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## Criminal Sentencing in Antebellum America: A North-South Comparison

**David J. Bodenhamer\***

Abstract: Scholars often view the 19th-century emphasis on efficient and predictable justice as synonymous with the rise of the commercial-industrial state, and especially with urbanizing areas. An examination of the sentences assigned to white defendants convicted of crimes in two states of the antebellum United States casts doubt on this interpretation. Indiana was a northern, urbanizing, commercial-industrial state; Georgia was southern, rural, and agricultural. Both states operated with similar legal systems and criminal codes, although Georgia assigned sentencing authority to the judge and Indiana to the jury. A comparative analysis of sentences in the two states reveals: (1) Georgia sentences fell into a more narrow and predictable (hence »bureaucratic«) range than did Indiana sentences; (2) Indiana juries displayed no predictability in sentencing; and (3) both states developed »plea bargainings despite the wide discrepancy in sentencing patterns. This latter finding contradicts the traditional view that plea bargains were a late-19th century innovation.

Over the past decade historians have exhibited considerable interest in early nineteenth-century attempts to reform criminal justice. Most of this research has detailed the shift from retributive to reformatory justice and has focused on the development of the penitentiary, the revision of criminal codes, and the various efforts to abolish the death penalty. Traditionally, scholars have explained these changes as the consequence of the liberal-democratic ideas unleashed by the American Revolution.(1)

Other historians challenge this view and interpret the changes in criminal justice in terms of modernization theory. In the United States modernization is usually synonymous with the commercial-industrial city, a development associated with the northern states. Dominant social values

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in modernizing areas are order, predictability, and security of property. These concerns undoubtedly reflect the nature of the urban environment, with its social stratification, cosmopolitanism, and anomie. Because traditional structures of authority are weak or non-existent in the city, law must control threatening behavior. So in modern societies, the criminal justice system concerns itself with prosecuting crimes that threaten order and property and attempts to ensure predictability and efficiency in punishment. It also relies heavily on negotiated pleas and sentences, or so-called »plea bargaining«.(2)

Most often the modernization argument draws support from the decline of moral-order offenses and the concurrent rise of property crimes in urbanizing areas during the first half of the nineteenth century. Few scholars would dispute this general trend, yet by itself this evidence is insufficient. There have been few comparative studies on the differences between urban and rural areas and virtually no careful examination of criminal sentencing, one of the key factors in any attempt to ensure efficient, predictable punishment.

This paper examines the sentences assigned to white defendants convicted of crimes in two antebellum states, one midwestern (Indiana) and one southern (Georgia). There are several reasons for the choice of these locales. Both states experienced similar demographic and political development; both adopted in large measure the reform agenda of the early nineteenth century; and excellent data exist on the criminal justice systems - state and local - of each area.(3) For this study, there were two important dissimilarities between the two states. In terms of economic development, Indiana embraced free-market capitalism, while Georgia maintained a precapitalist slave system with some market-oriented features. The most striking difference involving criminal process concerns the responsibility for sentencing. In Georgia, the trial judge had sole authority to assign the penalties allowed by law; the jury exercised such power in Indiana.

For purposes of comparison, this study explores sentencing patterns only for white felons. In Georgia, a separate court tried slave defendants under a special code; and free black defendants in both states were too few to establish any meaningful conclusion. Among the questions asked are: 1. What was the purpose of punishment? 2. Who had the power to sentence, and what does this imply about the system of criminal justice? 3. What were the statutory limits on the sentencing power? 4. How did actual sentences compare with these statutory boundaries, and to what extent did they achieve the state's aim in punishment? 5. Did the defendant play any role in the sentencing process (i.e., did plea bargaining occur)?

Several types of sources provide answers to these questions. Legislative debates, official state reports, and private correspondence suggest the intended purpose of punishment; session laws outline the sentencing process

and its statutory limits; and prison records and trial court minutes yield valuable information on the sentences actually imposed. A caveat is necessary, however. Antebellum trial records usually do not reveal particular information about the crime before the court, nor do they provide information about the socio-economic status of the defendant. Without such evidence, the historian must refrain from making judgments about the justice of individual sentences.

