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BOOK REVIEW

PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878. By Michael Stephen Hindus. Chapel Hill, NC: The University of North Carolina Press, 1980. Pp. xxviii, 285. $20.00.

ERIC MONKKONEN*

Michael Stephen Hindus' *Prison and Plantation* firmly places a major building block in the new structure of interdisciplinary scholarship—a structure which is characterized by a freshness in perspective, approach and conceptualization. It is neither the "social history of the law," nor is it a vague study in "law and society"; it cannot be termed merely "criminal justice history" or "legal history" because both of these give the new structure too narrow a sound. As the product of social scientific thinking, broad policy concerns, a driving need for a historically grounded social analysis and a growing dissatisfaction with the increasingly narrow questions asked by most academic disciplines, this new structure resists categorization because it seeks a new mode of social and self-understanding. Thus, *Prison and Plantation* speaks both to historians of legal institutions and to those interested in community dispute settlement. It also speaks to those trying to understand the role of the state and law in social and economic development and to policymakers concerned with court crowding. The book does so, not by addressing the particular current concerns of these different constituencies, but by grappling with empirical evidence concerning the interaction of the society, the state and the criminal justice institutions during the emergence of our modern world.

It is a sad commentary on our specialized intellectual lives that this book will probably not get the exposure it merits, for the simple reasons that it will not fit neatly into college courses and it is a little too demanding for armchair reading. One can only hope that the unnamed intellectual structure which this book helps to build will eventually create a critical social understanding through which the crude South Carolina magistrates of the antebellum era and the late nineteenth century Massachusetts prison reformers can be seen as parts of the same world

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now peopled by court-appointed defenders and community dispute settlement centers.

Prison and Plantation is, for the most part, a descriptive book. The description is systematic; carefully drawn concepts and theories have been utilized to determine what to include and what to exclude. The description is informed with the notion that facts do not speak for themselves, and, more importantly, that the objects of the description have an implicit, systematic relationship. The book describes the judicial systems of the two states, the behavior of their courts, their laws and the reformers' attempts to change those laws. In addition, it describes the penal system of Massachusetts and the plantation system which was in use in South Carolina in place of any institution such as the modern state penitentiary. The major emphasis of the book is in accounting for the dramatic differences between North and South, for as Hindus describes them, they were almost polar opposites. Massachusetts had what Donald Black would term much law;[1] South Carolina, on the other hand, had very little.

Throughout the book the author uses the word "state" to indicate two very different notions, the one narrowly referring to a constitutionally defined political jurisdiction, the other to the broader notion of the state as including the formal and informal political apparatus, organizations, institutions and rules of behavior. In the broader concept of the state, Massachusetts and South Carolina were, again, almost polar opposites; Massachusetts had a complex, aggressive and extensive state in contrast to the intentionally weak, passive and limited state apparatus of South Carolina. Hindus uses the successes of reformers in the North and the frustrations of reformers in the South to illuminate the reasons for the root differences:

> Basically, the world view of Massachusetts reformers reflected, accepted, and welcomed the destabilizing features of nineteenth-century American life. In South Carolina, a more traditional conception of the place of crime and the penal system in the social order, buttressed by slavery, obviated the need for reforms, and, accordingly, for official collective action to secure them.[2]

These differing world views, of course, rationalized and legitimized the differing economies of the North and the South—of the factory and the plantation, of wage labor and of slavery.

One might be tempted by this analysis to draw a direct, linear, causal line from the economic structure to the criminal justice system, but this Hindus is careful not to do, for the story is more complex. Neither South

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[1] *See* D. BLACK, THE BEHAVIOR OF LAW 2-4 (1976).

[2] M. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 225 (1980).

