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# EXPLORING THE ROOTS OF OUR CRIMINAL JUSTICE SYSTEMS

*Samuel Walker\**

THE ROOTS OF JUSTICE. By *Lawrence M. Friedman* and *Robert V. Percival*. Chapel Hill: University of North Carolina Press. 1982. Pp. xiii, 335. \$21.

CONSCIENCE AND CONVENIENCE. By *David Rothman*. Boston: Little, Brown & Co. 1982. Pp. xxi, 464. \$17.50.

Several years ago Lawrence Friedman admonished his fellow legal historians to leave their traditional realm of appellate court opinions and study the much larger, messier and more mundane world of the day-to-day administration of justice. The reality of the law for most Americans does not consist solely of the fine points of law found in appellate court opinions. In the case of the criminal law, for example, the reality of the law is found in the actions of police officers on the street, of prosecutors and defense attorneys in pretrial proceedings, and only occasionally in actual criminal trials. These stages of the criminal process are what Yale Kamisar once called the "gatehouses" of American criminal procedure.<sup>1</sup> Although largely hidden from public view, they are far more important in terms of the actual impact on peoples' lives than the more visible "mansions" represented by the opinions of appellate court judges.

Professor Friedman has taken his own advice to heart and, in collaboration with Robert V. Percival, one of his students, has produced one of those rare books that can be truly characterized as a landmark. *The Roots of Justice* reverberates throughout the field of legal history and the realm of contemporary criminal justice studies. The authors give us a better overall view (what the social scientists would call a "model") of how the criminal justice system works than our criminologists and political scientists have been able to fashion. It is ironic that although *The Roots of Justice* is a work of history, it may well have more significance for contemporary social science than for the field of history.

This is not to say that *The Roots of Justice* is flawless. On several points it is less than satisfying, especially where the authors fail to answer adequately the very questions they raise. Indeed, they seem to waffle on the most important point. But such failings pale in significance when measured against the truly impressive accomplishment they have made.

Friedman and Percival set out to produce a "snapshot" of the workings of one local criminal justice system. They chose Alameda County, Califor-

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1. Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* (1980).

nia (of which Oakland is the principal city) between 1870 and 1910. It was a fortunate choice because an apparently large body of official records has survived. The book is rich in detail, not just with respect to general patterns but about particular cases, which gives it the feel of specificity. We cannot, of course, assume that Alameda County was or is typical of criminal justice systems elsewhere in the country, and the authors make the appropriate disclaimers. But in other ways the snapshot provided by *The Roots of Justice* identifies important general phenomena about the administration of justice. Its principal contribution lies in its effort to grasp one entire local criminal justice system, from police operations to sentencing and punishment of convicted offenders.

*The Roots of Justice* is a commentary on much of the literature in the field of criminal justice. In a curious way it establishes an implicit dialogue with the second book reviewed here, *Conscience and Convenience*, by David Rothman.<sup>2</sup> The dialogue primarily involves methodology. But, as we shall see, issues of methodology are crucial for dealing with the substantive questions of how our criminal justice system works and, in particular, how it changes. Both of these books raise provocative points about the prospects for the "reform" of criminal justice, points that are extremely relevant to current policy debates.

In its effort to grasp the day-to-day workings of one local criminal justice system, *The Roots of Justice* illuminates two major shortcomings of existing scholarship in the field of criminal justice history. The first is the fact that most studies deal with only one institution. Thus, we have studies of the police, courts, or correctional institutions in a particular time or place. Some take a regional or national perspective, but all are essentially partial views. They do not tell us how the apparatus of criminal justice functions as a whole and cannot, therefore, begin to address the fundamental questions of the quality of justice. What we want to know is, to put it crudely, "who got what?" If Friedman and Percival do not quite answer this question to our satisfaction, they have at least brought us to the point where the question can be considered seriously. That alone is an impressive achievement.

The second great shortcoming of criminal justice history has been the neglect of the day-to-day administration of justice. Existing studies tend to be accounts of the creation of institutions. Rothman's *The Discovery of the Asylum*<sup>3</sup> is one of the better examples of the genre. One finds a common dramatic structure in these works. They open with a description of the old order; the rising action involves the mobilization of the reform effort; the dramatic climax is the creation of the new institution; finally the falling action traces the failure of the institution to fulfill the hopes and dreams of its creators.

