BOOK REVIEW


PAUL FINKELMAN ♦

In Prison and Plantation, Michael Hindus, a historian turned lawyer, has attempted to explain the nature of crime, criminal justice, and punishment in nineteenth century America by comparing evidence gathered from Massachusetts and South Carolina. He uses such diverse sources as manuscript court records, state reports, legislative debates, memoirs, letters, and pamphlets to study prison reform, crime, vice, prostitution, poverty, delinquency, and dueling. He combines literary evidence, judicial opinions, and government reports and documents with statistical compilations of arrest, trial, and incarceration rates. The research and descriptions in this book are convincing and important. They tell us a great deal about how criminal justice systems worked in these two states in the nineteenth century. From this evidence we can better understand not only the nineteenth century, but our own era as well. For scholars and practitioners concerned with the problems of crime, society, and justice, this is an important and provocative book.

Despite the importance of the evidence presented, Hindus has written a troublesome and ultimately unsatisfactory book. There are two important aspects of this book that must be addressed separately. First, Hindus’s choice of South Carolina and Massachusetts for comparison is open to question. Second, Hindus has placed his evidence in an analytical framework that is unworkable and ultimately unpersuasive, and as a result his conclusions are undermined by the evidence he presents. This evidence is the major contribution of the book, but it must be discussed in the context of Hindus’s comparison of South Carolina and Massachusetts, his analytical framework, and his resulting conclusions.

♦ Assistant Professor of History and Visiting Assistant Professor of Law, University of Texas at Austin. B.A. 1971, Syracuse University. M.A. 1972, Ph.D. 1976, University of Chicago.

(1485)
I.

It would be simple to argue that Hindus chose the wrong states to compare in his book. Massachusetts and South Carolina were not representative states in the antebellum period. As Hindus notes, "[i]n the area of legal and penal reform, for example, few northern states were as innovative as Massachusetts, few southern states as recalcitrant as South Carolina. Massachusetts, therefore, cannot represent the typical northern state, nor South Carolina the typical southern state." In many areas in addition to legal and penal reform, Massachusetts exemplified the innovator and South Carolina the recalcitrant. Antebellum Massachusetts was a fertile ground for all types of reform. Prisons, schools, churches, insane asylums, hospitals, and governmental institutions came under the close scrutiny of social activists, who also busied themselves with issues as far-ranging as temperance, vegetarianism, prostitution, world peace, women's rights, and, of course, antislavery. Nineteenth century Massachusetts was a land of "isms," with abolitionism leading the way.

In South Carolina, on the other hand, all change was resisted. Politicians, teachers, judges, lawyers, and clergymen in the Palmetto State all sought to maintain the status quo. Change, after all, might undermine the very basis of the society—what the secessionists would later call the "cornerstone" of the confederacy—slavery. White South Carolinians, who seem to have lived in constant fear of slave rebellions and abolitionists, could ill afford to allow any innova-

1 M. HINDUS, PRISON AND PLANTATION XX (1980).

2 Speaking about the newly established Confederacy in 1861, Alexander Stephens presented the often quoted "cornerstone speech": "[I]t is founded, its cornerstone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition." H. CLEVELAND, ALEXANDER H. STEPHENS 721 (1886), quoted in C. LEE, THE CONFEDERATE CONSTITUTIONS 110 (1963). For a general discussion of Southern efforts to preserve the cornerstone of their society, see J.H. FRANKLIN, THE MILITANT SOUTH 80-95 (1956).

3 See P. WOOL, BLACK MAJORITY (1974). The Stono rebellion, which led to the death of about 25 whites and 35 slaves, had a profound effect on the white population of South Carolina. After the 1739 rebellion, South Carolinians long remained fearful of another outbreak. The rebellion led to one of the few major revisions of the South Carolina slave code, an attempt to rid the colony of some of the more barbaric forms of slave punishment, such as castration, burning alive, and mutilation. The use of these punishments did in fact decline, but was not completely eliminated. The response to the rebellion also included stricter control over the movement of slaves and over their occupations.

For the period after independence, see W. FREEHLEN, PRELUDE TO CIVIL WAR 70-94 (1965). Although no serious national antislavery movement existed until the 1830s, South Carolinians tended to blame any disturbance, such as the abortive Vesey Conspiracy of 1822, on abolitionists and northerners.
tions in their society. Any change, even one limited only to whites, might disturb the delicate balance between a stable plantation system based on apparently contented slaves, and the nightmare that most of the state’s whites feared: a race war led by discontented slaves and traitorous whites.⁴

Thus, in the antebellum period, Massachusetts was a leader in social reform, legal change, and economic development. While Massachusetts was willing to accept all kinds of experiments, South Carolina would accept only one: secession from a nation that did not share its values and institutions. South Carolina spent most of the century attempting to stop all progress in the nation, or even to go back in time, if that was necessary to “defend the cornerstone.”

Massachusetts and South Carolina can be seen as symbolic representatives of the sectional crisis, and studying them can provide insights into the developing conflict. In political debates throughout the century, Massachusetts often represented the North while Carolina stood for the South. During the nullification crisis, it was Daniel Webster of Massachusetts who defended the Union against the onslaught of South Carolina led by Robert Y. Hayne. In 1850, Webster again took the floor of Congress to speak “not as a Massachusetts man, nor as a northern man, but as an American. . . .”⁵ Only three days earlier John C. Calhoun had spoken for South Carolina and against compromise. While Webster gave his speech, his nemesis listened. It would be the last time Calhoun came to the Senate—within the month he would be dead. But spokesmen from Massachusetts and South Carolina would continue to do battle. When the status of Kansas as a slave or free territory was in the balance, it was Charles Sumner of Massachusetts who verbally assaulted Senator Andrew S. Butler of South Carolina for his alleged indiscretions with his female slaves, and, more to the point, for his complicity in the “Crime Against Kansas;” and it was South Carolina’s Congressman Preston Brooks who physically assaulted Sumner a few days later, beating the Senator insensible.⁶

Slave rebellions in other states, particularly the abortive Gabriel’s Rebellion in 1800 and Turner’s Rebellion in 1831 (both in Virginia), also served to heighten fears in South Carolina of slave rebellion and abolitionist conspiracy. Id. 91-94. See G. MULLIN, FMRIR AND RELBELLION 140-63 (1972) (Gabriel’s Insurrection); S. OATES, THE FTRES OF JUBILEE (1975) (Nat Turner’s Rebellion).

⁴ Hindus suggests that even moves toward more democracy for whites were considered dangerous: “Any tinkering with South Carolina’s apparent social and political stability raised the fear of a black revolt for freedom or a white uprising for political participation.” M. HINDUS, supra note 1, at 233.

⁵ THE SPEECHES OF DANIEL WEBSTER 489 (B. Teft ed. 1854).

⁶ C. Sumner, The Crime Against Kansas. The Apologies for the Crime. The True Remedy. (Boston 1856). In his speech, Sumner referred to Senator Butler:
These two radical states symbolized the sectional conflict outside of Congress as well. The Garrisonian abolitionists in Boston preached disunion because of slavery; the hotheads in Charleston preached the same doctrine, over the same issue—but obviously for different reasons. Even the antislavery poetry of James G. Whittier was answered by the proslavery works of Charleston’s William J. Grayson.\(^7\) When secession finally came, the Garrisonians supported the Union and worked for an end to slavery,\(^8\) while South Carolina was the first state to secede and the place where the war actually began. The radicalism of the two states led at least one important Union general to blame them both for the war: William T. Sherman remarked, just before he led his army through South Carolina, that “Massachusetts and South Carolina had brought on the war, and that he should like to see them cut off from the rest of the continent, and hauled out to sea together.”\(^9\)

Thus, to compare Massachusetts with South Carolina is not to compare a representative or typical northern state with its southern counterpart. Rather, Hindus has compared two states which might be considered extremist.\(^10\) This of course raises questions about the

---

\(^7\) See, e.g., Grayson, The Hireling And The Slave, reprinted in Slavery Defended 57-68 (E. McKitrick ed. 1963).