### **Purpose of Punishment**

By the mid-eighteenth century reformation had replaced retribution as the goal of an enlightened criminal law. This change in the theory of punishment owed much to the Italian scholar, Cesare Beccaria, whose treatise, On Crime and Punishment, became the standard for many post-Revolutionary reforms of punishment. Among his many prescriptions for achieving a rational and humane criminal process, Beccaria urged that punishment be strictly limited, proportionate to the crime, and inflicted with speed and certainty.(4) The Revolutionary generation took this lesson to heart and replaced inhumane features of their legal system with rational laws and salutary punishments. A belief that such reforms would control crime more effectively led to vigorous efforts in the early republic to limit or abolish the death penalty and to develop institutions which would reform offenders.(5)

Throughout the antebellum years Hoosiers (citizens of Indiana) publicly and privately declared that reformatory principles must guide the criminal process. The state's first constitution enjoined »cruel and unusual punishments« and required that all penalties »be proportioned to the nature of the offense.« (6) Over thirty years later delegates to a second constitutional convention overwhelmingly endorsed, and voters ratified, a section that the penal code be »founded on principles of reformation, and not vindictive justice.« (7) Juvenile offenders in particular, the legislature decided the next year, must »be treated with humanity and in a manner calculated to promote their reformation.« (8)

Private citizens also expressed support for a legal system which acted to redeem malefactors. It was in society's best interest, wrote a prominent resident of Marion County, to show a »spirit of forgiveness.« When laws were based on arbitrary and sanguinary principles, »then the same feeling of murder and revenge would rule in the breast of its lowest members.« (9) This sentiment found voice in numerous essays and petitions, especially in the 1830s and 1840s, during legislative debates on proposals to abolish the death penalty. Declaring that »we live in an age ... of Reform,« a group of Union County citizens petitioned for criminal laws that »shunned the Spi-

rit of revenge and retaliation« and sought instead to restore offenders to society.(10)

The law of criminal punishment in Indiana reflected this reformist impulse, although incompletely. Soon after entering the Union, legislators abandoned the territorial practice of whipping in favor of confinement in a penitentiary modeled on the Auburn plan of New York. On the other hand, the death penalty survived repeated attempts to abolish it; and despite a constitutional mandate, efforts to establish houses of refuge for juveniles and females failed to gain legislative support until the 1860s.(11)

The law of criminal punishment in antebellum Georgia also responded to reform efforts, although with somewhat different results. For example, the state established a penitentiary at Milledgeville in 1816, only to abandon it for a brief time in the 1830s. Even when in use, the reform of felons appeared to be secondary to their removal from society. Nor was the campaign to abolish the death penalty as strong in Georgia. But the Beccarian influence on the criminal code was more explicit and more pronounced than in Indiana. This influence was especially apparent in the lengthy critique of the state's first criminal code, which James McPherson Berrien made in 1817 in response to a legislative mandated 12)

Berrien, then a superior court judge, took his task seriously; his report was lengthy and detailed, treating every section of the code in turn. He directed some of his most severe criticism at the legislature for its incomplete reform of the law of punishment. In framing the code, he wrote, the legislature had followed Beccaria's admonition to reduce the severity of punishment, but it had done little to make puniton more certain. The central problem was that the judge determined the sentence for some crimes, while for similar offenses the jury fixed the extent of punishment. This divided responsibility introduced inconsistency into the criminal process, Berrien argued, and ultimately it destroyed the redemptive features of the penal code.(13) This critique evidently had a desired effect: in 1818 the legislature revised the code along the lines of Berrien's suggestions.

### **The Sentencing Authority**

As noted above, Indiana and Georgia differed in their assignment of sentencing authority. Indiana law made jurors responsible for fixing the sentence in most non-capital trials; the judge determined punishment only when the defendant admitted guilt or when the defendant, with the consent of the prosecutor, submitted his case to the court for judgment^ 14) The decision to vest such authority in the jury was consistent with other provisions of the state's statute and appellate law. In a practice which ran counter to other antebellum states, Hoosier juries had sole po-

wer to decide law and fact in criminal trials. Lawmakers and jurists declared repeatedly that such power properly belonged to the people, and in a remarkable decision in 1857, the state Supreme Court ruled that jurors even had the right to interpret constitutional law.(15)

In Georgia, the judge alone exercised the power to sentence in cases »where the term of punishment. . . (was) discretionary,« even though the code admonished him to pay »due respect to any recommendation which the Jury may think proper to make....« The judge also had the right to commute a death sentence to life imprisonment whenever the conviction rested solely on circumstantial evidenced 16)

### Statutory Boundaries

Sentences had to fall within limits set by statute law, but within those boundaries the judge or jury exercised considerable discretion. Horse theft, for example, exposed the Indiana criminal to a penalty which could range from 2 to 14 years in the state pen plus a fine up to \$1,000; punishment for the same offense in Georgia ran from 6 to 14 years. Although there was wide latitude in the length of a sentence, the legislature prescribed the type of punishment for each crime. Thus, a conviction for capital murder necessarily brought a sentence of death by hanging, and confinement for some minimum term in the state penitentiary was required for other felonies.

