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Anthony Grasso

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Abstract

As the global leader in incarceration, America locks up its own citizens at a rate that dwarfs that of any other developed nation. Yet while racial minorities and the urban poor fill American prisons and jails for street crimes, the state has historically struggled to consistently prosecute corporate crime. Why does the American state lock people up for street crimes at extraordinary rates but demonstrate such a limited capacity to prosecute corporate crime? While most scholarship analyzes these questions separately, juxtaposing these phenomena illuminates how the carceral state's divergent treatments of street crime and corporate crime share common and self-reinforcing ideological and institutional origins. Analyzing intellectual history, policy debates, and institutional change relating to the politics of street crime and corporate crime from 1870 through today demonstrates how the class biases of contemporary crime policy emerged and took root during multiple junctures in U.S. history, including the Gilded Age, Progressive Era, New Deal, and post-war period. This reveals that political constructions of street criminals as pathological deviants and corporate criminals as honorable people driven to crime by market dynamics have consistently been rooted in common ideas about what causes and constitutes crime. By the 1960s, these developments embedded class inequalities into the criminal justice institutions that facilitated the carceral state's rise while the regulatory state became the government's primary means of controlling corporate crime. The historical development of mass incarceration, the corporate criminal law, and regulatory state should not be viewed as autonomous developmental threads, but as processes that have overlapped and intersected in ways that have reinforced politically constructed understandings about what counts as "crime" and who counts as a "criminal."

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PUNISHMENT AND PRIVILEGE:
THE POLITICS OF CLASS, CRIME, AND CORPORATIONS IN AMERICA

Anthony J. Grasso

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Supervisor of Dissertation

Marie Gottschalk

Professor of Political Science

Graduate Group Chairperson

Matthew Levendusky, Professor of Political Science

Dissertation Committee

Adolph Reed

Professor of Political Science

Rogers Smith

Professor of Political Science

PUNISHMENT AND PRIVILEGE: THE POLITICS OF CLASS, CRIME, AND
CORPORATIONS IN AMERICA

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For my Mom, my first teacher

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ABSTRACT

PUNISHMENT AND PRIVILEGE: THE POLITICS OF CLASS, CRIME, AND CORPORATIONS IN AMERICA

Anthony Grasso

Marie Gottschalk

As the global leader in incarceration, America locks up its own citizens at a rate that dwarfs that of any other developed nation. Yet while racial minorities and the urban poor fill American prisons and jails for street crimes, the state has historically struggled to consistently prosecute corporate crime. Why does the American state lock people up for street crimes at extraordinary rates but demonstrate such a limited capacity to prosecute corporate crime? While most scholarship analyzes these questions separately, juxtaposing these phenomena illuminates how the carceral state's divergent treatments of street crime and corporate crime share common and self-reinforcing ideological and institutional origins. Analyzing intellectual history, policy debates, and institutional change relating to the politics of street crime and corporate crime from 1870 through today demonstrates how the class biases of contemporary crime policy emerged and took root during multiple junctures in U.S. history, including the Gilded Age, Progressive Era, New Deal, and post-war period. This reveals that political constructions of street criminals as pathological deviants and corporate criminals as honorable people driven to crime by market dynamics have consistently been rooted in common ideas about what causes and constitutes crime. By the 1960s, these developments embedded class inequalities into the criminal justice

institutions that facilitated the carceral state's rise while the regulatory state became the government's primary means of controlling corporate crime. The historical development of mass incarceration, the corporate criminal law, and regulatory state should not be viewed as autonomous developmental threads, but as processes that have overlapped and intersected in ways that have reinforced politically constructed understandings about what counts as "crime" and who counts as a "criminal."

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CHAPTER 1: THE POLITICS OF CLASS, CRIME, AND CORPORATIONS IN AMERICA IN HISTORICAL PERSPECTIVE

“Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through.”
-Jonathan Swift, 1707¹

Nearly a decade has passed since the onset of the Great Recession. The economy has made steady improvements in that time, but the economic collapse reshaped the lives of millions of people who lost their homes, jobs, and savings in its wake. The Financial Crisis Inquiry Commission’s 2011 report indicated that the recession was not just an accident. The word “fraud” was used over 150 times to describe the actions of the financial officers and agents who precipitated the crisis.² In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act to comprehensively reform the financial industry, create a Consumer Financial Protection Board, and mandate new regulations on high-risk financial instruments and speculative trading. At the bill signing, President Barack Obama stated that “unless your business model depends on cutting corners or bilking your customers, you’ve got nothing to fear from reform.”³

Obama’s statement seemed to offer a real promise that through Dodd-Frank, the state would rein in financial fraud and never let a similar disaster unfold again. But such bold rhetoric is not new to American politics. In the early 2000s, the energy-trading company Enron perpetrated one of the biggest frauds in U.S. history with help from the

¹ Jonathan Swift, “A Trritical Essay Upon the Faculties of the Mind (1707),” in *The Works of Jonathan Swift*, vol. IX (Edinburgh: Archibald Constable and Co., 1814), 338.

² Financial Crisis Inquiry Commission, “Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States” (Washington: Government Printing Office, January 2011); Jed S. Rakoff, “The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?,” *The New York Review of Books*, January 9, 2014.

³ “Obama’s Remarks at the Signing Ceremony,” *New York Times*, July 21, 2010, <http://www.nytimes.com/2010/07/22/business/22regulate-text.html?mcubz=0>.

accounting firm Arthur Andersen. After Enron's collapse, Congress passed the Sarbanes-Oxley Act of 2002 to monitor corporate accounting, auditing, and financial disclosures. Upon signing the bill, President George W. Bush said, "Every corporate official who has chosen to commit a crime can expect to face the consequences."⁴ Years earlier, President George H.W. Bush made similar claims. Over 1,000 Savings & Loan Associations ("S&Ls") shuttered in the 1980s upon going insolvent as financiers profited through risky speculative investments and junk bond operations. After the collapse, Bush signed the Financial Institutions Reform, Recovery, and Enforcement Act, stating, "This legislation will...put in place permanent reforms so these problems will never happen again."⁵

It is a recurring pattern for policymakers to "discover" the problem of corporate crime and provide a solution only to "discover" it again during the next crisis.⁶ In spite of this, the state has never developed the ongoing capacity to prosecute corporate crime. This stands in contrast to the broader development of the criminal justice system. As the global leader in incarceration, America locks up its own citizens at a rate that dwarfs that of any other developed nation. Yet while racial minorities and the urban poor fill prisons and jails for property crime, drug use, and violent crime, the state has struggled to punish those who have made millions of dollars at the cost of ruining millions of lives.

Industry leaders who cause such massive collapses routinely defend themselves as different from and more redeemable than the street criminals penalized so harshly by the

⁴ George W. Bush, "Remarks on Signing the Sarbanes-Oxley Act of 2002," July 30, 2002, <http://www.presidency.ucsb.edu/ws/?pid=73333>.

⁵ Nathaniel Nash, "Savings Cure May Kill the Patient," *New York Times*, August 3, 1990, <http://www.nytimes.com/1990/08/03/business/savings-cure-may-kill-the-patient.html?mcubz=0>.

⁶ William Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago: University of Chicago Press, 2006), 69; Robert Tillman, Henry Pontell, and William Black, *Financial Crime and Crises in the Era of False Profits* (New York: Oxford University Press, 2017), 2.

justice system. After the collapse of Enron, its CEO Jeffrey Skilling famously insisted that, “We are the good guys...We are on the side of the angels.”⁷ Angelo Mozilo, the CEO of Countrywide who drove his company deep into the sub-prime mortgage business prior to the Great Recession, asserted that “we didn’t do anything wrong” and that the “tides go in and out. This is just another tide.”⁸ Even after precipitating economic devastation, it has been commonplace for executives to defend themselves as rational and morally upright community leaders who should not be confused with common criminals.

Herein lies the project’s fundamental puzzle: why does the American state excessively incarcerate the urban poor and racial minorities for street crimes while turning a blind eye to the crimes of corporate executives which, in many ways, are far more damaging than everyday street crimes?⁹ Scholars offer a variety of answers. For one, corporate actors can defend themselves with well-financed legal teams that most defendants cannot afford.¹⁰ Accounts of “too big to fail” politics have argued that the state also views corporations as “too big to jail” and fears that punishing corporate crime

⁷ ABC News, “Enron’s Ex-CEO Skilling on Hot Seat,” ABC News, January 6, 2016, <http://abcnews.go.com/Business/story?id=87377&page=1>.

⁸ Julia La Roche, “ANGELO MOZILO: ‘No, No, No, We Didn’t Do Anything Wrong,’” Business Insider, September 2, 2014, <http://www.businessinsider.com/mozilo-says-he-did-not-do-anything-wrong-2014-9>.

⁹ For analyses of the extent of annual damage inflicted through corporate crime, see Michael L. Benson, Shanna R. Van Slyke, and Francis T. Cullen, “Core Themes in the Study of White-Collar Crime,” in *The Oxford Handbook of White-Collar Crime*, ed. Shanna R. Van Slyke, Michael L. Benson, and Francis T. Cullen (New York: Oxford University Press, 2016), 1–24; Michael Levi, “Sentencing Respectable Offenders,” in *The Oxford Handbook of White-Collar Crime*, ed. Shanna R. Van Slyke, Michael L. Benson, and Francis T. Cullen (New York: Oxford University Press, 2016), 582–602; Russell Mokhiber, “20 Things You Should Know About Corporate Crime,” *Harvard Law Record*, March 24, 2015, <http://hlrecord.org/2015/03/20-things-you-should-know-about-corporate-crime/>.

¹⁰ Matt Taibbi, *The Divide: American Injustice in the Age of the Wealth Gap* (New York: Spiegel and Grau, 2014); David O. Friedrichs, *Trusted Criminals: White Collar Crime in Contemporary Society* (Belmont, CA: Thomson Wadsworth, 1997).

could hurt the economy.¹¹ Historically oriented scholars suggest that deregulation and the growth of the financial industry since the 1980s has glorified corporate crime as a social good.¹² And well-resourced corporations can use their political and financial clout to capture regulatory agencies and shape legislation in their favor.¹³

These are all valuable explanations for why the state has struggled to prosecute corporate crime during the late twentieth century prison boom. But while they are not wrong, they are incomplete. These arguments are ahistorical, as the state struggled to punish corporate crime well before the 1980s.¹⁴ And to the detriment of the literature, scholars typically analyze corporate crime in isolation from the politics that have driven mass incarceration.¹⁵ This has left unexplored how the political development of the carceral state and the state's stunted capacity to punish corporate crime are related.

Alternatively, this dissertation juxtaposes these phenomena to illustrate how the criminal justice system's divergent treatments of street crime and corporate crime share

¹¹ Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge: Belknap of Harvard University Press, 2014).

¹² Tillman, Pontell, and Black, *Financial Crime and Crises*; John Hagan, *Who Are the Criminals? The Politics of Crime Policy from the Age of Roosevelt to the Age of Reagan* (Princeton: Princeton University Press, 2010); Rana Foroohar, *Makers and Takers: The Rise of Finance and the Fall of American Business* (New York: Crown Business, 2016).

¹³ Gregg Barak, *Theft of a Nation: Wall Street Looting and Regulatory Colluding* (Lanham: Rowman and Littlefield, 2012); Daniel Carpenter and David Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014); Gretchen Morgenson, *Reckless Endangerment: How Outsized Ambition, Greed, and Corruption Led to Economic Armageddon* (New York: Times Books, 2011); for a good review of literature demonstrating that the costs of white-collar crime outweigh the costs of street crime by several orders of magnitude, see Benson, Van Slyke, and Cullen, "Core Themes in the Study of White-Collar Crime," 13–14; see Rebecca Katz, "United States," in *Encyclopedia of White-Collar and Corporate Crime*, ed. Lawrence Salinger, vol. 2 (New York: SAGE, 2005), 838–41 for an argument that the costs of corporate crime are uniquely high in the U.S. since it is the world's preeminent capitalist power.

¹⁴ Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper and Row, 1975); Laufer, *Corporate Bodies and Guilty Minds*.

¹⁵ Hagan, *Who Are the Criminals?*; Taibbi, *The Divide* are two notable exceptions that will be discussed.

common and self-reinforcing ideological and institutional origins.¹⁶ This demonstrates that the historical development of mass incarceration, corporate criminal law, and the regulatory state should not be understood as autonomous developmental threads. These processes have intersected and overlapped in ways that reinforce politically constructed understandings about what counts as crime and who counts as a criminal. Divergent political constructions of street criminality and corporate criminality have regularly been rooted in common currents in American political thought and criminological discourse. While the street criminal has been constructed as pathological, irredeemable, and deserving of incarceration, the corporate criminal has been constructed as a rational, self-interested individual whose behavior can be guided with mild regulatory interventions.

By examining how prevailing intellectual and ideological discourses about crime shaped institutional development, criminal justice, and regulatory policy since 1870, this project illustrates how the punitive character and class biases of contemporary U.S. crime policy emerged and took root. Since the late nineteenth century, policymakers have relied on prevailing ideologies about what causes and constitutes crime to design policy. This facilitated the construction of a criminal justice system designed to punish the poor and a regulatory state built to channel the wealthy away from criminal sanction.

The origins of these institutional arrangements can be found in late nineteenth century politics, when scholars of the emergent school of criminal anthropology articulated new ideas about crime. They posited that the criminal was a naturally

¹⁶ "Street crime" technically refers to crimes committed in public, including property crime and vandalism, but is more commonly used to refer to crimes common among lower class citizens, including drug use and violent crime. "Corporate crime" refers to crime committed by a corporate entity or by employees acting on behalf of a corporation.

occurring phenomenon with a biological constitution predisposed to violence and amorality. Criminal anthropologists built on evolutionary and eugenic research that attributed poverty and inequality to individuals' biological dispositions, and thus operated with a preconceived notion that the likely criminal was a lower-class citizen. They consequently focused on behaviors common among disadvantaged populations. This imbued criminal anthropology with a series of a priori assumptions about what counted as crime and who was a likely criminal that instilled class biases into crime discourse. Policymakers used these ideas to justify punishments for populations viewed as pathologically criminal, including blacks, immigrants, organized labor, and the poor.

Arguably criminal behaviors took on different substantive meanings when committed by people who did not fit this image of the criminal type. This is visible in late nineteenth century discourses about economic regulation and the robber barons. Debates about regulating the new large corporations dominating the economy and the men running them hinged less on whether executives did "bad things" and more on whether they were judged to be "bad people." The economically motivated businessman was seen as an inversion of the natural criminal, a man whose virtuous disposition was not inclined to crime. Once judged as non-criminal persons, the debatably criminal actions of executives were rationalized as outcomes of healthy market dynamics and capitalist self-interest rather than criminal temperaments. This framing provided for a stark contrast from prevailing discourses of criminality that depicted lower-class offenders as inherently defective. The regulatory state was in part designed as an alternative to the criminal justice system for respectable offenders who did not warrant punishment and could be monitored through carefully crafted rules intended to guide their behavior.

These developments established ideological and institutional precedents that conditioned subsequent crime politics. From the Gilded Age through Progressive Era, New Deal, and post-war period, criminal justice institutions developed to identify and punish people deemed pathologically prone to criminality. Through the twentieth century, crime and regulatory politics remained frontloaded with class biases inherited from late nineteenth century politics. Interpretive understandings of the “corporate criminal” never matched established ideas of the natural criminal guiding the development of the criminal justice system, so the regulatory state channeled corporate actors away from the prison.

By comparing how street crime and corporate crime have been politicized, the project provides new insights into the class disparities of American criminal justice. The limited prosecution of corporate crime has persisted alongside a growing carceral state because distinct conceptions of street and corporate criminality have been embedded into state institutions. These ideas are rooted in shared ideologies about what causes and constitutes crime that have been hardened through the development of the criminal justice system and regulatory state. Strategies to dismantle the carceral state and enhance the prosecution of corporate crime must recognize how political constructions of different types of criminality guide the state’s responses to different varieties of criminal behavior.

The project makes five major contributions to extant scholarship. First, it speaks to research about ideas and institutions in American political development (APD). Crime policy is an important area to study the interplay of ideas and institutions. Political actors have regularly deployed and modified intellectual and ideological constructs of crime to advance their goals and shape who and what is considered criminal in American law.

Second, the project insists that scholars of the carceral state be attentive to the Gilded Age and Progressive Era. Contemporary law-and-order rhetoric attributes crime, especially among lower-class citizens, to individual personal faults while obscuring the structural roots of crime.¹⁷ This mirrors nineteenth-century discourses about the biological pathologies of criminals. This is no simple coincidence. Ideas associated with bio-essentialist crime theory shaped the carceral state's institutional foundation and conditioned the evolution of crime discourse over the twentieth century. The distinction that street criminals are pathologically irredeemable and corporate criminals are respectable and rational took shape and was sewn into institutional frameworks in the late nineteenth and early twentieth centuries. After biological crime ideologies were discredited in the mid-twentieth century, political actors continued to operate within an institutional context embedded with class-skewed practices and premises informed by biological theory. This tied policymakers to a governing class ideology of crime even after explicitly biological ideas of criminality and human behavior declined in influence.

A third contribution is to analyses of corporate crime. Scholars acknowledge that regulatory agencies have discretion to respond to corporate crime through administrative controls, but rarely explore the political basis of this institutional design. This project explores how ideational constructs of the corporate criminal have shaped regulatory development and the state's underdeveloped ability to prosecute corporate crime.

The project also speaks to literature about the regulatory state. Scholars often fail to recognize how debates about regulatory policy have been intertwined with debates

¹⁷ Stuart Scheingold, *The Politics of Street Crime: Criminal Process and Cultural Obsession* (Philadelphia: Temple University Press, 1992).

about crime. Dating back to the Interstate Commerce Commission's creation in 1887, regulatory agencies have internalized a political construct of the corporate criminal that is less "criminal" than lower-class offenders. This project's wide historical lens highlights how and why the regulatory state was designed to siphon off corporate crime from the criminal justice system while investigating the effects this has had on American politics.

A fifth contribution is to literature on business-government relations in the U.S. Corporations are uniquely powerful interests, but research often overlooks nuances in how they exercise their power. In debates over regulation, corporate actors have secured their favored policies by framing their policy preferences within prevailing political, social, and economic discourses. Corporate actors who have drawn on dominant ideas about criminality to frame their preferences in these debates have been more successful than those who attempted to use sheer force to attain their goals. By speaking to dominant discourses of a moment, strategic business leaders have made their policy goals appealing to policymakers. This illustrates how political and ideational discourses can condition the range of policies that can be pursued at a given moment, even by powerful interests.

Class and criminality have been mutually constitutive constructs in American politics. Class hierarchy and street criminality have regularly been explained as products of a shared set of faults among lower-class citizens. With pathological constructions of street criminality embedded into the criminal justice system and respectable constructions of corporate criminality embedded into the regulatory state, both institutions reflect and reinforce a class-skewed understanding of who and what counts as "criminal."

The relations between the carceral state, corporate criminal law, and regulatory state are underappreciated in current scholarship. Analyzing these developmental threads

together reveals understudied dynamics about U.S. crime politics that have shaped public policies and institutions traditionally not considered in broader analyses of American criminal justice. The shared roots of the state's divergent treatments of street crime and corporate crime must be fully understood if they are to be transformed.

Project Overview

The project's timeline encompasses several periods of American political development. Beginning in 1870, policy and institutional change is traced through the Gilded Age, Progressive Era, New Deal, post-war period, and Great Society. By relying on an examination of intellectual history in conjunction with primary source analyses of legislative histories, case law, agency documents, and archival sources, the project connects shifting ideas about crime to institutional development and policy change. This illustrates how political developments ingrained class inequalities into the criminal justice institutions that have facilitated the carceral state's rise since the 1960s while the regulatory state has become the state's primary means of controlling corporate crime.

To highlight differences and commonalities in how policymakers have conceptualized street and corporate criminality, the empirical chapters are structured into pairs. The first pair examines the Gilded Age, with chapter two focusing on the politics of street crime from roughly 1870 through 1900 and chapter three studying the politics of corporate crime during the same period. Chapters four and five are organized similarly to examine the early twentieth century Progressive Era, and chapters six and seven study the politics of street crime and corporate crime from the Great Depression through 1960s.

Many scholars identify the politics of the 1960s as a proximate trigger for the prison boom, pointing to the southern strategy and conservative backlash to civil rights

and Johnson's War on Poverty as ushering in a new brand of punitive politics that facilitated the rise of the carceral state.¹⁸ Scholars of business history also emphasize the importance of the 1960s, when the rise of consumerism promoted robust regulatory reforms that led to a significant uptick in the political mobilization of corporations.¹⁹ This project illustrates how common institutional and ideological roots influenced both of these developments. The basis for contemporary punitive crime politics was laid over the course of the previous century when ideological frameworks stigmatizing street criminals as pathological shaped the institutional terrain on which the carceral state evolved. During the same period, the channeling of corporate crime into regulatory arenas was facilitated by elements of this crime discourse. In the 1960s, this institutional context steered anti-business impulses towards regulatory rather than criminal justice reform. This reveals how the ideological and institutional basis for a class-biased system of mass incarceration originated out of long-standing trends in American politics.

The dissertation takes 1870 as its analytic starting point for several reasons. First, in the late nineteenth century, large corporations emerged and developed in ways that adapted to and reshaped the American economy.²⁰ Business crimes were not new in the

¹⁸ Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005); Vesla Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development* 21, no. 2 (Fall 2007): 230–65; Michael Tonry, *Punishing Race: A Continuing American Dilemma* (New York: Oxford University Press, 2011).

¹⁹ David Vogel, *Fluctuating Fortunes: The Political Power of Business in America* (Washington: Beard Books, 1989), 16–37; Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer--and Turned Its Back on the Middle Class* (New York: Simon and Schuster, 2010), 95–115; Timothy Werner and Graham Wilson, "Business Representation in Washington, DC," in *The Oxford Handbook of Business and Government*, ed. David Coen, Wyn Grant, and Graham Wilson (Oxford: Oxford University Press, 2010), 261–84.

²⁰ Alfred Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: Harvard University Press, 1977); Stephen Skowronek, *Building a New American State: The*

late 1800s, but the size of corporations altered the scope of corporate crime and its character as a social and political problem. As corporations became capable of abuses on an unprecedented scale, American business posed new challenges to American politics.

This periodization does not imply that there was no status differentiation in punishment prior to 1870. Criminal codes entailed class biases long before the industrial revolution, and racial biases were written into southern Black Codes after the Civil War.²¹ But early nineteenth century criminal justice was localized and municipalities kept poor records, leaving it difficult to study who was punished and why during these years.²² The few analyses that try find that states fostered a relative equality in punishment when compared to Europe, sentencing planters and laborers to comparable rates of monetary, carceral, and corporal sanctions in the colonial era and nineteenth century.²³ However, these analyses use unreliable data, and the emergence of large corporations in the late nineteenth century changed the nature of inequality in American society.

Expansion of National and Administrative Capacities, 1877-1920 (New York: Cambridge University Press, 1982); Richard Bense, *The Political Economy of American Industrialization, 1877-1900* (New York: Cambridge University Press, 2000); Naomi R. Lamoreaux, *The Great Merger Movement in American Business, 1895-1904* (New York: Cambridge University Press, 1988).

²¹ William Chambliss, "A Sociological Analysis of the Law of Vagrancy," *Social Problems* 12, no. 1 (Summer 1964): 67–77; David Oshinsky, *"Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996); Matthew Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* (Columbia: University of South Carolina Press, 1996); Alex Lichtenstein, *Twice The Work of Free Labor: The Political Economy of Convict Labor in the New South* (New York: Verso, 1996).

²² William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Belknap of Harvard University Press, 2012), chapters 3-5.

²³ Donna Spindel, *Crime and Society in North Carolina, 1663-1776* (Baton Rouge: Louisiana State University Press, 1989), 131; Douglas Greenberg, *Crime and Law Enforcement in the Colony of New York, 1691-1776* (Ithaca: Cornell University Press, 1976), 114; see David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown, 1971) who claims that high status offenders were housed in prisons with recidivists and violent criminals; James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between American and Europe* (New York: Oxford University Press, 2003), 165–70 for a historical comparison of status distinctions in punishment in the US, UK, and France.

The project also begins in 1870 because crime politics experienced a critical shift at this moment. Preceding 1870, American penology was largely built on the classical school of criminology. This philosophy embodied the ideas of Cesare Beccaria, who linked criminal sanction to deterrence and claimed that punishment should be swift, certain, and proportional to the crime committed in order to deter criminal behavior. Beccaria said sentences should not be too severe because he ascribed a degree of rationality to the potential criminal and assumed that he or she could be deterred through moderate sanctions.²⁴ Then in 1870, the American Congress of Corrections published its “Declaration of Principles” directing U.S. prisons to focus on rehabilitating offenders.²⁵ The rehabilitative ideal went on to supplant deterrence-based penology and older philosophies of punishment.²⁶ But rehabilitative ideology’s nominal progressivism was compromised by its reliance on the developing school of criminal anthropology.

Founded by Italian scholar Cesare Lombroso, criminal anthropology attributed criminal behavior to the biological constitution of offenders. Lombroso claimed to identify physiological characteristics and congenital atavistic traits that were indicative of a primitive biological inheritance predisposed to criminal behavior. He referred to

²⁴ Cesare Beccaria, *On Crime and Punishment*, trans. David Young (Indianapolis: Hackett Publishing, 1986); Marcello Maestro, *Cesare Beccaria and the Origins of Penal Reform* (Philadelphia: Temple University Press, 1973). Jeremy Bentham was also a significant thinker in the classical school of criminology.

²⁵ E.C. Wines, ed., “Declaration of Principles Adopted and Promulgated by the 1870 Congress of the National Prison Association,” in *Transactions of the National Congress on Penitentiary and Reformatory Discipline* (Albany: Weed and Parsons, 1871).

²⁶ Alexander Pisciotta, *Benevolent Repression: Social Control and the American Reformatory-Prison Movement* (New York: New York University Press, 1994); John Phillips Conrad, “Correctional Treatment,” in *Encyclopedia of Crime and Justice*, ed. Sanford H. Kadish, vol. 1 (New York: Free Press, 1983); Rebecca McClennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (New York: Cambridge University Press, 2008); Nicole Hahn Rafter, *Creating Born Criminals* (Chicago: University of Illinois Press, 1997).

individuals with such traits as “born criminals.”²⁷ Scholars of crime and human behavior readily imported Lombrosian philosophy to America, fitting it into an intellectual context favoring eugenics and scientific racism. Combining criminal anthropology with bio-deterministic research on poverty, scholars proceeded to link socioeconomic inequality and crime to a singular defective biology. This caused criminal anthropological scholars to narrowly focus on crimes associated with lower class and poor populations.²⁸

Scholars relied on this work to design two prongs of the rehabilitative ideal—one premised on reforming and releasing inmates and another on punishing those deemed “incorrigibles” who proved immune to reform. The incorrigibles concept reflected Lombroso’s idea of born criminals. Incorrigibles were viewed as driven by natural biological impulses that left them irrational, rendering Beccarian deterrence philosophy useless and warranting severe rather than moderate punishment. This construct of incorrigibility was imbued with the class biases that shaped criminal anthropology. By taking for granted what counted as crime and who was likely to commit it, rehabilitative ideology narrowly defined who counted as a criminal by focusing on lower-class citizens while obscuring the structural roots of crime under an emphasis on individual defects.

The influence of biological theories of behavior was not limited to studies of crime and poverty. Similar themes appeared in the work of economists like William

²⁷ Cesare Lombroso, *Criminal Man*, ed. Mary Gibson and Nicole Hahn Rafter (Durham: Duke University Press, 2006).

²⁸ Arthur MacDonal, *Criminology* (New York: Funk and Wagnalls, 1893); Henry M. Boies, *Prisoners and Paupers: A Study of the Abnormal Increase of Criminals, and the Public Burden of Pauperism in the United States: The Causes and Remedies* (New York: Putnam, 1893); Henry M. Boies, *The Science of Penology: The Defence of Society Against Crime* (New York: G.P. Putnam’s Sons, 1901); Charles R. Henderson, *An Introduction to the Study of the Dependent, Defective, and Delinquent Classes* (Boston: Heath and Company, 1893). These scholars and others are discussed in depth in chapter two.

Graham Sumner who used Herbert Spencer's concept of "social Darwinism" to rationalize capitalist economics. The disadvantages of lower classes were attributed to their pathologies, but capitalists' successes were credited to their natural superiority, an argument that was readily accepted by leaders of industry. With natural selection serving as a biological apology for the inequalities of capitalism, these ideas synthesized the glorification of Protestant ethic, classical economics, and evolutionary theory in a way that justified conservative thought and opposition to proposals for economic regulation.²⁹

Legislators and corporate interests articulated comparable ideas in debates over the criminal provisions in the Interstate Commerce Act of 1887. This logic formed the basis of a regulatory ideology deployed by lawmakers and leaders of major railroads. According to this perspective, executives were driven by healthy self-interest and market dynamics, not amoral dispositions. Even if their actions shared affinities with crimes like theft, their behaviors took on new substantive meanings because they were committed by respected members of society. The economically motivated capitalist was not a born criminal, but a man who rose to the top by virtue of his character. Even if he engaged in harmful or unethical behavior, he did not require penalization to change his ways.

Regulatory ideology shaped the design of the Interstate Commerce Commission as an alternative to criminal courts for controlling railroads. Regulatory ideology does not rule out criminal sanction for corporate actors but gives regulators the discretion to respond to criminal behavior through civil and regulatory sanctions. These are not simply

²⁹ Richard Hofstadter, *Social Darwinism in American Political Thought* (Philadelphia: University of Pennsylvania Press, 1945), 1–47; William Graham Sumner, *What Social Classes Owe to Each Other* (New York: Harper & Brothers, 1883); William Graham Sumner, *The Challenge of Facts: And Other Essays* (New Haven: Yale University Press, 1914).

alternatives to incarceration the way fines or probation are, which are substitutes or supplements to imprisonment in the wake of a conviction. In the regulatory approach, agencies are permitted to respond to prosecutable criminal behavior through responses like cease and desist orders, injunctions, or warning letters that do not carry the stigma of criminality. In this way, a corporate actor can commit multiple offenses, be sanctioned through administrative interventions each time, and never once be charged with a crime. The regulatory approach permits regulators to ascribe alternative meanings to behaviors legally defined as criminal by using regulatory sanctions in lieu of prosecution and emphasizing market dynamics as the targets of reform rather than individuals.

Rehabilitative and regulatory ideologies work together to serve projects of class sorting and ideological messaging. Rehabilitative ideology sorts lower-class offenders into prisons for either rehabilitation or containment, while regulatory ideology sorts corporate offenders into administrative venues under the presumption that businesspeople are rational individuals who will be responsive to mild sanctions. Together, they send a message that only certain types of people count as “criminal” and deserve punishment.

With the rise of rehabilitative ideology, policy debates over crime became centered less on questions of *what* to punish and more on questions of *who* to punish. This was different from earlier modes of crime theory, such as deterrence or retributivist schools, which emphasized consistency in punishment for criminal acts.³⁰ Rehabilitative thought rested on the notion that punishment should be individualized. Two people

³⁰ Andrew Von Hirsch and Committee for the Study of Incarceration, *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration* (New York, Hill and Wang, 1976) on Kantian retributivism, which emphasized punishment as a means of correcting the moral imbalance produced by a criminal act; Beccaria, *On Crime and Punishment*.

convicted of the same crime must receive different sentences if they have different dispositions and rehabilitative potential. Alternatively, regulatory ideology was built on the idea that corporate criminals did not fit the conventional ideational construct of the “criminal” frontloaded with class-skewed assumptions. These ideologies have become entrenched in the criminal justice system and regulatory state over time, embedding premises and practices into institutional arrangements that have preserved a durable class ideology of punishment long after Lombrosian theory was refuted.

Although they are few and far between, there have been scattered historical examples of financiers being convicted of crimes. But juxtaposing the development of the carceral and regulatory states highlights that harshly punishing corporate criminals would exacerbate the problems of mass incarceration, which is overlooked by many scholars of corporate crime. Savage sentences for those like Bernie Madoff (150 years) and Sholam Weiss (845 years) satiate public demands for punishing white-collar criminals.³¹ These cases are exceptions, not the norm, and they defuse political demands for systematic change to the political economy and regulatory state by making examples out of a few.

Subjecting a handful of corporate criminals to brutal sentences obfuscates how regulatory ideology has inhibited the state from developing the consistent will and capacity to prosecute corporate crime. Instead of calling for harsh justice for corporate offenders, this project complements the responsive regulation model of John Braithwaite and Ian Ayres. In their model, regulators rely on a “regulatory sanctions pyramid,” initially responding to corporate offenses through regulatory tools before escalating to

³¹ Peter Henning, “Sentences Get Harsher in White-Collar Cases,” *New York Times*, April 12, 2010, <http://dealbook.blogs.nytimes.com/2010/04/12/sentences-get-harsher-in-white-collar-cases/?scp=57&sq=sentencing&st=cse>; Rakoff, “The Financial Crisis”; Garrett, *Too Big to Jail*, 271.

criminal sanctions for repeated or dangerous behavior.³² They theorize that this would encourage regulators to employ a mix of sanctions that would deter corporate crime, a notion that has received empirical validation from scholars of corporate crime deterrence.³³ This indicates that the more regular prosecution of serious and repeated behavior coupled with modest sentences would more effectively deter corporate crime than the inconsistent use of prosecution coupled with wildly harsh sentences.³⁴

Policy choices made in the nineteenth century established discursive parameters and institutional arrangements that conditioned the development of crime and regulatory policy through the twentieth century. The institutional bifurcation of street crime and corporate crime hardened class divisions in American society by stigmatizing one class of offenders as more “criminal” than the other. With rehabilitative and regulatory ideologies embedded into the criminal justice system and regulatory state, policymakers remained tied to a class ideology of punishment that made it difficult to conceptualize street and corporate criminality in comparable terms. Assessing these developments relies on research about ideas and institutions in American political development, the carceral state, corporate criminal law, regulatory state, and business-government relations.

Ideas, Institutions, and American Political Development

Recent work in the APD canon has closely explored the relationship between ideas and political development.³⁵ Karen Orren and Stephen Skowronek contend that

³² John Braithwaite and Ian Ayres, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992). Their model is discussed in depth later in this chapter.

³³ Natalie Schell-Busey et al., “What Works? A Systematic Review of Corporate Crime Deterrence,” *Criminology & Public Policy* 15, no. 2 (2016): 387–416.

³⁴ This argument will be elaborated in a later section of this chapter.

³⁵ Mark Blyth, Oddny Helgadóttir, and William Kring, “Ideas and Historical Institutionalism,” in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia Falletti, and Adam

authoritative coalitions within political orders alter the ideas channeled through institutions to guide development.³⁶ Skowronek has also argued that policymakers can recover political purchase in old ideas by modifying their purposes in pursuit of new goals.³⁷ Robert Lieberman has claimed that development springs from “friction” between mismatched institutional and ideational patterns that become uncomfortably situated within one another over time.³⁸ While these scholars provide frameworks for assessing how ideas can facilitate or impede change, Rogers Smith’s “spiral of politics” model offers a general theory of how political actors, ideas, and institutions interact. According to the theory, political development occurs within an environment of established institutions and ideas. Political actors can use preexisting ideas to promote coalition formation and change, which modifies the ideational and institutional universe. While actors can exert agency by articulating new ideas, prevailing ideational and institutional patterns can also condition development and constrain the expression of new ideas.³⁹

The spiral model helps to explain how, why, and when political actors use ideas by directing attention onto the varying processes through which ideas and institutions can promote change and stability. It complements the work of scholars who have emphasized

Sheingate (New York: Oxford University Press, 2016), 142–62 on the history of ideational and historical institutionalist (HI) scholarship; for arguments that HI and ideational research should be separate, see; Paul Pierson and Theda Skocpol, “Historical Institutionalism in Contemporary Political Science,” in *Political Science: State of the Discipline*, ed. Ira Katznelson and Helen Miller (New York: WW Norton, 2002), 693–721; Theda Skocpol, “Why I Am a Historical Institutionalist,” *Polity* 28, no. 1 (1995): 103–6.

³⁶ Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 82–85. These coalitions are called orders of governance.

³⁷ Stephen Skowronek, “The Reassociation of Ideas and Purposes,” *American Political Science Review* 100, no. 3 (2006): 385–401.

³⁸ Robert Lieberman, “Ideas, Institutions, and Political Order: Explaining Political Change,” *American Political Science Review* 96, no. 4 (2002): 703, 709.

³⁹ Rogers Smith, “Ideas and the Spiral of Politics: The Place of American Political Thought in American Political Development,” *American Political Thought* 3, no. 1 (2014): 126–36.

how political actors use ideas to build coalitions, persuade opponents, and induce institutional change.⁴⁰ The theory also recognizes that while history can limit the potential avenues for change, it is not deterministic, as path dependencies can abruptly change at punctuated junctures or development can unfold gradually through layering or drift.⁴¹ It also stresses timing and sequence, as major changes can be driven by seemingly minor or contingent events that can establish rigid developmental trajectories. This project relies on the spiral model to examine the role of ideas in American crime politics because it captures a variety of dynamics that can shape political development.

Ideas about what causes and constitutes crime and how the state can best respond to it have been crucial to American political development. A range of ideational forces has shaped crime politics since the colonial era, including Puritan principles, racial ideologies, and law-and-order politics.⁴² Understudied in this literature are the legacies of biological theories of crime and rehabilitative and regulatory ideologies, which instilled class biases into the label of criminality that have solidified over time.

These class biases have been hardened by ideational and institutional forces. For instance, chapter four illustrates that twentieth century variants of crime theory associated

⁴⁰ Vivien Schmidt, "Taking Ideas and Discourses Seriously: Explaining Change through Discursive Institutionalism as the Fourth 'New Institutionalism,'" *European Political Science Review* 2, no. 1 (2010): 1–25; Mark Blyth, "Any More Bright Ideas? The Ideational Turn of Comparative Political Economy," *Comparative Politics* 29, no. 2 (1997): 229–50.

⁴¹ Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94, no. 2 (2000): 251–67; Jacob S. Hacker, "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Welfare State Retrenchment in the United States," *American Political Science Review* 98, no. 2 (2004): 243–60; Wolfgang Streeck and Kathleen Thelen, "Introduction," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen (Oxford: Oxford University Press, 2005), 1–39.

⁴² Frank Browning and John Gerassi, *The American Way of Crime* (New York: G.P. Putnam's Sons, 1980), 20–23, 130–33; Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006); McClennan, *The Crisis of Imprisonment*, 19. These scholars list many other ideational forces in addition to those listed.

with psychology and culture maintained a focus on individual defects inherited from criminal anthropology. Chapter six shows that while some scholars of the 1930s broke from criminology's focus on individual faults by attributing crime to social and economic forces, policymakers channeled these ideas into rehabilitative frameworks that reoriented them to focus on individual defects rather than macro-economic reform. This demonstrates how new ideas can be reshaped by existing institutional contexts. Although untied from biological theory, policymakers in the 1930s operated in an institutional setting infected with the class-biased premises of biological crime ideologies.

Modern penal practices continue to reflect the principles of rehabilitative ideology. For instance, sentences remain individually tailored based on defendants' personal traits and behavioral histories. Even strict sentencing guidelines consider an offender's criminal history. America's reliance on criminal history in sentencing is highly unusual in comparative perspective, and it is largely a legacy of the rehabilitative ideal and its emphasis on sentencing individualization.⁴³ Contemporary labels for recidivists like "career criminal" mirror ideas about natural criminality and remain colored with class-biased assumptions about who is likely to rehabilitate or recidivate.⁴⁴ In contrast, while prosecutors and judges view deterrence as paramount in white-collar cases, favorable impressions and preconceived notions of white-collar criminals check their impulse to punish "respectable" offenders viewed as unlikely to recidivate.⁴⁵

⁴³ Michael Tonry, *Sentencing Fragments* (New York: Oxford University Press, 2016), 51–63. This is discussed in more detail in parts of chapter six.

⁴⁴ Hagan, *Who Are the Criminals?* see his chapter on "career criminology"; Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: Oxford University Press, 2001).

⁴⁵ Stanton Wheeler, Kenneth Mann, and Austin Sarat, "Sentencing the White-Collar Criminal," *American Criminal Law Review* 17 (1980): 479–500; Michael L. Benson and Francis T. Cullen,

Regulatory ideology has also remained a persistent force in political development. After shaping the Interstate Commerce Commission in the nineteenth century, regulatory ideology has been repackaged by different coalitions over time. Those evolving coalitions reflected shifts in the relative power of different sectors of the political economy. While railroads were the first advocates of the regulatory model in the nineteenth century, the financial sector adapted it in the early twentieth century. By the New Deal, Wall Street financiers, investment bankers, and securities exchanges were leading proponents of regulatory ideology. These ideas travelled over time due to changes in the political economy that led different coalitions to repurpose them for historically specific circumstances. By the 1930s, regulatory ideology was so institutionally ingrained that even foes of corporate power in the Roosevelt administration accepted tenets of regulatory ideology in ways that limited the state's will to initiate corporate prosecutions.

Changes in the social sciences also altered how rehabilitative and regulatory ideologies were politicized. Initially articulated by sociologists and anthropologists, these ideologies were reshaped by eugenicists, cultural theorists, and economists in the twentieth century. In the New Deal era and mid-twentieth century, new ideas articulated by social structure and conflict theorists were stifled by rigid institutional frameworks built upon rehabilitative and regulatory ideologies.

The project links an analysis of intellectual history to political development through primary source analyses of legislative histories, case law, and commission and agency documents. This tracks how various coalitions and political actors deployed ideas

Combating Corporate Crime: Local Prosecutors at Work (Boston: Northeastern University Press, 1998); Peter Henning, "Is Deterrence Relevant in Sentencing White-Collar Criminals?," *Wayne Law Review* 61 (2015): 27–59; Levi, "Sentencing Respectable Offenders."

about crime to pursue policy change and institutional development. It shows how these ideas have promoted punitive policies for street criminals and regulatory sanctions for corporate offenders based on shared assumptions about what it means to be a criminal.

Race, Class, and the Political Development of the Carceral State

In recent years, an interdisciplinary literature has grown examining the causes and consequences of mass incarceration. Given this project's core arguments, it naturally builds on this body of work. Many scholars start by pointing to the 1960s as key to the rise of the carceral state and suggest that a conservative backlash to civil rights and the Great Society fueled the Republican Party's southern strategy and a new brand of racialized punitive politics.⁴⁶ Others have challenged this narrative, highlighting how law-and-order campaigns through U.S. history incrementally built a state capable of mass incarceration.⁴⁷ Scholars have also shown that the racial biases of American criminal justice long predated the southern strategy, comparing the carceral state to older systems of racial caste like Jim Crow.⁴⁸ And liberals have not been innocent in this story—in the early twentieth century, 1940s, and modern era, liberals embraced brands of harsh justice politics that promoted racial inequality.⁴⁹ This highlights the deep historical roots of the carceral state and shows that punitive politics has long been a bipartisan persuasion.

⁴⁶ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Flamm, *Law and Order*; Henry Ruth and Kevin Reitz, *The Challenge of Crime: Rethinking Our Response* (Cambridge: Harvard University Press, 2003); Tonry, *Sentencing Fragments*; Tonry, *Punishing Race*; Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York: Oxford University Press, 1997).

⁴⁷ See Gottschalk, *The Prison and the Gallows* for a good review of this history.

⁴⁸ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2012).

⁴⁹ Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge: Harvard University Press, 2010); Naomi Murakawa, *The First*

This project situates itself against literature emphasizing the 1960s while building on research exploring the carceral state's deep historical origins. While the rejection of the rehabilitative ideal in the 1960s is often taken for granted by scholars as a catalyst for carceral growth, this project shows how rehabilitative ideology helped construct the institutional and ideological landscape on which the carceral state emerged.⁵⁰ The ideas associated with bio-determinism that shaped the rehabilitative ideal cannot be discarded as antiquated ideational relics. Many rehabilitative practices, like indeterminate sentencing, are still in use today or shaped modern penal practices. Even though bio-determinist crime theories have waxed and waned in influence over the twentieth century, institutional practices associated with rehabilitation still infect the criminal justice system with ideas of innate criminality. This has kept policymakers tied to a class ideology of punishment even after biological theories of criminality fell out of favor.

Research on the long history of the carceral state commonly emphasizes links between race and punishment. This is a warranted focus given the racialized character of the prison population, but historical links between class and crime are often overlooked in this research. This project focuses on how class ideologies of punishment have been embedded into state institutions and policies. This does not mean that race will be ignored. Rather, class-driven analyses can compensate for drawbacks to scholarship that exclusively emphasizes racial disparities. Adolph Reed and Merlin Chowkwanyun have argued that racial disparities studies often attribute inequality to “institutional racism”

Civil Right: How Liberals Built Prison America (New York: Oxford University Press, 2014); Stuntz, *The Collapse of American Criminal Justice*, 239–41.

⁵⁰ Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven: Yale University Press, 1981); Garland, *The Culture of Control*; Tonry, *Sentencing Fragments*.

and individual racial animus without contextualizing these trends in social and economic relations.⁵¹ This project explores how racial ideologies have shaped crime politics while heeding Reed and Chowkwanyun’s warning by considering how racial ideologies have interacted and overlapped with class dynamics in American crime politics.

This approach brings APD research on the carceral state into dialogue with analyses of the relationship between prison systems and political economic dynamics.⁵² It does so by drawing on research in critical criminology. Critical criminologists adopt Marxist analytic frames to argue that the state politicizes crime to stigmatize the poor and justify their exploitation.⁵³ Loïc Wacquant’s work shows how critical criminology can be attentive to both class and race. He contends that the carceral state hides the social disorder produced by neoliberalism by compelling the poor to transform into worker-citizens or face incarceration.⁵⁴ Wacquant argues that prisons and ghettos work in tandem to perpetuate inequality among an increasingly black subproletariat, linking the racialized character of mass incarceration to the rise of a post-Keynesian state.⁵⁵

⁵¹ Adolph Reed and Merlin Chowkwanyun, “Race, Class, Crisis: The Discourse of Racial Disparity and Its Analytical Discontents,” in *Socialist Register 2012: The Crisis and the Left*, ed. Leo Panitch, Gregory Albo, and Vivek Chibber (New York: Monthly Review Press, 2011), 149–75; Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton: Princeton University Press, 2015) for how this argument applies to analyses of carceral inequalities.

⁵² Nicola Lacey, *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008); Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (London: SAGE, 2006). Neoliberal states like the U.S. are typically found to produce the most punitive policies.

⁵³ Richard Quinney, *Critique of Legal Order: Crime Control in Capitalist Society* (Boston: Little Brown, 1973); Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* (New York: Wiley, 1979); William Chambliss, “The Saints and the Rough-Necks,” *Society* 11 (1973): 24–31.

⁵⁴ Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham: Duke University Press, 2009).

⁵⁵ Loïc Wacquant, “Deadly Symbiosis: When Ghetto and Prison Meet and Mesh,” *Punishment and Society* 3, no. 1 (2001): 95–134.

This project complements the work of critical criminologists by showing how ideational constructs of crime have helped the state to define criminality with a class slant. While speaking to literatures on race and crime, this approach emphasizes issues related to class inequality that are sometimes downplayed in political science research by showing how poverty and criminality have regularly been politicized as products of a common set of individual failings.

By situating an institutionally grounded analysis within a critical criminological framework, the project contributes to a subset of the mass incarceration literature on the criminalization of poverty. Particularly, modern banishment laws criminalize behaviors common among the urban poor like sleeping in public so that police can displace them out of neighborhoods.⁵⁶ Katherine Beckett and Steve Herbert have shown how policymakers frame these laws as crime prevention mechanisms by politicizing poverty and homelessness as indicators that an individual is likely to fall into serious crime and should thus be preemptively contained.⁵⁷ This rationale is not new but was fundamental to rehabilitative ideology and the vagrancy law reforms of the late nineteenth and early twentieth centuries. These statutes are largely retooled vagrancy laws written to pass constitutional muster after the Supreme Court struck down vagrancy laws in 1972.⁵⁸

⁵⁶ Katherine Beckett and Steve Herbert, *Banished: The New Social Control in Urban America* (New York: Oxford University Press, 2009); Katherine Beckett and Herbert, Steve, "Penal Boundaries: Banishment and the Expansion of Punishment," *Law and Social Inquiry* 35, no. 1 (2010): 1–38; Brianna McGinnis, "Exile in America: Political Expulsion and the Limits of Liberal Government" (Doctoral Dissertation, Georgetown University, 2015); Leonard Feldman, *Citizens without Shelter: Homelessness, Democracy, and Political Exclusion* (Ithaca: Cornell University Press, 2004); Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (New York: Cambridge University Press, 2016).

⁵⁷ Beckett and Herbert, *Banished*; also see Bernard Harcourt, *The Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge: Harvard University Press, 2002).

⁵⁸ Goluboff, *Vagrancy Nation*; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

By putting literatures on race, class, and crime into dialogue, the project reveals the broad political purchase deterministic constructs of criminality have had in American politics. The labels “incorrigible” and “born criminal” served as categories that were populated with blacks, immigrants, organized labor, the poor, and the mentally ill in different places at different times. The deterministic disposition of criminal anthropology was a fertile basis out of which various prejudices could flourish.⁵⁹

The project makes one final contribution to carceral state research. This literature naturally focuses on crimes the state has penalized severely, devoting attention to the War on Drugs, three-strikes laws, and mandatory sentencing.⁶⁰ But this focus inadvertently reinforces preexisting notions about what counts as crime by taking as a starting point the behaviors the state chooses to punish harshly. Scholars rarely analyze the dynamics of mass incarceration alongside the state’s inconsistent response to white-collar crime.

There are two notable exceptions to this trend, and this project complements both while rectifying their shortcomings. One is Matt Taibbi’s *The Divide*. Taibbi argues that as income inequality has grown, so have disparities in punishment, as the poor are controlled by a system harshly punishing small offenses like welfare fraud while Wall Street financiers freely commit frauds on much larger scales. While compelling, Taibbi’s account lacks rigor and nuance in certain respects. He overlooks the historical persistence of class inequality to emphasize how income disparities today produce unequal justice

⁵⁹ Rafter, *Creating Born Criminals*.

⁶⁰ Beckett, *Making Crime Pay*; Zimring, Hawkins, and Kamin, *Punishment and Democracy*; Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: University of Chicago Press, 1998); Tonry, *Sentencing Fragments*; Alexander, *The New Jim Crow*.

outcomes and ignores how political institutions have developed in ways that enforce class inequalities in punishment.⁶¹

The arguments made in this project more closely mirror those made by John Hagan in his book, *Who Are the Criminals?* Hagan argues that scholarly ideas of crime have historically been linked to shifts in governing ideologies, and that structural criminology fostered progressive crime politics during the “age of Roosevelt” (1933-1973) while career criminal criminology produced punitive policies for street criminals and lenience for white-collar offenders in the “age of Reagan” (1974-2008).⁶² While Hagan’s work provides noteworthy insights, it falls short in other regards. By beginning his analysis in the 1930s, he overlooks consistencies in crime policy across the Reagan and Roosevelt eras that are traceable to the influence of rehabilitative and regulatory ideologies. Further, while Hagan studies white-collar crime generally, this project focuses on corporate crime, or crimes committed by a corporate entity or individuals acting on behalf of a corporation. This entails closer attention to specific dynamics and processes, like the development of the regulatory state. Through a broad historical timeline and narrowed analytic foci, the project provides new insights into the interplay between ideas about crime and governing ideologies.

The Punishment of Corporate Crime

Research on corporate crime is concentrated in the disciplines of law and criminology and is typically inattentive to historical trends in U.S. politics. The ahistorical character of this research is surprising given the prominence of Edwin

⁶¹ Taibbi, *The Divide*.

⁶² Hagan, *Who Are the Criminals?*

Sutherland's 1949 book *White-Collar Crime* in the canon. In the book, Sutherland studied 980 legal decisions brought against seventy corporations in the early twentieth century. He found that only 20% of charges were brought in criminal court while 80% were handled through regulatory sanctions, civil courts, and equity proceedings despite the fact that all of the behaviors were defined as crimes.⁶³ Sutherland's conclusions are typically a starting point for corporate crime scholars today, with some suggesting that controlling corporate crime through regulation rather than prosecution is "the American way."⁶⁴ This uncritical acceptance of Sutherland has caused many researchers to study corporate crime in isolation from the general dynamics of American crime politics.

Alternatively, this project situates an analysis of corporate crime within the general currents of American crime politics. Only a few criminological scholars have done this. One of the first was Christopher Stone, who claimed in 1975 that the criminal law evolved to deter individuals rather than corporations and that the corporate criminal law should be abandoned in favor of a focus on regulation.⁶⁵ Recently, Gregg Barak's *Theft of a Nation* (2012) provides a criminological analysis of the social construction of fraud and the design flaws in regulatory frameworks in relation to the 2008 financial crisis.⁶⁶ But these works do little to connect historical inquiry to politics. This project fills this gap by assessing the political construction of corporate criminality over time.

⁶³ Edwin Sutherland, *White-Collar Crime* (New York: Dryden Press, 1949). Sutherland suggests this design first appeared in the Sherman Antitrust Act of 1890, while this project traces it to the Interstate Commerce Act of 1887.

⁶⁴ Katz, "United States."

⁶⁵ Stone, *Where the Law Ends*, argues that corporate criminal liability—the doctrine by which a corporation can be held criminally liable for the acts of its agents—inhibits the deterrent force of prosecution; also see Laufer, *Corporate Bodies and Guilty Minds*.

⁶⁶ Barak, *Theft of a Nation*.

Positioning an analysis of corporate crime next to an analysis of the carceral state also avoids the implications made in many studies of corporate crime. Numerous analysts have criticized the state's lackluster response to the behavior that caused the Great Recession and insist on subjecting financiers to lengthy prison terms.⁶⁷ While there are problems in the way the state responds to corporate criminality, subjecting executives to brutally long prison terms is not the solution. Extreme sentences like those given to Madoff or Weiss quench the public's short-term demands for punishment while neutralizing political momentum that could be directed towards political economic reform or structural changes to regulatory frameworks. For example, the state's harsh sentencing of Madoff satisfied public demands for justice but overshadowed the fact that the SEC failed to uncover his Ponzi scheme even after initiating five inquiries over sixteen years preceding its collapse.⁶⁸ Responses like this detract attention away from the fact that agencies like the SEC are grossly underfunded, causing them to focus on easy cases to bolster their statistics at the expense of ignoring serious and challenging cases.⁶⁹

While there are disputes in the small literature on corporate crime deterrence, a series of articles published in 2016 in the journal *Criminology & Public Policy* indicated that deterrence can be achieved without severity.⁷⁰ The main piece was a meta-analysis of

⁶⁷ Charles H. Ferguson, *Predator Nation: Corporate Criminals, Political Corruption, and the Hijacking of America* (New York: Crown Business, 2012); Morgenson, *Reckless Endangerment*; Gretchen Morgenson and Louise Story, "In Financial Crisis, No Prosecutions of Top Figures," *New York Times*, April 14, 2011; Rakoff, "The Financial Crisis."

⁶⁸ Zachary A. Goldfarb, "The Madoff Files: A Chronicle of SEC Failure," *Washington Post*, September 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/02/AR2009090203851.html>.

⁶⁹ Rakoff, "The Financial Crisis."

⁷⁰ For research arguing that little works to promote deterrence, see Sally Simpson, *Corporate Crime, Law, and Social Control* (New York: Cambridge University Press, 2002); Keith Hawkins, "Compliance Strategy, Prosecution Policy and Aunt Sally," *British Journal of Criminology* 30, no. 4

corporate crime deterrence studies by Natalie Schell-Busey and several coauthors. They only found evidence of deterrence when agencies used a combination of regulatory, civil, and criminal sanctions rather than relying on one type. Qualifying that more research is needed to verify their findings, they suggest that “a mix of agency interventions” including regulatory and criminal sanctions is the best way to achieve deterrence.⁷¹

Responses to the study were varied. Peter Yeager argued that the glorification of noncompliance in corporate culture and rise of “too big to fail” politics compromised the criminal law’s deterrent power by making prosecution a rare occurrence.⁷² His piece complements work studying how corporations have weakened the force of law by capturing agencies and shaping Justice Department policy to their liking.⁷³ It also builds on research suggesting that economic financialization, the “pattern of accumulation in which profits accrue primarily through financial channels rather than through trade and commodity production,” has glorified the pursuit of profits through illicit means.⁷⁴ According to Yeager, these developments create a low risk of legal sanction for corporations that reduces the deterrent power of prosecution. John Braithwaite was more critical of the piece, arguing that the lack of reliable data on corporate crime makes it difficult to study deterrence. Echoing Sutherland, he noted that the discretion afforded to

(1990): 444–66; Hazel Croall, *Understanding White Collar Crime* (Philadelphia: Open University Press, 2001); Marshall Clinard and Peter Yeager, *Corporate Crime* (New York: Free Press, 1980).

⁷¹ Schell-Busey et al., “What Works?,” 388, 407.

⁷² Peter Yeager, “The Elusive Deterrence of Corporate Crime,” *Criminology & Public Policy* 15, no. 2 (2016): 439–51.

⁷³ Garrett, *Too Big to Jail*; Jed S. Rakoff, “Justice Deferred Is Justice Denied,” *New York Review of Books*, February 19, 2015; Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (New York: Simon and Schuster, 2017); Friedrichs, *Trusted Criminals*; Roger Lowenstein, *The End of Wall Street* (New York: Penguin Press, 2010); Ferguson, *Predator Nation*.

⁷⁴ Greta Krippner, “The Financialization of the American Economy,” *Socio-Economic Review* 3, no. 2 (2005): 174; Foroohar, *Makers and Takers*; Tillman, Pontell, and Black, *Financial Crime and Crises*.

agencies in responding to corporate behavior makes it hard to quantify corporate crime in the first place.⁷⁵ Analyses of corporate crime deterrence are limited by the fact that available datasets reflect the dispositions of the agencies charged with reporting them.⁷⁶

Despite their differences, Schell-Busey et al., Yeager, and Braithwaite agreed that the responsive regulation approach outlined by Braithwaite and Ayres is the best means of monitoring corporate crime.⁷⁷ Suggesting that the state should initially respond to corporate crime through cooperative regulatory approaches before escalating to punitive interventions, Braithwaite and Ayres claim that regulations only work as deterrents if prosecution is used regularly enough that corporate actors view it as a “big gun” constituting a meaningful threat.⁷⁸ Schell-Busey et al. state that their results validated the model by showing that a mix of sanctions had deterrent effect.⁷⁹ This indicates that relying on a combination of sanctions while using prosecution consistently enough to be a credible threat is more effective than a few severe sentences. The increased certainty of prosecution for serious offenses would enhance the deterrent force of the entire sanctions pyramid. This project’s claims comport with the responsive regulation model, noting how an overreliance on regulatory sanctions masks corporate criminality, reinforces class-biased ideas of crime, and weakens the law’s potency without calling for harsh justice.

⁷⁵ John Braithwaite, “In Search of Donald Campbell: Mix and Multimethods,” *Criminology & Public Policy* 15, no. 2 (2016): 417–37.

⁷⁶ Piers Bierne and James Messerschmidt, *Criminology*, 3rd ed. (Boulder: Westview Press, 2000), 27–57; Albert J. Reiss and Albert D. Biderman, *Data Sources on White-Collar Law-Breaking* (Washington: US Government Printing Office, 1980).

⁷⁷ Ray Paternoster, “Deterring Corporate Crime: Evidence and Outlook,” *Criminology & Public Policy* 15, no. 2 (2016): 383–86 summarizes the authors’ conclusions.

⁷⁸ Braithwaite and Ayres, *Responsive Regulation*, 19–53.

⁷⁹ Schell-Busey et al., “What Works?,” 406.

Unpacking the deterrence debate within an APD analysis highlights a central limit of this literature. By focusing on what does and does not work to deter corporate crime, deterrence research is constrained to considering the effects of existing structures without questioning how and why those structures have been designed as they are. This misses how favorable ideational constructs of corporate criminality have been embedded into regulatory institutions in ways that compromise the law's force. Understanding the interaction of these ideas with state development requires looking outside of traditional criminal justice machinery and at the origins of regulatory institutions.

The Political Development of the Regulatory State

The regulatory state is a distinctly American model of business-government relations.⁸⁰ While businesses have been hostile to regulators throughout the twentieth century and decried regulations as impediments to capital accumulation, the regulatory state was designed to support capitalist structures.⁸¹ In lieu of public ownership or more directive instruments, regulatory frameworks allow the state to react to the economy in ways that leave it responsive to industries. Agencies create rules of the road to maintain balance in markets without altering the direction or layout of the road itself.⁸² In contrast, a competing literature has presented U.S. agencies as exceptionally hostile to business.⁸³

⁸⁰ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge: Harvard University Press, 1995); Michael Moran, "The Rise of the Regulatory State," in *The Oxford Handbook of Business and Government*, ed. David Coen, Wyn Grant, and Graham Wilson (Oxford: Oxford University Press, 2010), 383–403.

⁸¹ David Vogel, "Why Businessmen Distrust Their State: The Political Consciousness of American Corporate Executives," *British Journal of Political Science* 8, no. 1 (1978): 45–78.

⁸² Moran, "The Rise of the Regulatory State"; Timothy Sinclair, "Institutional Failure and the Global Financial Crisis," in *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation*, ed. Wyn Grant and Graham Wilson (Oxford: Oxford University Press, 2012).

⁸³ David Coen, Wyn Grant, and Graham Wilson, "Political Science: Perspectives on Business and Government," in *The Oxford Handbook of Business and Government*, ed. David Coen, Wyn Grant,

This debate fosters all-or-nothing statements about the U.S. being either pro- or anti-business that overlook nuanced qualitative dimensions of regulatory policy. For instance, some scholars argue that the litigious and adversarial style of U.S. regulation makes the American regulatory state anti-business. But others have shown that businesses have resource advantages in court and are adept at choosing which cases to settle to avoid hostile rulings and which to push to secure favorable precedent.⁸⁴ So sweeping claims about the regulatory state's pro- or anti-business inclinations are often overbroad. More useful is noting how the regulatory state is both pro- and anti-business. Michael Moran captures this complexity in his description of the regulatory state as “snarling and smiling at business.” On one hand, it smiles because it was built to sustain capitalist structures and intervene in markets only when necessary to restore balance. But regulators snarl when they rely on litigation and broad liability rules to exact punitive damages.⁸⁵

Understanding this snarling and smiling dichotomy requires an analysis of the regulatory state's origins. There is a sizable APD literature on this topic. Skowronek has described late nineteenth century development as “state-building as patchwork,” as

and Graham Wilson (Oxford: Oxford University Press, 2010), 9–34 p. 11 for a summary of this literature. For literature on agency capture, see Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton University Press, 1955); Gabriel Kolko, *Railroads and Regulation, 1877-1916* (Princeton: Princeton University Press, 1965); Carpenter and Moss, *Preventing Regulatory Capture*; for arguments about adversarialism, see Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (New Brunswick: Transaction Publishers, 2002); Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2009).