A number of problems are associated with this approach to history. The most serious is that the story is told from the point of view of the reformers. The narrative is energized by their critique of the old order, their agenda

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2. In many ways, this book is an improvement over Rothman's earlier prize-winning work examining the Jacksonian origins of the asylum in the United States. See D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971).

3. *Id.*

for reform, their success and subsequent disillusionment. Methodologically, these histories tend to rely primarily on the writings of the reformers, and we are generally asked to accept their view of things at face value. This is essentially a form of intellectual history, an account of ideas about crime and justice told from the perspective of the reformers. *The Discovery of the Asylum* relies heavily on the "pamphlet wars" between the advocates of different approaches to prison design. (Thus, the "war" is really a skirmish between rival groups of reformers.) The point here is not that *The Discovery of the Asylum* is a bad book; rather, because it is one of the best in the field, it illustrates the limitations of the approach it takes.

There are, of course, different fashions in intellectual history. For decades the dominant school of thought offered a liberal-progressive interpretation of criminal justice history. This view took at face value the assumptions of the reformers about such things as the role of police and prisons. If the institutions failed, it was because intervening factors, usually political interference, prevented them from fulfilling their intended mission. More recently, an anti-progressive school has come to the fore. *The Discovery of the Asylum* was and is the most influential statement of this view.<sup>4</sup> The anti-progressive view simply turns the liberal-progressive view upside down. It treats the assumptions of the reformers as inherently suspect and regards the institution as doomed from the start. Anthony Platt's influential account of the juvenile court, *The Child Savers*,<sup>5</sup> joins Rothman's book as one of the best examples of this approach.

While the anti-progressive school is appropriately more skeptical of reform and reformers than is the liberal-progressive school, it still views events through the eyes of the reformers. Rothman's current volume, *Conscience and Convenience*, represents a considerable advance, if only because it takes into account the views of a wider range of actors in the drama. Accordingly, it heightens our appreciation for the complexity of the politics of social change.

*The Roots of Justice* takes an entirely different approach. Eschewing intellectual history, it seeks to give us an administrative history of how criminal justice institutions actually functioned. It allows us to begin to grapple with the fundamental questions of social history: What role did these institutions play in the broader context of society? How did the machinery of justice affect peoples' lives? What was the role of criminal justice in the allocation of power and opportunity in American society?

Given the task, Friedman and Percival necessarily had to employ a quantitative methodology. They needed to identify the general patterns of institutional behavior by examining large data sets. The quantitative approach has emerged as the major alternative to the dominant intellectual/political approach to criminal justice history. Its partisans, led by Eric Monkkonen, have been aggressive in asserting its potential.

A major part of the achievement of *The Roots of Justice* is its common sense application of methodology. Quantitative history has enormous

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4. *Id.* For an analysis of this book in light of Francis Allen's "rehabilitative ideal," see Schneider, *The Rise of Prisons and the Origins of the Rehabilitative Ideal*, 77 MICH. L. REV. 707 (1979).

5. A. PLATT, *THE CHILD SAVERS* (1969).

promise, not the least of which is its potential for exploring basic questions that other methodologies cannot begin to examine. But it also entails a number of its own problems, not the least of which is determining exactly what all those numbers mean. Arrest rates, for example, are not necessarily a valid indicator of the level of crime and disorder. The quantitative partisans make a strategic retreat in the face of this criticism and argue that the numbers are a valid indicator of bureaucratic activity. True enough, but it begs the question of what factors shape changes in bureaucratic behavior. Why, for example, do arrest rates go up or down? The numbers themselves cannot tell us whether it was because of changes in the level of crime, or changes in public attitudes about criminal behavior, or factors inside the bureaucratic agency itself.