Both Indiana and Georgia law allowed punishment to vary within legislatively mandated limits, but striking differences existed in maximum sentences in each state. Georgia set an upper limit of 5 to 7 years for most felonies against persons or property; only rape, mayhem resulting in loss of a tongue, and horse-stealing carried the potential of a longer sentence. Indiana law, on the other hand, established 21 years as the maximum sentence for most crimes against persons and 14 years for crimes against property. Unlike Georgia, these prison terms could be accompanied by fines not to exceed \$1,000.

Nothing illustrates the greater latitude given to Indiana juries better than the statutory penalties for manslaughter and robbery. A conviction for voluntary or involuntary manslaughter in Indiana brought a sentence from 2 to 21 years; in Georgia, voluntary manslaughter drew terms from 2 to 4 years and involuntary manslaughter from 1 to 3 years. Robbery in Indiana placed the defendant in jeopardy for a term of 2 to 14 years, while the same crime in Georgia carried a maximum penalty of 5 or 7 years, depending on the degree of force used by the robber.

It is unclear why such wide variance existed in the statutory punishments of the two states. But there is no evidence that lighter penalties in

Georgia stemmed from a lesser concern about crime or its consequences. An opposite conclusion may be more accurate. Georgia lawmakers evidently took to heart the lessons taught by Beccaria and other liberal reformers and set out to increase the certainty of punishment by reducing its severity.(17)

More puzzling than Georgia's lesser penalties is the wide discretion given to Indiana juries. There is no direct evidence on this question, but it may have represented an attempt to give legal substance to the ideology of reform by allowing jurors to match the punishment to the circumstances of the offense and the character of the offender. Even so, there was danger of an abuse of power in such a system, as John McPherson Berrien noted in his critique of a similar, though more attenuated, feature in Georgia's code of 1816. Such authority in the hands of twelve individuals, he warned, would end not in a rational correspondence of crime and punishment but rather in a compromise on some arbitrary term in order to discharge a burdensome duty. This result would make illusory any claim that the aim of punishment was to redeem the wayward individuals 18)

### **Sentencing Patterns**

Regardless of the statutory bounds of punishment, and the reasons for their placement, it is important to know the actual sentences given to convicted defendants. In this study, two sources - prison records and minute books from trial court - yield such information.(19) Prison records disclose valuable data in convenient form: the central register of inmates lists the crime, sentence, time actually served, and certain socio-economic characteristics of the criminal - age, nativity, county of residence, occupation, and at times, level of education. This information enables the historian to determine the mean, median, and range of sentences for those crimes which ended in prison terms, and some things about the way personal characteristics of defendants might have influenced the sentences they received. Prison data are limited in at least two ways, however. The registers disclose none of the circumstances of the crime itself, nor do these records reveal anything about the trial which produced the conviction.

Local court records provide the glimpse of the criminal process which prison books ignore. Although this information varies by state and even by county, the minute books reveal the legal action, or lack of action, taken on every felony. Sometimes, as was true in Indiana, the data are skimpy and provide only a formulaic record of the case. The minute books of Georgia, on the other hand, often contain an extensive transcript of the testimony and other evidence in addition to basic trial data. This was espe-

cially true when the defendant appealed his conviction. But even the best minute books list only the defendant's name. To discover the class or status of the criminal, the historian must consult other records - census schedules, tax rolls, city directories and the like. Still, when used together, trial documents and prison registers reveal much information about the sentencing practices of local courts.

### **Sentencing Patterns in Antebellum Indiana and Georgia**

For the period 1830 to 1860 most convicted felons were sentenced to terms in the state prison; by definition, a lesser sentence meant that the crime was a misdemeanor. Of course, the vast majority (75 percent) of all felony indictments in both Indiana and Georgia never came to trial; and 25 percent of the cases carried to judgment resulted in verdicts of not guilty or guilty of a misdemeanor. To be found guilty of a felony, however, meant a prison term and, in Indiana, a fine, unless the offense was capital and thus required the death penalty.

Surprising similarities and differences existed in the sentencing patterns of the two states, depending on the type of crime involved. The weighted average sentence for property crimes<sup>(20)</sup> during the 30-year period was 3.4 years in Indiana and slightly over 4 years in Georgia. But the relationship between these two means was not constant. In the 1830s, the average sentence for property crime in Georgia was 3.24 years; by the 1850s this figure had risen by eleven months to 4.13 years. Conversely, Indiana imposed somewhat stiffer sentences in the 1830s than in the 1850s, with the highest average sentence occurring in the 1840s (Table 1).