⁸⁴ Coen, Grant, and Wilson, “Political Science,” 21 on the difficulties of making comparative claims; see Kagan, *Adversarial Legalism* on adversarial legalism; on the advantages of business in courts, see Marc Galanter, “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change,” *Law & Society Review* 9, no. 1 (1974): 95–160; Catherine Albiston, “The Rule of Law and the Litigation Process: The Paradox of Losing by Winning,” *Law and Society Review* 33 (1999): 869–910; Gregory C. Shaffer, “Law and Business,” in *The Oxford Handbook of Business and Government*, ed. David Coen, Wyn Grant, and Graham Wilson (Oxford: Oxford University Press, 2010), 63–88.

⁸⁵ Moran, “The Rise of the Regulatory State.”

reform-driven professionals and bureaucrats secured piecemeal victories against political elites in initially designing the administrative state.⁸⁶ Gabriel Kolko, Gerald Berk, and Richard Bensele have shown how corporations helped facilitate the shift from laissez-faire economy to a corporate capitalist one overseen by a minimal regulatory state.⁸⁷ While this research outlines economic debates and institutional forces involved in the regulatory state's early development, it overlooks how the regulatory state in part a product of crime politics. In many ways, the regulatory state is a relative of the criminal justice system.

By exploring the origins of regulatory ideology and how debates about regulation have been wound up with debates about crime, this project makes sense of the regulatory state's "snarling and smiling" dualism. Agencies snarl at business because they monitor activity defined as criminal and reflect the adversarial dynamics of American law. But the regulatory state was also designed as an alternative to the criminal justice system for corporate actors. Regulatory ideology does not rule out prosecution but gives regulators the discretion to attribute non-criminal meanings to behaviors defined as crimes through the use of alternate sanctions. This institutional framework channels corporate criminality away from criminal justice institutions and can thus be viewed as smiling at business.

In *The Rich Get Richer and the Poor Get Prison*, Jeffrey Reiman's critical criminological account veers from traditional Marxist analyses of crime by suggesting that the disproportionate incarceration of the poor not only serves a functionalist purpose, but an ideological one. By being intentionally designed to fail to reduce crime, prisons

⁸⁶ Skowronek, *Building a New American State*, chapter 5.

⁸⁷ Kolko, *Railroads and Regulation*; Gerald Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917* (Baltimore: Johns Hopkins University Press, 1994); Bensele, *The Political Economy of American Industrialization*.

send an ideological message that the poor are dangerous.⁸⁸ By suppressing the criminal law under regulatory sanctions, the regulatory state serves an inverse purpose to the one Reiman attributes to prisons. The design of the regulatory state both expresses and legitimizes the idea that corporate criminals are honorable people who neither require nor deserve the types of punishment meted out to conventional criminals.

The Nature of Business-Government Relations in the U.S.

Although the regulatory state emerged in response to the rise of large corporations, businesses shaped regulatory legislation to facilitate growth and insulate policy from popular control.⁸⁹ As a result, this project is attentive to the ways in which businesses can and have influenced political development. Scholars offer many theories on the general dynamics of business-state relations. In 1977, Charles Lindblom argued that businesses constrain the authority of democratic institutions by limiting the options political actors have to those that please business.⁹⁰ Whether or not corporations enjoy advantages that produce suboptimal policy has been debated by scholars of pluralism, power-elite theory, agency capture, and lobbying.⁹¹ In 1960, E.E. Schattschneider famously said that the Republican Party was the “political instrument of big business.”⁹²

⁸⁸ Reiman, *The Rich Get Richer*.

⁸⁹ Kolko, *Railroads and Regulation*; Berk, *Alternative Tracks*; Skowronek, *Building a New American State*; Benschel, *The Political Economy of American Industrialization*; Samuel DeCanio, *Democracy and the Origins of the American Regulatory State* (New Haven: Yale University Press, 2015).

⁹⁰ Charles Edward Lindblom, *Politics and Markets: The World's Political Economic Systems* (New York: Basic Books, 1977).

⁹¹ Bernstein, *Regulating Business*; Carpenter and Moss, *Preventing Regulatory Capture*; Werner and Wilson, “Business Representation in Washington, DC”; Frank R. Baumgartner et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (Chicago: University of Chicago Press, 2009); Martin Gilens and Benjamin Page, “Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens,” *Perspectives on Politics* 12, no. 3 (2014): 564–81.

⁹² E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (Hinsdale, IL: Dryden Press, 1960), 40.

For many reasons, this literature tends to promote overgeneralized claims leading to the conclusion that big business always secures its policy goals with ease. In three ways, this project resists this tendency. First, analyses of business-government relations often treat economic, social, and political contexts as static in order to make broad statements that the political power of business is near absolute. But David Vogel has shown that big business has had “fluctuating fortunes” in U.S. history, growing in influence during periods of economic decline when the state is fearful of impeding enterprise and losing influence during times of prosperity when the public feels more comfortable with regulation.⁹³ This project draws on Vogel’s work, acknowledging that business-state relations evolve and adapt in response to the political economic climate.

Second, scholars often use the phrase “business community” or similar blanket phraseology to refer to corporate interests as a homogenous bloc without differentiating between businesses of different sizes, sectors, or regions. This ignores divides among businesses and within sectors of industry. At certain moments in history business interests have concentrated their party allegiances, while at other times they have divided into diverse coalitions.⁹⁴ And while the Republican Party has been the political instrument of big business at times, party ideologies shift. With contemporary Democrats embracing big business, Schattschneider’s claims seem like a relic of a previous era.⁹⁵

Treating the “business community” as a monolithic entity with fixed political allegiances obscures the role that specific industries have played in driving change and

⁹³ Vogel, *Fluctuating Fortunes*.

⁹⁴ Werner and Wilson, “Business Representation in Washington, DC.”

⁹⁵ Graham Wilson and Wyn Grant, “Business and Political Parties,” in *The Oxford Handbook of Business and Government*, ed. David Coen, Wyn Grant, and Graham Wilson (Oxford: Oxford University Press, 2010), 191–207.

transmitting regulatory ideology over time. Lead advocates of regulatory ideology have reflected shifts in power among sectors of the political economy. Railroads defended regulatory ideology in the nineteenth century, the financial sector modified it in the Progressive Era, and Wall Street bankers and exchange officials supported it during the Great Depression. These shifting coalitions consisted of prominent business leaders from different industries dominating the political economy at different times, not a homogenous business community. Appreciating how shifting business interests deployed similar ideas about crime to affect change and embed favorable understandings of corporate criminality into regulatory frameworks entails attention to shifting power balances in business-state relations and the political economy.

Examining splits among businesses highlights when and why certain coalitions have been more effective than others. This illustrates the third way this analysis is distinct from many studies of business-government relations. Recognizing differences among businesses reveals that the successful corporate coalitions have framed their goals within prevailing political, social, and economic discourses. By drawing on dominant ideas about crime in debates about regulation, business leaders in effective coalitions framed themselves as contrasts to prevailing understandings of criminality.

This demonstrates the conditioning power ideational and ideological discourses can have on politics. Businesses are powerful interests, but general analyses of business-state relations and quantitative assessments of elite influence on policy overlook nuances in how that power is exercised. This project shows how successful corporate coalitions have framed their policy goals within the discursive parameters of a moment. In the late nineteenth century, railroads drew on regulatory ideology to contrast business leaders

from ideas of natural criminality. As Progressives favorable to expert administration gained power in the twentieth century, the financial industry reframed regulatory ideology to emphasize the role administrators could play in preventing crime among those who were not naturally criminal. In the 1930s, bankers and exchanges repackaged regulatory ideology as a familiar and safe approach to managing the Depression.

That discursive contexts have conditioned the politicking of businesses leads to reinterpretations of historical accounts of corporate power. For instance, in *The Age of Acquiescence* (2015), Steve Fraser argues that while Americans exhibit a complacent acquiescence to organized wealth during the “Second Gilded Age” today, the Populists effectively mobilized to rein in the power of the robber barons during the “first Gilded Age” of the nineteenth century.⁹⁶ He notes that many business leaders resisted regulatory reform during this period by defending laissez-faire, leading him to conclude that the creation of regulatory agencies were victories for the Populists. But he overlooks that some of the robber barons were not laissez-faire purists. In legislative debates over the Interstate Commerce Act examined in chapter 3, leaders from the railroad industry pushed for a regulatory commission as an alternative to strict criminal prohibitions on their behavior. Essential to their political strategy was how they portrayed railroad executives as foils to prevailing conceptions of born criminality—as inherently good men with no criminal histories who could be monitored through gentler rules and regulations.

These business leaders used regulatory ideology to limit state administrative authority and obscure the prevalence of corporate crime. By drawing on prevailing crime

⁹⁶ Steve Fraser, *The Age of Acquiescence: The Life and Death of American Resistance to Organized Wealth* (Boston: Little and Brown, 2015).

ideologies, they reoriented the debate and ensured that corporate behaviors that could be conceptualized as forms of theft took on distinctive meanings because they were committed by men who did not fit prevailing constructions of criminality. Their actions were instead rationalized as functions of markets and healthy competitive dispositions.

Exploring how different business coalitions articulated their goals reveals nuances to business-government relations that are unappreciated in current scholarship. Successful corporate coalitions have spoken to prevailing political and ideological discourses so that their demands resonate with lawmakers. This illustrates that discourses can condition the range of policies that can be pursued at a given moment, even for powerful interests, and that sometimes businesses lose their political battles. While studies of agency capture, party control, and lobbying highlight many ways in which businesses influence politics, business-state relations are also subject to ideational, institutional, and ideological forces.

Dissertation Structure

Chapters are structured into pairs to analyze the politics of street and corporate crime during specific historical periods. Chapter 2 examines the politics of street crime from roughly 1870 through 1900, when criminal anthropology became the prevailing framework for understanding criminal behavior. Lawmakers used ideas about inherent criminality to justify punishment for blacks, immigrants, poor whites, and organized labor. Chapter 3 analyzes the politics of corporate crime during the same period, focusing on the Interstate Commerce Act of 1887. In debates over the law, corporate criminality was explained as a function of market realities and the competitive dispositions of railroad executives, not deviant natures requiring punishment or rehabilitation. These

ideas justified Congress's decision to give the Interstate Commerce Commission discretion to respond to corporate crime through non-criminal sanctions.

Chapter 4 studies psychological, cultural, and eugenic theories of crime that emerged in the early twentieth century. These schools reinforced the idea that crime was a function of innate pathologies among "undesirable" social groups such as the poor, blacks, and "mental defectives" for whom eugenic interventions were necessary. Chapter 5 examines regulatory reform during the same period. Progressives' faith in professional administration led them to create the Federal Trade Commission (FTC) in 1914 to identify anti-competitive practices in industries. But by not giving the FTC power to initiate prosecutions, Progressives designed the agency to guide businesses towards ethical behavior and push persistently unethical ones out of markets. The chapter also discusses the origins and development of corporate criminal liability.

Chapter 6 studies the politics of street crime during the New Deal and postwar-period. In the 1930s, an emergent group of scholars challenged prevailing theories by attributing crime to socioeconomic disadvantage. But an analysis of the Wickersham Crime Commission's reports and state-level debates over sentencing reform reveals how politicians reinterpreted these ideas to be consistent with the individualized rehabilitative model. Although new ideas could have promoted change, their meanings were modified as they were channeled through preexisting rehabilitative frameworks that proved resistant to change. Chapter 7 examines corporate crime during this period, beginning with the Securities Act of 1933 and Securities Exchange Act of 1934. Bankers and securities exchange officials repackaged regulatory ideology in the context of the Great Depression by arguing before Congress that criminalizing activity on securities markets

would further disrupt the hurting economy. The chapter also examines reforms to regulatory proceedings and operations in the Administrative Procedure Act of 1946.

In chapter 8, this analysis is connected to the current moment. Developments from 1870 through 1965 formed the ideological and institutional terrain on which the carceral state rests by cultivating a focus on the pathologies of offenders, instilling a class slant into constructions of criminality, and channeling corporate crime into regulatory venues.

CHAPTER 2: PUNISHING BORN CRIMINALS: CRIMINALIZING POVERTY, RACE, AND LABOR IN THE GILDED AGE

“The tramp and the millionaire have always existed... put them down side by side naked and helpless on a desert island; and in one year the one will be what he was at first, namely, a pauper, while the other will have become a capitalist.”
- *New York Daily Tribune*, July 26, 1887⁹⁷

During the final decades of the nineteenth century, industrialization, urbanization, waves of immigration, and the emancipation of millions of former slaves upended the nation’s political economy and social structure. With all of this change came extreme economic and racial inequality, a tremendous concentration of wealth, and intense conflicts between capital and labor that ended in working class repression.

An assessment of crime politics during these decades cannot be divorced from the broader political and ideological currents of the late nineteenth century. It was a period of frequent political contestation characterized by the use of state violence against a range of groups that were politicized as criminal threats. In the wake of the Civil War, racial ideologies maintained old racial hierarchies in part by depicting blacks as criminal deviants.⁹⁸ Repressive criminal justice policies targeted immigrants as menaces to the evolving urban order that also challenged the nation’s white Anglo-Saxon identity.⁹⁹ And state violence was frequently directed against the urban poor out of fear that they were prone to serious crime, especially because they were often perceived as a violent ally of

⁹⁷ “Tramps and Millionaires,” *The New York Daily Tribune*, July 26, 1887.

⁹⁸ Oshinsky, *Worse Than Slavery*; Alexander, *The New Jim Crow*; David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (Cambridge: Belknap of Harvard University Press, 2010).

⁹⁹ Rafter, *Creating Born Criminals*; Pisciotta, *Benevolent Repression*; Muhammad, *The Condemnation of Blackness*.

organized labor, with which the state had frequent conflicts. All of these groups were viewed as threats to social and economic stability and depicted as criminals.¹⁰⁰

Existing literature treats the punishment of these groups as separate phenomena attributable to unique social, political, and economic forces. This chapter illustrates how prevailing constructions of criminality in late nineteenth century politics helped to facilitate the punishment of all of these populations. Building on dominant currents in American political and intellectual thought, late nineteenth century scholars viewed criminality as a natural phenomenon. Darwinism and evolutionary theory were a crux of Gilded Age political thought, so the emergent school of criminal anthropology, which attributed criminal behavior to the biological traits of individuals, was amenable to scholars and lawmakers of the late nineteenth century. Studying the development of criminal justice policy during this period through the lens of criminal anthropology's rise demonstrates that while diverse dynamics drove the criminalization of various social groups, ideas about innate criminality colored all of these debates. The behaviors of immigrants, blacks, the poor, and organized labor groups were "naturalized" by being attributed to their inherently pathological nature. Each group was seen as a variant of the "born criminal" concept articulated by Lombroso. The deterministic disposition of criminal anthropology operated as a genus out of which anti-black, anti-poor, anti-worker, and anti-immigrant anxieties flourished. Thus, the biological crime discourse of

¹⁰⁰ Todd DePastino, *Citizen Hobo: How a Century of Homelessness Shaped America* (Chicago: University of Chicago Press, 2003); Kenneth L. Kusmer, *Down And Out, On the Road* (New York: Oxford University Press, 2001); Paul Ringenbach, *Tramps and Reformers, 1873-1916: The Discovery of Unemployment in New York* (Westport: Greenwood Press, 1973); Robert Justin Goldstein, *Political Repression in Modern America From 1870-1976* (Urbana: University of Illinois Press, 2001); Alex Gourevitch, "Police Work: The Centrality of Labor Repression in American Political History," *Perspectives on Politics* 13, no. 3 (2015): 762–73.

the era stabilized multiple systems of inequality by locating the causes of various inequalities in nature.

Section I unpacks the general currents of American political thought in the late nineteenth century out of which the born criminal idea emerged and took hold. Section II examines how Gilded Age scholars articulated ideas of natural criminality in their work, condemning various social groups as inherently criminal and recommending new policy instruments to regulate crime. Their work drove the rise of the “rehabilitative ideal,” the philosophy that punishment should reform inmates, but exhibited a dual commitment to reform and incarceration. Section III explores how deterministic constructs of criminality stigmatized four groups as inherently criminal—the urban poor, blacks, immigrants, and organized labor—through examinations of national prison conference hearings, charities conference meetings, and reports from State Boards of Charities (SBCs). SBCs were advisory boards designed to oversee and supervise state welfare institutions while making policy assessments and recommendations to state legislatures, and their annual reports demonstrate how ideas about criminal incorrigibility were used by state-level reformers to justify punitive public policy. Given the lack of state legislative records from this period, SBC reports provide insights into state policy debates, and analyses of SBCs in Illinois, Indiana, Ohio, Pennsylvania, and New York—industrialized states with high immigrant and urban poor populations—illustrate how deterministic ideas of criminality shaped vagrancy law reform.

I. Ideological and Ideational Currents of Gilded Age Politics

The late nineteenth century is frequently depicted as a period characterized by struggles between capital and labor. For many scholars, this is a warranted focus. As the

country moved away from being an agrarian society of small farmers to a manufacturing society of large corporations and masses of workers, industrial growth and scientific innovation facilitated the emergence of unruly urban centers dominated by financial, manufacturing, and transportation corporations. This growth, especially in the North and Midwest, promoted rapid industrialization, a concentration of wealth, and exacerbated income inequality. The emergence of the large corporation dwarfed Jeffersonian ideals about localized agrarian life, and labor organizations and discontented agrarian communities clashed with the large corporations running the economy.¹⁰¹

While conflicts about class and inequality were fundamental to Gilded Age politics, this was also an era of nativism, sexism, and racism. Millions of new immigrants flooded the country seeking to capitalize on the growing number of jobs in the U.S., prompting exclusionary responses to curb non-Nordic immigration. Reconstruction era egalitarian ideals were displaced as the seeds of Jim Crow were planted, promoting segregation and African-American disfranchisement. Industrialization promoted urbanization, but cities were often populated with the out-of-work poor living in abject poverty. Numerous ascriptive legal systems were designed to promote restriction,

¹⁰¹ For overviews adopting this perspective, see Victoria Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton: Princeton University Press, 1993); Richard Bense, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1977* (New York: Cambridge University Press, 1990); Bense, *The Political Economy of American Industrialization*; Robert Wiebe, *The Search for Order: 1877-1920* (New York: Hill and Wang, 1967); Morton Keller, *Affairs of State: Public Life in Later Nineteenth-Century America* (Cambridge: Harvard University Press, 1977); Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916* (New York: Cambridge University Press, 1988); Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (New York: Cambridge University Press, 1991); Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982); Fraser, *The Age of Acquiescence*.

exclusion, and repression for segments of the population that did not fit the nation's middle-class, white, Anglo-Saxon, Protestant identity.¹⁰²

This heated political context gave rise to multiple countervailing political and ideological discourses, two of which are emphasized in this chapter—a populist politics challenging the inequalities associated with the growth of industry and a responsive conservatism favoring industrial expansion and free markets. Republicans became the party of business, seeking to facilitate government assistance to businesses by supporting the industrial tariff and aiming to nationalize the economy.¹⁰³ Democrats remained the party of states' rights, only shifting towards a more distributive and regulatory politics as the Populists became credible threats to their survival. But both major parties remained dedicated, at least when convenient, to doctrines of laissez-faire, particularly Republicans who opposed regulatory initiatives hostile to industry. Alternatively, Populists voiced a strict anti-monopolist politics positing that robust administrative reforms to state apparatuses could and should be used to create competitive market conditions.¹⁰⁴

In his analysis of the Gilded Age, historian Robert Wiebe called 1870s America a “distended society” in which international markets, large corporations, and mass urban centers trampled over the “island communities” of self-contained rural towns that

¹⁰² Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University, 1997), 347–409; Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: Oxford University Press, 2005).

¹⁰³ See Benschel, *The Political Economy of American Industrialization* for a useful history on the relationship of the Republican Party to big business.

¹⁰⁴ See Smith, *Civic Ideals*, 349–51 for an analysis of the affinities between the ideologies of the major parties; for strict antimonopolism of populists, see Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era* (Princeton: Princeton University Press, 2016), 57–58; for how populists' antimonopolism reflected a faith in enforced competition and self-regulating markets, see Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900-1932* (New York: Cambridge University Press, 2009), 2–3, 10, 25–27, 35, 252.

organized American life before the Civil War.¹⁰⁵ It was these agrarian communities that formed the backbone of Gilded Age populism. Populists articulated a class-based farm-labor politics, influencing the latter platforms of the People's Party, Socialist Party, and Progressives. Populists preached a redistributive and bureaucratic politics, condemning the growth of corporate power and articulating a strict anti-monopolism.¹⁰⁶ But while populism challenged industrialization, it was not a re-creation of Jeffersonianism. Populists used grassroots activism among poor farmers to break from laissez-faire, insisting on national ownership of railroads, democratic control over the money supply, and anticipating the modern regulatory state.¹⁰⁷ The Populists fueled discourses about the "robber barons" as ruthless manipulators, painted trusts as "soulless," and denounced business leaders as "morally pathological" and "robbers" of the public good.¹⁰⁸

At its core, Populism was driven by agrarian discontent and labor activism. Populists made some attempts to include the urban proletariat within their discourse, but as Steve Fraser has argued, the movement "remained ambivalent about the city." The growth of abusive financial networks was, "an irreducibly urban phenomenon," and Populists often "recoiled from the visage of proletarian squalor and demoralization."¹⁰⁹

¹⁰⁵ Wiebe, *The Search for Order*.

¹⁰⁶ Charles Postel, "The American Populist and Anti-Populist Legacy," in *Transformations of Populism in Europe and the Americas: History and Recent Tendencies*, ed. John Abromeit et al. (London and New York: Bloomsbury Academic, 2016), 116–35; Charles Postel, "TR, Wilson, and the Origins of the Progressive Tradition," in *Progressivism in America: Past, Present, and Future*, ed. David Woolner and John Thompson (New York: Oxford University Press, 2016), 3–13.

¹⁰⁷ Fraser, *The Age of Acquiescence*, 87–102; for more on populist debates over the political economy, see Bensel, *The Political Economy of American Industrialization*; Skowronek, *Building a New American State*.

¹⁰⁸ For a particularly excellent account of the origins and development of agrarian populism, see Fraser, *The Age of Acquiescence* chapter 4 in particular.

¹⁰⁹ Fraser, 103.

Their fight essentially pitted farmers and labor against capital, leaving the urban poor and immigrants out of their politics.

This is important when recognizing the broad appeal of Darwinian theory in the late nineteenth century. The flourishing of race science, biological determinism, and evolutionary theory laid a foundation for the development of the eugenics movement. But as Rogers Smith has written, “Across the spectrum...from laissez-faire enthusiasts and white supremacists through Socialists and black separatists, leading writers accepted evolution in ways that permanently altered how they understood even the features of American life they endorsed.” As a result, even “poor white voters suffered from the inegalitarian political trends they all too often embraced.” Support for evolutionary theory was not universal but was embraced across political ideologies, legitimating racist, nativist, and classist sentiments even among segments of the Populists. With poor urban whites, immigrants, and African Americans absent from the era’s major political coalitions, they were left vulnerable to criticisms that their conditions of inequality were a function of the fact that they were socially and biologically “unfit.”¹¹⁰

Richard Hofstadter’s *The Age of Reform* provides an account of Populism in which he suggests that Populists were driven by a nativist consensus. His thesis rests on a number of questionable premises, and his conceptualization of Populism encompasses such a diverse collection of forces that he denies the movement any cohesion.¹¹¹ He overlooks the Populists’ forward-looking redistributive, bureaucratic, and pro-labor politics that rejected laissez-faire, as well as divides within the movement over Social

¹¹⁰ Smith, *Civic Ideals*, 351, 409.

¹¹¹ Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955).

Darwinism.¹¹² Still, sizable numbers of Populists invoked Social Darwinist principles to legitimate their hostility to immigrants and the poor. They did not use Darwinist logic like Progressives would to justify an expansion of state power, nor did they use Darwinism like their laissez-faire opponents to naturalize free markets. Rather, they entertained essentialist narratives of group difference in endorsing a view of America as a white Christian nation. This underscores how Populism was able to coexist with support for exclusionary immigration and racial policy.¹¹³

The onset of a robust populist politics hardened conservative opponents who remained dedicated to laissez-faire, freedom of contract, and hard money.¹¹⁴ Conservative countercurrents to Populism built on Herbert Spencer's theory of Social Darwinism. While populist politics portended the emergence of a modern bureaucratic state, large segments of the upper middle class clung to free market ideologies, which were legitimated through the doctrines of natural selection and "survival of the fittest."¹¹⁵ Corporate actors particularly exerted enormous political influence during this period and ensured that economic development suited the needs of major industries. Many corporations and conservatives remained dedicated to a purist conception of laissez-faire and fought hard against demands for economic regulation.¹¹⁶ Some leading scholars, such

¹¹² Postel, "TR, Wilson, and the Origins of the Progressive Tradition."

¹¹³ See Leonard, *Illiberal Reformers* for an account of Social Darwinism's appeal across the political ideologies of populism, conservatism, and progressives; For the development of race science, see Muhammad, *The Condemnation of Blackness*; Ann Fabian, *The Skull Collectors: Race, Science, and America's Unburied Dead* (Chicago: University of Chicago Press, 2010).

¹¹⁴ Postel, "The American Populist and Anti-Populist Legacy"; Postel, "TR, Wilson, and the Origins of the Progressive Tradition."

¹¹⁵ Fraser, *The Age of Acquiescence*, 102; Leonard, *Illiberal Reformers*, 97–105; Smith, *Civic Ideals*, 351–57.

¹¹⁶ Bensel, *The Political Economy of American Industrialization* for an account of the political economy of industrialization in the late nineteenth century.

as Steven Fraser and Michael McGerr, contend that middle-class resistance checked the growing power of corporations by securing significant regulatory reform against the wishes of the robber barons.¹¹⁷ Chapter three will expose flaws in this narrative by illustrating that while some robber barons remained dedicated to laissez-faire, others pushed for regulatory reform as an alternative to criminalization of corporate activities.

Laissez-faire economics particularly found scientific validation in the works of Herbert Spencer. Spencer's theory of evolution was not an appropriation of Darwin's work, but he did coin the phrase "survival of the fittest" as his own description of Darwinian theory. He portrayed social Darwinism as a variant of political economy that could explain the inequalities of late nineteenth century industrial conditions. For Spencer, evolution implied support for free markets and opposition to government social and economic assistance.¹¹⁸

Social Darwinism aligned with the goals of ideological conservatives, and economist William Graham Sumner was the most prominent voice making this connection. Sumner used Spencerian logic to criticize state provision of social assistance for the poor. According to Sumner, markets spurred people to action through competitive dynamics that promoted productivity. Natural selection was an unsentimental science, so he said that society "does not need any care or supervision" to lead to the emergence of the "natural social order." To reach said order, society must return to the doctrine of laissez-faire. Sumner wrote, "Let us translate it into blunt English, and it will read, Mind

¹¹⁷ Fraser, *The Age of Acquiescence*; McGerr, *A Fierce Discontent*.

¹¹⁸ See Hofstadter, *Social Darwinism in American Political Thought*, 22–47; and Smith, *Civic Ideals*, 351–53 for an overview of the history of these ideological currents.

your own business.”¹¹⁹ If government simply stayed out of the way, society would order itself naturally into appropriate social and economic hierarchies.

Captains of industry used Social Darwinism to justify their perceptions of their own superiority, which the next chapter will address. But advocates of Spencerian theory also used his logic to reject labor protection, discredit social policy assisting marginalized communities, and naturalize classical economics. Pecuniary success was deemed a result of thrift, diligence, and intelligence, while socioeconomic struggle was a function of natural unfitness. According to Sumner, inequalities in industrial economies were a natural process of eliminating the unfit. Such individuals should be left behind for the race to succeed and progress.¹²⁰

Reverend Josiah Strong’s book *Our Country* (1885) exemplified how ideas about natural inequality manifested in a resurgent nativism. Strong celebrated the nation’s economic and scientific advances while articulating fears that immigration posed challenges for the nation’s homogeneous citizenry. He feared that ill-educated immigrants were sources of vice, crime, and civic incompetence and would be unable to assimilate into American culture. He wrote that most immigrants were from “the pauper and criminal classes” and cited selective statistics to argue that immigrants were “twelve times as much disposed to crime as the native stock.” He wrote that inferior immigrants would die off and be left behind in “the final competition of races.”¹²¹

¹¹⁹ Sumner, *What Social Classes Owe to Each Other*, 119–20.

¹²⁰ Sumner, 8–10, 55–58, 107, 114–16, 126.

¹²¹ Josiah Strong, *Our Country: Its Possible Future and Its Present Crisis*, Revised, 1891 (New York: Baker and Taylor, 1885), 56–57, 222.

Hofstadter's critical account of the Populists neglects the force with which they rejected the brands of laissez-faire economics endorsed by Sumner and their long-term influence in shaping Progressivism, New Deal politics, and the Great Society.¹²² But in important ways, Populists shared affinities with their conservative opponents by accepting elements of Darwinist and Spencerian theory. The fact that many Populists embraced ideas about naturalized hierarchy left room for Darwinist theories of inequality to flourish across ideological divides.¹²³ Debates over Populism, nativism, racism, socialism, and laissez-faire were crucial to Gilded Age politics, but almost any social scientist could enlist evolutionary ideas to support a different view. This consensus on the basic precepts of Darwinism and natural selection was fundamental to political development during this period. Prevailing constructs of criminality reflected these deterministic ideas of human behavior and naturalized understandings of inequality.

II. The Genealogy of the “Born Criminal” Idea and the Rehabilitative Ideal

Darwinism clearly numerous political goals outside of legitimating criminal justice reform, but Gilded Age constructs of criminality reflected these biological ideational currents. Darwinist and bio-determinist theories of criminality played crucial roles in the politics of the era by promoting policies that have had enduring legacies on American criminal justice.

Law-and-order campaigns have been recurring features of American political development, and their long-term effects can only be understood by examining how ideas about crime have evolved and interacted with changing political contexts. Ideas about

¹²² Particularly see Postel, “The American Populist and Anti-Populist Legacy.”

¹²³ Postel, “TR, Wilson, and the Origins of the Progressive Tradition”; Leonard, *Illiberal Reformers*; Fraser, *The Age of Acquiescence*.

biology were useful ideational weapons for Gilded Age political entrepreneurs and reform-oriented actors seeking to change public policy. These changes were geared towards repressing the urban poor, racial minorities, and immigrants who challenged the nation's WASP identity. New ideas of criminality in American scholarship often adopted the "born criminal" idea of Cesare Lombroso to justify policies targeting the poor, immigrants, and blacks through a discourse of rehabilitation. Given the Darwinist ideas at its foundation, the rehabilitative model comported with bio-deterministic ideas embraced by Populists, conservatives, and Progressives, and thus had broad political appeal.

Ideas about crime associated with biology challenged older and established ideologies, particularly Beccarian utilitarianism. In his 1764 publication *On Crimes and Punishments*, Italian scholar Cesare Beccaria depicted crime as a function of free will that could be deterred through clearly defined terms of incarceration. Beccaria was a significant influence on American penology during the Founding.¹²⁴ But ideas associated with biology and evolution advanced new claims theorizing criminality as a natural trait, upending deterrence theory's assumption that each criminal was a rational actor. This was driven by the rise of criminal anthropology, the school of thought founded by Lombroso. Criminal anthropologists like Lombroso argued that certain biological defects rendered some individuals as evolutionary throwbacks unable to control their violent, selfish, and amoral natures, thus earning them the classification "born criminal."¹²⁵

Criminal anthropology quickly eclipsed Beccarian deterrence theory in influence as Lombroso's seminal book *Criminal Man* (1876) became popular in the United States.

¹²⁴ Beccaria, *On Crime and Punishment*; Browning and Gerassi, *The American Way of Crime*, 122–23; Whitman, *Harsh Justice*, 51–52; Maestro, *Cesare Beccaria*; Conrad, "Correctional Treatment."

¹²⁵ See Lombroso, *Criminal Man* which was the foundational text of criminal anthropology.

Importantly, Lombroso's work sparked the onset of criminological positivism. Positivist criminologists claim that through the measurement of criminal behavior, the causes of crime can be identified. Whereas Beccarian deterrence theory focused on punishing a specific crime—that is, issuing a punishment appropriately proportional to the criminal act in order to deter it—criminal anthropology focused on analyzing individuals to assess their natural criminality. In short, it focused on punishing the *criminal* more than the *crime*. In the early the 1800s, most states used sentencing structures influenced by Beccarian thought that issued clearly defined terms of punishment in response to specific crimes.¹²⁶ But this changed with the emergence indeterminate sentencing in the late nineteenth century, through which sentences were tailored to the individual. This model was heavily influenced by Lombrosian theory, as inmates capable of rehabilitation were to be reformed and released early while incorrigible ones were to be contained.

As articulated in *Criminal Man*, Lombroso's theory was individualistic and deterministic. In the book, Lombroso contended that physiological stigmata like skull thickness and protruding ears were indicative of a primitive biological inheritance that left an individual predisposed to crime. He argued that 40% of offenders were “born criminals.” The final edition of *Criminal Man* stated that, “born criminals must be interned in special institutions for the incorrigible.”¹²⁷ Lombroso extended the label of “born criminal” widely, concluding in an 1891 study of Italian revolutionaries that 34% of anarchists shared the stigmata of born criminals. He clarified that the instincts of radicals could be used to pursue meaningful social change, but his argument was that the

¹²⁶ Conrad, “Correctional Treatment”; Maestro, *Cesare Beccaria*.

¹²⁷ Lombroso, *Criminal Man*, 224, 348; Rafter, *Creating Born Criminals*.

dispositional instinct that drove political revolutionaries was the same one that drove criminal behavior.¹²⁸ He also identified black men as innately criminal, writing in 1897 that “the great obstacle to the negro’s progress [in America] is the fact that there remain latent within him the primitive instincts of the savage.” He attributed high rates of homicide in America to the natural criminality of black men.¹²⁹

By aiming to punish the criminal rather than the crime, Lombrosian theory was built on a biased image of the “criminal type.” Having the traits of a criminal type became a more important metric for determining whether someone deserved punishment than their behavior. This emphasis on personal pathologies and traits entailed a narrow focus on “street crimes” commonly committed by social undesirables and deviants who fit this preconstructed idea of the criminal. By emphasizing only specific types of crime and criminals, Lombrosian theory rested on class-skewed a priori assumptions about what counted as crime and who was likely to commit it. The ideas and ideologies that grew out of Lombrosian theory inherited these biases.

By contemporary standards, Lombroso’s claims were clearly substantiated with unsophisticated statistical methods. Nonetheless, his work resonated with American penologists. An intellectual milieu dominated by race science and Darwinism was amenable to the idea that crime was a function of biology. Some American scholars had suggested that criminals were biologically defective even before Lombroso’s work was transmitted to the U.S. In his 1877 book *The Jukes*, Richard Dugdale traced the ancestry

¹²⁸ Cesare Lombroso, “Illustrative Studies in Criminal Anthropology. III. The Physiognomy of the Anarchists,” *The Monist* 1, no. 3 (1891): 336–43; also see Lombroso, *Criminal Man*, 300, 352–55.

¹²⁹ Cesare Lombroso, “Why Homicide Has Increased in the United States,” *The North American Review* 165, no. 493 (1897): 641–48.

of the “Juke” family in New York and concluded that the family’ biology was predisposed to crime.¹³⁰ Though often read as purely bio-deterministic, his work noted that bad environments can “produce bad habits which may become hereditary,” revealing Dugdale’s commitments to the Lamarckian theory that acquired traits could become hereditary.¹³¹ This allowed him to acknowledge the variety of social factors that caused crime while accepting the idea that crime was still the result of inherited pathologies. He concluded that reform was possible for some, but “perpetual imprisonment” was necessary for “habitual criminals” for whom “we cannot accomplish individual cure.”¹³²

American criminal anthropologists were intellectual descendants of Lombroso and Dugdale. They adopted deterministic frameworks viewing criminals as naturally distinct from ordinary individuals. They understood criminal behavior as immoral actions attributable to the pathologically deviant natures of people. And like Lombroso and Dugdale, they endorsed treatment for curable offenders and incarceration for incurable ones deemed “born criminals.” The men who brought criminal anthropology to America were responsible for embedding the idea of the born criminal into a new and influential rehabilitative ideology of punishment.

Scholars of American criminal justice broadly agree that from the late nineteenth century through 1970s, American penology was influenced by the rehabilitative ideal—the idea that incarceration should be a reformatory experience for inmates, equipping them to lead law-abiding lives upon release. But since it was built on Lombrosian

¹³⁰ Richard L. Dugdale, *The Jukes: A Study in Crime, Pauperism, Disease, and Heredity* (New York: G.P. Putnam’s Sons, 1877), 15, 28–30, 92–94. “Juke” was a pseudonym for the real family name.

¹³¹ Dugdale, 66, 107–10.

¹³² Dugdale, 114–15.

constructs, rehabilitative ideology conceptualized criminality as a function of individual defects rather than a symptom of social, political, and economic forces. Bio-deterministic constructs of criminality shaped two prongs of rehabilitative theory—one premised on reforming and releasing inmates, and another punishing those deemed “incorrigibles” who fit the born criminal image and proved impossible to reform. Thus, rehabilitative ideology inherited Lombroso’s class skewed assumptions about what counted as crime and who was a likely criminal.

This class ideology was deeply embedded into rehabilitative theory from its origins. In 1870, the American Congress of Corrections held its first inaugural meeting in Cincinnati, where it articulated its support for rehabilitative penology. Attended by penal scholars, practitioners, and prison wardens, the Congress famously published and presented its “Declaration of Principles” at the conference. The Declaration has been widely recognized as establishing the rehabilitative ideal.¹³³ The document directed prison administrators to implement indeterminate sentencing, “moral training,” “industrial training,” and educational programs behind bars.¹³⁴

One of the attendees who assisted in the writing of the Declaration was Zebulon Brockway. In the following years, Brockway would receive national praise for his implementation of these techniques at New York’s Elmira Reformatory. Elmira was little more than a work camp in the years immediately after its opening in 1876, but under Brockway’s wardenship it established educational programs, indeterminate sentencing systems, and a marks system offering rewards for good behavior. This earned Brockway

¹³³ Conrad, “Correctional Treatment,” 269–70.

¹³⁴ Wines, “Declaration of Principles” see principles I, II, IV, VIII, X, XV, XVI, and XXXI.

the title “father of the rehabilitative ideal.” Nearly all the reformatories that opened across the nation in subsequent decades emulated Elmira.¹³⁵

Despite this reformative rhetoric, Elmira’s staff psychologically and physically abused inmates while “reforming” them into members of the working class.¹³⁶ This mutual embrace of “rehabilitation” and harsh justice can only be understood by examining Brockway’s conception of criminality, which entailed support for both rehabilitation and punishment. He endorsed a Lamarckian conception of evolution that saw degeneracy as an acquired trait that could become a hereditary cause of crime.¹³⁷ For example, he suggested that a “lack of proper education and other unfavourable circumstances” could create biologically transmittable defects in one’s moral and mental faculties. Brockway argued, however, that environmental factors contributed to crime only indirectly by altering biology and concluded that only 4% of criminals sprang from “healthy stock.”¹³⁸

His embrace of Lombrosian theory led him to suggest that despite the potential influence of environmental factors, inherently inferior types could be identified with

¹³⁵ Pisciotta, *Benevolent Repression*, 4, 14–27, 81–126; McClennan, *The Crisis of Imprisonment*, 177–186 on prison labor.

¹³⁶ Pisciotta, *Benevolent Repression*, 81–126 for a discussion of 17 reformatories that opened between 1877 and 1916 and were based on Elmira (MI, MA, PA, MN, CO, IL, KS, OH, IN, WI, NJ, IA, WA, OK, CT, and DC; Thomas Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (Urbana, Chicago, and London: University of Illinois Press, 1977), 194–96, 215–20.

¹³⁷ Zebulon Brockway, “Crime: Annual Address Before the National Prison Congress, 1898,” in *Papers on Penology*, 4 (Elmira: New York State Reformatory At Elmira, 1899), 73, 78.

¹³⁸ Zebulon Brockway, “The Ideal of a True Prison System for a State,” in *Transactions of the National Congress on Penitentiary and Reformatory Discipline: Held at Cincinnati, Ohio, October 12-18, 1870*, ed. E.C. Wines (Albany: Weed Parsons, 1871), 39; Zebulon Brockway, “Prisoners and Their Reformation,” in *Prisoners and Reformatories At Home and Abroad, Being the Transactions of the International Penitentiary Congress, Held in London July 3-13 1872*, ed. Edwin Pears (London: Longman, Greens, 1872), 615.

reference to physiological traits.¹³⁹ He argued that such “defective fellow beings” were driven by “undeveloped, incongruous, or unbalanced condition[s] of their higher mental faculties” that left their “animal instincts” unchecked.¹⁴⁰ He proposed that the elimination of criminals through rehabilitation and incarceration would lead to “a perfect race.”¹⁴¹

Given the influence of Lombroso and Lamarck on his thinking, Brockway mounted a defense of rehabilitation while espousing a belief in the existence of natural criminals who required indefinite containment. He reiterated that indeterminate sentences should offer opportunities for inmates to reform while being used to indefinitely contain incorrigibles.¹⁴² His discussion of the Elmira inmate Macauley—a man first committed for burglary, then twice for parole violations—provides a good example of his thinking. He suggested that Macauley typified the class of “incorrigible criminals.” Brockway stated that, “Such offenders, could they be committed under the absolute indeterminate sentence plan, would be continuously held under enough of custodial restraint to protect the public.”¹⁴³ His indeterminate model thus carefully balanced his dual commitments to rehabilitation and containment.

Brockway’s ideological duality conditioned the work of criminologists drawn to

¹³⁹ Zebulon Brockway, *Fifty Years of Prison Service: An Autobiography* (New York: Charities Publication Committee, 1912), 214–22.

¹⁴⁰ Brockway, “Crime,” 96; Brockway, “Prisoners and Their Reformation,” 613.

¹⁴¹ Brockway, “The Ideal,” 42.

¹⁴² Brockway, “Crime,” 79–80, 89–91, 96; Zebulon Brockway, “An Absolute Indeterminate Sentence,” in *Fifty-Ninth Annual Report of the Prison Association of New York For the Year 1903* (Albany: Oliver A. Quayle State Legislative Printer, 1904); Brockway, “The Ideal,” 42, 52–56 states that incorrigibles must be “kept under such continued custodial restraint as gives guarantee of safety from further trepadations”; Zebulon Brockway, “Reformatory Prison Discipline—What Is It, and by What Agencies to Be Attained?,” in *Transactions of the Third National Prison Reform Congress*, ed. E.C. Wines (New York: Office of the Association, 1874), 206–7; Zebulon Brockway, “The Incorrigible Criminal: What Is He, and How Should He Be Treated?,” in *The National Prison Association of the United States of America, 5th and 6th Report of Proceedings* (Boston: Geo. E. Crosby, 1886), 105–7.

¹⁴³ Brockway, *Fifty Years of Prison Service*, 265, emphasis added.

his rehabilitative philosophy and to Lombrosian theory. In *Creating Born Criminals* (1997), Nicole Hahn Rafter identifies seven prominent criminologists during the turn of the century who built on Lombrosian theory—Arthur MacDonald, Henry Boies, Charles Henderson, August Drahts, William McKim, G. Frank Lydston, and Philip Parsons.¹⁴⁴ Their writings also built on Brockway’s philosophy and became essential to the development of the indeterminate sentence and rehabilitative model.

Consistent with emergent progressive trends towards combining scientific expertise with policy reform, these men frequently held significant institutional power. They constituted a core of scholar-reformers who, like Brockway, were theorists who put their ideas into practice. For instance, Arthur MacDonald held a federal appointment with the U.S. Bureau of Education. Henry Boies served on the Pennsylvania Board of Charities for well over a decade. Brockway regularly served on New York’s Charities Board. And Charles Henderson, one of the nation’s most respected sociologists, was routinely a headlining speaker at American sociological, medical, and criminological conferences. Henderson served as the President of the National Conference of Charities from 1898-99, American Commissioner to the International Prison Commission in 1909, and president of the International Prison Congress in 1910.

Arthur MacDonald’s 1893 book *Criminology* provides a good example of the influence of Lombroso and Brockway in these scholars’ works. One of the earliest American works dedicated studying crime, MacDonald’s book opened by claiming that Lombroso left it impossible to “deny the organicity of crime, its anatomical nature and

¹⁴⁴ See Rafter, *Creating Born Criminals*, 129, notes 29 and 30 for Rafter’s methodology in selecting these authors.

degenerative source.” MacDonald insisted on the construction of special institutions for incorrigibles, as Lombroso did.¹⁴⁵ Henry Boies similarly asserted in *Prisoners and Paupers* (1893) that “a large proportion” of prison inmates “were born to be criminals.”¹⁴⁶ Along with Charles Henderson (1893), Boies argued that criminals should not reproduce until they are rehabilitated so their children do not inherit criminal tendencies.¹⁴⁷ This joint endorsement of Lamarckian and Lombrosian ideologies reflects the influence of Brockway on their thinking.

Support for the rehabilitative model and its assumptions about incorrigibility and biology manifested in endorsements of indeterminate sentencing. This was consistent among these scholars, who criticized former determinate systems for failing to offer offenders adequate reform incentives.¹⁴⁸ Alternatively, indeterminate sentences were praised as providing reform incentives and serving as a long-term containment tool.¹⁴⁹ For example, MacDonald stated that, “The indeterminate sentence is the best method of affording the prisoner an opportunity to reform, without exposing society to unnecessary dangers” because it permitted long-term detainment for incorrigibles.¹⁵⁰ August Drahts (1900) further claimed that the permanent containment of incorrigibles was a more

¹⁴⁵ MacDonald, *Criminology* The book is dedicated to Lombroso and includes an introduction written by him. Also see i, 22, 204, 219, 228, 271.

¹⁴⁶ Boies, *Prisoners and Paupers*, 171–72.

¹⁴⁷ Boies, 179; Henderson, *An Introduction*, 16.

¹⁴⁸ MacDonald, *Criminology*, 271; Boies, *Prisoners and Paupers*, 189–90; August Drahts, *The Criminal: His Personnel and Environment* (New York: Macmillan, 1900), 365–70; Henderson, *An Introduction*, 288–93; G. Frank Lydston, *The Diseases of Society: The Vice and Crime Problem* (Philadelphia: J.B. Lippincott, 1906), 605; William Duncan McKim, *Heredity and Human Progress* (New York: G.P. Putnam’s Sons, 1900), 20–26; Philip A. Parsons, *Responsibility for Crime: An Investigation of the Nature and Causes of Crime and a Means of Its Prevention* (New York: Columbia University Press, 1909), 177–81.

¹⁴⁹ Boies, *The Science of Penology*, 147–57; Henderson, *An Introduction*, 288–93; MacDonald, *Criminology*, 271; McKim, *Heredity and Human Progress*, 23–26.

¹⁵⁰ MacDonald, *Criminology*, 271.

important justification of indeterminate sentencing than granting curable criminals incentives to change. Henry Boies' wrote in 1893 that three convictions, regardless of severity, warranted life incarceration.¹⁵¹ In 1901, Boies stated that reformatories should separate criminals into "corrigible and incorrigible subdivisions." He claimed that, "those who can be cured will be cured before liberation. The chronic incorrigibles will be found to consist of two classes: the incurably vicious, the physical, mental, and moral imbeciles; and those whose organization is so defective as to be incapable of restoration...they should be confined under entirely different conditions."¹⁵²

From its origins, this rehabilitative model was built on bio-deterministic conceptions of criminal behavior and validated by the methodologies of race science. The ideal could not have flourished without a favorable political and ideological context reflecting a consensus around the precepts of race science and natural selection. This laid the basis for the later emergence of the eugenics movement. Growing out of Francis Galton's work, the eugenics movement sought to regulate human evolution by controlling breeding. The logic of these reform-oriented penologists led them to defend indefinite detention and eugenic solutions like compulsory sterilization, marriage restrictions, and extermination to control criminality.¹⁵³ This rendered rehabilitation a useful weapon for pro-eugenics Progressives in the early twentieth century.

In their works, Brockway, Boies, and other criminal anthropologists emphasized crimes common among racial minorities, the urban poor, and working class. Depicting

¹⁵¹ Drahts, *The Criminal*, 365–70; Boies, *Prisoners and Paupers*, 179, 186–90.

¹⁵² Boies, *The Science of Penology*, 188–89.

¹⁵³ Henderson, *An Introduction*, 153; MacDonald, *Criminology*, 269–70; Lydston, *The Diseases of Society*, 562–68; Boies, *The Science of Penology*, 311–31; Parsons, *Responsibility for Crime*, 137, 148–49; McKim, *Heredity and Human Progress*, 188–93.

these groups as naturally criminal complemented Spencerian theory and the works of Sumner. Sumner's use of Social Darwinism to wage war social reform and state economic assistance by depicting all social and economic hardship as incidental to the struggles of natural selection.¹⁵⁴ This provided a cosmic rationale for the inequalities common among the criminal classes. Sumner thus criticized leniency towards crime, arguing that it is a "false doctrine" that "criminals have some sort of a right against or claim on society."¹⁵⁵ He argued that if the state were to disperse the "poverty-stricken, vicious, and criminal inhabitants" of industrial slums, they would be forced into a society where they would either be "crushed by the competition of life" or be incarcerated.¹⁵⁶

These ideas had real political purchase that translated into policy. Gilded Age penology was driven by assumptions about what the likely criminal looked like and subjective judgments about the reformatory capacity of inmates. Behavior and personal traits common among the poor and working classes were pathologized as signs of an incurable criminal disposition, warranting anything but punishment meaningless. This reveals that the racism, classism, and nativism rampant in late nineteenth century politics cannot be entirely understood as isolated phenomena. The holistic perspective outlined here recognizes the interrelation of these dynamics by showing how deterministic framings of criminality were weaponized to punish a range of groups including blacks, immigrants, poor urban whites, and organized labor. The ideologies of Lombroso and Brockway laid fertile ground in which various ascriptive ideologies could flourish.

¹⁵⁴ Sumner, *What Social Classes Owe to Each Other* esp. pp. 17, 170; Sumner, *The Challenge of Facts*, 25.

¹⁵⁵ Sumner, *The Challenge of Facts*, 136–39.

¹⁵⁶ Sumner, 422.

IV. The Broad Reach of Brockway: The Punishment of Poverty, Race, and Labor

As inequality became more pronounced, the idea of natural criminality guided the restructuring of public policy as part of an effort to control the “dangerous classes.” This included social undesirables like the poor, low-income working class, immigrants, and racial minorities. This section examines the treatment of four populations deemed “incorrigible” criminals and subjected to punishment—tramps, blacks, immigrants, and organized labor. Deterministic crime discourse served as an ideological foundation that legitimated anti-poor, anti-black, anti-immigrant, and anti-labor sentiments.

Vagrancy Laws in the Industrial Northeast and Midwest

The regulation of vagrancy was a contested political question at the turn of the century. What to do with the growing population of the urban poor deemed offensive to bourgeois sensibilities became a significant concern for lawmakers. Maligned by conservatives and neglected by Populists, the urban poor were subjected to enhanced social control through a dramatic revamping of state and local vagrancy laws. The urban poor often came from the unemployed white working class, but the growing classes of vagrants in American cities were generally assumed to consist of immigrant populations, so vagrancy law reform was tightly wound up with xenophobic beliefs.¹⁵⁷

Vagrancy laws had a long history in America predating the late nineteenth century. Having inherited vagrancy laws from England, Americans have always viewed

¹⁵⁷ Francis Wayland, “A Paper on Tramps Read at the Saratoga Meeting of the American Social Science Association Before the Conference of State Charities,” in *Proceedings of the Fourth Annual Conference of Charities* (New Haven, 1877), 5; Ringenbach, *Tramps and Reformers*, 18, 26; DePastino, *Citizen Hobo*, 20; National Conference on Charities and Corrections, *Proceedings* (1885, n.d.), 192–95; John J. McCook, “A Tramp Census and Its Revelations,” *Forum* 15 (August 1893): 753–66; Sidney Harring, “Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894,” *Law and Society Review* 11, no. 5 (1977): 881–87.

the poor with a degree of hostility. But unlike the vagrancy statutes of England, American vagrancy laws eventually developed to control criminals and social undesirables instead of managing worker migration.¹⁵⁸ The evolution of these laws, shifting conceptions of vagrancy, the relationship of vagrancy statutes to political debates about crime illustrates how and why U.S. vagrancy laws diverged from their British antecedents.

Preceding the mid-nineteenth century, American vagrancy laws generally operated similarly to their British counterparts and regulated the flow of migratory labor. Jobless transients were rarely punished with extended prison sentences, and typically spent a night in the station house if found by police.¹⁵⁹ Through most of the nineteenth century, urban police were not formally institutionalized. They bore little resemblance to the professionalized and regimented forces of today, instead performing general social welfare functions beyond crime control like providing vagrants with lodging and meals. The duties of mid-eighteenth century urban police thus included managing the welfare of the poor, which did not entail harsh criminal sanction.¹⁶⁰

Beginning in 1873, popular understandings of poverty changed. An economic crash generated a social crisis as urban poverty became a more visible problem. Unemployment estimates soared to 3 million, and some scholars have suggested that 25

¹⁵⁸ Chambliss, "A Sociological Analysis of the Law of Vagrancy."

¹⁵⁹ DePastino, *Citizen Hobo*, 12; Ringenbach, *Tramps and Reformers*, 10. "Revolvers" rotated between precincts, and most only allowed tramps to spend one night in the station house.

¹⁶⁰ Cited in Sam Mitrani, *The Rise of the Chicago Police Department: Class and Conflict, 1850-1894* (Urbana: University of Illinois Press, 2015), 28; Eric H. Monkonnens, *Police in Urban America: 1860-1920* (Cambridge: Cambridge University Press, 2004); Roger Lane, "Urban Police and Crime in Nineteenth-Century America," in *Crime and Justice: A Review of Research*, ed. Michael Tonry and Norval Morris, vol. 15 (Chicago: University of Chicago Press, 1992), 20; Eric H. Monkonnens, "History of Urban Police," *Crime and Justice* 15 (1992): 553-59; Michael D. Reisig, "Community and Problem-Oriented Policing," *Crime and Justice* 39 (2010): 13.

percent of urban workers were unemployed.¹⁶¹ The crash generated a moral panic over a fictitious “tramp army,” an imaginary revolutionary force consisting of homeless men that wandered from city to city and threatened the nation’s social and political stability. In combatting this “tramp crisis,” the idea of pathological criminality became a tool for the state to depict the poor as criminals necessitating containment. Poverty became an indicator of an innate criminal disposition, which deflected attention away from the socioeconomic causes of poverty and permitted the state to harshly punish vagrancy.¹⁶²

As a qualification, many people were forced into poverty during this period, but others chose a life of unemployment as a means of protest. Varying synonyms for the urban poor thus emerged with distinct meanings. Hobos, for example, were homeless men wandering between cities in search of transient work opportunities. Tramps traveled between cities, but to avoid work and challenge the cultural archetype of the self-made man valuing employment, home ownership, and family life. Both tramps and hobos were paupers, which simply was a term for a poor person.¹⁶³ Despite these distinctions, the urban poor were often treated as one mass of deviants in political discourse, and “hobos,” “tramps,” and “paupers” were closely linked to criminality. Punishing the poor thus served to both hide the disorder produced by the economic crash and discipline people who willfully defied prevailing social ideals.

Dugdale, Brockway, and their protégés concluded that tramps shared the same

¹⁶¹ Ringenbach, *Tramps and Reformers*, 11, for the 3 million estimate. The total population of the nation was 40 million; Goldstein, *Political Repression*, 27 for the 25% figure.

¹⁶² Richard L. Dugdale, “Hereditary Pauperism,” in *Proceedings of the Conference of Boards of Public Charities, 1877*, 1877, 81; Ringenbach, *Tramps and Reformers*, 19.

¹⁶³ Ringenbach, *Tramps and Reformers*, 4; DePastino, *Citizen Hobo*, 4–7, 91; Kusmer, *Down And Out, On the Road*. These authors demonstrate that while many 'tramps' lived this life by necessity, other intentionally chose the life of tramping to challenge industrial capitalism and the wage labor system.

biological defects as criminals. In 1877, Dugdale argued that the Jukes' criminality could be attributed to the same genetic traits that contributed to their pauperism, including the record of laziness, sexual licentiousness, immorality, and idiocy in the family tree.¹⁶⁴ In 1898, Brockway argued that "the deprivation and dissipations of the improvident class" produced degeneracies that were "transmitted to generation after generation." His rationalization for punishing the poor asserted that the experiences and social environments of poor individuals implanted a tendency towards crime into their biology. Brockway concluded that if provided with money, inmates will "proceed to squander them before exerting themselves for a living." He argued that, "such habitual improvidence, with its attending poverty, must constitute one of the chief causes of the condition of mind we are considering."¹⁶⁵

Other criminal anthropologists argued that tramps were equivalent to incorrigible criminals and necessitated containment. Henry Boies argued that two classes of paupers existed: the physically and mentally impaired or the "incorrigibly idle, dissolute, and criminal," including "beggars, vagrants, and tramps." He argued that this class existed due to poor heredity, should be imprisoned, and either "transformed into honest self-supporters" or kept behind bars "for life." Boies claimed that pauperism was a crime against the state, suggesting that "The attempt to procure an unearned living, the practice, or habit of securing it, is in itself a theft from society" warranting a criminal sentence.¹⁶⁶

G. Frank Lydston went even further, claiming to find common physiological defects

¹⁶⁴ Dugdale, "Hereditary Pauperism," 81–95; Ringenbach, *Tramps and Reformers*, 16–17 on the forum at which Dugdale presented his paper. This conference will be discussed later in the chapter.

¹⁶⁵ Brockway, "Prisoners and Their Reformation," 614.

¹⁶⁶ Boies, *Prisoners and Paupers*, 206-210 for quotes; 289 for marriage restrictions.

among the skulls of tramps and born criminals.¹⁶⁷ Other scholars described tramps as “a distinct social peril” and “constant iniquitous menace[s] to life and property.”¹⁶⁸

Ideas of natural criminality appeared in policy debates about vagrancy. In 1877, the Annual Conference of State Charities focused its deliberations on the tramp crisis. Attendees came from a variety of State Boards of Charities (SBCs). These boards had close relationships with the American Social Science Association (ASSA) and the social scientists and humanitarian reformers that made up the ASSA’s membership.¹⁶⁹ Attendees of the 1877 conference were particularly convinced by Richard Dugdale’s address, in which he presented his *Jukes* research linking poverty, crime, and biology. Most attendees dismissed the notion that men were not working because of a lack of jobs and agreed that the cause of the crisis was that tramps did not want to work.¹⁷⁰

Attendee Francis Wayland III, the Dean of Yale Law School, particularly attacked tramps by claiming that men became tramps due to personal defects in biology. Wayland was arguably the most nationally respected expert on poverty during this period. He argued that 94-99% of tramps were natural criminals and described the tramp as,

a lazy, shiftless, sauntering or swaggering, ill-conditioned, irreclaimable, incorrigible, cowardly, utterly depraved savage...he seems to have wholly lost all the better instincts and attributes of manhood. He will outrage an unprotected female, or rob a defenceless child, or burn an isolated barn, or girdle fruit trees, or wreck a railway train, or set fire to a railway bridge, or murder a cripple, or pilfer an umbrella, with equal indifference, if reasonably sure of equal impunity. Having no moral sense, he knows no gradations in crime.¹⁷¹

¹⁶⁷ Lydston, *The Diseases of Society*, 528, notes the comparatively similar “defective frontal and temporal development” between tramps and petty thieves.

¹⁶⁸ Parsons, *Responsibility for Crime*, 145; see Henderson, *An Introduction*, 278 for similar arguments.

¹⁶⁹ Haskell, *The Emergence of Professional Social Science*, 95–96, 109–14.

¹⁷⁰ Wayland, “A Paper on Tramps,” 16; Conference of Boards of Public Charities, *Proceedings*, 1874, 29; Charles Loring Brace, “Mendicity,” in *Johnson’s New Illustrated Universal Cyclopaedia*, vol. III (New York, 1877), 410; Brace cited in Ringenbach, *Tramps and Reformers*, 17.

¹⁷¹ Wayland, “A Paper on Tramps,” 10, 13, 16.

Wayland's claims reflected broader anxieties common among authors like Lee O. Harris who viewed tramping as a precursor to more serious crimes like rape.¹⁷² This logic drew on themes of evolutionary savagery tied to Lombrosian theory and criminal anthropology. Between the works of Dugdale, Wayland, and the scholar-reformers associated with the conference of Boards of Charities, physiology was linked to poverty and deviant behavior before criminology explored the connection.¹⁷³

Political anxieties over tramps were related to demands that indeterminate sentences should indefinitely contain the naturally criminal. With the rehabilitative ideal taking root, SBCs pushed legislatures into passing indeterminate sentencing laws as both curative and repressive tools designed to reform the savable and contain incorrigibles. For instance, the Ohio SBC secured an indeterminate sentencing statute in 1885. The SBC argued that not only felons, but also petty thieves who had "failed to reform" warranted life incarceration. The board relied on correspondence from Brockway to guide their structuring of the indeterminate system.¹⁷⁴ Indiana followed suit, establishing an indeterminate system in 1897 after the State Board repeatedly cited Elmira as proof that indeterminate sentencing protected society through "reforming the corrigible criminals

¹⁷² Lee O. Harris, *The Man Who Tramps: A Story of To-Day* (Indianapolis: Douglass and Carlon, 1878), 269; The Man Who Tramps; Wayland, "A Paper on Tramps," 11.

¹⁷³ Charles Loring Brace, *The Dangerous Classes of New York, and Twenty Years' Work Among Them* (New York: Wynkoop and Hallenbeck, 1880); Ringenbach, *Tramps and Reformers*, 20–23; Wayland, "A Paper on Tramps," 18; Conference of Boards of Public Charities, *Proceedings*, 1877, xxiii, 106.

