law? Sir Matthew Hale proclaimed that “Martial Law” was “not a law,”<sup>32</sup> and Sir William Blackstone endorsed the same view in his mid-18th century treatise, *Commentaries on the Laws of England*. That four volume

<sup>27</sup>FREDERIC HARRISON, MARTIAL LAW: SIX LETTERS TO THE “DAILY NEWS” (London, Jamaica Committee, 1867) (number 5 in the *Jamaica Papers* series) (copy on file in the British Library).

<sup>28</sup>*Id.* The best overall account of the episode can be found in THOMAS C. HOLT, THE PROBLEM OF FREEDOM: RACE, LABOR AND POLITICS IN JAMAICA AND BRITAIN 1832-1938 (1992).

<sup>29</sup>The phrase “badge of servitude” referred to the continued existence of the oppressive and discriminatory laws attached to the freedmen. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 92 (1873). This phrase permeates post-Civil War law. For example, Justice Field reports it being used by Senator Lyman Trumbull when talking about the Civil Rights bill of 1866. *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess., 474 (1866)).

<sup>30</sup>DON FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); Arthur Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860*, 54 J. ILL. ST. HIST. SOC’Y 117-80 (1961).

<sup>31</sup>PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1860 (1974).

<sup>32</sup>MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 26 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1713). Hale’s work is the starting point for many jurists and commentators. It should be used with caution. Hale throws together concepts that today are kept separate. His opening remark is often all that is cited: “That in Truth and Reality it [martial law] is not a law, but something indulged rather than allowed as a law . . .” *Id.* at 26. The rest of the sentence is this: “[T]he Necessity of Government, Order and Discipline in an Army, is that only which can give those Laws a Countenance . . .” *Id.* Then Hale said of martial law in general: “This indulged Law was only to extend to Members of the Army, or to those of the opposite Army . . .” *Id.* A distinction made later—between military law and martial law—does not appear in Hale’s book.

treatise was the primary source of legal education in the United States before the Civil War.<sup>33</sup> But, the most widely quoted definition of martial law was that of the Duke of Wellington at the time of the Peninsular War against Napoleon. It was nothing more or less than the “will of the commander.”<sup>34</sup>

One highly regarded commentator was Brevet Colonel W. W. Winthrop. In the 1880 edition of his work, *A Digest of Opinions of the Judge Advocate General of the Army with Notes*, he described the military commissions that acted under martial law as “simply criminal war courts.”<sup>35</sup> Seventy years later, in a U.S. Supreme Court case, *Madsden v. Kinsella*, Associate Justice Harold H. Burton called military commissions “our common law war courts.”<sup>36</sup>

American cases involving martial law are filled with references to English experiences. The War of 1812 produced some of the first uses of martial law in American experience.<sup>37</sup> A landmark case emerged out of the Dorr War in Rhode Island in the early 1840s.<sup>38</sup> The Dorrites claimed to have replaced the existing Whig government, which rested on an extremely narrow suffrage of property holders. The Dorrites drafted a new constitution and elected new state officers without authority from the existing government. Their ideological justification was revolutionary constitutionalism, that is, the right of the sovereign people to alter or abolish the government at will.<sup>39</sup> The Whig government responded with the suspension of the

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<sup>33</sup>WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford, Clarendon Press 1765-69).

<sup>34</sup>The definition given by the Duke of Wellington appears in nearly all studies of martial law. Among the studies of martial law that have been the most influential are the following: ROBERT S. RANKIN, WHEN CIVIL LAW FAILS: MARTIAL LAW AND ITS LEGAL BASIS IN THE UNITED STATES 4 (1939); CHARLES M. CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW (London, John Murray 1872); WILLIAM BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW (Wash., James J. Chapman 1892); CHARLES FAIRMAN, THE LAW OF MARTIAL RULE (2d ed. 1943). One other I would mention is the treatise published in the Confederacy: CHARLES HENRY LEE, THE JUDGE ADVOCATE’S VADE MECUM: EMBRACING A GENERAL VIEW OF MILITARY LAW, AND THE PRACTICE BEFORE COURTS MARTIAL, WITH AN EPITOME OF THE LAW OF EVIDENCE, AS APPLICABLE TO MILITARY TRIALS (Richmond, West & Johnston 1863).

<sup>35</sup>WILLIAM W. WINTHROP, JUDGE-ADVOCATE GENERAL’S DEPT., A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, WITH NOTES 325 (Washington, Gov’t Printing Office, 1880).

<sup>36</sup>*Madsden v. Kinsella*, 343 U.S. 341, 346-47 (1952) (footnote omitted). He added that they had been called by several different names: “Military Commission, Council of War, Military Tribunal, Military Government Court, Provisional Court, Provost Court, Court of Conciliation, Arbitrator, Superior Court, and Appellate Court.” *Id.* at 347 & n.11.

<sup>37</sup>See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 52-3 (1866) (describing the imposition of martial law in New Orleans during the 1815 seige).

<sup>38</sup>*Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

<sup>39</sup>GEORGE DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861 (1976); see also WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U. S. CONSTITUTION 87-110

writ of habeas corpus and the declaration of martial law over the whole state. The uprising collapsed early but the complete end did not come until 1849 in the U.S. Supreme Court case of *Luther v. Borden*.<sup>40</sup> An especially strong condemnation of martial law came in the concurring opinion of Associate Justice Levi Woodbury. He nearly sickened at the thought that a citizen could be tried and “hung up” to the nearest lamppost after a “trial” in a “drum-head court-martial.”<sup>41</sup>

Another historical milepost came during the Mexican war. In 1847, General Phillip Kearney imposed martial law in the area of Mexico occupied by the U.S. army under his command. The purpose was to maintain order and serve in place of civil authorities whose rule had collapsed. He did not set out to remodel the law of Mexico.<sup>42</sup> This experience with martial law was used as a precedent throughout the Civil War and Reconstruction to establish the legitimacy of military rule under some emergency circumstances.

Legitimacy is a bedrock problem in political theory. It raises a presumption that the people subject to a given rule, including military rule, owe obedience to that rule. On the other side, the events of the clans in Scotland raise the question of the limits of obedience. The English, following Culloden, used the military not to end disorder, but to put an end to a style of life that contained within it the seedbed for discontent and insurrection.

A series of laws were adopted by the British and applied to Scotland that destroyed the world of the clans, a world closer to feudalism than to modernity. The laws prohibited the wearing of plaids and the possession of arms, and undermined the old land tenures and the unique private forms of justice.<sup>43</sup>

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(2004); MARVIN E. GETTLEMAN, *THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM, 1833-1849* (1973).

<sup>40</sup>*Luther*, 48 U.S. 1.

<sup>41</sup>*Id.* at 62.

<sup>42</sup>MARK J. STEGMAIER, *TEXAS, NEW MEXICO, AND THE COMPROMISE OF 1850: BOUNDARY DISPUTE & SECTIONAL CRISIS* (1996).

<sup>43</sup>The question of legitimacy is one of the crucial questions in political philosophy. One of the sharpest debates occurred among German thinkers in the years between the World Wars. It can be followed in the work of the authoritarian thinker Carl Schmitt. See, e.g., CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer, ed., trans., Duke Univ. Press 2004) (1932); DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER IN WEIMAR* (1997); *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* (William E. Scheuerman, ed., 1996). There was an interesting precedent for such a debate. It was provoked by the rising in the Scots Highlands. Plank noted, for instance, that “Britain’s soldiers in 1745 were fighting in the presence of philosophers.” PLANK, *supra* note 5, at 106 (footnote omitted). Writers gave consideration to such questions as loyalty owed. The English laws dealt with a wide variety of Scottish norms. “Wardholding,” for instance, was abolished in 1747. It was a feudal remnant. It was a “customary practice which had traditionally placed tenants under an obligation to perform military service for their superiors.” *Id.* at 107 (footnote omitted). What were called “hereditary jurisdictions” whereby the Highland aristocracy had held their own law courts were abolished as well. *Id.* (footnote omitted). Moreover, a decade long effort began after

Military force and the law of the conqueror ended a way of life in the Highlands, and something similar happened to the slave-based societies of the so-called Old South. In place of both, a modern alternative was introduced—the legal and equitable rules of market capitalism. In both cases, on the other side, there was a significant claim. David Hume, the towering Scottish philosopher, summarized it in a brief essay, *Of Passive Obedience*, as follows: “[G]overnment binds us to obedience only on account of its tendency to public utility, [but] that duty must always, in extraordinary cases, when public ruin would evidently attend obedience, yield to the primary and original obligation. *Salus populi suprema Lex*, the safety of the people is the supreme law.”<sup>44</sup> The use of violence to establish or reestablish a social order would have its claims. Hume feared that the pretensions of the Stuarts to royal authority “are not yet antiquated; and who can foretell, that their future attempts will produce no greater disorder?”<sup>45</sup> His concern for the future was based on the past in which, he noted, “We have had two rebellions . . . besides plots and conspiracies without number.”<sup>46</sup> The uprising of 1745-46 was the last of the upheavals.<sup>47</sup> The future in the American South was likewise filled with possibilities for violence, especially because of the virulent racism in the region.

The first massive change in the defeated Confederacy was the total eradication of racial slavery. Exactly when it ended and by what authority are not easy questions to answer. Did slavery end legally on January 1, 1863, with the Emancipation Proclamation, or did it end only when the army gave it substance with the defeat of the Confederate armies and the occupation of the South? Did it end with the Southern white’s constitutional recognition of its end? In most of the South, that would mean it ended under presidential Reconstruction in late 1865. Or did it end only in December 1865 with the ratification of the 13th Amendment?<sup>48</sup>

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Culloden “to reform the character of Gaelic-speakers and integrate their region more fully into Britain’s political structure and the world of commercial exchange.” *Id.* at 103 (footnote omitted).

<sup>44</sup>David Hume, *Of Passive Obedience*, in HUME: POLITICAL ESSAYS 202, 202 (Knud Haakonssen ed., 1994) (1777). *Of Passive Obedience* was written in 1748.

<sup>45</sup>David Hume, *Of the Protestant Succession*, in HUME: POLITICAL ESSAYS, *supra* note 44, at 213, 218. *Of the Protestant Succession* was written in 1752.

<sup>46</sup>*Id.* at 217.

<sup>47</sup>*Id.* at 325 n.2.

<sup>48</sup>In *Mitchell v. De Schamps*, 34 S.C. Eq. (13 Rich. Eq.) 9 (1866), South Carolina’s Judges Benjamin F. Dunkin (majority), David L. Wardlaw and John A. Inglis (concurring) angrily rejected the notion that the Emancipation Proclamation ended slavery as of January 1, 1863.

[I]t is preposterous to attribute such effect to the mere proclamation of President Lincoln. The consequences of such a doctrine would be fraught with ruin and disaster to the southern people. Proceedings in the Courts would at once spring up, and in fearful profusion, at the suit of the freedman against the white, to recover wages for labor since 1st January, 1863, and damages for false imprisonments, assaults and batteries, trespasses and other injuries to the person and property of the freedman. The result would be, that all transactions affecting slaves, since 1st January, 1863, all contracts for their hire, purchase or sale, and all partitions and divisions of estates,

Lawful violence had always been a central element of the social order of the slave-based societies of the South. It was fitting perhaps that that world ended in violence. South Carolinians, for example, declared in the constitution they adopted under presidential authority that slavery had ended by federal force. The state's highest court ruled thereafter that slavery ended by the will of the federal generals in the spring of 1865. Violence, nonetheless, remained a part of the world of South Carolinians. In 1872, Major Lewis Merrill, in command of federal troops in the KKK infested upcountry of the state, reported that, "in my experience [South Carolina] has no parallel, either in wanton and brutal cruelties inflicted . . . or in the utter deadening of the moral sense in large parts of white communities reputed and believed to be far removed from the barbarism of savages."<sup>49</sup> The objective of the white violence, in his view, was "to make a salvage of the wreck of rebellion."<sup>50</sup> In time, of course, violence carried the day for white supremacists.

## II. MILITARY RULE IN SOUTH CAROLINA 1865-1866

The end of chattel slavery in South Carolina came in the spring of 1865, under the authority of the generals, according to the state supreme court. Civil authority, moreover, ceased with the collapse of the Confederacy even though it was not always clear to the former Confederate office-holders. K. G. Billips is an example. As late as January 9, 1866, he wrote to Governor James L. Orr to report a case of "interposition" by the military with a "regular civil process" in Lancaster Court House.<sup>51</sup> He identified himself as a Commissioner in Equity "holding a commission from the Governor of the state."<sup>52</sup> When he tried to exercise his authority under the law of South Carolina he was informed by the officer in command that "there is no civil law in force here."<sup>53</sup>

One of the first demands on the federal military was to provide order. They also oversaw the process central to President Andrew Johnson's Reconstruction policy—

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wherein slaves were given or received in lieu of money or other property, would be at once annulled, and, . . . "be swept pell-mell into chaos."

*Id.* at 12 (quoting Sheffey, J., of Virginia). ALLEN C. GUELZO, *LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA* (2004), and MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* (2001), deal with other roads to freedom. A superior volume that shows the piecemeal collapse of slavery during the war is *1 FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867* (Ira Berlin et al. eds., 1985).

<sup>49</sup>Letter from Lewis Merrill, Major, to Adjutant General (Jan. 14, 1872) (on file with the United States National Archives, Record Group 94, Records of the Adjutant General's Office, 1780s-1917, Letters Received, Adjutant General, M666, reel 26).

<sup>50</sup>*Id.*

<sup>51</sup>Letter from K. G. Billips, Commissioner in Equity, State of South Carolina, to James L. Orr, Governor, State of South Carolina (Jan. 9, 1866) (on file with the South Carolina Department of Archives and History, Governor Orr Papers).

