In his article in this forum, Eric Monkkonen notes the odd fact that throughout the nineteenth century, the U.S. legal system tolerated homicide. Monkkonen was not the first to observe the problem; more than a hundred years ago, Horace Redfield argued that many southerners killed because they believed that their local courts would treat them lightly or even let them escape punishment. More recent studies have established that Redfield was wrong to cast this as a distinctively southern phenomenon, but they have borne out his general premise: in the nineteenth-century United States, the courts tended to punish killers lightly, or not at all. These studies also suggest that when this practice came to an end, as it did around the start of the twentieth century, its demise reflected a shift in procedure, from trials to plea bargaining, not an increased aversion to homicide. But what are we to make of it? In his major study of homicide in New York City, Monkkonen argued that if we are ever going to understand homicide rates in the United States, we must learn why the legal system tolerated murder for so long. As simple as that formulation is, the reality behind it has been so complex as to make uncovering an explanation difficult. The “legal system,” even in a single state, has always been a multi-headed beast that acts through a number of people and in a variety of ways, which means that the decision to tolerate a particular murder could have occurred at several points in the legal process, for a host of reasons. We need to give careful consideration to what happened at each of those points as we try to determine why and how the legal system responded to homicide the way it did.1

In the rest of this essay, I look at two particular points, verdict and sentencing,
in a handful of cases from antebellum South Carolina to suggest the sorts of questions that need to be asked and to outline some of the tentative answers that scholars have begun to offer. I focus on South Carolina because it is notorious both for its murders and for its passive legal response to those killings. Redfield complained in his study that in the second half of the nineteenth century, South Carolinians killed each other “with too much rapidity,” and he bemoaned the tepid legal response of the courts. In *Prison and Plantation*, Michael Hindus demonstrated that the same complaints could be made about the antebellum era: from 1800 to 1860, barely half (50.5 percent) of all people indicted for murder in the state were convicted of that offense. That certainly looks like a legal system that tolerated murder, but as I show below, that toleration, extensive as it was, came in many guises.2

The range of the problem is suggested by two cases that bookend the period. Both began with anger that escalated into homicidal rage. Sometime in the late afternoon on November 11, 1850, Felix Hubbard of Edgefield, South Carolina, interrupted a quarrel between his mother, Martha McClendon, and his stepfather, Britton McClendon. Words became acts, and Hubbard nicked Britton McClendon with an ax. Prudently, McClendon walked away, but only briefly. When he returned a few minutes later, Hubbard was ready. Using a pocketknife that he had borrowed to trim his nails, Hubbard stabbed his stepfather several times. McClendon quickly died. Not quite fifty years earlier, in 1806, John Slater, a ship captain and slave owner in Charleston, South Carolina, had become angry at one of his slaves, Abe, who was working at the dock. After having Abe bound hand and foot, Slater ordered another, unnamed slave to chop off Abe’s head. That done, Slater threw Abe’s remains into nearby Charleston Harbor.3

Both Hubbard and Slater were arrested and brought to trial, and both were treated lightly by the legal system. Hubbard was acquitted, and Slater, who was found guilty, was merely fined. But there the resemblance ends: in 1806, when Slater murdered Abe, the law in South Carolina provided, as it had for more than half a century, that the killing of a black, free or enslaved, was not murder. Rather, it was “the highest species of misdemeanor” known in law, a crime that was punishable only by a fine. Yet after a trial at which Slater was found guilty, “the proud jury,” “deeply impressed with his daring outrage against the laws, both of God and man,” offered

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2 Redfield, *Homicide*, 108 (quote). Michael Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767–1878* (Chapel Hill, N.C., 1980), 90–91 and Table 4.3. Hindus also found that in the antebellum era, very few homicide cases—slightly more than a third (37.5 percent) of all cases—resulted in a conviction. See also Jack Kenny Williams, *Vogues in Villainy: Crime and Retribution in Ante-bellum South Carolina* (Columbia, S.C., 1959).

what the trial judge characterized as “a very strong expression of their feelings” that Slater should be convicted of murder, and that the laws relating to the killings of slaves should be changed. After repeating those sentiments and deploring the fact that the laws of the state authorized such a “very slight punishment” for killers such as Slater, the trial judge concluded with regret that only the legislature could change the law to make the killing of a slave murder. Limited by the law, the judge ordered that Slater be fined, and he expressed the hope that social sanction and eternal punishment would make up for the legal system’s failure.4