A breakdown of sentences into discrete groups helps to explain the higher average in Georgia. There, almost 7 of 10 sentences (65.7 percent) fell within a range from 3 to 5 years, while over one-half (52.9 percent) of all prison sentences for property crimes in Indiana were for 1 to 2 years (Table 2). This pattern held constant for all three decades in Georgia and for two of three in Indiana. Only in the 1840s did the number of property offenders in the lowest category (1-2 years) slip below 50 percent.

The lighter sentences imposed by Indiana juries for property crimes is somewhat surprising. Given recent arguments by legal historians, especially William Nelson, that antebellum criminal law placed a greater emphasis on the protection of property, then we might expect longer, not shorter, prison terms for Hoosier felons.<sup>(21)</sup> Indeed, the use of a low dollar value (\$5.00) to demarcate grand and petit larceny and the high maximum sentences allowed under Indiana law would suggest that Nelson is correct. So it is surprising to discover that the typical prison term was briefer in Indiana, an emerging commercial state, than in Georgia. And had it not



been for the imposition of terms over 10 years in 4 percent of all sentences, the average confinement would have been even shorter.

Local court records illustrate the differences in sentencing patterns even more dramatically than do the prison registers. In Marion County, Indiana, site of the state capital and an important midwestern commercial center, the average prison term for larceny was 2.5 years, less than the state-wide average by almost one full year. But the same crime drew an average penalty of 5.5 years in Muscogee County, Georgia (Columbus), and almost 4.5 years in Bibb County (Macon). What caused the difference? Certainly not a higher level of economic activity or greater population density - two variables which might have resulted in stiffer sentences - because Marion County was larger and more economically dynamic than either of the southern counties. Nor does the age or occupation of criminals explain the difference. The age profile was very similar in all three counties.(22) Moreover, 87 percent of the property felons from the Georgia counties claimed respectable occupations - 52 percent were craftsmen or professionals - while 41 percent of Marion County's criminals were listed as laborers. Any attempt to attribute lower sentences to the presence of felons from a higher social class does not find support in the data.(23)

When sentences for violent crime are compared(24), the different patterns of the two states become more pronounced and more difficult to explain. By all accounts, the South was the most violent region of the nation; indeed, Georgia courts handled almost twice as many prosecutions for violent crimes than did their counterparts in Indiana.(25) But Hoosier juries sentenced these criminals to far longer sentences on the average-and imposed a stiffer median sentence - than did Georgia judges. For the antebellum decades, the mean sentence for violent offenders in Indiana was 8.2 years compared to 3.6 years in Georgia. Moreover, the Georgia mean for each decade from 1830 to 1860 was within a narrow three-month range of the 30-year average, whereas the Indiana figure stood at 7.82 years for the 1830s, dropped slightly to 7.4 years in the 1840s, and climbed to 8.5 years in the 1850s (Table 3).

These averages must be interpreted with caution. After all, 4 or 5 years was the maximum punishment for most violent crimes under Georgia law; in Indiana, the maximum was 14 or 21 years, depending on the offense. Thus, a longer average term would be expected in the Hoosier state. But what is interesting is that one-half of all sentences for violent crimes in Georgia fall into the 3 to 5 year bracket, and only 1 of 10 offenders received terms over 6 years. By contrast, 53.5 percent of all violent felons in Indiana served terms of six years or more. Moreover, one in every six such Hoosier inmates received life imprisonment; in Georgia, only 3 in 100 did (Table 4).

It is tempting to attribute the difference in penalties to the southerner's alleged tolerance of violence. To be sure, the rather limited punishments

prescribed by the Georgia legislature lends support to such an interpretation. But other evidence (grand jury reports, legislative debates and private correspondence) reveals that Georgians expressed great concern about the impact of violence on their society, and they demanded that violent criminals receive a just measure of punishment.(26) It is also difficult to reconcile the image of the tolerant southerner with the frequent resort to the gallows. Although no register exists for whites who suffered death for their crimes, it is noteworthy that Bibb and Muscogee counties sentenced 19 men to hang during a 30-year period.(27) Finally, the spread between the sentencing means in Indiana and Georgia disappears when only urbanizing counties are compared. Marion County juries imposed an average punishment of 4 years (median: 3 years) in the state pen, while Bibb and Muscogee judges levied terms which averaged 4.45 years (median: 4 years).

As was the case with criminals convicted of property offenses, socio-economic data do not explain adequately the sentencing patterns for violent crimes. Both the average age at time of confinement (32.7 years in Indiana, 31.5 years in Georgia) and the distribution of inmate ages were similar. It is more plausible to argue that considerations of social class influenced sentencing decisions, although aggregate data support this only in part. Almost three-fourths (73.8 percent) of the violent felons in the Indiana prison were laborers, a figure which suggests that Hoosier juries might have imposed longer sentences in an effort to control this dangerous class.« (28) Yet in Georgia, where average sentences were significantly lower, almost 14 percent of violent criminals listed no occupation. Although this does not disprove any class-based interpretation of the practice in Indiana, it casts doubt on the efficacy of this as the only explanation of sentencing decisions.