¹⁷⁴ Ohio State Board of Charities, *Fifteenth Annual Report of the Board of State Charities* (Columbus: Westbote, 1891), 36–37, 43–44; Ohio State Board of Charities, *Sixteenth Annual Report of the Board of State Charities* (Columbus: Westbote, 1892), 424; Ohio State Board of Charities, *Twenty-Fourth Annual Report of the Board of State Charities* (Columbus: Westbote, 1900), 9.

and indefinitely containing the incorrigible.”¹⁷⁵ In 1891, Illinois similarly passed an indeterminate sentencing act by arguing that it was necessary for containing the “the most dangerous” and “born criminals.”¹⁷⁶ The Pennsylvania Board, on which Henry Boies sat from 1887 to 1901, praised the state’s indeterminate sentencing law for increasing average periods of confinement for its inmates.¹⁷⁷

The politics driving the indeterminate sentence were wrapped up with arguments that laws regulating poverty should look more like indeterminate sentencing, specifically in the sense that they needed longer potential maximums so incorrigibles could be incarcerated for longer. For example, in 1892, the Ohio Board suggested that recidivist misdemeanants were members “of the incorrigible class” and should receive “indefinite sentences” so that society could be “protected by [their] permanent imprisonment.” The Board favored extended sentences for “all misdemeanants of the incorrigible class.”¹⁷⁸ Indiana’s Board made comparable recommendations in 1891 to expand sentences for misdemeanants.¹⁷⁹ In 1896, Pennsylvania’s Board suggested that “better results would

¹⁷⁵ Indiana State Board of Charities, *First Annual Report of the Board of State Charities* (Indianapolis: WM. B. Burford, 1890), 31; Indiana State Board of Charities, *Fourth Annual Report of the Board of State Charities* (Indianapolis: WM. B. Burford, 1894), 33–34; Indiana State Board of Charities, *Fourteenth Annual Report of the Board of State Charities* (Indianapolis: WM. B. Burford, 1904).

¹⁷⁶ Illinois Board of Commissioners of Public Charities, *Eighth Biennial Report of the Board of State Commissioners of Public Charities* (Springfield: HW Rokker, 1885), 168–69; Illinois Board of Commissioners of Public Charities, *Tenth Biennial Report of the Board of State Commissioners of Public Charities* (Springfield: Springfield Printing, 1888), 177.

¹⁷⁷ Pennsylvania Board of Commissioners of Public Charities, *Twentieth Annual Report of the Board of Commissioners of Public Charities* (Harrisburg: Edwin K. Meyers, 1890), 7; Pennsylvania Board of Commissioners of Public Charities, *Twenty-Third Annual Report of the Board of Commissioners of Public Charities* (Harrisburg: Edwin K. Meyers, 1893), 13; Pennsylvania Board of Commissioners of Public Charities, *Thirty-First Annual Report of the Board of Commissioners of Public Charities* (Harrisburg: WM Stanley Ray, 1901), 5.

¹⁷⁸ Ohio State Board of Charities, *Sixteenth Annual Report*, 37–38, 49, 404, at times citing the Board’s 1890 report.

¹⁷⁹ Indiana State Board of Charities, *Second Annual Report of the Board of State Charities* (Indianapolis: WM. B. Burford, 1891), 33, 57.

come from longer periods of detention” for both paupers and serious criminals.¹⁸⁰ At the 1892 National Prison Association Meeting, it was clear that the poor were increasingly being categorized as a criminal type when Francis Wayland insisted on “the indefinite imprisonment of all habitual criminals, paupers, and drunkards.”¹⁸¹ Wayland would go on to defend harsh anti-tramp laws in states like Connecticut in Nevada, since “tramping, such as we have seen it, if not a crime at first, soon becomes one.”¹⁸²

The fear of innate criminality among the urban poor was not limited to intellectual and policy circles. The term “tramp” first appeared in an American newspaper in 1875, when the *New York Times* criticized tramps as willing to “do anything mean or disagreeable to maintain themselves in a condition of idleness.”¹⁸³ In 1877, during the height of the tramp crisis, the *Chicago Daily Tribune* cited New York’s enhanced vagrancy law as a laudable reform meant to “check the extent of pauperism, thereby of course checking the extent of crime.” The article described vagrancy as a “growing evil” that could “endanger society, and result in a frightful increase of crime.”¹⁸⁴ Later that year, a *Tribune* article argued for “putting a little strychnine or arsenic in the meat and other supplies furnished to tramps” to send “a warning to other tramps to keep out of the neighborhood.”¹⁸⁵ In 1894, the *North American Review* wrote that, “The relation of the

¹⁸⁰ Pennsylvania Board of Commissioners of Public Charities, *Twenty-Sixth Annual Report of the Board of Commissioners of Public Charities* (Harrisburg: WM Stanley Ray, 1896), 111.

¹⁸¹ “Perpetual Imprisonment: Suggested at the Prison Congress for Habitual Criminals, Paupers, and Drunkards,” *Washington Post*, December 6, 1892.

¹⁸² Francis Wayland and F.B. Sanborn, “Report on Tramp Laws and Indeterminate Sentence,” in *Seventh Annual Conference of Charities and Corrections* (Boston: A. Williams, 1880), 278.

¹⁸³ “The Question of ‘Tramps,’” *New York Times*, February 6, 1875, 4. Ringenbach claims that this was the first recorded use of the word tramp in an American newspaper, a conclusion validated by my own search.

¹⁸⁴ “Vagrancy Laws,” *Chicago Daily Tribune*, March 8, 1877.

¹⁸⁵ “Protection Against Tramps,” *Chicago Daily Tribune*, July 12, 1877.

vagrant to the criminal class...is of the closest character; it is hard to say where the one begins and the other ends,” and that they deserved to be “severely punished, and by force exterminated.”¹⁸⁶

The political conflation between tramps and incorrigible criminals resulted in policy changes at the state level. Through the final decades of the century, forty states revamped their vagrancy laws into “antitramp” acts.¹⁸⁷ Of those forty, thirty-seven authorized incarceration in penal institutions as a legal punishment for tramping. This marked a shift from the vagrancy laws of the earlier nineteenth century, which were used to lodge the urban poor for short periods before moving them to different neighborhoods.

Naturally, state laws varied. While some treated incarceration as a first option, other states fined tramps before incarcerating them—although fines, which most tramps could not pay, almost invariably led to incarceration. Still others mandated hard labor.¹⁸⁸ The laws broadly embraced expansive definitions of vagrancy, extending the laws’ reach beyond disorderly behavior to simply wandering without work. Some laws also converted certain misdemeanors into felonies if committed by tramps.¹⁸⁹ By the 1890s, many observers went so far as to advocate for a national antitramp act.¹⁹⁰ Statutes also varied in severity; for example, New Jersey sentenced tramps to a maximum of six months, but Massachusetts established a two-year maximum and Rhode Island a three-year maximum

¹⁸⁶ KK Bentwick, “Street Begging as a Fine Art,” *North American Review* 158 (1894): 125–28.

¹⁸⁷ “Vagrancy Laws”; “The Convict Camps of Alabama and the Vagrancy Laws of Michigan,” *Chicago Daily Tribune*, February 8, 1883; “A Stringent Anti-Vagrant Act Passed,” *Los Angeles Times*, February 6, 1891; “The Tramp Problem,” *Chicago Daily Tribune*, May 11, 1894.

¹⁸⁸ Harry Millis, “The Law Affecting Immigrants and Tramps,” *Charities Review* 7 (September 1897): 587–94.

¹⁸⁹ DePastino, *Citizen Hobo*, 22; David Montgomery, *Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market during the Nineteenth Century* (New York: Cambridge University Press, 1993), 86–87.

¹⁹⁰ Seymour D. Thompson, “Notes,” *The American Law Review* 28 (1894): 420–28.

for tramping.¹⁹¹ States also got creative in targeting tramps. New Hampshire and Pennsylvania paid the public for information on the whereabouts of tramps while Connecticut and Nevada gave police and prosecutors bonuses for catching tramps.¹⁹²

The expansion of vagrancy laws into antitramp acts entailed sharp changes in urban policing. Crackdowns on the poor became increasingly common, especially given that tramps were commonly blamed as instigators of working class unrest in cities.¹⁹³ The rate of growth of urban police departments far outpaced the growth of city populations from 1882 to 1909, with some city departments in the Northeast and Midwest growing at rates doubling population growth. Victimless social disorder offenses topped the lists for causes of arrest.¹⁹⁴ Increased crime rates at the time were thus not simply functions of urban growth, but a reflection of a decreased tolerance for social disorder and poverty.¹⁹⁵

The Dangerous Classes: Punishing Immigrants

An 1897 survey of antitramp acts found they were generally more severe in the Northeast.¹⁹⁶ That vagrancy laws were harsher in the industrial core, especially as they were transformed into punitive anti-tramp acts, makes sense given that tramps tended to

¹⁹¹ Benjamin H. Bristow, "Statement Before the American Bar Association," in *Annual Report: Including Proceedings of the Annual Meeting*, vol. 3 (Philadelphia: EC Markley and Son, 1880), 100–102; New Jersey State Legislature, "An Act to Define and Suppress Tramps," Chapter CXXCI, General Public Laws, 218–220 § (n.d.); The Public Statutes of the Commonwealth of Massachusetts, enacted Nov. 19, 1880, to take effect Feb. 1, 1882 (Boston, 1883), chap. 207, 1169–1170, cited in Alexander Keyssar, *Out of Work: The First Century of Unemployment in Massachusetts* (New York: Cambridge University Press, 1986), 135–37.

¹⁹² Millis, "The Law Affecting Immigrants and Tramps."

¹⁹³ Sidney Harring, *Policing a Class Society: The Experience of American Cities, 1865–1915* (New Brunswick: Rutgers University Press, 1983).

¹⁹⁴ Montgomery, *Citizen Worker*, 70; Harring, *Policing a Class Society*, 44–75, esp. 35; Eric H. Monkonen, "Cop History to Social History: The Significance of the Police in American History," *Journal of Social History* 15 (1982): 578–85; Mitrani, *The Rise of the Chicago Police Department*, 136.

¹⁹⁵ Lane, "Urban Police"; Roger Lane, *Policing the City: Boston, 1822–1885* (Cambridge: Harvard University Press, 1967).

¹⁹⁶ Millis, "The Law Affecting Immigrants and Tramps."

be white industrial workers. But this ran counter to the false but prevailing image of tramps as predominantly being indolent immigrants. Given the xenophobic and nativist overtones in the work of Sumner, Strong, and others, it makes sense that vagrancy laws would be the harshest in Northeastern areas with high immigrant populations.

Khalil Gibran Muhammad's rich analysis of the Progressive Era illustrates important differences in how freed slaves and European immigrants were punished at the turn of the century and how they were pathologized as inherently criminal in race science research.¹⁹⁷ As an intellectual discipline, race science purported to have discovered scores of races globally in the late nineteenth century.¹⁹⁸ Included in these categorization schemes were immigrant groups coming to America at high rates. Claiming that the influx of European immigrants into the U.S. "seems to have something to do with the volume of crime in our own country," Brockway argued that immigrants should be subjected to eugenic restrictions. He thought that such eugenic policies would contain the spread of their "dangerous tendencies" into American gene pools, highlighting Brockway's conflation of immigrant status with criminality.¹⁹⁹

Scholars of immigration commonly connected immigrant groups to criminality and, more frequently, political violence. In 1880, Charles Loring Brace condemned immigrants as "the dangerous classes" fueled by "the same explosive social elements" as supporters of the Paris Commune.²⁰⁰ In *Social Problems* (1883), Henry George claimed that urban immigrants were "barbarians who may be to the new what Hun and Vandal

¹⁹⁷ Muhammad, *The Condemnation of Blackness*.

¹⁹⁸ Adolph Reed, "Revolution as 'National Liberation' and the Origins of Neoliberal Antiracism," *The Socialist Register* 53 (2017): 299–322.

¹⁹⁹ Brockway, "The Ideal," 42–43.

²⁰⁰ Brace, *The Dangerous Classes*, 25–73, quotes on 27, 29.

were to the old.”²⁰¹ Henry Cabot Lodge wrote in 1891 that lax immigration laws let in “low-class labor from the far East” that contributed to the criminal classes.²⁰² These authors exemplified the chorus of opinion linking immigrants to crime.²⁰³ Newspapers called immigrants “scum and offal,” “venomous reptiles,” “reckless foreign wretches,” and “human and inhuman rubbish.”²⁰⁴ Arguing that races were not “equally endowed,” Daniel G. Britton told the American Association for the Advancement of Science in 1895 that “the black, the brown, and red races” each had a “peculiar mental temperament which has become hereditary” and rendered them “recreant to the codes of civilization, and therefore technically criminal.”²⁰⁵

Exclusionary immigration policy was presented as necessary to prevent letting criminal classes flood through the nation’s borders. Policymakers in favor of restrictive immigration policy often spoke in terms that stigmatized new immigrants as criminal threats. For example, while newly freed slaves were the most frequent targets of lynch mobs, immigrants were also subjected to this form of vigilante justice. Recounting the lynching of eleven Italian men in New Orleans in 1891, House Representative Henry Cabot Lodge (R-MA) denounced the mob’s activity as “deplorable,” but stated that the more problematic underlying cause of these events was the “utter failure of any laws or regulations which we now have to exclude members of the criminal classes.”²⁰⁶ Theodore

²⁰¹ Henry George, *Social Problems* (Garden City: Country Life Press, 1883), 6.

²⁰² Henry Cabot Lodge, “Lynch Law and Unrestricted Immigration,” *The North American Review* 152, no. 414 (May 1891): 607.

²⁰³ Fraser, *The Age of Acquiescence*, 110–13.

²⁰⁴ Quoted in John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New Brunswick: Rutgers University Press, 1955), 55.

²⁰⁵ Daniel Brinton, “The Aims of Anthropology,” *Science* 2 (1895): 241–52; discussed in Smith, *Civic Ideals*, 356.

²⁰⁶ Cabot Lodge, “Lynch Law and Unrestricted Immigration,” 604, 609.

Roosevelt, serving on the U.S. Civil Service Commission at the time, referred to the lynching as “a rather good thing.”²⁰⁷ Vigilante killings of immigrants were not blamed on the instigators of the violence, but rather on the state for allowing criminals into the country in the first place. As will be shown later, lawmakers excused the harsh justice the state doled out to organized labor by defending the misperception that hostile and violent immigrants and an army of tramps were the ones driving labor unrest.

Given the links drawn between poverty and immigration by Sumner, Strong and others, it is unsurprising to see the era’s crime scholars link crime to immigrants. That tramps were widely feared to consist disproportionately of immigrant groups helped to legitimate their punishment. However, vagrancy laws were not only important in Northern states. Enhanced vagrancy laws were connected to efforts to punish groups other than homeless white men. In particular, vagrancy laws were important in the South, but served a different purpose—preserving the racial caste system.

Punishing Blackness: The Unique Purposes of Southern Vagrancy Laws

The 1897 analysis of vagrancy laws which found that they were particularly punitive in the Northeast and Midwest ignored how southern vagrancy laws were specifically designed to bridge the South’s transition out of a slave-based economy. In the South, convict-lease systems relied on vagrancy statutes and were justified by the idea that black offenders were innately criminal. The convict-lease system was in large part justified by economic factors, as it gave planters cheap labor while the southern economy adjusted to abolition. But deterministic conceptions of crime complemented preexisting

²⁰⁷ Richard Gambino, *Blood of My Blood: The Dilemma of the Italian-Americans* (New York: Anchor Books, 1975) op. cit., p. 118. .

ideas about black deviance and violence. Vagrancy laws became crucial to Black Codes built to control recently freed blacks, and ideas about innate racial dispositions helped justify the construction of a unique system of punishment for southern blacks.²⁰⁸

As David Oshinsky has demonstrated, vagrancy laws were fundamental to turn of the century southern criminal justice. But unlike their northern counterparts, southern vagrancy laws were more likely to authorize fines as a punishment for vagrancy. Free blacks over 18 were required to provide proof of employment in order to avoid a vagrancy charge, and if they could not provide proof nor pay the fine, local police would sell their labor to whatever planter paid the fine. Police would often perform sweeps of local vagrants when local companies were in need of cheap labor. The use of vagrancy laws to stock the convict-labor pool solved multiple problems for southern Democrats—it provided industry cheap labor, served as a system of racial control, and appeased white resistance to funding penitentiaries.

Political resistance to incarcerating blacks was justified by race science and biological literature concluding that blacks were incorrigible and could not contribute to society unless compelled. For example, Henry Boies's *Prisoners and Paupers* included a chapter studying "The Negro Element of Increase," in which he stated that, "The inbred habits of life, confirmed by generations of slavery, when all were the property of a master...have tended to utterly obliterate all consciousness of *meum* and *tuum*." Latin for "mine and yours," Boies suggested that blacks lack a biological capacity to distinguish

²⁰⁸ Matthew Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* (Columbia: University of South Carolina Press, 1996); Alex Lichtenstein, *Twice The Work of Free Labor: The Political Economy of Convict Labor in the New South* (New York: Verso, 1996); Oshinsky, *Worse Than Slavery*, 21. Oshinsky specifically mentions MS, SC, GA, FL, AL, LA, and TX.

private property, so they were likely to be thieves. Boies states that blacks were “compelled often to steal or starve” due to a lack of “conscientious scruples to deter them.”²⁰⁹ While Boies condemned southern states for neglecting to reform black inmates, his language provided a basis for condemning blacks as naturally prone to crime. Charles Henderson contradicted himself in a similar fashion, suggesting that, “The negro in a northern city is urged downward towards pauperism, and especially toward crime, not alone by his racial defects, but also by...social prejudices.” But he also claimed that in regards to the high levels of crime and poverty among blacks, “The primary factor is racial inheritance, physical and mental inferiority, barbarian and slave ancestry culture.”²¹⁰

Muhammad’s historical analysis provides an in-depth account of the link between race science, prejudices about black criminality, and punishment during this period. He discusses the nature and prevalence of ideas about innate black criminality in intellectual circles, demonstrating how these ideas influenced policymakers in the South and North. Muhammad directs attention onto the work of Frederick L. Hoffman, and particularly his book *Race Traits* (1896).²¹¹ Relying on 1890 census data, Hoffman showed that the proportion of black crime was higher than the proportion of blacks in the population. He used this data to conclude that blacks had a “decided tendency towards crime.” Claiming that social interventions in black communities had no reformatory effects, Hoffman

²⁰⁹ Boies, *Prisoners and Paupers*, 69.

²¹⁰ Henderson, *An Introduction*, 29, 247.

²¹¹ Muhammad, *The Condemnation of Blackness*, chapter 2 provides a more thorough summary of the role of Hoffman than will be given here; also see Garland, *Peculiar Institution*.

alleged that blacks were criminal by nature.²¹² Alluding to racial stereotypes, Hoffman described rape by black men as marked “by a diabolical persistence and malignant atrocity of detail that have no reflection in the whole extent of the natural history of the most bestial and ferocious animals.” This analysis drew on common notions, often “verified” in race science research, that black men had biological proclivities to rape white women.²¹³ Hoffman’s work seamlessly blended white supremacist discourse, race science, and Lombrosian theory in ways that reinforced fears that sexual aggression was a biologically engrained trait in black men. Hoffman went so far as to defend lynching as “the effect of a cause, the removal of which lies in the power of the colored race.”²¹⁴

Lynching was a crucial form of crime control from the Reconstruction era through the mid-20th century. As David Garland (2010) has shown, lynching was a form of de facto capital punishment as local, state, and federal officials acquiesced to the practice, especially in cases where black men were accused of raping white women. Garland concludes that the “specter” of lynching shapes the dynamics of capital punishment to this day.²¹⁵ Given its influence on the development of the criminal justice system, ignoring lynching because it was not a state-sanctioned practice would downplay how blacks and immigrants were stigmatized as incorrigible criminals and punished as a result. In conjunction with convict-leasing, lynching was in part a response to stereotypes about the predispositions of black men.

²¹² Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro* (New York: MacMillan, 1896), 217–25, 236.

²¹³ Hoffman, 231; James W. Messerschmidt, “‘We Must Protect Our Southern Women’: On Whiteness, Masculinities, and Lynching,” in *Race, Gender, and Punishment: From Colonialism to the War on Terror*, ed. Mary Bosworth and Jeanne Flavin (New Brunswick: Rutgers University Press, 2007), 77–94.

²¹⁴ Hoffman, *Race Traits*, 234.

²¹⁵ Garland, *Peculiar Institution*.

This rationality spread into the work of race scientists purporting to prove that blacks were an inherently inferior race. As southern penologist Dr. Albert Henley informed the National Prison Association in 1891, “We have difficulties at the south which you at the north have not...We have a large alien population, an inferior race...The Negro’s moral sense is lower than that of the white man.” Henley rationalized the convict-lease system on the grounds that blacks would only work if they were compelled and that southern penologists “do not yet know” of any way to meaningfully reform black criminality.”²¹⁶

The idea that black criminals were incapable of reform had broad appeal. Taxpayers in the South often refused to waste money on “incorrigible” young blacks by building reformatories. In *“Worse than Slavery”* (1996), David Oshinsky recounts the efforts one Mississippi state legislator who pushed to protect juveniles from the convict-lease system at the turn of the century by constructing a state reformatory specifically for juveniles. However, the proposal faced significant pushback in the state legislature and was rejected by legislators who suggested that “it was no use trying to reform a negro,” leaving the convict-lease system intact as a means of controlling black youths.²¹⁷

The memoirs of J.C. Powell, a convict labor camp captain, also provide insight into the link between ideas of innate criminality and the convict-lease system. Powell explicitly connected notions of black criminal incorrigibility to poor labor potential. Powell wrote, “We have little material for skilled labor among the criminals of the South. The bulk of our convicts are negroes who could not by any possibility learn a trade, and

²¹⁶ “Remarks of Mr. Henley of Alabama, and P.D. Sims, Chairman of the Board of Prisons, Tennessee,” 1891, 120–21; see Oshinsky, *Worse Than Slavery*, 83–84.

²¹⁷ Oshinsky, *Worse Than Slavery*, 21–47; 30 and 47 especially.

how to employ them at anything save the simplest manual toil is a problem not yet solved.” Powell argued that black criminals must, and should, be forced to work. They were only capable of low-skill labor, and as a result could never learn a useful trade or meaningfully contribute to society on their own volition. Since they could not be transformed into independent workers, the convict-lease system was designed for irredeemable black criminals who needed compulsion to work.²¹⁸

Historical accounts from Oshinsky and Muhammad provide insightful analyses of the ways in which racialized ideas about criminality contributed to the criminalization of blackness. But their works do not recognize how the repression of blacks was, in some ways, related to the forces legitimating state violence against immigrants and poor whites. Convict-leasing and lynching were driven by ascriptive hierarchical racial ideologies that were irrelevant to the punishment of tramps or labor, but southern Democrats and penologists were also able to justify convict-leasing through the deterministic ideologies that facilitated the repression of poor whites, organized labor, and immigrants. These race-based historical accounts miss how racialized punishments were partially justified by the same ideational forces driving additional developments in criminal justice. In some ways, convict leasing and lynching were expressions of the broader deterministic mindset of the late nineteenth century American crime politics.

Punishing Labor: Equating Organized Labor with Criminality

Equated with criminals, immigrants, and tramps, organized labor was not immune to the violent hand of the criminal law. More than any other group, immigrants were

²¹⁸ J. C. Powell, *The American Siberia: Or, Fourteen Years' Experience in a Southern Convict Camp* (Philadelphia: H. J. Smith & Company, 1891), 5.

widely presumed to be a driver of labor aggression at the century's end. The United States Industrial Commission, appointed by President William McKinley in 1898 to investigate capital-labor relations, ended up dedicating a large portion of its nineteen volumes to studying high rates of criminality among paupers and immigrants.²¹⁹

This complemented the rhetoric of conservatives, who depicted tramps as the instigators of labor agitation. Blending ideas about criminality with xenophobic attitudes was a useful strategy to those seeking to quell labor activism. By associating labor organizations with radical immigrants and a “tramp army,” conservatives delegitimized organized labor by connecting it to ideologies of criminality. Anxieties that an insurrectionary labor force could decimate the social order facilitated state repression of labor organization in ways that targeted the urban poor and immigrants.²²⁰

Brockway himself noted that “the labor question...bears directly upon crime” given that his own research concluded that 82% of prisoners were laborers. He contended that many laborers had potential to reform, but his arguments created opportunities to connect labor unrest to criminality.²²¹ Other scholars connecting criminality to labor protest had a more pejorative perspective. In 1893, Henry Boies argued that American cities were welcoming “criminals, anarchists, and ferocious beasts of prey.”²²² G. Frank Lydston employed an unusual argument in *The Diseases of Society*, claiming that

²¹⁹ U.S. Industrial Commission, *Review of the Report of the Commission on Immigration*, vol. 15 (Washington: Government Printing Office, 1901), xxi–xxii, xliv, xlvii; U.S. Industrial Commission, *Reports of the Industrial Commission on Immigration, Including Testimony, with Review and Digest, and Special Reports, and on Education, Including Testimony, with Review and Digest*, vol. XV (Washington: Government Printing Office, 1901), lxi–lxx, xlvii, 27, 50–51, 285–92.

²²⁰ DePastino, *Citizen Hobo* chapter 1, especially pp. 16-17; Harris, *The Man Who Tramps: A Story of To-Day*, 21.

²²¹ Brockway, “Crime,” 40, 43, 60–61.

²²² Boies, *Prisoners and Paupers*, 239.

paleontological discoveries of mammoth and mastodon fossils found that they traveled in close packs, suggesting that “among the lower animals true communism is found.”²²³ Lydston, like many others during his day, connected the criminal behavior of strikers to “foreign-born anarchy” and argued that the pursuit of equality by labor was a result of “the ill-advised and incoherent efforts of diseased and undisciplined minds.”²²⁴ The large immigrant membership of pro-labor organizations like the International Working People’s Association seemingly validated these concerns.²²⁵

As a result, when the United States experienced its first nationwide strike in the 1870s, the middle-class and propertied elements panicked. The strike began with workers on the Baltimore and Ohio Railroad in Martinsburg, West Virginia in July 1877, but outrage over wage cuts and poor working conditions ignited a national response, prompting thousands to join the cause. St. Louis, Pittsburgh, and Chicago were shut down, and federal troops were sent to seven states and state militias into many more. By the strike’s end in August, over one hundred people were dead and thousands injured.²²⁶

Several states responded to the experience of 1877 by expanding criminal conspiracy doctrines making it easier to obtain injunctions against labor and repress the coordination of dissent before action was taken. Courts commonly ruled that injunctions against labor could be sought if it was shown that a strike could damage the “probable expectancies” of business. This allowed strikers to be arrested preemptively and

²²³ Lydston, *The Diseases of Society*, 53.

²²⁴ Lydston, 233–40, 286.

²²⁵ Joseph Rayback, *A History of American Labor* (New York: Free Press, 1959), 168.

²²⁶ Goldstein, *Political Repression*, 31; Philip S. Foner, *The Great Labor Uprising of 1877* (New York: Monad Press, 1977).

summarily tried before a judge for contempt.²²⁷

That tramps were relatively absent from the 1877 strike did not prevent them from being politicized as the villains of the events.²²⁸ Lee O. Harris attributed the strike in Pittsburgh to tramps and Francis Wayland claimed that the series of riots was caused by a “standing army of professional tramps.”²²⁹ Wayland declared that tramps were “at war with society.”²³⁰ Newspapers described tramps as the proletariat’s “lowest layer,” claiming that they were willing to “gladly participate in any mob action” while wearing “badges of red.”²³¹ Other observers—including Allan Pinkerton, who would later found the Pinkerton Detective Agency that became crucial in business’s efforts to control labor—argued that the unrest was due to communists.²³² The 1877 strike was thus perceived as caused by a combination of communists, labor organizations, and tramps, especially since so many strikers were arrested on broad vagrancy charges.²³³

According to this narrative, an army of immigrants, tramps, and labor organizations threatened social and political stability. While this idea was widely accepted, an alliance between these groups was unlikely in reality. The inflow of immigrants undercut the wage labor market and caused labor organizations to advocate

²²⁷ Goldstein, *Political Repression*, 16–18.

²²⁸ DePastino, *Citizen Hobo*, 24–25.

²²⁹ Harris, *The Man Who Tramps: A Story of To-Day*, 43, 267–71; Wayland, “A Paper on Tramps,” 15.

²³⁰ Wayland, “A Paper on Tramps,” 10.

²³¹ “Once More the Tramp,” *Scribner’s Monthly* 15 (April 1878): 883; W.H. Brewer, “What Shall We Do With Our Tramps,” *New Englander* 37 (July 1878): 532; “From Another Point of View,” *Rural New Yorker* 37 (July 13, 1878): 444; all cited and discussed in Ringenbach, *Tramps and Reformers*, 13.

²³² Ringenbach, *Tramps and Reformers*, 12–13; Robert Bruce, *1877: Year of Violence* (Indianapolis: Bobbs-Merrill, 1959), 226–27; Allan Pinkerton, *Strikers, Communists, Tramps, and Detectives* (New York: G.W. Carleton, 1878), 67.

²³³ Goldstein, *Political Repression*, 14–15.

for restrictions on immigration.²³⁴ The culture of tramping was steeped in Anglo-Saxon masculinity, so while some immigrants and blacks were homeless, tramping was a racially exclusionary counterculture.²³⁵ Even poor whites embraced race science to protect the hegemony of native-born white men.²³⁶ And while labor initially defended tramps as victims of circumstance, they reversed their position as governments blamed labor unrest on tramps by calling for antitramp laws to differentiate between honest unemployed workers and criminal tramps.²³⁷

Linking labor unrest to populations associated with innate criminality opened the door to revisions in the criminal law. States pursued several reforms after 1877 enhancing their ability to punish labor. State militias were expanded through private subsidies from business.²³⁸ Corporations hired private police to fight labor, which facilitated abuses of workers' rights. The deputization of private police during strike suppressions and the business-led expansion of state militias underscored a remarkable convergence between business, the state, and the criminal justice system.²³⁹ Facilitated by anti-statist sentiment, the emergence of private police to respond to labor aligned the police with corporate interests. And in unintended ways, Populists like William Jennings Bryan inadvertently helped to expand carceral institutions by objecting to private policing in favor of public

²³⁴ Bensel, *The Political Economy of American Industrialization*, 116, 143–52.

²³⁵ DePastino, *Citizen Hobo*.

²³⁶ Smith, *Civic Ideals*, 409.

²³⁷ See DePastino, *Citizen Hobo*, 32–35.

²³⁸ Goldstein, *Political Repression*, 13–14, 32; Rayback, *A History of American Labor*, 240–43.

²³⁹ Goldstein, *Political Repression*, 11–16; See Harold Aurand, *From the Molly Maguires to the United Mine Workers* (Philadelphia: Temple University Press, 1971) for a good example of the convergence of business and state interests. The Molly Maguire investigation, in which strikers on the Philadelphia and Reading Railroad were prosecuted for violence against mine owners, relied entirely on private detectives, private police, and private prosecuting attorneys hired by the corporation to punish the corporation, leading to six executions and twenty convictions with almost no state involvement.

policing.²⁴⁰

When labor was accused of violence in capital-labor conflicts, it justified severe criminal justice interventions. A good case in point is the 1886 Haymarket affair. What started as a peaceful rally in support of an eight-hour day ended in violence after an unknown person threw a bomb at the police seeking to end the rally. The incident validated perceived connections between the natural violence of immigrants and labor, even though the identity of the bomber was unknown. In the wake of Haymarket, businesses subsidized police crackdowns on known anarchists. Chicago police continued to carry on unnecessary raids for years after the threat subsided in order to maintain the funding arrangement.²⁴¹

The depression of 1893, which increased the population of unemployed men, coincided with an increase in strike activity, and again it was widely feared that tramps were responsible. At the peak of the crisis in 1894, seventeen groups of unemployed men totaling 10,000 people marched towards Washington to demand unemployment relief. This physical manifestation of a “tramp army” validated popular links between tramping, workers’ rights, and violence. Marchers were frequently arrested on vagrancy charges, including Jacob Coxey, the leader of “Coxey’s Army,” the biggest group marching. The arrest of Coxey and others broke the movement, calming alarmed conservatives.²⁴²

The 1894 Pullman strike was a particularly crucial moment in American labor history. Due to wage cuts in 1893 and 1894, labor discontent within the Pullman Car

²⁴⁰ Gottschalk, *The Prison and the Gallows*, 102.

²⁴¹ Goldstein, *Political Repression*, 34–40, 42; Smith, *Civic Ideals*, 363; Fred Shannon, *The Centennial Years* (Garden City: Doubleday, 1969), 236.

²⁴² Goldstein, *Political Repression*, 50–53; Arnold Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1877-1900* (Ithaca: Cornell University Press, 1960), 129.

Company in Illinois prompted 3,000 employees to strike in June of 1894. Under the leadership of Eugene Debs, the American Railway Union (ARU) carried out sympathy strikes in 27 state and territories involving over 250,000 strikers. With public anxieties piqued over Coxe's Army, the public landed on the side of railroad management.²⁴³ With the support of Attorney General Richard Olney, a former corporate attorney with ties to railroads, the railroads' General Managers Association (GMA) secured injunctions hampering the ARU's efforts. Federal troops and marshals were dispatched nationally to aid state and local authorities. In total, 190 strikers were indicted and 515 arrested. Under the Sherman Act, the Supreme Court upheld Debs' six-month sentence and the three-month sentences given to several of his associates for violating the injunctions.²⁴⁴

The Pullman strike was a crucial conflict not only in that it criminalized labor violence while private violence carried out by corporations went unaddressed; the state's victory also put to bed larger debates about the economic order. Labor's demands for workers' rights ran counter to conservatives' defense of the economic status quo and law-and-order responses to labor uprisings. But the ARU was decimated after the Pullman loss, prompting other labor organizations like the American Federation of Labor (AFL) to swing rightwards to avoid the same fate. Victoria Hattam has shown that the AFL's retreat from leftist politics to business unionism was a response to a conservative judiciary that repeatedly overturned the labor movement's victories in court, one which ultimately precluded an embrace of political commitments that could have formed the

²⁴³ Goldstein, *Political Repression*, 47–57; Paul, *Conservative Crisis*, 109–46.

²⁴⁴ Goldstein, *Political Repression*, 53–57; Paul, *Conservative Crisis*, 113–46.

basis for a broader working class movement.²⁴⁵ Other scholars concur that under Gompers' leadership, the AFL pursued change within the system rather than challenging it as a survivalist response.²⁴⁶ The pattern of growing labor militancy, repression, and a rightwards swing would be repeated in the future.²⁴⁷ The AFL's choices at this time stunted the development of the labor movement, and it is key to recognize that this choice was partially driven by criminal crackdowns on labor in the nineteenth century.

Links between organized labor and criminality gave the state the validation to punish labor and prevent the emergence of a strong leftist politics. The way crime politics framed capital-labor conflicts in the Gilded Age helped settle broader debates between labor and capital on the terms of political conservatives. The delegitimization of organized labor as innately criminal quieted the strongest opponents of corporate power and undermined the best means workers had for challenging corporate power and abuse.

IV. Conclusion

Naturalized constructs of criminality were not just functionalist tools in late nineteenth century politics. They did not emerge only as a mechanism for solving social problems involving poverty, race, and labor on the terms of the white upper middle class. These ideas emerged within a larger ideological context amenable to race science and bio-determinism. Within this ideational milieu, an embrace of Darwinism and bio-determinism spanned political ideology. Ideas about "born criminality" and

²⁴⁵ Hattam, *Labor Visions*.

²⁴⁶ Jefferson Cowie, *The Great Exception: The New Deal and the Limits of American Politics* (Princeton: Princeton University Press, 2017), 56–61; Martin Shefter, "Trade Unions and Political Machines: The Organization and Disorganization of the American Working Class in the Late Nineteenth Century," in *Working Class Formation: Nineteenth-Century Patterns in Western Europe and the United States*, ed. Ira Katznelson and Aristide R. Zolberg (Princeton: Princeton University Press, 1986), 197–276 especially p. 230.

²⁴⁷ Goldstein, *Political Repression*, 42–43, 56–60.

“incorrigibility” were outgrowths of general ideational and ideological currents that had broad political appeal.

The rehabilitative ideology articulated by late nineteenth century scholars and reformers has exhibited remarkable resilience over time. Rehabilitative ideology has waxed and waned in influence, but never fully disappeared from American crime politics. Parole, probation, and the indeterminate sentence have become durable features of American criminal justice. And the notion that crime is best solved through individual-level micro-interventions—whether that means reformatory or punitive interventions—has conditioned how American scholars, activists, and policymakers conceptualize criminality. Criminal anthropologists and rehabilitative scholars fundamentally restructured constructions of criminality in American politics by fostering a focus on “criminals” rather than “crimes” and on people who fit the image of the likely criminal so they can be preemptively detained before committing more serious crimes. By conceptualizing criminality as a function of individual faults and traits, rehabilitative frameworks naturalized criminality while hardening class and racial distinctions.

Rehabilitative ideology and the biological constructions of criminality that informed it had wide-ranging effects. During the Gilded Age, anti-poor, anti-black, and-immigrant, and anti-worker sentiment spawned out of a shared well of ideas and ideologies related to rehabilitation and bio-determinism. Treating the punishment of these groups in distinctive silos would overlook important dynamics of American politics that justified punishment of them all. This sheds new light on the nature of American crime politics and the complex ways in which racism, classism, and nativism are interrelated.

This reveals important political developments that give us insight into the rise of

mass incarceration. The urban poor, blacks, immigrants, and organized labor were all punished through the indeterminate sentence and vagrancy laws. The indeterminate sentence has been a mainstay of American criminal justice since its creation, but today is often believed to be a benevolent alternative to the determinate sentence. This neglects its punitive origins and effects. And though vagrancy laws were struck down as unconstitutional in the 1960s, many scholars have argued that contemporary ordinances regulating conduct common among the homeless and urban poor are merely versions of vagrancy laws dressed in modernized language.²⁴⁸ Understanding the development of vagrancy laws provides insight into the development of their contemporary counterparts.

The story of Gilded Age crime politics illustrates an underappreciated dynamic in American political development—the mutual constitution of class and criminality. Poverty, socioeconomic disadvantage, and criminality were all theorized as outcomes of a common set of personal traits among Gilded Age crime scholars, practitioners, and policymakers. By focusing on the atomized individual, criminal anthropology and rehabilitative ideology naturalized crime in a way that embedded constructions of criminality into class relations. Class hierarchy and criminal behavior became linked as associated phenomena and outgrowths of the same individual faults. Being of a certain social or economic class became more important than what you actually did in determining if you should be punished, and behaviors common among certain classes of people were criminalized to preemptively detain individuals deemed prone to crime. By naturalizing class difference and criminality, Gilded Age politics charted a developmental

²⁴⁸ Beckett and Herbert, *Banished*; Beckett and Herbert, Steve, “Penal Boundaries”; Goluboff, *Vagrancy Nation*.

trajectory in which class and criminality have defined and been defined by each other.

Bio-determinism and Darwinism were essential facets of Gilded Age American political thought, but they did more than shape repressive criminal justice policies. Darwinist ideologies were also deployed by business leaders as defenses of laissez-faire economics. Corporate actors involved in debates over the regulatory state's design drew on laissez-faire defenses of market competition and prevailing notions of criminality to depict business leaders as inversions of the born criminal—good men driven by healthy capitalist self-interest. By drawing on prevailing discourses in this way, politically savvy railroad executives and industry leaders defused the potential for an explosive politics founded on the idea that the “robber barons” deserved harsh punishment.

CHAPTER 3: PRIVILEGING CORPORATE CRIMINALS: CRIME POLITICS AND THE BIRTH OF THE REGULATORY STATE

“The millionaires are a product of natural selection... They may fairly be regarded as the naturally selected agents of society for certain work.”
- William Graham Sumner, 1882²⁴⁹

Criminal anthropology and rehabilitative ideology justified punitive policies for racial minorities, the urban poor, and organized labor in the late nineteenth century. These developments mostly unfolded at the state and local level. On first glance, the prevalence of this discourse was less evident on the national stage where there was no national brand of crime politics to invoke the crime-as-pathology discourse. But this interpretation rests on a narrow definition of crime politics by only considering the politics of street crime. The politics of economic regulation during the Gilded Age was, in many ways, a brand of crime politics, and prevailing ideas and ideologies about crime featured prominently in regulatory debates.

Widely condemned as ruthless and exploitative “robber barons,” the leaders of America’s rapidly growing industrial sectors were commonly disparaged as criminals in the public eye. As Populists mobilized in response to the conditions of industrial capitalism and the abuses of a growing plutocratic class, an angry public embraced the rhetoric of corporate criminality. Executives’ actions were deemed harmful and dangerous, so it was argued that they should be punished. This rhetoric leads historians like Steve Fraser to argue that popular resistance to economic elites successfully limited the economic inequalities produced by the Gilded Age industrial order.²⁵⁰

²⁴⁹ Sumner, *The Challenge of Facts*, 90.

²⁵⁰ Fraser, *The Age of Acquiescence*.

Fraser's emphasis on this public outcry ignores how and why it failed to produce meaningful policy change. Populists expressed outrage at the robber barons and were quick to equate their behavior with criminality, so the origins of the regulatory state cannot be separated from the politics of criminal justice. However, research emphasizing populist rhetoric and literatures on the development of U.S. regulatory frameworks miss how crime has been politicized in regulatory debates.

The "robber barons" were not a homogenous bloc, but a diverse group of corporate leaders with different policy preferences who made different strategic choices. Fraser is not wrong in suggesting that those who embraced a strict laissez-faire philosophy lost in debates over regulation, but not all shared this position. Perceptive industry leaders, cognizant of the political climate, fought for rather than against regulatory reform by articulating a regulatory ideology that framed their arguments within prevailing modes of American political thought, including dominant discourses about criminality. Their endorsement of a regulatory commission was voiced in opposition to demands for straightforward criminalization of market activity. A commission was presented as an appropriate alternative for ethical business leaders who would be responsive to light sanctions and administrative guidance, minimizing the need to codify severe criminal sanctions. Only by framing their goals within prevailing discourses were these business leaders able to reach a favorable compromise in the creation of the Interstate Commerce Commission.

Fraser's narrative thus simplifies the political development of the regulatory state. It is true that many conservatives and corporations exhibited a dogmatic adherence to laissez-faire, but other sectors of business endorsed regulatory reform. These corporate

interests, particularly railroads, combined the rhetoric of laissez-faire adherents who naturalized markets through Social Darwinist language with prevailing rhetoric about crime in which criminality was explained through similar Darwinist principles. This promoted a unique regulatory ideology in which corporate executives were depicted in contrast to dominant understandings of criminality. Railroad leaders used these ideas to advocate for regulatory reform in ways that minimized state intervention into markets.

In their endorsement of regulatory ideology, argued that rapacious businessmen should be viewed as natural capitalists rather than natural criminals. The natural capitalist became an inversion of the born criminal, one whose competitive and creative nature led him to succeed in the market. Railroads were thus able to alter the nature of regulatory debates. Instead of focusing on whether businessmen committed criminal acts, debates were focused on whether businessmen were criminal types. Legislative deliberations became centered on determining whether the average businessman's behavioral history, character, socioeconomic background, or personal traits demonstrated a criminal propensity.

Debates about the Interstate Commerce Act became less about whether executives did bad things and more about whether they were bad people. Situating the debate within the framework of regulatory ideology made for a stark contrast between railroad officers—reputable men with no criminal record—and prevailing ideas natural criminality. Corporate actions that could reasonably be compared to theft took on unique, non-criminogenic meanings because they were committed by people who did not fit prevailing constructions of criminality. Instead, corporate crimes were viewed as rational

responses to market dynamics and healthy displays of capitalist self-interest, not manifestations of criminal dispositions warranting rehabilitation or incarceration.

Again, regulatory ideology does not rule out prosecution as an option. Rather, it promotes a degree regulatory discretion that allows regulators to respond to criminal behavior through non-criminal sanctions, permitting corporate actors to evade the label of criminality even after they commit criminal acts. Regulatory ideology thus treats corporate crimes as “less criminal” than street crimes, and it does so by virtue of the traits of the perpetrators. The regulatory approach to corporate crime is consequently more attentive to correcting market conditions rather than the people running businesses.

The emphasis on punishing the criminal, not the crime, turned debates over the Interstate Commerce Act’s criminal provisions into a moral and political choice as to whether corporate executives were judged to be “bad people,” regardless of the nature or consequences of their actions. The prevailing interpretive understanding of corporate criminality that emerged from these debates was a logical reciprocal to prevailing ideas of natural born criminality. This helped to produce institutional arrangements that channeled corporate criminals, who lacked criminal dispositions, away from the criminal justice system and into regulatory venues like the Interstate Commerce Commission.

Siphoning corporate crime off from the criminal justice system was a political decision that has had long-term institutional and ideological ramifications. Regulating rather than punishing the activities of corporate executives reflected a choice to embed normative meaning into these actions that was distinct from the normative meaning ascribed to street crimes. That corporate executives were deemed superior to poor and working-class criminals is predictable, but the a priori positing of corporate criminals as

not innately criminal and thus not deserving of punishment is a testament to the class character of the crime ideational framework. The choice to control corporate malfeasance through regulatory oversight has conditioned the subsequent development of the regulatory state while conveying the ideological message that corporate crime is different and somehow less “criminal” than common street crimes.

The following section reviews key changes in the industrial economy and the development of the large corporation in the late nineteenth century. Section II describes trends in prevailing modes of political, economic, and criminological thought that depicted the corporate criminal as a natural capitalist and granted scientific legitimacy to market competition. Section III explores how these ideas and ideologies manifested in debates over the Interstate Commerce Act. Section IV reviews how the politics of corporate crime evolved in the aftermath of the Interstate Commerce Act’s passage.

I. The Development of the Nineteenth Century Political Economy

As the nation industrialized in the final decades of the nineteenth century, the nation’s small towns described as autonomous “island communities” by Robert Wiebe transformed into a “distended society” in which citizens shed small town ideals to accommodate a bureaucratic state capable of ordering a national market.²⁵¹ This experience with a more localized economy fueled resistance to the growth of corporate capitalism and elite power Steve Fraser highlights in *The Age of Acquiescence* (2014).²⁵²

Literature on Populism often stresses the movement’s enduring ideological impact and the reining in of corporate power during this era. Primarily southern and western

²⁵¹ Wiebe, *The Search for Order*.

²⁵² Fraser, *The Age of Acquiescence*.

farmers and laborers, the Populists articulated a class-based politics that was previously unable to attain national support. But after they gained traction in the nineteenth century, the movement laid ideological foundations that would condition early twentieth century Progressivism and New Deal politics. However, Populist coalitions also demanded radical change that hardened conservative dedication to laissez-faire and freedom of contract.²⁵³ This is often overlooked by scholars who overstate the power of populists by concentrating on the radical character of their ideology and potency of their rhetoric.

Some scholars are more attentive to how and why populist political energies failed to produce institutional reform. They tend to attribute this failure to the fragmented nature of the working-class. Scholars like Jefferson Cowie and Martin Shefter suggest that the lack of a coherent working-class identity inhibited workers from fighting corporate power with any sense of class-consciousness.²⁵⁴ Others recognize how influential business coalitions countered populist politics by advocating a conservative politics in policy arenas.²⁵⁵

The arguments in this chapter complement literatures highlighting the limited achievements of Populists in securing reforms by showing how agents of big business politicized crime to their advantage in order to shape regulatory reform. Legislators allied with corporations, especially railroads, articulated more favorable depictions of corporate criminality in policy arenas than was presented in popular rhetoric. This was critical in containing attacks on corporate abuse and the robber barons. Historical analyses of the

²⁵³ Fraser; McGerr, *A Fierce Discontent*; Postel, "The American Populist and Anti-Populist Legacy"; Postel, "TR, Wilson, and the Origins of the Progressive Tradition."

²⁵⁴ Cowie, *The Great Exception*, 54–61; Eric Foner, "Why No Socialism in the United States?," *History Workshop Journal* 17 (Spring 1984): 57–80; Shefter, "Trade Unions and Political Machines."

²⁵⁵ Kolko, *Railroads and Regulation*.

regulatory state's origins understate the influence debates about crime had on its development, but understanding these debates requires examining the broad story of economic and regulatory development in the late nineteenth century.

The corporations that appeared in the final decades of the nineteenth century were unusual by historical standards, dwarfing the businesses that drove the local economies of previous decades. Alfred Chandler has argued that such large enterprises emerged at this moment to coordinate the growing national market, and railroads served as organizational models replicated across various industries. But a nationalized market posed unique challenges for large businesses. Requiring vast amounts of capital to be raised quickly, corporations became increasingly reliant on investment banking, facilitating a rapid growth in the financial industry. Institutional maintenance and financial coordination on a national scale also required the operation of diverse geographic units and detailed cost accounting procedures. To adapt to these changes, railroads employed specialized tiers of managers trained to perform distinctive tasks. Chandler argues that the class of professional managers performing these distinct functions was essential to reconstituting business enterprises into larger hierarchical organizations.²⁵⁶

Chandler's account has since been critiqued as excessively functionalist by depicting the emergence of large corporations as an adaptive and inevitable response to the development of a nationalized market and new technologies. Historically oriented political scientists have revised this narrative by demonstrating that politics were crucial to reconstituting the industrial order. Describing late nineteenth century development as

²⁵⁶ Chandler, *The Visible Hand*, 13–14, 76–87, 121–24, 244–45, 316; Vincent P. Carosso, *Investment Banking in America: A History* (Cambridge: Harvard University Press, 1970), 29–50.

“state-building as patchwork,” Stephen Skowronek has demonstrated that political elites and judges resisted attempts to undermine prevailing institutional arrangements as piecemeal administrative reforms displaced judicial regulation of industry. This limited the state’s reconstruction into one capable of managing the new industrial order, throwing the state into a constitutional stalemate that was not settled until the ICC emerged in 1920 as the “signal triumph of the Progressive reconstitution.”²⁵⁷

In *Alternative Tracks* (1997), Gerald Berk highlights other dynamics that shaped political economic development. He demonstrates how the industrial order was molded by constitutional and political choices through which courts buttressed a system of large national railroads by revising receivership laws and locating control over corporations with officers and directors rather than shareholders. In a case study of the Great Western Railroad, he shows that an alternative economic model that was regional, relied on flat hierarchies, split authority between owners and managers, and achieved economies of scope offered distinct advantages to a large national model. That the latter prevailed was due to political and constitutional choices.²⁵⁸

More generally, Richard Bensele has shown how the Republican Party constructed the industrial economy. As agents of big business, Republicans represented the financial core and manufacturing belt in the Northeast and Midwest. Countering Chandler’s claim that the corporation was a response to market forces, Bensele shows that a minimally regulated national market was a precondition Republicans deliberately pursued to enable large corporations to grow. But this goal was a liability for Republicans, as producers in

²⁵⁷ Skowronek, *Building a New American State* chapters 5, 8, p. 248.

²⁵⁸ Berk, *Alternative Tracks*.

the West and Plains states paid exorbitant rates to large railroads to ship their goods to urban markets. Republicans kept the market minimally regulated by using tariff policy to attract labor, western sheep raisers, southern sugar refiners, and Union veterans to their coalition in order to maintain their opposition to market regulation.²⁵⁹ The emergence of corporations was an outcome of this push for an unregulated national market. Bensel complements the work of Gabriel Kolko, who concludes that by 1900 American politics was dominated by businesses that facilitated a shift away from a laissez-faire economy to a corporate capitalist one with a minimized regulatory state.²⁶⁰

While Progressives would later embrace corporate capitalism, many Gilded Age robber barons deployed laissez-faire ideology as a weapon to fight discourses critical of corporate power. Businessmen were aware of the rhetoric depicting them as callous and manipulative thieves. As discussed, evolutionary theory was embraced by supporters of various political ideologies during this period, including laissez-faire proponents.²⁶¹ Doctrines of “survival of the fittest” and natural selection not only legitimated racial, gender, and class hierarchies while protecting the place of the upper-middle classes—they also validated the sense of superiority among industry leaders.

Business leaders embraced the precepts of Spencerian theory and accepted Darwinist discourse as a justification for their own conditions. Not only was natural selection doctrine an apology for inequality; it also satisfied elites’ desire for a scientific rationale of individualist economics. The men who popularized Spencer in the U.S. were

²⁵⁹ Richard Bensel, *The Political Economy of American Industrialization, 1877-1900* (New York: Cambridge University Press, 2000), pp. xix, 12-13, 118-125, 148-149, 163, 225-235, 289-344, 457-506, 516.

²⁶⁰ Kolko, *Railroads and Regulation*.

²⁶¹ Smith, *Civic Ideals*, 351, 409.

typically conservatives who used his philosophy to paralyze efforts at social and economic reform. Spencerian theory rationalized capitalist economics by attributing inequality to the pathologies of the poor *and* the superiority of capitalists.²⁶² Again, William Graham Sumner was in large part responsible for the theoretical move of applying Social Darwinism to capitalist economics.

Sumner and Spencer embraced property rights and individualism as instruments in humanity's battle for progress and as laws of the economic jungle. In their philosophy, schemes of state regulation would only impede racial progress. More appropriate would be to reward rather than disincentivize voracious economic competition so as to promote racial improvement. By grounding laissez-faire economics in evolutionary science, they offered ammunition to corporations opposed to regulatory reform.

Drawing on the ideas of Darwinism and race science, defenders of laissez-faire drew from similar currents in political thought as those who fought for enhanced punishments for vagrants, immigrants, minorities, and labor. But they did so by articulating constructs of corporate criminality that warranted less punitive responses from the state and by depicting business leaders as healthy competitive capitalists rather than criminals. While laissez-faire purists failed to prevent the creation of the Interstate Commerce Commission, other industry leaders successfully blended these defenses of laissez-faire rooted in Social Darwinism with prevailing discourses of criminality steeped in bio-determinism. The regulatory ideology they advocated thus combined arguments from proponents of laissez-faire with popular discourses of criminality in order to present

²⁶² Hofstadter, *Social Darwinism in American Political Thought*, 3–36.

corporate criminals as inversions of the natural criminal, helping them to champion the ICC as an alternative to the strict criminalization of market activities.

II. Robber Barons or Natural Capitalists? Constructions of Corporate Criminality

Synthesizing classical economics and survival of the fittest appealed to businessmen. It resonated with their beliefs in their natural superiority in contrast to the lower classes, served as a weapon against critical rhetoric, and rationalized laissez-faire and economic inequality. Sumner was the pivotal player in bringing evolutionary theory to economics. He argued that, “The millionaires are a product of natural selection...They may fairly be regarded as the naturally selected agents of society for certain work.” He wrote that while the “intensest competition” may produce inequality, “the bargain is a good one for society” because it ensures that “all those who are competent for a [given] function will be employed in it.”²⁶³

Sumner’s defense of the status quo rationalized corporate greed and rapacity as natural social goods. Scholars of crime deployed similar arguments in studying the actions of business elites that were often condemned as dangerous. Criminologists of the period naturally focused on behavior commonly deemed deviant, so it is somewhat surprising that some of them addressed economic crime, but they rationalized these behaviors as products of a distinctively competitive rather than criminal nature. For instance, Charles Henderson claimed that destructive competition and business practices among industry leaders were natural and healthy. He wrote that,

It would be strange...if the ‘captain of the industry’ did not sometimes manifest a militant spirit, for he has risen from the ranks largely because he was a better fighter than most of us. Competitive commercial life is not a flowery bed of ease,

²⁶³ Sumner, *The Challenge of Facts*, 90.

but a battle field where the ‘struggle for existence’ is defining the ‘industrially fit to survive.’²⁶⁴

He went on to write that market competition develops a “peculiar type of manhood, characterized by vitality, energy, concentration, skill...great foresight...[and] integrity.” Henderson concluded that, “the sense of fairness and justice is strong in business men.”²⁶⁵

Defenders of the status quo deployed language about the natural capitalist to fight attempts to criminalize economic activity. For instance, during a banquet honoring Hebert Spencer’s visit to New York in 1892, Richmond and Allegheny Railroad executive Eugene Leland said that businessmen “give nominal adherence” to doctrines designed to govern their behavior because such policies are typically “wholly inconsistent” with the realities of business operations. He claimed that “the fundamental laws upon which the doctrine of evolution rests have a bearing on the questions that daily confront business-men,” promoting competitive dynamics in market that will always trump incentives to follow state-made rules and render regulation futile.²⁶⁶

Needless to say, these perspectives resonated with the common sense of superiority shared by titans of industry like John Rockefeller in oil and Andrew Carnegie in steel. With the language of biology providing a scientific validation of laissez-faire, this common sense was substantiated through “empirical” findings that corporate abuse

²⁶⁴ Charles R. Henderson, “Business Men and Social Theorists,” *American Journal of Sociology* I, no. 4 (1896): 385–86.

²⁶⁵ Henderson, 385–86, 394; see MacDonald, *Criminology*, 39–40 for a similar argument claiming that prominent men of society have distinctive physiognomies that distinguish them from others.

²⁶⁶ Eugene R. Leland, “What Mr. Leland Got No Chance to Say,” in *Herbert Spencer on the Americans and the Americans on Herbert Spencer: Being a Full Report of His Interview, And of the Proceedings of the Farewell Banquet of Nov. 11, 1882* (New York: D. Appleton and Company, 1883), 82–83.

was healthy. In a famous Sunday school address, Rockefeller declared that, “The growth of a large business is merely a survival of the fittest.” Employing the metaphors of nature and Darwinism, he stated that, “The American Beauty rose can be produced...only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working out of a law of nature and a law of God.”²⁶⁷

In 1889, Carnegie penned a defense of laissez-faire in *The North American Review*. He drew directly on the philosophy of Sumner and Spencer, offering a biological foundation for the laws of industrial competition and economic inequality. He dismissed critics of the inequalities of industrialism, stating, “It is a waste of time to criticise the inevitable.”²⁶⁸ Carnegie claimed that laissez-faire was not only economically sound, but also necessary to promote racial progress. He said of laissez-faire that,

It is here; we cannot evade it; no substitutes for it have been found; and while the law may sometimes be hard for the individual, it is best for the race, because it insures the survival of the fittest human in every department. We accept and welcome, therefore, as conditions to which we must accommodate ourselves, great inequality of environment, the concentration of business, industrial and commercial, in the hands of a few, and the law of competition between these, as being not only beneficial, *but essential for the future progress of the race.*²⁶⁹

Carnegie went on to say that “not evil, but good, has come to the race from the accumulation of wealth by those who have the ability and energy that produce it.”²⁷⁰

The idea of the natural capitalist served as a contrast to the idea of the natural criminal, and this gave businessmen ammunition against populist rhetoric that even spread to popular discourse. In his book *Democratic Vistas*, Walt Whitman offered a

²⁶⁷ Quoted in Hofstadter, *Social Darwinism in American Political Thought*, 32.

²⁶⁸ Andrew Carnegie, “Wealth,” *North American Review* CCCXCL (June 1889): 654.

²⁶⁹ Carnegie, 655.

²⁷⁰ Carnegie, 656.

stinging critique of Gilded Age corruption, but still wrote that, “I perceive clearly that the extreme business energy, and this almost maniacal appetite for wealth prevalent in the United States, are parts of amelioration and progress.”²⁷¹

These divergent constructions of criminality—the “born criminal” and the “natural capitalist”—were rooted in common ideological and theoretical trends. Evolutionary and Darwinist discourses naturalized criminality as a class problem by depicting the criminal as a natural phenomenon tied to a specific class. In contrast, the businessman was not a criminal, but a naturally competitive capitalist.

The scientific naturalization of pure laissez-faire as endorsed by Carnegie and Rockefeller did not prevent any and all regulation of markets. But although the proponents of laissez-faire did not defeat attempts at regulatory reform, leaders of the nation’s largest industry—the railroads—took a different approach. To justify regulatory oversight as an alternative to criminal sanction, railroads and their legislative allies brought this language about the natural capitalist to debates over the Interstate Commerce Act (ICA) and presented it in contrast to prevailing discourses of criminality. In doing so, they successfully distinguished railroad executives from popular constructions of criminality while arguing for the creation of a commission in lieu of strict criminalization of their actions. This uniquely favorable construction of corporate criminality embedded into their regulatory ideology was reflected in the design of the Interstate Commerce Commission (ICC).

III. Crime Politics in the Interstate Commerce Act of 1887

²⁷¹ Walt Whitman, *Democratic Vistas, and Other Papers By Walt Whitman* (London: Walter Scott, 1888), 29.

A Brief Legislative History of the ICA

Democrat John H. Reagan of Texas, the lead architect of the ICA, was first elected to Congress in 1857 as the representative for Texas's 1st District in the House. His stint in Congress proved short when Texas seceded in 1861, prompting him to resign and serve in Jefferson Davis's cabinet. Ten years after the war ended, he was reelected to the House, fueled by agrarian discontent with railroads that charged rural farmers exorbitant rates to ship their goods to urban markets. States like Texas where agrarian frustration was palpable initially pursued relief through state-level "granger laws" regulating the rates railroads could charge shippers. But in 1877, Reagan became the first lawmaker to suggest granting the federal government the power to oversee the railroad industry.²⁷²

Multiple versions of an interstate commerce bill were debated before its passage in 1887, but Reagan consistently insisted on criminalizing abusive rate-setting practices by railroads. Attuned to the anger in his base, his 1877 proposal addressed every complaint lodged at railroads by criminalizing rebates, drawbacks, pooling, and long- and short-haul discriminations as misdemeanors and punishing the agents responsible with a \$5,000 fine.²⁷³ The bill contained no mention of a commission, meaning that the state's only response to the actions outlined in his proposal was prosecution. This highlights how from the beginning of this debate, crime politics were central to the law's development.

Legislators of varying partisan and regional alliances agreed that the use of

²⁷² Ben H. Proctor, *Not Without Honor: The Life of John H. Reagan* (Austin: University of Texas Press, 1962); U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Forty-Fifth Congress, 1st Session*, vol. 6 (Washington: Government Printing Office, 1877), see p. 193 for Reagan's bill.

²⁷³ Skowronek, *Building a New American State*, 140; Proctor, *Not Without Honor*; "A Bill To Regulate Inter-State Commerce," 45 H.R. 674 (1877).

common law to regulate business practice was becoming futile. Corporations were growing in complexity and becoming adept at exploiting ambiguities in judicial precedent in their favor.²⁷⁴ But questions about whether or not corporate abuses counted as crime, whether executives were motivated by criminal intent, and what the most appropriate state response was to these behaviors were contested as Congress considered various versions of the law. With competing answers being put forward, the one that prevailed was that business executives, agents, and officers should be treated as inherently good men just seeking to survive in the capitalist jungle. While some corporate leaders fruitlessly used this idea to support absolute opposition to regulation, others used it as a persuasion tool to garner support for a regulatory approach as an alternative to the strict criminalization proposed by Reagan. Even many populist legislators who were hostile to railroads came to accept this logic over the course of debate.