Far from condoning Slater’s murder, the judge and jury punished Slater to the furthest extent allowed by law and wished they could do more. It is clear that they did not tolerate his murder of his slave, but it is less clear how significant their reactions were. One recent study argues that the Slater case exposed a legal system out of sync with popular sentiment, which increasingly viewed slaves and blacks as people entitled to the protections of the law. That suggests a split within the legal system, but the situation was not that straightforward. Notwithstanding the strong feelings of the jurors and judge in the Slater case, it was not until fifteen years later that the law in South Carolina was changed to provide that those who killed slaves could be prosecuted for murder. And even after this change in the law, whites in the state who were tried for murdering slaves were often treated lightly in the courts. When two white cattle rustlers were brought to trial in Colleton District, South Carolina, charged with murdering a slave named James while they were stealing cattle, they were acquitted of the murder and sentenced only to be whipped for the rustling. When a young slave named Green was stabbed to death in Edgefield, South Carolina, during a fight with an equally young white boy, Joseph Stalnaker, Stalnaker was charged with murder. But at his trial, the jury found him guilty only of manslaughter, and the judge never sentenced him, which suggests that his punishment was time served—the three months he had been in jail awaiting trial. Even at the end of the antebellum era, whites were found guilty of murdering a slave and punished severely only in the most extraordinary circumstances. A case in point occurred in 1849, when a jury found the planter Martin Posey guilty of murdering his slave Appling, after first finding that Posey had induced Appling to murder Posey’s wife. After sentencing Posey to death for the murder of his wife, the trial judge sentenced him to death a second time for the murder of his slave. Both verdicts and sentences were upheld on appeal, and Posey was hanged.5

4 Williams, *Vogues in Villainy*, 36 (laws relating to the murder of slaves); John Belton O’Neill, *The Negro Law of South Carolina* (Columbia, S.C., 1848), 19. The quotes are from Sentence of Judge Wields in *People v. John Slater*, 1806. Another, longer version of what purports to be the opinion is found in John Belton O’Neill, *Biographical Sketches of the Bench and Bar of South Carolina* (Charleston, S.C., 1859), 103–104; it contains an entire paragraph (the second) that is not in the handwritten copy on file in the South Caroliniana Library. As O’Neill notes (ibid., 104), there is no record of what fine Slater was assessed.

So the impassioned reaction during the Slater case did not mark a shift in attitudes that directly led to a change in the law; and even after the law finally did change, those who murdered slaves were treated lightly by the courts most of the time. What, then, distinguished those cases in which whites who murdered slaves met with little or no punishment from those in which a judge or jury contemplated more serious punishment? The difference does not seem to turn on the facts of the crime: we can attribute Slater’s grisly execution of Abe to the hostile, if impotent, reaction to his crime, but Stalnaker, who literally disemboweled Green—prompting one witness at the coroner’s inquest to refer to him as “a little son of a bitch, or probably a damn son of a bitch”—received a very light sentence even after changes in the law permitted a harsher punishment. Conversely, the killings of James and Appling were relatively straightforward murders, but the defendants in the former case received no punishment for their victim’s death, while Appling’s killer was executed.6