The different location of the sentencing authority might explain the similarity of punishment for property felons, as well as the dissimilarity for violent criminals. Judges determined the sentence in Georgia, and except for crimes which attracted community attention, they undoubtedly came to view their function as routine or administrative. In most cases, there was little to distinguish one felony from countless other serious crimes which came to trial during the judicial tenure. Thus, it might be expected that the judge would impose similar penalties for similar crimes.

The same conclusion cannot be drawn for states like Indiana where juries determined the extent of punishment. Jurors had scant experience with criminal trials. While there was no limit on the number of times a citizen might appear on the venire, most jurors served only for one court session. Also, the liberal number of challenges permitted defense or prosecution attorneys decreased the number of times an individual juror sat on a criminal trial. Add to this the reliance in the 1840s and 1850s on

bystanders at court to serve as jurors, and it seems likely that for most jurors each case was unique, each crime was atypical.(29) It is also probable that jurors were tempted to assess a harsh penalty as a way of expressing community outrage at offense or offender, or conversely, to soften a punishment when the defendant clearly violated a law, but did so for a reason justifiable by community standards.

If this interpretation is correct, then we should expect to find more variance in sentencing by the jury than by the judge. A survey of sentences for specific crimes suggests that this was indeed the case. With few exceptions, Georgia judges appear to have imposed similar sentences for similar crimes. They had begun to administer criminal justice in a bureaucratic fashion. Such was not the case in Indiana, where there were few routine sentences. For example, the prison register for 1845 listed four inmates convicted of rape or attempt to rape. (The statute law defined these as separate crimes but provided identical penalties of 2 to 21 years for each.) A mulatto received the maximum sentence of 21 years for an attempted rape, while a black man from the same county was sentenced to 5 years for the same offense. Vastly different terms assigned to two whites serving time on manslaughter convictions make the point even more dramatically. In one instance the sentence was 10 years; for another, 2 years. Listed in a column headed »cause as assigned by themselves for commission of offense,« the inmate with the longer sentence had written »unintentional«; the other inmate claimed to have acted »in defense of his family.«

These examples, and others like them(30), must be interpreted cautiously because circumstances of the crime are unknown, as are the age, sex, and social status of the victims. But the existence of such widely varying sentences lends credence to complaints by editors and others that jurors assigned punishments capriciously and did not attempt to match the sentence to the severity of the crime.(31)

### **Plea Bargaining**

Almost without exception, legal historians have concluded that the plea bargain developed in response to the demands placed on the criminal justice system by late nineteenth and early twentieth century population growth, especially in urban areas.(32) So an unexpected finding of this study is that plea bargaining occurred in the courts of antebellum Georgia, and while the evidence is not as strong, it almost certainly existed in Indiana as well.

It is not easy to show plea bargaining at work; such agreements between prosecutor and defendant rarely appear in the formal court record. But most legal scholars recognize that a change of plea from not guilty to

guilty, especially guilty of a lesser crime, signals that the parties to the case reached some agreement on its disposition. In the four Georgia counties surveyed, this change of plea occurred in 12 percent of all felony trials; and in the great majority of these cases the defendant pleaded guilty to a lesser crime.

A few examples are instructive here. In July, 1848, Augustus N. Hargrove was indicted in Murray County for stabbing a man in a barroom brawl. A plea of not guilty at the arraignment gave way to a confession of guilt to the lesser charge of assault and battery. Conviction of this misdemeanor brought a fine of \$100 and costs, but Hargrove had avoided a term in the state prison.(33) The next term witnessed the indictment of William Percy for assault with intent to murder and a plea of guilty to simple assault. The fine was 6 1/4 cents.(34) Other Georgia counties accepted the same practice. In November, 1852, Thomas Stubblefield was indicted in Muscogee Superior Court for assault with intent to murder, but he pleaded guilty to assault and battery and escaped with a slight fine.(35)

There is little doubt that the judge knew of such agreements between prosecutor and defendant. Indeed, in some cases the judge may have set the stage for a negotiated plea by signaling his willingness to impose a light sentence or to dismiss other charges against the defendant. The extent of judicial involvement is revealed in an entry in the Bibb County minute book for 1846. There the judge promised to treat the defendants leniently if they would admit guilt and promise to refrain from further Sunday openings of their tipping houses.(36) On other occasions, judges arranged for arbitration after an indictment had been issued in an effort to keep the case from reaching trial.(37)