In 1877, Reagan's initial interstate commerce bill passed in the House with support from the South and West before dying in the Republican Senate.²⁷⁵ Railroad magnates demanding to be heard by Congress stymied his efforts to reintroduce it in 1880. In a series of hearings before the House Commerce Committee, numerous representatives of railroads pleaded with the committee to instead create a commission to

²⁷⁴ Skowronek, *Building a New American State*, 5–8, 23; Chandler, *The Visible Hand*, 316; Bense, *The Political Economy of American Industrialization*, 337–38; Edward C. Kirkland, *Industry Comes of Age: Business, Labor, and Public Policy, 1860-1897* (New York: Holt, Rinehart, and Winston, 1961), 278–305; Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Baltimore: Johns Hopkins University Press, 1955), 42–53, 80–83, 259–67.

²⁷⁵ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Forty-Fifth Congress, Third Session*, vol. 8 (Washington: Government Printing Office, 1878), 93–102.

regulate ratemaking, investigate conflicts, and make policy recommendations.²⁷⁶ Reagan secured passage of his bill in the House once more in 1885 by incorporating compromises to satisfy the most fervently anti-railroad members of his coalition, but the Senate responded with a bill sponsored by Shelby Cullom (R-IL) proposing a commission. Cullom eschewed a hard line against the railroads and felt that the complexity of the railroad system left legislators ill-informed to write policy details. He favored a law “which could not possibly harm the railroads or other business interests of the nation.” The more moderate Senate, where corporations had more pull, avoided decisions that could hurt railroads and favored creating a commission with wide discretion.²⁷⁷

A committee led by Cullom opened hearings in March of 1885 to explore avenues for railroad regulation. A variety of experts and railroad allies testified in support of his bill. It authorized the ICC to respond to common carriers violating the law by instituting proceedings in equity, the body of law authorized to provide relief through remedies like injunctions and other decrees forbidding specific actions.²⁷⁸ The committee’s final report claimed that Reagan’s reliance on criminal sanction “would assuredly have retarded the building up of the country.” The new bill accommodated calls to punish railroads by defining violations as misdemeanors punishable by a \$1,000 fine, but also created the ICC as an initial venue to adjudicate disputes, pursue equity proceedings to stop

²⁷⁶ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Forty-Sixth Congress, 2nd Session*, vol. 10 (Washington: Government Printing Office, 1879), 1079–82, 4018–32; Skowronek, *Building a New American State*, 28, 143–44.

²⁷⁷ Skowronek, *Building a New American State*, 144–45; James Nielson, “Shelby M. Cullom: Prairie State Republican,” *University of Illinois Studies in the Social Sciences* 51 (1962): 93–99.

²⁷⁸ “A Bill To Regulate Commerce” 49 S. 1093 (1886), section 10 for cease and desist orders. The ICC could report failures to obey these orders to district attorneys.

violations, and monitor railroad crimes through administrative sanctions.²⁷⁹

A conference committee ironed out the differences between the bills in 1886, with both sides making concessions.²⁸⁰ Long- and short-haul discriminations and pooling were banned, satisfying agrarian radicals, in exchange for a commission. The law contained provisions through which a carrier's officers, agents, and directors could be criminally punished with a fine of up to \$5,000 for violations of the law, which were deemed misdemeanors. But the ICC was also allowed to issue cease and desist orders to impede those behaviors and was given the authority to petition for proceedings in equity if common carriers disobeyed the law.²⁸¹ As a result, the law defined specific behaviors as criminal actions—like rebating, a practice through which railroads attracted business from large shippers by reducing their shipping rates and shifting costs onto smaller shippers—but gave the ICC a variety of mechanisms to respond to them, including civil and administrative interventions. The law did not specify at what point or in what cases a violation of the law called for prosecution versus a civil suit, administrative response, or equity proceeding, instead leaving that choice to the discretion of the ICC. This meant that a railroad could break the law regularly and repeatedly be enjoined or sanctioned by the ICC without ever being charged criminally. This statutory design not only complicated the application of the criminal law—it expressed an ideological message that railroad rate-setting abuses were substantively different than the crimes punished through

²⁷⁹ U.S. Senate Select Committee on Interstate Commerce, "Report of the Senate Select Committee on Interstate Commerce, to Accompany Bill H.R. 1093" (2356 S. Report 46, January 18, 1886), 5–6.

²⁸⁰ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Forty-Ninth Congress, Special and First Session*, vol. 17 (Washington: Government Printing Office, 1885), 4423, 7756.

²⁸¹ "Interstate Commerce Act," Pub. L. No. 24 Stat. 379, Chap. 104 (1887); Sutherland, *White-Collar Crime*, 32–48 argue that this trend started with the Sherman Antitrust Act, but its true origins lay with the Interstate Commerce Act.

the criminal justice system.

This constituted an innovative but comparatively unusual institutional design. Comparative work has drawn attention to the relative weakness of American regulatory bureaucracies historically and comparing the ICC to its global counterparts throws these differences into relief.²⁸² Comparable bureaucracies that emerged in the UK in the 1840s and 1870s were granted far more robust powers, as the British treated railroad combinations as inevitable and regulated them to minimize injury to shippers. In Belgium, Prussia, France, Austria, Italy, and Canada, railroads were either nationalized or regulated with the understanding that large combinations were unavoidable and should be controlled closely by the state.²⁸³ Alternatively, American policymakers relied on a combination of regulatory and criminal provisions to enforce competition. This fostered a uniquely antagonistic relationship between American business and the state.²⁸⁴ By neglecting to nationalize the railroads or directly regulate monopoly, the American state relied on a vague set of criminal and regulatory controls that engendered hostile business-government relations.

Scott James has meticulously outlined the legislative coalition that drove the ICA's passage. James shows that in 1884, Democratic Party leaders set themselves up for a conflict with their own rank-and-file. Agrarians in the Democrats' base long insisted on stringent restrictions on railroads, but Democrats courted Mugwumps in the 1884

²⁸² David Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton: Princeton University Press, 2012).

²⁸³ Paul Stephen Dempsey, "The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure," *Marquette Law Review* 95, no. 4 (2012): 1160; Charles Lee Raper, *Railway Transportation: A History of Its Economics and of Its Relation to the State* (New York: G. P. Putnam's sons, 1912), 1-60.

²⁸⁴ Skowronek, *Building a New American State*; Vogel, *The Politics of Precaution*; Vogel, "Why Businessmen Distrust Their State."

elections. Republicans who abandoned their party to vote for Cleveland in 1884, Mugwumps were a swing constituency that delivered Democrats the White House. But “business Mugwumps,” including large manufacturers, commercial wholesalers, and others who relied on national transportation services, were supportive of railroads. James shows how the demands of coalition maintenance trumped the party’s historic commitments. Democratic leaders gamed the lawmaking process to ensure that agrarian discontent would be quieted in order to maintain support for a commission and satisfy Mugwumps. The party’s commitment to this state-building exercise legitimized the ascendance of corporate capitalism through the commission.²⁸⁵

It is not enough to understand the story of the ICA as purely driven by economic debates. A Republican-controlled Senate and a tenuous Democratic-Mugwump alliance in the House created a window of opportunity for the creation of a commission, and economic ideas were obviously central to debate. But this should not downplay the ways in which policymakers politicized crime in this process. Senators, Republicans, and Mugwumps politicized ideas about corporate criminality to defend railroads, and even Democrats with records of agrarian sympathy came to embrace this ideational construction. Politicizing corporate crime was crucial to the interests and legislators pursuing the construction of a commerce commission.

By mixing regulatory and criminal policy, policymakers imbued railroad crime with a distinctive meaning that differed from conventional understandings of crime. The law sent the message that businessmen were tangibly different than criminals and

²⁸⁵ Scott C. James, *Presidents, Parties, and the State: A Party System Perspective on Democratic Regulatory Choice, 1884-1936* (New York: Cambridge University Press, 2006), 36–122.

deserved sympathy from the state.

Competing Ideas to the Corporate Criminal as “Natural Capitalist”

In the ICA, legislators deemed several actions common among railroads to be criminal misdemeanors but created the ICC to adjudicate disputes before resorting to criminal sanction. Ideas that businessmen were not criminals but “natural capitalists” driven by healthy competitive dynamics were crucial to this policy choice. But the legislative record reveals that over ten years of debate, lawmakers deployed many frameworks to try to understand executives’ actions. Analyzing how these ideas competed reveals the complex way crime politics shaped this debate and why the politics of the moment favored the conception of corporate criminality that prevailed.

First, some legislators used a retributivist logic asserting that railroad executives should be treated equally to other criminals. The term “retributive” in this context refers to the idea that the actions of corporate executives or agents were deemed morally wrong, thus necessitating criminal sanction proportionate to the harm done.²⁸⁶ Legislators from the south, west, and plains with constituencies aggrieved by railways commonly invoked retributivist logic. Reagan was its most ardent advocate. In 1882, he wrote in a minority committee report that his bill “does not provide for punishment for anything except for manifest wrongs, which injure citizens and the public...it is framed on a theory which respects their [the public’s] intelligence and sense of moral right.”²⁸⁷

Several legislators voicing retributivist arguments relied on James Hudson’s book

²⁸⁶ See Von Hirsch and Committee for the Study of Incarceration, *Doing Justice* for an outline on retributive theories of punishment.

²⁸⁷ See U.S. House Commerce Committee, “A Bureau of Inter-State Commerce,” Report, June 12, 1882 “Views of the Minority” for Reagan’s statements.

The Railways and the Republic. Through a case study of Standard Oil, Hudson argued that, “greed for wealth can corrupt commercial morality.” He summarized how Standard Oil coerced railroads into granting rebates for Standard at the expense of their competitors. Calling the organization “an unmitigated evil,” Hudson concluded that Standard’s actions were crimes against the public.²⁸⁸ Senator James Beck (D-KY) referenced Hudson’s work on the Senate floor to note that if “Western bandits” amassed the wealth Standard did through comparable means, they would be punished criminally.²⁸⁹ Many legislators invoked Hudson’s work to similarly argue that criminally punishing railroads was an appropriate expression of moral judgment.²⁹⁰

Despite being associated with the party of big business, some Republicans from regions susceptible to agrarian populism employed this language. Albert Hopkins (R-IL) suggested that the law’s criminal provisions were nothing “but the assertion of a just principle.”²⁹¹ Representative John Anderson (R-KS) maintained that, “morally I can see no difference between [railroad crimes] and absolute, naked, bald-headed robbery.” He supported making “every violation” of the law “a criminal offense.”²⁹² His claims explicitly challenged the politically and socially constructed nature of crime, disputing the idea that there was any moral distinction between robbery and financial crime. Partisanship was thus not an absolutely determinative factor of a legislator’s perspective,

²⁸⁸ James F. Hudson, *The Railways and the Republic* (New York: Harper & Brothers, 1887), 55, 67–106, 240, 332.

²⁸⁹ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Forty-Ninth Congress, Second Session*, vol. 18 (Washington: Government Printing Office, 1886), 481.

²⁹⁰ U.S. Congress, *Cong. Rec.*, 1885, 17:7282 for comments from Reagan (D-TX); U.S. Congress, *Cong. Rec.*, 1886, 18:149, 790 (Rep. Sumner), 2111 (Sen. Jones), and Appendix for Rep. Holman.

²⁹¹ U.S. Congress, *Cong. Rec.*, 1886, 18:790.

²⁹² U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Forty-Eighth Congress, Second Session*, vol. 16 (Washington: Government Printing Office, 1884), 16.

but such arguments were predominantly made by legislators (often Democrats) from regions where populist sentiment was strongest.

Ideas about moral fairness and retributive justice were the starting point of debate over the ICA and were essential to Reagan's initial proposal. However, retributive ideas were derided as irrational and unreasonable impediments on markets. Legislators commonly criticized this logic as barbaric, outdated, and inappropriate for men who had proven themselves to be contributors to society. Nonetheless, this language was central to the Populists' "robber baron" rhetoric and prompted the corporate defenses of laissez-faire and opposition to regulation tracked in numerous historical narratives about Gilded Age populism.²⁹³ But focusing on these two camps, the Populists and their most conservative opponents, makes it seem like business lost and Populists won. However, a closer look at the nuances of this debate reveals that railroads and their legislative allies employed diverse arguments, some of which were more successful than others.

A second and more frequently employed ideational framework was utilitarian in nature, focusing on the deterrent effect of the criminal law. For instance, Senator Charles Van Wyck (R-NE) and Representatives Poindexter Dunn (D-AR) and Charles O'Ferrall (D-VA) used deterrence rationality to justify criminal sanctions. As early as 1884, Dunn argued that a commission would lack the force of the criminal law and would permit railroad abuses to "go unprevented and unrestrained."²⁹⁴ Van Wyck claimed that, "the only thing required" of the ICC is to "write essays," which constituted a less effective

²⁹³ Fraser, *The Age of Acquiescence*; McGerr, *A Fierce Discontent*.

²⁹⁴ U.S. Congress, *Cong. Rec.*, 1884, 16:194.

response than criminal penalties.²⁹⁵ O’Ferrall stated that the penal section of the bill “will go much further in securing adherence to the law” than civil or equity remedies.²⁹⁶

Democrats routinely argued that a commission would fail as a deterrent. Representative John Glascock (D-CA) called the commission bill “valueless” with weakened criminal provisions, and suggested that the proposed commission had “none of the elements of the English commission so potent to regulate railways abuses.”²⁹⁷ William McAdoo (D-NJ) agreed, decrying the commission as “impotent” and “a harmless safety-valve for popular and individual discontent.”²⁹⁸ Thomas Wood (D-IN) called it a “farce” to “declare certain acts and practices of railroad companies wrong and a crime and then leave it out to a commission to investigate.”²⁹⁹

Opposition to the commission was strong in agrarian precincts, with Andrew Caldwell (D-TN) calling it a “Trojan horse and a deception to close courts” to aggrieved parties, and Charles O’Ferrall (D-VA) suggesting that a commission would usurp the authority of Congress and the Courts to write and enforce laws.³⁰⁰ In his analysis of roll-call votes on the Interstate Commerce Act, Scott James found that agrarian Democrats widely opposed the commission in the proposals made preceding 1887.³⁰¹ Party leaders seeking to satisfy Mugwumps later engineered the Democrats’ capitulation to the commission bill, but during debates, Democrats often opposed the commission by

²⁹⁵ U.S. Congress, 16:751.

²⁹⁶ U.S. Congress, *Cong. Rec.*, 1885, 17:7295.

²⁹⁷ U.S. Congress, *Cong. Rec.*, 1884, 16:191–92.

²⁹⁸ U.S. Congress, 16:199.

²⁹⁹ U.S. Congress, 16:201.

³⁰⁰ U.S. Congress, *Cong. Rec.*, 1885, 17:7292–93, 7296.

³⁰¹ James, *Presidents, Parties, and the State*, 36–122.

employing retributive or deterrence-based frames to justify strict statutory criminal prohibitions.

Lawmakers aligned with railroads easily inverted this deterrence-based defense of criminal sanction by arguing that the ICC would shine enough “sunlight” on corporate behavior that it would induce compliance in rational businessmen. In House hearings in 1882, Chauncey Depew (an attorney for Vanderbilt’s railroads) and Wayne MacVeagh (a former attorney general and the chairman of the Pennsylvania Civil Service Reform Commission) claimed that “the open sunlight” afforded by a commission would deter fraudulent activity without having to resort to criminal punishment.³⁰²

Corporate defenders in Congress readily picked up their logic. Representative William Rice (R-MA) stated that the commission afforded “the bright sunshine of publicity” and would “be more potent to reform than fines or imprisonments.”³⁰³ Representative John Stewart (R-VT) asserted that a commission’s existence “would exert a strong and constant tendency to bring and keep the management of the roads of the country within the limits of righteous dealing” in a way that criminal provisions could not.³⁰⁴ Senator John Sherman (R-OH) concluded that the ability of a commission to enforce obedience “would be greater than the judgment of fifty State courts.”³⁰⁵ The deterrence framework thus cut in different ways depending on how it interacted with one’s policy preferences. Those who favored criminal punishment employed a Beccarian

³⁰² U.S. House Committee on Commerce, “Arguments and Statements in Relation to Certain Bills Proposing Congressional Regulation of Interstate Commerce,” § Committee on Commerce, House, 47th Congress, 1st Session (1882), 16, 209.

³⁰³ U.S. Congress, *Cong. Rec.*, 1884, 16:100.

³⁰⁴ U.S. Congress, 16:165.

³⁰⁵ U.S. Congress, 16:1205.

deterrence logic that criminal law would deter crime, but allies of railroads suggested that a commission would deter reasonable executives who did not require the heavy hand of criminal punishment to follow the law.

That Congress created the ICC partially under the theory that “sunlight” provided adequate deterrence indicates that the regulatory deterrence argument carried more influence than the criminal law deterrence logic. A key reason the regulatory version prevailed was that many railroad agents and their legislative allies deployed regulatory ideology during debate to suggest that executives were rational men who committed crime due to market dynamics and competitive dispositions and would thus be more responsive to mild interventions than common criminals. This framework was frequently invoked during debate to explain railroad criminality and emphasize the character, background, and personal traits of corporate actors. It mirrored the prevailing anthropological theories of criminality by drawing attention to the behavioral history and disposition of offenders rather than their actions. But by meshing these arguments with Darwinist interpretations of *laissez-faire*, the business criminal became a logical reciprocal to the born criminal—a virtuous and productive individual whose arguably criminal actions should not be judged as fully criminal because they were functions of market dynamics, not personal pathologies. Debates about the law’s criminal provisions thus became hinged less on whether executives did bad things and more on whether they were judged to be “bad people.”

While the most ardent corporate defenders of *laissez-faire* were unsuccessful in their fight against regulation in all forms, numerous railroad agents and executives deployed regulatory ideology to good effect. Treating the Populists and business

community as homogenous entities in opposition during this period oversimplifies the complex nature of these economic debates, not least by obscuring meaningful differences in the politics of business leaders. The railroads and legislators who drew on regulatory ideology designed an agency that reflected the interests of railroads by minimizing the criminal oversight of markets. Doing so involved effectively drawing on prevailing understandings of criminality and parts of the arguments from laissez-faire advocates.

Much like in debates over rehabilitation and vagrancy, the political focus in the criminal aspects of the ICA debate became punishing the criminal, not the crime. But men of high social standing without criminal backgrounds made for a stark contrast to prevailing ideas of criminality. Corporate actions that could be reasonably compared to theft took on unique substantive meanings because they were committed by people who did not fit the image of the natural criminal. Their behaviors were consequently interpreted as rational responses to market dynamics and displays of healthy capitalist self-interest, not as manifestations of criminal dispositions.

The “Natural Capitalist” As Inversion of the “Born Criminal”

The idea that natural capitalists were inappropriately viewed as corporate criminals cut across partisan and regional divides. It mirrored the dominant way lawmakers, intellectuals, and experts on criminal behavior understood street crime at the time. By emphasizing the absence of personal pathologies in corporate offenders and their personal dispositions and background, legislators conceptualized corporate criminality in a way that reflected the basic ideological features of criminal anthropology. This focused their attention on whether they should punish the criminals being targeted rather than whether their particular crimes warranted punishment.

Legislators aligned with railroads articulated this framing to defend regulatory rather than criminal sanctions and persuade others to adopt this perspective. Legislators with anti-railroad sentiment in their constituent base eschewed criminal provisions for many reasons, but these ideas played a role in their reasoning—either as a reason for making that decision or as a post-hoc justification of said decision. In either case, these ideas had meaningful political purchase for legislators who needed to justify their choice to regulate rather than criminalize railroads.

A cursory historical analysis indicates that the activities criminalized in the ICA were generally monitored through regulatory rather than criminal interventions. However, by overlapping criminal sanctions with regulatory ones for a common range of behaviors, the law established oft-ignored institutional and ideological legacies. It served an ideological function by reflecting and validating the idea that corporate crimes were normatively different than street crimes while channeling corporate crime into alternate institutional venues from criminal courts, setting an institutional precedent that conditioned the development of the regulatory state.

This reciprocal image of the natural criminal consisted of four facets: corporate agents were not driven by criminal dispositions but by healthy competitive ones; their worst behavior was a function of market forces that excuse their actions; those market forces were also dynamics that produced social goods, imbuing their potentially criminal behavior with non-criminogenic meanings; and victims of corporate crime were ignorant, vindictive, and would use the criminal law to hurt men who do not deserve punishment. This construct reflected the natural capitalist idea that appeared in the work of William Graham Sumner, Charles Henderson, and others.

Railroads' lawyers and agents routinely brought the rhetoric of Sumner, Henderson, Carnegie, and others to debates over the law. They testified for years preceding the law's passage that railroad men were morally upright and that there were no pathologies driving their behavior that necessitated reform or containment. For example, legally representing Vanderbilt's railroads, Chauncey Depew told the House Commerce Committee in 1882 that railroad executives "have outlived the penitentiary for mistakes."³⁰⁶ He later stated that the bill did not target the "convicted thief," but "as fair, as honorable, as reputable a class of our fellow-men...as any other."³⁰⁷ For Depew, the officers and agents were not the pathologically deviant "others" depicted in the politics of street crime—they were as normal, healthy, and honest as anyone else. To depict them as criminals drew on archaic ideas that he argued were inappropriate when applied to this class of men. When he told Congress "We have outlived the penitentiary for mistakes," he did not mean we as a society, but rather the class of honorable men running industry.

John C. Brown made similar arguments. Tennessee's former Governor and future president of the Texas and Pacific Railroad, Brown informed the same committee that railroad managers "are just as honest as lawyers, doctors, legislators, and...any other class of people." He argued criminal punishment was excessive for such men. Albert Fink, a nationally respected expert railway engineer, made comparable claims in the 1882 hearings. He stated that, "the evils encountered in the management of this great property in this country are not the result of any wickedness on the part of the American railroad

³⁰⁶ "Arguments and Statements," Committee on Commerce, House (1882), 209.

³⁰⁷ "Arguments and Statements in Relation to Certain Bills Proposing Congressional Regulation of Interstate Commerce," § Committee on Commerce, House; Committee on Interstate and Foreign Commerce, House, 48th Congress, 1st Session (1884), 36.

managers.”³⁰⁸ By pointing to their moral senses, Depew, Brown, and Fink painted an image of executives as more similar to functioning members of society than pathological criminals.³⁰⁹ These arguments suggested that corporate offenders did not need to spend time behind bars because they lacked the tendencies, traits, and dispositions criminal sanction was meant to punish or correct, regardless of what they did.

Many Republicans from the Northeast and Midwest drew on this logic in legislative debates. Representative Roswell Horr (R-MI) panned Reagan’s bill for targeting a class of people undeserving of punishment. He said Reagan’s proposal would “take men who stand well among their neighbors, who are honored and respected by those who know them best, who are well spoken of by the entire community in which they live” and associate them with “‘cut-throats,’ or...‘naked, bald-headed robbers.’”³¹⁰ Representative Byron Cutcheon (R-MI) criticized the notion of punishing “upright and enterprising men” who have “never been accused in [their] community of being dishonorable.”³¹¹ Both of these legislators vocally noted that criminal sanctions would unfairly lump corporate executives into the same category as ordinary criminals. It was inappropriate to characterize these men as criminal “robber barons” as populists did. In opposition to Reagan’s bill, Representative William Rice (R-MA) alleged that the “the managers of these roads are no longer robber barons, but practical and able business men.”³¹² This emphasis on the clean behavioral histories, upright character, and “normal”

³⁰⁸ U.S. House Committee on Commerce, Arguments and Statements in Relation to Certain Bills Proposing Congressional Regulation of Interstate Commerce, 1882, 162, 185.

³⁰⁹ U.S. House Committee on Commerce, Arguments and Statements in Relation to Certain Bills Proposing Congressional Regulation of Interstate Commerce, 1884, 95.

³¹⁰ U.S. Congress, *Cong. Rec.*, 1884, 16:120.

³¹¹ U.S. Congress, 16:47, and Appendix.

³¹² U.S. Congress, 16:99.

dispositions of executives justified opposition to the criminal sanctions in the Reagan bill and the anti-robber baron rhetoric more generally.

Lawmakers opposed to criminalization praised the final law's inclusion of a commission, viewing it as a suitable alternative to criminal sanction for men who lacked criminal natures. Representative Ralph Plumb (R-IL) stated that the commission was a "practical measure," necessary to alleviate the threat of prosecution for men who are "fair-minded and just" with "as much probity as any other class."³¹³ Even Rep. Albert Hopkins (R-IL), an advocate of the criminal provisions throughout debate, came to support the commission shortly before the law's passage. He defended his shift on the grounds that "the officers and managers of some of the great railroads of the country are just and honorable men can not be denied, and that they manage the affairs of their roads in a spirit of fairness to the public must, too, I think, be admitted."³¹⁴ Again, the actions of executives became irrelevant. The focus of debate was whether or not executives fit prevailing images of the criminal person.

Many legislators from regions with populist sympathies did not defend criminal provisions, despite the anti-railroad sentiment in their constituencies. This is not to assume that criminalization would have been more effective than regulation, but Populists were strident in their critiques of capitalism and the robber barons. Support for punishing rate-setting abuses was strong in the south, west, and plains, and on a symbolic level, criminal sanction constituted a stronger attack on railroads than regulation. It makes sense that lawmakers like Poindexter Dunn (D-AL), Senator Charles Van Wyck

³¹³ U.S. Congress, *Cong. Rec.*, 1886, 18:869.

³¹⁴ U.S. Congress, 18:789.

(R-NE), and Reagan opposed the commission as too weak, fearing that its convoluted powers left it susceptible to being captured by railroads.³¹⁵ But they were unable to garner support for their perspective, and many Democrats accepted sympathetic arguments about corporate criminality to justify their absence from Reagan's coalition.

Representative Edward Seymour (D-CT) serves as a good case in point. Seymour declared that railroad executives "are no saints," acknowledging Reagan's critiques, but also admitted that they were "prudent men." He concluded that they would respond to a commission's interventions without prosecution.³¹⁶ Days before passage, Senator John Morgan (D-AL) said the criminal provisions only served to "make a moral point on" an executive, "damage his reputation," and "hurt his feelings."³¹⁷ Similarly, Senator Edward Walthall (D-MS) stated that, "I have no word of denunciation for the railroad managers of the country as a class." He argued that railroad industry leaders "are just like other men."³¹⁸ Ignoring the actions of executives in favor of emphasizing their character gave Democrats a justification for supporting a policy that may not have had strong support among their base.

Many of these legislators could have been using these ideas in an instrumental sense. While their political allegiances and regional associations indicated otherwise, they easily could have been in the pockets of large corporations. However, there is evidence that at least some of these legislators were foes of railroads. As Democrats grew more

³¹⁵ U.S. House Committee on Commerce, Arguments and Statements in Relation to Certain Bills Proposing Congressional Regulation of Interstate Commerce, 1882, 260–61; U.S. Congress, *Cong. Rec.*, 1884, 16:194, 751–52.

³¹⁶ U.S. Congress, *Cong. Rec.*, 1884, 16:43.

³¹⁷ U.S. Congress, *Cong. Rec.*, 1886, 18:657.

³¹⁸ U.S. Congress, *Cong. Rec.*, 1885, 17:4307.

powerful in the 1880s, the Senate—controlled by Democrats from 1879-1883—was occupied by opposing camps of Democrats, one more receptive to industrial development and another sympathetic to small-town economics. For instance, John Morgan of Alabama long exhibited agrarian sympathies that countered the politics of Alabama's other Senator, the pro-business James Pugh. Nonetheless, Morgan supported the commission and dismissed the law's criminal provisions as only designed to "make a moral point on" executives.

Edward Walthall is also a good case in point. A Senator from Mississippi elected in 1885, Walthall lacked a long legislative record at the time the ICA was being debated, but he was a protégé to the popular Mississippi Senator L.Q.C. Lamar whose advocacy of states' rights was only compromised by his support for federal economic regulation. The regional associations and political records of both men suggest that they aligned with the agrarian wing of the Democratic Party.³¹⁹ That they held a favorable perception of railroad executives, despite their personal politics and constituents' attitudes, indicates that the ideas put forward about corporate criminality had some meaningful power. Whether these ideas convinced them to vote against their politics or helped them mask pro-business sympathies, the idea of the natural capitalist as an inversion to the natural criminal had political value for them.

By arguing that personal pathologies did not drive rate-setting abuses, this pro-regulatory coalition of railroads and legislators generated the second facet of the

³¹⁹ David J. Rothman, "The Structure of State Politics," in *Political Parties in American History: 1828-1890*, ed. Felice Bonadio and Morton Borden, vol. 2 (New York: Putnam, 1974), 824; James B. Murphy, *L. Q. C. Lamar: Pragmatic Patriot*, First Edition edition (Baton Rouge: Louisiana State University Press, 1973); *Senate, 1789-1989, V. 1: Addresses on the History of the United States Senate* (Government Printing Office, n.d.), 367.

“corporate criminal” construct—the attribution of corporate criminality to market forces. This argument had several effects. Some legislators conceded that the rate-setting abuses were moral wrongs, but also feared that punishing them would interfere with markets in counterproductive ways. Alternatively, others argued that because the actions at issue in the bill were byproducts of forces that provided social goods, actions that would have been labeled criminal in other contexts took on different substantive meanings. In either case, criminal sanction was deemed inappropriate because the behaviors were functions of markets rather than pathologies.

Legislative hearings were replete with examples of this reasoning. Pennsylvania Civil Service Reform Chairman Wayne MacVeagh argued in 1882 that although rebates, drawbacks, and other rate-setting discriminations may cause injury to shippers, they were industry norms. He argued that, “no man believes that it is a crime or a wrong” for railroads to take these actions, stating that criminal punishment should be reserved “for some of the manifold forms of crime, in the ordinary acceptance of that term.”³²⁰ MacVeagh’s use of the phrase “in the ordinary acceptance of that term” is particularly telling. It embodied common assumptions about what constituted crime, which economic crime did not fit. MacVeagh neglected to challenge this assumption, serving as a testament to the class-skewed character of the political construction of criminality.

During his 1882 testimony, Albert Fink made similar claims. After defending the character of railroad executives, he concluded that their arguably criminal behaviors were “inherent in the system of railroad transportation itself.”³²¹ Fink repeated this argument in

³²⁰ "Arguments and Statements," Committee on Commerce, House (1882), 4-5.

³²¹ U.S. House Committee on Commerce, 162, 185.

1884, calling it “a great injustice to hold the railroad companies responsible for those evils of the transportation business which are the result of the system adopted by the people in creating these railroads.”³²² His rationale excused harmful or injurious actions by railroads as necessary costs of industrialization, and went on to attack the penal provisions defended by Reagan while making no reference to the behaviors targeted. His argument was rooted in the idea that it was wrong to punish people for actions that were not the result of personal “wickedness.” By locating the causes of corporate criminality in markets rather than pathologies, Fink defused defenses of the criminal provisions.

Testimony before the Cullom Committee in 1885 was no different. John D. Kernan, chairman of the New York Railroad Commission, argued that penal sanctions were inappropriate for regulating railroad’s policies “because they relate to and are a part of and share in the vicissitudes and disturbances of business.”³²³ George Richardson, former president of the Northern Pacific Railroad, stated that, “Sometimes the nature of trade is such that a man feels excused for being dishonest. It would be very difficult to enforce the [criminal] law.”³²⁴ By explaining their behavior through reference to markets rather than traits, Richardson and Kernan made their behavior seem less “criminal.”

Comparable claims were advanced on the floor of Congress. Representative William Phelps (R-NJ) claimed that Reagan’s bill foolishly attempted to “interfere with

³²² U.S. House Committee on Commerce, Arguments and Statements in Relation to Certain Bills Proposing Congressional Regulation of Interstate Commerce, 1884, 61.

³²³ “Report of Select Committee on Interstate Commerce. Testimony as to the Regulation of Interstate Commerce by Congress,” § Committee on Interstate Commerce, Select, Senate. 49th Congress, 1st Session (1885), 9.

³²⁴ U.S. Senate Select Committee on Interstate Commerce, “Report of the Senate Select Committee on Interstate Commerce, to Accompany Bill H.R. 1093,” 341–42.

[the] general laws” of the economy.³²⁵ He did not defend what the railroads did but was concerned that market functionality would be impeded by criminal sanction. This was an argument in which ideas about criminality justified Phelps’ preferences for minimalist state intervention in the economy.

Senator Orville Platt (R-OH) made a particularly emphatic defense of railroad leadership using this logic in the days preceding the law’s passage. One of the primary leaders of the Republican Party in the Senate, Platt opposed the inclusion of any criminal provisions, even as additions to the commission’s administrative interventions. He stated that penal sanctions should be reserved for actions that were “inherently wrong” and “not a necessary result of the system.”³²⁶ Platt argued that if these actions were driven by market structures, they were not “inherently wrong” and deserving of sanction.

Several Democrats agreed. Rep. Edward Seymour (D-CT) argued that, “experience shows that there must sometimes from the necessity of the case be rebates and drawbacks” and that criminalizing rebates constitutes “an attempt to make that a criminal offense which in the very nature of things ought not to be so made.”³²⁷ Senator James Pugh (D-AL) called penal provisions “impracticable” because they were designed “without any regard to differences or changes in the conditions, relations, or surrounding of the twelve hundred railroads running all over thirty-eight States.”³²⁸ Rep. Gilbert

³²⁵ U.S. Congress, *Cong. Rec.*, 1884, 16:371.

³²⁶ U.S. Congress, *Cong. Rec.*, 1886, 18:393.

³²⁷ U.S. Congress, *Cong. Rec.*, 1884, 16:41–45.

³²⁸ U.S. Congress, 16:1084–86.

Woodward (D-WI) similarly argued that the crimes specified in the law were really “[errors] of judgment” that “should not be treated as a crime.”³²⁹

Even Representative Martin Clardy (D-MO) agreed with this sentiment. Hailing from Missouri with a Populist base, Clardy was the second longest tenured member of the House Commerce Committee behind Reagan in the 1880s. But in 1885 Speaker John Carlisle went to great lengths to minimize Clardy’s role on the committee, appointing Charles Crisp to the second seat over Clardy. Crisp was a second-term representative that Democratic leaders felt was controllable, allowing party leadership to accommodate the interests of the Mugwumps that favored a commission. In 1885, Carlisle gave Crisp the seat instead of Clardy deliberately to minimize the voices of agrarian discontent so that a commission bill could be more easily passed.³³⁰

Despite the party’s assumption about his agrarian sympathies, Clardy spoke out against provisions in the Reagan bill. He stated that he disagreed with Reagan’s assessment “as to the justness” and “equity of the principle” embodied by the penal sanctions. He felt that it wrongly punished executives for errors of judgment that, although harmful, were outcomes of decisions made in the course of business.³³¹ It is telling that even Clardy, who party leaders feared would identify with agrarian radicals and oppose a commission, fought the penal sanctions on the grounds that the behaviors were not criminal but parts of business life.

³²⁹ U.S. Congress, 16:197.

³³⁰ Skowronek, *Building a New American State*, 133; U.S. Congress, *Senate, 1789-1989, V. 1*, 367; James, *Presidents, Parties, and the State*, 51–55, 93–98.

³³¹ U.S. Congress, *Cong. Rec.*, 1884, 16:286.

The first two pieces of this political construct of corporate criminality formed the core of the idea and laid the basis for the two other aspects of it. The notion that market structures were the cause of corporate crime led to the idea that punishing executives risked impairing economic functionality. In effect, it was a precursor to “too big to jail” politics. There was certainly hostility to government intervention in business before this point, but with the rise of large corporations, “too big to fail” and “too big to jail” became common philosophies of monitoring corporate activity.

This point was made repeatedly before the House Commerce Committee in the 1882 hearings. E.P. Alexander, an executive of multiple southeastern railways, criticized Reagan’s bill for treating railroad leaders as “robbers...of the most villainous kind” because this neglected to weigh the “compensating advantages” of their actions.³³² The day after Alexander testified, Chicago lawyers Emory Storrs spoke on behalf of several western railways. He similarly suggested that criminal provisions would “impair, and, as a final result, destroy, inter-State commerce.”³³³ Weeks later, director of the New York and Erie Railway George Blanchard stated before the committee that, “we [railroad directors] are not robbers or malefactors.” He claimed that punishing executives would interfere with the “great public trusts and benefits” they provide.³³⁴ Later during those same hearings, Albert Fink suggested that the “evils of the transportation business have been magnified to you by interested classes” who have represented those evils “as a great

³³² "Arguments and Statements," Committee on Commerce, House (1882), 53.

³³³ U.S. House Committee on Commerce, 83.

³³⁴ U.S. House Committee on Commerce, 107.

mountain, and its benefit as mole-hills.” He said that an accurate picture would depict the benefits as “a great mountain chain” while the evils would be a molehill.³³⁵

Legislators of varying partisan allegiances employed this logic. As early as 1885, Senator James Pugh (D-AL), a staunch ally of railroads and big businesses generally, argued that the Reagan bill would “impede the whole transportation of business of this country.”³³⁶ In the days before the final vote, Senator Joseph Brown (D-GA) argued that there “is no reason why Congress should seriously cripple all the great railroad interests of this country” due to the actions of “a few bad men.”³³⁷ Representative Jonathan Rowell (R-IL) similarly expressed these concerns, qualifying his support of the bill by criticizing the penal provisions and asserting that “There is another class of men who see only a set of robbers in transportation companies,” and that those who seek to punish them forget “that a bankrupt railroad company is like any other kind of bankruptcy, a bad thing for the community.”³³⁸ By focusing on the negative collateral consequences of a criminal prosecution, these arguments drew attention to the benefits of industrial growth in ways that obscured the harmful actions of railroads.

Concerns about market functionality raised a concern that formed the final feature of the corporate criminal image. It was feared that because the public did not understand the complexities of business, they would abuse the criminal law through frivolous

³³⁵ U.S. House Committee on Commerce, 192; See John Kernan’s statements in U.S. Senate Select Committee on Interstate Commerce, Report of Select Committee on Interstate Commerce. Testimony as to the Regulation of Interstate Commerce by Congress, 6–7, 20 for similar arguments.

³³⁶ Rothman, “The Structure of State Politics,” 824; U.S. Congress, *Cong. Rec.*, 1884, 16:1086.

³³⁷ U.S. Congress, *Cong. Rec.*, 1886, 18:572.

³³⁸ U.S. Congress, 18:856.

prosecutions. Railroad executives were thus not potential criminals, but potential victims of a vindictive public.

A legal representative of several Midwestern railways, attorney Darwin Hughes argued before the House Commerce Committee in 1882 that penal provisions would create “a hungry and mercenary swarm of informers and spies” hunting for violations.³³⁹ Albert Fink similarly argued that executives would “be treated as criminals” due to the allegations of people “entirely ignorant of the facts and the principles” of business. This, Fink warned, would “ruin the railroad companies,” and “the commerce of the country.” He stated that “the railroads have been wronged, not the people,” because the public has condemned railroads as criminals out of “misapprehension and ignorance.”³⁴⁰ Future Texas & Pacific Railway President John C. Brown stated that the punitive elements of the bill were “calculated to make railways and their officers and agents the prey of a horde of harpies.”³⁴¹ Two years later, Brown repeated that penal provisions would “crowd the dockets with blackmailing informations” because they offer “a premium for men to become spies.”³⁴² The assumption became that railroad executives, having not committed any crime, would be subjected to unwarranted prosecutions should the criminal provisions be included in the law.

Lawmakers shared this fear, suggesting that the penal provisions were a poorly thought out response to populist uproar. Rep. Roswell Horr (R-MI) suggested that the

³³⁹ "Arguments and Statements," Committee on Commerce, House (1882), 49.

³⁴⁰ U.S. House Committee on Commerce, 185, 192.

³⁴¹ U.S. House Committee on Commerce, 231.

³⁴² "Arguments and Statements," Committee on Commerce, House (1884), 100.

bill's supporters have "mistaken...local clamor for genuine public sentiment."³⁴³ Senator Orville Platt (R-CT) stated in the days preceding passage that the criminal provisions punish behaviors "entirely misunderstood in character, in purpose, [and] in results."³⁴⁴ Those like Horr and Platt concluded that the bill authorized criminal prosecutions only to satisfy an irrational and vindictive public.

This reasoning again crossed partisan and regional lines. Representative Edward Seymour (D-CT) stated that without a commission, the bill "tempted a new swarm of spies and informers."³⁴⁵ Senator Johnson Camden (D-WV) declared that a "class of agitators" was advocating for criminal provisions.³⁴⁶ Senator John Morgan (D-AL) argued that the criminal sanctions expose corporations "to a set of men who have no other interest in the world in the matter than to levy blackmail and to profit."³⁴⁷

The Commission received the most support from the more conservative Senate, although there was agrarian opposition to the commission from Democratic regions in both chambers. For example, Representative Andrew Caldwell (D-TN) called the commission "a Trojan horse and a deception to close the courts" against the rural shippers aggrieved most by railroads, while Charles O'Ferrall (D-VA) stated that a commission usurped the authority of Congress to enact the laws and the authority of courts to enforce them.³⁴⁸ Similarly, Iowa's James Weaver (D) expressed dismay that

³⁴³ U.S. Congress, *Cong. Rec.*, 1884, 16:120.

³⁴⁴ U.S. Congress, *Cong. Rec.*, 1886, 18:361.

³⁴⁵ U.S. Congress, *Cong. Rec.*, 1884, 16:45.

³⁴⁶ U.S. Congress, *Cong. Rec.*, 1885, 17:3556, 7290.

³⁴⁷ U.S. Congress, *Cong. Rec.*, 1886, 18:657.

³⁴⁸ U.S. Congress, *Cong. Rec.*, 1885, 17:7292-93, 7296.

Reagan and the House conferees permitted the commission in conference committee and retreated from the unambiguous statutory prohibitions Reagan had long defended.³⁴⁹

Scott James and Stephen Skowronek both attribute the agrarian House Democrats' capitulation on the commission to the political maneuvering of party leadership and the necessity of maintaining their tenuous coalition. James has shown that the final votes on the ICA were heavily correlated with partisan allegiance and region. Particularly, Democrats from Mugwump districts or areas with a threat of electoral contestation were more supportive of the bill, while Democrats from agrarian strongholds were more consistently opposed.³⁵⁰ However, in the final House vote, Democrats split with 128 in favor and only 15 against, showing remarkable consensus within the party.³⁵¹

A bipartisan consensus in both chambers led to a bill that weakened the initial statutory prohibitions, gutted the original agrarian proposal, and granted discretionary judgment to a commission. How a coalition of railroads and pro-business lawmakers politicized crime to achieve their goals is an ignored feature of this debate. The discourses they drew from embedded ideologies into regulatory law that distinguished corporate crime from street crime. Federal lawmaking relied on a political construct of corporate criminality that inverted popular images of natural criminality, which helped to produce institutional arrangements that channeled corporate criminals away from the criminal justice system and into regulatory venues.

There are many practical reasons that might explain why legislators from Democratic or Populist strongholds with records of support for agrarian demands rejected

³⁴⁹ U.S. Congress, *Cong. Rec.*, 1886, 18:818.

³⁵⁰ James, *Presidents, Parties, and the State*, 101–6.

³⁵¹ U.S. Congress, *Cong. Rec.*, 1886, 18:881.

criminal penalties. For example, many Republican Senators argued that small shippers could not defeat large railroads in criminal court and claimed that the commission would provide a more effective avenue for relief.³⁵² This argument could easily have been appreciated by agrarian Democrats. Nonetheless, the idea that corporate criminals were substantively different from “street” criminals had visible political significance during these debates. Whether they rejected or accepted the idea, lawmakers who opposed big business had to grapple with questions as to whether railroad executives fit popular assumptions of what a criminal looked like. The fact that the law submerged criminal sanctions underneath regulatory interventions indicates which political understanding of corporate criminality, the natural capitalist who could be regulated or ruthless robber baron who deserved punishment, prevailed in the debate.

The complexities of this debate illustrate what is missing by characterizing it as a confrontation between Populists and big business. It is true that some business leaders, like Rockefeller and Carnegie, drew on the rhetoric of the natural capitalist to justify their dogmatic adherence to laissez-faire. But while the ICA may not have been their favored outcome, other business leaders articulated a regulatory ideology that helped create a commission that served the interests of railroads while limiting the railroads’ susceptibility to prosecution. Unlike their strict laissez-faire counterparts, these business leaders drew on prevailing understandings of criminality in effective ways to achieve a favorable political outcome. While Populists often harshly condemned corporate power, many also accepted the era’s Social Darwinist discourses and were thus able to

³⁵² U.S. Congress, *Cong. Rec.*, 1884, 16:329, 1153–55, 1199; U.S. Congress, *Cong. Rec.*, 1885, 17:3477.

rationalize their anti-robber baron rhetoric with the idea that the robber barons were also not fully “criminal.” By speaking to the prevailing ideational currents of the period, railroads and their friends in Congress built a sizable enough coalition to lay the foundation of a regulatory state that reflected and reinforced the idea that law-breaking business leaders should be not be equated with common criminals.

IV. Crime Politics and the Aftermath of the Interstate Commerce Act

The politicization of crime in the ICA was entrenched within larger debates about economics, state power, and regulation. But in ensuing years, questions about corporate crime increasingly became subjects of debate in their own right. This section examines three political developments in the 1890s that grew out of the ICA debate and laid foundations for changes that will be explored in other chapters. Those developments include the passage of the Sherman Antitrust Act, amendments to the ICA, and shifts in discourse concerning corporate criminal liability.

The Sherman Antitrust Act of 1890

In 1890, Congress passed the Sherman Antitrust Act, the statutory cornerstone of American antitrust law. The act specified three means of punishing corporate efforts to restrain trade or create artificial monopolies. Violations could be punished through prosecutions resulting in a \$5,000 fine and one-year prison sentence, injunctions, or civil suits rewarding triple damages to injured parties. The use of equity and civil proceedings to suppress criminal violations mirrored the provisions of the Interstate Commerce Act, a

fact overlooked by Edwin Sutherland in *White-Collar Crime* when he argued that the use of injunctions and civil remedies to enforce the criminal law originated in Sherman.³⁵³

Notably, the Sherman Act did not create a commission. Discretion over how to punish wrongdoing was granted to the Department of Justice. Whereas legislators were commonly concerned that the DOJ lacked the institutional capacity to enforce the Interstate Commerce Act, lawmakers seemed less concerned with this in passing the Antitrust Act. This offers some validation to historical analyses arguing that legislators viewed the law as largely symbolic, but the lack of a commission became essential decades later in early twentieth century debates over antitrust law.

The act, which passed almost unanimously, has been explained as the product of consumer interests, producer interests, or as a disingenuous attempt at regulating trusts to satisfy the public.³⁵⁴ The legislative record offers significant evidence in support of Mark Graber's argument that Congress intentionally wrote the law vaguely and left the details to the Supreme Court in order to avoid politically charged questions.³⁵⁵ Nonetheless, legislators' widespread agreement over the bill is puzzling. Having just gained unified control of Congress and the White House, it is surprising that Republicans pursued

³⁵³ Sutherland, *White-Collar Crime*, 32–48, 62–69.

³⁵⁴ Robert H. Bork, "Legislative Intent and the Policy of the Sherman Act," *The Journal of Law & Economics* 9 (1966): 7–48 for the consumer welfare hypothesis; Christopher Grandy, "Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis," *The Journal of Economic History* 53, no. 2 (1993): 359–76 for the producer welfare hypothesis; Peter R. Dickson and Philippa K. Wells, "The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared," *Journal of Public Policy & Marketing* 20, no. 1 (2001): 3–14 on politics; Thomas W. Hazlett, "The Legislative History of the Sherman Act Re-Examined," *Economic Inquiry* 30, no. 2 (April 1, 1992): 263–76 on politics.

³⁵⁵ Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7, no. 35 (1993): 35–73.

antitrust policy before tariff policy given the tariff's centrality to the 1888 election.³⁵⁶ Historians have also noted that Senators with connections to big business including Rufus Blodgett, Henry Payne, Orville Platt, Leland Stanford, William McKinley, and Thomas Reed were inactive during debate.³⁵⁷ Sherman introduced the bill in December 1889, and it was signed after little debate the following July.³⁵⁸

An outspoken protectionist, John Sherman (R-OH) denied Democrats' allegations that the industrial tariff fostered trusts.³⁵⁹ He condemned Democrats' calls for tariff reform as a means of checking trust formation as "quack medicine."³⁶⁰ However, upon passage of the McKinley Tariff in September of 1890, Sherman stated industries "must not degenerate into monopoly, into trusts or combinations" after the law's passage. He claimed that if manufacturers formed trusts after the tariff's passage that he would, "be as ready to repeal this law as I am now ready to vote for it."³⁶¹ That he threatened to repeal the tariff instead of using antitrust law to break up trusts not only reveals that Sherman was aware of the relationship between trusts and tariffs, but also that he had little faith in

³⁵⁶ Bense, *The Political Economy of American Industrialization*, 116-123 on antitrust policy; 476-478 on tariffs in the 1888 election.

³⁵⁷ Thorelli, *The Federal Antitrust Policy*, 215-216. The law passed 52-1 in the Senate and 242-0 in the House.

³⁵⁸ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Fiftieth Congress, 2nd Session*, vol. 20 (Washington: Government Printing Office, 1888), 7513; U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Fifty-First Congress, 1st Session and Special Session of the Senate*, vol. 21 (Washington: Government Printing Office, 1889), 2456, 2660, 2901, 3148, 4089.

³⁵⁹ Hazlett, "The Legislative History," 268-69; U.S. Congress, *Cong. Rec.*, 1889, 21:2569.

³⁶⁰ U.S. Congress, *Cong. Rec.*, 1889, 21:2470-72 (Sen. Vest, D-MO); 2609 (Sen. Morgan, D-AL); 4098 (Rep. Sayers, D-TX); 4099 (Rep. Wilson, D-WV); 4102 (Rep. Fithian, D-IL).; For Republicans who rejected these claims, see U.S. Congress, 21:2470-72 (Sen. Allison, R-IA, Sen. Teller, R-CO), 4098 (Sen. Taylor, R-OH), 4099 (Sen. Cannon, R-IL), 2569 for Sherman's quote on quack medicine.; See Grandy, "Original Intent and the Sherman Antitrust Act," 370, who suggests that this comment aggravated his Senatorial colleagues so much that the bill was referred to the Judiciary Committee and out of Sherman's control at least partially out of spite.

³⁶¹ U.S. Congress, *Cong. Rec.*, 1889, 21:10668; Dickson and Wells, "The Dubious Origins of the Sherman Antitrust Act," 11.

the antitrust law he sponsored. In this context, the antitrust law appears to have served as political cover to pass the more controversial McKinley Tariff.

What little debate there was over the bill involved some discussions over criminalizing trusts and concerns about corporate criminal liability. Sherman's original bill included provisions making violations of the law punishable by a fine of \$5,000 and prison sentence of five years. Senator James George (D-MS) voiced the only significant concern, arguing that the difficulties in proving that a trust acted with the *intent* to prevent competition brought with it difficulties that would render the law ineffective.³⁶² A revised version in March removed criminal provisions entirely, which Sherman attributed to George's complaints. He concluded that determinations of how exactly trust formation should be punished "shall be defined by the courts."³⁶³ When Democrats opposed the removal of criminal provisions, including now Senator John Reagan (D-TX), Richard Coke (D-TX), and the moderate James Pugh (D-AL),³⁶⁴ Sherman claimed that it was "best to omit the criminal clause and to leave that for future consideration."³⁶⁵

The bill was transferred to the Judiciary Committee in March, away from Sherman. It was amended once more to include penal provisions instituting a maximum fine of \$5,000 and prison sentence of one year for violations.³⁶⁶ But on the floor, Republicans fought to include injunctions in the law as well. Senator George Vest (D-MO) railed against the regulatory ideology defended by Republicans, contending that the

³⁶² U.S. Congress, *Cong. Rec.*, 1889, 21:1766.

³⁶³ U.S. Congress, 21:2457.

³⁶⁴ U.S. Congress, 21:2469, 2473, 2561.

³⁶⁵ U.S. Congress, 21:2562.

³⁶⁶ This revision was likely driven by four Democrats (George, Pugh, Coke, and Vest) and one Republican (Ingalls) who expressed support for criminal provisions during floor debate. See U.S. Congress, 21:2473, 2561, 2597–2601, 2614–16, 2644.

inclusion of fines and injunctions sent the message to trust executives that “You are a lot of criminals, thieves, and robbers, but if you will give us a thousand dollars we will let you go on robbing.”³⁶⁷ Equity proceedings were incorporated as an alternative to the criminal law, giving Republicans the ability to proclaim that they incorporated a “grave penalty” while making the law almost wholly nominal in effect.³⁶⁸

Five years after its passage, the Supreme Court constrained the scope of the law in the decision *US v. EC Knight Co.* (1895). The EC Knight Company controlled 98% of the sugar refining business, prompting lower courts to issue an injunction. When the case reached the Supreme Court, it concluded that EC Knight only possessed a monopoly over manufacturing, which was confined to one state and thus not vulnerable to congressional control via the interstate commerce clause. The Court concluded that the trust did not engage in restraint of trade and that its monopoly only “incidentally and indirectly” impacted interstate commerce.³⁶⁹ As Arnold Paul has written, *EC Knight* cleared “the way for a tremendous concentration of capital, unrestrained by fear of effective prosecution; by the time court views were modified in the next decade, ‘bigness’ had become entrenched in the economy.”³⁷⁰ To evade antitrust actions, businesses integrated into consolidated holding companies insulated from prosecution.³⁷¹

The Sherman Act quickly became a useful tool in the federal government’s fights

³⁶⁷ U.S. Congress, 21:2564, 2568, 2640, 2644 (Vest quote), 2725. Republicans John Sherman (R-OH), Orville Platt (R-CT), John Sponner (R-WI), and George Hoar (R-MA) spoke out for alternative sanctions.

³⁶⁸ U.S. Congress, 21:3146.

³⁶⁹ *US v. EC Knight Co.*, 156 U.S. 1 (1895); *US v. Hopkins et al.*, 171 US 578 (1898) reiterated *Knight* in dismissing an action in equity against the Kansas City livestock exchange on the grounds that its business was local in character and its monopoly only indirectly impacted interstate commerce.

³⁷⁰ Paul, *Conservative Crisis*, 227.

³⁷¹ Lamoreaux, *The Great Merger Movement*, 159–80; Bensel, *The Political Economy of American Industrialization*, 319–20.

against labor.³⁷² One of the first cases of the Sherman Act's application occurred in 1892 during the general transportation strike in New Orleans. Upholding an injunction against the strikers, District Judge Billings stated that in writing the Sherman bill, it sought to "include combinations of labor, as well as of capital" in targeting "combinations in restraint of commerce."³⁷³ Billings' conclusions do reflect some of the tensions in the debates over the bill. As early as February of 1889, James George expressed concern that the Sherman law would target organized labor.³⁷⁴ Sherman stated that unions "are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported."³⁷⁵ He added an amendment exempting labor that disappeared before passage, giving judges a weapon in the state's efforts to repress labor organizing.

Railroad Managers, the ICC, and Amending the Law

The Interstate Commerce Act did not remain in its initial state for long. Congress amended the law on several occasions through the 1890s, and the ICC repeatedly pleaded for legislative reforms to improve the law's efficacy. But many of these changes were often made at the behest of railroads and further insulated them from punishment.

The law was first amended in 1889. While the initial ICA only instituted fines as punishment for criminal violations, legislators quickly revived debates about whether imprisonment was necessary. Shelby Cullom argued that, "the law will be more strictly obeyed and more thoroughly enforced if those guilty of violating it are...made subject to

³⁷² Thorelli, *The Federal Antitrust Policy*, 597; Paul, *Conservative Crisis*, 110–16 discusses the use of the ICA to obtain an injunction against strikers working for the Toledo, Ann Arbor, and Northern Michigan Railway.

³⁷³ Paul, *Conservative Crisis*, 109–10.

³⁷⁴ U.S. Congress, *Cong. Rec.*, 1889, 21:1458–59.

³⁷⁵ U.S. Congress, 21:2562–66.

imprisonment,” contradicting his earlier arguments opposing Reagan’s proposals. Cullom proposed amendments that passed in 1889 granting courts the authority to mete out fines, prison sentences, or both if the ICC referred evidence to the DOJ.³⁷⁶

While Cullom’s amendments seemed to counter the railroads’ preferences, Thomas Bayne’s (R-PA) comments suggest otherwise. His statements on the floor of Congress indicate that the passage of these facially strict prohibitions may have been disingenuous. Bayne called the amendment “a scheme in the interest of the railroad corporations,” noting that railroads favored clear prohibitions on rebating since large shippers like Standard Oil frequently extorted rebates from carriers. But Bayne pointed out that the criminal provisions would more likely hurt small shippers who erroneously underreported the weights of their shipments, not bigger corporations like Standard Oil. Given that the purpose of the ICA itself was to protect shippers, Bayne pleaded with Congress to hear from both sides before accepting an amendment recommended by the carriers it was designed to regulate.³⁷⁷

On the day of the bill’s passage, Albert Anderson (R-IA) seconded Bayne’s concerns. He argued that the proposal was pushed by railroads to divert sanction away from executives. He was dismayed that the amendment “makes the shipper *particeps criminis* [an accomplice] with the common carrier” and was critical that “the Interstate Commerce Commission was pushing this amendment, unasked and uninvited, on the

³⁷⁶ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Fiftieth Congress, First Session*, vol. 19 (Washington: Government Printing Office, 1887), 5146.

³⁷⁷ U.S. Congress, *Cong. Rec.*, 1888, 20:1475-78. Bayne’s arguments were far-fetched. He claimed that shippers should be allowed to ship at lower rates because should their goods be damaged, they would get reimbursed at lower rates than they valued their products at. By forcing shippers to classify their rates appropriately, Baynes contended they would have to pay more to common carriers even if they were willing to risk a loss by classifying it at a lower rate.

floor.” He pointed out that the amendment not only directed the law’s attention onto small shippers, but onto lower-level employees of railroads, a trend that reflected the insistence of railroad presidents that “their clerks and subordinates are the law-breakers, and that they [directors and presidents] are honest men and not responsible.”³⁷⁸

The statements from Baynes and Anderson were futile as Congress approved the amendments almost unanimously. There is evidence that railroads were the ones pushing for these criminal provisions. Railroads had long been hostile to large shippers, most famously Standard Oil, which could strong-arm them into offering rebates.³⁷⁹ Reports from the ICC indicate that these amendments were designed to target shippers more than carriers. In its first annual report, the commission stated that shippers’ billing practices should be the object of punishment. They cited the Chicago Board of Trade’s demands for amendments “which should make the fraudulent shipper criminally responsible for his conduct.” The ICC agreed and suggested that, “The possibilities for fraud which may be contrived between unscrupulous shippers and weak or unreliable employees are enormous.” Particularly interesting are the ICC’s comments that the agents who process merchandise are often “not upon the highest plane of honorable conduct,” suggesting that the dispositions of lower-level agents tend towards criminality more than those of executives. The ICC proposed amendments penalizing shippers for false billing, classification, or weighing.³⁸⁰

³⁷⁸ U.S. Congress, 20:2667–69.

³⁷⁹ Hudson, *The Railways and the Republic*.

³⁸⁰ U.S. Interstate Commerce Commission, *Interstate Commerce Commission Reports, Volume I. Reports and Decisions of the Interstate Commerce Commission of the United States. April 5th, 1887 to April 5th, 1888*, vol. 1 (New York: LK Strouse & Co., 1888), 647, 650, 656.

The railroads' demands for harsher criminal provisions served two purposes. First, it deflected blame from executives onto lower-level employees who, as the ICC argued, operate on a lower plane of conduct. As Albert Anderson stated, the reasoning for the amendments "is in keeping with the charge of the railroad presidents and their clerks that their subordinates are the law-breakers, and that they are honest men and not responsible."³⁸¹ Second, the law redirected criminal sanction onto shippers rather than carriers, which put smaller shippers—who were the main constituency the bill was supposed to protect—in the sights of the criminal law. Through character defenses of their executives and directors, railroads were able to deflect blame lower down the corporate hierarchy and onto other corporate actors.

The Political Foundations for Corporate Criminal Liability

An ongoing debate during the ICA's passage was whether or not corporate entities should be the subject of punishment instead of individuals. For years prior to the Interstate Commerce law's passage, state and federal courts began holding corporations criminally responsible for their agents' actions.³⁸² The Supreme Court would validate this practice in 1909, but in the late nineteenth century statutory law remained unclear on the question. In debates over the ICA, members of Congress were largely resistant to the idea that corporations could be criminally punished and thought it was impossible to attribute criminal intent to a faceless organization. But the foundation for the twentieth century debates over corporate liability actually had its origins in deliberations over the ICA.

Shifts towards corporate liability were part of the development of corporate

³⁸¹ U.S. Congress, *Cong. Rec.*, 1888, 20:2669.

³⁸² Laufer, *Corporate Bodies and Guilty Minds*.

personhood in the common law, as the Supreme Court ruled in the 1886 case *Santa Clara County v. Southern Pacific Railroad* that the 14th amendment's equal protection clause applied to corporations.³⁸³ In conjunction with personhood doctrine, the emergent notion of corporate "souls" further anthropomorphized the corporation. In order to restore faith in the moral integrity of their businesses, directors of railroads and other corporations instituted public relations campaigns in the 1870s and 1880s. By highlighting their community involvement, provision of benefits, and attention to social justice, corporations aimed to counteract public anxieties about corporate wrongdoing through metaphors of the "corporate soul."³⁸⁴ Railroads and other big businesses used this imagery to create a legal and social construct of the "corporate body" that had a degree of moral legitimacy.

Despite emergent notions of corporate soulhood and personhood, congressional lawmakers and railroad industry leaders were largely opposed to the prospect of punishing corporations rather than individuals in the 1880s. Reagan particularly disapproved of the idea, repeatedly referring to the adage that "corporations have no

³⁸³ *Santa Clara County v. Southern Pacific R. Co.*, 394 U.S. 118 (1886); Despite being initially designed to protect the citizenship rights of freed slaves, the 14th amendment was commonly used to protect "corporate persons." Between 1872 and 1910 only 0.5 percent of Supreme Court rulings invoking the 14th amendment protected African Americans, but more than 50 percent extended rights protections to corporations. See *Connecticut General Life Insurance Co. v. Johnson* (U.S. 1938); for an excellent account questioning the legitimacy of the Santa Clara case, see Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright Publishing, 2018).