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

the administration of the oaths of allegiance that policy required.<sup>54</sup> They also had to play a role in the introduction of new legal norms to replace the claims of whites to the absolute ownership of the labor and faculties of another. That meant, in practice, that the military had to oversee the introduction of a contract relationship, and contract theory held that the worker could sell or withhold his labor power in a free market. That was the theory, but it was a theory many white South Carolinians thought the freedmen were unable or unwilling to understand. Some even claimed sympathy for blacks. Julius Fleming, for instance, wrote to the *Charleston Courier* in July 1865 that “[t]he Negroes are to be pitied. . . . They do not understand the liberty which has been conferred upon them. A freedom which still involves the necessity of earning their bread by the sweat of their brow does not seem to them much of a boon after all.”<sup>55</sup>

It is clear enough that the Freedmen hoped and expected to become a small farming peasantry, at least during 1865 when the prospect of owning land seemed realistic.<sup>56</sup> It was a hollow expectation as it turned out, especially since the pardon and amnesty program of the President, resting on the oaths of allegiance, carried with it the full restoration of all property rights, except for slaves.<sup>57</sup> In the end, the Freedmen were pushed into signing contracts by military and Freedmen’s Bureau personnel.<sup>58</sup> For the most part, the contracts of 1865 were for shares of the crop, and

<sup>54</sup>ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960), remains one of the best overall studies of Johnsonian Reconstruction. On the significance of oaths the work of Harold Hyman is unsurpassed. There are two studies: HAROLD M. HYMAN, *ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION* (1954), and the more general, HAROLD M. HYMAN, *TO TRY MEN’S SOULS: LOYALTY TESTS IN AMERICAN HISTORY* (1959). The oath promulgated by President Johnson was as follows:

I, \_\_\_\_\_, do solemnly swear, (or affirm,) in presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States, and the union of the States thereunder, and that I will, in like manner, abide by, and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves. So help me God.

Andrew Johnson, Amnesty Proclamation (May 29, 1865), in 8 *THE PAPERS OF ANDREW JOHNSON*, at 128, 129 (Paul H. Bergeron ed., 1989).

<sup>55</sup>THE JUHL LETTERS TO THE CHARLESTON COURIER: A VIEW OF THE SOUTH, 1865-1871, at 20 (John Hammond Moore ed., 1974) [hereinafter THE JUHL LETTERS].

<sup>56</sup>This is a subject filled with thoughtful scholarship. One excellent starting point is *ESSAYS ON THE POSTBELLUM SOUTHERN ECONOMY* (Thavolia Glymph & John J. Kushma eds., 1985).

<sup>57</sup>JONATHAN TRUMAN DORRIS, *PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898*, at 34 (1953).

<sup>58</sup>The precise relationship between the army and the Freedmen’s Bureau (staffed in large measure by military personnel) was often unclear. GEORGE BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU 149-50* (1955); MARTIN ABBOTT, *THE FREEDMEN’S BUREAU IN SOUTH CAROLINA, 1865-1872* (1967). In a letter marked “highly confidential,” Letter from Oliver Otis Howard, Commissioner, Freedmen’s Bureau, to R. K. Scott, Brevet Major General

they often stipulated that the farm worker would be obedient, diligent, honest, sober, and so on. At the heart of these early contracts was the idea that labor had to be, and ought to be, under heavy constraints. As John William DeForest, a Bureau agent,

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(January 30, 1867) (on file with the United States National Archives, Record Group 105, Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, reel 13), Howard was trying, without success, to find a test case to take to the U.S. Supreme Court. The section of the Freedmen's Bureau Act of 1866 that raised questions for Howard was as follows:

That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have . . . the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery. And whenever in either of said States or districts the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and until such State shall have been restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States, the President shall, through the commissioner and the officers of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall prescribe, extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights, and no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offence. But the jurisdiction conferred by this section upon the officers of the bureau shall not exist in any State where the ordinary course of judicial proceedings has not been interrupted by the rebellion, and shall cease in every State when the courts of the State and the United States are not disturbed in the peaceable course of justice, and after such State shall be fully restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States.

Freedmen's Bureau Act of 1866, ch. 200, §14, 14 Stat. 173, 176-77. *See also* Letter from D. T. Corbin to Edward L. Deane, Major & Acting Adjutant General (Feb 6, 1867) (on file with the United States National Archives, Record Group 105, Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, reel 13). Corbin was with the Freedmen's Bureau during 1866 and held several crucial positions during radical reconstruction, during which time he was a major figure fighting the Ku Klux Klan. For practice in the courts set up by the Bureau see Thomas D. Morris, *Equality, 'Extraordinary Law,' and Criminal Justice: The South Carolina Experience, 1865-1866*, 83 S. C. HIST. MAGAZINE 15 (1982); DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868* (1979); James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, 25 CIV. WAR HIST. 66 (1979).

put it: "Many of the planters seemed to be unable to understand that work could be other than a form of slavery."<sup>59</sup>

By January 1866, a new set of contracts had to be negotiated and the military had to approve them as in 1865. General Daniel Sickles, in command in South Carolina, issued a General Order on January 1, to provide guidelines that the military would enforce. The intent, he wrote, was to ensure that the rights of "employer and the free laborer" were defined and respected, and "the system of free labor undertaken . . . the owners of the estates may be secured in their possession of their lands and tenements . . . persons able and willing to work may find employment . . . idleness and vagrancy may be discountenanced and encouragement given to industry and thrift."<sup>60</sup>

Parallel with the introduction of contract labor came the substitution of military justice in place of the void left with the collapse of the Confederacy. Much of it was in provost courts originally set up by General Quincy Gillmore in 1865, while some of it was in the higher level Military Commissions. These military courts functioned alongside the civil courts that were in place and functioning. By the fall of 1866, General Sickles, who had replaced Gillmore, turned the cases currently in the military courts over to the civil courts of the provisional governments set up earlier under Presidential authority.<sup>61</sup>

Generally, the primary function of these early military courts was to establish order, and they were not always staffed by people who knew law. On the other hand, some members of these courts were knowledgeable of the law. In the Orangeburg County provost court, for instance, the members dealt with cases begun through common law forms of action. There were cases dealing with *assumpsit* in contract disputes and in actions for debts.<sup>62</sup> One of the primary responsibilities of the provost courts was to provide a legal forum in which Freedmen could receive a fair-minded justice, as reports from the South made it clear they could not expect it in Southern courts.

Did they succeed in that first year or so? General O. O. Howard, the head of the Freedmen's Bureau evaluated those courts this way (and I believe he was correct):

In the great majority of instances, the provost courts decided fairly; but there were some where the officers composing them had the infectious prejudice against the negro, and discriminated against his interest; they

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<sup>59</sup>JOHN WILLIAM DEFOREST, *A UNION OFFICER IN THE RECONSTRUCTION* 28 (James H. Croushore & David M. Potter eds., 1948). At the same time, he wrote that "[m]ost of the difficulties between whites and blacks resulted from the inevitable awkwardness of tyros in the mystery of free labor." *Id.* at 28.

<sup>60</sup>JAMES D. SCHMIDT, *FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815-1880*, at 141 (1998).

<sup>61</sup>JAMES E. SEFTON, *THE UNITED STATES ARMY AND RECONSTRUCTION 1865-1877*, at 30-32, 98, 255 (1967).

<sup>62</sup>The cases are on file with the United States National Archives, Record Group 105, Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, South Carolina, vol. 255, Trials, Orangeburg Provost Court.

invariably meted out to those who abused him by extortion or violence, punishments too small and in no way commensurate with their offenses.<sup>63</sup>

The warmest endorsement of the work of the early courts is that of the historian James Sefton: “The generals,” he wrote, “were quick to proclaim whites and Negroes equal before the law and also quick to enforce that equality.”<sup>64</sup>

1865 was a year of disorder, legal confusion, violence, and even starvation. Sydney Andrews, a Northern correspondent, described Charleston (at about the time Presidential Reconstruction commenced) as a “city of ruins, of desolation, of vacant houses, of widowed women, of rotting wharves, of deserted ware-houses, of miles of grass-grown streets, of acres of pitiful and voiceless barrenness.”<sup>65</sup> One Charlestonian admitted that “[y]ou won’t see the real sentiment of our people, for we are under military rule; we are whipped, and we are going to make the best of things; but we hate Massachusetts as much as we ever did.”<sup>66</sup>

“Juhl” had a slightly different view. On March 20, 1866, he wrote to the *Courier* as follows: “The present state of things is decidedly anomalous and hurtful; wheels within wheels, Blackstone hemmed with bayonets, and clients and counsel sadly bewildered.”<sup>67</sup> Still, some things were clear. Martial law would end only with some major transformations in the institutional arrangements of South Carolina. “Let the same courts and the same laws,” he observed, “take cognizance of crimes in both races alike, and justice be impartially meted out to all . . . .”<sup>68</sup> Such calls for equality

<sup>63</sup> OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD, MAJOR GENERAL UNITED STATES ARMY 253 (1908).

<sup>64</sup> SEFTON, *supra* note 61, at 44.

<sup>65</sup> SIDNEY ANDREWS, THE SOUTH SINCE THE WAR I (Louisiana State Univ. Press 2004) (1866). John C. Calhoun was by all accounts the intellectual leader of South Carolina, if not the South in general, in its move toward secession and war. Andrews described a powerful symbol in Charleston of the destroyed world of the Carolinians:

Down in the churchyard of St. Phillip’s, one of the richest and most aristocratic of churches in this proud city, is a grave which every stranger is curious to see. It is the grave of the father of the Rebellion, and on the marble slab there is cut the one word,—

“CALHOUN.”

This churchyard symbolizes the city of Charleston. Children and goats crawl through a convenient hole in the front wall, and play at will among the sunken graves and broken tombstones. There is everywhere a wealth of garbage and beef-bones. A mangy cur was slinking among the stones, and I found a hole three feet deep which he had dug at the foot of one of the graves. Children were quarrelling for flowers over one of the more recent mounds. The whole yard is grown up to weeds and brush, and the place is desolate and dreary as it well can be. Time was when South Carolina guarded this grave as a holy spot. Now it lies in ruin with her chief city.

*Id.* at 5.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> THE JUHL LETTERS, *supra* note 55, at 83.

<sup>68</sup> *Id.* at 82.

before the law ran headlong into the persistent racism of white South Carolinians, a racism some seemed proud to publicly affirm. The governor of the state at the start of the war, for instance, published a candid pamphlet during the first year after the death of the Confederacy. It was entitled *Letter of Hon. Francis W. Pickens: The Crops and Conditions of the Country; The Interests of Labor; Effects of Emancipation; The Different Races of Mankind*.<sup>69</sup> His view of equality was none too favorable. “To declare universal equality,” he wrote, “and to enforce it, is to declare universal profligacy, and inaugurate universal revolution, plunder and murder. This universal equality and levelling of the human race sprang from the dreamy doctrines of Rousseau and Voltaire, overspread Europe, and culminated in the great French revolution.”<sup>70</sup> It was the conservatism of Robert Emmet’s prosecutors coupled with an unyielding racism.

### III. MILITARY JUSTICE AND THE CLOSURE OF THE WAR

Political justice in the courts of the military was a centerpiece of the policies of those responsible for the transition period between the collapse of the Confederacy and the reconstruction of the Union. The function of that transitional justice was to close the past. The first of the military trials that set the tone early was the trial of the alleged conspirators in the assassination of President Abraham Lincoln. It was followed by the trial of the commandant of the Andersonville prison camp. That, in turn, was followed by the landmark case that has become one of the sources for the placement of limitations on military justice: *Ex parte Milligan*.<sup>71</sup> The final case in this set has been ignored and with some reason: it was a trial that was never tried. This was the case of the President of the defeated Confederacy, Jefferson Davis. It was not without significance, however, and it will be covered below. The original expectation was that Davis would be one of the persons tried in the first case (he was named in that trial but was never brought before the court as the evidence placed him far out on the margin if it even placed him there).<sup>72</sup>

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<sup>69</sup>FRANCIS W. PICKENS, *LETTER OF HON. FRANCIS W. PICKENS: THE CROPS AND CONDITIONS OF THE COUNTRY; THE INTERESTS OF LABOR; EFFECTS OF EMANCIPATION; THE DIFFERENT RACES OF MANKIND* (Baltimore, The Printing Office 1866).

<sup>70</sup>*Id.* at 11. South Carolina newspapers published by whites were generally filled with racist points of view. An example is the following judgment on the passage of the Civil Rights Act of 1866 over President Johnson’s veto, which appeared in the *Charleston Daily Courier* on April 19, 1866: The passage was “iniquitous, unconstitutional and disgraceful to Anglo-Saxon blood. How the heart sickens at the sight of an American Congress—in a land of boasted enlightenment and intelligence—placing the woolly-headed Negroes of the South upon an equal footing with the white race!” CHARLESTON DAILY NEWS, April 19, 1866.

<sup>71</sup>*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>72</sup>ELIZABETH D. LEONARD, *LINCOLN’S AVENGERS: JUSTICE, REVENGE, AND REUNION AFTER THE CIVIL WAR* 83-86 (2004). The principal witness against Davis turned out to be completely unreliable. He first appeared under the name Sanford Conover, but his real name was Charles Dunham. The most tenacious “avenger” was Joseph Holt, Judge Advocate General. He appears throughout this book to have been a believer in conspiracies and a believer in the

The first and most public trial involved the murder of President Abraham Lincoln. President Andrew Johnson caught the mood of the day when he declared that, “treason must be made odious.”<sup>73</sup> Attorney General James Speed was of a similar mind, writing the President shortly after Lincoln’s death that, “I am of the opinion that the persons who murdered the President of the United States,” he began but caught himself, “or rather the persons charged therewith, can be rightfully tried by a military court.”<sup>74</sup> President Johnson followed the lead and issued his *Order for Military Trial of Presidential Assassins* on May 1, 1865.<sup>75</sup> It was an exertion of executive power to settle a crucial jurisdictional problem with an assertion. Did the executive possess the authority to create courts other than Article III courts? Johnson’s answer was yes. The President, moreover, ordered the Military Commissioners to establish “rules of proceeding as may avoid unnecessary delay, and conduce to the ends of public justice.”<sup>76</sup> The trial lasted two months and ended with the hanging of four of the defendants on July 7, 1865.<sup>77</sup>

John A. Bingham, who prosecuted the case, argued that the crime was not just murder. Bingham was to be the principle author of Section 1 of the 14th Amendment with its guarantee of due process of law.<sup>78</sup> He was not especially concerned with objective rules governing trials in the case at hand, however. It was the murder of the President with the intention of aiding the still smoldering rebellion. The rebellion, moreover, “was prosecuted for the vindication of no right, for the redress of no wrong, but was itself simply a criminal conspiracy and gigantic assassination.”<sup>79</sup> Bingham clearly intended to use the military forum to attack the war aims of the Confederacy: “What wrong,” he asked, “had this government or any

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ethical responsibility of persons in power to do everything possible “to sustain common people’s basic devotion to the good.” *Id.* at 17-18.