\(^8\) Although Garrison originated and supported the slogan “No Union With Slaveholders,” I believe that the secessionist arguments of the Garrisonian abolitionists were not genuine. Rather, they were used to taunt the South and to drive home the point that even residents of the North were connected to the peculiar institution. When the war finally began, most Garrisonians were willing to support the Union, some to the point of abandoning their pacifist principles. See P. Walker, Moral Choices 1-86 (1978); Rose, ‘Iconoclasm Has Had Its Day’: Abolitionists and Freedmen in South Carolina, in The Antislavery Vanguard 178-205 (M. Duberman ed. 1965).

\(^9\) W. Rose, Rehearsal for Reconstruction 325 (1964).

\(^10\) There are other states that might fit this description. In a legal context, for example, a Wisconsin Supreme Court ruling directly challenged the authority of the United States. In re Booth, 3 Wis. 1 (1854), rev’d, 62 U.S. (21 How.) 506 (1858). Accord, Ableman v. Booth, 11 Wis. 498 (1859). Similarly, New York State was involved in a number of controversies with Virginia over the extradition of free blacks from New York and the right of unmolested transit for Virginians passing through New York with their slaves. See, e.g., Lemmon v. People, 20 N.Y. 562 (1860); P. Finkelman, An Imperfect Union (1981).
validity of such a comparison. To identify regional patterns, it would be necessary to look at the criminal justice and penitentiary systems in a number of states from both the North and the South. Indeed, more research is needed regarding crime and punishment in states like New York, Pennsylvania, Ohio, and Illinois in the North and Virginia, Kentucky, Mississippi, and Louisiana in the South. To understand the similarities or differences in the way antebellum America dealt with criminal justice, it would be necessary to examine a number of states from each section. But in a pioneering study of this nature, it would be impossible to look at so many states. If two had to be chosen, Massachusetts and South Carolina are probably the best, precisely because they were so extreme.

By examining these two states, Hindus has successfully set out the issues of comparative criminal justice in antebellum America. Many ambiguities and shadings have been eliminated, but the starkness of the comparison is itself illuminating. Through this study we can see how the leading, or pacesetting, states of this period dealt with the same problems. The starkness of the comparison may have to be modified by future studies of other states, but for the moment scholars have a clear sense of at least what the boundaries are for the issues Hindus has examined. Indeed, if there is any major problem with Hindus's choice of Massachusetts and South Carolina, it is that he did not exploit the contrasts between the two. For, as will be discussed below, after clearly showing the differences between the two states, Hindus unfortunately tries to minimize and explain away these distinctions, in order to force his evidence into an analytical framework that ultimately does not work.

There is another sense in which these two states were ideal to compare, although here again Hindus does not exploit the contrasts that he describes. Massachusetts and South Carolina best exemplify the sectional trends of the antebellum period. This was a time of crisis which, of course, ultimately led to civil war. To the extent that there was a distinct "northern nation" and "southern nation," Massachusetts and South Carolina show us the direction in which those two "nations" were headed. Indeed, the best way to understand the extent of the difference between the North and the South may be to examine not the typical states, but those that were representative of the growing polarity within the nation. To this extent, Hindus's choice of Massachusetts and South Carolina was a good one.
II.

Given the contrasts between antebellum Massachusetts and South Carolina, and the validity of the comparison, we might expect Hindus to conclude that these two states produced markedly different criminal justice systems. Certainly, based on Hindus's own carefully researched descriptions, they appear that way on the surface. Massachusetts had penitentiaries where “[r]eformation may have been the goal, but incarceration was the means, and incapacitation (that is, the inability to commit additional crimes while confined) was always a result.”\(^\text{11}\) The court system was well established, with the authoritative Supreme Judicial Court at the top. The legal community, led by such giants as Edward Everett, George T. Curtis, Charles Sumner, Lemuel Shaw, and Joseph Story at the bar and on the bench, provided additional authority. Reformers such as Horace Mann, Dorothea Dix, and Samuel Gridley Howe successfully lobbied for changes in prison management and law enforcement. The number of crimes for which capital punishment was available diminished over time, while the system of criminal justice remained secure and stable. Conviction rates were high, the courts were relatively efficient, and punishment was sure and swift. The Massachusetts State Prison was the lynchpin of this system and a model of penal reform. As Hindus notes:

Throughout the nineteenth century, the prison was a center of attention. Inspectors and prison officials issued annual reports; governors and legislators lavished attention on the facility. An influential reform society, the Prison Discipline Society of Boston, assumed informal guardianship of the institution. Finally, the prison was a mandatory stop for American and foreign visitors interested in the new science of penology.\(^\text{12}\)

Criminal justice in South Carolina was quite different. There was no state prison. County and local jails were so “notorious, overcrowded, and decrepit” that slaveowners were fearful of condemning slaves to them, because by the time the sentence was over, the slave might be too ill or incapacitated to ever work again.\(^\text{13}\) The only institution that even vaguely resembled the modern pen-

\(^{11}\) M. Hindus, \textit{supra} note 1, at 125.

\(^{12}\) Id. 162.

\(^{13}\) Id. 145. For a description of conditions in South Carolina’s local jails, see \textit{id.} 202-03.
iteniary of Massachusetts was the Charleston workhouse, where some slaves were sent for punishment. The South Carolina court system was no better: "Complaints about the South Carolina judiciary were both frequent and severe. Many judges rode to the courthouse late, arrived intoxicated, or failed to show up at all. . . . Criticism of crowded dockets and unconscionable delays were common," as was criticism of the meager legal talent the bench attracted. Court reform was a failure. There were no clear lines of authority in the legal system. Throughout most of the antebellum period the state maintained a dual system of law and equity courts and lacked a supreme court to resolve differences between the two parallel systems. Any reform of the system proved impossible. Criminal statutes remained unchanged in this period, with the death penalty available for many crimes. Conviction rates were low, and in general criminal justice appeared lax.

Despite the overwhelming evidence of difference between Massachusetts and South Carolina, Hindus argues that these states shared similar legal traditions and experiences. He argues that they faced similar structural problems, and that institutions found only in one state were actually represented in the other by what he calls "functional equivalents." Where "functional equivalents" are not apparent, Hindus strains his evidence to minimize difference, in an effort to show that the criminal justice systems in both states were similar despite what he calls "the obvious structural contrasts." But a careful examination of Hindus's evidence shows that the "structural contrasts" between the two societies were much greater, and more fundamental, than Hindus admits. Thus, the "functional equivalents" were not really equivalent, and the legal systems of the two states were quite different in almost all respects.

The most obvious structural difference between the legal systems of the two states concerns the relationship between their court

---

14 See id. 146-50. The Boston reformer Samuel Gridley Howe remarked that the workhouses were "[t]he only clean, well-organized, and thoroughly administered institutions which I have seen in the South. . . ." He was particularly impressed with the workhouse in Charleston, "a large airy building, with ample courtyards and well-ventilated rooms. Every part is kept scrupulously clean; everything is well adapted for its purpose; every officer is active and energetic; its treadmill and its whipping post are the ne plus ultra of their kind." Id. 148 (citations omitted).

15 Id. 19.

16 Id. 21.

17 Id. 57.

18 Id. xix; see text accompanying note 43 infra.

19 Id. 253.
systems and the larger society. Here we are first struck by the contrasts. Massachusetts had a supreme court—called the Supreme Judicial Court—for most of the nineteenth century. The South Carolina Appeals Court, on the other hand, barely lasted a decade, and was abolished in 1835 because politicians feared its power and disliked its decisions. Hindus nevertheless compares the relatively minor reorganization of the Massachusetts Court of Common Pleas in 1859 with the abolition of the South Carolina Appeals Court in 1835. Hindus calls the Massachusetts changes “a complete re-structuring of the court system;” yet a few sentences later he notes:

The Superior Court that replaced Common Pleas in 1859 retained the identical jurisdiction of its predecessor and maintained with one exception the statewide unified structure. The one change was the inclusion of Suffolk County in the scheme. But Suffolk had been taken out of Common Pleas only four years previously, so even this one modification was hardly a significant innovation.  