Carolina's economy nor its state apparatus can be summarily defined as traditional or simple. Instead, the elite whites of South Carolina developed a two class vision of society; in their view, race slavery determined one class and the other, the white class, determined the role of the state in society. In fact, the social structure had at least two white classes, but the poor whites went unrecognized, even in the criminal courts. This created a tension between the state and society, a tension which translated into a paucity of courts, terrible jails and a substitution of corporal punishment or shaming punishment for imprisonment. The elite planters were interested in preserving the status quo, which included minimal state intervention in the society or the economy. Therefore, the state made justice cheap by making it costly. Extralegal justice was encouraged and vigilantes served as extralegal criminal justice enforcers and as slave controllers. For those in the elite class, dueling served as the dispute settlement forum. Hindus infers that courts often became a means of substitute dueling from the appearance of an enormous number of frivolous assault charges which were brought, but which resulted in no bills. Thus, the fact that South Carolina had a weak state and little law did not mean that it had little social control, but rather, that the social control was extralegal. Hindus implies a kind of functional equilibrium between the two contrasting systems in the North and South—the strong state having a good deal of formal control and little informal control, the weak state having little formal control but compensating with a sanctioned and encouraged system of informal control.

The legislature of South Carolina had to work at keeping the state weak. One apparently important part of this strategy was an extensive network of magistrates. Hindus estimates that there were about 500 white persons per magistrate in antebellum South Carolina, indicating that there were more magistrates per capita than modern cities have police officers per capita. This apparent penetration of society by the state apparatus belied the functional weakness of the magistrates, for in general the policy was that of restricting the number of and access to higher courts. Legislators consciously perceived a whole range of impediments to justice—from geographical inaccessibility to an uncodified and incomprehensible criminal law—as a means of keeping people out of the courts. A jumble of Elizabethan and Restoration statutes remained the law of South Carolina until Reconstruction. When these statutes were interpreted by untrained and generally incompetent lawyers and judges, what system there was worked unevenly and inconsistently. Hindus' argument is important because he interprets this confusion, and the resulting unpredictability and harshness, not as being dysfunctional, but as a functional means of reinforcing extralegal "justice."

Not too surprisingly, this system did not work to the advantage of

slaves, who composed over half of the population of antebellum South Carolina. Slave defendants had much lower acquittal rates than did white defendants and were punished much more often for crimes against property and order than were whites. As Hindus says: "When dealing with slaves, South Carolina justice got down to business."[3] That the criminal justice organizations of South Carolina could be quickly mobilized when it was necessary to protect the slave system implictly supports Hindus' argument that the extralegal system of white justice functioned to obscure the class structure of white society. There has been some controversy over the status of slaves in the criminal courts; some commentators have argued that slaves faired reasonably well, given their contradictory legal status.[4] Hindus' work provides a quantitative challenge to this position, for he shows that the state was not afraid to execute slaves against their owners' wishes, and indeed did so. But more interesting than the low quality of justice which black defendants received was the pattern of offenses with which they were charged. It shows that the courts, which represented local planters, saw the slave threat to property and order as worthy of serious investment in punishment proceedings. Interpersonal violence among slaves, however, got scant attention from the courts. The clear picture Hindus draws is one of the whites using assault proceedings to harass black disputants and to protect their own honor, while blacks were denied access to the courts to resolve their own disputes and conflicts. In neither case did the courts operate as they should have. Instead they operated to enforce the whites' status, only attending to the blacks when their threat to the state escalated beyond the boundaries of their locale.

While Hindus tries to maintain the same critical stance in his examination of the Massachusetts prison system and criminal justice reformers, he understandably cannot escape a normative evaluation of that commonwealth when juxtaposed with the state of South Carolina. By the post-Civil War period, the Massachusetts system had the same features and problems which continue to define our penal and justice systems today, from professional police in the major cities to prison organizations more interested in self-perpetuation than in the reformation of offenders. As a result of the familiarity of the Massachusetts system, Hindus' critical stance parallels that of an insider. He reminds us that the prison discipline system preceded the factory system of production; that individual reform and rehabilitation has failed as a policy and is too often and too easily replaced by punishment and regimenta-

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[3] *Id.* at 161.