Friedman and Percival manifest a refreshing degree of perception in responding to these complex questions. Steering a middle course, they point out that both traditional and newer quantitative methodologies can be "misused or abused" (p. 15). Thus, they use both methods: "Wherever possible, we drew samples and counted cases; some times we ran simple statistical tests. But at every step of the way we also tried to get behind our figures. We read reams and reams of documents, stuck away in drawers in the courthouse basement" (p. 15). They supplemented the data sets with anecdotal material from particular cases. "Both steps, we felt, were necessary. Without figures, we have only impressions, stories, fleeting moments, vague opinions. Numbers alone, on the other hand, are blind and mysterious: tablets written in an undeciphered script" (p. 15). Amen. The message here is one that partisans on all sides of the methodological wars should heed.

So much for methodology. Given these tools, what did Friedman and Percival find? Ironically, the most important substantive contribution of *The Roots of Justice* emerges not from the detailed analysis of the numbers but from the general conceptualization of the criminal justice system. The result is a "model" of American criminal justice that vastly improves over any currently available in the social science literature.

There is no single criminal justice system, they argue. Instead, there are several systems functioning simultaneously. Friedman and Percival posit a "wedding cake" model of criminal justice. At the top are a handful of "celebrated" cases which, for one reason or another, are unique and receive an inordinate amount of publicity. Because of the publicity, they shape public thinking about criminal justice despite the fact that they are completely unrepresentative. In the second layer are the routine felonies, and here we find the real business of crime control. Cases here are disposed of in an informal and highly routine fashion. As is true today, trials were rare in the period studied. Finally, the third layer involves the truly petty cases, the minor breaches of the peace and violations of local ordinances. The object is not so much punishment of crime as it is the imposition of discipline on those unlucky enough to be swept up into the system.

Each of these layers functioned in a very different fashion. The celebrated cases in the top layer involved the full-blown criminal process, including that rare event, the jury trial. Many, if not most, of the detailed technicalities of criminal procedure were invoked in such cases. The middle layer involved what we now recognize as a bureaucratized system of

justice. Cases were disposed of in the most convenient manner possible — convenient, that is, from the perspective of the officials maintaining the system. The bottom layer hardly resembled a system of “justice” at all. Legal niceties had little relevance, and cases were processed *en masse*.

This wedding cake model is a relevant description of contemporary criminal justice. We are familiar with the few celebrated cases, such as the recent John W. Hinckley trial, which have a grossly disproportionate effect on public awareness. We also recognize the informality with which routine felonies are handled. And we know that our municipal courts process cases *en masse* and pay scant attention to the formalities of criminal procedure. This wedding cake model is a substantial improvement over the unitary models offered by contemporary social scientists that fail to take into account the very different ways in which different categories of offenses are handled.

The policy implications of this model are substantial. Friedman and Percival are telling us that the “roots” of contemporary criminal justice are deep indeed. Consider the matter of plea bargaining. Obviously it is not a new phenomenon, and those commentators who talk of the “twilight” of the adversary system and the “decline” of the jury trial misread our history. The idea that we once enjoyed an adversarial system of justice is a sentimental fiction. The implications for reform are obvious: We will not readily “abolish” or even substantially restrict plea bargaining for there is no golden age of adversarial justice to which we can return.

The wedding cake model also suggests the hazards of confusing events that occur in different layers of the system. The recent uproar following the John W. Hinckley verdict is an excellent example of how the results of one celebrated case may be used to promote “reforms” (in this case the abolition or restriction of the insanity defense) in another layer. Friedman and Percival’s model sensitizes us to the point that the insanity defense, as one technicality of criminal procedure, has little practical relevance for the enormous volume of business in the second layer of the criminal justice wedding cake. Those who think that closing this alleged “loophole” will reduce crime or even substantially modify the processing of felonies are seriously mistaken.

Friedman and Percival conclude, with respect to reform, that “[s]omehow, reforms rarely ‘worked’ in the long run” in Alameda County (p. 323). The criminal justice system is too complex, too resilient, and it “resists deep structural reform” (p. 325). David Rothman has some equally penetrating insights into the nature of reform in *Conscience and Convenience*. But before turning to this book, I must comment on the major failing of *The Roots of Justice*.