The evidence from Indiana is not as full or as explicit as that from Georgia - there were fewer cases where defendants switched pleas to guilty, for example - but court records suggest that prior agreement occurred in some cases, especially for misdemeanors. A typical case involved a plea of guilty to some indictments in exchange for an acknowledgement by the prosecutor that he would not pursue other indictments against the defendant. In a letter requesting a pardon for a Switzerland County liquor dealer, the petitioning citizen noted that »there was 74 indictments against him, I was present in Court, and he came and voluntarily pleaded guilty to 20 of these indictments upon the prosecutor not pressing the balance.« (38)

Prior agreement also occurred in felony cases. The Lafayette (Ind.) Journal reported in June 1855 that four men had been convicted of the murder of one Cephus Farenbough. Two of the defendants pleaded not guilty, went before the jury, and received the death penalty; the remaining two defendants confessed their guilt and the judge sentenced them to life terms in the state penitentiary. »The public are awaiting with considerable interests the paper remarked,« to know the reason which induced the prosecuting attorney to allow the milder punishments ....« (39)

Guilty pleas were sometimes the result of obvious bargaining. But in Indiana many defendants pleaded guilty with no overt prior arrangement. The extent of this practice is surprising. Only 35 percent of all misdemeanants who came to trial in Marion County Circuit Court chose to contest the charge. For moral-order misdemeanors (liquor-related offenses, gaming, etc.) over 90 percent of defendants admitted their guilt. Of course, the figure was much less in trials for felony crimes. Only 8 percent of these defendants pleaded guilty from 1823 to 1860, with most of those pleas coming in the 1850s.

It is not easy to know what induced people to confess their guilt, but most defendants surely expected lighter, or at least more consistent, treatment from the judge in return for their plea. Milton Neumann has called this expectation »implicit bargaining» (40). In other words, defendants believed that they would be better off if they plead guilty than if they contested the indictment and lost. This was not an unrealistic assumption in Indiana, given the inconsistent sentencing patterns of Hoosier juries. The range of sentences assigned by juries in similar cases was much greater than the range of penalties assigned by the judges.

## Conclusion

Indiana and Georgia represent two models of economic development and two stages of modernization during the antebellum decades, yet each state adopted the criminal justice reforms characteristic of the United States during the first half of the nineteenth century. Reformation, not retribution, was the goal of punishment. Sentencing patterns, both in statutes and in practice, were consistent with the desire to redeem the miscreant and return him to society. Even when the law permitted lengthy sentences, most felons served only a few years in prison.

The key difference in criminal process between the two states was in the sentencing authority. Indiana gave wide latitude to the jury to establish an appropriate sentence within statutory bounds; Georgia reserved this power for the judge. The result was shorter prison terms for property crimes in Indiana, a finding not expected for a state with a vigorous market economy, and briefer confinement for violent crimes in Georgia, an expected outcome that is offset in large measure by the southern state's more frequent resort to the gallows.

More striking is the wide variance found in the sentencing patterns in Indiana and the much smaller range discovered in Georgia. Juries may have embodied popular justice, but they were also unpredictable and more likely to be swayed by the unique facts and local circumstances surrounding each case. Judges, even when elected, were much more even-handed

in the sentences they awarded for similar crimes. Yet regardless of which agent was responsible for sentencing, plea bargaining, at least implicit agreements, developed in both states well in advance of the time most scholars assign for its emergence.

Criminal justice in the antebellum United States operated within boundaries that varied from state to state and, as a result, reflected local circumstances and concerns. Yet despite the marked dissimilarities in the economic organization of the separate regions and even in the location of the power of punishment within the criminal process, the character of justice in the early republic was more alike than different. The American Revolution unleashed a reform ideology that shaped the administration of criminal justice in profound ways, often in a manner not consistent with theoretical understandings about the relationship of the law to a society's fundamental social and economic structure.