Indeed, Hindus admits that “[t]he opportunity to use the reorganization plan as a stepping stone to judicial rationalization was lost when the Supreme Judicial Court retained almost all of its original trial jurisdiction.” This hardly constitutes a complete restructuring of the court system, as Hindus claimed sentences earlier. Nor is it comparable to what South Carolina did in 1835, when the South Carolina Appeals Court was abolished.

In his discussion of the restructuring of these courts, Hindus asserts that in both states the notion of an independent judiciary posed problems for the ruling elite. By comparing the destruction of the South Carolina Appeals Court to the removal of Edward G. Loring from his position as a Massachusetts probate judge, Hindus attempts to illustrate how these two states similarly sought to control the independent power of the courts. But because of differences in the motivations for, and effects of, these changes, Hindus’s comparison is unpersuasive.

While the removal of Loring from his position as probate judge appears to violate the ideal of an independent judiciary, the circumstances of this incident differ greatly from those surrounding the South Carolina action. Loring was simultaneously a state pro-

20 Id. 17.
21 Id. 18.
22 Id. 2.
bate judge and a United States Commissioner under the Fugitive Slave Law of 1850. In 1854, as United States Commissioner, Loring ordered the rendition to Virginia of the fugitive slave Anthony Burns. With the aid of the state militia, the regular army, the Boston police department, and a United States revenue cutter, Burns was successfully removed from Boston and returned to his master in Virginia. The Massachusetts legislature then passed a law that allowed for the removal or impeachment of any judicial officer who continued to hold the office of United States Commissioner under the 1850 law. When the governor refused to remove Loring, at whom the statute was directed, a mandatory removal act was passed and Loring was removed from his position as a probate judge. In a separate private action, Loring was removed from his position as a faculty member of Harvard Law School.

The Loring case contrasts quite sharply with the situation in South Carolina. The 1835 abolition of the South Carolina Appeals Court was directly tied to the Nullification Crisis and the court’s decision in McCready v. Hunt. During the Nullification Crisis, the South Carolina legislature passed a statute requiring all state officials to swear to a state loyalty oath. In McCready v. Hunt, the Appeals Court declared this statute unconstitutional. As Hindus and other scholars have concluded, “[t]he immediate cause of the court’s demise was its ruling in ... McCready v. Hunt.” Loring, on the other hand, was not removed for a decision he made while on the bench; therefore, his independence as a probate judge was not at issue. Rather, he was removed for his activities off the bench as a federal commissioner under the Fugitive Slave Law; holding this position while also serving as a probate judge was “deemed to have violated good behavior, to have given reason for loss of public confidence.”

23 Act of Sept. 15, 1850, ch. 60, 9 Stat. 402 (1850) (repealed 1864); M. Hindus, supra note 1, at 16.


26 Act of Mar. 27, 1858, ch. 175, 1858 Mass. Acts 151 (1858) (repealed).


28 20 S.C.L. (2 Hill) 1 (1834).

29 M. Hindus, supra note 1, at 16.

30 See note 25 supra.
Loring choose between working for the United States government or the State of Massachusetts; Loring could have resigned his position as a commissioner under the Fugitive Slave Law, as the state statute required, and retained his judicial office. And in looking at the Loring case it is helpful to compare his experience to that of Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court: Shaw heard a number of fugitive slave cases and was often vilified by abolitionists for his unwillingness to challenge the federal law on the subject, but was never seriously threatened with removal, despite the general distaste for his decisions in these cases.\(^3\)

The second major difference between the removal of Loring and the destruction of the South Carolina Appeals Court is perhaps even more important: the removal of one justice had little effect on the actual administration of the courts in the Bay State. The subsequent court reorganization also did not substantially affect the nature of justice in the state.\(^2\) But the elimination of the South Carolina Appeals Court was another matter: "[the court] was abolished and the old system was reinstated so quickly that it caught the legal profession by surprise." \(^3\) Moreover, it destroyed the opportunity to have a unified court system in the state. These differences, then, cast doubt on Hindus's assertions that the elites in both states sought to limit the independent power base of the judiciary in response to similar structural problems in both states' legal systems.

If Massachusetts and South Carolina did face "similar structural problems," as Hindus asserts, they certainly resolved them in very different ways. The contrast between the removal of Loring and the destruction of the Appeals Court is even greater when we examine the general issues of judicial competence, court machinery, and legal systems in the two states. Hindus describes the post-Revolution failure of courts in both states to mete out sure and

\(31\) L. LEVY, supra note 27, at 72-108. Evidence does show that some members of the state senate strongly disapproved of Shaw's earlier decision to refuse a slave's petition for a writ of habeas corpus while that slave was being held for trial under the Fugitive Slave Act. Some senators even hinted at impeachment for Shaw, while others suggested that the judiciary be made responsible to public opinion by elections. In the end, however, these threats were never carried through because of the prevailing belief that the Supreme Judicial Court was pure and beyond corruption. Id. 96.

Any suggestion that Shaw resigned before he could be impeached must fail, because he stepped down from the bench in 1860, years after some of his most controversial decisions. Id. 106.

\(32\) See text accompanying notes 20 & 21 supra.

\(33\) M. HINDUS, supra note 1, at 16.
swift justice: "In both states, civil cases routinely took years to settle." 34 Lawyers in both states made more money when cases took longer to settle, and so the "fee system offered no incentive for speeding up the process." 35 But if "the problems were similar in each state, the responses were very different." 36 By 1815, Massachusetts had a viable and elaborate court system in place. Strong and respected judges—Isaac Parker, Theodore Sedgwick, and ultimately Lemuel Shaw—led the state to make changes, and in the process the Massachusetts bar and bench became the most respected in the nation.

The Massachusetts situation contrasts sharply with that in South Carolina, which failed even to establish a supreme appellate court until 1824, and then summarily abolished it for political reasons in 1835. However distinguished they were, such jurists as John Belton O'Neall, William Harper, and John Faucheraud Grimké were unable to secure reform for their antiquated court structure. The fierce individualism of the South Carolina planters, the impotence of the state government, and the lack of centralized political authority in the state led to a judicial system that would neither accommodate the needs of the state nor provide even a semblance of justice for all. The many complaints about the state's judges stemmed not only from their lack of punctuality and their intemperance, but also from their incompetence.37 One grand jury complained that "[j]udges have been known to take an unnecessary and strange course in charging a jury," while another observer complained that jurists' opinions were studded with "illogical deductions . . . and most startling outrages upon the King's English." 38 One early judge reportedly "was partial to female defendants and was deaf, senile, and infirm" towards the end of his career, while another "frequently took sides in criminal cases," and others "participated in duels even though dueling was a crime punishable by removal from public office." 39 In Massachusetts, few judges were impeached, whereas, not surprisingly, this was not the case in South Carolina.40 The Massachusetts court system may

34 Id. 11.
35 Id.
36 Id.
37 Id. 19. See text accompanying note 15 supra.
38 Id.
39 Id. 19-20.
40 See id. 20.
have been “an imperfect embodiment of the idea of equal justice under law,” as Hindus puts it,41 but compared to South Carolina’s system it was a model of propriety and fairness. Massachusetts chose a well-regulated, if imperfect, court system to control crime, while South Carolina relied on local, personal authority—duels, mobs, and plantation justice.