³⁸⁴ Roland Marchand, *Creating the Corporate Soul: The Rise of Public Relations and Corporate Imagery in American Big Business* (Berkeley: University of California Press, 1998) introduction and chapter 1; Fraser, *The Age of Acquiescence*, 105, 116; "A.B. Stickney's Scheme: The Plan of the Minnesota & Northwestern President.," *Chicago Daily Tribune*, December 4, 1887; "A Corporation with a Soul," *Los Angeles Times*, July 4, 1886; "One Corporation With A Soul," *The Washington Post*, October 2, 1881; "The Chicago, Burlington & Quincy Railway Company Demonstrates That There Are Corporations That Have a Soul," *Chicago Daily Tribune*, February 22, 1882; "A Generous Corporation," *Chicago Daily Tribune*, February 14, 1879; "A Corporation That Has A Soul," *Chicago Daily Tribune*, August 23, 1878.

bodies to be kicked and no souls to be damned.”³⁸⁵ Former Tennessee Governor and future president of the Texas and Pacific Railroad John C. Brown, a foe of Reagan’s initial ICA proposal, agreed with him on this issue. He argued before the House Commerce Committee in 1882 that, “a corporation...is not an individual” and “cannot be vindictive,” claims that he reiterated two years later.³⁸⁶ This rationality suggested that guilt is personal, and that to commit a crime one has to have exhibited criminal intent.

It should be noted that corporate personhood doctrine was used in diverse ways. Some legislators cited the idea of corporate personhood to criticize Reagan’s bill. For example, Representative Thomas Browne (R-IN) stated that Reagan’s proposal was excessively punitive and that, “We ought to treat corporations as we treat others who have rights under the law.”³⁸⁷ This logic posited that corporations should be the targets of the criminal law in order to afford them the rights granted to anyone accused of a crime.

The idea of punishing corporations was rarely discussed on the floor of Congress, as the general assumption guiding legislative debate was that the law would target individuals. But courts continued to issue decisions treating corporations as criminally punishable entities through the 1890s.³⁸⁸ Congress’s decision to punish individuals rather than corporations set the stage for a political conflict over the question of corporate versus individual liability. Political demands for corporate criminal liability came most conspicuously from the ICC. Interestingly, the ICC cited the testimony of railroad agents as their reasoning for supporting corporate liability.

³⁸⁵ "Arguments and Statements," Committee on Interstate Commerce, House (1882), 235–36.

³⁸⁶ U.S. House Committee on Commerce, 213.

³⁸⁷ U.S. Congress, *Cong. Rec.*, 1884, 16:530.

³⁸⁸ Laufer, *Corporate Bodies and Guilty Minds*.

The ICC's reports in the 1890s indicate that railroad managers consistently influenced the Commission's policy positions. The ICC regularly cited testimony from railroad managers as favoring corporate liability because they were unwilling to provide incriminating testimony against colleagues. Directing liability against the corporation rather than individuals protected middle-tier managers in ways that would make railroad employees more willing to turn over incriminating information. The ICC's reports also claimed that district attorneys lacked the institutional capacity to convict individual offenders and supported corporate liability as a practical alternative. It is unclear why the ICC thought prosecutors could charge large corporations if they lacked the capacity to convict individuals. The ICC's support for entity liability was rooted in the political demands of railroad managers seeking to insulate themselves from the criminal law.

A strong case in point of the railroads' influence on the ICC appears in the ICC's 1890 report. The Commission noted that carriers were resistant to retaliate against competitors through prosecution. Because "few carriers feel themselves entirely secure in the matter of the observance of the law," they tried to avoid invoking penal provisions. The prevalence of legally questionable behavior as an industry norm impeded the criminal law's enforcement. The report concluded that without cooperation from carriers or the injured parties, the ICC was powerless to enforce the law. The ICC concluded by considering without definitively supporting the notion of corporate criminal liability.³⁸⁹

In 1891, the ICC went further by condemning the criminal provisions of the Act as "defective" for only applying to individuals and not corporations. The fact that

³⁸⁹ U.S. Interstate Commerce Commission, *Annual Report of the Interstate Commerce Commission*, vol. 4 (Washington: Government Printing Office, 1890), 8, 66, 337.

criminal proceedings were instituted against individuals who did not directly benefit from the violation created “a sentiment in the minds of the public” that “militates against conviction.” The report noted that the ICC’s primary means of enforcement—that its findings were to be treated as prima facie evidence in courts—had been gutted by court rulings reviewing ICC findings de novo, essentially affording no deference to the commission’s findings.³⁹⁰ This left the ICC even more desperate to find a workable means of enforcement.

By 1894, it became clear that railroad managers were pushing for corporate criminal liability. The ICC’s report stated the following:

...we may properly allude to certain modifications of the penal provisions of the act, which are advocated by many railroad managers. It is proposed by them to exempt the officers and employees of carrying corporations from criminal liability for rate cutting and similar offenses, and to impose such liability solely upon the corporations themselves. In brief, the argument is that the extreme severity of the present law operates to prevent its enforcement; that railway managers will not give information against their rivals when the consequence might be the imprisonment of individuals with whom their personal relations are friendly and familiar, but that such disclosures would be freely made if they resulted only in the imposition of a fine upon the offending corporation.³⁹¹

Railroad managers openly informed the Commission that they would not provide incriminating information against individuals with whom they “are friendly and familiar,” but would gladly do so if it meant the imposition of a fine against a corporation. The Commission claimed that the wrongs committed involved “a high

³⁹⁰ U.S. Interstate Commerce Commission, *Fifth Annual Report of the Interstate Commerce Commission*, vol. 5 (Washington: Government Printing Office, 1891), 16 for quotes; also see U.S. Interstate Commerce Commission, *Sixth Annual Report of the Interstate Commerce Commission*, vol. 6 (Washington: Government Printing Office, 1892), 41–42 for similar statements.

³⁹¹ U.S. Interstate Commerce Commission, *Eighth Annual Report of the Interstate Commerce Commission*, vol. 8 (Washington: Government Printing Office, 1894), 15.

degree of moral turpitude” warranting imprisonment, but that they were not ready to attach liability to corporations in lieu of individuals without further consideration.³⁹²

The 1895 annual report explored this point further. The ICC stated that it was at “the special insistence of railroad managers...that the imprisonment features of the present law be repealed” and that all penal sanctions be limited to fines. The managers argued that the imprisonment clause acted as a “shield to the guilty.” Given the “resultant disgrace” following a conviction, managers claimed that persons with knowledge of incriminating facts refused to share them with prosecutors, aware “of the possible consequences to the wrongdoer.” Yet the report still stated that the ICC was not yet ready to take a stand on the question.³⁹³

Testimony from Aldace Walker before the ICC was cited directly in the 1898 report. As the former president of the Santa Fe Railroad and current receiver of the Atlanta and Pacific Railroad, Walker’s testimony demonstrated how high-ranking railroad directors and executives perceived the criminal provisions.

Mr. Walker: ...It is very difficult to get the absolute facts which are considered as necessary by the courts to punish railroads that are suspected...It results to a considerable extent from the reluctance of the railways to help.

The Chairman: To have the penalties attached to the misdemeanors enforced against their rivals?

Mr. Walker: Against their associates. That puts them in the position of being informers, and, as has been said, in this country an informer is worse than the criminal in the eyes of the public.³⁹⁴

³⁹² U.S. Interstate Commerce Commission, 8:16.

³⁹³ U.S. Interstate Commerce Commission, *Ninth Annual Report of the Interstate Commerce Commission*, vol. 9 (Washington: Government Printing Office, 1895), 23.

³⁹⁴ U.S. Interstate Commerce Commission, *Interstate Commerce Commission Reports, Volume VII. Reports and Decisions of the Interstate Commerce Commission of the United States. September, 1896, to May, 1898*, vol. VII (Rochester: Lawyers Co-Operative Publishing, 1898), 66.

Walker's testimony indicated that he and other railroad men disobeyed the law because of a widespread lack of cooperation among railroads. Industry norms of legal violations of the act did not result in prosecution, but instead fostered reciprocal relationships between competitors—everyone violated the law, so no one reported it.

By the end of the nineteenth century, the ICC completed a reversal in its policy position. In 1899, its annual report argued that the law targeted “Men who in every other respect are reputable citizens” for “acts which, if the statute law of the land were enforced, would subject them to fine or imprisonment.” The commission argued that, “It is difficult to estimate the moral effect of such a condition of things upon a great section of the community.” It concluded that, “we are convinced that criminal remedies as applied to the present situation are utterly inadequate to prevent departures from published rates.” In lieu of individual liability, the ICC endorsed corporate criminal liability.³⁹⁵

The ICC's reorientation towards corporate criminal liability was largely facilitated by managers' demands, but it is remarkable that this is not how the ICC justified its policy recommendations in 1899. Instead, it referred to the agents and officers punished as “reputable citizens” whose punishment would have a negative “moral effect” on the community. That judgments about the dispositions of corporate executives emerged in this context even though the debate seemed removed from these ideas highlights the broad political purchase of the “corporate criminal” construct present in the ICA debates. It is true that the shift towards corporate liability appears to have been

³⁹⁵ U.S. Interstate Commerce Commission, *Twelfth Annual Report of the Interstate Commerce Commission*, vol. 12 (Washington: Government Printing Office, 1899), 19.

rooted in debates about efficacy, but that these ideas resurfaced as the ICC made a significant shift in their policy position after a decade of equivocation indicates that these ideas were still powerful forces in political discourse. This ideational construct of the corporate criminal remained a prevailing idea that policymakers had to address when justifying their policy positions.

By 1902, the ICC's annual report made strong demands that without amendments to criminalize corporate entities, the law's criminal sections "are practically a dead letter."³⁹⁶ This trajectory towards corporate criminal liability is surprising given the attitudes of the ICC Commissioners in the early 1890s. Commissioners' correspondence with lawmakers and attorneys repeatedly expressed concerns that district attorneys lacked the resources to carry out litigation under the ICA. Calling them "unequal to the work...[and] duties" required of them in the law, commissioners stated that prosecutors' failures to secure convictions made the ICC appear weak. Commissioners frequently requested that DAs receive extra resources to perform the functions required of them.³⁹⁷

In this context, it is hard to understand why the commission shifted towards supporting corporate criminal liability. If prosecutors lacked the capacity to charge individuals, requiring them to punish large corporate entities without additional resources made little sense. There were arguments that the ICC could have made, such as that

³⁹⁶ U.S. Interstate Commerce Commission, *Sixteenth Annual Report of the Interstate Commerce Commission*, vol. 16 (Washington: Government Printing Office, 1902), 8–9.

³⁹⁷ Morrison, W.R. to S.M. Cullom, "General Letters of the Interstate Commerce Commission, Vol. 6," July 1, 1890, 100–101, National Archives II, College Park, MD; Morrison, W.R. to William S. Holman, "General Letters of the Interstate Commerce Commission, Vol. 9," April 18, 1892, 187, National Archives II, College Park, MD; Morrison, W.R. to Richard Olney, "General Letters of the Interstate Commerce Commission, Vol. 12," August 16, 1893, 1–3, National Archives II, College Park, MD; Worll, James W. to J.W. Blythe, "General Letters of the Interstate Commerce Commission, Vol. 9," April 25, 1892, 220–21, National Archives II, College Park, MD.

detecting individual liability within a large corporation was difficult or that corporations benefitted more directly from criminal acts than individuals, but these arguments were not advanced. Instead, the ICC abandoned their concerns about prosecutorial capacity over the course of the decade. This suggests that railroad managers were essential to framing and defining what ideas and concerns mattered to this debate.

The shift towards corporate criminal liability was politically constituted by the demands of railroad managers as channeled through the ICC. This complements Chandler's conclusions regarding the "managerial revolution" in American business in the late nineteenth century, demonstrating that railroad managers were key political players shaping policy.³⁹⁸ But it highlights how these managers shaped political debate by defining the nature and scope of the conflict and delimiting the range of possible solutions policymakers considered.³⁹⁹ Chapter 5 unpacks regulatory developments during the early twentieth century, further exploring these political origins to corporate criminal liability and the doctrine's development during the Progressive era.

V. Conclusion

Gilded Age constructions of corporate criminality sharply countered prevailing constructions of criminality. The thief, the murderer, and the vagrant were born criminal and could be preemptively identified on sight based on their class, skin color, or accent. In contrast, the ruthless robber baron was born to be a capitalist. His actions may have looked similar to theft, but he was a survivor of capitalism rather than a criminal. These

³⁹⁸ Chandler, *The Visible Hand*; U.S. Interstate Commerce Commission, *ICC Reports and Decisions*, 1898, VII:66.

³⁹⁹ Schattschneider, *The Semisovereign People*; Peter Bachrach and Morton S. Baratz, "Two Faces of Power," *The American Political Science Review* 56, no. 4 (1962): 947–52.

divergent constructions of criminality reflected a shared set of assumptions of who and what counted as “criminal.”

The inequalities of American crime policy have long been rooted in social, economic, and material inequalities, but scholars have failed to appreciate how these inequalities have been embedded into political constructions of criminality. Of course, corporations can avoid prosecution by buying strong legal defense teams, capturing agencies, or initiating capital strikes, but the story presented in this chapter reveals other dynamics that shape business-government relations. Businesses cannot simply achieve their goals by bullying political actors into conceding to their demands. They must be strategic, remain attentive to prevailing discourses, and frame their demands within them so as to communicate their policy goals in ways that resonate with policymakers and the public. While the creation of the ICC was a loss for business leaders who exhibited a dogmatic adherence to absolute laissez-faire, it was a victory for those who advocated regulatory ideology and deployed prevailing discourses about crime and social Darwinism to design the ICC to their liking. This group of business leaders knew that supporters of laissez-faire countered anti-robber baron rhetoric with Social Darwinist discourse, understood that criminality was popularly conceived in bio-deterministic terms, and realized how these ideas could be synthesized into a regulatory ideology that could insulate them from criminal sanction. This illustrates how dominant ideas, ideologies, and discourses of a moment can powerfully shape how business interests behave politically and articulate their policy goals.

The Interstate Commerce Commission’s creation is often understood as the laying the foundation for the modern regulatory state. But agencies like the ICC are explicitly

designed to monitor behavior defined as criminal, and research on the political development of the regulatory state often ignores its relation to crime politics. This chapter illustrates why regulatory politics should be understood as a brand, or at least a relative, of crime politics. The regulatory politics of the nineteenth century were shaped by the same collection of ideas and ideologies that informed the politics of street crime during this period, but Darwinist theory and bio-determinism were used to conceptualize corporate criminality favorably. The strategic use of these ideas entailed articulating a unique construct of corporate criminality that diverged from prevailing constructions of street criminality, which then became embedded into the regulatory state's design.

Studying street crime politics in juxtaposition to regulatory politics can shed light on how prevailing discourses and modes of thought in American politics have been used to rationalize inequalities in crime policy. Divergent Gilded Age political constructions of street and corporate criminality reflected and reinforced common ideas about who and what counted as crime and became embedded into state institutional frameworks. In the early decades of the twentieth century, similar developments would unfold out of common ideational and ideological currents relating to eugenics and state administration.

CHAPTER 4: EUGENICS, CRIME SCIENCE, AND PROGRESSIVES

“I wish very much that the wrong people could be prevented entirely from breeding; and when the evil nature of these people is sufficiently flagrant, this should be done. Criminals should be sterilized and feeble-minded persons forbidden to leave offspring behind them.”

- President Theodore Roosevelt, 1913⁴⁰⁰

As America adapted to rapid industrialization and urbanization, the nation continued to experience unprecedented levels of immigration, inequality, labor mobilization, and industrial consolidation. But the Progressives of the early twentieth century widely rejected the “survival of the fittest” ethos of Social Darwinism that dominated late nineteenth century politics. Whereas Gilded Age political actors viewed Social Darwinism as a rationalization for the inequalities of capitalism, Progressives believed the government could be a powerful tool that could eradicate social ills. Progressives insisted that an active government promoting an agenda of social welfare could solve social problems related to class warfare, racism, inequality, and criminality. They fought for a stronger state that they believed could humanize industrial capitalism.

However, Progressives did not believe the system could or should be humanized for everyone. Progressives routinely coupled welfarist impulses with a politics of exclusion built on scientific racism and eugenics. Instead of allowing natural selection to run its course, Progressives pursued an agenda of artificial selection in which the state proactively identified the “unworthy,” including mental defectives, minorities, and undesirables, and sorted them out of the “worthy” population before they damaged society or infected the nation’s racial stock. This governing philosophy produced rigid

⁴⁰⁰ Theodore Roosevelt, “Twisted Eugenics,” *The Outlook* 106 (1914): 32.

immigration restrictions, repressive monitoring of poverty, labor, and racial minorities, and state sanctioned compulsory sterilization laws.

The two prongs of the rehabilitative ideal had a natural appeal to Progressives articulating an agenda of inclusion for the worthy and exclusion for the unworthy. They adapted the works of Lombroso, Brockway, and rehabilitative scholars by attaching them to a new set of policy commitments and a new understanding of the state's role. The state should not sit idly by and wait for natural criminals to reveal themselves, but rather engage in a process of artificial selection by proactively identifying, detaining, and sterilizing them before they committed serious crimes or spread their racial stock. Progressives' social welfarist and exclusionary politics were thus both rationalized in the name of progress and necessitated an expansion of the government's crime control powers.

In this context, the class-skewed character of the rehabilitative ideal took on a new significance. The criminal repression and sterilization of the poor, minorities, mental defectives, and criminals became a project of class sorting in the Progressive Era. The rehabilitative model directed lawmakers and penologists to look to individuals' behavioral histories, personal and racial traits, and socioeconomic background as evidence of their propensity to commit crime. This justified the Progressives' political choices to mete out harsh justice for the poor and disadvantaged while the crimes of elites continued to take on alternative meanings.

The chapter begins by unpacking the meaning of "progressive" during the Progressive Era, outlining core ideological and ideational consistencies across varying strands of progressivism in the early twentieth century. This is followed by an analysis of

the constructions of criminality produced within this context. Hereditarian theory is particularly emphasized, as it was widely embraced by race scientists, economists, and eugenicists in the early twentieth century. This section stresses the evolution of the social sciences at the turn of the century, showing that while criminal anthropologists and sociologists dominated the social science of crime in the nineteenth century, eugenicists and economists became critical intellectual forces in the twentieth century. The subsequent section explores the legacies of Gilded Age crime politics, illustrating how Progressives rationalized forms of class control, racial control, and criminal sanction created in the nineteenth century through eugenics-based politics. This is followed by an account of how eugenics scholars, reformers, and political activists deployed eugenic ideas about crime to secure policy reform through compulsory sterilization statutes. The chapter concludes with a brief examination of the influence of progressive constructs of criminality on 1920s politics, examining the rise of the crime commission and the influence of eugenic criminology.

I. The Ideational and Ideological Currents of the Progressive Era

The label “progressivism” has had multiple meanings over the course of American political history. During the Progressive Era, it is important to realize that the phrase was not attached to a particular political ideology or set of policy commitments. Rather, “progressivism” referred to a specific set of philosophical and governing principles about the role the state should play in modern society. Progressives adopted such diverse ideological perspectives that in 1912 the three major presidential candidates, all from different parties, identified as Progressives.

Progressives of varying party allegiances shared a few basic precepts. They critiqued the constitution, its emphasis on individual rights, and the role of parties, corruption, and bossism in American politics. They favored a state that was administered by experts and professionals, advised by knowledge-based communities, and anchored governance in science. Discourses of determinism, heredity, and eugenics flourished in this setting.⁴⁰¹

Three ideational and ideological features of Progressive political thought created a fertile ideological terrain for these developments. First, Progressives believed that the modern state should be guided by science rather than politics. It was thought that disinterested, nonpartisan, objective experts would run the state more efficiently than politically motivated individuals selected by party bosses. Despite their diverse factions, Progressives relied on expertise by drawing from a historically specific set of scientific and intellectual discourses that shaped the politics of the early twentieth century.⁴⁰²

Central to this discursive universe were the sciences of heredity, including Darwinism, scientific racism, and eugenics. These frameworks presented social, moral, and economic failure as outcomes of biological inferiority among society's weakest and most defective. But it was the eugenics movement that pushed the conclusions of race

⁴⁰¹ Stephen Skowronek and Stephen Engel, "The Progressives' Century," in *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State*, ed. Stephen Skowronek, Stephen Engel, and Bruce Ackerman (New Haven: Yale University Press, 2016), 1–15; Nicole Mellow, "The Democratic Fit: Party Reform and the Eugenics Tool," in *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State* (New Haven: Yale University Press, 2016), 197–218.

⁴⁰² Daniel Rodgers, "In Search of Progressivism," *Reviews in American History* 10, no. 4 (December 1982): 113–32; Rogers Smith, "The Progressive Seedbed: Claims of American Political Community in the Twentieth and Twenty-First Centuries," in *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State*, ed. Stephen Skowronek, Stephen Engel, and Bruce Ackerman (New Haven: Yale University Press, 2016), 264–90; Skowronek and Engel, "The Progressives' Century."

science and evolutionary theory to new extremes. Whereas bio-determinist logic during the Gilded Age rationalized a “survival of the fittest” approach to economics and social policy, eugenics called for a greater expansion of state power. Eugenicists believed it was the state’s duty to identify and sort out the unfit as part of an effort to regulate breeding and promote racial progress. This replaced the “natural selection” logic of Gilded Age politics with a project of artificial selection led by expert administrators who proactively identified the unfit to prevent them from propagating.

This allowed Progressives of varying ideologies to defend invasive and repressive legal regimes. Jim Crow laws, restrictive immigration statutes, compulsory sterilizations, and repressive policies for the poor, women, and “unfit” became essential to the state’s program of improving the nation’s racial stock. Progressives consequently defended social uplift for some members of society and repression for others because they relied on discourses that lent scientific credence to established hierarchies of race, class, and gender, believing that eugenics would enable the state to improve the polity by uplifting the worthy and repressing the unworthy.⁴⁰³ So despite similarities with Gilded Age political thought, the eugenics movement changed the state’s relationship to the citizen by promoting new interventions to monitor social behavior.

The Progressives’ embrace of eugenics is related to a second theme of the era’s politics—an emphasis on the primacy of the collective over the individual. As Daniel Rodgers has argued, Progressives embraced the “rhetoric of the moral whole” while

⁴⁰³ Leonard, *Illiberal Reformers*; McGerr, *A Fierce Discontent*; Alexandra Minna Stern, *Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America* (Oakland: University of California Press, 2015); Muhammad, *The Condemnation of Blackness*.

rejecting the individualist ethos of American political culture.⁴⁰⁴ Progressives articulated anthropomorphic depictions of American society as a living organism that needed to be cared for.⁴⁰⁵ But to protect society as social organism required exclusionary politics; undesirable groups were viewed as uninvited parasites and social diseases that threatened collective national health and survival. This drove the move from natural selection to state-administered artificial selection; instead of allowing nature to run its course through minimal intervention into economic and social policy, restrictive immigration regimes and invasive eugenic policies were means of protecting the social organism of the polity from invasive and parasitic undesirables.⁴⁰⁶

The Progressives' embrace of eugenics was premised on exterminating, or at least controlling, the unfit to improve the social body. This required the "fittest" to be determined *prior* to the selection process. As a result, eugenicists constructed elaborate taxonomic hierarchies of naturally occurring human types to guide the state's selection of the fit and unfit. By asserting the primacy of the collective over the individual, Progressives ironically justified great social control over the individual in the name of collective health. Their articulation of social unity thus relied on a mix of eugenics and race science to justify exclusionary politics and state expansion in service of a greater good. Worked into these taxonomic structures were constructs of criminality.

This emphasis on science and expertise during the Progressive Era was not simply nominal. A third important current of progressive politics was that scientific experts

⁴⁰⁴ Rodgers, "In Search of Progressivism."

⁴⁰⁵ Skowronek and Engel, "The Progressives' Century."

⁴⁰⁶ McGerr, *A Fierce Discontent*; Cowie, *The Great Exception*; Rafter, *Creating Born Criminals*; Edwin Black, *War Against the Weak: Eugenics and America's Campaign to Create a Master Race* (Washington: Dialog Press, 2003).

believed it was their duty to be public figures. Men like Charles Henderson, Frederick Winslow Taylor, and Richard Ely threw themselves into academia and public policy debates. They worked with professional organizations, held federal appointments, worked on state policy boards, and were active members of prominent academic associations. Progressives believed that experts should not only identify the public good and instruct the public as to what it was—they should help the state pursue it through public service. This ensured that eugenics and race science travelled from intellectual circles into policy ones.⁴⁰⁷

It was in this political milieu that state-sponsored eugenic selection came to be the state's logic of social control. According to Progressives, it was the state's duty to identify and target biologically inclined criminals, among other defectives, for segregation out of the population. This is not to say there was no contestation over understandings of criminality in the Progressive Era. Lombrosian theory still persisted alongside psychological and eugenic theories. Cultural theorists and critical race scholars attacked notions of natural criminality, and their work forged new directions for sociological and criminological research. But hereditarian theory and eugenics were among the most widely accepted strands of expertise among Progressives studying race, economics, sociology, and crime. These discourses fueled repressive crime policy in ways that promoted a state-sponsored program of class control.

II. Constructs of Criminality in the Progressive Era

The Persistence of Lombrosian Orthodoxy and Its Challengers

⁴⁰⁷ Leonard, *Illiberal Reformers*.

Late nineteenth century constructs of bio-criminality persisted into early twentieth century scholarship. Books by William Duncan McKim, G. Frank Lydston, Philip Parsons, and August Drahms transported Lombrosian ideologies about crime into twentieth century debates.⁴⁰⁸ But these scholars were more skeptical of Lombroso than their late nineteenth century predecessors while still accepting his basic claims. McKim, for example, posited that the criminal type was not simply recognizable by an analysis of anatomical differences, even though he agreed that, “the tendency to crime is essentially inborn.”⁴⁰⁹ G. Frank Lydston (1906) similarly concluded that “undue importance” was assigned to Lombrosian theory, but still included a chapter in his book on criminal crania. He suggested that Lombrosian physiological defects were indicative of “mental or moral defects” likely associated with criminal behavior.⁴¹⁰

These scholars’ works only differed from the standard Lombrosian narrative in trivial ways. The rationale of McKim and Lydston added an intermediate step to Lombrosian theory—physiological defects were signs of inherent moral defects that manifested as crime—but left intact a causal arrow from biology to crime. They still paired bio-determinism with rehabilitative philosophy, as McKim, Lydston, Parsons, and Drahms supported the indeterminate sentence both as a reformative measure and a punitive one.⁴¹¹ Their proposed treatments for incorrigibles entailed eugenic solutions of

⁴⁰⁸ Parsons, *Responsibility for Crime*; McKim, *Heredity and Human Progress*; Lydston, *The Diseases of Society*; Drahms, *The Criminal*.

⁴⁰⁹ McKim, *Heredity and Human Progress*, 159, 162–64.

⁴¹⁰ Lydston, *The Diseases of Society*, 88.

⁴¹¹ Drahms, *The Criminal*, 365–70; McKim, *Heredity and Human Progress*, 20–26; Lydston, *The Diseases of Society*, 605; Parsons, *Responsibility for Crime*, 177–81.

extraordinary severity, including indefinite containment, sterilization, or extermination.⁴¹² Their works maintained the marriage of an ostensibly progressive rehabilitative discourse to punitive interventions.

Despite the work of these scholars, Lombrosian orthodoxy was uncommon among Progressives. Two new schools of thought purported to challenge Lombrosian theories of crime in the early twentieth century—cultural and hereditarian theories. In an evolving social science terrain in which scholars of culture, eugenics, and economics became increasingly prominent, the primary intellectual carriers of ideas about crime shifted. The ways in which cultural theorists and especially eugenicists built on and modified the ideas of nineteenth century criminal anthropologists shaped the character of American crime politics in the early twentieth century.

As will be discussed, hereditarian scholarship was little different from Lombrosian theory. Although many presented themselves as breaking from Lombroso's work, hereditarian scholars endorsed ideas of natural criminality first articulated in Lombroso's research and defended the rehabilitative ideal as a tool for the eugenics movement. Scholars of culture posed more meaningful challenges to bio-deterministic science, but even they failed to wholly dislodge the assumptions of race science and bio-determinist theory. Cultural theorists commonly articulated essentialist narratives of group difference to explain divergences in behavior across race.⁴¹³ When "black culture"

⁴¹² McKim, *Heredity and Human Progress*, 146, 188–93; Lydston, *The Diseases of Society*, 562–68; Parsons, *Responsibility for Crime*, 65, 148–49.

⁴¹³ Reed, "Revolution as 'National Liberation'"; Walter Benn Michaels, "Race into Culture: A Critical Genealogy of Cultural Identity," *Critical Inquiries* 18, no. 4 (1992): 655–85; George Stocking, *Race, Culture, and Evolution: Essays in the History of Anthropology* (Chicago: University of Chicago Press, 1968), 195–233.

was used to explain disparities in crime, it still pathologized black crime as a distinct social problem. Even as a cultural phenomenon, “black crime” was treated as a function of one’s racial identity, impeding the capacity for cultural scholarship to fully discredit the arguments of bio-determinists and race scientists.

In *The Condemnation of Blackness*, Khalil Gibran Muhammad demonstrates why Progressive Era cultural theory failed as a counter-discourse to biology. Muhammad points to Franz Boas’s publication of *The Mind of Primitive Man* in 1911 as a critical juncture. A foundational text of cultural anthropology, *The Mind of Primitive Man* claimed to break from biological explanations of racial inferiority by arguing that perceptions of racial inferiority were truly outcomes of social neglect.⁴¹⁴ But Muhammad argues that Boas simply “erased the color line and replaced it with a culture line.” By linking inferior behavior to black culture, Boas fostered a discursive shift from biological to cultural essentialism. His emphasis on the distinctiveness of black culture grounded his work in an a priori assumption of racial difference, leaving room for readers to accept his arguments in addition to claims about innate racial inferiority among blacks.⁴¹⁵

Other studies of race and culture by scholars like W.E.B. Du Bois attributed crime to cultural forces in ways that reinforced the idea that black culture was distinctively criminogenic.⁴¹⁶ Du Bois’s analysis in *The Philadelphia Negro* (1899) was a rigorous examination of poverty and discrimination against black Philadelphians. He attributed black criminality to socioeconomic and cultural forces that could only be understood with

⁴¹⁴ Franz Boas, *The Mind of Primitive Man* (New York: Macmillan, 1911); Stocking, *Race, Culture, and Evolution*, 230–33.

⁴¹⁵ Muhammad, *The Condemnation of Blackness*, 101–11.

⁴¹⁶ W.E.B. Du Bois, *The Philadelphia Negro: A Social Study* (New York: Schocken Books, 1899), 242, 255. See Muhammad (2010) for this argument.

reference to the long history of racial repression in America. It was a study of significant import that constituted a pivotal reformulation of the concept of race and laid groundwork for the development critical race theory. But Du Bois's contemporaries classified his work under the "Negro question," separating his research from larger questions about labor, immigration, and poverty, even though Du Bois made a strong case for their interrelation.⁴¹⁷ Despite its longer historical significance, *The Philadelphia Negro's* immediate impact was shaped more by the leading scholars interpreting it than its author.

Nonetheless, even Du Bois's work was infected with strains of determinism. He wrote there were degenerates among blacks just as there were among Europeans, noting that "some [blacks] were fitted to know and some to dig."⁴¹⁸ This is a testament to the tremendous sway of hereditarian theory in the Progressive Era—even a leading opponent of race science feared the excessive breeding of the unfit and argued that there existed, within each racial type, natural hierarchies of superiority.

Among eugenicists, race scientists, and even cultural theorists, criminality remained intimately connected to racial identity and biological makeup. Numerous progressive scholars accepted the work of hereditarians and determinists.

The Emergence of Hereditarian Theory

Hereditarian theorists often presented their work as challenges to biological scholarship, but hereditarian theory was mostly a repackaging of ideas related to bio-determinism. The central difference between hereditarian and biological theory was that

⁴¹⁷ Leonard, *Illiberal Reformers*, 70.

⁴¹⁸ Du Bois, *The Philadelphia Negro*, 74–75.

atavistic features were not seen as direct causes of criminality. Rather, they were indicative of lower intelligence or moral defects, which were the true causes of crime. This was a distinction of marginal import, as in both schools of thought, criminality remained a congenital defect requiring predictive containment. The shift from biological and anthropological to hereditarian theories of crime kept the basic ideology of crime the same while changing its scientific clothing. The more important difference were the unique policy implications of hereditarian theory, which insisted that the state play a greater and more interventionist role in selecting the unfit out of society. The hard science of heredity proved valuable to Progressives. Expressing a deep faith in objective science, Progressives relied on the science of heredity to hierarchically order humanity into natural tiers of superiority, which justified an agenda of state administered artificial selection.

Stephen Jay Gould's *The Mismeasure of Man* (1981) tracks the origins and development of early twentieth century hereditarian scholarship. French psychologist Alfred Binet sparked the emergence of psychology as an intellectual field by developing mental tests to quantify intelligence and correlate it with human behavior. Binet was an "anti-hereditarian," in the sense that he did not measure mental capacity hoping it would uncover each individual's developmental ceiling. Rather, he sought to use it to identify individuals who had unique educational needs.⁴¹⁹

American scholars quickly perverted Binet's aims, interpreting his tests as proof that people had natural limits to their development. Scholars like H.H. Goddard and Lewis Terman linked this to criminality. In his seminal book *Feeble-Mindedness* (1914),

⁴¹⁹ Stephen Jay Gould, *The Mismeasure of Man* (New York: W. W. Norton & Co., 1980), 178–87.

Goddard argued that, “The so-called criminal type is merely a type of feeble-mindedness.” He estimated that 25 to 50 percent of the people in prisons were mental defectives “incapable of managing their affairs with ordinary prudence.”⁴²⁰ He suggested that criminality was heritable through intelligence.⁴²¹ Goddard was primarily concerned with “morons,” a diagnostic label for people whose testing scored them at a mental age between 8 and 12. Morons typically lacked the observable physiological features of mental deficiency, and Goddard feared they could be mistaken as healthy and interbreed with the healthy population.⁴²²

In 1916, Lewis Terman built on Goddard’s ideas in *The Measurement of Intelligence*. Terman identified intelligence as the most relevant trait in explaining crime, asserting that, “the most important trait of at least 25 percent of our criminals is mental weakness.” Like Goddard, Terman saw himself as challenging criminal anthropology by pointing to the role of intelligence in criminality. He stated that, “The physical abnormalities which have been found so common among prisoners are not the stigma of criminality, but the physical accompaniments of feeble-mindedness. They have no diagnostic significance except in so far as they are indications of mental deficiency.”⁴²³

It was a trivial difference. Terman and Goddard disagreed that Lombrosian stigmata were indicative of a criminal biology but suggested that they were markers of a defective intelligence that caused crime. Their causal connections had an extra step but

⁴²⁰ Henry Herbert Goddard, *Feeble-Mindedness: Its Causes and Consequences* (New York: Macmillan, 1914), 6–7.

⁴²¹ Goddard, 188–92; Rafter, *Creating Born Criminals*, 136–41.

⁴²² Goddard, *Feeble-Mindedness*, 4–6, 171. “Imbeciles” scored from age 3–7, and idiots less than 3. See Gould (1980), 188–90.

⁴²³ Lewis M. Terman, *The Measurement of Intelligence: An Explanation of and A Complete Guide for the Use of the Stanford Revision and Extension of the Binet-Simon Intelligence Scale* (Boston: Houghton Mifflin, 1916), 7.

accepted the correlations Lombroso claimed to identify. It is predictable that Terman made policy proposals similar to the ones that Lombroso, Brockway, and biologically oriented rehabilitative scholars defended. He insisted on “permanent custodial care” for the “hopelessly feeble-minded.”⁴²⁴

Hereditarian scholarship was closely tied to race science and eugenics scholarship, but there were meaningful differences between the three. Hereditarian scholarship viewed heredity as the primary explanation for human behavior and intelligence, implied the necessity of more state intervention in monitoring the selection process, but presented itself as an objective science without the normative spin attached to race science and eugenics. Scientific racism alternatively aimed to uncover scientific proof of racial inferiority and superiority explicitly in the service of a white supremacist agenda. Eugenics constituted both an intellectual discipline and a political and social movement, seeking to use the state to improve the human race through selective breeding. Hereditarian scholarship, scientific racism, and eugenic scholarship thus intersected and overlapped in complex ways. As a movement, eugenics channeled the ideas and ideologies articulated in all three fields into political demands for expanding the state’s powers to engage in artificial eugenics-oriented selection. The tight intertwining of these intellectual and ideological threads justified the targeting of undesirables, including criminals, for harsh justice.

Concepts like “feeble-minded” and “mental defective” emerged in these intellectual traditions independent from debates about crime. But scholarship published by Goddard and Terman blurred the lines between intelligence, mental illness, and

⁴²⁴ Terman, 132–33.

criminality by treating the “feeble-minded,” “insane,” and “epileptics” as “criminal types.” Goddard explicitly stated that “Lombroso’s famous criminal types...may have been types of feeble-mindedness on which criminality was grafted.”⁴²⁵

Consequently, early twentieth century scholars of crime defended eugenic solutions for criminals, and the idea of incorrigibility became instrumental to their theories. It was scholars like Lydston, Boies, and McKim who helped transport ideas about innate criminality into Progressive Era politics, while hereditarians like Goddard and Terman repackaged these ideas into ideational frameworks amenable to Progressives. But it was scholar-reformers who helped put them into practice through policy change.

As the social sciences evolved in the twentieth century, hereditarian theory was deployed by three groups of scholar-reformers to pursue policy reform and depict various sub-populations as inherently criminal and unworthy of social assistance. Economists presented criminals as inherent defectives that impaired the functionality of the American economy and labor market. Race scientists depicted immigrants and racial minorities as likely criminals and as threats to the survival of American society. Finally, eugenicists used hereditarian theories to label the urban poor, racial minorities, immigrants, and mental defectives natural criminals, offering scientific legitimacy to state sterilization laws. Although eugenics was a fundamentally racist project, it took a broad range of forms and legitimated ascriptive hierarchies of race, class, gender, and ethnicity. The embrace of eugenics by a diverse class of scholar-reformers highlights how eugenics legitimated the durable racist, classist, and nativist biases of American political culture.

⁴²⁵ Henry Herbert Goddard, *The Kallikak Family: A Study in the Heredity of Feeble-Mindedness* (New York: Macmillan, 1912), 59.

Hereditarian Theory and Economists

Thomas Leonard has shown how economists like Richard Ely, John Commons, and Edward Ross pushed for progressive reforms like minimum wage laws in ways that embraced social exclusion. Driven by race science and eugenics, Progressive economists pursued legislation that would uplift the worthy poor while excluding the unworthy poor, including immigrants, blacks, women, mental defectives, and “white trash.” They formed the American Economists Association in the late nineteenth century in order to connect intellectuals and scholars to policymaking circles.⁴²⁶

These scholars were Progressives in that they viewed criminals as pathologies to the collective social body. Fears of “race suicide,” the idea that the unfit were outbreeding their betters, fostered anxieties that natural selection was inefficient at breeding out social undesirables in modern society. Scholars of political economy viewed criminality as a tendency common among undesirables who were a drain on community resources, weakened society’s productive capacity, and thus needed social control, typically through compulsory sterilization.

For instance, Richard T. Ely wrote in *Introduction to Political Economy* that, “the dependent and criminal classes...impair the productive power of the community.”⁴²⁷ He wrote that there were three divisions of the unemployable population, specifically “the defective, delinquent, and dependent.” He argued that these classes were “morally incurable” and “should not be allowed to propagate their kind.”⁴²⁸ Economist Frank

⁴²⁶ Leonard, *Illiberal Reformers*, 28–39.

⁴²⁷ Richard T. Ely, *Introduction to Political Economy* (New York: Eaton and Maines, 1901), 120.

⁴²⁸ Richard T. Ely, “Pauperism in the United States,” *North American Review* 152, no. 413 (1891): 395, 407.

Taussig made similar claims, arguing that there existed only two classes of unemployables—the aged and disabled, and the “feebleminded” who mostly consisted of “irretrievable criminals and tramps” who were “tainted with hereditary disease” and should be “prevented from propagating their kind.”⁴²⁹ In these contexts, criminals were perceived as defectives and drains on the nation’s political economy.

Edward Ross’s work particularly carried ideas about criminality carried into progressive discourse. He argued that the criminal law should not punish a crime in proportion “to the measure of harm” it incurred. This, he said, was more common in “rude communities” that over-sympathized with victims. Alternatively, he insisted that, “offences should be repressed *according to the badness of character they imply.*” This emphasis on the character of the offender rather than the action reflected ideas from nineteenth century debates. Whether someone fit the idea of the criminal type was the most important factor in determining their punishment. Ross thus drew conclusions that “the trolley company, the quack medicine man, the insurer or rotten ships, and the jerry builder” should not be punished as harshly as other offenders “because they are morally superior” to ordinary criminals.⁴³⁰

Ross connected criminal punishment to the health of the collective society. In his 1896 article “Social Control,” he wrote that society should be focused on the “moulding of the individual’s feelings and desires to suit the needs of the group.”⁴³¹ He said that “insuring greater harmony of social life by segregation of the insubordinate and

⁴²⁹ Frank Taussig, *Principles of Economics*, vol. 1 (New York: Macmillan, 1911), 300.

⁴³⁰ Edward Ross, *Social Control: A Survey of the Foundations of Order* (New York: Macmillan, 1901), 110.

⁴³¹ Edward Ross, “Social Control,” *American Journal of Sociology* 1, no. 5 (1896): 518.

elimination of the criminal, aims...at progress.”⁴³² He drew on rehabilitative ideology to package ideas of innate criminality into progressive economics. Ross wrote that, “the principle of *individual responsibility* is another great improvement in the technique of control.” He concluded that, “as to the mass of small-witted, weak-willed, impulse-ridden human ‘screenings’ that collect in prisons, our care should be to reform the reformable and to hold fast the incurable the rest of their days.”⁴³³

These economists regularly argued that artificial selection was preferable to natural selection. In his 1901 book *Social Control*, Ross wrote that “we can regard this society as a living thing” and social control “as one of the ways in which this living thing seeks to keep itself alive.”⁴³⁴ He wrote a few years later in defense of “sterilization of all congenital criminals as the only means of thinning out the bad breeds.”⁴³⁵ He even defended Wisconsin’s sterilization statute in 1914 by connecting it crime prevention, stating, “Sterilization is not nearly so terrible as hanging a man, and the chances of sterilizing the fit are not nearly so great, as are the chances of hanging the innocent.”⁴³⁶ Economist John Commons similarly wrote that “We cannot placidly rely on any abstraction of natural selection to wipe out crime...Evolution is not always development upwards.”⁴³⁷ Ely also pointed to the “superiority of man’s selection to nature’s

⁴³² Ross, 521.

⁴³³ Ross, *Social Control*, 1901, 118–19.

⁴³⁴ Ross, 67.

⁴³⁵ Edward Ross, “Recent Tendencies in Sociology III,” *Quarterly Journal of Economics* 17, no. 3 (1903): 447.

⁴³⁶ Quoted in Rudolph Vecoli, “Sterilization: A Progressive Measure?,” *The Wisconsin Magazine of History* 43, no. 3 (1960): 190–202.

⁴³⁷ John Commons, *Social Reform and the Church* (New York: TY Crowell, 1894), 6–8.

selection.”⁴³⁸ It was through this logic that economists justified sterilization for defectives, the unfit, and criminals, among others who were viewed as drains on the national economy.

Hereditarian Theory and Race Scientists

Race scientists also transported ideas about natural criminality into twentieth century debates. It should be noted that the term “race” had broad, vague, and multiple meanings to progressive scientific racists, often being used to refer to the human race, national races (e.g. “the American race,”) or phenotypic racial categories. The eugenics movement largely focused on the preservation of the American Anglo-Saxon racial identity, which involved sterilizing or segregating non-Anglo-Saxon elements away from native white racial stock. Rather than discussing racial differences between blacks and whites, race scientists were more focused on growing immigrant races that posed a threat to Anglo-Saxon dominance. Expansive conceptions of racial difference were used to connect non-white European populations, like Italian and Irish immigrants, to criminality. Scholars of political economy like Commons, Ely, and Ross commonly linked defective heredity, and hence criminality, to immigrant populations.⁴³⁹ President William McKinley’s Industrial Commission, appointed in 1898 to study capital-labor relations,

⁴³⁸ Richard T. Ely, *Studies in the Evolution of Industrial Society* (New York: Chautauqua Press, 1903), 141; Ely, *Introduction to Political Economy*, 62.

⁴³⁹ Leonard, *Illiberal Reformers*; John Commons, *Races and Immigrants in America* (New York: Macmillan, 1907); U.S. Industrial Commission, *Report of the US Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business (Second Volume on This Subject)*, vol. XIV (Washington: Government Printing Office, 1901) see Commons’ testimony on pp. 38-45.

devoted a significant portion of its reports to linking pauperism and vice crimes like alcoholism and gambling to certain immigrant populations like Irish and Italians.⁴⁴⁰

Given their emphasis on purifying the Anglo-Saxon race, eugenicists initially remained unconcerned with purifying black genetics as long as they were kept within the black community. Scholars and medical professionals like Robert Bean and Bernard Barrow eventually helped bring sterilization into the South by linking eugenics to black inferiority. Bean even applied Lombrosian methods in studying the cranial patterns of blacks to make his case. But the South started passing sterilization laws several years after Northern states, as Jim Crow laws and anti-miscegenation statutes had long been the primary way blacks were kept from interbreeding with whites. Counter-intuitively, eugenic solutions like sterilization were delayed in their application to black citizens in southern states.⁴⁴¹

Still, race science research about black inferiority persisted within the intellectual currents of progressivism. Scholars like William Hannibal Thomas reaffirmed the conclusions drawn in Frederick Hoffman's research. A black man born into a family of former slaves, Thomas called blacks "savages," who were doomed to a "lawless existence." He concluded that blacks were naturally inferior in "mind, morals, judgments, and character" to whites.⁴⁴² Race scientists like Robert Shufeldt and Charles McCord

⁴⁴⁰ U.S. Industrial Commission, *Reports of the Industrial Commission on Immigration, Including Testimony, with Review and Digest, and Special Reports, and on Education, Including Testimony, with Review and Digest*, XV:lxix-lxx, 27, 50-51.

⁴⁴¹ Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (New York: Penguin, 2016), 58, 71-76; Robert Bean, "The Negro Brain," *Century Magazine*, September 1906, 778-84.

⁴⁴² William Hannibal Thomas, *The American Negro: What He Was, What He Is, and What He May Become* (New York: Macmillan, 1901), x-xix, 139, 159, 165.

mirrored the work of Thomas and Bean by connecting race and crime.⁴⁴³ Their works hardened the well-established link between blackness and criminality within eugenics frameworks.

Hereditarian Theory and Eugenicists

Progressives were especially drawn to the research of eugenicists who were quick to build on the work of Terman, Goddard, and hereditarians. Active players in the eugenics movements eagerly picked up this research, funded similar projects, formed organizational centers, and lobbied for eugenic policy in the name of social and racial progress. Eugenicists had organizational centers and institutional infrastructure that enabled their ideas to be heard louder and more clearly than alternative ideas.

The Eugenics Records Office (ERO) was established in 1910, proclaiming itself as the national center for the study of human heredity. Founded by Charles Davenport, the ERO sought to sterilize the most defective 10% of the human population. This included the feeble-minded, the poor, and criminals, among others. Arguing that the “fact of incorrigibility” mandated the sterilization of criminals, the ERO targeted a range of criminals from vagrants to convicted felons, defended long sentences for mentally defective criminals, and deemed sterilization a condition of release. The ERO served as an organizational center for the eugenics movement, producing research and engaging in lobbying campaigns.⁴⁴⁴

⁴⁴³ Bean, “The Negro Brain”; R.W. Shufeldt, *The Negro: A Menace to American Civilization* (Boston: Gorham Press, 1907), 124, 129, 134; Charles McCord, *The American Negro as a Dependent, Defective, and Delinquent* (Nashville: Benson, 1914), 189, 217–21, 282, 293; See Muhammad, *The Condemnation of Blackness*, 78–80 for a general discussion of this intellectual history.

⁴⁴⁴ Charles Davenport, *Heredity in Relation to Eugenics* (New York: H. Holt and company, 1915), 83–92, 261, 266; Black, *War Against the Weak*, 39–60; MacDonald, *Criminology*, 269–70.

In 1916, Arthur Estabrook published a follow-up study of Richard Dugdale's *The Jukes* under the ERO's auspices. Titled *The Jukes in 1915*, Estabrook's research followed the lead of Terman and Goddard. He distanced himself from Lombrosian theory, writing that, "There is no evidence in the Jukes which points to the existence of a trait of criminality." However, he concluded that criminality is "closely associated with mental defect and lack of moral restraint." He claimed that there exists a "close correlation between feeble-mindedness and crime."⁴⁴⁵ Estabrook concluded that, "the eradication of crime in defective stocks depends upon the elimination of mental deficiency." He defended sterilization by arguing that it would, "interfere with the real liberty of the individual less than custodial care."⁴⁴⁶ Estabrook was dedicated studying degenerate families in the tradition of Dugdale, having also co-published *The Nam Family* in 1912 with Davenport.⁴⁴⁷ Goddard also studied degenerate families, publishing *The Kallikak Family* in 1912. In the book, Goddard reiterated his conclusion that "Lombroso's famous criminal types" were just "types of feeble-mindedness."⁴⁴⁸

Leading scholars of the eugenics movement continued to tie criminality to heredity when advocating for sterilization. In *The Passing of the Great Race* (1916), arguably the most authoritative text on eugenics in the early twentieth century, Madison Grant wrote that compulsory sterilization "will in self-defense put a stop to the supply of feeble-minded and criminal children of weaklings." He called sterilization "a practical,

⁴⁴⁵ Arthur Estabrook, *The Jukes in 1915* (Washington: Carnegie Institute of Washington, 1916), 66–67.

⁴⁴⁶ Estabrook, 85.

⁴⁴⁷ Arthur Estabrook and Charles Benedict Davenport, *The Nam Family: A Study in Cacogenics* (Cold Spring Harbor, NY: New Era Printing, 1912); Also see Arthur Estabrook, *Mongrel Virginians: The Win Tribe* (Baltimore: Williams and Wilkins, 1926).

⁴⁴⁸ Goddard, *The Kallikak Family*, 59.

merciful, and inevitable solution” that “can be applied to an ever-widening circle of social discards, beginning always with the criminal, the diseased and the insane.”⁴⁴⁹ Another leading race scientist William Ripley wrote in *The Races of Europe* (1899) that certain racial categories are particularly prone to certain varieties of crime.⁴⁵⁰

Davenport himself repeatedly linked crime, feeble-mindedness, pauperism, and heredity. He bemoaned the fact that, “criminality is ascribed to poverty, to bad example, to bad or inadequate education, despite the fact of incorrigibility” and concluded that eugenicists provided “a more fundamental explanation for these non-social traits” than scholars of culture or social disadvantage did.⁴⁵¹ He embraced the progressive perspective on science and expertise, arguing that eugenicists should actively participate in public debates to ensure that “public spirit is aroused” so that the public will is “crystallized in appropriate legislation.” He defended sterilization for criminals, claiming that “idiots, low imbeciles, incurable and dangerous criminals...may under appropriate restrictions be prevented from procreation—either by segregation during the reproductive period or even by sterilization.”⁴⁵²

Davenport was widely acknowledged as a respected national authority on eugenics. Most famously, President Theodore Roosevelt endorsed the work of Davenport on multiple occasions. Roosevelt called race suicide “the great problem of

⁴⁴⁹ Madison Grant, *The Passing of the Great Race or the Racial Basis of European History* (New York: Charles Scribner’s Sons, 1916), 49, 51.

⁴⁵⁰ William Z. Ripley, *The Races of Europe* (New York: D. Appleton and Company, 1899), 523. For instance, Ripley wrote that the Teuton was predisposed to property crime and the Celt to violent crime.

⁴⁵¹ Davenport, *Heredity*, 261–62.

⁴⁵² Charles Davenport, *The Science of Human Improvement by Better Breeding* (New York: Holt and Co., 1910), 33–34.

civilization.”⁴⁵³ In a 1913 personal letter to Charles Davenport, he wrote that, “society has no business to permit degenerates to produce their kind.”⁴⁵⁴ The next year, he wrote in a public letter that, “criminals should be sterilized, and feeble-minded persons forbidden to leave offspring behind them.”⁴⁵⁵

Research across the disciplines of economics, race science, and eugenics in the Progressive era cannot be neatly disentangled. These disciplines were fundamentally intertwined and reliant on one another. Each legitimated the nativist, racist, and classist impulses of American politics through the veneer of objective science. This provides a compelling case that questions about race, poverty, labor, and criminality should not be viewed as separate phenomena in the Progressive era. The science of heredity and eugenics served as a framework that scientifically legitimated an assortment of ascriptive biases. Constructions of criminality spanned across race and class but were all rooted in scientific discourses of crime and heredity.

III. The Political and Institutional Legacies of Gilded Age Crime Politics

Criminalizing Class Through Eugenics

Like many Progressive scholars, economists like Ely, Commons, and Ross sought to play an active role in pursuing reform. Many of them worked with or testified before President McKinley’s Industrial Commission from 1898 and 1902, participating in its analysis of industrial concentration, labor markets, and the impact of immigration on the

⁴⁵³ Theodore Roosevelt, *The Foes of Our Own Household* (New York: George H. Doran Company, 1917), 258.

⁴⁵⁴ Theodore Roosevelt, “T. Roosevelt Letter to C. Davenport about ‘Degenerates Reproducing,’” DNA Learning Center, January 3, 1913, <https://www.dnalc.org/view/11219-T-Roosevelt-letter-to-C-Davenport-about-degenerates-reproducing-.html>.

⁴⁵⁵ Roosevelt, “Twisted Eugenics,” 32.

economy. Thomas Leonard has noted the political attention received by the Industrial Commission and its reports, which made recommendations on antitrust law and regulatory policy for corporate criminals that are examined in the next chapter. But interestingly, eugenic perspectives also appeared in the Commission's nineteen reports to defend harsh justice for street criminals, racial minorities, the urban poor, and immigrants.

In their own work, these economists linked pauperism and criminality to a shared hereditary basis. Ely, for instance, wrote that there are two classes of paupers—one that is willing to work but simply has not learned the requisite skills for labor, while it is “practically impossible” to reform those in the second group that “belongs to the criminal class.”⁴⁵⁶ Frank Taussig similarly tied “criminals and tramps” together as variants of the feeble-minded class who are “unemployable.”⁴⁵⁷ Their language was little different than the language of “incurability” employed by Brockway and his adherents, but their conclusions were cloaked in the sciences of heredity and eugenics rather than anthropology and phrenology.

The Industrial Commission thus advocated for putting the urban poor and tramps to work behind bars, arguing that they were inherently criminal and needed compulsion to work.⁴⁵⁸ Commission members wrote that Italians, Hebrews, and Irish were prone to pauperism and criminality, and consequently made up majority of this class of the lazy

⁴⁵⁶ Ely, “Pauperism,” 400.

⁴⁵⁷ Taussig, *Principles of Economics*, 1:300.

⁴⁵⁸ U.S. Industrial Commission, *Report of the U.S. Industrial Commission on Labor Legislation*, vol. V (Washington: Government Printing Office, 1900), 178, 187–89, 194, 197–99.

criminal poor.⁴⁵⁹ For instance, when Commons testified before the Commission, he claimed that “foreigners and children of foreigners are the worst element which we have in this country,” made up a disproportionate number of the poor and criminal classes, and should be put to work in prison.⁴⁶⁰

In its volume on prison labor, the Commission embraced ideas of incorrigibility just as scholars like Ely and Taussig did. In evaluating prison labor, the Commission identified the Elmira Reformatory as the premier example of prison management. Being “intended for the reclaiming of the younger lawbreakers, who could not be properly classified as hardened or incorrigible criminals,” the Commission endorsed the segregation of inmates based on categories of corrigibility. The Commission suggested that reformatories should follow Elmira’s lead of grading convicts in three tiers of reformability, with the third grade consisting of “the incorrigible” who should be “kept in confinement” and “at such labor as practicable.”⁴⁶¹ The Commission endorsed the indeterminate sentence, stating if criminals “are becoming habitual criminals, they can be sent for a longer time, even to the extent of a life sentence,” which could arguably “be applied to all delinquents, including the pauper.”⁴⁶²

Late nineteenth century trends linking poverty, crime, and heredity persisted into the early twentieth century, even though the image of the tramp underwent a significant

⁴⁵⁹ U.S. Industrial Commission, *Review of the Report of the Commission on Immigration*, 15:xlvi, xlv, xxi–xxii.

⁴⁶⁰ U.S. Industrial Commission, *Report of the US Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business (Second Volume on This Subject)*, XIV:38–40.

⁴⁶¹ U.S. Industrial Commission, *Report of the Industrial Commission on Prison Labor*, vol. III (Washington: Government Printing Office, 1900), 57–58.

⁴⁶² U.S. Industrial Commission, *Report of the US Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business (Second Volume on This Subject)*, XIV:ccxxxi.

transformation in popular culture. In *Tramping with Tramps* (1899), sociologist Josiah Flynt argued that it is “better for criminology to study the criminal’s *milieu*” instead of his skull, contesting ideas of innate criminality among the poor.⁴⁶³ This contributed to a more positive image of tramps in pop-culture. Vaudeville routines depicted tramps as victims of circumstance, not social threats.⁴⁶⁴ But this trend romanticized poverty by labeling behaviors once criticized as faults as virtues. Even Charlie Chaplin’s famous “little tramp” character was a thief and con artist.⁴⁶⁵ Despite its positive connotations, this comedic imagery did little to divorce perceptions of tramps from ideas of criminality, and kept poverty linked to laziness and deviance.

As a result, this nostalgic imaging coexisted readily with ideologies and rhetoric justifying exclusionary policies targeting the poor. Praising Pennsylvania’s anti-tramp law, the *Los Angeles Times* reported in 1901 that, “Tramps have multiplied here at an alarming rate in the last few months, and a notable increase in the number of robberies and assaults has resulted.” Brockway connected the criminal poor to cultural determinism, with the *Washington Post* quoting him as saying, “The culture of crime...the mass of misdemeanants, and the present shiftless methods of treatment produce hardened criminals.”⁴⁶⁶

This contrast between the pop-culture image of the tramp and public anxieties over the poor was not lost to observers of American criminal justice. In 1901, the *Los*

⁴⁶³ Josiah Flynt, *Tramping with Tramps: Studies and Sketches of Vagabond Life* (New York: Century, 1899), 22, 24, 26.

⁴⁶⁴ DePastino, *Citizen Hobo* chapter 5; Kusmer, *Down And Out, On the Road* chapter 9.

⁴⁶⁵ Kusmer, *Down And Out, On the Road*, 183.

⁴⁶⁶ “Crime and Its Cure: Z.R. Brockway on Methods of To-Day and the Future,” *The Washington Post*, April 20, 1901.

Angeles Times wrote that, “The hobo of the comic page is an amiable soul, with a tomato can; the hobo of real life, when he gets to California, is thoroughly vicious, degraded and dangerous...An epidemic of crime invariably follows the coming of the tramps.”⁴⁶⁷ William A. Pinkerton stated in 1903 that, “The chief criminal work of this age is done by hoboos or professional tramps.”⁴⁶⁸ In 1907, the *New York Times* stated that the vagrant or tramp “is necessarily a dangerous element, whether or not, or rather even before, he blossoms out into a professional criminal.”⁴⁶⁹ This indicates that those in policy circles were less willing to accept the makeover the poor received in popular culture, instead holding onto ideas linking criminality to poverty.

Links between poverty and criminality remained tenacious in intellectual circles as well. For instance, *The Journal of the American Institute of Criminal Law and Criminology* frequently published articles relating poverty to crime.⁴⁷⁰ In his 1914 study of New York’s municipal lodging house, Robert Gault argued that, “A large proportion of vagrants” were “pathologic” and 12% “showed definite evidence of defective mentality.”⁴⁷¹ In the next issue, John Lisle wrote that the tramp class “must be destroyed” and that tramps’ criminality “is not due to their failure to bear their share of the social burden...but in their dangerous characters.”⁴⁷² These ideas served as the basis for

⁴⁶⁷ “Ball and Chain for Tramps: Women Vagrants to Get Same Treatment as the Males,” *Los Angeles Times*, January 28, 1901.

⁴⁶⁸ “Tramps Who Are Criminals,” *The New York Times*, September 29, 1903.

⁴⁶⁹ “Crime and Vagrancy,” *The New York Times*, May 2, 1907.

⁴⁷⁰ Edward Lindsey, “The Bill to Establish a Criminological Laboratory at Washington,” *The Journal of the American Institute of Criminal Law and Criminology* 1, no. 2 (1910): 106–11.

⁴⁷¹ Robert Gault, “Pathologic Vagrancy,” *The Journal of the American Institute of Criminal Law and Criminology* 5, no. 3 (1914): 321–24.

⁴⁷² John Lisle, “Vagrancy Law: Its Faults and Their Remedy,” *Journal of the American Institute of Criminal Law and Criminology* 5, no. 4 (November 1914): 500.

multiple proposed bills to create a federal criminological laboratory in the Justice Department to study the criminal and pauper classes.⁴⁷³

Journalists and intellectuals clearly held onto the connection between poverty and innate criminality, but people with institutional power also shared these beliefs. For instance, Director of the National Association for the Prevention of Vagrancy James Forbes stated in 1911 that, “It is practically impossible to reform a tramp.”⁴⁷⁴ State laws relating to tramping thus remained as punitive as they were in the Gilded Age. In 1916, 46 states had statutes authorizing the incarceration of tramps for varied periods of time. Twenty of these states authorized a maximum between 3 and 6 months behind bars for tramping; eleven authorized a maximum of anywhere from one to three years.⁴⁷⁵ As noted in chapter two, these laws were justified on the logic that vagrancy laws should look more like the indeterminate sentence in the sense that they required a longer maximum sentence so that incorrigibles could be incarcerated for longer periods of time.