In an essay that discussed the murder of James, Bertram Wyatt-Brown suggested the possibility that verdicts were a function of class. In support of this interpretation, he offered the comments of David Gavin, a planter from Colleton County, who complained that the murderers “were acquitted by ‘a dirty ragged ____ Jury.’ ”7 Gavin had a point: class was relevant to jury composition in antebellum South Carolina. Although the grand juries in the state were bastions of the elite, any white man in South Carolina who paid more than a dollar in property taxes could be called to serve on one of the petty juries that heard criminal cases. But while relatively poor men could sit on juries, it did not mean those juries were dominated by the poor. Wealthier men sat on petty juries as well, and often served as foremen. While I have been unable to obtain the necessary records for the Slater trial, or for the hearing on the murder of James, records I have found reveal that the juries that tried Joseph Stalnaker and Martin Posey were hardly composed of poor men. On the contrary: although Stalnaker was a very poor young man (he lived with his brother on a small farm without slaves, and according to the 1850 census, the brother owned no property of value), the average wealth in real estate held by the men who served as jurors in his case was $2,100, above the district mean of $2,038; and three of those men owned land worth $2,000 or more, while only one had no recorded real estate assets. In contrast, Posey was fairly well off; at the time of his trial, he held a thousand acres and more than twenty slaves, which placed him in the top quintile in Edgefield. The jurors who tried him for the murder of his wife were equally well off, with real estate worth an average of $4,000. The jury that tried him for the murder of his slave was not so wealthy: five of its members had no real estate assets, according to the 1850 census; but the four members of the jury who did have landholdings averaged $1,950 in real estate assets.8 (I could find no records for three of the jurors.)
Thus, it would be an overstatement to say that “dirty ragged” jurors determined verdicts. However, the cases suggest that class may have been a factor in a slightly different way. We can assume that the cattle rustlers were poor, but we know that James’s owner, Lewis Morris, was rich. According to the 1850 census, he owned more than 150 slaves and had property worth $50,000. Likewise, we know that Stalnaker was a poor young man, and we also know that John Cheatham, who owned Green, was a comparatively wealthy merchant with 13 slaves and real estate worth $1,500. If the defendants in those two cases—both of whom were treated lightly by the jurors and the judge—were poor, the defendants in the other two cases were relatively well-off. Posey was a farmer with substantial holdings and a mill, and Slater, about whom I have been able to find less information, was a ship captain who was at the very least rich enough to own several slaves, including the man he killed. This raises the possibility that class played a double role: jurors, who determined guilt in the South Carolina legal system, were most outraged when elites—ship captains, slave owners, wealthy men—killed their own slaves, but they were less concerned with, or inclined to punish, poorer men who killed the slaves of others, even when (perhaps especially when) the owners of the slaves they killed were rich. These examples also hint that judges, who determined punishment in South Carolina, likewise were more inclined to punish wealthy men who killed their own slaves more harshly than poorer men who murdered the slaves of others. This suggests that the class of the killer, not the class of the jury, influenced the outcome in cases involving the murder of slaves.

If class mattered in cases involving the killing of slaves by whites, what about cases in which whites killed whites? A close look at the Hubbard case, reading it in comparison to some others, suggests that class still played a role in these cases, but not in the same way. The grand jury indicted Felix Hubbard for the fatal stabbing of his...
stepfather; it also indicted his mother, Martha McClendon, as an accessory. They were tried separately, and the two sets of jurors came back with very different, even inconsistent, verdicts. Felix Hubbard was acquitted of murder at his trial; a few days later, a different jury found his mother guilty of manslaughter. The judge then sentenced her to two years in prison and read her a sharp lecture, which, unfortunately, no longer exists.11

In contrast to the Slater case, in which the jury’s verdict was constrained by law, legal rules permitted the disparate outcomes in the McClendon murder trials. Hubbard’s acquittal rested on self-defense, although it is not clear whether the jury concluded that he acted because he reasonably believed that McClendon intended to kill him, or whether they felt that he killed his stepfather because he feared that Britton intended to kill Martha. Either was legitimate grounds for an acquittal under well-established common-law principles and the established doctrine in South Carolina.12 But while self-defense provided a legal justification for the verdict in Hubbard’s case, the jurors were not compelled to find that he had acted in self-defense, and they could easily have concluded that Hubbard pursued the fight even after McClendon was no longer a threat. The jury made a choice, deciding to tolerate this particular killing. The jury in the trial of Martha McClendon had to make a second sort of choice, because while logic and the traditional English common-law precedents urged otherwise, as a matter of South Carolina law Hubbard’s acquittal did not mean that his mother, on trial as his accessory, had to be found not guilty. Instead, South Carolina law allowed a jury to decide that an accessory was guilty even when the principal had been acquitted.13 Once again, the key term is “allowed”: the law did not compel the jury to find Martha McClendon guilty; it allowed it to do so. And once the jury had done so, the judge made a second choice, choosing to punish Martha McClendon more severely than Joseph Stalnaker had been punished for the murder of Green, and as severely as some white men were punished for killing other white men outright.14

11 SCDAH, Minutes, General Sessions, Edgefield County, Criminal Journal, Spring Term 1851, 92 (indictment, People v. Felix Hubbard); ibid., 94 (indictment, People v. Martha McClendon); ibid., 96–97 (trial and verdict, People v. Hubbard); ibid., 100 (trial, People v. McClendon); ibid., 101 (sentencing, People v. McClendon). The only reference to Judge Frost’s “impressive address” to Martha McClendon during sentencing is a note in the Edgefield Advertiser that it occurred; March 20, 1850, 2.