<sup>73</sup>PETER MASLOWSKI, *TREASON MUST BE MADE ODIOUS: MILITARY OCCUPATION AND WARTIME RECONSTRUCTION IN NASHVILLE, TENNESSEE, 1862-65* (1978).

<sup>74</sup>Letter from James Speed, Attorney General, United States of America, to Andrew Johnson, President, United States of America (Apr. 28, 1865), in *7 THE PAPERS OF ANDREW JOHNSON*, *supra* note 54, at 651, 651 (Leroy P. Graf ed., 1986).

<sup>75</sup>Andrew Johnson, *Order for Military Trial of Presidential Assassins* (May 1, 1865), in *8 THE PAPERS OF ANDREW JOHNSON*, *supra* note 54, at 12, 12.

<sup>76</sup>*Id.*

<sup>77</sup>LEONARD, *supra* note 72, at 129-30. The four executed were Mary Surratt, George Atzerodt, David Herold, and Lewis Powell. Four other defendants were sentenced to the Dry Tortugas: they were, Michael O’Laughlen, Samuel Arnold, Edman Spangler and Samuel Mudd. *Id.* at 137-38.

<sup>78</sup>WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 49, 66, 78, 115, 145 (1988).

<sup>79</sup>8 *AMERICAN STATE TRIALS* 499 (John D. Lawson ed., Scholarly Resources Inc. 1972) (1917).

of its duly constituted agents done to any of the guilty actors in this atrocious rebellion?"<sup>80</sup>

One of the crucial questions Bingham confronted was jurisdictional, while another concerned the authority that authorized the trial in the first place. Finally, there was the question of structure and norms. On the last point, Bingham claimed that the military officers were to be the "sole judges of the law and the fact."<sup>81</sup> There would be no jury trial, a fact that Reverdy Johnson, one of the defense counsel, argued violated the basic rule of law in its American form. It was, moreover, not needed since the loyal civil courts were open and in "full and undisturbed exercise of all their functions" in Washington, D.C.<sup>82</sup> The President, in any case, lacked constitutional authority to order the creation of a military tribunal. If a military commission created on the mere authority of the President could proceed, nothing could stop it from violating the rights secured in the Bill of Rights, especially the 5<sup>th</sup> and 6th Amendments.<sup>83</sup> "It [could have] no foundation but in the principle of unrestrained, tyrannic power, and passive obedience."<sup>84</sup> It would leave a "nation of slaves," he concluded, without a sense of irony.<sup>85</sup>

Bingham's response was to claim that the Tribunal had no power to declare the authority by which it was constituted illegitimate. "How can it be possible that a judicial tribunal can decide . . . that it does not exist . . . ?"<sup>86</sup> By what authority did the court exist? It was not an Article III court created by Congress under its constitutional power to create courts below the Supreme Court. "This court," Bingham affirmed, "exists as a judicial tribunal by authority only of the President," and he derived this extraordinary power from the sovereign people whose passive obedience legitimized the power.<sup>87</sup> Still, one widely accepted premise was that the "self-evident truth that whenever government becomes subversive of the ends of its creation, it is the right and duty of the people to alter or abolish it."<sup>88</sup> Bingham's dilemma was that this was what Southern leaders claimed as the basis of secessionism. His problem was to uphold the basic constitutional doctrine, and to persuasively deny its use in the current situation. "[D]uring these four years," he argued, the people, who possessed the right of revolution, also had the "right and duty, both by law and by arms, that the government of their own choice, humanely and wisely administered, oppressive of none and just to all, shall not be overthrown

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<sup>80</sup>*Id.*

<sup>81</sup>*Id.* at 498.

<sup>82</sup>*Id.* at 275.

<sup>83</sup>*See id.* at 261-68.

<sup>84</sup>*Id.* at 254.

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 505.

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 499.

by privy conspiracy and armed rebellion.”<sup>89</sup> To no one’s surprise, the commission rejected the challenge to its authority and proceeded to try the defendants. On July 5, 1865, the Judge Advocate General Joseph Holt informed President Johnson of the Commission judgments.<sup>90</sup> Two days later, four of the defendants were executed.<sup>91</sup>

Within a few months, Henry Wirz went on trial for war crimes before a military tribunal. Since he was a military figure, his trial was far less controversial. I will comment on only one issue that arose. One of the charges against Wirz was that he had authorized the use of vicious hounds to run down escapees, and some were fatally mauled by the dogs. Wirz defended himself on the ground that Andersonville was in Georgia, that Georgia law should prevail, and that under that law, what he did was lawful.<sup>92</sup> He was arguably right on the last point. The law of Georgia did allow the use of “Negro dogs” to uphold the so-called peculiar institution. Georgia’s Chief Justice, Joseph Henry Lumpkin, ruled in *Moran v. Davis* that slavery was a divine institution and what was necessary to sustain it was legitimate.<sup>93</sup> He concluded this opinion with an extensive quote from the Book of Revelations. The court disposed of the argument with the observation that prisoners of war were not slaves, and the war put an end to the barbarism of slavery.<sup>94</sup> The laws of slavery were no more. Henry Wirz, of course, was found guilty and executed.<sup>95</sup> A far different worldview was on the verge of replacing that which perished in the war.

The Southern laws of slavery<sup>96</sup> had collapsed parallel with the closing of the local court system. Along the Sea Islands of South Carolina, the collapse occurred in the fall of 1861.<sup>97</sup> An exception in South Carolina was the Magistrate-freeholders courts which were ad hoc courts called into being to try slaves and free blacks. By 1865, such courts met infrequently, but they did meet. One example was an inquiry into

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<sup>89</sup>*Id.*

<sup>90</sup>Letter from Joseph Holt, Judge Advocate General, United States Army, to Andrew Johnson, President, United States of America (July 5, 1865), in 8 THE PAPERS OF ANDREW JOHNSON, *supra* note 54, at 355.

<sup>91</sup>*See supra* note 77 and accompanying text.

<sup>92</sup>8 AMERICAN STATE TRIALS, *supra* note 79, at 820-21; JOHN MCELROY, THIS WAS ANDERSONVILLE 300-01 (Roy Meredith, ed., 1957).

<sup>93</sup>*Moran v. Davis*, 18 Ga. 722, 723-24 (1855).

<sup>94</sup>8 AMERICAN STATE TRIALS, *supra* note 79, at 821; MCELROY, *supra* note 92, at 300. For additional information about Andersonville, the military prison controlled by Henry Wirz, see also JOHN MCELROY, ANDERSONVILLE (Arno Press 1969) (1879). The best historical reconstruction of this sad story is WILLIAM MARVEL, ANDERSONVILLE: THE LAST DEPOT (1994). MACKINLAY KANTOR, ANDERSONVILLE (1955), can still be read for its insights into the human spirit.

<sup>95</sup>MARVEL, *supra* note 94, at 246-47.

<sup>96</sup>*See* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 (1996).

<sup>97</sup>*See* WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT (1964). This remains one of the finest studies within the historiography of Reconstruction.

the death of a black in Spartanburg County. It was the last case heard in that court, and it contained a horrid possibility for the future. Bob, a Freedman, was hanged by “unknown persons.”<sup>98</sup> Coroner’s inquest juries reached similar conclusions in all too many cases in the future. Another example was in Clarendon County. On March 19, 1865, a Magistrate-freeholders court tried Henry, a slave, for the homicide of another slave (no consideration of the various forms of homicide was mentioned in the record). He was found guilty and sentenced to 150 lashes and two weeks imprisonment.<sup>99</sup> Generally, these were exceptions and provost courts replaced these occasional ad hoc Southern courts.

A year later, lower civil courts had replaced the provost courts. Down to the transfer of jurisdiction in October 1866, the provost courts proved more congenial to the rights of the Freedmen than Southern whites had; but, the former were still inconsistent. They were little better, on occasion, than the white Magistrate-freeholders courts. A sample of sentences from the Orangeburg provost court should make that clear. For the crime of larceny, Kit was sentenced to two weeks hard labor on bread and water. Wesley, convicted of stealing a horse in April 1866, was sentenced to two months hard labor and to be tied up by his thumbs three times a week for two hours each day. If he was able to return the horse, he would be released.<sup>100</sup> Sometimes cruelty and sordidness showed up in sentences. For example, Ben, found guilty of larceny, received a one month term to have one-half of his head shaved and to stand on a barrel six hours every day for one week.<sup>101</sup> Provost

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<sup>98</sup>State v. Bob, coroner’s inquest (on file in manuscript form with the South Carolina Department of Archives and History, Court of Magistrates-Freeholders Trial Papers); Philip N. Racine, *The Spartanburg District Magistrates and Freeholders Court, 1824-1865*, 81 S.C. HIST. MAG. 197 (1986).

<sup>99</sup>State v. Henry, Mar. 19, 1865, Clarendon County (on file in manuscript form with the South Carolina Department of Archives and History, Court of Magistrates-Freeholders Trial Papers).

<sup>100</sup>Morris, *supra* note 58, at 21.

<sup>101</sup>There were a handful of civil cases with very significant facts and/or results. An example is *Jethro Gourdin Colored v. Peter G. Gourdin White*, Suit for Debt (on file with the United States National Archives, Record Group 393, Provost Court Civil Docket, 1867-1868, Berkeley, South Carolina). The Freedmen’s Bureau prosecuted the case in a provost court sitting in Berkeley County in August 1867. Jethro claimed to be the “illegitimate” son of Samuel Gourdin, a white planter. Dr. Samuel Gourdin said Sam had left \$50 for his family. He also claimed that the Blacks were not freed “by Sam Gourdin, but were given to him as Slaves, and that all property belonging to his Slaves became his own.” *Id.* He said that Samuel Gourdin “had been assisted in increasing his Slave property by some other chivalric Gentleman in the neighborhood.” *Id.* Lieutenant Liedtke in the 43d Infantry and Assistant Sub Assistant Commissioner in the Bureau recommended that all possible wills of Samuel Gourdin should be examined as he believed Dr. Gourdin was trying to take advantage of “these poor people.” *Id.* The finding of the court is an interesting mixture of law and presumption.

After mature deliberation on the evidence . . . considering the fact that under the laws of South Carolina nothing could be left in his will by Samuel Gourdin to these people they being his slaves though universally known as his own children & the fact that the

court justice occasionally spilled over what limitations might exist on their discretion. The larger question was the place of military justice in the American legal order. What were the constitutional limitations on their jurisdiction?

The question was finally addressed in the spring of 1866, with the U.S. Supreme Court decision in *Ex parte Milligan*.<sup>102</sup> Today, it stands as one of the landmarks of constitutional liberty. Consequently, it was considered by the administration of President George W. Bush when he issued his November 13, 2001, executive order on the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”<sup>103</sup> The fact is that *Milligan* has not yet proved to be an insuperable obstacle.

Proponents of President Bush’s planned use of Military Commissions cite the World War II case involving German saboteurs, *Ex parte Quirin*.<sup>104</sup> The saboteurs had removed their uniforms and thereby were treated by the Roosevelt administration as enemy combatant noncitizens. Their trial by a military tribunal and subsequent execution were upheld because of their noncitizenship. Nearly all of the 490 persons held at Guantanamo (as of this writing) are noncitizens captured outside the U.S. and particularly in Afghanistan. They are the people currently at risk of

Defendant Dr. P.G. Gourdin paid these people the interest on \$50 for several years, the court is of opinion that the claim is just . . .

*Id.* “[C]onsidering that \$10 ha[d] already been paid,” the court ordered the Defendant to pay \$40 with 7% interest from January 1862 and to pay the costs of the suit. *Id.* This, of course, was an exercise of equitable jurisdiction by a provost court.

<sup>102</sup>*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>103</sup>*See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2760 (2006) (plurality opinion). The President’s effort to set up trials for the detainees at Guantanamo ran into a significant barrier on June 29, 2006, when the U.S. Supreme Court handed down its decision in *Hamdan v. Rumsfeld*. The opinion for the court by Justice Stevens was a plurality opinion, however. Justice Kennedy’s vote supported the conclusion that the commission to try Hamdan was illegitimate, but he declined to join all parts of Stevens’ opinion. Justice Breyer also wrote a very brief concurrence to emphasize the point that Congress could authorize the President’s action. *Id.* at 2799 (Breyer, J., concurring). Justice Thomas wrote the dissent focused on in the plurality opinion. *Id.* at 2823 (Thomas, J., dissenting). Justices Scalia, *Id.* at 2809 (Scalia, J., dissenting), and Alito, *Id.* at 2849 (Alito, J., dissenting), wrote separately, and Chief Justice Roberts did not participate since he had participated in the circuit opinion under consideration. *Id.* at 2799 (plurality opinion). One point I would highlight is that the members of the court did try to provide historical authority for their various conclusions. However, it was here that the plurality failed to carry the majority. “The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists,” is the opening sentence of Section V of Justice Stevens opinion. *Id.* at 2775. Section V was not agreed to by the majority. The critical opinion in this regard is that of Justice Kennedy, who saw the issue in terms of separation of powers. He did not reject the value of history; however, he focused on different sides of the history. One of the key points for Kennedy was that “the President has acted in a field with a history of congressional participation and regulation.” *Id.* at 2800 (Kennedy, J., concurring). What history and what norms should govern divided the justices and hopefully will be probed deeply by scholars in the future.

<sup>104</sup>*Ex parte Quirin*, 317 U.S. 1 (1942).

trials by military commissions. A linchpin in the edifice being erected against the noncitizens has been the *Quirin* case. Its place in the argument, however, is not as firmly settled as it might appear. Louis Fisher has raised some serious questions about its persuasiveness from the point of view of an historian.<sup>105</sup> Nonetheless, the weight of opinion probably is, for the present, on the side of limiting *Milligan* to the protection of citizens.