Beyond arguing that Massachusetts and South Carolina faced similar structural problems, Hindus concludes that the states had similar systems of justice. Function is his point of comparison. He argues that the purpose and theories of criminal justice in the two states were really the same; institutions in South Carolina which might appear very different from anything in Massachusetts were similar, Hindus argues, because they served the same functions. “A functional alternative is obviously not an exact substitute, but rather an arrangement in the social structure that appears to serve a similar purpose in society.”42 Examining these functional equivalents leads Hindus to conclude that “[i]ronically, what seemed at first a clear study in contrasts must yield to an understanding of the essentially similar role of the system of authority and law in preserving, albeit in different forms, order and social cohesion.”43 An examination of how Hindus reaches this “ironic”—and erroneous—conclusion must start with an examination of the roles of authority and “functional equivalents” in restraining those members of a society who are viewed as “dangerous” by those in control of the society.

Hindus rightly sees that “[c]rime and criminal justice are important components of a society’s system of authority.”44 According to Hindus, those who possessed power in each state maintained their authority through sanctions—both legal and nonlegal—against those who violated societal norms.45 Hindus argues that “the function of law and authority”—and they must be seen as separate as well as combined factors in society—“was to channel the behavior

41 Id. 25.
42 Id. xix.
43 Id. 255.
44 Id. 1.
45 Of course, sanctions to enforce order and authority need not come from courts. Ostracism, for example, has long been used as a sanction to enforce rules and authority at the United States Military Academy at West Point. Some religious groups and many communities have used similar treatment to discipline members or to keep them from breaking rules or questioning authority. The willingness of Orthodox Jews to declare their children dead, and sit shivah, has proven to be a strong sanction in preventing intermarriage.
of potentially threatening or dangerous segments of the population." 46 In Massachusetts, the classes of people who most threatened the status quo were immigrants and the unemployed. In South Carolina, according to Hindus, the greatest threat to the status quo came from slaves. Thus, Hindus finds that the "most obvious [functional equivalents] are the plantation for the penitentiary, slaves for the criminal class." 47 Expanding this prison-plantation analogy by comparing the Boston Police Department with the irregular slave patrols in Charleston and the rest of South Carolina, Hindus argues that these institutions were similar because they served similar purposes in each state: to control the dangerous classes.

This analogy breaks down, however, on close examination. The greatest problem with the comparison between the plantation and the penitentiary is Hindus's assumption that "both institutions confined those people seen to be the most threatening to the social order." 48 A careful analysis of antebellum South Carolina—and indeed the entire antebellum South—would show that plantation slaves were not considered the most dangerous class; rather, it was free blacks, urban slaves, and the skilled slaves in small towns who really threatened the system. 49 Perceived as even more threatening, of course, were the abolitionists, who southerners believed were secretly infiltrating their society to foment a slave rebellion. The few abolitionists who came south and were detected passing out abolitionist literature or aiding fugitive slaves were harshly punished, but such punishment took place in the courtroom and the city, county, or state prison, not on the plantation. 50 Furthermore,

46 M. Hindus, supra note 1, at 251.
47 Id. nix.
48 Id. 125.
50 See, e.g., Drayton v. United States, 7 F. Cas. 1063 (D.C. Cir. 1849); United States v. Crandell, 25 F. Cas. 684 (D.C. Cir. 1836); Commonwealth v. Garner, 44 Va. (3 Gratt.) 624 (1846); D. Martin, Trial of the Rev. Jacob Gruber, Minister in the Methodist Episcopal Church, At the March Term, 1819, in the Frederick County Court, For a Misdemeanor (Fredericktown, Md. 1819) (describing the case of a Pennsylvania minister tried and acquitted for an antislavery sermon); D. Webster, Kentucky Jurisprudence (Vergennes 1845) (describing Webster's trial and imprisonment for helping slaves escape); T. Brown, Brown's Three Years in the Kentucky Prisons (Indianapolis 1837) (describing the trial and imprisonment of Thomas Brown for helping slaves escape); J. Walker, Trial and Imprisonment of Jonathan Walker, at Pensacola, Florida, for Aiding Slaves to Escape from Bondage (Boston 1846) (describing the trial, imprisonment, and public branding with the
Hindus clearly demonstrates that the South Carolina justice system failed to adequately prosecute white criminals. But this suggests a dilemma: these white criminals were not amenable to the state's "equivalent" of the penitentiary—the plantation. Therefore, either white criminals were not considered a dangerous class or Hindus's notion of equivalency fails.

Other evidence also supports the view that slaves were not the most dangerous class in South Carolina. The state's efforts to encourage the growth of the slave population contrast sharply both with its efforts to prevent the immigration of free blacks and with Massachusetts's responses to criminal and immigrant populations. Massachusetts might have deported criminals, if such had been possible. The state and its elite citizens certainly did little to encourage the growth of an immigrant population, especially when that population became increasingly Catholic and Irish. One searches in vain for evidence of the elite of Massachusetts arguing for the immigration of the Irish, even when Irish immigrants provided the main source of labor for New England's industrial revolution.51

This differs greatly from South Carolina's long history of involvement with the African slave trade. At the Constitutional Convention in 1787, Charles Pinckney, General Charles Cotesworth Pinckney, and John Rutledge all argued for a continuation of the African slave trade.52 After the trade was legally abolished, South Carolina was notorious for allowing it to continue. Jurors in South Carolina were unwilling to convict traders who violated the law, and popular and successful politicians campaigned in favor of opening the trade.53 Free blacks, on the other hand, were prevented from entering the state. State authorities and individuals were willing to confront federal officials54 and representatives from other states55 to prevent any free black seamen from entering Charleston. letters "S.S."—for slave stealer—of Walker, who attempted to help slaves escape from Florida).

51 See, e.g., O. Handlin, Boston's Immigrants, 1790-1865 (1941); J. Higham, Strangers in the Land (1955).


53 See, e.g., W. Freehling, supra note 3; I. Hayne, Argument Before the United States Circuit Court, by Isaac W. Hayne, Esq., on the Motion to Discharge the Crew of the Echo (Albany, N.Y. 1859); J. Woodruff, Report of the Trials in the Echo Cases (Columbia, S.C. 1859).

54 See, e.g., Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823).

55 In 1844, Massachusetts sent Samuel Hoar to South Carolina to try to settle their interstate squabble over the rights of free black merchant seamen entering the
Louisiana and Virginia showed a similar inclination to control free black seamen, while most southern states restricted free blacks within their jurisdiction and prohibited them from immigrating to their states. If the populations controlled by the prison and the plantation were not both viewed as the most dangerous to the social order of each state, then these institutions could not have served the same function, as Hindus argues they did.

In attempting to prove that the prison and the plantation both served the function of social control, Hindus erroneously argues that these institutions functioned similarly in order to control the most threatening individuals. According to Hindus, the nature of confinement for slaves in South Carolina and prisoners in Massachusetts was similar in essential respects. He writes, for example, that: "Prison and plantation confined at forced, unpaid, large-scale labor those people in society seen as threatening. Both inmates and slaves were deprived of basic political, civil, and human rights by a legal system sworn to uphold those rights for others."

But there are some serious problems with this notion. Prisoners were incarcerated only after an involved process which included arrest, indictment, trial, and sometimes appeal, and had many opportunities along the way to avoid incarceration. Slaves, on the other hand, were either kidnapped into slavery or born into the system, and the legal system of South Carolina never pretended to uphold their rights.

Once in prison, criminals in Massachusetts were deprived of some, but not all, of their civil and human rights. Prisoners were allowed to worship their own religions, read books and write letters or learn these skills, keep their own names, maintain ties to their families, and prepare for their eventual release from prison. They could not be removed from the state against their will. They could not be beaten without cause (at least in theory), and eventually all such punishments in the Massachusetts penitentiary were prohibited. Prisoners had at least the theoretical right to appeal to higher authority if they were mistreated; indeed, there were prison reform

port of Charleston on ships from Massachusetts. Hoar was forced to leave the city after government officials told him his life was in danger and could not be protected. See W. Wiecker, The Sources of Antislavery Constitutionalism in America, 1760-1848, at 128-40 (1977); H. Wilson, I History of the Rise and Fall of the Slave Power in America 576-86 (1872).