12 For South Carolina law relating to self-defense, see State v. Ferguson, 2 Hill 618 (S.C. 1835); State v. McCants, 1 Speers 384 (S.C. 1843). The common-law doctrine relating to killings undertaken in defense of oneself and others is summarized in William Blackstone, Commentaries on the Laws of England (Dublin, 1769): “Under this excuse of self-defense, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defense of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.”

13 For the cases dealing with situations in which one person kills another through a third party, see the discussion in State v. Martin Posey, 35 S.C. 103 (1849) (conviction for the murder of Matilda Posey affirmed). On accessories to murder, compare Blackstone, Commentaries, 4: 34–35, with the different rule in South Carolina, which provided that an accomplice could be charged for an offense even if the principal was not found guilty. State v. Putnam, 18 S.C. 175 (1882) (where three were charged with manslaughter, the jury found that the principal acted in the heat of passion, and hence was not guilty of manslaughter, but the court held that it was not an error for the jurors to find the accomplices guilty of manslaughter). Although Putnam was decided after the McClendon case, the court cited cases from around the time of the McClendon case in support of its ruling, including People v. Posey. Putnam, 18 S.C. at 177–178.

14 For some cases that suggest the range of sentences given to white men who murdered other white men in Edgefield District, see SCDAH, Coroner’s Inquisition Book, Edgefield District, South Carolina,
If not the rules of law themselves, what inspired these conflicting verdicts for this single crime? At first glance, class and race seem to have been irrelevant: everyone involved was poor and white. According to the 1850 census, Britton McClendon was a farmer, but neither he nor his wife owned slaves or held real estate of any value. Felix Hubbard was even worse off; he worked as a laborer on someone else’s farm. Hubbard’s class may have benefited him at his trial, but the same class dynamic produced the opposite result in Martha McClendon’s case. In a study of convictions in antebellum North Carolina, Laura Edwards offered one possible explanation for this variation, arguing that the sex of the defendant determined the legal system’s response, with the result that white women were punished more harshly than white men. But while the Hubbard and McClendon verdicts seem consistent with this interpretation, the statistics for antebellum South Carolina do not bear it out. In his study of antebellum crime, Jack Kenny Williams concluded that white women charged with crimes were convicted at the same (low) rate as white men and given roughly the same sorts of punishment.\(^{15}\)

A look at the results in some other cases in which women and men were accused of working together to kill, however, suggests that there was a South Carolina variant on Edwards’s argument. Although Martin Posey was tried, convicted, and executed for murdering first his wife and then his slave, his lover, Eliza Posey (she married him after his arrest), was never indicted, let alone tried, even though several witnesses testified that she had goaded Posey into committing the murders. When Elizabeth Cannon and her lover, Joshua Nettles, were tried together for murdering her husband as he slept, Nettles was convicted and sentenced to death, while Cannon went free. It is difficult to reconstruct women’s wealth from the available records, but such evidence as there is suggests that both these women were from relatively wealthy families—far richer, at least, than Martha McClendon. In contrast, when Elizabeth Green—who seemed to be closer in economic status to McClendon than to Cannon—had a slave kill her husband, Henry, in 1836, she was found guilty and convicted; the male slave who was charged with helping her was acquitted. These cases raise the possibility that when white women were charged with aiding and abetting in the murder of white men, class determined the outcome for them. Poorer white women were subject to the censure of both judges and jurors, while wealthy women were more likely to be exempted from prosecution, or to be acquitted if tried.\(^{16}\)

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1844–1850, *State v. the Body of Benjamin Jones* (Price shot Jones in store); Minutes, General Sessions, Edgefield District, South Carolina, Fall Term 1845, Microfilm Roll ED 85, October 11, 1845 (sentencing; *People v. Price*, one year in jail); SCDAH, Coroner’s Inquisition Book, Edgefield District, South Carolina, 1844–1850, *State v. Body of William Bailey*, hearing dated June 19, 1846, 57 (Prince stabbed Bailey to death in dispute over button); SCDAH, Minutes, General Sessions, Edgefield District, Criminal Journal, Fall Term 1846, Microfilm Roll ED 85, October 8, 1846 (trial and sentencing, *People v. Prince*, five years in jail).