Has *Milligan* ever been as significant as constitutional historians have claimed? It is doubtful in the view of Mark E. Neely, Jr., in his Pulitzer Prize winning book, *The Fate of Liberty: Abraham Lincoln and Civil Liberties*.<sup>106</sup> He concluded that it “lacked practical influence in protecting liberty,” and, in fact, the real legacy of *Ex parte Milligan* is confined between the covers of the constitutional history books.<sup>107</sup> The decision itself had little effect on history. One of the leading scholars of American political trials, Michal R. Belknap, has argued that President Bush probably has a lawful right to authorize such trials.<sup>108</sup> He relied on the “inherent” powers of the presidency, especially the Commander-in-Chief clause, to authorize military trials of civilians.<sup>109</sup> However, Belknap believes that the “putrid pedigree” of military commission trials makes it “unwise” to do so.<sup>110</sup> Louis Fisher has been even more expansive. His book, *Military Tribunals & Presidential Power*, sweeps broadly as his target is the unbounded, expanding institution of the executive in the twentieth century.<sup>111</sup> Fisher, like Neely, emphasizes the failure of the case to halt trials from the spring of 1866 down to 1869 when the military generally drew back from direct involvement in the administration of justice. Both scholars emphasize that, during those early years of Reconstruction, there were over one thousand cases tried by military commissions, not to mention the trials at the lower level of the provost courts.

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<sup>105</sup>LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW (2003). Fisher’s principal target was President Roosevelt whose “creation of the military commission was deeply flawed.” *Id.* at 172. Not only did he create the commission but he interpreted the law of war. He ignored Congress. Moreover, the trial record went directly to him for review. A final point I would emphasize is Fisher’s point that Roosevelt’s authorization for the tribunal to “make . . . rules . . . as it shall deem necessary for a full and fair trial of the matters before it,” got it wrong. *Id.* at 173. “Procedural rules,” Fisher noted, “need to be agreed to before a trial begins, not after.” *Id.* The same problem plagues *Milligan*.

<sup>106</sup>MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991).

<sup>107</sup>*Id.* at 184.

<sup>108</sup>Michal Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective* 38 CAL. W. L. REV. 433 (2002).

<sup>109</sup>*Id.* at 442.

<sup>110</sup>*Id.* at 440, 497.

<sup>111</sup>LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 176-77 (2005).

A different perspective is provided by two legal scholars, Neal Katyal and Laurence Tribe.<sup>112</sup> Their approach is to test the Bush Military Order by “constitutional commands.”<sup>113</sup> They do not do much with the history of military commissions. The strength of their work is structural not historical. It is a strong argument. They conclude that the Constitutional structure creates a “rights-protecting” political system.<sup>114</sup>

A widely held view is that President Bush’s executive order diminishes our country in the eyes of the international community. President Bush has taken action, many critics maintain, and defined positions so often in terms of force and war that it raises a strong case for describing his policies as militaristic. It is shameful and destructive of our country’s best values. This is not to claim that there are not circumstances under which military justice can be seen as legitimate; but it is to argue that Justice Davis occupied higher ground when he intoned that the Constitution and the rights it secures applies to times of war as of peace. The President’s critics argue that he does not seem to understand “rights.”

We are at another delicate point in our history in which the danger of erosion of our constitutionally protected rights is surely at least level with the danger during World War II. History can help illuminate the possibilities we face and it can deepen our understanding of the nature of communities, rights, and human relationships.

Upon the topic of the place of justice in our legal world (which includes relationships, rights and community), there is more to learn from the history of the experiences with military tribunals. They are a part of the history of our legal order. As a contribution to understanding that history better, I want to examine a part of the *Milligan* case that is usually overlooked. What I propose to do is examine the role of precedent in the decision, not the decision as precedent itself. The modern conception of precedent in which judges claim to be bound by earlier authorities was not wholly possible until the emergence of authoritative law reports, which occurred during the first half of the 19th century. Prior to that, it was common to find more than one report of legal cases. A prominent example was the *Somerset Case* in which Sir William Mansfield allegedly decided that slavery could not exist in England. The exact boundaries of the decision differ somewhat depending upon whose report is read.<sup>115</sup>

The modern sense of precedent arose during the first half of the 19th century, parallel with the emergence of single, authoritative reports. The practice of citing authorities was not as common as we might expect and arguments among legal scholars, treatise writers, as well as judges spanned the century. One towering figure

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<sup>112</sup>Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L. J. 1259 (2002).

<sup>113</sup>*Id.* at 1260.

<sup>114</sup>*Id.* at 1268.

<sup>115</sup>JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1221-44* (1992); William Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 88-95 (1974).

in the debate was Jeremy Bentham, one of the most prominent of all proponents of legal positivism.<sup>116</sup> Bentham's thoughts about precedent went through various transformations. "The coherence of the common law," one scholar observed of Bentham's jurisprudence, was "supposed to be protected by the requirement that judges 'tread in one another's steps.'"<sup>117</sup> The object of law, it was common to claim, was to protect stability in human relationships, to favor protection of expectations, and, in the end, to protect property rights. Judicial lawmaking—often hidden beneath such streams of ideas as "natural law," "reasonableness," and "policy"<sup>118</sup>—Bentham came to believe, undermined "confidence in the 'stability of any rules of Law, reasonable or not reasonable: that stability on which every thing that is valuable to a man depends.'"<sup>119</sup> On the other side, Bentham perceived a different danger, and that was the problem that a slavish view of the notion of precedent leads to the philosophy of "*Whatever is, is right.*"<sup>120</sup> The *Milligan* case, then, was decided when the Union was still in disarray and the world of legal thought was in turmoil.

Lambdin P. Milligan was an ardent supporter of the Confederacy from Indiana. He was alleged to have been a member of the pro-Confederate Sons of Liberty, a group that was supposedly prepared to act on behalf of the South within the Midwest. Actually, the group was never much of a threat, and people like Milligan

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<sup>116</sup>Frederick G. Kempin Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959); A. L. Goodhart, *Precedent in English and Continental Law*, 50 LAW Q. REV. 40 (1934). Goodhart argues that the notion of an "absolute authority" did not appear "fully developed" until the 19th century. *Id.* at 42, 63. Nonetheless, he contends that the idea of a precedent as an authority appeared around the time of Sir Edward Coke. If the precedent cited is not "directly on point" it might still be used but as an analogy in judicial reasoning. To that extent it still might be "quasi-authoritative." *Id.* at 64. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977), has focused on the "retreat from precedent" down to the mid-19th century as judges increasingly used law as an instrument to secure and advance commercial and entrepreneurial interests. *Id.* at 27. After 1850, instrumentalism gave way to formalism. "Law, once conceived of as protective, regulative, paternalistic," Horwitz claims, "and, above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic and political power." *Id.* at 253; *see also* PRECEDENT IN LAW (Laurence Goldstein ed., 1987); RUPERT CROSS & J. W. HARRIS, *PRECEDENT IN ENGLISH LAW* (4th ed. 1991).

<sup>117</sup>SHIRLEY ROBIN LETWIN, *ON THE HISTORY OF THE IDEA OF LAW* 155 (Noel B. Reynolds ed., 2005) (quoting Jeremy Bentham, *Petition for Justice*, in 5 *THE WORKS OF JEREMY BENTHAM* 444, 478 (John Bowring ed., London, Simpkin, Marshall & Co. 1843)).

<sup>118</sup>*Id.*

<sup>119</sup>*Id.* at 156 (quoting Jeremy Bentham, *A Fragment on Government*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT*, 391, 409 (J.H. Burns and H.L.A. Hart eds., 1977)).

<sup>120</sup>*Id.* at 156 (quoting Jeremy Bentham, *Constitutional Code*, in 9 *THE WORKS OF JEREMY BENTHAM*, *supra* note 117, at 1, 322).

became victims in political trials before military tribunals held in Indiana.<sup>121</sup> He was convicted and sentenced to death in a case that reached the U.S. Supreme Court in 1866.

The majority opinion was written by Justice David Davis, joined by four members of the court. Chief Justice Chase wrote for himself and three others. Davis began his consideration of precedent with the nature of man and the “history of the world.”<sup>122</sup> What this history showed was that the Founders had woven a taught fabric that none of the divisions of government could disturb, with the sole exception of the suspension of the writ of habeas corpus.<sup>123</sup> Davis moved rapidly and with passion through the language of constitutional discourse. To this point he had cited no “precedent” or authority. What he did was to deepen his construction of the political world. There could always be an “emergency of the times” so imminent that some men had to be held against “go[ing] at large.”<sup>124</sup> Necessity determined it was sometimes acceptable to ignore the rights of some in order to protect “just authority and overthrow its enemies.”<sup>125</sup> But the only guidance was the provision for the temporary suspension of the right to a judicial inquiry though a writ of habeas corpus. The Constitution, he observed,

does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law . . . the lessons of history informed [the Framers] that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen

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<sup>121</sup>FRANK L. KLEMENT, DARK LANTERNS: SECRET POLITICAL SOCIETIES, CONSPIRACIES, AND TREASON TRIALS IN THE CIVIL WAR (1984).

<sup>122</sup>*Ex parte Milligan*, 71 U. S. (4 Wall.) 2, 120 (1866).

<sup>123</sup>*Id.* at 125. The writ of habeas corpus cum causa, the form of the writ known as the Great Writ of Liberty was a centerpiece in the Civil War and Reconstruction. This writ mediated claims to personal liberty and the needs of the state, especially during periods of violence. There was a virtual pamphlet war during the Civil War over the writ. This struggle can be approached through UNION PAMPHLETS OF THE CIVIL WAR 1861-1865 (Frank Freidel ed., 1967). An earlier pen was EDWARD INGERSOLL, THE HISTORY AND LAW OF THE WRIT OF HABEAS CORPUS WITH AN ESSAY ON THE LAW OF GRAND JURIES (Philadelphia, T.K. and P.G. Collins 1849). The principal prewar American treatise was ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES (Albany, W.C. Little & Co. 1858). An intricate example of the possible political use of habeas corpus occurred in Tennessee in 1867. Judge Thomas Frazier, a judge of the Davidson County Criminal Court, issued a writ of habeas corpus to challenge the forceful seizure of some legislators who had been taken to the legislature to make up the number of legislators needed as a quorum to act on ratification of the 14th Amendment. For his attempted interference he was impeached. See PROCEEDINGS OF THE HIGH COURT OF IMPEACHMENT, IN THE CASE OF THE PEOPLE OF THE STATE OF TENNESSEE VS. THOMAS N. FRAZIER, JUDGE, ETC. BEGUN AND HELD AT NASHVILLE, TENNESSEE, MONDAY, MAY 11, 1867, at 74 (Nashville, S.C. Mercer 1867).

<sup>124</sup>*Milligan*, 71 U.S. at 125.

<sup>125</sup>*Id.*

against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.<sup>126</sup>

Nonetheless, Davis was prepared to admit some legitimacy to martial law, but it required that real “necessity . . . be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.”<sup>127</sup> He then reframed the point and concluded that “[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”<sup>128</sup>

It was at this point that Davis turned to authority. “We are not without precedents,” he began.<sup>129</sup> They were in “English and American history” and even though they illustrated his views, he believed it “hardly necessary to make particular reference to them.”<sup>130</sup> Despite the relative insignificance of precedent or legal authority, Davis did make a cursory examination of them. His first “precedent” was a case of attainder of the Earl of Lancaster in the reign of Edward III (it ended in 1377).<sup>131</sup> His next reference was that “down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.”<sup>132</sup> As far as English legal authority was relevant, that was the end of the matter.

He did turn to English colonial law with a brief reference to the case of the Reverend Smith in Demerara and, more to the point, Lord Brougham’s condemnation of the judicial murder in the 1824 parliamentary debate.<sup>133</sup> From there, he shifted to the American Revolution and the condemnation of British use of martial law by the revolutionaries.<sup>134</sup> He then moved to the War of 1812 and mentioned, without identifying them, that there were four cases regarding military trials of civilians when the civil courts were open.<sup>135</sup> Next came *Luther v. Borden*,

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<sup>126</sup>*Id.* at 126.

<sup>127</sup>*Id.* at 127.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.* at 128.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

<sup>135</sup>*Id.* at 128-29.

only to be dismissed as authority.<sup>136</sup> The end of the excursus was near. “We do not deem it important,” Davis wrote, “to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.”<sup>137</sup>

It was not a masterpiece of legal reasoning or historical reconstruction, but it was revealing in laying open the weakness of the rule of *stare decisis* in the face of a strong political argument. It also showed that American forms of adjudication were moving in different channels from the English. According to P. S. Atiyah and Robert Summers, two modern legal scholars, English judges are more inclined to emphasize adherence to form while Americans are more willing to go for the substance.<sup>138</sup> Davis’s opinion, moreover, can be used as a strong affirmation of “rights,” despite its limited, even slightly shabby, foundations in legal authority.

Chief Justice Chase added nothing to the discussion of precedent. His opinion was more concerned with political theory. Here, it might be worth emphasizing that counsel arguing the case cited all kinds of historical circumstances and numerous cases they hoped would influence the final judgment. Counsel and Justices were moving within somewhat different languages and with different sources of law and authority. Chase wrote to emphasize that there was a legitimate congressional power to authorize military tribunals.<sup>139</sup> He did so with links to the general sense of community. “We have no apprehension,” he wrote, “that this power [to authorize military commission trials], under our American system of government, in which all official authority is derived from the people . . . is more likely to be abused than the power to regulate commerce, or the power to borrow money.”<sup>140</sup> He made no reference to definitions found in statutes or common law authorities.

The final case in this set that looked toward the past was the case that was never tried, the case of Jefferson Davis. There would be no trial by military tribunal for Davis. There were procedural delays, assertions by Chief Justice Chase that he would not sit on a trial in a district under martial law, and even delays because of conflicts in schedule. But there was a telling hearing in a federal court in the Fourth Circuit in 1868, after which no more was heard but a whimpy entry in the records of the U.S. Supreme Court. Most of what we know of his case appeared in 1876 at the end of Reconstruction. Bradley T. Johnson of the Virginia bar prepared a volume entitled *Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit*.<sup>141</sup> It was revised and corrected by Chase himself. One hundred twenty four pages were devoted to the Jefferson Davis case.

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<sup>136</sup>*Id.* at 129-30.

<sup>137</sup>*Id.* at 130.

<sup>138</sup>P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* (1987).