Friedman and Percival are least successful in answering their own questions about the role of criminal justice in society. The issue has been posed in recent years by radical and Marxist criminal justice scholars: Is the machinery of justice a tool for maintaining systematic social inequities? Does it serve to keep the outcast out and the downtrodden down? In a section on “Class Justice and the Functions of Criminal Law” (pp. 315-18), the authors waffle, and their answer is not really satisfying. “These are ques-

tions," they write, "that we cannot really answer from our data." While no definitive answers are likely, more extended consideration seems in order.

*Conscience and Convenience* is a sequel to Rothman's earlier study, covering the second great period of institution-building in American criminal justice. Whereas *The Discovery of the Asylum* explored the development of the prison in the pre-Civil War era, this volume deals with the rapid spread of probation, parole, the indeterminate sentence, and the juvenile court in the Progressive Era. The ideas underlying these institutions had been circulating for decades, and there had been a few tentative experiments prior to 1899. In a remarkable burst of institution-building during the next sixteen years, these institutions became the established norm in American criminal justice. After 1915 only a few states lacked these components of what is now the full criminal justice "system."

The most significant part of Rothman's account is not the story of the creation of these institutions but of their subsequent survival in the face of widespread public hostility. By the early 1920's parole was in disrepute. A large segment of the public accused parole boards of excessive leniency and found them guilty of releasing allegedly dangerous felons into society. The mood and rhetoric of the period bears a striking resemblance to our situation today. Other critics were aware that parole boards lacked any real scientific basis for their decisions concerning the release of prisoners. Parole boards were only the most convenient whipping boys. To indict parole, after all, was to indict not only the indeterminate sentence but the very philosophical underpinnings of our methods of dealing with convicted offenders. Long implicit in criticisms of existing institutions, this philosophical debate did not really surface until the mid-1970s.

Rothman points out that parole survived this pervasive disillusionment, and the explanation is contained in the title of this book: Parole proved administratively convenient for key criminal justice officials. The parole bureaucracy had a vested interest in maintaining the institution. Possibly even more important were the prison officials who found that parole served a number of important administrative needs. Parole was a mechanism both for maintaining control over the inmates themselves and for managing the size of the prison population. Other officials, police chiefs and judges, while unhappy with many features of parole, deferred to the needs of their fellow administrators. Reform may well have sprung from the collective conscience of well-meaning reformers, but the convenience of administrators determined both its ultimate form and its ability to survive.

*Conscience and Convenience* represents an advance over *The Discovery of the Asylum* because it takes into account a wider range of actors. The first volume was too much an exercise in intellectual history, relying primarily on the expressed views of the active reformers. It told us too little about the ideas and actions of other key actors, notably the legislators who authorized the first prisons and the judges who were given new sentencing options. The story is perhaps a bit more complex than *The Discovery of the Asylum* would lead us to believe. *Conscience and Convenience*, while working with essentially the same methodology, adds new dimensions to the story and enhances our appreciation for the complexity of social change. To be sure, it is still a form of intellectual history. It tells us what key

officials thought rather than how the institutions actually functioned; nevertheless, it is an improved form of the genre.

By a different route, Rothman has reached some conclusions about the nature of criminal justice reform similar to those of Friedman and Percival. The potential for fundamental change in existing institutions is limited indeed. Friedman and Percival tell us that it is because of deeply rooted day-to-day processes. Rothman shows us how those processes are viewed from the perspective of the officials who run the institutions. The parallels between the 1920's, as described by Rothman, and the 1980's are striking. In both periods an era of hopeful reform and experimentation gives way to one of fear and frustration. Now, as in the 1920's, a conservative crime control mood reigns, and we are witnessing a variety of proposals designed to get tough with criminals. Both of these books suggest that this conservative reform effort will not seriously alter the basic processes of American criminal justice. But those who oppose the current conservative proposals should not take any comfort in this, for the sword cuts both ways. Those who have a different view of the problems of our criminal justice system are no more likely to be able, should the political mood shift, to effect any fundamental changes either.

The message implicit in these two books is depressing indeed. It is all the more depressing because the books are so persuasive. These two books are the products of mature scholars at the height of their powers. Friedman and Rothman have thought deeply about the nature of our criminal justice system and have presented us with two extremely important works. We can only hope that they will continue their respective lines of inquiry and that the junior member of this group, Robert Percival, will pursue the scholarly inquiry he has begun.