### Notes

1. Representative works are **David J. Rothman**, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston, 1971); David Brion Davis, »The Movement to Abolish Capital Punishment in America, 1787-1861,« *American Historical Review*, 63 (Oct. 1957), 38-43; Michel Foucault, *Discipline and Punish* (New York, 1977).
2. A discussion of criminal justice and modernization **may be found in** Michael Hindus, »The Social Context of Crime in Massachusetts and South Carolina, 1760-1873: Theoretical and Quantitative Perspectives,« *Newberry Papers in Family and Community History* 75-3 (September 10, 1976), 3-6. Also see Marc Galanter, »The Modernization of Law,« in Myron Weiner, ed., *Modernization: The Dynamics of Growth* (New York, 1966), 153-65. For the impact of modernization on the antebellum United States, see Robert D. Brown, *Modernization: The Transformation of American Life, 1600-1865* (New York, 1976).
3. The **local court data** are contained in the following **works by David J. Bodenhamer**: »Law and Disorder on the Early Frontier: Marion County, Indiana, 1823-1850,« *Western Historical Quarterly*, 10 (July 1979), 323-36; »Law and Disorder in the Old South: The Situation in Georgia, 1830-1860,« in Walter J. Fraser and Winfred B. Moore, Jr. (ed.), *From the Old South to the New: Essays on the Transitional South* (Westport, Conn., 1981), 109-19; »The Efficiency of Criminal Justice in the Antebellum South,« *Criminal Justice History: An International Annual* (1983), 81-95. Also see Bodenhamer, *The Pursuit of Justice: Crime and Law in Antebellum Indiana* (New York, 1986).

4. Cesare Beccaria, *On Crime and Punishment*, trans. Henry Paolucci (Indianapolis, 1963), 43.
5. Rothman, *Discovery of the Asylum*, 59-61.
6. Constitution of 1816, Article 1, sections 15 and 16.
7. Constitution of 1851, Article 1, section 18.
8. Indiana, Revised Statutes (1852), I, 347.
9. Samuel Merrill, »Ought the Executive of a State to Possess the Power of Pardoning Criminals?« (n.d.) in Samuel Merrill Papers, Indiana Historical Society Library.
10. »Resolution of Citizens of Union County to Hon. James A. Whitcomb^ in Governor's Correspondence (Whitcomb), Division of Archives and public Records, Indiana State Archives.
11. For a more complete discussion of reform efforts in Indiana, see David J. Bodenhamer, »Criminal Punishment in the Age of Jackson: The Limits of Reform in Antebellum Indiana,« *Indiana Magazine of History*, 82 (Dec. 1985), 339-55.
12. John McPherson Berrien to Governor of Georgia, Sept. 15, 1817, in Charles Haynes Andrews Papers, Southern Historical Collection, University of North Carolina-Chapel Hill.
13. Ibid.
14. Indiana, Revised Laws (1843), 995; Revised Statutes, II (1852), 377. In capital cases, the death sentence followed automatically upon a guilty verdict.
15. *Lynch v. State*, 9 Ind. 541-42 (1857).
16. Oliver H. Prince, *Digest of the Laws of the State of Georgia* (Athens, 1837) , 661-62; Thomas R.R. Cobb, *Digest of the Statute Laws of Georgia* (Athens, 1851), 837-38.
17. The Old South, including Georgia, participated in the republican reforms which resulted in reduced punishments and the establishment of the penitentiary. Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the 19th Century South* (New York, 1984), 34-72.
18. Berrien to Governor, Sept. 15, 1817.
19. For Indiana, the following sources in the State Archives and/or Historical Society Library yielded data on sentences: Report of the State Visitor (1824-1860); Report of the Keeper of the State Prison (1825-1860), which includes a register of convicts; Marion County Circuit Court Minute Books, 1823-1860; Marion County Court of Common Pleas Dockets, 1852-1860. For Georgia, the study used superior court minute books from Bibb, Muscogee, Liberty and Murray counties, in addition to the Central Register of Convicts, 1817-1860. All Georgia sources are found in the Georgia Department of Archives.
20. This study defined property crimes as convictions for robbery, burglary and larceny. Sentences for these crimes were weighted according to the frequency of the crime during the reporting period.