15 Edwards, “Law, Domestic Violence, and the Limits of Patriarchal Authority” (also noting that the race of the defendant mattered). In South Carolina, where blacks, free or enslaved, were tried in a different court system, under different rules, it is nearly impossible to test the racial component of her thesis. Entry for Britton McClendon, 1850 Manuscript Census for Edgefield District, South Carolina, Microfilm Roll M432_852 (entry for Britton McClendon, did not own slaves); ibid. (entry for Felix Herbert [sic], no slaves). On South Carolina’s conviction rates for men and women, see Williams, *Vogues in Villainy*, 20–23.

16 Dale, “A Different Sort of Justice” (Posey case and the treatment of Eliza). Because women who were not heads of households were not listed in the census before 1850, I have had to rely on legal records for evidence about the relative status of Elizabeth Cannon and Elizabeth Green. See S. C. Carpenter,
These cases suggest that at one level David Gavin was right: class (in concert with other factors, particularly the defendant’s sex) determined whom the legal system would find guilty of murder and whom it would acquit. But did that mean that people got away with murder in antebellum South Carolina? Perhaps not, for reasons suggested by the judge’s opinion in the Slater case. After bemoaning the fact that the legal system would not punish Slater sufficiently, the judge expressed the hope that society (and if society failed, God) would punish him instead. The anonymous author of a published report on the trial of Martin Posey made a similar remark with respect to Eliza Posey, wondering if she would be punished for her crime by the women of her community. Such evidence as there is suggests that she was shamed and shunned until she remarried and moved away.\(^{17}\)

South Carolina’s enthusiasm for extralegal justice in the nineteenth century is well-established, but historians have typically focused on the role it played in creating a culture of violence within the state. What if we reversed that examination and asked instead what role, if any, extralegal justice played in punishment, and to what extent it functioned as an alternative to the legal system? We could, and should, consider how many duels were “tolerated,” even when they led to killings, because they functioned in place of law. Taking the hints offered in the Slater and Posey cases, we could expand that inquiry to consider whether shame and ostracism also were used to punish those whom the legal system did not. We need to explore the possibility that acquittal was not a sign that defendants suffered no punishment, and we must look beyond the courts to see whether the communities they lived in relied on other, extralegal means to punish them for their crimes. Taken in combination with evidence about who was acquitted and in what sorts of cases, this would give us a much more complete understanding of when and why the legal system tolerated homicide, and whether that meant that society tolerated it as well.\(^{18}\)

Of course, to find that out, we need to continue the sustained examination of homicides that marked Eric Monkkonen’s career, pushing his inquiries even further. In addition to trying to track down homicides, we need to dig deep for the facts that determined outcomes in particular cases and trace broad patterns through the study

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\(^{17}\) South Caroliniana Library, University of South Carolina, Columbia, South Carolina, Joshua Sharpe Papers, Sentence of Judge Welds in *People v. John Slater*, 1806.

\(^{18}\) Dale, “An Informal Court” (discussing Eliza Posey case). This sort of inquiry may reinforce conclusions about the influence of class; at least one antebellum commentator asserted that social sanction was the only punishment recognized by the elite. Sidney George Fisher, *A Philadelphia Perspective: The Diary of Sidney George Fisher Covering the Years 1834–1874* (Philadelphia, 1967), 155–156. Fisher was discussing a case from Philadelphia, but that does not mean that the same principle might not obtain in southern states.
of many prosecutions. And we need to look beyond the legal outcomes, to see whether those who escaped the punishment of the courts were punished through extralegal processes. Only when we have done all that will we really understand homicide in the United States.

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