[4] *See, e.g.*, Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197 (1970). *See generally* M. HINDUS, *supra* note 2, at 130-31 n.3.

tion; that prison populations serve as painful mirrors of the class structure of industrial capitalism; and that even the best criminal justice systems have had a long tradition of rejecting the policies of liberal reformers. In spite of these and other criticisms, Hindus continually intimates that the Massachusetts system was better than that of South Carolina. This reviewer agrees. Even though the system functioned to support the status quo, even though it occasionally involved brutality and actual torture, it was still a system which tried to reform those within it, which occasionally responded to the efforts of social reformers, and which had much more consistency and predictability than did the system of South Carolina.

This implicit and occasionally explicit normative evaluation of the Massachusetts and South Carolina systems highlights a problem inherent in the methodology of comparative analysis—the tendency either to make the two subjects the ends of a scale or to draw up a balance sheet. Both of these tendencies push the analysis toward normative evaluation. Yet this is not the purpose of a comparative study. A comparative study is explicitly relativistic and seeks to account for similarities and differences on a basis more systematic than that provided by an ad hoc study of a single subject. Historian Samuel Hays has also argued that the comparative approach brings out problems which a single subject approach would miss.[5] Certainly this is the case with *Prison and Plantation*, where the differences between prosecutions of slaves and whites in South Carolina and free people in Massachusetts help demonstrate the divergent concerns of the two different states. Nevertheless, the comparative approach serves better as a descriptive tool than as an explanatory tool. Because the comparative approach has been used descriptively in this book as a guide through the unchartered sea into which the study has ventured, the "big" questions and the "big" theses elude the reader. That is the price paid for asking interdisciplinary questions about understudied problems; there are few straw persons to go after and few theses against which to build countertheses. The study does not explicitly delineate what problems the author expected the comparison to clarify and Hindus carefully avoids any mechanical linkage of the economy to the criminal justice system. As a result, the book does not have a strong theme to carry the reader from point to point. Instead, an elegantly written and detailed introduction serves as a starting discussion, setting up a series of empirical and descriptive questions, the answers to which follow in subsequent chapters.

Each chapter in the book is based on solid and impressive archival

[5] S. HAYS, *New Possibilities for American Political History: The Social Analysis of Political Life*, in AMERICAN POLITICAL HISTORY AS SOCIAL ANALYSIS 87, 122-28 (1979).

research—research made more impressive by the need for the author to master the sources of two different states and two different criminal justice systems. One wonders if the mass of research materials digested for this study may not have prevented the author from arguing any glib or simple thesis. At the same time, the study's strengths—comparison, detailed research on a variety of levels and sensitivity to nuance—have contributed to its major weakness, the lack of a clear and compelling thesis. Had the study been only on Massachusetts or South Carolina, it would have been easy for the author to argue more forcibly in favor of the prison/factory analogy or the plantation/weak state relationship, but the contrast of the other end of the continuum required that the author be more careful than would have been necessary in a single case study. Thus, Hindus criticizes the crude thesis that the criminal justice system provided the social control necessary to create the modern industrial system without completely rejecting the notion. His chapter on the Massachusetts prisons is entitled "A Great Manual Labor School." This title implies a simple social control analysis, yet Hindus does not opt for this easy explanation. Instead, he shows the complexity of prison reform and the impact of organizational creation and change on ideology, as well as the impact of organizational inertia on the potential for change or reform. It is difficult to be completely critical of a penal institution or its reformers when the comparison is with pre-prison and pro-execution South Carolina.