<sup>139</sup>*See Milligan*, 71 U.S. at 139-40, 142 (Chase, C.J., concurring).

<sup>140</sup>*Id.* at 142.

<sup>141</sup>JOHNSON, *supra* note 1.

Perhaps the real explanation of the final failure to try Davis for anything can be found in the following remark of the court reporter:

Trials for treason in the civil courts are not remedies adapted to the close of a great civil war. Honor forbids a resort to them after combatants in open War have recognized each other as soldiers and gentlemen engaged in a Legitimate conflict. . . . It would be shockingly indecorous for the ultimate victor in such a conflict to send his vanquished opponent before the civil magistrate to be tried as if he were a mere thief or rioter. . . . What honor forbids in an individual, policy prohibits in a government.<sup>142</sup>

Within the Southern worldview of the mid-19th century, as Bertram Wyatt-Brown has argued, honor was central. Jefferson Davis was, by all accounts, an honorable man.<sup>143</sup>

Nevertheless, a federal grand jury indicted him in May of 1866 for having joined with others to violate their obligation of obedience to the Federal Union. The beginning of the end of the case was a hearing in November of 1868 to quash the indictment. O'Connor, counsel for Davis, grounded his argument on the motion to quash on an interpretation of Section 3 of the 14th Amendment.<sup>144</sup> This may have been the first reliance upon that Constitutional Amendment, one of the most vital in our constitutional history. If so, there is irony galore since the U.S. Supreme Court held—in its first full consideration of the sweep of the Amendment—that it was limited to cases arising out of slavery and its abolition. It was ironic indeed that the first beneficiary of an Amendment to protect and extend rights to the Freedmen should be the deposed President of the Confederacy.

O'Connor's argument was that the prohibition on holding office under Section 3 for certain persons was a punishment, and it had the implicit affect of a repeal of earlier statutes on treason, insurrection, and rebellion. It was the latest expression of the will of the people and showed an intention to avoid a harsh policy toward Confederates.<sup>145</sup> Richard Henry Dana, Jr., for the prosecution, argued that Section 3 was not to punish but was incidental to the purpose of ensuring that governance was

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<sup>142</sup>*Id.* at 12-13.

<sup>143</sup>BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH* (1982); WILLIAM C. DAVIS, *JEFFERSON DAVIS: THE MAN AND HIS HOUR* (1991).

<sup>144</sup>U.S. CONST. amend. XIV, § 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

*Id.*

<sup>145</sup>JOHNSON, *supra* note 1, at 88-90.

in the hands of the people.<sup>146</sup> A “constructive repeal,” Dana argued, did not work because the offenses of treason and rebellion were not the same.<sup>147</sup> Interpretive rules required a “positive repugnance” to affect a repeal.<sup>148</sup> On December 5, 1868, Chief Justice Chase certified a disagreement to the U.S. Supreme Court. No further proceedings were ever held. At the end of 1868, President Johnson issued a General Amnesty. The court reporter noted that from that point on, “the certificate of disagreement rest[ed] among the records of the Supreme Court, undisturbed by a single motion.”<sup>149</sup> As a parting shot, Chase instructed the reporter to note that his position on the disagreement was in favor of the motion to quash and that all further proceedings were barred by the 14th Amendment.<sup>150</sup>

#### IV. RESTORATION OF ORDER AT THE LOCAL LEVEL

Scholars agree that the power of the federal government expanded relentlessly during the Civil War and Reconstruction. With the spread of industrial and then financial capitalism, the rush of authority to the federal level flowed like a stream after a torrential downpour. The shifting of trials from state to federal courts was significant. We should be mindful of the fact that federalism, as a political theory, and localism, as a daily reality for Americans, did not disappear. All of these beliefs and values were in dynamic tension.

Anthropologists deserve considerable credit for turning our attention to this with their work on smaller communities to grasp the ways human beings act and react. “Thick description” and “local knowledge” are methods used by some anthropologists, such as Clifford Geertz, to unravel the meaning in rituals, games, work patterns, conceptions of debt and so on.<sup>151</sup> Legal historians have seen the wisdom of unraveling local practice as well.<sup>152</sup> Such a focus on the actual practice of military courts at the level of local provost courts as well as the more public military

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<sup>146</sup>*Id.* at 105.

<sup>147</sup>*Id.* at 103. *See generally id.* at 91-105. Counsel for Davis argued for a “constructive repeal,” that is, that Section 3 of the 14th Amendment provided for the punishment for Davis and others similarly situated. A prohibition on office holding was a serious punishment for men like Davis who were used to the responsibilities of their status. The prosecutors responded that the offense of treason in levying war was not the same as engaging in insurrection and rebellion.

<sup>148</sup>*Id.* at 103.

<sup>149</sup>*Id.* at 124.

<sup>150</sup>*Id.*

<sup>151</sup>CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (3d ed. 2000).

<sup>152</sup>Examples of legal historians following this methodology are William A. Blair, *Justice Versus Law and Order: The Battles over the Reconstruction of Virginia’s Minor Judiciary, 1865-1870*, 103 VA. MAG. OF HIST. & BIOGRAPHY 158-80 (1995); Wayne K. Durrill, *Political Legitimacy and Local Courts: “Politicks at such a Rage” in a Southern Community During Reconstruction*, 70 J. S. HIST. 577-602 (2004).

tribunals help us understand the possibilities open to white and black South Carolinians at the end of the war. The end of slavery left an emptiness in authority that encouraged a period of violence that the army of occupation had to deal with, and it overlapped with the collapse of Confederate authority. A revealing case was heard, for instance, four days before the execution of the Lincoln conspirators. Edward W. Andrews was tried by a Military Commission sitting in Orangeburg, South Carolina. The court consisted of five officers, presided over by a Lieutenant Colonel, who was an officer in the United States Colored Troops. Andrews was allowed an attorney, William Legare. The charge against him was that he had murdered Cromwell Bright near Four Hole Swamp on May 18, 1865.<sup>153</sup>

The trial opened with a plea in bar of trial for want of jurisdiction in the commission. The argument was that the commission had no jurisdiction over acts done before the establishment of martial law, and that martial law alone could give it legitimacy. To do otherwise would be a violation of the constitutional prohibition against ex post facto laws. Moreover, the arraignment before this court violated the 5th Amendment promise of due process and the 6th Amendment jury trial guarantee.<sup>154</sup> The act of killing was lawful when done. "There existed," Legare argued, "at the time [of the killing,] an organized body of men, a provost guard for the country, legally constituted and charged with the execution and preservation of law, of which body the accused was a member, and to which alone he was responsible for his acts . . . ."<sup>155</sup> To sustain the argument would have required the court to recognize the legality of a Confederate provost guard and the legitimacy of its actions. The court did not sustain the plea to the jurisdiction.<sup>156</sup>

The testimony showed that the members of the so-called guard suspected that Cromwell Bright had stolen a horse. Cromwell and his son were being held at a farm when Andrews arrived.<sup>157</sup> He argued that "an example must be made."<sup>158</sup> He was asked if any court or magistrate was available to hear the case. The answer was no, as it would have been throughout much of the state.<sup>159</sup> There were occasional

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<sup>153</sup>1 EDWIN M. STANTON, LETTER OF THE SECRETARY OF WAR, S. EXEC. DOC. NO. 39-11, at 2-3 (1st Sess. 1866). The document communicates, "[i]n compliance with a [Senate] resolution . . . copies of the records and proceedings . . . of the Military Commissions . . . which . . . tried and convicted E. W. Andrews, of South Carolina; J.M. Brown and C. C. Reese, of Georgia; [and] J. L. McMillan and Neill McGill, of North Carolina." *Id.* at 1. See also KENNETH RADLEY, REBEL WATCHDOG: THE CONFEDERATE STATES ARMY PROVOST GUARD (1989). There is no mention of the Andrews case, or the alleged leader of the "guard," Frederick, in Radley's study.

<sup>154</sup>S. EXEC. DOC. NO. 39-11, at 3-4.

<sup>155</sup>*Id.* at 3.

<sup>156</sup>*Id.* at 4.

<sup>157</sup>*Id.* at 5.

<sup>158</sup>*Id.*

<sup>159</sup>*Id.* at 7.

magistrate-freeholders courts held, however, no one on the Military Tribunal asked about the possibility of calling upon a magistrate-freeholders court. Confederate authority was gone and that was that.

The trial proceeded. It was established that Andrews took the Brights to Four Hole Swamp where he told Cromwell to say his prayers as he was going to kill him. While on the ground praying Andrews shot him.<sup>160</sup> Israel Bright provided some of the crucial evidence. Legare argued that he was incompetent because he was a slave at the time of the “execution” and the rules of evidence of South Carolina should govern.<sup>161</sup> The evidentiary claim was brushed aside by the Tribunal as quickly as the Commission had done in the Wirz trial.<sup>162</sup> The tribunal trying Andrews turned to the question of the “legitimacy” of the “execution.”<sup>163</sup>

Down to the surrender of Confederate General Joseph Johnston, the men in the case at hand had been a part of the Confederate army. After the surrender, they reconstituted themselves as a provost guard. Mr. Frederick, the leader of the guard, denied that it was “the intention of the company to set aside the [s]tate and common law of the land.”<sup>164</sup> Necessity, he claimed, validated a deviation from common law rules. It could justify shooting someone summarily, he argued.<sup>165</sup> Asked for an example of necessity, he answered, “If I was to catch a man stealing, and I could not stop him in any other way, I would execute him, of course.”<sup>166</sup> Perhaps even more revealing was this: “Question. Was one of the duties of this patrol to guard plantations, and keep Negroes from leaving them? Answer. Yes, sir.”<sup>167</sup> The Confederacy had fallen and during the transition to occupation by the federal army. Southern whites turned to what they knew to protect the social order that was crumbling all around them. The Commission may have been sensitive to the chaotic situation as it chose to find Andrews guilty of manslaughter, because the “malice” required for a conviction of murder had not been established. The Tribunal, in short, may have used basic concepts of English common law. Even if that is true, a problem remains, and that is the meaning of “malice.”

The difficulty can be illustrated with a look at two works on the law of homicide. The first is Francis Wharton, *A Treatise on the Law of Homicide in the United States*, published in 1855.<sup>168</sup> Wharton’s approach exuded certitude about the meaning of

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<sup>160</sup>*Id.* at 5.

<sup>161</sup>*Id.* at 7-8.

<sup>162</sup>*Id.* at 7.

<sup>163</sup>*Id.* at 11-12.

<sup>164</sup>*Id.* at 13.

<sup>165</sup>*Id.*

<sup>166</sup>*Id.*

<sup>167</sup>*Id.* at 14.

<sup>168</sup>FRANCIS WHARTON, *A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES* (Philadelphia, Kay & Brother 1855).

“malice.”<sup>169</sup> He cited an English treatise by Sir William Russell. “Malice,” Russell observed, was a common law word meant to refer to a “wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent on mischief.”<sup>170</sup>

The second book on that law is Francis Wharton, *A Treatise on the Law of Homicide in the United States*, published in 1875.<sup>171</sup> Wharton began with the same opening definition but then uncertainty entered: “So far . . . as this definition is distinctive it is inconclusive.”<sup>172</sup> Malice, he now thought, was a term that required “peculiar exposition and limitation.”<sup>173</sup> His final judgment was this:

We must reach . . . a . . . conclusion: if the sagacity of our jurists working on this important topic for so long a series of years has been unable to construct a terse, satisfactory definition of homicide, this is because such a definition cannot, from the nature of the thing to be defined, be constructed. In order, therefore, to understand what murder is, we must study the subject in the concrete.<sup>174</sup>

Violent death from weapons and disease had become so common in the lives of the Civil War generation that it left imprints all over law. Andrews was one who benefited from the changing perceptions and definitions. He was sentenced to serve ten years in the Albany penitentiary in New York.<sup>175</sup>

The rules governing such trials at that time required approval by the Commander of the Military District in which the trial had been held. The commander in 1865, General John P. Hatch, disapproved. He returned the case and asked the tribunal to give it more “mature deliberation.”<sup>176</sup> He also ordered the court to explain why the judgment was not “guilty of ‘murder.’”<sup>177</sup> The case was reconsidered, the manslaughter decision was upheld, and—this time—General Hatch approved.<sup>178</sup> The

<sup>169</sup>*Id.* at 3.

<sup>170</sup>WILLIAM OLDNALL RUSSELL, *A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS* 412c (Philadelphia, T. & J. W. Johnson 4th Am. ed. 1841) (1819).

<sup>171</sup>FRANCIS WHARTON, *TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES* 2 (Philadelphia, Kay & Brother 1875) (1855). A leading reference for Wharton was the report of one of the English commissions studying various aspects of criminal justice in Britain. This one was the Homicide Amendment Commission of 1874.

<sup>172</sup>*Id.* at 1.

<sup>173</sup>*Id.* at 2.

<sup>174</sup>*Id.*

<sup>175</sup>1 EDWIN M. STANTON, *LETTER OF THE SECRETARY OF WAR, S. EXEC. DOC. NO. 39-11*, at 35 (1st Sess. 1866).

<sup>176</sup>*Id.* at 33.

<sup>177</sup>*Id.*

<sup>178</sup>*Id.* at 34.

next step was submission of the case to the Judge Advocate General Joseph Holt. Holt was so angry that he recommended a severe reprimand for all the commission judges.<sup>179</sup> His thinking was this: “The murder was undoubtedly committed under the influence of that brutal contempt for the lives and rights of the Negro race [that prevailed] with certain classes of the [S]outh, and in fanatical defiance of the government which has taken that race under its protection.”<sup>180</sup> Racism had led to a murder and the killing had been justified because of a claimed, but illegitimate, necessity.

On the other side, many South Carolina whites signed a large petition urging mercy for Andrews because he was a very dim witted person.<sup>181</sup> Holt was not moved—it would not excuse or reduce culpability. Rather, it was more evidence of the “benumbing influence upon the moral sense of the system of forced labor in the midst of which the prisoner has been brought up, and the manifestations of which it is the bounden duty of this government inexorably to punish.”<sup>182</sup> Racial slavery and its legal supports, along with its stunted moral code, were to be uprooted and replaced by a free market society. Military trials would be used in the destruction of an old and repressive social order as they were in the Scottish Highlands a hundred years before.