See notes 54 & 55 supra (on the problem of free black seamen entering Louisiana). On southern restrictions of free blacks, see I. Berlin, supra note 49; P. Finkelman, supra note 10. On the controversy between New York and Virginia over free blacks, see P. Seward, William H. Seward passim (1877).

M. Hindus, supra note 1, at 127.
societies in Massachusetts that would hear such complaints. Prisoners could remain married, continue to own property, and retain some custody over their children. Once released from prison, the former inmate regained other rights—including freedom of movement, the right to make contracts, and the right to control his own labor—that had been temporarily suspended. Most important of all, throughout their incarceration prisoners could look forward to the day when they would be free.

Slaves, on the other hand, had no civil or political rights. Those from Africa were forced to speak a new language and take new names. American-born slaves in South Carolina were prohibited by statute from learning to read or write. They could not marry or control their own children. Nor did they have the legal rights to own property, control their own labor, or travel freely. They could not easily avoid capricious beatings from their masters, and they had no higher authority to appeal to if their masters were inhumane. Slaves could not look forward to the day when they would be released, for it was almost impossible to legally manumit a slave in South Carolina. Furthermore, to free a slave would be to create a new member of the dangerous classes. Unless one argues that slavery was some type of preventive detention for life, the analogy between the plantation and the penitentiary breaks down.

More important than how someone entered either system, or the rights people had under them, is that the prison and the plantation were created for two fundamentally different purposes; they cannot be considered "functional equivalents," because they served basically different functions in each society. The Massachusetts penitentiary was designed to remove from society those people perceived as a threat to the general peace and welfare of the community. The South Carolina plantation, on the other hand, was an economic

---

58 A strong statement in support of the master's total control of his slave is found in State v. Mann, 13 N.C. (2 Dev.) 263 (1829). In that case, a man who had rented a slave was acquitted for shooting the slave in the back when she attempted to avoid punishment. Judge Ruffin declared that "[t]he power of the master must be absolute, to render the submission of the slave perfect." Id. 266. Slaves could not appeal to the courts to review their masters' treatment of them. Judge Ruffin wrote:

We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.

Id. 267. But cf. State v. Hoover, 20 N.C. (3 & 4 Dev. & Bat.) 365 (1839) (upholding the conviction and death sentence of a master for murdering his slave). There Judge Ruffin wrote that "the master's authority is not altogether unlimited."
and social institution designed to create a certain lifestyle and livelihood for the master. Both institutions had certain things in common; in particular, there was a measure of paternalism in both systems, and both slaves and prisoners worked at hard labor. But these superficial similarities should not be confused, as Hindus confuses them, with functional equivalents.

Both the prison and the plantation exuded paternalism. Through their words and deeds, prison officials and social reformers often expressed the view that inmates were like children and that it was the function of the penitentiary to discipline and train them while providing for their needs.\(^6^9\) Under the “Auburn system” of prison discipline, prisoners were isolated from each other and forced to work and rest in seclusion, and communication with the outside world was similarly limited.\(^6^0\) Nineteenth century penologists thought that criminals could be reformed in this way. The Auburn system was ultimately abandoned, but the paternalistic notion that the warden, or legislature, or prison visiting committee knew what was best for the inmates continued. In the Massachusetts penitentiary, prisoners labored in ways that might be analogous to the type of labor found in New England factories.\(^6^1\) As Hindus points out, the Massachusetts state penitentiary actually showed a profit in some years because of its prison industries.\(^6^2\) But profit was not the goal of the system. It was only a side effect. The true purpose of the prison was incarceration and reformation. That profit may have resulted, or that the prisoners ended up doing work similar to the non-criminals then working in New England’s factories, was only incidental to the purpose and goals of the penitentiary.

The type of paternalism connected to the penitentiary was based on the notion that “experts” could improve human behavior. This was of course consistent with other notions of reform then prevalent in the Bay State. This paternalism was institutionally oriented, rather than directed at individuals. Indeed, with prison uniforms, guards, prison manuals, remote wardens, and a legislature ultimately controlling the institution, it is not surprising that paternalism was more theoretical than actual. By the 1870s, the

\[^{6^9}\text{See generally M. Hindus, supra note 1, at 166-81.}\]

\[^{6^0}\text{See generally Id. 164-68; D. Rothman, The Discovery of the Asylum 94-108 (1971).}\]

\[^{6^1}\text{See M. Hindus, supra note 1, at 165.}\]

\[^{6^2}\text{Id. 170 n.24.}\]
Massachusetts Board of State Charities criticized the prison as a place where no rehabilitation was possible. The bureaucratization of the prison—and the subsequent institutionalization of a paternalistic system that lacked any meaningful human input or flexibility—had in fact begun much earlier. Thus, the reform of prisoners and the profits produced from prison labors were, as Hindus describes, doomed to fail in a system that was successful at only one thing: incarcerating criminals until their sentences were complete.

The purpose of the plantation, on the other hand, was not to incarcerate or incapacitate. Rather, the plantation was both an economic enterprise and a social system. The planter, especially the resident planter, was interested in creating a way of life for himself and his slaves. Many planters referred to slaves as part of their “family.” Despite the whippings and the occasional barbaric treatment of slaves, most masters honestly believed they were patriarchs who were responsible for the well-being and happiness of their slaves. However unrealistic the image of the happy slave may have been, it is important to remember that the master class believed in this myth. And for some slaves there was some reality to the myth. One does not have to be an apologist for the peculiar institution to accept that some masters treated their slaves well and that some slaves were able to adjust to bondage, accept their lot, and make the most of it. “Masters were not all alike. Some governed their slaves with great skill and induced them to submit with a minimum of force. Others, lacking the personal qualities needed to accomplish this, governed inefficiently.” On the other side, “[s]laves were not all alike either. They reacted to a particular master or overseer in different ways, some acquiescing in his authority and others rebelling against it.” The plantation system often functioned through a paternalistic relationship between master and slave. The slave’s “commitment to a paternalistic system deepened accordingly,” and both master and slave “relied heavily on local custom and tradition.” This type of compromise, when it worked best, gave slaves the privilege (if not the legal right) to own some personal property, to plant private gardens, and to market some of their produce. Some slaves had greater control over their

---

63 Id. 179.
65 Id. 142.
66 E. GENOVESE, ROLL, JORDAN, ROLL 30 (1974).
families and their personal lives than others, because of the personal relationships of their particular plantations.\(^{67}\) None of this makes slavery a good, or moral, institution, but it does contrast sharply with the more rigid control of the prison. One cannot imagine a prison guard or a warden referring to his charges as "my family" the way many masters did.\(^{68}\)

Plantations were also, of course, economic organizations. But, here again, the comparison with the prison does not work very well. The purpose of the plantation, as an economic system, was profit. The purpose of the prison was otherwise, despite the fact that some profit might be made from prison industries. Indeed, the nature and reasoning behind prison industry undermines the analogy. Prisoners were taught skills so that they could function on the "outside" as good citizens. Slaves were taught skills and made to work so that they could produce more wealth for their masters. Comparing and contrasting the plantation and the factory might be more apt, because both are economic organizations. The analogy is strengthened if we consider that the factory kept the "dangerous classes" busy performing useful work, and thus prevented the workers from becoming criminals and fulfilling their potential as the "dangerous class." Similarly, the plantation kept potentially dangerous free blacks in an ordered environment, as useful slaves.

Hindus is correct in understanding white South Carolinians' fear of blacks and the potential danger they were for the society. Similarly, he understands, and documents, the Massachusetts elite's fear of immigrants, vagrants, and the working class generally. But the plantation-prison analogy fails to usefully show the similarities and contrasts between the two states with regard to class control and criminal justice.