The major criticism to be made of this book is that, while Hindus maintains it is a study which considers the complete criminal justice system, it neglects the lowest common denominator of the system—the persons who produced arrests or to whom complaints were made. Although both the urban police of Massachusetts and the magistrates of South Carolina are mentioned, much more is needed to complete the analysis. For one thing, in the last thirty years of the period studied, more and more urban places in Massachusetts created paid, uniformed police. This development usually paralleled the advent of publicly funded prosecution of offenders and would, therefore, have had an effect on the court behavior studied. In the pre-police era, it would seem that the kind of offense which could have been most easily prosecuted by victims would have been assaults, especially where the assailant was known. Crimes against property, on the other hand, would have been more likely to be prosecuted by full-time, paid officers. Therefore, one can predict that because South Carolina, with the exception of Charleston, and small-town and rural Massachusetts had no such police organization, a greater proportion of the cases coming to criminal courts should have been assaults and other offenses of personal violence. Hindus found that this was indeed the case, yet he attributes this pattern to the differences between a strong and weak state. He is most certainly correct

if the creation of a uniformed police is the arm of a strong state, but the basic nineteenth century preconditions for the creation of a paid, uniformed police force were the existence of a city and the existence of an imitable model. Hindus implies that Charleston was late in its creation of a uniformed police.[6] On the contrary, in relation to other cities its size, Charleston was very early; by forming its police force in 1856,[7] it led Brooklyn, Baltimore, St. Louis, New Orleans, Cincinnati and many other cities.[8] Boston police officers did not wear uniforms until a year or two after the police of Charleston.[9]

Thus, from the urban perspective, South Carolina would seem to have had the trappings of a strong rather than weak state. The extraordinarily high ratio of one magistrate to 230 whites, or 530 total persons, which existed in South Carolina in 1846—a number which excludes other law enforcement personnel—suggests a state which aggressively permeated civil society rather than one which shrank back. All of this raises perhaps the most important issue in the book: What constitutes a strong state? Or, how does the criminal justice system relate to the structure of the state? Is a strong state a powerful state? More specifically, how do we compare and evaluate the role of the (theoretically) reactive magistrates vis à vis the role of the full-time, proactive, uniformed police? Perhaps the best way to consider the role of the state is not as being only strong or weak, but rather as being either passive or aggressive. From this perspective, a paid, uniformed police force certainly represents an aggressive state, while magistrates who take complaints and execute warrants represent the passive state. In the case of South Carolina, the passive magistrates were also pervasive, suggesting that a state might be both strong (pervasive) and passive. All of these speculations and criticisms move away from Hindus' actual book, but they show the breadth and complexity of the issues to which his research speaks. They also illustrate that Hindus' emphasis on the actual behavior of the criminal justice system, rather than merely on its statutory existence, can prompt an exciting way of analyzing our past which helps us understand our present.

The issues considered in *Prison and Plantation* are not century-old issues of policy and action. While we no longer have slavery, we still have prisons, courts, police and, at least in some states, magistrates. The questions of achieving justice—of the relationship of the justice system to the society and the economy, of the kind and quality of state

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[6] *See* M. HINDUS, *supra* note 2, at 39.

[7] M. Hindus, Prison and Plantation: Criminal Justice in Nineteenth-Century Massachusetts and South Carolina 62 (University of California, Berkeley 1975) (unpublished dissertation on file with University Microfilms, Ann Arbor, MI).

[8] E. MONKKONEN, POLICE IN URBAN AMERICA, 1860-1920, at 162-68, app. A (1981).

[9] *See generally* R. LANE, POLICING THE CITY: BOSTON 1822-1885, at 104-05 (1967).

intervention we want—still need to be addressed. In his introduction, Hindus speaks of the "automatic justice machine" model, a model which emphasizes rationality, organizational efficiency and a Benthamite calculus of fairness. He implies that this model is chimerical, ignoring as it does the changing relationship of the state, the economy and the society. This was the model to which Massachusetts, in its best moments, aspired. When contrasted with the personalistic, informal, community-guided and unpredictable reality of South Carolina, the model is still appealing. That our twentieth century felicitous calculus no longer expects the actual reform of criminal offenders is our loss, and even in this we have much to learn from our nineteenth century predecessors. Michael Hindus' book provides a convincing demonstration that we may learn from our past and that we may often learn without costly human and social experiments.