The next case, *In re Egan*, however, should have raised concern about the whole process of liquidating the war and beginning Reconstruction.<sup>183</sup> It was a Military Commission trial of an 80 year-old man from Lexington County in the upcountry. He was found guilty of shooting a “[N]egro boy” to death in September 1865, and sentenced to life in the Albany Penitentiary.<sup>184</sup> While in the New York prison, he appealed to Justice Samuel Nelson of the U.S. Supreme Court, who was serving his federal circuit court duties. Nelson ruled that the trial was improper because it occurred months after the surrender of the Confederate armies and the opening of the local courts.<sup>185</sup> The case was heard about the time that the U.S. Supreme Court was deciding *Milligan*. Egan was discharged and never tried again.

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<sup>179</sup>*Id.* at 36.

<sup>180</sup>*Id.*

<sup>181</sup>*Id.* at 37-38.

<sup>182</sup>*Id.* at 40. For one of the only scholarly discussions of this case see CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, PART 1, at 148-49 (Paul A. Freund ed., 1971) (volume 6 in *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* series).

<sup>183</sup>*In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (No. 4,303).

<sup>184</sup>*Id.* at 367.

<sup>185</sup>*Id.* at 368.

A final case I want to mention is *Ex parte Crawford Keyes*.<sup>186</sup> It was the last in a series of early cases tried in military tribunals in South Carolina that reached the federal court level. It arose in October 1865 when Keyes, along with his sons and a couple of their friends, went on trial for the murder of three union soldiers at a crossing of the Savannah River.<sup>187</sup> The soldiers were guarding cotton claimed by Keyes but held at the time by agents of the Treasury Department.<sup>188</sup> Race was not an issue in this case, but the limits of violence that carried over from the prewar South doubtless was.<sup>189</sup> Keyes was not a dim young thug like Andrews. He was a prominent person in Anderson Court House.<sup>190</sup> A later congressional investigation of this case showed that he was a very active, even notorious member of a local “vigilance committee” during the war.<sup>191</sup> That did not automatically prejudice the occupation leaders against him, however, as he was appointed to a provost court set up by the Union army of occupation.<sup>192</sup> In any event, Keyes was found guilty of murder and sentenced to death by the military commission.<sup>193</sup> His case became a cause celebre among prominent white South Carolinians. The list of supporters included James L. Orr, the governor elected under presidential Reconstruction.<sup>194</sup> President Johnson bowed to the pressure from such sources. He commuted the death sentence to time in the Dry Tortugas, where those found guilty in the Lincoln assassination—but not of a capital offense—had been sent.<sup>195</sup>

*Milligan* changed the ultimate outcome in the Keyes case.<sup>196</sup> *Milligan* was wedged in between the original trial of Keyes and the emerging political domination

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<sup>186</sup>The *Crawford Keyes* case is in the report by a select committee of the House of Representatives appointed to investigate the case. See 3 F.A. PIKE, MURDER OF UNION SOLDIERS, H.R. REP. NO. 39-23 (2d Sess. 1867).

<sup>187</sup>*Id.* at 2-3.

<sup>188</sup>*Id.* at 1.

<sup>189</sup>The classic study by JOHN HOPE FRANKLIN, *THE MILITANT SOUTH 1800-1861* (1956), describes the various forms of violence.

<sup>190</sup>H.R. REP. NO. 39-23, at 3.

<sup>191</sup>*Id.* at 20.

<sup>192</sup>*Id.* According to Pike, Secretary of War Edwin M. Stanton, recommended the commutation “being unwilling, as he states, after the decision of the Supreme Court in the *Milligan* case, to take the responsibility of executing the death penalty in accordance with the sentence of the military commission.” *Id.* at 3. President Johnson ordered the prisoners to be sent to Fort Delaware. *Id.* at 3-4. The United States District Judge for Delaware ordered the release. *Id.* at 4.

<sup>193</sup>*Id.* at 3.

<sup>194</sup>*Id.* Sickles was asked the following question: “Can you suggest any method of doing justice except through the administration of martial law?” He answered: “I do not know any other constitutional method.” *Id.* at 15.

<sup>195</sup>*Id.* at 3.

<sup>196</sup>*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

of Reconstruction by radical Republicans in the fall elections of 1866. Southern whites had self destructed with the adoption of harsh Black Codes, and race riots in places such as New Orleans and Memphis—both of those major riots were in the summer of 1866.<sup>197</sup> Within South Carolina, the action of one of the district judges, A. P. Aldrich, added to the negative view of the course of white Southerners.<sup>198</sup> This confrontation involved one of the symbols of the slave South—the whip. Whips and slavery were intertwined, but so were whips and authority. Authority to use force for “correction” of those who bore a subordinate relationship to another was spread across the pages of the law books of the South, as well as the metropolis and other colonies. William Green observed that under the apprenticeship system the English adopted as a transition in the West Indies, the whip occupied an anomalous position at law.<sup>199</sup> “Punishments,” he wrote, were “mitigated during apprenticeship, and in some colonies the whip was entirely abandoned.”<sup>200</sup> Moreover, “[w]here it was not [immediately] retired, it was allowed only as a form of judicial punishment.”<sup>201</sup>

The issue of the whip as judicial punishment arose in 1866 in South Carolina, when Judge Aldrich imposed the sentence of whipping on a white man in a larceny case in Charleston.<sup>202</sup> General Daniel Sickles refused to allow the punishment and issued a military order prohibiting the whip thereafter. Aldrich was a strong-willed racist who also believed in a conservative respect for the law of his state. He refused to acknowledge the subordination of state law to the authority of the military. He would be suspended from office a year later after he refused to enforce a jury order issued by the General commanding, E. R. S. Canby.<sup>203</sup>

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<sup>197</sup>See, e.g., 3 E.B. WASHBURN, MEMPHIS RIOTS AND MASSACRES, H.R. REP. NO. 39-101 (1st Sess. 1866); 2 ELIOT, NEW ORLEANS RIOTS, H.R. REP. NO. 39-16 (2d Sess. 1867); WILLIAM IVY HAIR, CARNIVAL OF FURY: ROBERT CHARLES AND THE NEW ORLEANS RACE RIOT OF 1900 (1976). For a brief general study of the codes, see THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965). DAVID WARDLAW & ARMISTEAD BURT, REPORT OF THE COMMITTEE ON THE CODE, OCTOBER 25, 1865 (n.p. n.d.) (copy on file in the South Caroliniana library). This is the first major document leading to the adoption of the South Carolina Black Code. It expressly preserved the right of a master in a master-servant relationship to “moderately correct” the servant.

<sup>198</sup>See *infra* notes 204-07 and accompanying text.

<sup>199</sup>WILLIAM A. GREEN, BRITISH SLAVE EMANCIPATION: THE SUGAR COLONIES AND THE GREAT EXPERIMENT 1830-1865, at 135 (1976).

<sup>200</sup>*Id.*

<sup>201</sup>*Id.*

<sup>202</sup>See generally THOMAS KENEALLY, AMERICAN SCOUNDREL: THE LIFE OF THE NOTORIOUS CIVIL WAR GENERAL DAN SICKLES 321-22 (2002); FRANCIS BUTLER SIMKINS & ROBERT HILLIARD WOODY, SOUTH CAROLINA DURING RECONSTRUCTION 57 (Peter Smith 1966) (1932).

<sup>203</sup>3 MESSAGE OF THE PRESIDENT OF THE UNITED STATES AND ACCOMPANYING DOCUMENTS TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE THIRD SESSION OF THE FORTIETH CONGRESS, H.R. EXEC. DOC. NO. 40-1, pt. 1, at 338 (3d Sess. 1868). The document contains the *Annual Report of the Secretary of War*, which includes the *Report of Brevet Major General E.R.S. Canby, Commanding Late Second Military District*. *Id.* at 337. See

It was within the context of growing hostility that the final acts in the Keyes case were played out. Following the commutation, Keyes was transferred to Delaware and brought before a U.S. District Judge.<sup>204</sup> The Judge issued a writ of habeas corpus to examine the imprisonment and ruled the trial by military commission illegal.<sup>205</sup> Keyes was freed, making a triumphant return to Anderson Court House where the populace greeted him with a large picnic.<sup>206</sup>

Keyes' case had one more act. It was investigated by a congressional committee which concluded that "unless substantial justice is done the laboring classes hereafter, and to the Union men and northern men who desire to go there to engage in business enterprises, no improvement in the state of affairs can reasonably be expected."<sup>207</sup> Market capitalism—"business enterprise"—defined the possibilities in the South. That meant recognition of the need for order, security, and stability of expectations. The place of labor, overwhelmingly former slaves, remained unsettled. Equality before the law for labor was the still unattained objective. The result of these aspirations was the shift away from the presidential form of Reconstruction that left initiatives to the former Confederates, and the emergence of a more radical Military Reconstruction that began in March 1867.

There were some signs, however weak, that Southern whites were prepared to move toward a more progressive legal order. The provost courts that heard most cases involving African Americans turned pending cases over to civil courts in October 1866, and white South Carolinians held civil courts down to the spring of 1867. General Sickles's report on this experience was optimistic: the superior courts, he wrote, showed a "conscientious respect for law,"<sup>208</sup> although he admitted that there had been some "irregularities."<sup>209</sup> A coroner's jury at Hilton Head concluded in one case that some freedmen had met their death "by means to the jury

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*also* 2 MESSAGE OF THE PRESIDENT OF THE UNITED STATES AND ACCOMPANYING DOCUMENTS TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE SECOND SESSION OF THE FORTIETH CONGRESS, H.R. EXEC. DOC. NO. 40-1, pt. 1, at 307 (2d Sess. 1867). The document contains the *Annual Report of the Secretary of War*, which includes another report by Canby. *Id.* at 299.

<sup>204</sup>3 F.A. PIKE, MURDER OF UNION SOLDIERS, H.R. REP. NO. 39-23, at 4 (2d Sess. 1867).

<sup>205</sup>*Id.*; see *United States v. Commandant of Fort Del.*, 25 F. Cas. 590 (D. Del. 1866) (No. 14,842).

<sup>206</sup>H.R. REP. NO. 39-23, at 4. John Pillsbury, an army surgeon, testified about Keyes' wartime activities as well as his membership on a provost court. *Id.* at 18-21.

<sup>207</sup>*Id.* at 5. General Daniel Sickles testified before a vital congressional investigating committee in January 1867. *Id.* at 10. The testimony was being taken as preparation for what became the Military Reconstruction Act of March 1867.

<sup>208</sup>3 MESSAGE OF THE PRESIDENT OF THE UNITED STATES AND ACCOMPANYING DOCUMENTS TO THE TWO HOUSES OF CONGRESS, H.R. EXEC. DOC. NO. 39-1, at 66 (2d Sess. 1866). The document contains the *Annual Report of the Secretary of War*, which includes the *Report of Major General D.E. Sickles*. *Id.* at 59.

<sup>209</sup>*Id.* at 67.

unknown.”<sup>210</sup> The “irregularity” was that the killers were on the coroner’s jury.<sup>211</sup> Nonetheless, Sickles’s report was optimistic as he noted that “tranquility and order have been restored under martial law” and that “[c]apital, enterprise, and population are coming from the [N]orth.”<sup>212</sup>

#### V. THE RADICAL TURN

Republicans swept the elections in the fall and moved with dispatch thereafter. By March 1867, they passed a Military Reconstruction Act that wiped out or delegitimized the provisional Presidential governments. The law then divided the South into five military districts, provided for the enfranchisement of black males, and imposed “political disabilities” on leading whites that removed them from Reconstruction until Congress removed the disabilities.

The army of occupation was at the center of this congressional phase of Reconstruction. During the early summer, the sole job was registration of those who were enfranchised under the Military Reconstruction Act. It was largely a ministerial undertaking. They would administer the oath required and keep lists of those eligible to vote on a proposed convention to draft a new state constitution. They did exercise some judgment because persons who sought registration could be challenged as not qualified or excluded. At the outset, General Sickles was the commander in the Second District, which included the Carolinas. He was replaced early by General E. R. S. Canby, who oversaw the registration. The District had a Bureau of Civil Affairs headed by A. J. Willard.

One of his earliest opinions concerned this question: What were sufficient grounds for rejecting a person from registration to participate in the election?<sup>213</sup> Willard’s approach was to categorize the reasons registrars had listed beside the name of persons challenged. The process, it was clear, was chaotic and needed organization. The result of the approach was a series of tables of reasons that were subdivisions of the two basic categories—sufficient and insufficient. This was followed by a brief, but intricate opinion by Willard. Among the insufficient reasons that appeared beside people’s names were “commissioners of roads, clerk of district court, held executive office, deputy marshal, marshal, clerk of state senate, members of secession convention . . . commissioner in equity, judge advocate, custom house officer . . . justice of the peace, officer patrol . . . [and so on].”<sup>214</sup> On the other side were a variety of facts sufficient to reject a person:

hiring horses to confederate soldiers . . . invested in confederate bonds,  
furnishing horses to rebellion by sale, encouraging men to enlist . . .

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<sup>210</sup>*Id.*

<sup>211</sup>*Id.*

<sup>212</sup>*Id.*

<sup>213</sup>Opinions of the Chief of the Bureau of Civil Affairs (on file with the United States National Archives, Record Group 393, Records of the Second Military District).