Some of Hindus's other "functional equivalents" work much better than the plantation-prison analogy. However, the ones that work best are also the ones that most seriously undermine Hindus's general conclusions about the similarity between the two societies and their criminal justice systems. The most fascinating "functional equivalent" concerns the failure of South Carolina to prosecute crimes of personal violence. Hindus argues persuasively that the dueling field in South Carolina was the functional equivalent of the Massachusetts courtroom.\(^{69}\) Gentlemen settled their quar-

\(^{67}\) Id. passim.

\(^{68}\) Id. 70 (chapter title "Our Black Family").

\(^{69}\) M. HinduS, supra note 1, at 42-48.
rels—be they over honor, business, or personal disagreement—not in the courtroom, but by the formal system of dueling. Indeed, "[h]onor was an important part of the state's economic life and formed the basis of its legal life as well. When the legal system proved ill-equipped to protect honor, South Carolinians took matters literally into their own hands." 70 Such was the state of things that "[d]uelists claimed they were not above the law at all, but guided by another law" 71—that delineated in John Lyde Wilson's The Code of Honor. 72 Here, the "functional equivalence" of the plantation system and the Massachusetts economic system—a comparison which is apt, valid, and thoroughly useful—underscores Hindus's argument. Slaveowners learned from birth to value honor and personal qualities more than any laws or statutes. 73 Thus, it was natural for them to settle their differences on the "field of honor" rather than in a court of law. Similarly, the capitalists of Massachusetts saw the courtroom as the proper forum in which to settle their differences. For a society where the whip was a symbol of authority, the duel was symbolic of the proper forum for settling disputes. For a society where the merchant's ledger was the symbol of success, the courtroom was the proper forum.

Although the "court" of honor and the court of law may have been functional equivalents, this does not mean that the results were the same. In one society, order was achieved (to some extent) through a legal system that was official and established, and to which all were subject; in the other, deference and violence com-

70 Id. 35.

71 Id. 45.


73 On the concept of honor in the South, see J.H. Franklin, supra note 2, at 33-37. It is also worth considering Thomas Jefferson's observations on honor and its connection to slavery:

The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it . . . . The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to the worst of passions, and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities. The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. . . . [The system of slavery] transforms those into despots . . . .

T. Jefferson, Notes on the State of Virginia 155 (Torchbook ed. 1964) (1st ed. Paris 1782). Raised under such conditions, it is not surprising that the master class would value honor and would be used to settling disputes through violent means.
bined to create a multi-tiered system of social control which can hardly be called justice. For example, a duel might result in the death or maiming of citizens and lead to even more violence and more duels; a suit for libel or slander, on the other hand, would normally lead to a peaceful resolution of differences, assuming that the final judgment rendered by the court was accepted by the parties. And in Massachusetts, the "criteria for confinement" focused on violations of the public peace, while in South Carolina dueling might impose punishment for breaches of personal as well as societal norms. Thus, the functional equivalents would not necessarily produce similar results.

The problems with Hindus's functionalist framework are also apparent in his analysis of why prison reform flourished in Massachusetts and failed in South Carolina. Hindus concludes that the different fates of these reform efforts exemplify how law in each state functioned to preserve the power and authority of the ruling elite. In Massachusetts, prisons were important for the state's control of the dangerous populations, and improving these institutions could only help to tighten the society's control over those classes. In contrast, Hindus argues, South Carolinians refused to acknowledge the existence of a dangerous class of whites, because they were beyond the control of slavery and would present a need for a prison system. Thus, according to Hindus, because law and penal institutions served to further these class notions, the different successes of prison reform in these states is easily explained.

To reach this conclusion about the function of law in each state, Hindus unsuccessfully attempts to demolish other persuasive explanations of the failure of prison reform efforts in South Carolina. Hindus's research shows, for example, that the leaders of the movement for a state prison were often unionists, who were considered

---

74 That people will not always peacefully obey the outcome of court proceedings is illustrated by the rescues of fugitive slaves in the 1850s and opposition to school desegregation in recent decades. The contrast between antebellum Massachusetts and South Carolina nevertheless appears sharp, because the duel and the courtroom still represented the norm in each society. Study of the acceptance of court decisions by the parties in Massachusetts is needed to allow us to better understand the similarities and differences between these two legal systems.

76 This term is used by Hindus throughout his book, see, e.g., M. Hindus, supra note 1, at 255, and refers to the reasons that a person is subjected to the penalties of the legal system. According to Hindus, these reasons for confinement are the concrete embodiments of the purposes which the law and legal institutions serve in a particular society.

77 See generally id. 242-49.
to be "soft" on the slavery issue. He then points out that a number of secessionists also supported prisons. But does this prove, as he asserts, that "[t]he correlation between Unionism, softness on slavery, and reform cannot be sustained"? That fire-eaters like John Lyde Wilson (author of the dueling manual) and Isaac Hayne (an attorney who defended people accused of violating prohibitions on the African slave trade) supported penal reform does not prove that most people did not associate this reform, or any other, with unionism and abolition. The leaders of the reform movement were in fact the leaders of the unionist movement in the state, and some, like Francis Lieber and Thomas S. Grimké, were clearly suspect on slavery. Indeed, the question that ought to be asked is why some fire-eaters were willing to support prison reform, not why the few that did were unable to counter the bad name given to any reform by the support of such men as Lieber, Grimké, or the arch-Unionist, Benjamin F. Perry.

Similarly, Hindu's argument that the failure of penal reform cannot be explained by this connection because reform efforts failed between 1760 and 1820, a time "which predates concern about abolitionism or Unionism, . . . a time of agitation for social and political change" during "the zenith of Jeffersonian liberalism in the South," merits close examination. Jeffersonian—or perhaps more properly "Virginian"—liberalism had virtually no effect on South Carolina during or after the Revolution. Nor is it entirely clear that South Carolina was not concerned about unionism, sectional crisis, and abolition long before the Missouri debates, "like a fire-bell in the night, awakened [Thomas Jefferson] and filled [him] with terror," since the debate over slavery, which the ex-president considered "the [death] knell of the Union," had in fact been raging for some time in the minds of South Carolina's leaders. As early as the First Continental Congress in 1774, representatives from South Carolina were quick to jump to their feet to protect slavery.

In the Constitutional Convention of 1787, the Pinckneys and Rut-

---

78 Id. 216-17.
79 Id. 217.
80 Id.
81 Id.
ledge made it absolutely clear that any threat to slavery would jeopardize the Union.84 Similarly, it is clear that in the period between 1787 and 1820 South Carolinians were always conscious of their "peculiar institution" and how it might be affected by national legislation or state action.85 Thus, it is not difficult to show that slavery and conservatism went hand in hand in South Carolina long before the Missouri crisis of 1820 or the Vesey Conspiracy in 1822.

Finally, Hindus rejects the notion that conservatism prevented reform by simply stating that "conservatism as an explanation is unsatisfying" because "[s]uch political moves as Nullification and secession were hardly conservative." 86 The problem here is that nullification and secession were in fact quite conservative, especially when placed in the context of nineteenth century South Carolina. Nullification and secession were initiated to protect and preserve a society and a way of life. They were both couched in conservative terms. They represented a return of government to the local level and a rejection of nationalism and national power. The confederate constitution was almost entirely a conservative document. It was to a great extent based on the United States Constitution, with the crucial changes necessary to "conserve" slavery and local government.87 Indeed, to deny the conservative nature of South Carolina and the reactionary nature of secession and nullification is to misunderstand the ideology of the antebellum South.

Having rejected all the obvious explanations for the failure of prison reform, Hindus tells us that "[w]hat has traditionally been ascribed to conservatism—and, accordingly, blamed for South Carolina's immobility—was actually a certain view of society and the groups that comprise it;" a view that was "rooted in the state's conception of class."88 That class is directly tied to a "conservative" or "reformist" ideology within either state seems perfectly obvious. What is lacking is an understanding that just because two societies had some "conception of class" does not mean that the two societies are the same.