FIGURE 4.1: Maximum Sentences of Vagrancy Laws in the US States, 1916⁴⁷⁶

| | Fine | No Max. | <3 Months | 3 Months | 6-10 Months | 1 Year | 2 Years | 3 Years |
|--------|----------|----------|---|--|---|----------------------|----------------------------|----------|
| Total | 2 | 2 | 11 | 9 | 11 | 4 | 5 | 2 |
| States | IN TX | TN VA | AR NE DE NC KY ND MS OK MO SC SD | AZ MT CO NV ID NM MN UT WY | LA CA NJ FL OR GA PA IL WA IA ME | AL CT KS MD | MI MA NY WI NH | OH RI |

⁴⁷³ Lindsey, “The Bill”; Adalbert Albrecht, “Cesare Lombroso: A Glance at His Life Work,” *The Journal of the American Institute of Criminal Law and Criminology* 1, no. 2 (1910): 237–49.

⁴⁷⁴ “What Tramps Cost Nation: Seven Hundred Thousand Hoboes Put \$100,000,000 Burden on the Workers,” *The Washington Post*, June 18, 1911, 000.

⁴⁷⁵ *Laws of the Various States Relating to Vagrancy*, Revised (Lansing, MI: State Printer, 1916).

⁴⁷⁶ Tabulated from *Laws of the Various States Relating to Vagrancy*. The only state without a vagrancy law was West Virginia.

In his research, Eric Monkonnen (2004) found that arrests for victimless crimes like vagrancy declined in the early twentieth century. He concludes that early twentieth century police focused on punishing criminal behavior rather than repressing poverty.⁴⁷⁷ But this data should not lead us to overlook the fact that urban police remained agents of class control. Monkonnen notes that those who were considered part of the “dangerous classes” had both negative and positive interactions with police in the nineteenth century, often being lodged and fed by urban police. In the early twentieth century, the police became a blunt negative instrument that enforced neighborhood boundaries. As skid rows emerged in cities to accommodate seasonal labor, police reinforced class lines by ensuring the poor were contained in certain neighborhoods.⁴⁷⁸

Progressives continued to associate the urban poor with labor violence, fearing them as likely instigators of a working-class revolution. Police often targeted tramps while criminalizing protests and strikes.⁴⁷⁹ While exaggerated, this link was not wholly unwarranted; the Industrial Workers of the World (IWW, or Wobblies), helped to infuse hobo culture with a leftist fervor. The IWW newspaper *Solidarity* wrote in 1914 that hoboes were “admirably fitted to serve as the scouts and advance guards of the labour army,” and could become “the guerillas of the revolution.”⁴⁸⁰ As Todd DePastino has

⁴⁷⁷ Monkonnen, *Police in Urban America*, 83–85.

⁴⁷⁸ Monkonnen, 157–58.

⁴⁷⁹ “Soldiers War on Tramps: Infantry Will Perform Police Duty at For Sheridan,” *Chicago Daily Tribune*, July 13, 1905, 3.

⁴⁸⁰ Quoted in Ralph Darlington, *Syndicalism and the Transition to Communism: An International Comparative Analysis* (Burlington: Ashgate Publishing, 2008), 97; also see Walker C. Smith, “The Floater and the Iconoclast,” *The Industrial Worker*, June 4, 1910; Joyce Kornbluh, *Rebel Voices: An IWW Anthology* (Ann Arbor: University of Michigan Press, 1964), 94–126; DePastino, *Citizen Hobo*, 95–104.

argued, Wobbly folklore built on the image of the savage tramp to romanticize the tramp's primitivism and masculinity as part of the class struggle.⁴⁸¹

State, local, and federal authorities continued to punish radical labor organizations, especially those with high foreign-born membership, into the Progressive Era.⁴⁸² The reports of the Industrial Commission often linked certain ethnic groups to working class radicalism, and President Theodore Roosevelt stoked public anxieties linking foreign radicals to deterministic discourse about crime.⁴⁸³ Roosevelt claimed that the cause of the anarchist's criminality is "his own evil passions."⁴⁸⁴ Politically, the repression of labor was still justified by links between criminality, race, and determinism.

State laws criminalizing anarchy and federal crackdowns on Wobblies satiated fears that workers were prone to criminality. Private organizations like the American Protective League (APL) also emerged as security forces funded by local businesses to infiltrate radical organizations. With the DOJ's endorsement, the APL demonstrated how intertwined the interests of big business, the police, and the state became in controlling labor through criminal sanction.⁴⁸⁵

⁴⁸¹ DePastino, *Citizen Hobo*, 116.

⁴⁸² Goldstein, *Political Repression*, 63–66.

⁴⁸³ U.S. Industrial Commission, *Reports of the Industrial Commission on Immigration, Including Testimony, with Review and Digest, and Special Reports, and on Education, Including Testimony, with Review and Digest*, XV:xliv, 27, 50–51.

⁴⁸⁴ Theodore Roosevelt, "Message of the President of the United States, Communicated to the Two Houses of Congress, at the Beginning of the First Session of the Fifty-Seventh Congress, December 3, 1901," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 2 (New York: P.F. Collier and Son, 1910), 534–35.

⁴⁸⁵ Harring, *Policing a Class Society*, 144–47; DePastino, *Citizen Hobo*, 105 note 34; George Mowry, *The California Progressives* (Chicago: Quadrangle, 1963), 48–50; "Execution of Anarchists," *Washington Post*, February 25, 1908; Goldstein, *Political Repression*, 68–80 note 17, 108–10, 139–153. Four states passed laws criminalizing anarchism, indicative of an acceptance for a greater state role in handling political repression that foreshadowed the robust federal interventions that came during World War I.

After a sharp uptick in strike activity in 1919—the height of the first “Red Scare”—Attorney General A. Mitchell Palmer instituted a series of raids in 1919 resulting in thousands of arrests. The climax came in January 1920, when federal agents arrested between 5,000 and 10,000 individuals across thirty cities. Palmer defended the raids by attributing the behavior of radical workers to their innate criminality. He drew explicitly on language from anthropological assessments of criminality, suggesting that “from their lopsided faces, sloping brows, and misshapen features,” anarchists and strikers arrested “may be recognized [as] the unmistakable criminal type.”⁴⁸⁶

Into the twentieth century, the poor and working classes were still viewed as dangerous criminals. But eugenics and hereditarian theory were not only crucial to helping Progressives rationalize class repression through criminal law. These same ideas translated readily into the repression of racial minorities as well.

Hereditarian Theory, Race, and Crime

A large proportion of Progressives supported racial segregation. Academics like Booker T. Washington and politicians like Theodore Roosevelt clung onto scientific discourses of racial inferiority and defended the segregationist policies and strict immigration laws of the Progressive Era.⁴⁸⁷ Within this exclusionary agenda, Progressives used ideas about hereditary criminality to defend a harsh justice politics targeting African Americans and immigrants.

⁴⁸⁶ U.S. Senate Committee on the Judiciary, “Address of A. Mitchell Palmer, Attorney General of the United States, at the Dinner of the New York County Lawyers’ Association, Hotel Astor, New York City, Friday Evening, February 27, 1920,” in *Charges of Illegal Practices of Department of Justice: Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate* (Washington: Government Printing Office, 1921), 623.

⁴⁸⁷ McGerr, *A Fierce Discontent*, 183–215.

For instance, as reviewed in chapter two, vagrancy laws played an important role in southern criminal justice by stocking the convict-lease system. Crimes such as “mischief,” “insulting gestures,” and “pig laws” punishing theft of farm animals were variants on vagrancy laws and were disproportionately enforced against young black men in states like Mississippi, Georgia, Florida, Alabama, Louisiana, and Texas. Convict lease officially ended in 1928 when Alabama abolished it, but for decades the system encouraged police to sweep up vagrants and minor offenders in line with the labor needs of a state’s dominant industries.⁴⁸⁸

The convict-lease system was not a purely instrumentalist project fueled by economic interests, but one also justified by the logic of bio-determinism. State legislators and southern medical and penological professionals routinely defended convict-lease on the grounds that reformatories would not help to reform an inherently inferior race.⁴⁸⁹ David Oshinsky’s analysis of James Vardaman’s term as Mississippi’s Governor from 1904-1908 provides an example of how politicians deployed these ideas. Vardaman, nicknamed the “Great White Chief” for his white supremacist politics, deployed rhetoric depicting blacks as pathologically criminal. He described blacks as “lazy, lying, lustful animal[s]” with an “increased capacity for crime,” favored the use of vagrancy laws to compel black men into labor, and defended lynching as an appropriate response to black crime.⁴⁹⁰

⁴⁸⁸ N. Gordon Carper, “Martin Tabert: Martyr of an Era,” *Florida Historical Quarterly* 60, no. 2 (1981): 161–73.

⁴⁸⁹ “Remarks of Mr. Henley of Alabama, and P.D. Sims, Chairman of the Board of Prisons, Tennessee,” 119–12; see Oshinsky, *Worse Than Slavery*, 32, 47 for quotes; chapters 2-4 on general history of convict-leasing and vagrancy laws.

⁴⁹⁰ Oshinsky, *Worse Than Slavery* see chapter 4.

The practice of lynching persisted into the Progressive Era and was justified by the notion that black men were innately violent and prone to raping white women.⁴⁹¹ Even Presidents Theodore Roosevelt and William Taft qualified their concerns with the practice in ways that validated prevailing ideas about black criminality. Contending that lynching targeted black men accused of rape, Roosevelt feared that lynching posed a challenge to the state's authority to punish crime. He wrote in 1903 that such cases should be processed more quickly in order to preempt lynching.⁴⁹² Two years later, he stated at a luncheon in Arkansas that, "Long delays of justice, abuses of the pardoning power, [and] the sluggishness with which either court or attorney moves...[bring] about the condition of affairs which produces lynch law."⁴⁹³ Roosevelt repeatedly stated that lynching could be prevented if blacks reported black crime and worked to change black culture.⁴⁹⁴ Taft's conclusions were little different, as he stated in 1909 that lynching was caused by "the uncertainties and injustice growing out of delays in trials, judgments, and

⁴⁹¹ Garland, *Peculiar Institution*; Messerschmidt, "We Must Protect Our Southern Women," 77–94.

⁴⁹² Theodore Roosevelt, "Letter to Governor Durbin, August 6, 1903," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 2 (New York: P.F. Collier and Son, 1910).

⁴⁹³ Theodore Roosevelt, "Speech at the Luncheon at Little Rock, Arkansas, October 25, 1905," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 2 (New York: P.F. Collier and Son, 1910), 543.

⁴⁹⁴ Roosevelt, "Letter to Governor Durbin," 524–25; Theodore Roosevelt, "Address at the Lincoln Dinner of the Republican Club of the City of New York, Waldorf-Astoria Hotel, February 13, 1905," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 3 (New York: P.F. Collier and Son, 1910), 230; Theodore Roosevelt, "At Tuskegee Institute, October 24, 1905," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 4 (New York: P.F. Collier and Son, 1910), 525; Theodore Roosevelt, "At City Park, Little Rock, AR, October 25, 1905," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 4 (New York: P.F. Collier and Son, 1910), 535–36; Theodore Roosevelt, "At Hampton Normal and Agricultural Institute, May 30, 1906," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 5 (New York: P.F. Collier and Son, 1910), 762.

the executions thereof by our courts.”⁴⁹⁵ Both voiced their opposition to lynching not by expressing concerns about racial injustice, but by expressing concerns that lynch mob justice usurped the state’s authority to punish black men who committed crime.

Progressives also used racialized crime politics to condemn immigrant crime. The U.S. Immigration Commission, known as the Dillingham Commission, particularly linked immigrants to criminality. A bipartisan body in operation from 1907 to 1911, the Commission concluded that immigration from eastern and southern Europe seriously threatened U.S. society. Its reports were essential to the design of the immigration restrictions of the 1920s.⁴⁹⁶ Staffed by a combination of congressmen and experts including eugenicists like Jeremiah Jenks, the Commission dedicated volumes to studying immigrant physiology, intelligence, and criminality.

The Commission examined more than 3 million immigrants from over 300 American communities.⁴⁹⁷ They linked certain varieties of criminality to certain racial categories. For example, Italians were linked to blackmail, extortion, rape, and homicide, Russians to larceny, and Greeks to minor ordinance violations.⁴⁹⁸ The Commission concluded by advocating for stringent immigration restrictions and defending literacy tests, race-based quotas, and barring unskilled laborers from entry, among other

⁴⁹⁵ William Howard Taft, “Message to the Two Houses of Congress at the Second Session of the Sixty-First Congress, December 7, 1909,” in *The Collected Works of William Howard Taft*, ed. David Burton, vol. 3 (Athens: Ohio University Press, 2002).

⁴⁹⁶ Leonard, *Illiberal Reformers*; McGerr, *A Fierce Discontent*.

⁴⁹⁷ U.S. Immigration Commission, *Reports of the Immigration Commission: Abstract of Reports of the Immigration Commission, With Conclusions and Recommendations and Views of the Minority*, vol. 1 (Washington: Government Printing Office, 1911), 20.

⁴⁹⁸ U.S. Immigration Commission, *Reports of the Immigration Commission: Immigration and Crime*, vol. 36 (Washington: Government Printing Office, 1911), 17–20.

proposals.⁴⁹⁹ The expansive reach of race science targeted a diverse collection of populations as natural criminals deserving of exclusion.

IV. Crime, Eugenics, and Rehabilitative Ideology

In 1911, Gina Lombroso-Ferrero, Cesare Lombroso's daughter, published a book summarizing her father's work. In the opening pages, her father wrote an introduction recognizing America as a place where his ideas were given "a warm and sympathetic reception" and "speedily put into practice."⁵⁰⁰ The reorientation of American penality towards rehabilitative programming built on the conception of criminal behavior espoused in Lombroso's work. This rehabilitative penology thrived in the political milieu of the Progressive Era. The spread of indeterminate sentencing and sterilization laws during this period was driven by ideas rooted in Lombrosian-influenced rehabilitative ideology.

Progressives often endorsed a politics founded on pseudo-science to separate mental defectives, minorities, and undesirables from the population's worthy elements. In this framework, the incorrigible criminal idea had a potent political value that allowed Progressives to espouse a philosophy of reform while also reaping the benefits of cracking down on criminals. In the forty years following Elmira's opening, seventeen reformatories opened across the country emulating Brockway's model to varying degrees.⁵⁰¹ Nicole Rafter (1997) and Alexander Pisciotta (1994) have demonstrated how the ideas of criminal anthropology and rehabilitative penology influenced the

⁴⁹⁹ U.S. Immigration Commission, *Report of the Immigration Commission, Vol. 1*, 1:47–48.

⁵⁰⁰ Gina Lombroso-Ferrero, *Criminal Man According to the Classification of Cesare Lombroso* (New York: G.P. Putnam's Sons, 1911), xix, xi–xx. Lombroso-Ferrero's book is often mistake for Lombroso's original work.

⁵⁰¹ Pisciotta, *Benevolent Repression*, 81–126.

development of these institutions at the turn of the century. But ideas of incorrigibility in these older philosophies were of crucial importance in justifying the politics of eugenicists. There was significant regional variation in the compulsory sterilization laws advocated by Progressives, as some states emphasized psychiatric sterilization while others targeted poor citizens or women of color, but in many states, criminality was used as a reference point to justify sterilization.⁵⁰²

Elmira was a leader in facilitating a shift towards the eugenics model. The institution hired doctors in the early twentieth century to identify mental defectives among its inmates, and as of 1910, 38 percent of the institution's population was declared mentally defective with either congenital or acquired defects indicative of incorrigibility. The Massachusetts Reformatory followed suit, concluding that 58% of its inmates were incorrigible mental defectives. By 1919, Elmira had a positive reformative prognosis for only 4% of offenders, and many of the medical professionals employed by the institution explicitly advocated to put such offenders in penal colonies or sterilize them.⁵⁰³

Outside of Elmira, a variety of Progressive intellectuals, professionals, and reformers advocated for sterilization of the criminal classes. Some of the earliest endorsements of criminal sterilizations came from doctors who cited nineteenth century criminal anthropologists espousing ideas of incorrigibility. In 1899, Doctor A.J. Oschner defended sterilization in *The Journal of the American Medical Association* by noting that Lombroso proved that “there are certain inherited anatomic defects which

⁵⁰² Stern, *Eugenic Nation*; Cohen, *Imbeciles*.

⁵⁰³ Pisciotta, *Benevolent Repression*, 114–18, 131.

characterize...born criminals,” who commit the majority of crime.⁵⁰⁴ The next year, President of the American Academy of Medicine George Makuen endorsed compulsory sterilization. He cited Brockway in stating that penology should be about caring for criminals while also preventing their propagation. He claimed that William McKim’s suggestion to provide “a gentle and painless death” to incorrigibles was excessive, but that McKim’s proposal revealed the broader “drift of thought with reference to these matters” in criminological circles. He used McKim’s extreme arguments to depict compulsory sterilization as humanitarian. Makuen also cited Boies’ *Prisoners and Paupers* in claiming that “Pauperism, criminality, [and] insanity” are “all one interdependent family” that should be grounds for sterilization.⁵⁰⁵ In the next year’s Academy Bulletin, S.D. Risley similarly drew on McKim to depict sterilization laws as benevolent.⁵⁰⁶

Important players in the eugenics movement drew on ideas linking rehabilitative potential to criminal sterilization. In 1904, Dr. Martin Barr explicitly presented sterilization as a curative tool for offenders, writing, “Let asexualization be once legalized, not as a penalty for crime but a remedial measure preventing crime.”⁵⁰⁷ In 1908 the American Prison Association (APA) established a Physicians Association, and at the

⁵⁰⁴ A.J. Oschner, “Surgical Treatment of Habitual Criminals,” *Journal of the American Medical Association* 32, no. 16 (1899): 867.

⁵⁰⁵ G. Hudson Makuen, “Some Measures for the Prevention of Crime, Pauperism, and Mental Deficiency,” *Bulletin of the American Academy of Medicine* 5, no. 1 (1900): 2–7; McKim, *Heredity and Human Progress*, 188.

⁵⁰⁶ S.D. Risley, “Some of the Ethical and Sociological Relations of the Physicians to the Community,” *Bulletin of the American Academy of Medicine* 5, no. 8 (1901): 584–86.

⁵⁰⁷ Martin Barr, *Mental Defectives: Their History, Treatment and Training* (Philadelphia: P. Blakiston’s Son & Co., 1904), 191; See final pages of Harry Sharp, *Vasectomy: A Means of Preventing Defective Procreation* (Jeffersonville: Indiana Reformatory, 1909) for similar quotes from additional medical professionals.

1908 meeting eugenicist Dr. Charles Carrington stated that he “unreservedly” supported sterilization for “habitual” and “incurable” offenders.⁵⁰⁸ At the next year’s meeting, Daniel Phelan, Theodore Cooke, and former APA president Charles Henderson discussed sterilization as a means of controlling the “incurable criminal” identifiable by “physical irregularities.”⁵⁰⁹

As early as 1893, inmates of reformatories across the country were being subjected to compulsory sterilization off the books. Physician Harry Sharp performed at least 176 vasectomies in Indiana reformatories between 1893 and 1907, when the state finally legalized the practice. A prominent advocate for inmate sterilization, Sharp wrote in 1909 that, “In treating upon this subject [of criminal sterilization] there must ever be borne in mind the distinct understanding that degeneracy is a defect, and that a defect differs from a disease in that it can not be cured.”⁵¹⁰ Targeting “confirmed inebriates, prostitutes, tramps, and criminals, as well as habitual paupers,” Sharp argued that the vasectomy was the most humane means of ensuring that mental defectives would not interbreed with the general population.⁵¹¹ However, he noted that, “this operation shall not be performed except in cases that have been pronounced unimprovable,” pointing out that traditional reformative interventions should be a first resort.⁵¹² But he stated that the

⁵⁰⁸ Charles Carrington, “Sterilization of Habitual Criminals,” in *Proceedings of the Annual Congress of the American Prison Association* (Indianapolis: WM. B. Burford, 1908), 175.

⁵⁰⁹ Daniel Phelan, “The Mental and Physical Characteristics of the Criminal and Degenerate,” in *Proceedings of the Annual Congress of the American Prison Association* (Indianapolis: WM. B. Burford, 1909), 223, 226, 228–29, 233, 253; Theodore Cooke, “The Advisability of Laws Making It Compulsory That Every Prisoner Charged With Any Offense Against the State in Any Court of Justice Be Examined Before Trial by a Physician,” in *Proceedings of the Annual Congress of the American Prison Association* (Indianapolis: WM. B. Burford, 1909), 235–53.

⁵¹⁰ Harry Sharp, *The Sterilization of Degenerates* (Jeffersonville: Indiana Reformatory, 1909), 1.

⁵¹¹ Sharp, 1–10.

⁵¹² Sharp, 8.

“decidedly defective individual is very easily recognized,” and argued that this “mental abnormality is usually accompanied with prominent physical defects, described by Lombroso” and others.⁵¹³

In the early twentieth century, Sharp, Barr, and other medical professionals were essential in passing sterilization laws in many states. Sharp played an important role in Indiana, Ross in Wisconsin, and as the chief physician at the Pennsylvania Training School for Feeble-Minded Children, Barr played a critical role in Pennsylvania.⁵¹⁴ In doing so, these eugenic theorists and practitioners drew on multiple ideas undergirding rehabilitative penology, and prominent eugenicists paid attention. Invoking the notion of incorrigibility, Charles Davenport defended sterilization as the only way to stop incorrigibles from reproducing.⁵¹⁵ Similarly, David Starr Jordan of the American Breeder’s Association argued that the criminal “can perhaps be healed,” but if he was incurable, “he can be kept in confinement; and to physicians, and to them alone, the community must look for help in these matters.”⁵¹⁶

This highlights how eugenicists of varying stripes endorsed the logic of rehabilitation. Sharp and Davenport viewed criminals as incorrigible, rendering sterilization a necessary solution. Others like Martin Barr viewed sterilization itself as a rehabilitative procedure for those who had limited rehabilitative potential. For instance, Barr rationalized sterilization thusly:

⁵¹³ Sharp, *Vasectomy*, 4–6.

⁵¹⁴ Cohen, *Imbeciles*, 37–76.

⁵¹⁵ Davenport, *The Science of Human Improvement*, 33–34.

⁵¹⁶ David Starr Jordan, “The Training of the Physician: Commencement Address at Cooper Medical College, 1892,” in *The Care and Culture of Men: A Series of Addresses on the Higher Education* (San Francisco: Whitaker & Ray, 1896), 137.

Let asexualization be once legalized, not as a penalty for crime, but a remedial measure preventing crime and tending to future comfort and happiness of the defective; let the practice once become common for young children immediately upon being adjudged defective by competent authority properly appointed, and the public mind will accept it as an effective means of race preservation. It would come to be regarded just as quarantine, simple protection against ill.⁵¹⁷

Both punitive and rehabilitative eugenicists drew on presumptions of rehabilitative penology to rationalize sterilization. In his typology of sterilization laws for criminal offenders, ERO officer Harry Laughlin noted this distinction. He wrote that some state laws were “therapeutic” in design (like California, which called the procedure “beneficial and conducive” to the inmate), while others were punitive (like Washington, which called the procedure “an addition to punishment”).⁵¹⁸ This contrast in logic is reminiscent of Ross’s defense of Wisconsin’s sterilization statute as more humane than hanging for crime.

Harry Laughlin’s work particularly highlighted the relationship between Lombrosian theory, hereditarian scholarship, and the eugenics movement. Superintendent of the Eugenics Records Office for its entire existence, Laughlin frequently cited rehabilitative penologists, including Henry Boies and G. Frank Lydston. His treatise *Eugenical Sterilization in the United States* (1922) cited multipage-length quotes from Boies’ *Prisoners and Paupers* (1893), including Boies’ statements that imprisonment permitted the reproduction of “those who would perish without its aid” and that, “in no sense could the deprivation of [sexual] organs inflict injury or damage to criminal[s].”⁵¹⁹ Laughlin noted that Washington State similarly cited Boies’s work to defend its

⁵¹⁷ Barr, *Mental Defectives*, 191.

⁵¹⁸ Harry H. Laughlin, *Eugenical Sterilization in the United States* (Chicago: Psychopathic Laboratory of the Municipal Court of Chicago, 1922), 100–101.

⁵¹⁹ Laughlin, 158–59.

sterilization statutes from legal challenges. He defended sterilizations for “born criminals” and argued that many state sterilization statutes were informed by Lombrosian theory. He wrote that, “asexualization can only be justified in the case of born criminals.”⁵²⁰

Laughlin’s work underscored the relationship between sterilization and rehabilitative ideology. He defended the indeterminate sentence as it was envisioned to work by Lombroso but wrote that while “Reformation of the individual is humane...but absolutely undesirable and poor sociological economy if at the expense of the rights of organized society.”⁵²¹ What to do with the incorrigibles, then, became the central problem of rehabilitative thought.

The opening to Laughlin’s book answered this problem. Laughlin’s close friend and fellow eugenicist, Chief Justice Harry Olson of the Chicago Municipal Court, wrote the introduction. Olson wrote that “the segregation of incorrigible defectives...as a measure of crime prevention is urgently needed...however, in a number of states...experiments have been made with sterilization. The two theories of segregation and sterilization are not antagonistic, but both may be invoked.”⁵²² Olson’s quote illustrates that segregation and sterilization were both seen as appropriate state responses for dealing with incorrigible populations.

Olson’s career as a prominent jurist shows that support for eugenics was not limited to medical professionals and penologists. In his article “The Two Percent Solution” (1998), Michael Willrich has demonstrated that the convergence of eugenics

⁵²⁰ Laughlin, 122–24.

⁵²¹ Laughlin, 159, 327.

⁵²² Laughlin, vi.

discourse and urban court operations in the early twentieth century facilitated the emergence of “eugenics jurisprudence,” defined as “the aggressive mobilization of law and legal institutions in pursuit of eugenic goals.”⁵²³ Willrich outlines the history of Olson’s Chicago Municipal Court as the prime example of eugenics jurisprudence. Olson believed that courts should use psychological testing to identify mental defectives requiring long-term confinement.⁵²⁴ In 1914, the Court opened a Psychopathic Laboratory to identify genetically predisposed criminals, and tens of thousands of defendants were tested in the lab during Olson’s tenure as Chief Justice until 1930. The lab assisted judges in sentencing, directed clinical research on crime, and served as a model for similar labs in other cities and for a proposed national laboratory. Olson argued that crime control was “the first step in the eugenics programme.”⁵²⁵

By 1922, sixteen states authorized criminal sterilizations. Several laws focused on violent and sexual offenders, but others cast a wider net. When signing New Jersey’s law, Governor Woodrow Wilson explicitly stated that it was designed to target “the hopelessly defective and criminal classes.”⁵²⁶ California’s 1909 law and Oregon’s 1917 statute included anyone convicted of any three felonies as eligible for the procedure, and four states targeted the “habitual criminal.” Three states provided no definition of the term

⁵²³ Michael Willrich, “The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930,” *Law and History Review* 16 (1998): 66.

⁵²⁴ For the relationship between Laughlin and Olson, see Cohen, *Imbeciles* chapter 5; Laughlin, *Eugenical Sterilization* introduction.

⁵²⁵ Lindsey, “The Bill”; Olson quoted in Willrich, “Two Percent Solution,” 85, 89.

⁵²⁶ “Gov. Wilson Signs the Sterilization Bill,” *New York Tribune*, May 4, 1911.

“habitual criminal” and Kansas vaguely defined it as, “a person who has been convicted of some felony involving moral turpitude.”⁵²⁷

The link between sterilization and crime was not only apparent in state statutes. The Supreme Court upheld compulsory sterilization laws in the 1927 decision *Buck v. Bell*. In the most famous passage of the decision, Justice Oliver Wendell Holmes explicitly discussed criminality. Holmes wrote,

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.⁵²⁸

It is significant that Holmes linked degeneracy to crime. In his famous speech “The Path of the Law” given thirty years prior to *Buck v. Bell*, Holmes stated that, “If the typical criminal is a degenerate, bound to swindle or murder by as deep seated an organic necessity as that which makes the rattlesnake bite...he cannot be improved.”⁵²⁹ Holmes’ linkage between criminality and heredity reflected both a broader national acceptance of these connections and his personal longstanding beliefs in eugenics. After *Buck v. Bell*, the national rate of sterilizations skyrocketed to nearly 2,000 annually.⁵³⁰

There is reason to believe that sterilizations were less common in prisons than in mental facilities, especially since some states passed sterilization laws that targeted the

⁵²⁷ For the laws and their text, see Harry H. Laughlin, *Bulletin No. 10B: Report of the Committee to Study and to Report on the Best Practical Means of Cutting off the Defective Germ-Plasm in the American Population: The Legal, Legislative, and Administrative Aspects of Sterilization* (New York: Eugenics Record Office, 1914); Laughlin, *Eugenical Sterilization*.

⁵²⁸ *Buck v. Bell*, 274 U.S. 200 (U.S. 1927).

⁵²⁹ Oliver Wendell Holmes, “The Path of the Law,” *Harvard Law Review* 10, no. 8 (n.d.): 470.

⁵³⁰ Black, *War Against the Weak*, 122–23.

mentally impaired but not criminals.⁵³¹ But as Rafter (1997) has shown, early twentieth century eugenics research published by the likes of H.H. Goddard and Lewis Terman blurred the lines between low intelligence, mental illness, and criminality by treating the “feeble-minded,” “insane,” and “epileptics” as various “criminal types.” Further, courts with psychopathic laboratories like Chicago’s routinely sent criminal defendants to institutes for the feeble-minded. This suggests that the occupants of mental institutions where sterilizations were most common may have included many “criminal types,” demonstrating how constructions of criminality overlapped with diagnoses of mental illness. While not all were convicted criminals, at least 70,000 people were subjected to compulsory sterilizations between 1900 and 1970, with the majority of them occurring in the Progressive Era.

The Court’s ruling in *Buck v. Bell* briefly rejuvenated the eugenics movement, leading to a new wave of sterilization laws so that 28 states had them by 1931. Nonetheless, eugenics did not exhibit resilience into the latter twentieth century. But how the legacies of eugenics conditioned crime politics through the twentieth century will be explored in chapters 6 and 8.

Some scholars suggest that eugenicists created the idea of criminal incorrigibility.⁵³² The incorrigibility idea was present in eugenic debates, but this argument ignores consistencies between eugenic and anthropological theories of criminality. Both treated crime as a function of immutable physiological pathologies, concluded that many offenders were incorrigible, and lent scientific credence to the

⁵³¹ Joel Hunter, “Sterilization of Criminals: Report of Committee ‘F’ of the Institute,” *Journal of the American Institute of Criminal Law and Criminology* 7, no. 3 (1916): 373–78.

⁵³² Pisciotta, *Benevolent Repression*, 125.

racist, nativist, and classist strands of American political culture. Arguments for sterilizing and indefinitely detaining “incurables” were not new in the early twentieth century. Eugenic reformers reframed established ideas about crime in pursuit of a new policy agenda, repackaging ideas associated with rehabilitative ideology to further their aims.

V. Crime Politics in the 1920s and the Rise of the Crime Commission

The crime politics of the 1920s in many ways looked remarkably different from the crime politics of the early twentieth century. A series of crime waves and high-profile cases fueled new public anxieties over criminality in the 1920s. Culture wars over narcotics regulation, prostitution, and prohibition pushed different issues of criminal law onto the national agenda.⁵³³ The rise of organized crime gave the federal government a reason to increase its involvement in crime control. Strike activity was consistently derided as criminal, serving to further discredit unionism as a threat to public safety.⁵³⁴ The Red Scare, Boston Police Strike, and race riots of the early 1920s all laid the basis for the federalization of crime control in the 1930s.⁵³⁵ A new managerial penal philosophy also took root, focusing on efficiently managing prisoners with little regard for their reformation by repurposing rehabilitative tools to make convicts complacent inmates rather than reformed citizens. This shift was ostensibly rooted in a disillusionment with the rehabilitative model.⁵³⁶

⁵³³ Stuntz, *The Collapse of American Criminal Justice*, 158–90.

⁵³⁴ Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1980), 161–169.

⁵³⁵ Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1980), 161–69.

⁵³⁶ McClennan, *The Crisis of Imprisonment*, 419–48.

While these were major differences, there were also consistencies between Progressive Era crime politics and the politics of the 1920s, two of which are essential for understanding the crime politics that would develop during the New Deal. First, the managerial penology of the 1920s bore key similarities to rehabilitative penology by drawing on ideas of incorrigibility. The spread of “habitual offenders laws” in the 1920s, 1930s, and 1940s were rationalized as mechanisms for incarcerating incorrigibles but had roots in these managerial shifts. The relationship between the managerial model and the rehabilitative ideal will be studied more closely in chapter six.

The second major consistency can be seen in how the state and the federal governments responded to the unique issues of the 1920s. Public concerns over gangs, prohibition, and culture wars prompted the “crime commission” to become a principle instrument of criminal justice reform. Crime commissions were outgrowths of progressivism’s reliance on science and expertise. Commonly created at the state and federal level, crime commissions were regularly tasked with employing experts to address social and political problems related to crime. Crime commissions were so common that historian Samuel Walker has referred to the 1920s as “The Era of the Crime Commission.”⁵³⁷ Commissions regularly shook up public opinion and created support for an enlarged federal role in crime control. The rapid spread of commissions set the precedent for the creation of the national Wickersham Crime Commission in 1929, whose reports shaped federal crime politics and political discourse about crime during the New Deal.

Often funded by business interests, state-level commissions as well as one

⁵³⁷ Walker, *Popular Justice*, 169–78.

National Crime Commission in 1926 published many reports through the 1920s. They addressed a variety of issues relevant to criminal justice including corrections, police behavior, law enforcement, and plea-bargaining, and often expressed disillusionment with rehabilitation. Often, their prime focus was on the success or failure of prohibition and the rise of organized crime. These commissions had real political power, discussing numerous reforms that shaped how states responded to crime. In doing so, they regularly reviewed popular theories of criminal behavior, informing lawmakers as to which theoretical explanations of criminal behavior had the strongest empirical basis. From 1919 through 1931, at least 35 crime commissions were created at the state or federal level to examine such questions.⁵³⁸ Through the reports of these crime commissions, scientific experts kept ideas about eugenics, bio-determinism, and innate criminality alive.

Of these thirty-five, the three best known were the Cleveland Crime Survey (1922), the Missouri Crime Survey (1926), and the Illinois Crime Survey (1929).⁵³⁹ The Illinois Crime Survey endorsed what it called the “School of Modern Penology,” which was founded on the logic that “uncontrollable hereditary impulses...[make] the commission of crime almost inevitable.” The report supported the “individualization and segregation” of inmates called for by rehabilitative ideology but decried the sentimentalist impulses of rehabilitative scholars and suggested that extended punishment was often necessary. The commission thus expressed approval when they found that the

⁵³⁸ American Bar Foundation, *The Administration of Criminal Justice in the United States: Plan for a Survey* (Chicago: American Bar Foundation, 1955), 5–6.

⁵³⁹ Joseph F. Spillane and David B. Wolcott, *A History of Modern American Criminal Justice* (Thousand Oaks: Sage, 2012), 146; Walker, *Popular Justice*, 169–70.

indeterminate sentence had increased the average term of incarceration for inmates.⁵⁴⁰ The Missouri Crime Survey similarly linked its support for indeterminate sentencing to concerns about incorrigibility, writing that repeat offenders “should be dealt with by specially devised habitual criminal laws and be subjected to wholly indeterminate incarceration.”⁵⁴¹

In studying the causes of crime, state commissions routinely validated the ideas of eugenics scholars. In fact, biological factors were often the only causes of crime commissions explored. The sole examination of the causes of crime in the Cleveland Commission’s report came in a section called “Medical Science and Criminal Justice,” which directed attention onto juvenile delinquency, mental health, and how health workers and medical professionals could detect criminality.⁵⁴² The Missouri Commission also only had one chapter on the causes of crime, called “Mental Disorder, Crime, and the Law” which explored “feeble-minded persons,” “psychopathic personalities,” and mental disorder among adult and juvenile criminals.⁵⁴³ Similarly, the Illinois Commission’s only attention to crime’s causes was a chapter titled “The Defective or Deranged Delinquent,” exploring the “psychopathic conditions” of individuals charged as criminals and the psychiatric assistance provided to the Cook County Court system by the Psychopathic

⁵⁴⁰ Illinois Association for Criminal Justice and Chicago Crime Commission, *The Illinois Crime Survey* (Chicago: Illinois Association for Criminal Justice, 1929), 430, 433, 448.

⁵⁴¹ Missouri Association for Criminal Justice and Guy A. Thompson, *The Missouri Crime Survey* (New York: Macmillan, 1926), 406, 497.

⁵⁴² Cleveland Crime Commission, *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* (Cleveland: The Cleveland Foundation, 1922), 439–88.

⁵⁴³ Missouri Association for Criminal Justice and Thompson, *The Missouri Crime Survey*, 399–428.

Laboratory.⁵⁴⁴ And it was not just crime commission reports that kept the eugenic tradition alive; work by H.H. Goddard, Clarence Darrow, and Ernest Hoag and Edward Williams kept links between biology, psychology, and crime strong through the 1920s.⁵⁴⁵

There were some commission reports that endorsed perspectives emphasizing the sociological or cultural causes of crime. For example, the Chicago Commission on Race Relations' report *The Negro in Chicago* (1922), published after the Chicago riots of 1919, emphasized environmental factors contributing to crime. While it was not a “crime commission” but a race-relations commission, the Chicago Commission discussed the “tangle of predisposing circumstances” driving black crime, including poor housing and deteriorating neighborhood conditions. Its report claimed that socioeconomic factors and biased media coverage produced “an exaggerated picture of Negro crime.” But in doing so, the report emphasized the distinctive criminal character of black culture as having “a pathological attitude towards society.” Such an attitude, the commission concluded, promoted “violence and other lawlessness” driven by “a desire for social revenge” against a history of abuse. In this way, the few reports that heard the arguments of Du Bois, Boas, and others succumbed to the same deficiencies as cultural theory. Essentializing black culture as a cause of crime propounded a theory of cultural

⁵⁴⁴ Illinois Association for Criminal Justice and Chicago Crime Commission, *The Illinois Crime Survey*, 737–814.

⁵⁴⁵ Goddard, Henry Herbert, *Psychology of the Normal and Subnormal* (New York: Dodd, Mead and Co., 1919); Clarence Darrow, *Crime: Its Cause and Treatment* (New York: Thomas Y. Crowell Co., 1922); Ernest Bryant Hoag and Edward Huntington Williams, *Abnormal Minds and the Law* (Indianapolis: Bobbs-Merrill, 1923).

difference that was rooted in assumptions of racial difference and did little to discredit claims that black criminality was a unique social problem rooted in black pathology.⁵⁴⁶

While the commissions of the 1920s were responses to a historically specific set of concerns, they reflected the progressive tradition of relying on expertise to solve social problems. The fact that commissions commonly endorsed the biological tradition highlights the tenacity of bio-determinist theories of criminality among experts. However, the eugenics movement began to lose steam in the 1920s as eugenicists increasingly struggled to secure funding for research and courts began to question the utility of eugenics measures. Calls for explicit eugenics laws quieted during the 1920s in favor of calls for managerial efficiency in prisons.⁵⁴⁷ While biological ideas remained alive in academic and political discourses to some extent in the 1920s, they began to lose the potency to produce policy change they had in previous decades.

Nonetheless, the ideational structure of the theories expounded Lombroso, Brockway, and their eugenicist followers contributed to what is called the positivist school of criminology, a school of thought premised on the notion that the causes of crime can be scientifically identified through empirical testing. The works of Lombroso, Brockway, and their adherents sewed assumptions about class, determinism, and criminal behavior into positivist criminology. These assumptions would crucially shape the ideas articulated by scholars of crime that aimed to discredit biological and eugenic theories in the 1930s and 1940s.

⁵⁴⁶ Chicago Commission on Race Relations, “The Negro in Chicago: A Study of Race Relations and a Race Riot” (Chicago: University of Chicago Press, 1992), 327, 341–45, 526, 560–61.

⁵⁴⁷ Spillane and Wolcott, *A History of Modern American Criminal Justice*, 73–74.

One of these assumptions was the basic notion that criminality was a personal individual trait that could either be curable or incorrigible. This put an emphasis on the focal individual that proved useful for penal practitioners, experts, and lawmakers even after support for eugenics measures faded. The idea of incorrigibility, absent its biological flavor, was still used to politically through the 1930s and 1940s to portray crime as a personal trait that could only be addressed through individual-level interventions. Through the New Deal and mid-century, the rehabilitative model encouraged policymakers to pursue individual-level reforms to rehabilitate inmates in lieu of structural reforms, detaching new social-structural theories of crime from demands for economic reform.

Criminal anthropology and eugenics also established a second discursive parameter in positivist criminological scholarship. By explicitly challenging biological theorists, positivist social-structural scholars of crime accepted terms of debate dictated by biological theorists. Specifically, by only examining the crimes eugenicists and anthropologists studied, they focused on crimes common among the poor. Much as cultural schools of race and crime inadvertently verified the idea that the crime problem was a race problem, social structural theorists reaffirmed the notion that the crime problem was a class problem. The influence of these ideas through the New Deal era and post-war years will be explored in more depth in chapter six.

VI. Conclusion

The eugenics movement built on the arguments of Lombroso, criminal anthropologists, and rehabilitative scholars. But eugenicists repackaged the ideas of Lombroso and Brockway to defend a unique political agenda that appealed to

Progressives. By advocating that scientific experts could and should play a role in weeding out the unfit criminal incorrigibles in order to preserve social health and the national racial stock, eugenicists modified preexisting ideas about incorrigibility to justify policy proposals that fit within progressive political thought. The repression of the “unfit” and emergence of criminal sterilization statutes reflected older ideas of incorrigibility in ways that abandoned the Gilded Age emphasis on “survival of the fittest” in favor of a program of state-sponsored artificial selection driven by science.

In this way, we can see how the story of Progressive Era crime politics can be understood on Smith’s “spiral of politics.”⁵⁴⁸ Operating in a preexisting institutional and ideational universe, political actors drew on and refashioned preexisting ideas in ways that changed the character of those ideas and promoted institutional change. The ability of Progressives to create new ideas was conditioned by preexisting and prevailing ideas, and the influence of Lombroso, Brockway, and others on progressive thought is evident. But through a creative process of ideational modification and appropriation, political actors reattached these altered ideas to a new set of policy commitments that comported with progressives’ political philosophy and served their policy goals. By the New Deal, the cyclical process of development outlined in the spiral restarted within an ideational and institutional universe that had been altered and modified by Progressives.

The class-skewed crime politics of the Progressive Era not only reflected trends in eugenics, race science, and criminology, but also economics. This chapter showed how economists became some of the most vocal proponents of criminal sanction and sterilization for the unfit, who they viewed as drains on the nation’s political economy, as

⁵⁴⁸ Smith, “Ideas and the Spiral of Politics.”

economics developed into a prominent intellectual discipline. In this evolving social science milieu, economists were key actors who brought comparable ideas into debates about economic regulation. Much like Progressives believed scientific experts should proactively identify and segregate the unfit out of the population, they also believed that scientific experts should proactively identify and segregate unscrupulous businessmen out of the marketplace. This rationale embedded into Progressive Era regulatory politics a unique political construction of corporate criminality that was rooted in similar ideational and ideological trends.

CHAPTER 5: REGULATING COMPETITION AND PUNISHING CORPORATIONS IN THE PROGRESSIVE ERA

“The law-making power of the State of New York...has put on the same footing prostitutes, gamblers, and corporations... It is a great deal safer...to be a prostitute or gambler than it is to be a corporation.”
– Walter S. Logan of the New York Bar, 1901⁵⁴⁹

Progressives generally viewed laissez-faire economics as outmoded and inefficient. The industrial behemoths and robber barons that rose to power in the nineteenth century had been viewed as the most “naturally fit” of the late nineteenth century economy, but the Progressives of the early twentieth century questioned whether or not that was truly the case.

The last chapter emphasized how Progressives called into question natural selection, Social Darwinism, and survival of the fittest, claiming that undesirable traits could sometimes become commonplace absent state regulation. This logic led Progressives to insist that natural selection dynamics be replaced with artificial selection processes driven by the state. This rationale for state expansion was mirrored in Progressives’ regulatory politics. As chapters two and three outlined, market competition was politicized as an economic analog of natural selection in the Gilded Age. Absent robust state intervention, competition would permit the best in the market to succeed. But just as Progressives questioned the efficiency of natural selection, they also questioned the efficiency of laissez-faire. Progressives argued that the state could do a better job if it actively selected out criminals before they committed crimes *and* if it actively selected unscrupulous businessmen out of markets rather than relying on competitive dynamics to

⁵⁴⁹ Walter Logan, “The Use and Abuse of Corporation,” *The American Lawyer* 9 (1901): 158–59.

do it. Progressives thus concluded that a stronger state reliant on objective science and expertise had a crucial role to play in monitoring the industrial economy.

Progressives were more critical of corporate power than either the advocates laissez-faire or regulatory ideology were in the late nineteenth century. They were more disposed to condemn business practices as criminal and were willing to use the state to monitor markets as a result. In fact, some progressive economists included the unethical businessmen within their eugenic taxonomies of human types. Due to this rejection of individualist classical economics, many Progressives also embraced the real entity theory of the firm—the idea that the corporation was an autonomous entity with an identity distinct from that of its owners or shareholders. Many defended this concept in order to give the state a means of regulating corporations and ensuring that businesses act in civically and socially responsible ways.

Intuitively, this suggests that Progressives likely instituted meaningful reforms that checked the crimes of large corporations. A closer look reveals a different story. While Progressives contended that laissez-faire allowed the unethical rather than the fittest to survive, they generally claimed that most businessmen were good people. Only a few men in industry were rapacious capitalists driven by primitive predatory impulses. The problem was that these few bad men compelled good men to engage in unethical activity to effectively compete. Progressive regulatory reforms, most notably the creation of the Federal Trade Commission (FTC), were built not to protect the public from predatory capitalism, but to protect good businessmen from bad ones by preventing the bad ones from committing crime in the first place through cooperative mechanisms.

As a result, the FTC was designed to work with rather than against business. After much debate, the FTC was granted no meaningful way of pursuing criminal sanctions. Legislators feared that the threat of prosecution would deter good businessmen from innovation and risk-taking, and the FTC reflected the design advocated by Louis Brandies. It was built to regulate competition by working with businesses to identify industry-specific restraint of trade practices, prevent them from occurring, and discourage concentration rather than prosecute criminal wrongdoing. By reframing regulatory ideology to new purposes, Brandeis constructed the FTC primarily as an ally to business and less as a protector of the public welfare, leaving it vulnerable to cooptation by corporate interests shortly after its passage. While this collaborative and cooperative approach was a worthwhile pursuit, the lack of any robust enforcement mechanism left the FTC with little ability to compel obedience. In the context of Braithwaite and Ayres' sanctions pyramid, the FTC only had cooperative regulatory sanctions at its disposal without a credible threat of prosecution backing them up should corporations disobey.

Further, the doctrine of corporate criminal liability counted as many libertarian adherents as it did liberal ones. While advocates of regulation assured that the doctrine would allow the state to hold big business accountable, those who opposed regulation noted that the principle granted corporations the same legal and constitutional protections as a human person. A close analysis of the doctrine's origins demonstrates that it was not liberal progressives who drove its creation, but rather railway managers who insisted that it was a more pragmatic means of punishing corporate crime than punishing individuals. This history indicates that the railways' political push for corporate liability was a disingenuous move that served to further insulate corporations from the criminal law's

reach. In a criminal justice system premised on the existence of free will and proof of criminal intent, corporate criminal liability stands out as an anomaly, and punishing corporate entities has proven historically difficult.⁵⁵⁰

This chapter begins by outlining core currents of progressive political thought in relation to economic regulation. The next section discusses the way corporate criminality was constructed within this ideological milieu, highlighting the crucial role economists played in this process as economics established itself as a prominent intellectual discipline. Then, the relation of Progressive Era constructions of corporate criminality to policy change is traced through antitrust law. Given the changing role of the Presidency in the early twentieth century, this begins with an analysis of the antitrust politics of Presidents Theodore Roosevelt, William Taft, and Woodrow Wilson. This illustrates how Progressive antitrust politics created a unique context for the emergence of the FTC in 1914. This culminated in the design of a commission that was built to protect big business from itself rather than protect the public from predatory business practices. As the financial sector grew into a dominant force in the political economy, financial corporations helped transmit and effectively adapt regulatory ideology in debates over financial reform and the FTC. The penultimate section reviews the political development of corporate criminal liability, highlighting its broad-ranging political appeal and the politicking that facilitated its articulation in the Elkins Act of 1903 and in the Supreme Court ruling *New York Central and Hudson River Railroad v. New York* in 1909. The final part of the chapter highlights how these developments shaped the crime politics of

⁵⁵⁰ Laufer, *Corporate Bodies and Guilty Minds*; John Braithwaite and Brent Fisse, “Varieties of Responsibility and Organizational Crime,” *Law and Policy* 7 (1985): 315–43.

the 1920s and set the stage for the Great Depression, while leaving the state with a limited capacity to respond to the corporate abuses and negligence that caused it.

I. Progressive Political Ideologies and Big Business

As the last chapter noted, despite their diversity of political views, Progressives drew from a shared collection of intellectual discourses relating to race, economics, human behavior, and politics.⁵⁵¹ Four broad currents of progressivism are essential for specifically understanding the politics of regulation in the early twentieth century.

First, Progressives believed that industrialized society should be supervised by a modern administrative state. They expressed a strong faith in the state's "visible hand" to diagnose and treat the social ailments of industrial capitalism.⁵⁵² Confidence in the visible hand reflected Progressives' rejection of laissez-faire. Progressives viewed laissez-faire as economically unsound and obsolete, concluding that markets were not always efficient and that an active state could correct for market inefficiencies. Progressives pushed to shift regulatory and economic oversight authority from courts and parties to independent agencies. As Robert Wiebe noted, the central emphasis of progressivism was that the state "should fulfill its destiny through bureaucratic means."⁵⁵³

Monitoring industry required more than simply creating networks of regulatory agencies. A second tenet of progressivism was a belief that bureaucratic experts who relied on objective science should guide these administrative bodies. It was thought that a dependence on science would insulate bureaucratic administrators from politics, but true

⁵⁵¹ Rodgers, "In Search of Progressivism."

⁵⁵² Chandler, *The Visible Hand*.

⁵⁵³ Wiebe, *The Search for Order*, 166; Skowronek, *Building a New American State*; Leonard, *Illiberal Reformers*.

autonomy proved difficult to attain. While agencies remained deeply political in their behavior and decision-making, Progressives rationalized their faith in scientific expertise and bureaucratic administration as alternatives to political decision-making.⁵⁵⁴

As with crime politics, social scientists were key players in policy debates about regulation. To understand these debates, one must look to the prevailing discourses about economics. The field of economics grew in prominence in the 1900s as the American Economic Association (AEA), founded in 1885, evolved into a political and intellectual force. Richard Ely, Professor of Political Economy at the University of Wisconsin, became the AEA President in 1900. The AEA has been under the control of academics ever since.⁵⁵⁵ Ely called economists a “natural aristocracy,” claiming that because their authority and power were derived from scientific knowledge, they were wholly incorruptible. This commitment to disinterested truth-seeking is what Ely said differentiated economists from capitalists pursuing profits or politicians seeking power and thus made them necessary to policy debates.⁵⁵⁶

Progressive economists thought that they had the knowledge to cure social and economic problems while promoting market efficiency and articulated new ideas about corporate capitalism, criminality, and regulation that diverged from laissez-faire ideologies. Economists critiqued the inefficiencies of Gilded Age capitalism, suggesting that the robber barons once deemed the most “fit” were really the most unscrupulous.

⁵⁵⁴ See Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton: Princeton University Press, 2001) on how bureaucracies achieve autonomy most effectively when mid-level officials build relationships and reputations among a diverse range of interests for providing unique services.

⁵⁵⁵ Michael Bernstein, “A Brief History of the American Economic Association,” *The American Journal of Economics and Sociology* 67, no. 5 (2008): 1007–23.

⁵⁵⁶ Ely, *Studies*, 456; Leonard, *Illiberal Reformers*, 34.

Constructs of naturalized hierarchies were also incorporated into economic analyses of industrial reform. Particularly, Frederick Winslow Taylor's 1911 book *The Principles of Scientific Management* promoted what was thought to be state of the art business theory. His theory of management aimed to improve labor efficiency by fragmenting jobs within the production process, thus minimizing the skill requirements of workers, easing the execution of their jobs, and simplifying managerial supervision of factory operations. Taylorism is now associated with inhumane work conditions, but at the time was universally praised. Louis Brandeis, John Commons, Thorsten Veblen, Theodore Roosevelt, and even muckraker Ida Tarbell embraced "Taylorism." But Taylor justified his theory with eugenics, believing that workers were lazy, unintelligent, and required simple jobs and close supervision to be productive.⁵⁵⁷

This is related to a third crucial theme of progressivism—that Progressives' faith in science legitimated faith in natural hierarchy. Discourses of Darwinism justified systems of racial and class oppression and simultaneously infused regulatory discourse with naturalized constructions of criminality. Progressive race scientists often included categorizations of the rapacious capitalist in their racial taxonomies, presenting them as products of archaic predatory instincts. Such scholars argued that Gilded Age analysts mistook immoral and unscrupulous businessmen for the "fittest" of the market jungle, and that a stronger administrative state was necessary to monitor them.⁵⁵⁸

It is reasonable to think this would lead to harsh criminal laws targeting the destructive capitalists. But Progressives' hostility to the few predatory businessmen was

⁵⁵⁷ Leonard, *Illiberal Reformers*, 60–61; Foroohar, *Makers and Takers*, 70–75.

⁵⁵⁸ Ripley, *The Races of Europe*; Thorsten Veblen, *Theory of the Leisure Class* (New York: Macmillan, 1899), 215–20.

checked by their faith in the character of the majority of businessmen. Among Progressives, some defended populists' insistence for the destruction of large businesses while others supported large corporations as inevitable and efficient.⁵⁵⁹ But a third perspective endorsed the model of regulated competition, which fused faith in expertise with populist sympathies for markets. Gerald Berk has shown how historical actors led by jurist Louis Brandeis convinced policymakers to design the Federal Trade Commission based on this model, aiming to foster industry habits of productive experimentation, innovation, and collaboration rather than cutthroat competition.⁵⁶⁰

It was within the model of regulated competition that the dichotomy between the criminal and ethical capitalist flourished. It was rationalized that ethical businessmen needed protection from unethical ones through state regulation, and Progressive experts were uniquely well suited to distinguishing the good from the bad. This approach rested on a belief that capitalists could be morally rehabilitated and their behavior channeled into productive directions by the state without punishment. As a result, the FTC was empowered to work *with* business leaders in ways that promoted cooperation. This interpretation of corporate criminality facilitated the regulation of competition, not the punishment of cutthroat business tactics, and regulatory ideology was thus intertwined into Brandeis's model of regulated competition.

⁵⁵⁹ Wiebe, *The Search for Order*; Leonard, *Illiberal Reformers*, 57–58; Berk, *Alternative Tracks*; McGerr, *A Fierce Discontent*, 154–59; for relationship between populist anti-monopolism and progressive era attitudes on big business and regulation, see Postel, “The American Populist and Anti-Populist Legacy”; Postel, “TR, Wilson, and the Origins of the Progressive Tradition”; Smith, “The Progressive Seedbed: Claims of American Political Community in the Twentieth and Twenty-First Centuries”; Skowronek and Engel, “The Progressives’ Century.”

⁵⁶⁰ Berk, *Louis D. Brandeis*.

Progressives thought laissez-faire was inefficient in the same way they thought natural selection was inefficient. Just as assertive state interventions monitoring criminality like sterilization replaced natural selection with artificial selection, state-led market coordination replaced a “survival of the fittest” market mentality with an artificial selection process. The state was to be used to weed out predatory capitalists from the good ones, direct predatory impulses into productive directions, and displace remnants of laissez-faire with state monitoring. This philosophy still entailed a belief in the superiority of capitalists but authorized more involvement from the state to efficiently sort between bad and good businessmen. So as shifts in discourse from the Gilded Age to Progressive Era adapted and transmitted aspects of rehabilitative and regulatory ideologies over time, a political shift followed. In place of a natural selection philosophy (“born criminals” and “survival of the fittest” markets), Progressives endorsed state-led artificial selection as more efficient (eugenics and regulated competition).

A fourth and final important theme is that progressives commonly attributed a collective identity to social bodies and organizations, including corporations. Much in the way Progressives viewed the social body as a collectivity rather than a disaggregated collection of individuals, they also embraced the real entity theory of the firm—the idea that the corporation was “a real and natural entity whose existence is prior to and separate from the state.”⁵⁶¹ Leftist Progressives thought real entity theory could be a means of holding capital accountable. Aware of the state’s reluctance to regulate industry, they depicted corporations as organic entities that had the duty to act in civically responsible

⁵⁶¹ Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 101.

ways so as to give the state a way to hold corporations responsible for antisocial behavior through doctrines of corporate criminal and civil liability. Corporate criminal liability particularly was contingent on the belief that the corporate body possessed the requisite mens rea to commit a crime.⁵⁶²

Despite its leftist appeal, real entity theory had right-wing libertarian supporters. Treating the corporation as an autonomous being granted it as much legal protections as an individual. This provided a rationale for an anti-regulatory politics aiming to insulate the corporation from the state.⁵⁶³ In early twentieth century policy debates about corporate criminal liability, both leftist Progressives and conservatives agreed that punishing the corporation rather than the individuals within it was a more efficient means of sanction. But driven by mid-level railroad managers, the doctrine ultimately served to insulate executives from the reach of the criminal law.

It is within these ideological currents that constructions of the corporate criminal evolved. Gilded Age accounts steeped in the rationality of market competition presented robber barons as the naturally fittest of the capitalist setting, limiting state responses to predatory business. Progressives were more willing to criticize the unscrupulous capitalist, but only as a foil to the ethical businessman, and most Progressives supported the large corporation as an efficient phenomenon that should be monitored in lieu of the individuals within it. This made for a precarious combination of policy commitments that produced a unique set of policy outcomes. The regulated competition philosophy that

⁵⁶² David Millon, "Theories of the Corporation," *Duke Law Journal*, 1990, 201–62; Mark Hager, "Bodies Politic: The Progressive History of Organization 'Real Entity' Theory," *University of Pittsburgh Law Review* 50 (1989): 575–654.

⁵⁶³ Millon, "Theories of the Corporation," 241; Hager, "Bodies Politics," 580.

undergirded the FTC embodied the idea that the state could and should differentiate good and bad businessmen and morally rehabilitate the bad ones.

II. Progressive Era Constructs of Corporate Criminality

There were three key facets to the Progressives' conceptualization of corporate criminality. Most fundamental was the idea that market-driven natural selection was inefficient, minimal state intervention had allowed the unscrupulous to run upright businessmen out of business, and that bureaucratic experts would effectively distinguish between good and bad capitalists. As Richard Ely wrote in his 1901 book *Introduction to Political Economy*, "Competition, if unregulated, tends to force the level of economic life down to the moral standard of the worst men who can sustain themselves in the business community."⁵⁶⁴ Edward Ross made similar claims, linking wealth accumulation to his concerns about racial progress. In 1903, he wrote that, "The struggle for wealth does not bring to the top the intellectual aristocracy...[t]he plutocracy of to-day is far, very far...from favoring the multiplication of the best."⁵⁶⁵

Economist and eugenicist Irving Fisher clarified that while ideas about natural criminality justified social repression, ideas about natural corporate rapacity justified regulation. In his 1907 article "Why Has the Doctrine of Laissez-Faire Been Abandoned?" Fisher discussed the shift from the laissez-faire to "modern doctrines of governmental regulation and social control." He claimed that the lower classes rarely knew their best interest, saying that "some men need enlightenment...and others need restraint." This reflected the dichotomy between reformation and incorrigibility. But

⁵⁶⁴ Ely, *Introduction to Political Economy*, 74.

⁵⁶⁵ Ross, "Recent Tendencies," 447.

Fisher went further, arguing that the educated should always “be allowed to dominate,” the “ignorant” classes. And for those at the top, cutthroat competition produced inefficient outcomes and should be replaced with rationalized regulatory interventions.⁵⁶⁶

Economists recognized that concepts of fitness in Social Darwinist thought were contingent constructs. Progressive luminaries like Lester Frank Ward, Henry Carter Adams, and John Bates Clark shared this belief. They saw themselves as antagonists to Herbert Spencer and William Graham Sumner’s efforts to weaponize Darwinist ideas to rationalize laissez-faire, instead understanding natural selection as an environmentally conditioned process.⁵⁶⁷ Like Gilded Age apologists for laissez-faire, Progressives argued that those who succeeded in business were naturally distinct human types, but unlike their predecessors they critiqued the unprincipled businessman as driven by a natural disposition. For instance, famous sociologist Thorsten Veblen argued that the rapacious capitalist could be understood as a natural racial type driven by an animalistic predatory instinct.⁵⁶⁸ The most successful capitalists were sometimes products of natural selection, but at other times were unscrupulous men who exhibited undesirable traits to thrive in the competitive dynamics of capitalism. Progressives thought that state monitoring could differentiate such individuals from successful businessmen who were morally sound, and thus help to create markets in which ethical businessmen could succeed. Regulation would thus save capitalism from itself.

⁵⁶⁶ Irving Fisher, “Why Has the Doctrine of Laissez-Faire Been Abandoned?,” *Science* 25, no. 627 (1907): 18–27.

⁵⁶⁷ See Leonard, *Illiberal Reformers* chapter six for more on the broader trends in this economics literature.

⁵⁶⁸ Veblen, *Theory of the Leisure Class*, 215–20.

Arguments about the unethical businessman were intertwined with a second current in Progressive debates—the idea that most businessmen were ethical and the few who were not were reformable. Progressives hinged their support for regulation on the need to protect good businessmen, not the public, from their unethical competitors. Absent regulation, as economist Edward Ross said, economic life would be brought down “to the moral standard of the worst men who can sustain themselves in the business community.” This inclination to protect business against itself rather than protect society from predatory practices checked their impulses to punish corporate malfeasance.