<sup>214</sup>*Id.*

encouraging war by speeches . . . Opposing Reconstruction in Private & Public violent Secesh . . . Convicted of hunting U. S. prisoners with dogs . . . bad rebel . . . voted for appropriation of \$10,000 for the widows and orphans of confederate soldiers.<sup>215</sup>

Table G under sufficient reasons was an interesting potpourri: “Could not take the oath, convicted of burglary, convicted of rape, convicted of murder, born in Africa, too old (over 100 years), insane, pauper, oath to Confederate government, disloyalty, publicly whipped, would not take off his hat to qualify or swear, Cherokee Indians, [and] Murdered two freedmen.”<sup>216</sup>

Willard’s opinion set forth some “general principles” so that there would be consistency throughout the District. The first principle was that when the name of an officer was used, it should be inferred that the office was held before the war. One of the more interesting “principles” concerned the use of felonies. “The commission of a felony,” he wrote, “is not ground of disqualification in itself. It is being convicted of felony in a court of competent jurisdiction that constitutes disqualification.”<sup>217</sup> Willard concluded with a list of offices that would be sufficient to reject a person if it was held before the war and the person thereafter engaged in rebellion.<sup>218</sup>

The result of the registration process was the registration in South Carolina of 123,056 people. The vote on whether a convention should be called to draft a constitution was this: 68,768 in favor, 2,278 opposed and 57,010 abstained.<sup>219</sup> Down to the summer of 1868, the military remained in control and acted with greater boldness than it had in its first phase that ended in October of 1866. Its activities can be followed in the final report by Canby to the Secretary of War on August 31, 1868.<sup>220</sup>

One of Willard’s opinions, for instance, involved racial discrimination by law. His opinion was a response to a question he received from Marion, North Carolina. The question was whether the state laws on marriage licenses was to be applied to blacks. His opinion was that

the civil rights bill as the Supreme law of the land supplied the defects of the laws of North Carolina in regard to proceedings where Blacks are

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<sup>215</sup>*Id.*

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>3 MESSAGE OF THE PRESIDENT OF THE UNITED STATES AND ACCOMPANYING DOCUMENTS TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE THIRD SESSION OF THE FORTIETH CONGRESS, H.R. EXEC. DOC. NO. 40-1, pt. 1, at 340 (3d Sess. 1868).

<sup>220</sup>*Id.* at 337. The Canby report should be used in conjunction with Willard’s opinions for the Bureau of Civil Affairs. See Opinions of the Chief of the Bureau of Civil Affairs (on file with the United States National Archives, Record Group 393, Records of the Second Military District).

concerned, and [no] instructions seem to be required to enable the blacks to claim the advantages of all laws relating to whites from officers acting under local law. The same is true of all restrictive legislation by virtue of the civil rights bill; it applies instantly to blacks without further legislation.<sup>221</sup>

Equality before the law—it was a heady policy generally opposed by white Carolinians, but it was adopted with firmness by the military leadership.

One of the most dramatic public confrontations over the notion of equality began as early as May 1867. It ended, in a sense, in October of that year. It involved what Canby considered the most important reform in the Second Military District, it involved the “modification of the jury system” in the Carolinas. Each state presented different problems. The social structure and mores differed a great deal, and the laws reflected that. North Carolina was filled with smaller farms and few huge plantations. South Carolina was a state with a slave system spread throughout and one of the wealthiest planter classes in the South along the coastal rice region.<sup>222</sup>

What Canby found was that “in North Carolina the qualification of a juror was determined by the possession of a freehold estate, and in South Carolina, . . . by the color of the citizen.”<sup>223</sup> Canby’s solution was to order the jury list to include all citizens “who were identified with the community in which they resided by the payment of taxes, and who were mentally and morally qualified for the performance of jury duty.”<sup>224</sup> The courts were “empowered to purge the jury lists of all persons who were personally unfitted by reason of mental or moral incapacity.”<sup>225</sup>

Generally, white South Carolinians groused about the jury order but it was in the hands of those who issued orders for the calling of jurors to act. Only one judge chose to openly resist, and his resistance led to his removal from the bench—that was Judge A. P. Aldrich, who had already had a confrontation with the military over the issue of whipping as a lawful punishment. He now claimed that he faced a

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<sup>221</sup>*Id.*

<sup>222</sup>The tasks the military faced were determined in part by the nature of slavery in the various divisions of the Carolinas. There is much literature on slavery and masters along the coastal districts. The following are reasonable starting points for the reader: PETER A. COCLANIS, *THE SHADOW OF A DREAM: ECONOMIC LIFE AND DEATH IN THE SOUTH CAROLINA LOW COUNTRY 1670-1920* (1989); STEPHANIE MCCURRY, *MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS, AND THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY* (1995); WILLIAM DUSINBERRE, *THEM DARK DAYS: SLAVERY IN THE AMERICAN RICE SWAMPS* (1996); *THE SOUTH CAROLINA RICE PLANTATION AS REVEALED IN THE PAPERS OF ROBERT F.W. ALLSTON* (J.H. Easterby ed., 1945); JULIE SAVILLE, *THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 1860-1870* (1994).

<sup>223</sup>H.R. EXEC. DOC. NO. 40-1, pt. 1, at 337.

<sup>224</sup>*Id.* at 338.

<sup>225</sup>*Id.*

conflict between Canby's jury order and his own official oath to uphold and defend the 1831 jury law of South Carolina.

Believing as I do that the present Congress is an usurping body, and that its [sic] attacks upon the co-ordinate departments of government, and the United States and State constitutions, are fast reducing the country to the condition of party vassalage, I cannot retain my self respect, conscientiously perform the obligations of my oath of office, and lend my aid to support and perpetuate the tyranny of which we complain.<sup>226</sup>

He concluded his defiant statement as follows: "The juries have been drawn, impaneled [sic], and summoned, in obedience to the jury law of South Carolina, whose judge I am. I am now ready to proceed with the call of the dockets."<sup>227</sup>

He was suspended from office, but he made a last dramatic appearance at Barnwell Court House on October 21, 1867. In a crowded courtroom, he read the relevant documents on the jury order, pronounced the order unconstitutional, and rose from his seat and announced that he gave up his seat "for the present," in "forced obedience" to Canby's order.<sup>228</sup> "The time is at hand," he announced, "when we will be relieved from the tyranny and insolence of military despotism."<sup>229</sup>

Drama was one thing, but for the present, South Carolina was on a course to the creation of a new government committed to equality before the law. Its foundation was in the Congressional Reconstruction laws of March 1867 and its supplements.<sup>230</sup> From March 1867 to the summer of 1868, the orders of the military would be the law of South Carolina: local courts would function but at the sufferance of the army commander, and military courts once again heard cases.

Possible ways to achieve equality before the law included an imaginative use of English common law norms. A striking illustration was a criminal case heard by a military tribunal in August 1867 at the military post in Newberry, South Carolina. Canby's report to the Secretary of War a few months later did not develop this case, but it was telling nonetheless. The defendant was B. J. Ramage who was the local agent for the Greenville and Columbia Railroad Company. The charge against him was a violation of a General Order that the federal Civil Rights Act of 1866 was to be the law in the Second Military District. Ramage violated the order when he refused to sell a first class ticket to Benjamin F. Randolph, a politically active African American who had been sent south by the American Missionary Association. He nettled some white South Carolinians with the demand for equality

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<sup>226</sup>*Id.* at 349.

<sup>227</sup>*Id.* at 350.

<sup>228</sup>2 MESSAGE OF THE PRESIDENT OF THE UNITED STATES AND ACCOMPANYING DOCUMENTS TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE SECOND SESSION OF THE FORTIETH CONGRESS, H.R. EXEC. DOC. NO. 40-1, pt. 1, at 307 (2d Sess. 1867).

<sup>229</sup>*Id.*

<sup>230</sup>FAIRMAN, *supra* note 182, at 253-365.

of rights—so much so that over a year after the Ramage case he was murdered by the KKK.<sup>231</sup>

In 1867, Randolph told Ramage that he “would claim it as a right” to buy a first class ticket under the military order.<sup>232</sup> Ramage refused. He was summoned to appear before a military tribunal where he pled guilty and read a statement. The rates and regulations of the railroad were governed by the order of his superior on the railroad, and he was but an agent. In October 1866, at the time that the first phase of military justice ended, the superintendent set up a rate schedule based on race and age. Ramage concluded his statement with a plea: “I would wish the tribunal to understand that my refusal to sell the said B. F. Randolph a first class ticket was not through malice or prejudice on account of caste or color nor to show a disposition to disobey orders [from the military] but simply,” in pursuit of instructions.<sup>233</sup> His agency defense did not protect him and no charges were leveled against his superior. Ramage was ordered to pay a fine or serve fifty days. The sentence was approved and then clemency was granted because Ramage did not intend to violate the military rule on equality. The case amounted to an application of English law on common carriers—such a carrier was required to “deal with its customers equally, [and] charge a single set of rates.”<sup>234</sup>

Progressive possibilities were surfacing during those vital months. Some are easily overlooked, partly because they did not survive the Reconstruction period, but they are revealing all the same. An example that derived from English landlord-tenant law was the remedy of distress for rent. This was a remedy that was not uniformly beloved among South Carolina judges before the war. Judge Elihu Bay, in *Youngblood v. Lowry*, for instance, was upset by this private remedy that allowed landlords to go onto rental property and seize and sell any property found there in order to cover rent due and still unpaid.<sup>235</sup> American states had generally abolished the remedy, but South Carolina law-makers, among the more conservative in the country, had left it intact. Distress for rent was but one of the self help remedies in their slave society; another was the right of recaption of fugitive slaves. That right was raised to the level of a federal constitutional right by the U.S. Supreme Court in *Prigg v. Pennsylvania*.<sup>236</sup> South Carolinians usually did not favor intrusion into

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<sup>231</sup>On Randolph see ERIC FONER, *FREEDOM’S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 175-76* (Louisiana State University Press rev. ed. 1996). Randolph was free born and educated at Oberlin in Ohio. He served as a Presbyterian minister and preached as a Methodist in 1866. *Id.*

<sup>232</sup>Proceedings of a Military Tribunal (on file with the United States National Archives, Record Group 393, proceedings of a military tribunal, U.S. v. Ramage, August 1867, Newberry, South Carolina, 1-10).

<sup>233</sup>*Id.*

<sup>234</sup>*Id.*

<sup>235</sup>*Youngblood v. Lowry*, 13 S.C.L. (2 McCord) 39 (S.C. 1822).

<sup>236</sup>*Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

rights claimed by slaveowners. An exception was the state prohibition on in-state manumission.<sup>237</sup>

The military leaders in South Carolina, however, did not favor self-help remedies like recaption and distress for rent. The first allowed the seizure of a person—it ended with the end of slavery. The second allowed the seizure of property in his possession. By General Orders No. 32, landlords were given a lien on the crop of tenants. Liens had to be enforced in courts so that the self-help remedy was in danger. Willard was formally asked for an opinion about the impact of the order on the distress for rent. The answer was that it repealed it.<sup>238</sup> Lest any doubts remain, the new radical government, established in 1868, passed a law on attachments. It was brief, stating, “Distress for non-payment of rent, as heretofore existing, is abolished.”<sup>239</sup>

One final reform I would like to mention that occurred under military rule in these years came in the area of criminal law. It did not occur with great fanfare, but it was a very important transformation in the common law of crimes nevertheless. It involved the law of burglary. Before the war, South Carolina clung to traditional law as much as possible, and burglary (often enough a charge against slaves) was a good example. Today, most people would answer that it is a crime against property, which (for the most part) probably reflects the current state of the law. As market capitalism spread, burglary became more and more to be seen as a property crime only. But, that does not capture the common law view of this crime.

Only two crimes were considered mixed offenses in that they were crimes against persons and against property, and they were seen as especially dangerous. Both crimes involved crimes against dwellings during the nighttime. The offenses were burglary and arson. Blackstone linked them in a chapter on “Offences against the Habitations of Individuals.”<sup>240</sup> The crimes had to be during the nighttime because the element of moment was the danger and the terror of nighttime invasions into a

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<sup>237</sup>*Youngblood*, 13 S.C.L. at 39; MORRIS, *supra* note 96, at 371-423. 13 WORDS AND PHRASES PERMANENT ED. 5 (1965) says the following of the distress for rent in arrears: It is one of the most ancient, as well as one of the most efficient, of the landlord’s remedies for the collection of rent. It is a right *sui generis*, belonging to the landlord whenever the relation of landlord and tenant exists. It is the right to distrain or levy upon all the goods upon the demised premises, whether those of the tenant or of a stranger . . . . It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure.

*Id.* See also *Prigg*, 41 U.S. 539.

<sup>238</sup>3 MESSAGE OF THE PRESIDENT OF THE UNITED STATES AND ACCOMPANYING DOCUMENTS TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE THIRD SESSION OF THE FORTIETH CONGRESS, H.R. EXEC. DOC. NO. 40-1, pt. 1, at 342-43 (3d Sess. 1868) (General Orders No. 32, May 30, 1867).

<sup>239</sup>Act of Sept. 24, 1868, No. 51, § 20, 1868 S.C. Acts 101, 105 (Spec. Sess. 1868). It was the last section of a long and intricate law adopted by the Congressional Reconstruction government.

<sup>240</sup>BLACKSTONE, *supra* note 33, at 220-28.

person's "castle." When James L. Petigru worked on a possible codification of the law of the state during the early years of the war, he did not recommend major departures from the common law.<sup>241</sup>

Elsewhere, however, burglary had been separated from arson and had become more and more a crime against property (not so much a crime against "habitation"). When the military considered the issue of jurisdiction between military tribunals and provost courts, it granted sole jurisdiction over murder, rape, and arson to the tribunals—burglary was not listed among those serious offenses.<sup>242</sup> For the moment,

<sup>241</sup>H.R. EXEC. DOC. NO. 40-1, pt. 1, at 343-44.

<sup>242</sup>*Id.* at 353. For a sample of crimes see the following table, supplied by Canby. *Id.* (Any disparity in numbers is due to the fact that some cases involved more than one defendant).