In his desire to find a common thread for Massachusetts and South Carolina, Hindus seems to assert that the two societies were

84 See note 52 supra. See also S. Lynd, CLASS CONFLICT, SLAVERY & THE UNITED STATES CONSTITUTION 153-213 (1967).
85 See note 83 supra.
86 M. Hindus, supra note 1, at 219 (emphasis in original).
87 See generally note 2 supra.
88 M. Hindus, supra note 1, at 219.
similar because in both states the law was administered by and for those who had authority and power. In South Carolina, those in authority were most interested in controlling slaves—the plantation model of law enforcement. In Massachusetts, those in power controlled immigrants and moral deviates, drunkards, fornicators, and vagrants through the factory and the prison. Law enforcement in both states becomes "a matter of class," and "class relations are a key to understanding the nature of crime and authority." 89 Thus, "despite the different economic systems, . . . vast demographic differences, and . . . different types of legal structures, the criminal justice systems of both states served similar functions." 90 Hindus asserts that "[o]nce we go beyond the obvious structural contrasts, when we abandon the litmus-test conviction rates and the disputes over courts and the proper posture of authority and populace, we find that somehow things were not as drastically different in the two states as they appeared." 91 He concludes, "[t]he purpose of law and authority, not the structures and institutions, becomes the point of comparison, rather than of contrast. And thus, if one society chose the prison and the other the plantation, it was the criteria for confinement and not the institutional setting with which we must contend." 92

This conclusion undermines the importance of the research in this book for two reasons. First, it is clear that the conditions of confinement—that is the institutional setting—were intrinsically connected to the whole criminal justice system. To use a rather stark modern analogy: theft is considered a criterion for punishment in both the Islamic world and the western world, but the punishment in one case can be loss of a hand or imprisonment under conditions that may be far worse than the simple imprisonment in the other case. To use a strictly American example, in 1976 the State of Alabama conceded in open court that incarceration in the state's penitentiary constituted cruel and unusual punishment and violated the eight and fourteenth amendments of the United States Constitution; 93 presumably most penal institutions in other states do not violate these amendments. Thus, while the criteria for confinement may be the same in all states, at least for some crimes, the

89 Id. 251.
90 Id. 253.
91 Id.
92 Id. 255.
conditions and the end result of confinement may vary a great deal from state to state, despite the likelihood that the same class relationships exist from state to state. Hindus could conclude that those in power in both an Islamic society and the United States are exercising control over those who violate particular behavioral norms. But unless the nature of the punishment, including the conditions of confinement, is examined, the amount of control being exercised in each case will be misapprehended. How much a society disapproves of different behaviors will provide an important clue about the purposes of the criminal justice system.

Hindus's descriptions of antebellum South Carolina illustrate another reason why an examination of the institutional setting is necessary in order to understand the criteria for confinement. In South Carolina during this period, a large number of crimes were punishable by death. The stated criteria for conviction for these offenses might indicate that it was extremely important to control persons who stole, or forged, or engaged in other disapproved behavior. Without knowing the institutional setting, however, our understanding is incomplete. These types of behavior may not have been considered as reprehensible as the punishment suggests. Instead, the death penalty may only reflect the unavailability of long-term imprisonment as an alternative punishment because South Carolina had no suitable penitentiary.

The second problem with Hindus's conclusions is that the "institutional setting" for confinement may in fact help determine both why defendants are convicted or acquitted and, if convicted, why they receive certain punishments. The Alabama case helps illustrate this. It is quite likely that sentencing procedures and prosecution decisions have changed as a result of Judge Frank Johnson's decision in Pugh v. Locke. If no more prisoners can be incarcerated in a penitentiary, then one of a number of things must occur. Among the possible options are: build more prisons; re-

94 M. Hindus, supra note 1, at 93.


As yet, there have been no empirical studies of sentencing and parole rates in Alabama since this decision. Professor Larry Yackle at the University of Texas School of Law is in the midst of studying the entire case. Yackle "suspects" that the rate of pretrial confinement is probably down and that misdemeanor sentencing is also down. Each of these practices would relieve some pressure on local jails which now have to accommodate the prisoners who cannot be sent to the state penitentiary. However, no matter what the actual results are, it is clear that, if no more prisoners can be sent to the state penitentiary, the "criteria for confinement" at that institution have been changed, and not by social values, but rather by the institutional arrangements.
lease some prisoners, either through pardon or parole, in order to make room for others; cease sentencing people to the state penitentiary; cease prosecuting and convicting people for certain crimes, and place prisoners in alternative forms of incarceration. With all but the first option, the nature of punishment would change as a result of a change in the institutional setting, even though the stated "criteria for confinement" remained exactly the same.

Perhaps the clearest contrast between the two states is seen in Hindus's table titled "Simple and Effective Conviction Ratios." The simple conviction rate is the percentage of convictions based on cases which were actually brought to trial. For total cases, we find that 85.9% of Massachusetts prosecutions ended in convictions versus 71.5% of trials in South Carolina. Clearly, in Massachusetts prosecutors were more effective or juries were more willing to convict, or both. The end result is the same: in Massachusetts accused criminals were more likely to be convicted than their counterparts in South Carolina.

The "effective conviction rate" is even more illuminating. This statistic measures "the ratio of convictions to all cases that reached grand or petty juries. It takes into account both the 'no bill,' a finding by a grand jury that insufficient evidence existed to indict, and nolle prosequi, the decision by the prosecutor or plaintiff not to proceed." Through this brilliantly innovative measure, Hindus shows that the conviction rate in Massachusetts was more than twice that in South Carolina: Massachusetts had a 65.8% effective conviction rate, while South Carolina's was only 30.9%.

Thus, Hindus's own evidence indicates that in both South Carolina and Massachusetts the criteria for conviction were affected by the institutional setting. While the stated criteria for conviction of capital offenses did not change substantially during this period in South Carolina, evidence indicates that the severity of the available

---

86 A recent example of the last alternative occurred at the Texas Department of Corrections facility in Huntsville, Texas, where a decision handed down by federal Judge William W. Justice has forced Texas officials to end immediately the practice of placing more than two prisoners—often there were four or more—in cells designed for two. See Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), motion to stay granted in part, 650 F.2d 555 (5th Cir. 1981); N.Y. Times, Apr. 21, 1981, at 12, col. 6. Governor William Clements had ordered that inmates be housed in tents provided by the Texas National Guard. N.Y. Times, supra. As in Alabama, sentencing and incarceration are now determined as much by the "institutional setting" as by Texas's stated criteria for confinement.

87 M. HINDUS, supra note 1, at 91.

88 Id. 90.

89 Id. 91.
punishment redefined the actual criteria of confinement. Although it is difficult to determine how much jury verdicts were affected by the harsh punishment that faced a defendant convicted of a capital crime, it is clear that in each state the conviction rate for these offenses was "well below that for all crimes." Not all defendants who had committed such acts were convicted. The institutional setting, then, affected the reasons why persons were convicted or acquitted.

Hindus is not wrong in concluding that the criteria for confinement were based, at least in part, on notions of class and authority. But to assert that class and authority are all that mattered is to reach the meaningless and erroneous conclusion that because all societies protect their values through some form of criminal justice system, all criminal justice systems must therefore be alike. Fortunately, Hindus has provided ample and persuasive evidence throughout his book that this was in fact not the case. Despite the erroneous conclusions and inadequate analytical framework, _Prison and Plantation_ is a valuable book precisely because it presents this evidence.

III.

What, then, has Hindus accomplished? Primarily, he has described in great detail the critical distinctions between the legal systems of two very different states. These states can be seen as representatives of the North and the South in the sectional crisis. In comparing them in this manner, Hindus's findings help illustrate and explain some of the real differences between the northern nation and the southern nation. This evidence leads to the conclusion that, in law as well as in so many other areas of life, the two sections were really quite dissimilar. On another level, we can view the two states as representatives of a capitalist, industrial, bourgeois, society and a slave-based, patriarchal plantation system. This comparison supports the notion that the North and the South were so different in their economic and social structures that other institutions, such as the legal system, also developed in different ways.