This also does not mean that rationalizations for corporate greed disappeared in Progressive Era scholarship on crime and human behavior. G. Frank Lydston particularly rearticulated older Gilded Age rationalizations of corporate rapacity. He defended businessmen accused of wrongdoing by saying, “None of them have a previous criminal record,” reflecting tendencies in rehabilitative ideology to use past behavior as a metric of criminal tendencies and rehabilitative capacity.⁵⁶⁹ Lydston claimed that businessmen were driven by a “great inherent capacity for good, and the force of character that makes men great,” but that they also can make “great criminals.” He argued that the businessman driven to crime is fueled by a different instinct than the typical criminal, but one that can still result in undesirable behavior. He wrote that, “Whether ambition results in great crimes or in good deeds, the individual will be found to be of a forceful character. The petty thief is not impelled by it.” Given that the capitalist lacked criminal instincts, Lydston wrote that “Certain influences may divert the force of a strong

⁵⁶⁹ Lydston, *The Diseases of Society*, 116.

character in the direction of criminality.”⁵⁷⁰ His arguments supported regulatory ideology by contending that businessmen who committed crimes were inherently good, deserved mild regulations rather than punishment, and could be pushed in non-criminal directions if the state created healthy market conditions. Hereditarians like Lewis Terman similarly endorsed arguments about the innate superiority of the business classes. Terman argued that IQ scores perfectly corresponded to class, economic success, and criminality.⁵⁷¹

While progressive economists remained concerned about the rapacious capitalist, they presented him as a rare deviation from the positive construct of the businessman articulated in laissez-faire ideologies, and one who was still not fully criminal. Edward Ross wrote that “The trolley company, the quack medicine man, the insurer of rotten ships, and the jerry builder,” should not be dealt with like the common criminal “because they are morally superior to him.”⁵⁷² Thus in Progressives’ logic, businessmen should not be punished for two reasons. First, good businessmen who resorted to crime to compete with their corrupt rivals should not be punished. They simply needed protection from lesser men who engaged in unethical practices and forced their competitors down to their level. Richard Ely argued that such men had “inferior natures” and “have not been able to endure” the temptations of material power.⁵⁷³ The second reason businessmen should be punished is that these weak-willed businessmen tempted by material power did not

⁵⁷⁰ Lydston, 56.

⁵⁷¹ Terman, *The Measurement of Intelligence*, 11, 320, 336–38, 348. Terman argued that business judgment was a “higher thought process,” and noted that his tests of schoolchildren’s IQs almost perfectly corresponded to class, with the highest scoring almost entirely consisting of children whose parents belonged to the “very successful business classes.”

⁵⁷² Ross, *Social Control*, 1901, 110.

⁵⁷³ Ely, *Introduction to Political Economy*, 50.

deserve punishment. Rather, the market conditions tempting them should be corrected so they could be encouraged to engage in more productive practices and activities.

Constructs of businessmen as superior human types clearly did not disappear. Chauncey Depew, formerly Vanderbilt's attorney and now a retired Senator from New York, wrote in his autobiography in 1922 that men of fame and fortune succeeded due to their "superior ability, foresight, and adaptability."⁵⁷⁴ Railroad magnate James J. Hill also wrote in his autobiography in 1910 that, "the fortunes of railroad companies are determined by the law of survival of the fittest."⁵⁷⁵ The idea that businessmen succeeded by virtue of their own intelligence, work ethic, and innate ability still persisted, but alongside new ideas that unscrupulous competitors were lowering the best in the industry down to their level.

A third tenet of progressivism that checked the impulse to punish businessmen was Progressives' embrace of real entity theory. Scholars like Richard Ely discussed the corporation as an artificial person with a degree of autonomy.⁵⁷⁶ But viewing the corporation as a collectivity rather than aggregation of individuals forced Progressives to contemplate whether individuals were the only unit through which selection could be monitored or if competition among collective entities like corporations could be explained through Darwinism. Thomas Leonard has shown that while Progressives were skeptical that industry leaders were the fittest products of natural selection, they were willing to accept natural selection doctrine "when the competitors were nations or races or even the trusts." Societies, races, and corporations could be understood as existing in a

⁵⁷⁴ Chauncey Depew, *My Memories of Eighty Years* (New York: Charles Scribner's Sons, 1922), 384.

⁵⁷⁵ James Hill, *Highways of Progress* (New York: Doubleday, 1910), 126.

⁵⁷⁶ Ely, *Introduction to Political Economy*, 24; also see Hager, "Bodies Politics."

natural state of competition with one another, meaning that in regulated markets, industrial behemoths that outpaced competitors were simply the most efficient.⁵⁷⁷

Treating the corporation as the unit of social control further insulated corporate agents from the criminal law. As an artificial person, it was nearly impossible to understand a corporation's criminality in terms of innate predispositions. The difficulty in identifying a corporate mens rea rendered it hard to attribute blame to corporate forms. Nonetheless, the doctrine of corporate criminal liability was something Progressives from both the right and left supported. Its emergence was not simply an organic outgrowth of the common law, but a politically contingent outcome.

Progressives did not discredit ideas about the natural superiority of capitalists embedded into regulatory ideology. Rather, these ideas were repackaged into the Progressives' defenses of corporate liability and regulated competition. Richard Ely neatly summarized this perspective, writing that, "statutory regulation, well-enforced, would simply confirm the efforts of the most intelligent and most just employers" rather than the more manipulative and exploitative ones.⁵⁷⁸ Ely endorsed a logic resembling the philosophy of regulated competition, stating that, "Turning now to competitive businesses, what is required with respect to them is that sort of regulation which, without destroying competition, will raise its ethical level...Regulated competition within its own proper sphere is one of the conditions of social progress."⁵⁷⁹ John Commons similarly wrote that without regulation, all employers are "forced down to the level of the most

⁵⁷⁷ Leonard, *Illiberal Reformers*, 96.

⁵⁷⁸ Ely, *Introduction to Political Economy*, 62–63.

⁵⁷⁹ Richard Ely, "Social Progress," *Cosmopolitan* 31, no. 1 (n.d.): 64.

grasping.”⁵⁸⁰ The fact that ethical businessmen existed next to unethical ones warranted regulation to ensure that the unethical were monitored and reformed without intruding on the actions of good capitalists. Regulated competition was less about punishing criminality or protecting the public than promoting economic growth in the least intrusive way. The Progressives’ perspective on regulated competition thus bundled core elements of regulatory ideology into a new brand of politics.

III. Progressives and Antitrust Reform: Regulating Competition and Criminality

Given progressive debates over the benefits and drawbacks of industrial consolidation, the growth of trusts became an issue of enormous political significance in the early twentieth century. From 1890 through 1903, the federal government initiated 23 antitrust cases, sixteen of which were civil and seven were criminal. Only one criminal conviction was obtained despite the frenzy of mergers that occurred in the years following the Sherman Antitrust Act’s passage.⁵⁸¹ In its early years, the Sherman Antitrust Act actually proved most effective in state confrontations with organized labor rather than trusts.⁵⁸² But in 1903, there were signs of change as the Department of Justice received congressional funding specifically for an antitrust division.⁵⁸³ This ushered in an era of “trust-busting” according to the narratives presented in standard history textbooks.

In reality, Progressives had varied views on trusts. Only a minority shared the strict anti-monopolist attitudes of Populists insistent on the destruction of big business.

⁵⁸⁰ Richard A. Gonce, “John R. Commons: Five Big Years, 1899-1904,” *American Journal of Economics and Sociology* 61, no. 4 (n.d.): 765.

⁵⁸¹ Thorelli, *The Federal Antitrust Policy*, 369–405 on Attorney Generals from 1890 through 1903, 587-97 for details on criminal prosecutions; Lamoreaux, *The Great Merger Movement*.

⁵⁸² Thorelli, *The Federal Antitrust Policy*, 597.

⁵⁸³ Lewis Gould, *The Presidency of Theodore Roosevelt*, 2nd ed. (Lawrence: University of Kansas, 2011), 100–101; Thorelli, *The Federal Antitrust Policy*, 535–36.

Most Progressives, including prominent economists like John Commons and politicians like President Theodore Roosevelt, saw bigness as inevitable.⁵⁸⁴ They were not pure apologists for corporations and were not hesitant to criticize monopoly, but they supported consolidation as more efficient than competition among small business.⁵⁸⁵ Others like jurist Louis Brandeis charted a middle ground, hoping to regulate and monitor competition through expert-run bureaucracies. Gerald Berk's analysis of early twentieth century antitrust policy demonstrates that Brandeis's model prevailed in the passage of the Federal Trade Commission Act of 1914.⁵⁸⁶ But a long series of political decisions led to the creation of the FTC, and the politics preceding its creation were colored with questions about the nature of corporate criminality.

Only by assessing the interaction of competing strands of progressive thought in relation to consolidation can we get a full picture of the antitrust politics of the period. Roosevelt and his successor William Howard Taft viewed big business as efficient and inevitable to different degrees, while Woodrow Wilson embraced regulated competition. But despite the bluster of their antitrust politics, each relied on core elements of regulatory ideology to advocate for policies to support industrial capitalism. Their different approaches built on common ideas about corporate criminality that were drawn from the prevailing ideological currents of progressivism.

Political Context: Variations in Progressives' Antitrust Politics

⁵⁸⁴ "Opinions of New Yorks. Albert Shaw and John R. Commons Consider Trusts Inevitable, but Think They Should Be Controlled." *New York Times*, September 14, 1899.

⁵⁸⁵ Leonard, *Illiberal Reformers*, 58.

⁵⁸⁶ Berk, *Louis D. Brandeis*; see Smith, "The Progressive Seedbed: Claims of American Political Community in the Twentieth and Twenty-First Centuries" for varying perspectives within progressive circles.

Most accounts analyze progressive antitrust politics in the context of debates over economic growth, stability, and regulation. This is usually a warranted focus. But in important ways, the enforcement of antitrust law reflected Progressives' notions of corporate criminality. This becomes clear upon examining the politics of one of the era's most prominent alleged "trust-busters"—President Theodore Roosevelt.

It is reasonable to focus on the "trust-busting" Presidents of the early twentieth century to track understandings of corporate criminality through the development of antitrust policy. Stephen Skowronek has argued that presidential leadership has changed over time in relation to the emergence of new institutional resources and governing responsibilities relative to the institution of the Presidency that have altered the power resources and strategies a President has at his disposal to affect policy change. Skowronek argues that a major change occurred at the turn of the century, which he describes as a shift from the "partisan" Presidency in which Presidents served as the broker for national party coalitions by distributing patronage to party factions and local machines to the "pluralist" Presidency. In the pluralist mode of governance, which Skowronek argues emerged in 1900 with the presidency of Roosevelt, the President became "the steward of national policymaking," who bargained between leaders of major governing institutions, national organized interests, and the executive establishment.⁵⁸⁷ Beginning with Roosevelt, Presidents played a key role in negotiating between sectors of the political economy, warranting closer attention to the actions of Roosevelt, Taft, and Wilson than the presidents of the nineteenth century in relation to antitrust policy.

⁵⁸⁷ Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge: Harvard University Press, 1993), 53.

Roosevelt was unafraid to condemn big business's actions as criminal wrongs and supported state intervention in response.⁵⁸⁸ He claimed that if the state acted as “neutral ground” to regulate businesses, it would “serve as a place of refuge” for “the lawless man of great wealth.”⁵⁸⁹ He said he supported any and all means of punishing corporate wrongdoers.⁵⁹⁰ But in spite of this rhetoric, Roosevelt remained a pragmatic Hamiltonian who accepted industrial consolidation as inevitable and efficient. In his first State of the Union Address, he suggested that combinations were “natural” and provided “great good to our people.”⁵⁹¹ He criticized the Sherman law because it “struck at all business,” rendering it “a constant threat against decent businessmen” in addition to criminal ones.⁵⁹² Roosevelt repeatedly insisted that the law should only forbid combinations that do “harm to the general public,” cautiously differentiating between “good” and “bad” trusts.⁵⁹³

By anthropomorphizing the corporation, Roosevelt employed physiological metaphors to discuss business. He insisted that to “care for the body” of society,

⁵⁸⁸ John Murphy, “‘Back to the Constitution’: Theodore Roosevelt, William Howard Taft and Republican Party Division 1910-1912,” *Irish Journal of American Studies* 4 (1995): 110–12.

⁵⁸⁹ Theodore Roosevelt, “Conservation: Speech at Denver Before the Colorado Livestock Association, August 29, 1910,” in *The New Nationalism* (New York: Outlook, 1910), 49–76.

⁵⁹⁰ Theodore Roosevelt, “Message of the Governor of New York to the Legislature, January 3, 1900,” in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 2 (New York: P.F. Collier and Son, 1910), 784–85.

⁵⁹¹ Theodore Roosevelt, “Message Communicated to the Two Houses of Congress at the Beginning of the First Session of the Fifty-Seventh Congress, December 3, 1901,” in *Addresses and Presidential Messages of Theodore Roosevelt, 1902-1904* (New York: G.P. Putnam’s Sons, 1904), 292–94.

⁵⁹² Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* (New York: Charles Scribner’s Sons, 1921), 470.

⁵⁹³ Theodore Roosevelt, “Message Communicated to the Two Houses of Congress at the Beginning of the First Session of the Sixtieth Congress, December 3, 1907,” in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, New York, Part 6 (P.F. Collier and Sons: 1910, n.d.), 1502–3; Roosevelt, “Message Communicated to the Two Houses of Congress at the Beginning of the First Session of the Fifty-Seventh Congress, December 3, 1901,” 542.

industrial development must be promoted.⁵⁹⁴ He called the railroads “arteries” through which the “commercial life-blood of this nation flows.”⁵⁹⁵ By drawing on Darwinist language, he claimed that the emergence of big business was a “mere law of nature.”⁵⁹⁶ Comparing economic development and trust formation to notions of human fitness and competition appealed to the axioms of Darwinism present in Progressive Era thought.⁵⁹⁷

If trusts were natural outcomes of competition, Roosevelt concluded that attempts to overthrow the “more prosperous” trusts would be reckless.⁵⁹⁸ He was critical of muckraking anti-business journalists seeking to disrupt the natural economic order. He compared muckrakers to “quack” doctors whose solutions would be “more dangerous” to the “patient,” meaning the economy, than any “disease” infecting industry. While Roosevelt did not offer a blanket defense of big business, he thought that trusts were natural and should be treated with care and caution.⁵⁹⁹

Roosevelt also discussed the individuals running the trusts through Darwinist metaphors. He argued trusts led by immoral men could threaten the economic order. He

⁵⁹⁴ Theodore Roosevelt, “First Annual Message, December 3, 1901,” in *The Works of Theodore Roosevelt: State Papers as Governor and President 1899-1909*, National edition, vol. 15 (New York: Charles Scribner’s Sons, 1926), 101.

⁵⁹⁵ Theodore Roosevelt, “Address at the Capitol Building, Sacramento, California, May 19, 1903,” in *California Addresses by President Roosevelt* (San Francisco: California Promotion Committee, 1903), 141.

⁵⁹⁶ Theodore Roosevelt, “National Supervision of Great Combinations of Capital and Labor, April 9, 1902,” in *The Roosevelt Policy: Speeches, Letters and State Papers, Relating to Corporate Wealth and Closely Allied Topics*, ed. William Griffith, vol. 1 (New York: Current Literature Publishing Company, 1919), 25.

⁵⁹⁷ Leroy Dorsey, “Theodore Roosevelt and Corporate America, 1901-1909: A Reexamination,” *Presidential Studies Quarterly* 25, no. 4 (1995): 725–39.

⁵⁹⁸ Roosevelt, “National Supervision of Great Combinations of Capital and Labor, April 9, 1902,” 26; Theodore Roosevelt, “Progress Made Toward Federal Control of Corporations, April 3, 1903,” in *The Roosevelt Policy: Speeches, Letters and State Papers, Relating to Corporate Wealth and Closely Allied Topics*, vol. 1 (New York: Current Literature Publishing Company, 1919), 109–10.

⁵⁹⁹ See Dorsey, “Theodore Roosevelt and Corporate America,” 730–31 for more on this trend in Roosevelt’s public speeches.

claimed that the “predatory capitalist” order and men driven by “wolfish greed” threatened this system.⁶⁰⁰ He said that such individuals should be seen as wild predators, “stand[ing] on the same moral level with the creature who fattens on the blood money of the gambling-house and the saloon.”⁶⁰¹

In spite of his rhetoric, Roosevelt’s criticisms of industry leaders were tempered by his belief that such men were capable of moral reform. Roosevelt thought neither regulation nor legislation could formalize a system of ethics in business but claimed that he could rehabilitate executives through moral leadership.⁶⁰² Writing about the unethical activity among titans of industry, Roosevelt wrote that, “[I]t is only by a slow and patient inward transformation” that these men can be “helped upward in their struggle for a higher and a fuller life.”⁶⁰³ His public statements aimed to raise the moral standards of industry. For instance, he stated in 1905 that using profits as a metric to judge business success was a “delusion.” Profits are only a useful metric “so far as it is accompanied by and develops a high standard of conduct—honor, integrity, civic courage.”⁶⁰⁴

Roosevelt’s antitrust politics thus hinged on two constructs of corporate criminality—good trusts were natural and bad trusts needed to be controlled, and

⁶⁰⁰ Theodore Roosevelt, “There Will Be No Change in Policy, August 20, 1907,” in *The Roosevelt Policy: Speeches, Letters and State Papers, Relating to Corporate Wealth and Closely Allied Topics*, vol. 2 (New York: Current Literature Publishing Company, 1919), 564, 567; Theodore Roosevelt, “Industrial Peace, November 11, 1902,” in *The Roosevelt Policy: Speeches, Letters and State Papers, Relating to Corporate Wealth and Closely Allied Topics*, vol. 1 (New York: Current Literature Publishing Company, 1919), 102.

⁶⁰¹ Theodore Roosevelt, “The Campaign Against Privilege, January 21, 1908,” in *The Roosevelt Policy: Speeches, Letters and State Papers, Relating to Corporate Wealth and Closely Allied Topics*, vol. 2 (New York: Current Literature Publishing Company, 1919), 725.

⁶⁰² Dorsey, “Theodore Roosevelt and Corporate America,” 732–36.

⁶⁰³ Theodore Roosevelt, “Applied Idealism,” *The Outlook* 104 (1913): 475.

⁶⁰⁴ Theodore Roosevelt, “Fifth Annual Message, December 5, 1905,” in *The Works of Theodore Roosevelt: State Papers as Governor and President 1899-1909*, National Edition, vol. 15 (New York: Charles Scribner’s Sons, 1926), 280.

unethical businessmen running trusts could be reformed through moral leadership. Consequently, Roosevelt's preferred mode for monitoring trusts was not prosecution or regulation, but private agreements in which executives promised to alter their practices in exchange for lenience.⁶⁰⁵ Roosevelt believed that juries were often reluctant to convict "a reputable member of the business community for doing what the business community has unhappily grown to recognize as wellnigh normal in business," rendering informal agreements more practical.⁶⁰⁶ His efforts to broker negotiations with trusts is perfectly consistent with the model of pluralist presidential leadership described by Skowronek.

Roosevelt stated that, "publicity is the only sure remedy which we can now invoke" to regulate trusts, as "the courts of law are powerless."⁶⁰⁷ While he generally negotiated private agreements quietly, he occasionally resorted to publicizing the activities of trusts as a deterrent measure. He did this particularly by working with the Bureau of Corporations (BOC). Established in 1903, the BOC was a predecessor to the Federal Trade Commission and was primarily designed to report on major industries and search for monopolistic practices. The Bureau's enacting legislation gave the President the right to release any information gathered, which Roosevelt sometimes did.⁶⁰⁸ More frequently, Roosevelt reached informal agreements with corporations by working with the Bureau's first chair James Garfield. While a few publicized high-profile prosecutions

⁶⁰⁵ McGerr, *A Fierce Discontent*, 158.

⁶⁰⁶ Theodore Roosevelt, "At the Laying of the Corner-Stone of the Pilgrim Memorial Monument, Provincetown, MA, August 20, 1907," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 6 (New York: P.F. Collier and Son, 1910), 1357.

⁶⁰⁷ Theodore Roosevelt, "Message of the President of the United States, Communicated to the Two Houses of Congress, March 7, 1906," in *The Works of Theodore Roosevelt: Presidential Addresses and State Papers*, Part 5 (New York: P.F. Collier and Son, 1910), 689–90.

⁶⁰⁸ Thorelli, *The Federal Antitrust Policy*, 528–55; Skowronek, *Building a New American State*, 250; Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (New York: Free Press, 1963), 70–71.

maintained his anti-business image, Roosevelt's relationship with the Bureau exhibited a willingness to work with corporations.⁶⁰⁹ The Bureau actually complicated prosecutions, as private agreements with businesses like International Harvester and Standard Oil granted organizations immunity from the criminal law.⁶¹⁰

One example of Roosevelt's approach to antitrust enforcement occurred during the Panic of 1907. In the middle of the crisis, Roosevelt permitted U.S. Steel to purchase Tennessee Coal and Iron after Gary Frick of U.S. Steel convinced him that the merger would keep the market afloat. Shortly thereafter, it became clear that Frick's claims were disingenuous, and U.S. Steel gained tremendous market advantages at a bargain.⁶¹¹ In the case, Roosevelt's faith in businessmen and the advantages of bigness backfired, leading him to reach a flawed deal rather than intervene in the market directly.

Roosevelt's support for consolidation, faith in the reformability of businessmen, and belief that trusts could be "good" or "bad" complicate his image as a trustbuster. His actions reflected a desire to save honest business from unscrupulous competitors more than protect the public from predatory capitalism. His successor, William Taft, exhibited a more aggressive approach. Taft's administration quickly filed an antitrust suit against U.S. Steel after it negotiated its purchase of Tennessee Coal and Iron with Roosevelt, angering Roosevelt so much that some suggest it was why he made a third party

⁶⁰⁹ For high-profile administrations maintaining Roosevelt's trust-buster image, see discussions of the Northern Securities case in Thorelli, *The Federal Antitrust Policy*, 421; McGerr, *A Fierce Discontent*, 155–56; Kolko, *The Triumph of Conservatism*, 67; Gould, *The Presidency of Theodore Roosevelt*, 204–25, 272; George Ruiz, "The Ideological Convergence of Theodore Roosevelt and Woodrow Wilson," *Presidential Studies Quarterly* 19, no. 1 (1989): 159–77; Dorsey, "Theodore Roosevelt and Corporate America," 729–31; *Northern Securities v. U.S.*, 193 U.S. 197 (1904).

⁶¹⁰ Gould, *The Presidency of Theodore Roosevelt*, 204–25, 272.

⁶¹¹ McGerr, *A Fierce Discontent*, 179–80; Gould, *The Presidency of Theodore Roosevelt*, 240.

presidential bid in 1912.⁶¹² The case highlights how strong the tensions were among Progressives regarding antitrust politics.

Early in his presidency, Taft attributed the “prevalence of crime and fraud” among business to the failure of the criminal law and aimed to bolster the state’s antitrust enforcement.⁶¹³ In four years, Taft and his Attorney General George Wickersham filed eighty-nine antitrust suits, more than doubling Roosevelt’s seven-year total.⁶¹⁴ Nonetheless, Taft still expressed faith in the moral capacity of businessmen, arguing that antitrust crusades of the early twentieth century encouraged an unfair “impeachment of the motives of men of the highest character.”⁶¹⁵ He also criticized Roosevelt’s tendency to differentiate good from bad trusts, saying the public “ought to rid themselves of the idea that such a distinction is practicable.”⁶¹⁶ This reveals a core distinction between Roosevelt and Taft’s approaches to antitrust. They agreed that there existed good and bad businessmen, but unlike Roosevelt, Taft was less willing to tolerate the idea of “bigness” by distinguishing between good and bad trusts.

Perhaps the most significant antitrust case during Taft’s administration came against Standard Oil. In its ruling, the Supreme Court held that Standard Oil monopolized the petroleum industry and mandated its dissolution into competing firms. But in doing so

⁶¹² Gould, *The Presidency of Theodore Roosevelt*, 165–70.

⁶¹³ William Howard Taft, “Address at Orchestra Hall, Chicago, IL, September 16, 1909,” in *Presidential Addresses and State Papers of William Howard Taft*, vol. 1 (New York: Doubleday, 1910), 195.

⁶¹⁴ Kyle Burgason, “Wickersham, George,” in *The Social History of Crime and Punishment in America: An Encyclopedia* (Washington: SAGE Reference, 2012), 1937–39.

⁶¹⁵ William Howard Taft, “Address at the Lincoln Birthday Banquet of the Republican Club of the City of New York, February 12, 1910,” in *Presidential Addresses and State Papers of William Howard Taft*, vol. 1 (New York: Doubleday, 1910), 584.

⁶¹⁶ Oscar King Davis, “‘Big Business’ and the Sherman Law: Which Shall Be Modified, Business Ways or the Law?,” *The Century* 79 (1910): 750.

the Court endorsed the “rule of reason,” which interpreted the Sherman Act as authorizing judges to deem combinations illegal only if their effect was to unreasonably restrain trade.⁶¹⁷ Donald Cressey has discussed how this facilitated a shift away from strict liability by requiring that intent be proven in restraint of trade cases, complicating the state’s ability to secure convictions by requiring proof of intent from a corporate entity.⁶¹⁸

Critics have argued that the rule of reason gave activist judges the authority to label a restraint of trade as “reasonable” or “unreasonable” based on their personal preferences.⁶¹⁹ There does seem to be some circumstantial evidence that this is true, as the decision was followed by an immediate reduction in the rate of antitrust convictions.⁶²⁰ But more importantly, *Standard* exacerbated partisan divides over antitrust politics. Democrats, who were more attuned towards populist attitudes, were incensed at the decision, whereas Progressives were welcoming of it.⁶²¹ Taft himself endorsed the rule of reason, saying he only sought to punish trusts that demonstrated intent to suppress competition.⁶²² But the rule of reason assumed the existence of a

⁶¹⁷ *Standard Oil of New Jersey v. US*, U.S. 221 1 (1911); also see *Addyston Pipe and Steel Co. v US*, 175 U.S. 211 (1899).

⁶¹⁸ Donald Cressey, “The Poverty of Theory in Corporate Crime Research,” in *Advances in Criminological Theory*, ed. Williams S. Laufer and Freda Adler, vol. 1 (New Brunswick: Transaction Publishers, 1989).

⁶¹⁹ Dickson and Wells, “The Dubious Origins of the Sherman Antitrust Act,” 3–14; Kendrick Clements and William Cheezum, *Woodrow Wilson* (Washington: CQ Press, 2003), 111; Cressey, “The Poverty of Theory,” 44–45 on the difficulties of enforcement.

⁶²⁰ Donald Anderson, “The Anti-Trust Act and the Supreme Court, Commentary,” in *The Collected Works of William Howard Taft*, ed. David Burton, vol. 5 (Athens: Ohio University Press, 2002), 163–71.

⁶²¹ Berk, *Louis D. Brandeis*, 36–39.

⁶²² William Howard Taft, “Address at Des Moines, IA, September 20, 1909,” in *Presidential Addresses and State Papers of William Howard Taft*, vol. 1 (New York: Doubleday, 1910), 240–42; it was after the *Standard* ruling that Taft said the rule of reason is far from drawing a line between good

corporate *mens rea*, which has proved difficult and long since plagued the enforcement of the corporate criminal law.⁶²³

Taft's inclination towards tougher antitrust enforcement aggravated corporations and contributed to his failed reelection bid.⁶²⁴ After his term, however, he appeared to regret his punitive stances. He wrote in 1914 that sentencing trust leaders to prison terms would only have deterrent effects "in theory," because the public is reluctant to punish businessmen "for doing what some years ago was only regarded as shrewd business."⁶²⁵ Upon his appointment to the Supreme Court, Taft issued several pro-business rulings.⁶²⁶ Despite expressing stronger opposition to big business than Roosevelt, Taft still accepted industrial consolidation as a social good.

Roosevelt and Taft embodied varying visions of progressive thought in regards to big business, but both packaged elements of regulatory ideology into the political currents of the Progressive Era by defending the character of business executives and advocating for regulation rather than criminalization of trusts and their leaders. This illustrates both the durability of regulatory ideology and the way the "trust-busters" fashioned an antitrust politics that combined regulatory ideology with the politics of the Progressive Era. In contrast to Roosevelt and Taft, Woodrow Wilson endorsed the regulated competition model Brandeis favored, which was crucial in facilitating the

and bad trusts, and that the public should "rid themselves of the idea that such a distinction is practicable." See Davis, "'Big Business' and the Sherman Law."

⁶²³ See Laufer, *Corporate Bodies and Guilty Minds* for an excellent history of corporate criminal liability.

⁶²⁴ McGerr, *A Fierce Discontent*, 159.

⁶²⁵ William Howard Taft, *The Anti-Trust Act and the Supreme Court* (New York: Harper and Brothers, 1914), 131–32.

⁶²⁶ Gould, *The Presidency of Theodore Roosevelt*, 212.

design of the Federal Trade Commission and also hinged on familiar constructions of corporate criminality from regulatory ideology.

Woodrow Wilson and Reforming the FTC's Precursors

Unlike many Progressives, Woodrow Wilson was skeptical of regulatory commissions that he feared would entrench business power.⁶²⁷ He also rejected real-entity theory as it applied to corporate criminal liability, stating that, “guilt is personal.”⁶²⁸ So while he shared many affinities with his predecessors, like his belief that businessmen were generally honest, Wilson articulated a different brand of progressivism.⁶²⁹ It was under his administration that the Federal Trade Commission was created, one of the most significant regulatory innovations of the Progressive Era. Constructs of corporate criminality were intertwined into Wilson and Brandeis’s brand of progressivism and became embedded into the FTC’s design.

The FTC was designed with the power to prevent “persons, partnerships, or corporations, except banks, and common carriers...from using unfair methods of competition in commerce.”⁶³⁰ It was not designed to intervene in markets in particularly robust ways and had two institutional warrants—to work with industries in a deliberative manner to identify common industry-specific predatory and restraint of trade practices, and to curb those practices through education and information provision to corporations. It was argued that this would preclude power from becoming concentrated and prevent

⁶²⁷ Niels Aage Thorsen, *The Political Thought of Woodrow Wilson* (Princeton: Princeton University Press, 1988), 195–96.

⁶²⁸ “Wilson Calls for Control of Trusts,” *New York Times*, October 1, 1910.

⁶²⁹ McGerr, *A Fierce Discontent*, 159; Ruiz, “The Ideological Convergence,” 170–72.

⁶³⁰ U.S. Congress, “An Act to Create a Federal Trade Commission,” Pub. L. No. 38 Stat. 717, Chap. 311 (1914).

markets from becoming criminogenic. The law's only criminal provisions punished the inclusion of false entries in reports to the commission, refusal or failure to file reports, or the destruction of records. It did not criminalize any specific restraint of trade practices.

Gerald Berk's research carefully unpacks Brandeis's philosophy of "regulated competition" and its influence on the FTC. According to Brandeis, economic competition was ambiguous. That is, it could promote either good or bad outcomes, like innovation and efficiency or concentrated power and abuse. Progressives often glossed over this ambiguity, and Brandeis argued that the state should regulate competition to prevent the concentration of power by steering predatory competitive instincts into behavior that enhanced product quality and production efficiency. Wilson was the ideal candidate to assist Brandeis in enshrining this philosophy into law, given his appeal to both populists who favored market competition and pro-regulation Progressives dissatisfied with Taft and Roosevelt. Especially in his first term, Wilson drew heavily on Brandeis's counsel.⁶³¹

Although Brandeis and Wilson were key players in its emergence, the FTC did not come out of nowhere. Its creation was the result of almost two decades of institutional development and debates over antitrust policy, within which debates about corporate criminality were embedded. The FTC actually had its origins with its institutional precursor, the Bureau of Corporations. Created in 1903, the Bureau was designed to regulate trusts but was almost entirely advisory. It was authorized to investigate industrial consolidation and make policy recommendations, but essentially served a non-invasive

⁶³¹ Berk, *Louis D. Brandeis* especially see chapter 1, 2, and 4.

information-gathering role for the state and industry.⁶³² The Bureau was a central recommendation of McKinley's Industrial Commission, which claimed the Bureau should be modeled off the ICC, investigate industrial consolidation, collect reports, disclose the conditions of business, and monitor industries for monopoly.⁶³³ But the eventual Bureau's lack of enforcement mechanisms made it non-controversial, ensuring its swift passage over more stringent proposals.⁶³⁴

A need for stronger trust regulation became apparent in the 1910s as public anxieties over the growth of a "money trust" spread. As the financial sector became a more powerful element of the political economy, fears that a group of wealthy Wall Street financiers and bankers controlled a vast number of corporations brought new attention to the trust issue. The financiers and bankers feared to be at the heart of this money trust were the targets of a high-profile congressional subcommittee inquiry from 1912-1913. Known as the Pujo Committee for its chairperson Representative Arsene Pujo (D-LA), the inquiry's findings inspired public support for a number of reforms.

Led by Pujo and legal counsel Samuel Untermyer, the committee found that the "money trust" not only was real, but also controlled over \$22 billion across the mining, manufacturing, transportation, telecommunications, and financial sectors. Headed by the Morgan Empire, the trust held 341 directorships spanning 112 corporations. In statements before the committee, participants saw nothing wrong in their activity. When asked about

⁶³² Christopher Jay Hoofnagle, *The Federal Trade Commission: Privacy Law and Policy* (New York: Cambridge University Press, 2016), 9; U.S. Congress, "Act Establishing the Department of Commerce and Labor," Pub. L. No. 32 Stat. 825 (1903).

⁶³³ U.S. Industrial Commission, *Review of the Report of the Commission on Immigration*, 15:37; see 233 and 1194 for testimonies advocating for such a bureau; also see Leonard, *Illiberal Reformers*, 43.

⁶³⁴ Thorelli, *The Federal Antitrust Policy*, 528–55; Skowronek, *Building a New American State*, 250; Kolko, *The Triumph of Conservatism*, 70–71.

how the trust regularly altered stock prices to their advantage, former NYSE president Frank Sturgis defended the practice before the Pujo Committee. When pressed on the topic, he told the committee, “You are asking me a moral question, and I am answering you a stock-exchange question...They are very different things.” He described short selling as defensible during panics, and when asked whether it worsened economic conditions, he stated, “It might. Self-preservation is the first law of nature...I do not consider it wrong.” Sturgis’s comments did not go unnoticed. Newspapers the following morning noted that Sturgis’s testimony proved that “manipulation is well approved” and considered “regular and legitimate” on the New York Stock Exchange.⁶³⁵

It was commonplace for the financiers behind the money trust to divorce questions of business from questions of morality as Sturgis did by rationalizing corporate rapacity as the actions of reasonable men fighting to survive in the capitalist jungle. The New York State Chamber of Commerce cautioned the committee against mistaking the actions of executives as mala in se when they were only mala prohibita. The Chamber argued that criminalizing restraint of trade practices violated economic law because it “shackle[d] the genius of this country” while also being “inconsistent with moral law” for punishing actions that were not moral wrongs.⁶³⁶

Much as the robber barons of the nineteenth century did, money trust financiers defended their character as non-criminal to rationalize their anti-regulatory politics. For

⁶³⁵ “Lax Methods in Stock Exchange—Money Trust Probe Shows that Manipulation is Well Approved” *The Milwaukee Journal*, December 14, 1912, p. 10; “Sturgis Gives Evidence in Money Trust Inquiry,” *The Evening News* Dec 13, 1912, p. 1.

⁶³⁶ Chamber of Commerce of the State of New York, “Report on Proposed Antitrust Legislation,” “Hearings Before the Committee On Interstate Commerce United States Senate” on Bills Relating to Trust Legislation,” Volume II, 1059-60.

instance, William Sherer, the manager of the New York Clearing House Association, defended the discretion clearing-houses had to determine memberships of banks on the grounds that “the average business man...is a person of some moral status.” He claimed that even in the absence of regulation, abusive practices are not prevalent because businessmen “are going to do right anyway.”⁶³⁷ Nonetheless, the Pujo committee’s report recommended expanding regulations on stock exchanges, prohibiting holding multiple directorships of competing corporations, and regulating the securities industry.⁶³⁸ It influenced the design of several reforms, including the Clayton Antitrust Act of 1914.

Lawmakers who supported the law were quick to treat the money trust’s monopolistic actions and attempts to restrain trade as crimes. Populist Democrats spoke in support of the bill by deploying rhetoric of moral right. Representative Edwin Webb (D-NC) said that the law prohibited actions that should be forbidden “in conscience.”⁶³⁹ Senator Lewis (D-IL) argued that anything contrary to good public policy should “be treated as also a violation of public morals.”⁶⁴⁰ Still their colleagues drew on facets of regulatory ideology, criticizing the bill for targeting men who should not be viewed as criminals given their track record as upstanding members of their communities. Representative Joseph Moore (R-PA) and Senator Albert Cummins (R-IA) argued that

⁶³⁷ Investigation of Financial and Monetary Conditions in the United States Under House Resolutions Nos. 429 and 504 Before the Subcommittee of the Committee on Banking and Currency, Part 1 (Washington: Government Printing Office, 1913), Part 2, “Testimony of Mr. William Sherer-Continued,” June 26, 1912; 163-165; *Ibid.*, Part 7, “Testimony of Waldo Newcomer, President of National Exchange Bank and Baltimore Clearing House,” December 9, 1912.

⁶³⁸ U.S. House Committee on Banking and Currency, “Report of the Committee Appointed Pursuant to House Resolutions 429 and 504 to Investigate the Concentration of Control of Money and Credit, Submitted by Mr. Pujo, February 28, 1913” (Washington, DC, 1913).

⁶³⁹ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Sixty-Third Congress, 2nd Session*, vol. 51 (Washington: Government Printing Office, 1913), 9407, 9653.

⁶⁴⁰ U.S. Congress, 51:14205.

the Clayton law's provisions unfairly punished "the industrious and progressive business man" who "has lived an upright, moral, and manly life, building up a character that should stand in his support when accused."⁶⁴¹ This language thus mirrored debates during the Interstate Commerce Act. Instead of punishing bad behavior, more pro-business legislators tried to reframe the debate to be less about whether executives did bad things and more about whether they were "bad people." But in the Clayton Act, it seemed that this political reframing did not achieve the desired outcome.

The Clayton Antitrust Act was in large part based on the recommendations of the Pujo Committee's report. The law did not create a commission but rather clarified the Sherman law's provisions by prohibiting price discrimination, multiple directorships deemed anti-competitive, and more closely monitoring acquisitions and mergers. The law specified that if a corporation were guilty of any violation, any directors or agents who authorized the act would be punished with a \$5,000 fine and up to a year of imprisonment. It also authorized injunctive relief for any person or firm suffering potential losses due to a violation of the statute.⁶⁴²

Based on this account it appears as though the Clayton Act was a loss for the financiers and bankers who fought regulation, given the reforms it made to the criminal aspects of antitrust law. This story becomes more complicated upon exploring related reforms of the early Wilson Administration. The Pujo committee claimed in its final report that given the success of the ICC, the Clayton Act should make few clarifications to the Sherman law and be supplemented with a new commission to identify restraint of

⁶⁴¹ U.S. Congress, 51:9411 (Sen. Moore), 14251 (Sen. Cummins), 14039.

⁶⁴² U.S. House Committee on the Judiciary, "Report from the Committee on the Judiciary to Accompany H.R. 15657" (H.Rp. 627, May 6, 1914), 29, 42-43.

trade practices specific to various industries.⁶⁴³ Thus, it opened the door to the creation of the Federal Trade Commission. Many scholars have since outlined the numerous loopholes in the Clayton Act, with some suggesting that the original proposal's more robust criminal provisions were weakened in committee because it served a strategic purpose for Wilson by securing southern Democrats' support for the Federal Reserve Act.⁶⁴⁴ But it also opened the door to Brandeis's influence in the White House, enabling him to play a pivotal role in designing the FTC.⁶⁴⁵ While the Pujo hearings show how elements of the financial sector failed in their efforts to oppose regulation in whole, debates over the FTC show how Brandeis carried ideas associated with regulatory ideology into Progressive Era policy.

The Federal Trade Commission Act (1914)

The FTC Act was a response to anxieties over the money trust and an expression of bipartisan backlash to the rule of reason in the 1911 *Standard Oil* decision. Businesses feared the rule of reason would result in politically motivated enforcement, while anti-corporate forces feared it limited the fight against concentration by aiming to distinguish "efficient" from "inefficient" arrangements.⁶⁴⁶ The FTC was borne out of this conflict, with populists insisting on an informational commission designed to prevent bigness and Progressives favoring a strong agency to regulate natural monopolies. Ultimately,

⁶⁴³ U.S. House Interstate and Foreign Commerce Committee, "Interstate Trade Commission," Report, April 14, 1914, 1–8.

⁶⁴⁴ Goldstein, *Political Repression*, 84; Cowie, *The Great Exception*, 67; Leonard, *Illiberal Reformers*, 44; McGerr, *A Fierce Discontent*, 159; Sutherland, *White-Collar Crime*, 34–35, 42–43; Karen Orren, "Organized Labor and the Invention of Modern Liberalism in the United States," *Studies in American Political Development* 2 (1987): 317–36; for accounts on its role in passing the Federal Reserve Act, see Carosso, *Investment Banking*, 177; Berk, *Louis D. Brandeis*, 107.

⁶⁴⁵ Hoofnagle, *The Federal Trade Commission*, 10–13.

⁶⁴⁶ Hoofnagle, 11; William Jennings Bryan, "The Trusts Have Won," *The Commoner*, May 26, 1911.

Brandeis's model of regulated competition used "progressive techniques to realize populist ends," as Berk has argued. Regulation was used to discourage concentration, promote competition, distinguish natural from artificial monopoly, and work with businesses to identify industry-specific unfair trade practices.⁶⁴⁷

Berk's research shows that through education on cost accounting, benchmarking, and the promotion of trade monitoring, the FTC was built to enhance competition by working with rather than against businesses. The agency promoted collaboration within industries, encouraging companies to collectively identify effective practices for their operations. Even though the FTC lacked the standard features of a Weberian bureaucracy, state builders were able to construct a unique bureaucracy that attempted to redirect destructive habits into productive ones.⁶⁴⁸ But Brandeis's conceptualization of regulated competition also entailed the notion that businessmen were rational and could be monitored in ways that preempted the need for criminal sanction entirely. Thus, his philosophy rested on a construct of corporate criminality embedded into regulatory ideology and reflected Progressives' inclination to protect the good businessmen from the bad ones through milder regulation rather than invasive sanction.

Brandeis's criticisms of trusts have often been interpreted as a strict anti-monopolism. It is true that he was critical of trusts and famously condemned the way trusts worked with investment bankers not to improve their products or engage in

⁶⁴⁷ Berk, *Louis D. Brandeis*, 91–95.

⁶⁴⁸ Carpenter, *The Forging of Bureaucratic Autonomy*, 7–11; Kenneth Finegold and Theda Skocpol, *State and Party in America's New Deal* (Madison: University of Wisconsin Press, 1995), 53–57; Berk, *Louis D. Brandeis*, 115–18; for Weberian features of modern state see Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in *Bringing the State Back In*, ed. Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), 1–38; Bense, *Yankee Leviathan*, 106–16; Orren and Skowronek, *The Search for APD*, 177.

innovation but instead to promote consolidation.⁶⁴⁹ He insisted that there “are no natural monopolies in the industrial world,” and said to describe monopoly as natural was “misleading.” But he insisted that the “regulation of competition” was “essential to the preservation of competition and to its best development.” While Brandeis was skeptical of Progressives’ faith in the state to monitor monopolies, he argued that competition was necessary and endorsed a “policy of regulated competition” that he said was “distinctly a constructive policy.” Different from both minimally regulated markets and progressive-style regulation of monopoly, Brandeis’s philosophy threaded a middle ground aiming to encourage competition and discourage concentration.⁶⁵⁰ He was able to pursue republican ends of anti-monopolism through a modernized administrative apparatus that appealed to Progressives.

The FTC was thus not granted a warrant to punish unfair trade practices, but to work with business to identify industry-specific unfair trade practices. He argued that regulated competition would make prosecution unnecessary because the FTC would be positive and prophylactic, preemptively identifying and monitoring restraint of trade behaviors. This is because according to his theory, restraint of trade was not the result of the moral faults of men in business. Rather, the industrial system encouraged men to engage in unscrupulous practices in the name of competition. If the system could be appropriately monitored and reformed, businessmen would never resort to criminal activity, averting the need for prosecution entirely.

⁶⁴⁹ Louis D. Brandeis, *Other People’s Money: And How the Bankers Use It* (New York: F.A. Stokes, 1914).

⁶⁵⁰ Louis Brandeis, “Competition,” *American Legal News* 24 (1913): 5–14.

Brandeis's statements to the U.S. House Committee on Commerce in January and February of 1914 make these aspects of his philosophy clear. His testimony at this moment was enormously influential in changing the tenor of debate. Legislators had been deadlocked over how strong the FTC should be. Most Progressives supported a strong coercive commission, whereas Populists favored a weaker informational commission similar to that endorsed by libertarian-leaning Taft Republicans.⁶⁵¹ This impasse created an opportunity for Brandeis to walk between both views. His testimony clarifies how his philosophy reflected a specific understanding of corporate criminality. Instead of looking to the character of business leaders, Brandeis told the committee that "industrial crime is not a cause, it is an effect; the effect of a bad system." He stated that, "if we adopt a good system, we are very apt not to have much of industrial criminality." He suggested that the proposed FTC should "prevent breaches of the law and not punish breaches of the law" by "preventing the conditions which lead to the criminal tendency."⁶⁵²

Brandeis's emphasis on the commercial environment was connected to his genuine faith in the character of businessmen. He stated that the system should be reformed so that crime becomes "unnatural," because business leaders "who could be exercising their powers in the right direction...are led by a bad system to do things that are harmful to the community." Brandeis's support for regulation over punishment was in

⁶⁵¹ Berk, *Louis D. Brandeis* chapter 4 for a particularly close analysis of Brandeis's role in this debate; Berk's account challenges several prevailing narratives presenting this debate as being between a strong and weak commission. See Sklar, *The Corporate Reconstruction of American Capitalism* on how the FTC was a victory for corporate liberals; James, *Presidents, Parties, and the State* on how the FTC's creation was about partisan compromises; Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999) on how the FTC was a compromise between sectional and economic interests.

⁶⁵² U.S. House Committee on Interstate and Foreign Commerce, *Hearings on Interstate Trade Commission, 63rd Congress, 2nd Session, January 30-February 16, 1914* (Washington: Government Printing Office, 1914), 9, 89-90.

part driven by this faith in the character of business leaders to be guided by a reformed system. He stated that such men do not deserve harsh sanction, because their offenses are “not like those cases where the offense involves a moral taint in the individual.”⁶⁵³ He explicitly stated that in designing the commission, “Our aim should not be to instill fear, but to so develop the commercial conditions that crime becomes unnatural.”⁶⁵⁴

This statement reflected a deeper concern shared by economists like Ely, Ross, and Commons. While there were bad businessmen lowering the moral standards of competition and structural incentives driving businessmen to engage in unethical behavior, Brandeis and the era’s leading economists believed that most leaders of industry were not bad people. A coercive commission that instilled fear of prosecution into economic actors would not only discourage innovation, but also unfairly discourage good businessmen who sought to follow the law from engaging in any kind of risk-taking behavior. It was thus crucial that the commission did not threaten criminal sanction, but simply worked with industry to promote efficiency and innovation.

Brandeis’s argument that the state should not punish behavior with no “moral taint” mirrored debates about distinguishing *mala in se* from *mala prohibita* in regulatory law. To Brandeis, unfair trade practices could be harmful to the public welfare but lacked the stigma of other crimes. Given that he viewed competition as an ambiguous process, he claimed competitive practices could not be labeled inherently good or bad. Rather, competition should be encouraged so as to reap its benefits and regulated to identify,

⁶⁵³ U.S. House Committee on Interstate and Foreign Commerce, 89–91.

⁶⁵⁴ U.S. House Committee on Interstate and Foreign Commerce, 89–90.

preempt, and limit its dangers.⁶⁵⁵ Consequently, Brandeis's moral judgment of businessmen's characters was translated into a favorable legal construction of criminality in the FTC Act. Despite walking a middle ground, he relied on a construction of corporate criminality inherent to regulatory ideology which depicted corporate crime as morally superior to street crime and corporate criminals as more rational and reformable than street criminals.⁶⁵⁶

After Brandeis's testimony in early 1914, the idea of creating a commission with these goals in mind reoriented the legislative debate, although some contestation did persist. Lawmakers still disagreed over the enforcement powers of the commission, with some Progressives demanding a strong commission and some Populists insisting on a purely informational one. This is also not to say that after Brandeis's testimony, ideas about criminality became the sole determining factor in these debates. In committee reports, legislators from the House clarified that their support for the FTC was informed by the apparent success of Roosevelt's more informal approach to negotiating with business.⁶⁵⁷ Committee reports in both the House and Senate also expressed support for the FTC based on the perceived success of the ICC, noting that a similar commission to enforce antitrust law would have "prevented or remedied many of the abuses which have since grown up."⁶⁵⁸ The support for an agency also was a function of a lack of faith in the

⁶⁵⁵ Brandeis, "Competition," 8–11, 14.

⁶⁵⁶ To this point, as a Supreme Court Justice, Brandeis wrote in his dissent in *FTC v. Gratz* that the FTC "followed the precedent" of the ICC by giving a commission the power to make determinations about unfair methods of competition in individual cases. See *FTC v. Gratz*, 253 U.S. 421 (1920).

⁶⁵⁷ U.S. House Interstate and Foreign Commerce Committee, "Interstate Trade Commission," 5.

⁶⁵⁸ U.S. Senate Committee on Interstate Commerce, "Extracts from Report of the Senate Committee on Interstate Commerce on Senate Resolution No. 98," February 26, 1913, 36; U.S. House Interstate and Foreign Commerce Committee, "Interstate Trade Commission," 8; U.S. Senate Committee on Interstate Commerce, "Federal Trade Commission," June 13, 1914, 8.

Department of Justice, which was still underdeveloped institutionally. Given the Department's "varying policies, [and] its lack of tradition, record, and precedent," the Senate Committee on Interstate Commerce concluded that "an impartial quasi judicial tribunal similar to the Interstate Commerce Commission" would make more headway in antitrust enforcement than criminal prosecution.⁶⁵⁹

It was clear that Brandeis was not completely successful in his efforts. He had long contended that any notions that the FTC should resemble the ICC, which Congress explicitly endorsed, were "delusive."⁶⁶⁰ But in important ways, his arguments were critical to establishing discursive parameters for legislative deliberations over the FTC's design. Specifically, his contention that the FTC should preemptively monitor industry so as to make prosecution unnecessary resonated with lawmakers. This rationale was hinged on Brandeis's belief that businessmen generally wanted to follow the law, and thus an agency empowered to work with industry and target industry-specific restraint of trade actions would improve the nature of economic competition without criminal sanction.

As a result, an important question in the debates in 1914 was whether or not the restraint of trade practices should be considered *mala in se* or *prohibita*. Pro-business legislators and industry leaders began drawing on regulatory ideology in ways that comported with Brandeis's model, defending regulation of restraint of trade over criminalization. Legislators focused on their moral judgments of executives' character and behavior and reached the familiar conclusion that businessmen were good people driven to bad actions by economic circumstance and competitive markets, not personal

⁶⁵⁹ U.S. Senate Committee on Interstate Commerce, "Federal Trade Commission," 6.

⁶⁶⁰ Brandeis, "Competition," 13.

pathologies. Agents of oil, gas, and steel companies pleaded with legislators to create a commission to regulate industry without the threat of criminal sanction, promising lawmakers that businessmen “are as anxious to square their affairs with the morality of the time as any other class of men.”⁶⁶¹

Senator Albert Cummins (R-IA), a member of the Chamber’s Interstate Commerce Committee, rested his support for the FTC on a moral judgment of character and the idea that the agency should work with rather than against businessmen. He expressed “a confident belief that the business men of this country are honest, faithful men” who generally “intend to obey the law.” He argued on behalf of creating a commission to which men who “have a real desire to uphold the law” can turn to for advice and guidance “before they are branded as criminals.” He fought against giving the FTC powers to initiate prosecutions in restraint of trade cases, stating that “I am unwilling that the failure to obey these regulations...shall make the men who conduct our business affairs criminals, without consciousness of moral turpitude or moral dereliction.”⁶⁶²

This was not a partisan interpretation, as Democrats expressed similar ideas. Tennessee Senator John Shields of the Chamber’s Commerce Committee expressed his support for the Commission by discussing the alternative of criminalization. He stated that such an approach would make the assumption that “the business men of this country are all engaged in fraudulent practices and conspiracies.” Shields posed the question to

⁶⁶¹ U.S. Senate Committee on Interstate Commerce, “Hearings Before the Committee on Interstate Commerce United States Senate on Bills Relating to Trust Legislation, Volume II,” § U.S. Senate Committee on Interstate Commerce (1914), 874.

⁶⁶² U.S. Congress, *Cong. Rec.*, 1913, 51:11539.

his colleagues, “Have our business men a lower standing than criminals at the bar of justice?”⁶⁶³ He proceeded to endorse the mode of regulated competition rather than a stronger commission sought by more hard line Progressives.

As with debates over the ICC, centering legislative debate on the character of businessmen fostered favorable interpretations of their actions. If businessmen were good people, restraint of trade actions took on new substantive meanings distinct from traditional definitions of criminality. For example, representatives for the Columbus Steel Castings Company told the Senate Interstate Commerce Committee that criminal provisions would punish “people who had done things which were not considered to be immoral in themselves.” They argued that, “it is always dangerous to attempt too closely to define acts which, while in the absence of statutory laws are neither immoral in their nature nor savor of criminality.”⁶⁶⁴

Pro-business lawmakers voiced similar arguments. Representative Dick Morgan (R-OK) stated that, “our criminal laws only prohibit things which are immoral; but when we come to prohibit things which are involved in business transactions...we are entering not only upon a difficult but a dangerous field, dangerous to business, and very difficult to carry out without doing more injury than good.”⁶⁶⁵ His argument lent weight to the Brandeisian approach of creating a proactive prophylactic commission rather than a responsive one reliant on criminal sanctions.

⁶⁶³ U.S. Congress, 51:13060–61.

⁶⁶⁴ U.S. Senate Committee on Interstate Commerce, Hearings Before the Committee on Interstate Commerce United States Senate on Bills Relating to Trust Legislation, Volume II, 1102, 1114.

⁶⁶⁵ U.S. Congress, *Cong. Rec.*, 1913, 51:9065.

The difficulties involved in enforcing the Sherman Antitrust Act in comparison to the Interstate Commerce Act also led legislators to conclude that a commission was preferable to granting prosecutorial authority to the Department of Justice. Given its lack of institutional capacity to crack down on corporate lawbreakers, many called into question the notion that corporate behavior should be monitored criminally at all. As one lawmaker said, the Sherman Antitrust Act “is a mere economic statute and not a moral one,” rendering criminal prosecution inappropriate.⁶⁶⁶

As Brandeis did, legislators believed that businessmen were honorable people whose actions should not be considered crimes or mala in se. Therefore, they viewed the FTC as a prophylactic instrument that would improve business competition and economic health without threatening to prosecute honest businessmen. The House Interstate Commerce Committee concluded that the FTC will produce “an elevated business standard” and “better business stability” since it was not designed to be punitive.⁶⁶⁷ The Senate Committee on Interstate Commerce similarly concluded that the FTC would “promote fair competition,” but only because it was designed to be “persuasive and corrective rather than punitive so far as well-intentioned business is concerned.”⁶⁶⁸ The Commission was designed explicitly to not be punitive so as to avoid catching well-intentioned businesses in its grasp while improving the moral behavior of the most unscrupulous.

Brandeis successfully articulated his approach during an opportune political moment. With a Democrat in the White House, he had a political ally who shared his

⁶⁶⁶ U.S. Congress, 51:11235, 14941.

⁶⁶⁷ U.S. House Interstate and Foreign Commerce Committee, “Interstate Trade Commission,” 3.

⁶⁶⁸ U.S. Senate Committee on Interstate Commerce, “Federal Trade Commission,” 12.

distaste for monopoly while also identifying as a progressive. But Wilson did not secure a majority of the popular vote—with populist Democrats favoring a weak commission, Taft Republicans demanding an informational one, and Progressives insisting on a coercive agency, a commission could only be created through compromise. By empowering a progressive-style commission to attain the ends pursued by anti-monopolists, Brandeis's proposal had enough broad political appeal to secure passage.

Brandeis's model rested on a conceptualization of corporate criminality that was a core part of the regulatory ideology that emerged in the late nineteenth century. But in an evolving social science milieu where economists amassed credibility and a developing political economy in which finance became dominant, regulatory ideology had to be transmitted and articulated differently in the early twentieth century. When financiers replicated the strategy used by railroads in the ICA debate during the Pujo hearings, it backfired and generated an anti-corporate media frenzy in a political milieu constantly skeptical of concentrated corporate power. But regulatory ideology had begun to evolve into a durable governing ideology, even being picked up by corporate opponents like Brandeis in new and innovative ways that meshed with the drift of Progressive Era politics. When Brandeis incorporated regulatory ideology into his model of regulated competition, he repackaged it in a way that had appeal to Populists and Progressives of varying ideologies.

This underscores why it is essential to assess business-government relations within an analysis of the political economy's development, tracing how different sectors of industry become more powerful and take leading roles in policymaking. Financiers and bankers, not railroads, were the primary carriers of ideas related to regulatory

ideology and corporate criminality in the early twentieth century. They also were not entirely successful in their initial attempts to counteract anti-corporate sentiment, given the explosive findings of the Pujos hearings and passage of the Clayton Act. A more favorable outcome only came when Brandeis repackaged regulatory ideology into a political agenda that appealed to diverse factions of Progressives, highlighting once again that business cannot unilaterally move policy without paying attention to prevailing discourses.

V. The Political Construction of Corporate Criminal Liability

Progressives grappled with multiple questions inherited from Gilded Age debates. A primary one concerned corporate criminal liability, the doctrine that corporate entities should be punished criminally for the actions of their agents. Chapter three traced how railroad managers defended corporate liability as a practical alternative to individual liability in the final decade of the nineteenth century. In the early twentieth century, these debates produced policies that inform American corporate law to this day. The doctrine of corporate criminal liability, which crystallized between 1903 and 1909, made it harder to conceptualize corporate crime as a function of innate pathologies and created difficulties in attributing blame and intent to corporate entities. Historically, corporate criminal liability has been an ineffective mechanism to rein in corporate abuse.⁶⁶⁹

Progressives generally embraced the real entity theory of the corporation, the idea that the corporation is “a real and natural entity whose existence is prior to and separate from the state.”⁶⁷⁰ Ernest Freund was one of the earliest individuals to attribute a

⁶⁶⁹ Laufer, *Corporate Bodies and Guilty Minds*.

⁶⁷⁰ Horwitz, *The Transformation of American Law*, 101.

personality to the corporation, calling it his “organic theory.”⁶⁷¹ Real entity theory was both ontological and prescriptive; it minimized the supervisory role of the state because the corporation possessed its own authority and distinctive personality resembling that of a natural human. Therefore, it deserved the autonomy rights afforded to individuals.⁶⁷²

There was some contention among Progressives as to whether the corporation could or should be considered a person. John Dewey argued that corporate personhood doctrine was used inconsistently, while others like Thorsen Veblen and John Commons rejected neoclassical theory in favor of sociological accounts of market behavior. Leftist Progressives claimed real entity theory could hold capital accountable and empower unions. By treating corporations as moral communities with autonomy rights, the state could require them to act in civically responsible ways, and corporate criminal liability could hold business accountable for harmful behavior. But the theory also had libertarian appeal since treating corporations as autonomous entities granted them the same legal protections as human individuals, legitimating anti-regulatory politics.⁶⁷³

The rise of corporate criminal liability occurred within this context of political contestation, and its development was more complicated than most accounts suggest. The doctrine’s origins are often dated to the Supreme Court’s 1909 ruling in *New York Central and Hudson River Railroad v. U.S.*, which held that corporations could be held

⁶⁷¹ Ernst Freund, *The Legal Nature of Corporations* (Chicago: University of Chicago Press, 1897), 49–50.

⁶⁷² Peter Jones, “Human Rights, Group Rights, and Peoples’ Rights,” *Human Rights Quarterly* 21, no. 1 (1999): 80–107; Victor Muniz-Fraticelli, *The Structure of Pluralism* (Oxford: Oxford University Press, 2014).

⁶⁷³ John Dewey, “The Historic Background of Corporate Legal Personality,” *Yale Law Journal* 35, no. 6 (1926): 655–73; Daniel Ernst, “Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes,” *Law and History Review* 11, no. 1 (1993): 60; Millon, “Theories of the Corporation,” 203, 241; Hager, “Bodies Politics,” 580–83, 635–38.

criminally responsible for their agents' actions.⁶⁷⁴ Scholars typically attribute the ruling to organic developments in the common law.⁶⁷⁵ This misses how the doctrine's emergence was contingent on historically specific circumstances. This analysis departs from extant accounts of corporate criminal liability by studying the Elkins Act of 1903, in which Congress reformed the ICA to make interstate carriers criminally liable for their employees' actions.

It is true that the common law provided a foundation for criminally punishing corporations. Through the seventeenth century, English courts concluded that corporations could commit crimes of nonfeasance—failures to prevent certain acts or perform specific jobs—but not crimes that involved positive legal violations. This evolved out of case law holding governmental units responsible for not maintaining roads, canals, and waterways as failures to prevent public nuisances. In the early nineteenth century, U.S. courts began recognizing corporations as capable of committing crimes of nonfeasance, but rarely for positive legal violations. This kept liability confined to a small class of crime while laying a basis for a broader principle of liability.⁶⁷⁶

⁶⁷⁴ NY Central and Hudson River Railroad Company v. US, 212 US 481 (1909).

⁶⁷⁵ Vikramaditya S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?," *Harvard Law Review* 109, no. 7 (2005): 1479–88; Thomas J. Bernard, "The Historical Development of Corporate Criminal Liability," *Criminology* 22, no. 1 (1984): 3–18; Sara Sun Beale, "The Development and Evolution of the U.S. Law of Corporate Criminal Liability" (German Conference on Comparative Corporate Law, Marbury, Germany, 2013), <http://ssrn.com/abstract=2375318>; Ved P. Nanda, "Corporate Criminal Liability in the United States: Is a New Approach Warranted?," *The American Journal of Comparative Law* 58 (2010): 608–9; Andrew Weissman et al., "Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior" (US Chamber Institute for Legal Reform, 2008), 2–7, <http://www.instituteforlegalreform.com/uploads/sites/1/WeissmannPaper.pdf>.