Statement of the number of trials by military commissions and other military tribunals in the second military district from January 1, 1867, to June 30, 1868.

| Crimes Charged.                                  | Cases Tried. |         | Guilty. |         | Not Guilty. |         |
|--------------------------------------------------|--------------|---------|---------|---------|-------------|---------|
|                                                  | Whites.      | Blacks. | Whites. | Blacks. | Whites.     | Blacks. |
| Murder                                           | 4            | 15      | 3       | 3       | 1           | 12      |
| Manslaughter                                     | --           | 3       | --      | 2       | --          | 1       |
| Arson                                            | 2            | 3       | 2       | --      | --          | 3       |
| Assault, intent to kill                          | 21           | 6       | 18      | 4       | 3           | 2       |
| Assault, intent to commit rape                   | 3            | --      | 3       | --      | --          | --      |
| Assault and Battery                              | 61           | 13      | 53      | 8       | 8           | 5       |
| Highway Robbery                                  | 4            | 1       | 4       | 1       | --          | --      |
| Burglary                                         | 5            | 4       | 5       | 4       | --          | --      |
| Larceny                                          | 43           | 55      | 38      | 47      | 5           | 8       |
| Riot                                             | 21           | 7       | 11      | 7       | 10          | --      |
| Malicious trespass                               | 8            | 7       | 4       | 5       | 4           | 2       |
| Concealing Stolen Property                       | 10           | 2       | 7       | 1       | 3           | 1       |
| Obstructing Railroads                            | 9            | --      | 1       | --      | 8           | --      |
| Perjury                                          | --           | 1       | --      | 1       | --          | --      |
| Holding illegal court                            | 1            | 8       | 1       | 8       | --          | --      |
| Selling Liquor to soldiers                       | 41           | 7       | 38      | 7       | 3           | --      |
| Selling Liquor without a license                 | 44           | 9       | 43      | 9       | 1           | --      |
| Distilling Liquor in violation of military order | 3            | --      | 2       | --      | 1           | --      |
| Preventing registration or voting                | 11           | 2       | --      | 2       | 11          | --      |
| Carrying concealed weapons                       | 54           | 27      | 50      | 23      | 4           | 4       |
| Miscellaneous                                    | 23           | 12      | 20      | 10      | 3           | 2       |

*Id.*

it aroused no loud public reaction. It was apparently a transformation whose time had arrived.

#### VI. CONCLUSION

By the end of the Reconstruction period, there had been significant changes in the law of South Carolina: the military had tried to establish a legal order in which everyone was entitled to security in a society resting upon legal equality. This had not been the measure of the first phase of Reconstruction during which the military was involved in the restoration of order. What was missing in the wake of Confederate failure was a clear commitment to equality. What filled the void left by the end of the Confederacy was a political murkiness of purpose, mixed with a measure of racism and a pragmatic effort to secure current crops. Military justice is a legitimate part of a legal order, but it is defined by its nature and by the demands upon it. It is the starkest form of legitimated force that exists because of serious threats to the continued existence of the state. It is necessary, in other words, as a matter of state necessity. Its bare purpose is to reestablish or maintain order in a disordered time. Its legitimacy is necessity and its necessity is defined by others. It is, in that sense, an instrumental violence that exists somewhere around the margins of a legal order. Because of its nature, it can be used and its necessity judged as moral or immoral, just or unjust. It can be used as an instrument to carry out policies of forceful uprooting of an “unjust” social order. That was the claim of those who ended the feudalism in the Scottish Highlands and those who ended racial slavery in the American South.

Under some historical experiences, it can also mean the “absolute destruction” of the people in rebellion. A prominent example was German military culture in a colonial world. Its suppression of the Herero uprising in Southwest Africa at the turn into the 20th century was in violation of then existing international law in its cruelty.<sup>243</sup> Arguably, the British suppression of the Mau Mau uprising in Kenya during the 1950s was also beyond the boundary.<sup>244</sup>

None of these samples occurred in historical vacuums, of course. Insofar as the American South at the end of slavery and the outset of Reconstruction is concerned, an intricate legal heritage defined part of the boundary around military justice. There was little time or space, however, for a careful and well-understood use of legal rules and traditions, especially for untrained military personnel who sometimes sat on the provost courts from day to day. Many of those who sat on the Military Tribunals did know law. The question is, what law? This question is followed by another: What did it matter in the work of the military in occupation? Sometimes those who sat on these courts wrung their hands in despair over the questions of what law, and with what affect? In some cases—*Gourdin v. Gourdin* to take one example—the court

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<sup>243</sup>See ISABEL V. HULL, *ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY* (2005).

<sup>244</sup>See DAVID ANDERSON, *HISTORIES OF THE HANGED: THE DIRTY WAR IN KENYA AND THE END OF EMPIRE* (2005); CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* (2005).

admitted that the laws relating to slaves before the war governed relationships and the interpretations of personal rights and duties. It then found an equitable way around it.<sup>245</sup>

Presidential Reconstruction began in the fall of 1865, within a legal world filled with notions about loyalty and the genuine worth of oaths. President Johnson used the military to administer the oaths of allegiance. Congress sought to punish treason through a confiscation of property. But there were limitations as well. Thaddeus Stevens, a Pennsylvania Congressman, believed that the Southern aristocracy had to be destroyed through the break up of large landholding tracts. The fragments would be distributed to Southern loyalists and Freedmen. That was too radical a dream for Northerners to support.<sup>246</sup>

Time also placed significant limits upon the possible ways open to lawmakers. The first session of the 39th Congress did not meet until December 1865. Until then, Reconstruction was a presidential prerogative. As time would tell, the new constitutions drafted and the provisional governments created left too much discretion in the hands of the defeated Confederates. Southern whites would have an opportunity to direct Reconstruction, but with Black Codes, riots, and unbending hostility to the specifics of the Northern war aims, the only likely result was a failure of self-Reconstruction. There is, moreover, evidence that whites used existing law to hold back the growth of significant "rights." An example is the March 16, 1867, report of E. W. Everson, Assistant Adjutant Inspector General.<sup>247</sup> He reported that the white magistrate at Edgefield told him that there was a "widespread strategy to refuse to issue warrants."<sup>248</sup> The excuse was that the "freedmen could not furnish the required security."<sup>249</sup>

South Carolina law still used the notion that the state action in cases of crime began with a private complaint leading to an arrest warrant. The law provided that the complainant had to provide security before a warrant of arrest would issue. The white magistrate showed Everson how it worked. His example involved Elijah Wilson, a white man, who slashed Bob Griffin, a freedman, from his ear to his nose with a knife. Griffin could not get a warrant of arrest because he could not provide security, so no case developed.<sup>250</sup>

What replaced the approaches of the early months was a range of legal and constitutional possibilities that included use of legal categories and legal notions as various as the common law rules on common carriers, landlord-tenant law, the

<sup>245</sup>*See supra* note 101.

<sup>246</sup>HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865-1901*, at 47 (2001).

<sup>247</sup>Letter from E. W. Everson, Assistant Adjutant Inspector General, to H. W. Smith, Brevet Lieutenant Colonel & Assistant Adjutant General (March 16, 1867) (on file with the United States National Archives, Record Group 393, vol. 84/118, 53-58).

<sup>248</sup>*Id.*

<sup>249</sup>*Id.*

<sup>250</sup>*Id.*

common law on domestic relationships, and statutory innovations. It all fell apart as those Southern whites, who were bitterly opposed, turned to violence. In the end, violence proved to be the effective solvent used to defeat efforts at Reconstruction. Southern whites also used extraordinary remedies, including *quo warranto*, *mandamus*, and impeachment.<sup>251</sup>

The end of Reconstruction involved an intricate interplay of legal rights and remedies with a bloody mix of racial violence. That is another story. What I have endeavored to address here is the role of the military in the first few years following the military defeat and surrender of the Confederacy.

Walter Benjamin, in his *Critique of Violence* noted that there was a “lawmaking character inherent” in violence.<sup>252</sup> Former Confederates understood that. They understood that violence also affirmed law. Violence, in other words, was a means, not an end in itself. It could sustain the destruction of an old legal order, or it could be used to turn away from progressive legal transformation. This is what happened in the late 1870s. With their victory over radical Reconstructionists in the elections and subsequent legal actions in 1876-1877,<sup>253</sup> South Carolina’s white conservative lawmakers tried to recapture a world lost in the massive bloodletting of the Civil War. Among the first acts adopted by the redemptionist state legislature were: “An

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<sup>251</sup>On the extraordinary remedies see HORACE G. WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS AND PROHIBITION, HABEAS CORPUS, CERTIORARI, AND QUO WARRANTO (Albany, W.C. Little & Co. 1880). An example of the use of one of these extraordinary remedies is the REPORT OF THE TESTIMONY IN THE CASE OF IMPEACHMENT AGAINST MONTGOMERY MOSES, JUDGE OF SEVENTH JUDICIAL CIRCUIT (Columbia, Republican Printing Co. 1876).

<sup>252</sup>Walter Benjamin, *Critique of Violence*, in 1 WALTER BENJAMIN: SELECTED WRITINGS 1913-1926, at 236, 240 (Marcus Bullock & Michael W. Jennings eds., 1996); see also BEATRICE HANSEN, CRITIQUE OF VIOLENCE: BETWEEN POSTSTRUCTURALISM AND CRITICAL THEORY (2000). These are contributions at a high level of abstraction. For a more immediate approach, one that is focused on law, see NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1992). There are also numerous memoirs by leading figures in the movement to oust radical Republicans and recapture power for whites. No one surpassed Benjamin Tillman in his boastfulness about the role of violence in bringing Reconstruction to an end. Tillman was a governor of the state, and later a United States Senator. Around the turn of the century Tillman brought out his own work: BENJAMIN TILLMAN, THE STRUGGLES OF 1876: HOW SOUTH CAROLINA WAS DELIVERED FROM CARPET-BAG AND NEGRO RULE: SPEECH AT THE RED-SHIRT RE-UNION AT ANDERSON: PERSONAL REMINISCENCES AND INCIDENTS (1909) (copy on file in the South Caroliniana Library). His opening remarks on the Hamburg riot were these: “Judge Aldrich told you last night that he could tell more about the Hamburg riot than I could because he would not have to criminate himself. As for that, I have nothing to conceal about the Hamburg riot. I told the republicans in the [U.S.] senate that we had to shoot negroes to get relief from the galling tyranny to which we had been subjected . . .” *Id.* at 14.

<sup>253</sup>See *Livingston v. Wells*, 8 S.C. 347, 365 (1877). It will provide a start to following the numerous and sometimes very intricate set of cases that shows beyond doubt that American “exceptionalism” is a myth.

Act to Restore the Remedy of Distress for Rent,”<sup>254</sup> “An Act to Prevent and Punish the Intermarrying of Races,”<sup>255</sup> and “An Act to Repeal an Act Entitled, ‘An Act to Regulate the Granting of Divorces’” (divorce had been impossible before Reconstruction, and it was now impossible again).<sup>256</sup>

Finally, two statutes read together reveal a great deal about the values and sentiments that were seething beneath the surface as the military tried to establish order and equality, the radical Reconstruction hope. The first law was passed in May of 1877. It repealed a law passed to deal with a facet of KKK violence: “An Act to Repeal an Act Entitled, ‘An Act for the Relief of the Widows and Orphans of Persons Killed Because of Their Political Opinions.’”<sup>257</sup> The second law was passed two years later, and I will end with this, “An Act to Provide Artificial Limbs for all Soldiers of the State who Lost Their Legs or Arms During Military Services in the Years 1861, 1862, 1863, 1864 and 1865.”<sup>258</sup>

The values of the old South had proven to be firm, the memories of honor strong, and the racial savagery as vigorous as ever. The importance of the conscious use of history, that is, of “memory,” emerged as a theme fairly early into the period of

<sup>254</sup> Act of Mar. 18, 1878, No. 474, 1878 S.C. Acts 511 (Reg. Sess. 1877-78).

<sup>255</sup> Act of Dec. 12, 1879, No. 5, 1879 S.C. Acts 3. (Reg. Sess. 1879).

<sup>256</sup> Act of Dec. 20, 1878, No. 591, 1878 S.C. Acts 719 (Reg. Sess. 1878).

<sup>257</sup> Act of May 23, 1877, No. 204, 1877 S.C. Acts 223 (Extra Sess. 1877). For the repealed law, see Act of Mar. 13, 1872, No. 161, 1872 S.C. Acts 206 (Reg. Sess. 1871-72). *See also* CHARLESTON NEWS & COURIER, May 5, 1877. In the judgment of the Courier the repealed law “was an unmitigated job, and gave excellent opportunities of turning a dishonest penny to the Radicals who manipulated the fund.” Actually, the repealed law was a striking change in South Carolina law. One of the sources for the notion that the victims of a violent political upheaval were entitled to some recompense was the response in London to the Lord George Gordon riots. *The Proceedings at large on the Trial of George Gordon, esq., in 21 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783*, *supra* note 18, at 485-652 (T.B. Howell ed., 1816). Gordon was tried for High Treason. The riots were among the most well-known of all riots in English history. CHARLES DICKENS, *BARNABY RUDGE* (New York, Harper 1875) (1841), is a novel about the Lord Gordon riots. The issue appeared in South Carolina when Willard issued an opinion for the Second Military District. Willard’s opinion in the Second Military District was on a claim for damages that her store absorbed during a riot in Charleston. The city government refused to provide her relief. Willard ruled that her claim be investigated to determine whether she “has sustained damages by violence at the hands of an unlawful assemblage of persons.” Opinions of the Chief of the Bureau of Civil Affairs (on file with the United States National Archives, Record Group 393, Records of the Second Military District).

<sup>258</sup> Act of Dec. 24, 1879, No. 184, 1879 S.C. Acts 186 (Reg. Sess. 1879). Perhaps even more revealing was a statute passed in December 1880. It required all persons elected to the General Assembly and all officers required to take a general oath before taking office, to take an additional oath. “I do solemnly swear . . . that I have not, since the first day of January, A. D. 1881, engaged in a duel . . .” Act of Dec. 24, 1880, No. 410, § 3, 1880 S.C. Acts 501, 502 (Reg. Sess. 1880).

radical Republican rule. On December 19, 1872, the *Edgefield Advertiser* published a piece summarizing a meeting of the Survivor's Association. The President of the association was General Wade Hampton, soon to be the state governor. The senior vice-president was General Kershaw, and the Secretary was A. C. Haskell, soon to be a member of the state Supreme Court. The purpose of the Association was to "collat[e] statistics and preserve[e] records of the past, and thereby furnish[] material for the preparation of the history of our people in which, at least, justice may be done the dead, and the living taught to know their deeds of valor and to revere their memories."<sup>259</sup>

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<sup>259</sup>EDGEFIELD ADVERTISER, Dec. 19, 1872. On memory in these years see DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001). See also Act of Jan. 31, 1882, No. 550, 1882 S.C. Acts 737 (Reg. Sess. 1881-82) ("An Act to provide for the preparation of rolls of troops furnished by the State of South Carolina to the army of the Confederate States and of the militia of the State in active service during the war between the Confederate and United States."). It provided for the collection of the names of all South Carolinians who fought for the Confederacy as well as a "brief history or sketch of each and every regiment, battalion, battery, or squadron" and so on. *Id.* at 737.