---

100 Id. 93.

101 One is tempted to summarize Hindus's reasoning thusly: the main difference between criminal justice in Massachusetts and South Carolina is that in one state man exploits man and in the other state it is the other way around.

102 This also undermines, once again, the conclusions in R. Fogel & S. Engerman, _Time on the Cross_ (1974), that slaveowners were essentially capitalists working and thinking much like their northern industrial counterparts. For extensive criticism of _Time on the Cross_, see F. David, H. Gutman, R. Sutch, P. Temin,
It is clear from Hindus's evidence that the law and legal institutions were affected by the society around them. The criminal justice system emerges from this book as an integral part of the social, economic, and political institutions of each society, and not as an institution applying neutral and universal principles to specific sets of facts.

Hindus describes the struggle in Massachusetts to create a prison system that, it was hoped, would make the Bay State a peaceable kingdom despite the disruptions of immigration, industrialization, and urbanization. In that community, public morality was intimately tied to the economic system. Drunkenness and vagrancy were the most frequently punished crimes. In part, they were punished most often because they occurred most often, as the vast changes taking place within the society led to the more frequent occurrence of these disapproved behaviors. But they were also punished so often because they threatened the new economic order: vagrants and drunkards would not function as productive factory workers.

In South Carolina, on the other hand, we see a society preoccupied with race control. White criminals were often neither prosecuted nor convicted because, as Hindus argues, such legal sanctions might upset the state's racial balance. Individualism, rather than "equal justice for all," became the basis of law. Although dueling was proscribed, it nevertheless continued because it served to resolve disputes that the court system was ill-equipped, unwilling, or unable to handle. Individualism affected the law in another way. Unlike Massachusetts, South Carolina adopted a "laissez-faire attitude" towards the regulation of moral behavior, because "such regulation was not considered a proper exercise of state authority." 103 Such crimes as bastardy, fornication, Sabbath-breaking, and blasphemy, which Massachusetts punished, often with great rigor, were generally ignored in South Carolina. Mobs and vigilance committees—collections of individuals—often enforced the law in South Carolina, and their excesses were generally ignored by the legal system. 104


103 M. HINDUS, supra note 1, at 49.

104 Slavery and the plantation system helped create this notion of individualism in a number of ways. Since the seventeenth century, planters had considered themselves lords of their own manors, and thus a law unto themselves. In the early eighteenth century, William Byrd II wrote that "[T] live in a kind of Independence of Every one but Providence," and Landon Carter wrote that his Virginia
The contrast between reformist Massachusetts and laissez-faire South Carolina was caused, most directly, by the presence of slavery in the latter state. Massachusetts could afford to experiment with new ideas and new institutions. For many in the state, change was desirable. The descendants of those who built “A City on the Hill” still sought some kind of utopia here on earth. They were willing and eager to try anything that might better society. Here the weakness of the notion of “functional equivalents” is again apparent.

The estate was “an excellent little Fortress . . . built on a Rock . . . of Independence.” G. Mullin, supra note 3, at 3, 8 (emphasis in original). See also E. Morgan, American Slavery, American Freedom (1975). This attitude of self-sufficiency and independence led to a disdain for legal authority.

On another level, slaveowners were uninterested in vigorous enforcement of crimes of morality because such enforcement clearly had implications for their own behavior toward their slaves. Bastardy and fornication were, after all, common occurrences on the plantations. See, e.g., K. Stampf, supra note 64, at 350-61. It is similarly possible that South Carolina’s antiquated divorce laws, which Hindu contrasts with the more enlightened statutes of Massachusetts, were also connected to slavery, contrary to Hindu’s argument that the primary reason for the state’s refusal to change the divorce laws was a belief that the law had no business regulating private morality. Many men in South Carolina had easy access to extramarital relations with their slaves, and thus may have been more willing than men in Massachusetts to tolerate unhappy marriages. White South Carolina women, lacking political power and being placed on the pedestal reserved to “white southern womanhood,” were not consulted about this arrangement, and were often doomed to remain in unhappy marriages while their husbands created liaisons in the slave quarters. For an analysis of this issue from the viewpoint of southern women, see A. Scott, The Southern Lady: From Pedestal to Politics, 1830-1930, at 45-61 (1970); Censer, “Smiling Through Her Tears”: Ante-Bellum Southern Women and Divorce, 25 Am. J. Legal Hist. 24 (1981).

Finally, on the question of morality, bastardy, and slavery, consider the eloquent testimony of Mary Boykin Chesnut, the wife of a Charleston politician.

I wonder if it be a sin to think slavery a curse to any land. Sumner said not one word of this hated institution which is not true. Men and women are punished when their masters and mistresses are brutes and not when they do wrong—and then we live surrounded by prostitutes. An abandoned woman is sent out of any decent house elsewhere. Who thinks any worse of a negro or mulatto woman for being a thing we can’t name? God forgive us, but ours is a monstrous system and wrong and iniquity. Perhaps the rest of the world is as bad—this only I see. Like the patriarchs of old our men live all in one house with their wives and their concubines, and the mulattos one sees in every family exactly resemble the white children—and every lady tells you who is the father of all the mulatto children in everybody’s household, but those in her own she seems to think drop from the clouds, or pretends so to think.

* * *

You say there are no more fallen women on a plantation than in London in proportion to numbers. What do you say to this? A magnate who runs a hideous black harem and its consequences under the same roof with his lovely white wife and his beautiful and accomplished daughters? . . . “You see, Mrs. Stowe did not hit the sorest spot. She makes Legree a bachelor.”

In Massachusetts, there was genuine hope that the "dangerous classes" could be reformed and made part of the society. Penitentiaries were built not just to isolate criminals from society, but also to educate and train them for the day when they would return. The legally-sanctioned use of corporal punishment diminished, and ultimately disappeared. The use of capital punishment also declined, and for a short time it was abolished altogether. These efforts at reform of the criminal justice system and rehabilitation of criminals may have been poorly conceived and implemented, as Hindus shows in his descriptions of the prison system. But the society tried, as best it could or knew how, to rehabilitate lawbreakers. This goal stimulated perpetual reforms in the Massachusetts criminal justice system.

In South Carolina, race distinctions, not laws, guided the criminal justice system. Any reforms were deemed suspect in that society because they might upset the delicate balance between planters, other whites, and slaves. Indeed, if Hindus is correct that slave control was the main goal of South Carolina's legal system, then rehabilitation would have been unnecessary, unwise, and impossible. Slaves, after all, could not be rehabilitated into freemen. In South Carolina, then, the whip and the scaffold remained the most common methods of punishment for black and white criminals. Reform was simply not a possible goal.

Hindus's conclusions that these criminal justice systems served the same function despite their different structures and institutions obscures important issues and evidence. The structures created by each state to enforce societal norms tell us a lot about those societies. By examining the nature and design of each institution, including the prison and the plantation, we can discover what those with power and authority in each state really intended to accomplish in the way of crime, class, or race control. Similarly, to understand what purposes these institutions did serve in the antebellum period, the routines and deprivations imposed on those confined must be examined. Additionally, the responses of prisoners and slaves to these institutions are important for understanding what functions these structures served. Thus, contrary to Hindus's assertions, the institutional setting cannot be disregarded in an examination of criminal justice systems.

The contrast between the court systems of the two states is symbolic of the great differences that developed in Massachusetts and South Carolina before the Civil War. Whatever the topic—be it institutions, codification, types of punishment, rate of conviction,
quality of the judiciary, or types of crimes prosecuted—it is clear that contrast, not similarity, is the real theme of the evidence presented in this book. The contrasts help illuminate the problems of law enforcement not only in antebellum America, but today as well. Class bias in law enforcement, the place of authority in society, and government interference with the private lives of individuals all remain living issues. Hindus has shown how two quite different societies dealt with these problems a century ago. We can learn a great deal about our own legal culture and heritage from his evidence.