21. William E. Nelson, »Emerging Notions of Criminal Law in the Revolutionary Era: A Historical Perspectives New York University Law Review, 40 (May 1967), 452-66.
22. Mean age of property defendants in Bibb and Muscogee counties was 28.3 years; in Marion County, 29.2 years.
23. This finding may change somewhat when individual sentences are correlated with the socio-economic characteristics of individual offenders.
24. The violent crimes used in this paper are: murder; manslaughter (voluntary and involuntary); assault and battery with intent to kill, rob, or rape; mayhem; rape; stabbing. As was the case with property felonies, these crimes were weighted to reflect their frequency in the prison register.
25. For a discussion of the legal response to violent crime, see David J. Bodenhamer, »Violence, Law, and Society in the Old South,« American Studies Association, Memphis, Nov. 1981.
26. Ayers, Vengeance and Justice, 54-55.
27. See »Violence, Law, and Society in the Old South« for a discussion of use of the death penalty in four Georgia counties from 1830 to 1860.
28. This conclusion needs to be tested more rigorously by correlating individual offenders and sentences.
29. For a discussion of jury selection procedures and the reliance on bystander juries, see Bodenhamer, »The Democratic Impulse and Legal Change in the Age of Jackson: The Example of Criminal Juries in Antebellum Indiana,« The Historian, 45 (Feb. 1982), 206-19.
30. In the Indiana prison register of 1855, the following terms were given to defendants convicted of murder: 8 years, 5 years, 3 years, 2 years (2 inmates), life (4 inmates). For rape, the terms ran: 3 years, 4 years, 21 years.
31. Lafayette (Ind.) Courier complained that a six-month jail confinement for incest was woefully inadequate and harmful to community morals. Reported in Indianapolis Weekly Indiana State Journal, Nov. 10, 1859. A year earlier, the same paper reported, »In the Circuit Court on Saturday Chauncey Clarke was sentenced to two year imprisonment . . . for stealing a pistol. Yesterday Andrew Caslin was fined one cent and costs and sentenced to fifteen days imprisonment in the county jail for stealing some young pigs. So goes things around the Court House.« Indianapolis Weekly Indiana State Journal, Nov. 11, 1858. Similar accounts may be found in Indianapolis Daily Journal, June 29, 1855 and Feb. 20, 1860.
32. Lawrence M. Friedman, »Plea Bargaining in Historical Perspectives Law and Society Review, 13 (1979), 247; Albert W. Alschuler, »Plea Bargaining and Its History.« Columbia Law Review, 79 (Jan. 1979), 1-43.



33. State v. Augustus N. Hargrove, Murray County Superior Court Minute Book, 1846-1857, 164.
34. State v. William Percy, Murray County Superior Court Minute Book, 1846-1857, 197.
35. State v. Thomas Stubblefield, Muscogee County Superior Court, Minute Book F, 119.
36. State v. Harvey W. Shaw, et al, Bibb County Superior Court, Minute Book 4, 128. The entry reads: »And now comes the defendants ... and plead guilty to the charges and hereby pledge themselves (on the ground that the Court has intimated a determination to deal mercifully with said Defendants, on account of said promises) never again to keep open a tipling house on the Sabbath day, nor to permit others in their employ to do so.«
37. State v. Wesley Whitener and State v. Hamby Whitener, Murray County Superior Court, Minute Book, 1851-1858, 586. In these indictments for riot and assault, the judge submitted the cause to two arbitrators who concluded that defendants should pay all costs and that the prosecutor drop the cases.
38. John Durmont to Gov. Joseph A. Wright, May 25, 1852, in Governor's Correspondence (Wright), Division of Archives and Public Records, Indiana State Library. For further discussion of the prosecutor's use of the nolle prosequi in Indiana, see David J. Bodenhamer, *The Pursuit of Justice*, 117-35.
39. Lafayette (Ind.) Journal, as reported in Indianapolis Daily Journal, June 29, 1855.
40. Milton Heumann, »A Note on Plea Bargaining and Case Pressure,« *Law and Society Review*, 9 (1975), 515.

**Table 1:**

Average Sentence Length for Property Crimes  
by Decade, Indiana and Georgia, 1830-1859

Years	Indiana	Georgia
1830-39	3.5 yrs.	3.24 yrs.
1840-49	3.9	3.95
1850-59	3.3	4.13
1830-1859	3.4	4.03

**Table 2:**

Percentage of Sentences by Length of Term for  
Property Crimes, Indiana and Georgia, 1830-1859

Length of Sentence	Indiana n=491	Georgia n= 137
1 yr.	7.9%	3.6%
2 yrs.	45.0	13.1
3 yrs.	15.3	24.8
4 yrs.	7.3	30.7
5 yrs.	11.2	10.2
6-10 yrs.	9.2	10.2
11-15 yrs.	4.2	2.2
16-20 yrs.	0	> 1
Unknown	0	4.3

**Table 3:**

Average Sentence Length for Violent Crimes  
by Decade, Indiana and Georgia, 1830-1859\*

Years	Indiana	Georgia
1830-39	7.82 yrs.	3.3 yrs.
1840-49	7.4	3.8
1850-59	8.5	3.5
1830-59	8.2	3.6

•Excludes life and capital sentences

**Table 4:**

Percentage of Sentences by Length of Term for  
Violent Crimes, Indiana and Georgia, 1830-1859\*

Length of Sentence	Indiana n = 77	Georgia n = 81
i yr.	0%	9.9%
2 yrs.	16.9	13.6
3 yrs.	7.8	18.5
4 yrs.	2.6	28.4
5 yrs.	11.7	16.0
6-10 yrs.	22.1	6.2
11-20 yrs.	7.8	0
21+yrs.	13.0	0
Life	18.2	2.5
Unknown	0	4.9

•Excludes capital sentences