⁶⁷⁶ Bernard, "The Historical Development of Corporate Criminal Liability," 4–6; Nanda, "Corporate Criminal Liability," 606–7; Laufer, *Corporate Bodies and Guilty Minds*, 9.

Liability rules changed significantly as large corporations emerged in the late nineteenth century. Still, judges remained hesitant to attribute liability to corporations given the difficulties inherent in identifying a corporate mens rea, or guilty state of mind.⁶⁷⁷ Convictions of corporations were generally for crimes of nonfeasance not entailing proof of intent. But through the 1880s and 1890s, prosecutors began to more frequently initiate prosecutions against corporations for negligence, internal revenue infractions, and other violations requiring proof of intent.⁶⁷⁸

In the decision *New York Central and Hudson River Railroad Co. v. U.S.* (1909), the Supreme Court applied corporate criminal liability to all crimes. In the case, the New York Central and Hudson River Railroad challenged the constitutionality of the 1903 Elkins Act, which declared that railroad corporations could be held criminally responsible for agents who granted or sought rebates. The Court took the concept of *respondeat superior* governing civil law—the notion that employers could be held responsible for employees’ actions performed within the course of their jobs—and applied it to crimes. This vicariously imputed liability for agents’ behavior to the corporation, expanding the reach of the law to crimes requiring proof of mens rea.⁶⁷⁹

⁶⁷⁷ Bernard, “The Historical Development of Corporate Criminal Liability,” 6–8; Khanna, “Corporate Criminal Liability,” 1481–82; Nanda, “Corporate Criminal Liability,” 609; Weissman et al., “Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior,” 15.

⁶⁷⁸ Laufer, *Corporate Bodies and Guilty Minds*, 9–15.

⁶⁷⁹ *NY Central and Hudson River Railroad Company v. US*, 212 US; Weissman et al., “Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior,” 4; Pamela H. Bucy, “Corporate Ethos: A Standard for Imposing Corporate Criminal Liability,” *Minnesota Law Review* 75 (1991 1990): 1114.

The consensus among legal scholars and historians is that the 1909 decision was a natural outgrowth of the common law.⁶⁸⁰ These accounts are typically plagued by two faults. First, if this explanation is correct, then the U.K. and other common law nations should rely on a similarly robust form of corporate liability that developed along a somewhat comparable timeline. But most other common-law nations were far slower to embrace the doctrine and have done so in a more limited fashion.⁶⁸¹ Second, scholars typically overemphasize the import of *New York Central* and the role of judicial agency in shaping the doctrine.⁶⁸²

The Elkins Act of 1903 is an understudied piece of this story that sheds light on why Congress imputed criminal liability for rebating to railroad corporations. Tracing debates over the law highlights how the relationships between the ICC, Congress, and railroads shaped the legislation. Debates over criminalizing rebates occurred primarily before Congress and the ICC, and railroad managers convinced members of Congress and the ICC that corporate liability was the most pragmatic option for punishing railroad crime. By the time the Supreme Court ruled on the question, alternatives to entity liability had been effectively discredited by railroads in these other institutional venues.

⁶⁸⁰ Weissman et al., “Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior,” 4; Bernard, “The Historical Development of Corporate Criminal Liability,” 12–13; Khanna, “Corporate Criminal Liability,” 1486; Jennifer Arlen, “The Potentially Perverse Effects of Corporate Criminal Liability,” *The Journal of Legal Studies* 23, no. 2 (June 1, 1994): 1114–20.

⁶⁸¹ John Coffee, “Corporate Criminal Liability: An Introduction and Comparative Survey,” in *Criminal Responsibility of Legal and Collective Entities*, ed. Albin Eser, Gunter Heine, and Barbara Huber (Freiburg: Lus Crim, 1999); Sara Sun Beale and Adam G. Safwat, “What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability,” *Buffalo Criminal Law Review* 8, no. 1 (2004): 105.

⁶⁸² For an exception to this, see Laufer, *Corporate Bodies and Guilty Minds*, 9–15. Laufer adopts a broad timeline to show that corporate bodies had been held accountable for crimes as early as the 1880s. However, even his account almost entirely emphasizes the role of judicial precedent in shaping the principle.

The Elkins Act amended the ICA by imposing a criminal fine of \$20,000 on corporations that offered rebates to shippers.⁶⁸³ As reviewed in chapter three, ICC reports showed that enhanced punishments for rebating were supported by railroads hostile to shippers that coerced them into granting rebates. With support from President Roosevelt, Attorney General Philander Knox, and railroads, the Act passed almost unanimously over concerns that eliminating imprisonment would leave the law ineffective.⁶⁸⁴

The ICC's annual reports greatly influenced debate over the Elkins Act. The House Commerce Committee's first report on the bill directly cited the ICC reports reviewed in chapter three, in which the commission argued that corporations should be criminally punished in lieu of individuals. The first page noted that punishing agents instead of corporations "prevented the enforcement of the law."⁶⁸⁵

The report extensively quoted ICC Chairman Martin Knapp's statements before the committee. Knapp told the House Committee that the ICA was inadequate in two respects. First, "the corporation carrier is not liable, but only the officer, agent or representative." Knapp claimed that the "officials of that grade which participates actually in transactions of this kind are a sort of fraternity" and are resistant to provide evidence that could "inflict punishment and suffering upon some friend or send some

⁶⁸³ Skowronek, *Building a New American State*, 250–51; Kolko, *Railroads and Regulation*, 84–101.

⁶⁸⁴ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Fifty-Seventh Congress, Second Session*, vol. 36 (Washington, DC: Government Printing Office, 1902), 2159; other progressives, like Woodrow Wilson, staunchly opposed the idea that corporate entities should be the object of punishment in lieu of individuals. See "Wilson Calls for Control of Trusts," 2.

⁶⁸⁵ U.S. House Interstate and Foreign Commerce Committee, "Regulating Commerce with Foreign Nations, Etc.," February 12, 1903, 1.

associate to jail.” He argued that the individual who gets indicted is almost always “a subordinate, a clerk carrying out the implied if not expressed order of his superiors.”⁶⁸⁶

Knapp stated that he found rebating to involve “a very high degree of moral turpitude.” However, because of the interpersonal dynamics among railway employees, he claimed that, “punishment by imprisonment instead of being an aid is a hindrance.” He concluded if the response to incriminating evidence were to punish the corporation via a fine rather than prosecute an individual agent, railroad managers “would not hesitate to furnish the proof and would actively engage in the prosecution.”⁶⁸⁷

Joseph Fifer, another ICC commissioner, employed arguments mirroring the legislative debates over the ICA. He claimed that the behaviors targeted by the Interstate Commerce law only violated statutory law, but no moral principles. He stated that,

[T]hese violations are what the law calls *malum prohibita*, and I care not what certain individuals may think of it, mankind generally holds that the same moral turpitude does not attach to an act of that kind as does to a crime, which is *malum in se*, such as burglary and larceny, crimes in the absence of all law.⁶⁸⁸

Claiming that railroads’ crimes were only *malum prohibita* allowed Fifer to distinguish these behaviors from traditional constructs of criminality. When confronted by Representative Stewart, who asked, “Do you not think that in the form of *malum prohibita* these railroad corporations commit greater offenses than highway robbery, which, you say, is *malum in se*?” Fifer responded that these offenses “a short time ago

⁶⁸⁶ U.S. House Interstate and Foreign Commerce Committee, 1–3; quoting statement of Martin Knapp, Chairman of the ICC, U.S. House Committee on Interstate and Foreign Commerce, *Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on the Bills to Amend the Interstate Commerce Law* (Washington: Government Printing Office, 1902), 197–98, 203–4.

⁶⁸⁷ U.S. House Committee on Interstate and Foreign Commerce, *Hearings on Bills to Amend the Interstate Commerce Law*, 204–5.

⁶⁸⁸ U.S. House Committee on Interstate and Foreign Commerce, 250.

were no offenses at all” and that the individuals targeted “have friends...[and] standing in the community.”⁶⁸⁹ Fifer’s comments drew a sharp distinction between street and corporate criminals. He defused concerns about whether railroad executives did bad things by arguing that they were not bad people. This highlights how prevailing discourses produced distinctive political understandings of street and corporate criminality that persisted over time.

As chapter three showed, after hearing extensive testimony from railway managers, the ICC concluded that the criminal provisions of the ICA were inadequate. Its 1903 report thus expressed clear support for the basic features of the Elkins law. According to the ICC, directing liability onto the corporation “corrected a defect which has been explained in previous reports, because [the law] gave immunity to the principal and beneficiary of a guilty transaction.”⁶⁹⁰ Debate over the bill was brief and it passed over concerns that punishing individuals was necessary for the purposes of promoting fair outcomes or providing deterrence.⁶⁹¹

When the New York Central and Hudson River Railroad challenged the Elkins law in 1909, the company fought against the imputation of liability to the corporation. It asserted that fining a corporation for a crime committed by individuals amounts to “[taking] the property of every stockholder” and “destroys the presumption of innocence” for common carriers. The railroad’s counsel argued that the “presumption of innocence

⁶⁸⁹ U.S. House Committee on Interstate and Foreign Commerce, 250.

⁶⁹⁰ U.S. Interstate Commerce Commission, *Seventeenth Annual Report of the Interstate Commerce Commission*, vol. 17 (Washington: Government Printing Office, 1903), 8.

⁶⁹¹ U.S. Congress, *Cong. Rec.*, 1902, 36:2151–56; the law was amended in 1906 to include individual liability as a supplement, but not replacement, to corporate liability. See U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Fifty-Ninth Congress, 1st Session and Special Session of the Senate*, vol. 40 (Washington: Government Printing Office, 1905), 1773, 1784, 1905, 2001.

prevails alike whether the defendant in a criminal prosecution be a corporation or an individual.” It claimed that in order to secure convictions without adequate evidence, “recourse was had to legislation introducing civil analogies into the criminal law,” referencing the use of respondeat superior doctrine.⁶⁹²

The state responded that, “no railway corporation can ever be legally punished” for rebating if conviction required proof of a director’s involvement, rendering corporate liability the only feasible means of punishment. The state called the corporation “the real offender” and claimed that it would be “anomalous and unjust” to punish agents. The state’s brief cited committee reports, congressional debates and testimony, and annual reports from the ICC indicating that the Elkins legislation “was aimed at the corporate carriers because no [alternatives] practically existed.” The government noted that during the sixteen years between the ICA and Elkins Act, “no single successful prosecution [was] waged against a malefactor” because “the close relations that existed prevented one member of that class from testifying against his fellows.” The state thus defended corporate liability to cases involving mens rea as a practical necessity, stating that, “We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.”⁶⁹³ The Court reasoned that corporations were the most direct beneficiaries of rebates.

⁶⁹² Reply Brief for the Plaintiff in Error, *New York Central and Hudson River Railroad v. US* (212 U.S. 481, No. 57, 1909), 2–5, 10, 23.

⁶⁹³ Brief for the US, *New York Central and Hudson River Railroad v. US* (212 U.S. 481, No. 57, 1909), 14–15, 24–26, 29–32, 38.

The Court drew repeatedly on the annual reports of the ICC as evidence that corporate criminal liability was its only feasible option. Justice Day wrote in the majority that the futility of punishing individuals was “developed in more than one report of the Interstate Commerce Commission, [and] was no doubt influential in bringing about the enactment of the Elkins Law, making corporations criminally liable.” The Court concluded that to reject the doctrine “would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at it.”⁶⁹⁴

While the decision did reflect trends in common law, it was also contingent on political circumstance. The popularity of real entity theory shaped the political context in which the Justices argued that corporations could be attributed a mens rea. Concerns that shaped the ICA’s initial design and questions over whether executives were fully “criminal” carried into these debates. And the ideas and ideologies railroads articulated before Congress and ICC shaped how the Court ruled on the question by giving the Justices congressional and commission documents to cite when writing the decision.

In the wake of *New York Central*, corporations devised multiple strategies to avoid punishment. Businesses routinely emphasized the complexity of the corporate form and their good-faith efforts to prevent wrongdoing through internal compliance rules as defenses for crime. Many judges showed mercy when they believed corporations exhibited due diligence to avoid wrongdoing. Arguments emphasizing due diligence, the complexity of business, and the 14th amendment rights of corporations limited the impact of *New York Central* in its immediate aftermath.⁶⁹⁵

⁶⁹⁴ NY Central and Hudson River Railroad Company v. US, 212 US.

⁶⁹⁵ Laufer, *Corporate Bodies and Guilty Minds*, 15–19.

Literature painting the *New York Central* decision as an outgrowth of common law ignores this longer developmental history. In this light, it becomes clearer that the question posed to the Court in *New York Central* was an artificial binary. In only considering whether the state should prosecute corporations or individuals, some scholars have noted that the Court failed to consider a third option—to impose civil liability against corporations and criminal liability against individuals in cases of corporate crime.⁶⁹⁶ But scholarship misses that this binary was dictated by how railroads framed debates over the course of two decades preceding the ruling. Railway managers' testimonies provided Congress, the Court, and the ICC with a choice between two options, obscuring alternatives that could have been considered and framing the debate on terms favorable to the railway industry.

What emerged from *New York Central* was a construction of the corporate criminal entity rather than the corporate criminal person. This contrasted the natural criminal targeted by the criminal justice system, made it harder to conceptualize street and corporate criminality in comparable terms, and hardened the idea that corporate crimes lacked the moral stain of street crimes. Scholars have argued, however, that criminal businesses actually behave with far less morality than street-level offenders. Corporate entities often exhibit a willingness to break or bend legal and moral rules to pursue the goal of profit maximization. This has become so commonplace that Joel Bakan has argued that corporations are “dangerously psychopathic entities.”⁶⁹⁷

In spite of this, the state has not demonstrated a consistent concern with corporate

⁶⁹⁶ Bucy, “Corporate Ethos,” 1117; Khanna, “Corporate Criminal Liability.”

⁶⁹⁷ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable, 2005), 2.

social responsibility. In many ways, the 1919 Michigan Supreme Court case *Dodge v. Ford* helped to legitimate a normative discourse that the primary purpose of corporations is to maximize value for shareholders, even if it means pushing the boundaries of the law. The case involved a lawsuit between Henry Ford and the Dodge brothers, and it articulated the notion that corporations should prioritize shareholder profit maximization over the interests of customers, workers, and communities. This symbolized an acceptance of potentially unethical behavior as part of the corporation's legal obligations.

Henry Ford was never viewed as a stereotypical robber baron. He publicly praised the virtues of the common man, earning him an image as a compassionate businessman concerned with the working class. But this was a strategic ploy, as Ford regularly framed his competitive choices as benevolent ones, enabling him to build his empire, cut costs, and increase efficiency while maintaining support from his workers.⁶⁹⁸ Thus in 1916, he presented a decision to limit dividends to shareholders (despite a cash surplus) as part of a strategy to build better cars, a new factory, and pay higher wages.

The Dodge brothers, minority investors in the company, were displeased at the decision and demanded that part of the surplus be distributed as dividends. Ford rebuffed them, as he was hostile to the meddling of shareholders in his decision-making and aware that the Dodges planned to use the payout to start a rival firm. In 1917, the Dodge brothers filed suit to compel the distribution of dividends and secure an injunction forbidding the construction of the new factory. They argued that Ford's desire to build a factory made no business sense because it was founded on a flawed logic that the firm

⁶⁹⁸ M. Todd Henderson, "The Story of Dodge v. Ford Motor Company: Everything Old Is New Again," in *Corporate Law Stories*, ed. J. Mark Ramseyer (New York: Thompson Reuters, 2009), 50–55.

was primarily a means of doing social good and that profit-making was its secondary purpose. Ford stood his ground, responding that a business's purpose should only "incidentally [be] to make money."⁶⁹⁹

The Michigan Supreme Court denied the injunction but mandated the payment of dividends. Using specious mathematical analysis, the court reasoned that Ford's new factory would not increase the corporation's profits. They then chastised Ford for pursuing philanthropic goals over profit-maximization, writing that,

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.⁷⁰⁰

This principle not only tolerates but endorses the promotion of questionable ethical incentives. The ruling indicates that if an executive testifies that a corporation's decisions were unrelated to shareholder profits, they will lose legal challenges to those actions. But if executives claim that those actions were made in the pursuit of shareholder value, they will win. The principle protects any behavior as long as it is justified in terms of pursuing profit maximization.⁷⁰¹ The court was less concerned with Ford's actions than his motives and prioritized the pursuit of profit while making protection of the competitive ideal the primary goal of regulation.⁷⁰²

⁶⁹⁹ Henderson, 59–63.

⁷⁰⁰ Dodge v. Ford Motor Co., 204 Mich 459 (1919).

⁷⁰¹ Jonathan R. Macey, "A Close Read of an Excellent Commentary on Dodge v. Ford," *Virginia and Business Law Review* 3, no. 1 (2008): 189–90.

⁷⁰² Jan G. Deutsch, "Corporate Law as the Ideology of Capitalism," *Yale Law Journal* 93, no. 2 (1983): 395–408.

The significance of the *Dodge* decision is contested among scholars. Some argue that the decision is “bad law” and “a doctrinal oddity.” Lynn Stout argues that the decision’s significance is that it embodies the normative discourse about the proper purpose of the corporation. Others claim that the decision identified profit maximization as *a* primary goal, but not *the* primary goal of business.⁷⁰³ Still others argue that the decision stands as accurate, reasoning that under corporate law, directors and executives are required to maximize shareholder value.⁷⁰⁴

Regardless of the ruling’s legal sway or immediate effect, its impact has been to legitimate a normative discourse in which the corporation’s best interests are linked to profit maximization. This has had destructive effects on labor relations by prioritizing corporate profiteering over wage expansion, infrastructure improvements, and worker safety.⁷⁰⁵ And despite emerging from the Michigan Supreme Court rather than the U.S. Supreme Court, the ruling in *Dodge* is more than a piece of trivia. Contemporary court rulings and recent reports from legal organizations like the American Law Institute reflect the principle articulated in the case, and activist investors today often insist that profit maximization is the corporation’s primary goal in order to secure dividends and share buybacks from companies in lieu of long-term investments in wages and infrastructure.⁷⁰⁶

⁷⁰³ Lynn Stout, “Why We Should Stop Teaching *Dodge v. Ford*,” *Virginia and Business Law Review* 3, no. 1 (2008): 164–76; Einer Elhauge, “Sacrificing Corporate Profits in the Public Interest,” *New York University Law Review* 80, no. 3 (2005): 773–75.

⁷⁰⁴ Macey, “A Close Read of an Excellent Commentary on *Dodge v. Ford*.”

⁷⁰⁵ Foroohar, *Makers and Takers*, 70–72.

⁷⁰⁶ For an analysis on how the case is consistent with the ideas laid out in the American Law Institute’s *Principles of Corporate Governance* (1992), see Macey, “A Close Read of an Excellent Commentary on *Dodge v. Ford*,” 178; for an account of how investors deploy the principle to demand profit maximization over long-term growth, see Foroohar, *Makers and Takers*; additionally, recent decisions coming out of Delaware courts have reaffirmed the notion articulated in the case. In *eBay v. Newmark* (2010), the Delaware Chancery Court held that Craigslist—a privately owned company—

The principle in *Dodge* effectively outlawed prioritizing corporate social responsibility over profit-maximization, and by the 1920s, the legal construction of the corporate criminal made for a notable contrast to the image of the street criminal. Corporate entities were legally and morally directed to pursue profit-maximization over social responsibility, workers' rights, and consumers' interests. With a different ethical mandate and without any identifiable pathological contributors to crime, the anthropomorphized corporate criminal was a near total inversion of the natural criminal.

VI. Conclusion: The Political Development of Corporate Crime Politics in the 1920s

Samuel Untermyer wrote in 1914, that, “[t]he corporate form is a mere shield behind which the individual acts. The now trite saying that guilt is personal should be written into every line of the law.”⁷⁰⁷ As crime politics took a turn in the 1920s, Untermyer's statement proved prescient. State crime commissions emphasized street crimes committed by individuals, largely neglecting the varieties of crime committed by corporate entities. In this sense, the corporate form literally acted as a shield for individuals within corporations not only from criminal prosecution, but also from the attention of observers of the criminal justice system.

could not implement the “poison pill” of rescinding a rights plan to prevent the company from being taken over by eBay. The Delaware Court held that because the tactic was intended to protect the company's “corporate culture” and was unrelated to profit maximization, it could not implement the poison pill. Many scholars have agreed that the ruling reaffirmed that notion that shareholder value maximization should be the mandatory primary purpose of the corporation. For more on this, see David Wishnick, “Corporate Purposes in a Free Enterprise System: A Comment on EBay v. Newmark,” *Yale Law Journal* 121, no. 8 (2012): 2405–19; Lyman Johnson, “Beyond the Inevitable and Inadequate Regulation of Bankers: A Comment on Painter,” *University of St. Thomas Law Journal* 8, no. 1 (2010): 29–39; John Tyler, “Negating the Problem of Having ‘Two Masters’: A Framework for L3C Fiduciary Duties and Accountability,” *Vermont Law Review* 35, no. 1 (2010): 117–61.

⁷⁰⁷ Samuel Untermyer, “Completing the Anti-Trust Programme,” *Harper's Weekly*, June 6, 1914, 4.

Often funded by local businesses, it is unsurprising that none of the crime commission reports of the 1920s significantly addressed corporate crime. The Missouri and Illinois surveys each included a few passing references to antitrust cases in comparison to the pages on psychological or eugenic theories of crime.⁷⁰⁸ Part II of the Illinois report included twenty pages on racketeering in comparison to well over 200 pages on juvenile delinquents, violent offenders, and the “deranged or defective delinquent.” The emphasis on the focal individual as the object of crime control, a legacy of the Lombrosian shift in criminology, obscured conceptions of corporate crime that emerged in the Progressive Era. This laid the foundation for the Wickersham Commission and the federal crime politics of the 1930s to focus on street criminals.

Combined with increased reliance on due diligence and 14th amendment protections, corporate entities were increasingly able to evade punishment in the 1920s. Courts responsible for enforcing *New York Central* were reluctant to apply a strict interpretation of vicarious liability and expressed sympathy with the realities of business operations and the complexity of the corporate form. Accepting corporations’ arguments about good-faith compliance efforts and due diligence, the doctrine of corporate criminal liability had little value to regulators in the 1920s.⁷⁰⁹

As Braithwaite and Fisse have noted, American criminal law exhibits a bizarre contradiction. It embraces the individualistic nature of American political culture but

⁷⁰⁸ Missouri Association for Criminal Justice and Thompson, *The Missouri Crime Survey*, 118; Illinois Association for Criminal Justice and Chicago Crime Commission, *The Illinois Crime Survey*, 980–86, 1093.

⁷⁰⁹ Laufer, *Corporate Bodies and Guilty Minds*, 17–20.

allows for corporate responsibility for crime.⁷¹⁰ This incongruity becomes clear when contrasting the emergence of corporate criminal liability with prevailing trends in the criminal law at the time of its development, which included an emphasis on the rehabilitative ideal, individualizing sentencing to the offender, and eugenics justice. This highlights a basic reality of American corporate law—the doctrine of corporate criminal liability is uncomfortably situated within a justice system that emphasizes free will, criminal intent, and the individualization of sentencing to the personal traits of offenders.

By the 1920s, it became clear that Progressives had overestimated the will and power of the state to regulate corporations. Presidents Harding, Coolidge, and Hoover all pursued revived brands of laissez-faire.⁷¹¹ Appointments to the FTC favored informal compliance agreements and information provision became the agency’s primary activity. Particularly, William Ewart Humphrey’s term as chair of the FTC during the Coolidge Administration earned the FTC the approval of big business and the ire of Progressives.⁷¹² Even in his positive account of the FTC, Gerald Berk notes that the regulated competition model suffered setbacks in the 1920s. While the regulated competition model was not destroyed, the FTC’s most robust powers were significantly checked. In a series of rulings, most notably *FTC v. Gratz* in 1920, the Supreme Court decided that courts, not the FTC, had the authority to determine the scope of unfair

⁷¹⁰ Braithwaite and Fisse, “Varieties of Responsibility and Organizational Crime.”

⁷¹¹ McGerr, *A Fierce Discontent*, 315.

⁷¹² Hoofnagle, *The Federal Trade Commission*, 19.

methods in competition. This limited the FTC to policing practices already illegal in common law but nothing else practiced in trade.⁷¹³

The ideational and ideological tides of progressivism facilitated developments to regulatory and legal institutions that reflected particular constructs of corporate criminality. Progressives' endorsement of real entity theory culminated in a doctrine of corporate liability that exists awkwardly within a justice system designed to punish the individual. Progressives' faith in the character of businessmen also led to the creation of an agency designed to work with rather than against business. Facilitating cooperation and collaboration between the state and industry was a worthwhile and admirable pursuit. It reflected the Progressive perspective that markets were inefficient and that an expert-administered state apparatus would effectively sort out and reform bad businessmen rather than letting them reduce the general competitive ethics of markets.

The problem with the FTC's design can be conceptualized on Braithwaite and Ayres' responsive regulation pyramid. Without the threat of stronger interventions in extreme cases, businesses have little incentive to abide by milder cooperative sanctions.⁷¹⁴ The FTC was explicitly designed without the power to initiate prosecutions, and after the Supreme Court deprived the FTC of what coercive powers it was granted, the Commission's capacity for deterrence was severely compromised. By adopting the perspective that good businessmen needed to be protected from the bad ones—not that the public needed protection from predatory capitalism—the architects of the FTC left it without any real power to deter criminality and rendered it vulnerable to cooptation by

⁷¹³ FTC v. Gratz, 253 U.S.; also see FTC v. Beech-Nut Packing Co., 251 US 441 (1922); FTC v. Raladam Co., 283 US 643 (1931).

⁷¹⁴ Braithwaite and Ayres, *Responsive Regulation*.

business. Worried about discouraging innovation and risk-taking, legislators left the FTC without any strong enforcement powers, limiting the regulated competition model's success as an alternative to the laissez-faire dynamics of Gilded Age capitalism.

The investment environment of the 1920s enabled bigger banks to grow in cities, and industrial concentration became commonplace. A massive growth in securities ownership through the 1920s was driven by businesses that became reliant on securities for short-term financial needs and by growing public demand. With massive profits to be had in underwriting and securities distribution, there was a decline in banking judgment, ethics, and an exploitation of the public that laid the basis for the market collapse of 1929.⁷¹⁵ The tools the state inherited from the Gilded Age and Progressive Era offered regulators and lawmakers little ammunition for cracking down on the abuses and negligence that caused the Great Depression. Unwieldy doctrines of corporate liability and administrative agencies with meaningful regulatory but weak disciplinary powers offered few mechanisms for responding to the crisis. Having drawn from a regulatory ideology rooted in economics and Darwinism, lawmakers of the early twentieth century articulated unique constructions of corporate criminality that gave the state little reason to be attentive to corporate crime and a limited capacity to respond to it when it was found.

⁷¹⁵ Carosso, *Investment Banking*, 240–54.

CHAPTER 6: SOLIDIFYING THE CLASS-CRIME NEXUS: IDEAS, INSTITUTIONS, AND POLITICAL DEVELOPMENT IN THE NEW DEAL

“Individualization is the root of adequate penal treatment and the proper basis of parole.”
- The Wickersham Crime Commission, 1931⁷¹⁶

The New Deal has been described by Jefferson Cowie as the “great exception” of American politics, one in which the state used its resources to benefit working Americans in ways that it never did before and has not since.⁷¹⁷ Complementing this account of the period is John Hagan, whose book *Who Are the Criminals?* argues that crime politics and criminological theories during the New Deal era were characterized by progressive impulses that produced relatively benevolent and equitable crime policy.⁷¹⁸ He concludes that from the 1930s through 1970s, U.S. crime policy reflected the reformist and enlightened political discourse associated with the New Deal regime.

The reality of New Deal era crime politics is more complex than these narratives suggest. It is true that intellectual developments in criminological theory in the early 1930s marked a significant break from earlier trends. Scholars like Robert Merton, Clifford Shaw, and Henry McKay emphasized how crime was linked to social and economic relations and the structural dynamics of the American political economy. But the conclusion that their ideas contributed to a new kind of crime politics is the product of a hasty analysis of political developments during the New Deal and postwar years.

While the New Deal witnessed the development of robust redistributive and social welfare policy, the crime politics of the New Deal and postwar period followed a

⁷¹⁶ U.S. National Commission on Law Observance and Enforcement, *Report on Penal Institutions, Probation, and Parole*, 9 (Washington: Government Printing Office, 1931), 172.

⁷¹⁷ Cowie, *The Great Exception*.

⁷¹⁸ Hagan, *Who Are the Criminals?*

different trajectory. During the middle decades of the twentieth century, there was a resurgent interest in the rehabilitation and individualized treatment of offenders. While new developments in criminology were heard and appreciated by policymakers from the 1930s through 1960s, those new ideas were channeled into rehabilitative frameworks. This changed the meanings of these ideas. The individualistic and deterministic basis of rehabilitative ideology modified theories linking social and economic inequality to crime in ways that reaffirmed a class-skewed construct of criminality. Whereas scholars connected crime to poverty's structural roots, once their ideas were reinterpreted through the lens of rehabilitation, poverty was viewed as an individual trait correlated with crime that required an individualized rehabilitative solution. This robbed the crime theories of the New Deal of their most profound insights, dismissed the links they proposed between criminality and structural economic factors, and detached them from demands for political economic reform as a way to address crime.

The window of opportunity for potentially radical ideas about crime to reshape policy during this period was narrow. Merton, Shaw, and McKay wrote in the early 1930s in the immediate wake of the Depression, but through the 1930s and 1940s, political and economic discourse changed in ways that eschewed the Roosevelt regime's collectivist and redistributive instincts in favor of a politics that promoted private consumption and compensatory policies to drive economic growth and correct for inequality. Developments in crime theory followed suit. Scholars who followed in the footsteps of Merton, Shaw, and McKay abandoned their predecessors' macro-level emphases on the political economy in favor of a narrow focus on the atomized individual. As rehabilitative logic predominated crime discourse, crime scholarship's emphasis on

the individual fed into a politics of individualized treatment that brought a familiarity duality—reformation for those who can change and punishment for those who cannot.

Changes in criminological thought were thus not central drivers of development in the mid-twentieth century. Rather, the institutional makeup of the criminal justice system reshaped the era's crime theories in ways that deprived them of their urgency and most radical implications. This can only be understood upon recognizing how political actors were operating within an institutional context imbued with certain practices and premises related to rehabilitative ideology. The indeterminate sentence, parole and probation, and sentencing individualization had become core features of the justice system by the 1930s. This institutional terrain kept policymakers tied to a governing ideology in which rehabilitation and individualized treatment were the axiomatic and unquestioned goals of the justice system. Even absent explicit biological ideologies, ideas about incorrigibility and innate criminal dispositions were still embedded into these practices and institutions. Interpreting social-structural theories of criminality through a rehabilitative lens modified them to be consistent with rehabilitative ideology's individualistic and deterministic orientation.

In the late nineteenth and early twentieth century, policymakers constructed key features of the American criminal justice system by drawing from an ideational pool in which criminal anthropology, evolutionary theory, Social Darwinism, and eugenics dominated. These ideas became embedded into the institutional machinery of the justice system through rehabilitative reforms. In the New Deal and postwar eras, this institutional context interacted with an evolving alignment of political forces and kept policymakers tied to the principles of rehabilitative ideology. Lawmakers remained

connected to a durable class ideology of rehabilitation and its deterministic assumptions even though they did not endorse biological ideas about crime. The institutional arrangement of the criminal justice system, and the ideologies embedded into it, ensured that there was a limited “New Deal” when it came to criminology.

Section I reviews literature exploring the shifting political currents of the 1930s through 1960s, showing how the redistributive and collectivist politics of the 1930s was in retreat by the late 1930s and how the New Deal regime’s political commitments had changed by the 1940s. The section also reviews literature on simultaneous developments in crime politics during these years, demonstrating how they reflected these discursive shifts. Section II analyzes constructions of criminality in 1930s scholarship, which marked a meaningful break from earlier crime theories by emphasizing class relations. But through the 1940s and 1950s, crime theory evolved to reflect concurrent shifts in political and economic discourse by refocusing on micro- rather than macro-level factors. Section III explores how ideas of criminality traveled into politics through the Wickersham Crime Commission. The Commission’s reports reveal how political power-holders reinterpreted the structural crime theories of the New Deal in ways that deprived them of their political economic implications. The Commission linked these new theories to constructions of the individual criminal, rehabilitative goals, and the individualized treatment to offenders, not social and economic reform. Section IV reviews the spread of individualized treatment models of punishment from the 1940s through 1960s. An analysis of the constitutional validation of indeterminate sentencing, changes in deferred prosecution programs, and the spread of habitual offender laws illustrate how

rehabilitative ideology served as a framework that extinguished any potential to link crime to structural dynamics in crime politics.

I. Fluctuations in New Deal Politics

Scholarship exploring the New Deal often depicts the period as marking the arrival of the regulated, industrialized, democratic state that Progressives long sought. In this account, a liberal consensus emerged after the Great Depression that the state could and should actively redistribute wealth. Scholars in this vein claim that the New Deal's regulatory and welfarist measures rationalized the economy, pulled the nation out of depression, and reshaped the future of U.S. domestic policy.⁷¹⁹

Many scholars have challenged this narrative. Some suggest that the New Deal's greatest successes were transient and reversed by corporate interests in the latter half of the twentieth century.⁷²⁰ Building on power elite theory, new left historians have argued that the New Deal regime propped up capitalism from its beginnings and was driven by businesses to serve their interests.⁷²¹ Also emphasizing the New Deal's illiberal features

⁷¹⁹ Arthur Schlesinger, *The Coming of the New Deal* (Boston: Houghton Mifflin, 1959); William Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* (New York: Harper and Row, 1963); Fred Block, "The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State," *Socialist Revolution* 33 (1977): 6–28; William E. Leuchtenburg, *In the Shadow of FDR: From Harry Truman to Barack Obama* (Ithaca: Cornell University Press, 2009).

⁷²⁰ Vogel, *Fluctuating Fortunes*; Hacker and Pierson, *Winner-Take-All Politics*, 95–97, 117 especially; Kim Phillips-Fein, *Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan* (New York: WW Norton, 2009), 262–69.

⁷²¹ Barton Bernstein, "The New Deal: The Conservative Achievements of Liberal Reform," in *Towards a New Past: Dissenting Essays in American History*, ed. Barton Bernstein (New York: Pantheon, 1968), 263–88; Thomas Ferguson, "Industrial Conflict and the Coming of the New Deal: The Triumph of Multinational Liberalism in America," in *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steve Fraser and Gary Gerstle (Princeton: Princeton University Press, 1989), 3–31; Michael Bernstein, "Why the Great Depression Was Great: Towards a New Understanding of the Interwar Economic Crisis in the United States," in *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steve Fraser and Gary Gerstle (Princeton: Princeton University Press, 1989), 32–54; G. William Domhoff, *The Myth of Liberal Ascendancy: Corporate Dominance from the Great Depression to the Great Recession* (Boulder: Paradigm, 2013); G. William Domhoff and Michael J. Webber, *Class and*

are historical institutionalists who have outlined the ways Roosevelt's coalition excluded blacks, immigrants, and women from its promises of social generosity while advocating for facially egalitarian policies that institutionalized status distinctions.⁷²² And the New Deal has critics on the right who, in the tradition of Hayek and Friedman, argue that the Roosevelt Administration undermined American values and aggravated the depression.⁷²³

Often, this literature defines the New Deal period as encompassing many years or even decades. For instance, John Hagan's account defines the New Deal as spanning from 1933 to 1973. A perspective that eschews generalizations across the New Deal, Fair Deal, and Great Society highlights the coalition's fluidity, shifting political commitments, and accommodations with conservatives and corporations. This complements work by scholars who have exposed shifts in New Deal liberalism in the 1940s and 1950s.⁷²⁴

Outlining the political currents of the New Deal and the regime's ideological evolution

Power in the New Deal: Corporate Moderates, Southern Democrats, and the Liberal-Labor Coalition (Stanford: Stanford University Press, 2011); this school of thought broadly builds on C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956).

⁷²² Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: W. W. Norton & Company, 2013); Eva Bertram, *The Workfare State: Public Assistance Politics from the New Deal to the New Democrats* (Philadelphia: University of Pennsylvania Press, 2015); Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Ithaca: Cornell University Press, 1998); Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge: Harvard University Press, 1998); Cybelle Fox, *Three Worlds of Relief: Race, Immigration, and the American Welfare State from the Progressive Era to the New Deal* (Princeton: Princeton University Press, 2012); Margaret Weir, "States, Race, and the Decline of New Deal Liberalism," *Studies in American Political Development* 19 (2005): 157–72.

⁷²³ Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (New York: Harper Collins, 2009).

⁷²⁴ Nelson Lichtenstein, "From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era," in *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steven Fraser and Gary Gerstle (Princeton: Princeton University Press, 1989), 122–52; Alan Brinkley, "The New Deal and the Idea of the State," in *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steve Fraser and Gary Gerstle (Princeton: Princeton University Press, 1989), 85–121; Ira Katznelson, "Was the Great Society a Lost Opportunity?," in *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steve Fraser and Gary Gerstle (Princeton: Princeton University Press, 1989), 185–211.

provides a foundation for understanding changes in crime politics from the 1930s through 1960s.

The Shifting Political Currents of the New Deal

Jefferson Cowie describes the New Deal as a historical blip, calling the class realignments of the era a short-lived product of circumstance and its social initiatives fleeting experiments in redistributive policy.⁷²⁵ The New Deal coalition never fully transformed American political culture, as it left in place Jim Crow laws to accommodate its southern bloc, ignored the demands of women and immigrants, and struggled to organize labor in the South.⁷²⁶ The coalition's political commitments and policy successes ultimately promoted a working-class liberalism that defined workers as native-born Anglo-Saxon men. The New Deal can be broadly periodized into four phases—the first New Deal from 1933-35, when FDR's initial policies either failed or were reactionary policies to keep the economy afloat; the second New Deal from 1935-1937 when liberals pursued a cohesive Keynesian vision; retreat from 1937 through 1945 in the wake of a recession and war; and a postwar period driven by a moderate Keynesianism shaped by organized business groups like the Chamber of Commerce (COC), National Association of Manufacturers (NAM), and Committee for Economic Development (CED).⁷²⁷

⁷²⁵ Cowie, *The Great Exception*, 9-17 especially.

⁷²⁶ Cowie, 124–25, 130–33; Katznelson, *Fear Itself*; Mettler, *Dividing Citizens*; Fox, *Three Worlds of Relief*.

⁷²⁷ See Cowie, *The Great Exception*, 96–97 for a good summary of these phases; see Robert M. Collins, *The Business Response to Keynes, 1929-1964* (New York: Columbia University Press, 1981) for a good account of organized business groups and the modification of Keynesianism.

The choices of the first New Deal were relatively conservative and driven by an imperative to prop up the economy. The NIRA, the core of the first New Deal, essentially legalized the cartelization of the economy and freed industry from antitrust actions until it was invalidated by the Supreme Court. Pillars of financial law including the Glass-Steagall Act, Securities Act, and Securities Exchange Act were written with help from investment bankers and capital-intensive industries to keep the economy stable.⁷²⁸ The second New Deal was more redistributive as cornerstones of social welfare policy including the National Labor Relations Act (the Wagner Act) and Social Security Act were passed.⁷²⁹ But the New Deal found itself in retreat its third phase when Roosevelt charted a new pump priming approach to economic management in 1937. Insistent on a return to fiscal orthodoxy, he cut public investment and shrank the money supply to balance the budget, which prompted a recession. In response, southern conservatives and Wall Street moderates coalesced and solidified their opposition to the New Deal after 1937.⁷³⁰ Most scholars describe the postwar version of Keynesian theory that emerged in the New Deal's fourth phase as "commercial Keynesianism," a brand of thought pushed by corporations and conservatives. Unlike social democratic Keynesianism, it enjoyed greater support from private enterprise and was reliant on monetary policy and taxation to

⁷²⁸ Ferguson, "Industrial Conflict," 14–15, 19–24; Domhoff and Webber, *Class and Power in the New Deal*, 24–26; Domhoff, *The Myth of Liberal Ascendancy*, 24–25.

⁷²⁹ Domhoff, *The Myth of Liberal Ascendancy*, 25; Collins, *The Business Response to Keynes*, 23–52; Cowie, *The Great Exception*, 108–13. Although a burst of union organizing followed the NIRA's passage, Cowie notes that Roosevelt's relationship to labor was not as strong as it seemed. He called organized labor "allies of convenience" in his fight to regulate industry rather than core parts of his coalition.

⁷³⁰ Cowie, *The Great Exception*, 115–18; Ferguson, "Industrial Conflict," 4–6; Domhoff, *The Myth of Liberal Ascendancy*, 27–28.

promote growth. A bipartisan persuasion, commercial Keynesianism encouraged the state to back away from commitments to social welfare and public investment.⁷³¹

After the war revitalized popular faith in capitalism, advocates of social democratic Keynesianism began to lose debates to corporate Keynesians. Their politics robbed social-democratic political impulses of their urgency while fusing social welfare to a vision of sustained economic growth. Social and economic policy became less about providing security to the working class and more about turning “forgotten men” into a mass of consumers with the requisite purchasing power to drive economic growth.⁷³² By 1945, New Deal liberalism bore little resemblance to the first or second New Deal. Demands for redistributive policy were replaced by compensatory policies favorable to capitalism.⁷³³ Redistribution was dismissed as a hindrance to growth, and increasing the consumptive and productive power of individuals was the state’s goal rather than promoting a communal social democratic vision.⁷³⁴ The shift to commercial Keynesianism left the state with tools that could only redress imbalances in the private economy, limited the state’s capacity to challenge capitalist structures, and made state spending a means to promote consumption rather than provide economic security.

In this context, anything that smacked of social democratic Keynesianism was quieted. For instance, the National Resources Planning Board (NRPB), created in 1939,

⁷³¹ Michael Kazin, Rebecca Edwards, and Adam Rothman, *The Concise Princeton Encyclopedia of American Political History* (Princeton: Princeton University Press, 2011), 46–47; Brinkley, “The New Deal and the Idea of the State” calls this a shift from social Keynesianism to commercial Keynesianism; also see Collins, *The Business Response to Keynes*; Domhoff, *The Myth of Liberal Ascendancy*; Lichtenstein, “From Corporatism to Collective Bargaining” for similar analyses.

⁷³² See Collins, *The Business Response to Keynes*; Domhoff, *The Myth of Liberal Ascendancy*; Brinkley, “The New Deal and the Idea of the State” for good analyses of this history.

⁷³³ Brinkley, “The New Deal and the Idea of the State,” 98–112.

⁷³⁴ Cowie, *The Great Exception*, 145–48.

was designated during the war to study avenues for economic conversion in the postwar years. But the Board's 1943 publication *Security, Work, and Relief Policies* rattled conservatives. It favored progressive taxation to fund public works projects and welfare initiatives and outlined a social democratic benefits program that was incorporated into an "economic bill of rights" in Roosevelt's 1944 State of the Union. Conservatives promptly disbanded the NRPB in the wake of the speech.⁷³⁵ This was followed up with the passage of the Taft-Hartley Act, which limited organized labor to collective bargaining and legislative derailment as its only strategies to fight for social rights.⁷³⁶

By the 1960s, the labor movement's third-party pretensions had been suppressed as labor became an interest group rather a basis for a social or political movement.⁷³⁷ Since questions of class relations were reoriented to interest group politics in the 1940s, a social democratic politics was impossible to achieve during the Great Society. The Great Society conceived poverty as a matter of race rather than class relations, promoted self-improvement to integrate the poor into the economy, and resisted redistribution as a solution to inequality. This politics accepted a complacent Keynesianism that did not challenge the class compromise of the 1940s.⁷³⁸ It instead relied on a Jeffersonian individualism emphasizing rights and individual improvement to promote equality.⁷³⁹

The developments of 1940s reshaped New Deal liberalism into the 1960s. Although Democrats used the term "liberal" as tactical cover to discuss collective rights

⁷³⁵ Collins, *The Business Response to Keynes*, 13; Domhoff, *The Myth of Liberal Ascendancy*, 33–34. This created room for the conservative Business Advisory Council and Committee for Economic Development to gain power in its stead.

⁷³⁶ Domhoff, *The Myth of Liberal Ascendancy*, 62, 65, 67; Cowie, *The Great Exception*, 160.

⁷³⁷ Steve Fraser, "The Labor Question," in *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steve Fraser and Gary Gerstle (Princeton: Princeton University Press, 1989), 57.

⁷³⁸ Katznelson, "Was the Great Society a Lost Opportunity?"

⁷³⁹ Cowie, *The Great Exception*, 26–27, 170.

by tying their politics to nineteenth century individualism, the collective economic vision of the New Dealers was resituated under the rubric of individual liberty by the 1940s.⁷⁴⁰

The Evolution of New Deal Crime Politics

In 1934, Franklin Roosevelt became the first president to use the “war on crime” metaphor. Speaking at a national conference, he stated that Americans must constantly protect themselves against “the lawless and the criminal elements of our population.”⁷⁴¹ For many reasons, crime became a prominent national political issue in the 1930s. Politically savvy policymakers including Roosevelt, his Attorney General Homer Cummings, and the head of the Bureau of Investigation J. Edgar Hoover politicized crime to their benefit. Crime was also legitimized as a national issue by the Wickersham Commission. Coming out of the “age of the crime commission” in the 1920s, President Herbert Hoover appointed a National Crime Commission in 1929. Called the Wickersham Commission for its chairperson George Wickersham, the Commission’s final reports explored various questions of criminal behavior, crime policy, and statistics while legitimating an increased role for the federal government in crime control.⁷⁴²

John Hagan has argued that the socially progressive shifts of New Deal politics were reflected in crime theory and policy from the 1930s through 1970s.⁷⁴³ Hagan’s analysis of the core claims of prevailing criminological theories during these decades is thorough and accurate, but there are several problems with his argument. First is an

⁷⁴⁰ Cowie, 149–50; Domhoff, *The Myth of Liberal Ascendancy*, 44–48, 71–73, 107–10.

⁷⁴¹ Franklin Roosevelt, “Address to the Conference on Crime,” December 10, 1934, <http://www.presidency.ucsb.edu/ws/?pid=14792>.

⁷⁴² James D. Calder, *The Origins and Development of Federal Crime Policy: Herbert Hoover’s Initiatives* (Westport: Praeger, 1993), 5; Chambliss William, *Power, Politics, and Crime* (Boulder: Westview Press, 1999), 34; Walker, *Popular Justice*, 185–86.

⁷⁴³ Hagan, *Who Are the Criminals?*, 69–100.

oversimplified periodization scheme that overlooks shifts in political thought in the 1940s. Explanations of criminality and crime politics moved from emphasizing social-structural factors in the 1930s to the individual in the 1940s, mirroring broader shifts in political and economic thought. Further, Hagan misunderstands how these new ideas operated within preexisting institutional contexts. The social-structural crime theories of the 1930s were channeled into institutional machinery that changed the meaning and political significance of those ideas by reinforcing an emphasis on the individual offender.⁷⁴⁴ A survey of the literature on the era's crime politics provides a basis for contextualizing the relationship between crime theory and policy in these years.

In Hagan's defense, some early New Deal policies were unusually progressive by the standards of American politics. For example, the Civil Conservation Corps, which provided public works jobs for 2.5 million men, employed a large portion of the population that likely would have been incarcerated.⁷⁴⁵ Brooklyn district attorney Conrad Printzlein also operated an innovative deferred prosecution program in Brooklyn from 1936 to 1940. Today deferred prosecution agreements are a cornerstone of the Justice Department's lax approach to corporate crime, but Printzlein's initial plan delayed charging first-time juvenile offenders for a specified time and dropped the charges if the he or she exhibited good conduct during that period. The Justice Department endorsed his program in 1946.⁷⁴⁶

⁷⁴⁴ Hagan, 69–100.

⁷⁴⁵ John A. Pandiani, "The Crime Control Corps: An Invisible New Deal Program," *British Journal of Sociology* 33, no. 3 (1982): 348–50.

⁷⁴⁶ Stephen J. Rackhill, "Printzlein's Legacy, the 'Brooklyn Plan,' A.K.A. Deferred Prosecution," *Federal Probation* 60, no. 2 (1996): 8–15.

In spite of these examples, the populist nature of New Deal era crime politics should not be mistaken for progressive crime politics. In the 1930s, crime transformed into a federal issue that national lawmakers politicized for personal gain. Roosevelt and Cummings routinely made public appeals on crime to foster an anticrime climate. They secured several major crime packages in the 1930s and pushed unsuccessful proposals to mandate universal fingerprinting, triple FBI personnel, and eliminate the unanimous jury verdict in criminal cases. Law-and-order politics became a ticket to political stardom in the 1930s, as evidenced by Manhattan DA Thomas Dewey, who used his crusades against mobsters and Wall Street to secure the New York Governorship and launch several White House bids.⁷⁴⁷ J. Edgar Hoover appealed to populist impulses by politicizing high-profile criminals like John Dillinger or Bonnie and Clyde to facilitate an expansion of the Bureau of Investigation's powers.⁷⁴⁸ The Bureau also received a shot of institutional legitimacy in 1930 when it became the clearinghouse for the Uniform Crime Reports (UCR), the first national dataset on crime.⁷⁴⁹

The 1940s witnessed shifts in crime politics as the war exacerbated fears of communism and foreign threats, which were played up by Hoover. Over 16,000 enemy

⁷⁴⁷ Gottschalk, *The Prison and the Gallows*, 71–72.

⁷⁴⁸ Gottschalk, 65–69; Leuchtenburg, *Franklin D. Roosevelt*, 333; Kenneth O'Reilly, "A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security," *The Journal of American History* 69, no. 3 (n.d.): 642–45; Walker, *Popular Justice*, 183–86; Calder, *The Origins and Development of Federal Crime Policy*.

⁷⁴⁹ Lawrence Rosen, "The Creation of the Uniform Crime Report: The Role of Social Science," *Social Science History* 19, no. 2 (1995): 215–38; also see Walker, *Popular Justice*, 185–86. The UCR's creation will be examined in more detail in a later section. Despite serious flaws—the data only included statistics on seven felonies from police departments, leaving corporate offenses policed by regulators out of the data—it immediately became the nation's authoritative measure of criminality.

aliens were arrested by the war's end.⁷⁵⁰ Under Hoover's leadership the Bureau used its mandate to spy on fascist groups to criminalize nearly all forms of dissidence by placing any organization deemed radical under federal investigation, including leftist organizations and labor unions.⁷⁵¹ Anti-union laws including Taft-Hartley criminalized strike tactics like mass picketing and secondary boycotts, while the investigations of the House Un-American Activities Committee (HUAC) and Senator McCarthy's hearings in the Senate jailed communists under the Smith Act and ensured that citizens could be "effectively stigmatized though never convicted of any offense."⁷⁵²

The most crucial shift in postwar crime politics occurred at intersection of race, crime, and procedural justice. An emphasis on criminal procedure as the best way to promote equality in justice outcomes supplanted an emphasis on substantive equality, and the state focused on ensuring that prosecutors, judges, and police did their jobs fairly rather than critically considering what conduct was being punished.⁷⁵³ As the social and economic dislocations of the war produced racial disorder and protest, local and state attempts to improve police-minority relations emphasized improving criminal justice procedures, protecting individual rights, and professionalizing police more thoroughly.⁷⁵⁴ Naomi Murakawa's work shows how race liberals in the 1940s thought that building a procedurally fair system would promote race-neutral criminal justice outcomes. By

⁷⁵⁰ Goldstein, *Political Repression*, 242-282. A flurry of state and federal laws criminalizing sedition also contributed to this. The FBI also began wiretapping to combat sabotage.

⁷⁵¹ Walker, *Popular Justice*, 185-93; Goldstein, *Political Repression*, 195-284.

⁷⁵² Walker, *Popular Justice*, 205-6; Goldstein, *Political Repression*, 187-95, 292, 299-344, 399-419; Cowie, *The Great Exception*, 160; Domhoff, *The Myth of Liberal Ascendancy*, 62-67.

⁷⁵³ In important ways, this was facilitated by decades of Supreme Court rulings emphasizing procedural over substantive due process in criminal cases. See Stuntz, *The Collapse of American Criminal Justice*, 196-214.

⁷⁵⁴ Walker, *Popular Justice*, 195-97.

constraining the discretion of criminal justice practitioners to act on their prejudices, liberals believed they could purge the criminal justice system of racial inequality.⁷⁵⁵

Murakawa details how and why this was a problematic strategy. Liberals pursued an expansion of federal authority in criminal justice by introducing bills to equip and professionalize police to promote racially fair outcomes. But in pushing proposals to limit state violence against blacks, they reaffirmed linkages between blackness and crime. By claiming that reformed procedural guidelines would produce race-neutral punishment by checking the prejudices of police, liberals narrowly defined racial bias as a psychological problem rooted in individual biases. This obscured the structural ways racial bias was engrained into the criminal justice system. As a result, these reforms provided procedural legitimacy to a system that was infused with racialized constructions of criminality.⁷⁵⁶

Mixed into New Deal crime politics in the 1940s was a resurgent interest in rehabilitative programming. California sparked a revival of the rehabilitative ideal in the 1940s by establishing the “Youth Authority” and “Adult Authority,” expert-run boards that took control of sentencing away from judges and made determinations regarding terms, release dates, parole supervision, and other aspects of sentencing. But these attempts to individualize treatment also brought about more sophistication in predicting criminality and incorrigibility, as the state constructed prediction tables consisting of various personal traits of offenders to predict the criminal tendencies of defendants. In

⁷⁵⁵ Murakawa, *The First Civil Right*.

⁷⁵⁶ Murakawa, chapter 2 especially.

pursuing the rehabilitative ideal, the state adopted a sole focus on reducing recidivism and predictively identifying incorrigible defendants.⁷⁵⁷

While earlier New Deal programs exhibited some emphasis on the social and economic conditions that cause crime, they were overshadowed in later years as crime became a law enforcement issue characterized by questions of procedure and rehabilitation. Criminals were treated as individuals trapped “outside of society, not organic to it.”⁷⁵⁸ In this sense, crime politics moved from an emphasis on class-based relations to a politics of individualism in the 1940s, mirroring comparable shifts in political and economic discourse. This was part of a reorientation in American politics from a collective politics to a politics of individualization that made it easier to control individuals in the social realm and easier to punish them in the criminal justice realm.

II. Political Constructions of Street Criminality from the New Deal Through 1960s

Hagan argues that New Deal era crime theories focused on social and economic relations and that criminology only reoriented its focus back onto individual behavior after the onset of the Reagan era in 1973. His analysis of key theories of crime during this period is thorough and accurate, so my account draws extensively on his but evaluates these ideas within a more nuanced framework of the New Deal.⁷⁵⁹ The New Deal era was not a singular cohesive epoch that persisted unchanged for four decades. The crime theories of the New Deal era cannot be divorced from related shifts in political and economic discourses during these years. Political actors drew on prevailing crime

⁷⁵⁷ Walker, *Popular Justice*, 213–15.

⁷⁵⁸ Gottschalk, *The Prison and the Gallows*, 74.

⁷⁵⁹ Hagan, *Who Are the Criminals?*, 69–100 for summary of crime theories from 1933 through 1973. My analyses of the theoretical specifics of crime theories closely hew to the analyses in Hagan’s work.

theories in selective ways and these ideas were modified as they were transmitted into policy. This process changed the meanings of these ideas by running them through preexisting institutions.

Hagan convincingly illustrates how prevailing explanations of crime propounded in mid-century can be organized into three traditions—structural functionalism, symbolic interactionism, and conflict theory. His argument is that these theories of criminality “reflected in many ways the progressive politics of this era,” which is true to an extent.⁷⁶⁰ Many variants of these theories posed direct challenges to traditional criminology’s emphasis on individual pathologies, especially in the early years of the New Deal. But the window of opportunity for these progressive ideas to reshape American crime politics was both remarkably small and remarkably fleeting.

These new theories did not wholly discredit biological theories of crime, but simply quieted them. In 1939, Earnest Hooton published *The American Criminal*, a dense 600-page defense of the biological origins of crime. Ironically, Hooton opened the book by admitting that, “What is known of human heredity really amounts to exceedingly little,” but he did not hesitate to draw broad conclusions about biology and crime.⁷⁶¹ Hooton reinforced Lombroso’s findings and leveled criticisms at sociologists by claiming that Lombroso had, “never been scientifically refuted by a satisfactory demonstration.”⁷⁶²

⁷⁶⁰ Hagan, 69.

⁷⁶¹ Earnest Albert Hooton, *The American Criminal: An Anthropological Study* (Cambridge: Harvard University Press, 1939), 4.

⁷⁶² Hooton, 13, 202–20, 274–76.

Nicole Rafter has described Hooton as an “interloper” during a period of change in criminology.⁷⁶³ Hooton was an historical anomaly, as few studies during the 1930s endorsed Lombrosian theory, but his work highlights how these older ideas were never fully discredited. That he was able to garner attention in 1939 foreshadows biocriminology’s eventual resurgence in later decades. More importantly, his insistence that alternative theories must disprove crime’s biological basis to attain empirical validity serves as a testament to the orthodoxy of Lombrosian theory in criminological circles.

This underscores a crucial problem even in early New Deal theories of crime, which is that they took as a starting point the crimes examined by older criminologists. To disprove Lombroso and his adherents, they had to study the same types of behavior. Consequently, structural scholars directed their focus on street crimes, thus internalizing ideological biases embedded within the philosophies they critiqued. This imbued their theories with a similar set of a priori assumptions about criminality that reinforced the idea that the crime problem was a class problem. Nonetheless, at least in the 1930s, they initially offered prospects for breaking from criminology’s emphasis on the individual.

Early New Deal Era Theories: The Significance of Class Relations

Early structural functionalist theories presented the greatest challenge to criminology’s emphasis on natural criminality and the focal individual. Structural functionalism theorized that crime was an outcome of a breakdown in social institutions that typically produce conformity, including the family, school, and community. Early structural functionalists focused on class relations and group-level processes. Rooted in

⁷⁶³ Nicole Rafter, “Earnest A. Hooton and the Biological Tradition in American Criminology,” *Criminology* 42, no. 3 (n.d.): 735–72.

Durkheim's theory of anomie, structural functionalism ascribed criminality to a lack of social regulation and "normlessness." Without appropriate institutions to socialize individuals, groups felt a sense of purposelessness and normlessness and thus disregarded the standards and values commonly shared by the broader population.⁷⁶⁴

Durkheim's precepts formed the basis of Robert Merton's strain theory. Merton famously gave anomie theory a structural twist through a Marxist framing. He described anomie as an unequal distribution of resources and opportunities generated through social structure, arguing that normlessness follows when people lack the necessary means to attain socially prescribed goals. Merton emphasized how society identified widely shared goals (such as a having family and owning a home) but denied certain groups the socially acceptable means to achieve those goals (like educational and employment opportunities). As a result, appropriate means for attaining success are only available in higher socioeconomic strata. By imposing what amounted to unrealistic goals on the poor and low-income working classes, society created a strain that pushed them towards criminality. Merton concluded that disadvantaged groups are "*in* the society but not *of* it. Sociologically, they constitute the true 'aliens.'"⁷⁶⁵

Merton's theory was not an explanation for why some individuals deviate, but a theory of class relations explaining that disadvantaged groups deviated more because they had the greatest disparity between goals and means. Merton provided multiple examples of behaviors characterized by strain, describing economically motivated crime as "innovation," drug use as "retreatism," radical responses as "rebellion," and

⁷⁶⁴ See Emile Durkheim, *Suicide: A Study in Sociology* (New York: Free Press, 1897).

⁷⁶⁵ Robert K. Merton, "Social Structure and Anomie," *American Sociological Review* 3, no. 5 (1938): 677.

“ritualism” as abandoning socially prescribed goals but conforming to prescribed means.⁷⁶⁶

While Merton’s was the quintessential structural functionalist theory, Clifford Shaw and Henry McKay’s theory of social disorganization was the most influential. Shaw and McKay also deployed structural conceptions of anomie but focused on inner cities. Their 1931 analysis of Chicago found that people moved in and out of high-crime neighborhoods, but that neighborhoods rather than people remained criminal. Problems like truancy, infant mortality, mental disorder, and crime were clustered in geographic areas. As different groups moved in and out, the neighborhood remained troubled. Shaw and McKay explained these problems as outcomes of poverty, residential mobility, and ethnic heterogeneity, which weakened the social bonds of the community.⁷⁶⁷

Shaw and McKay’s work was particularly influential. In fact, their research was published as a sub-volume of the Wickersham Commission’s report on the causes of crime as related to juvenile delinquency. But Shaw and McKay’s work had a racially deterministic tinge by concluding that ethnic heterogeneity weakened community social bonds, a logic resting on an essentialist conception of ethnicity. Their 1932 work further linked criminality to race. In an article that conceptualized anomie in terms of intra-family strain, they found that crime was significantly correlated to broken homes only when their data was disaggregated by race. Given that black youth had the highest rate of broken homes, they suggested that black households were specifically likely to generate

⁷⁶⁶ Merton, 676.

⁷⁶⁷ Clifford Shaw and Henry McKay, *Social Factors in Juvenile Delinquency: A Study of the Community, the Family, and the Gang in Relation to Delinquent Behavior, for the National Commission on Law Observance and Enforcement*, vol. 2, 13 (Washington: Government Printing Office, 1931).

delinquent children.⁷⁶⁸ While Shaw and McKay presented structural disadvantage as a form of “anomie” driving criminality, they still maintained links between criminality and racial difference. Nonetheless, Shaw, McKay, and Merton emphasized class relations more than their predecessors and successors.

An alternative to structural functionalism was symbolic interactionism, which offered a general theory of crime. The explanatory power of structural functionalism depended on the individual committing a crime; it could explain crimes committed by the poor in disadvantaged neighborhoods, but not comparable behavior among middle or upper-class citizens. While structural functionalism offered an explanation for crime rooted in social and economic relations, it also buttressed dominant presumptions about the type of people who were criminals. Symbolic interactionism alternatively emphasized the meanings involved in explaining, labeling, and defining crime. By imposing the label of criminality on people, state responses to crime shaped individuals’ self-conception and subsequent behavior. This emphasized the role social control agencies and communities played in producing criminals through processes of social construction.

One of the original theoretical works in this intellectual tradition came from Edwin Sutherland in 1924. Sutherland focused less on the role of social control agencies than associations among social groups. His differential association theory argued that criminal behavior is learned via personal relationships. The core of his theory was that an individual becomes delinquent if his or her associates define crime so favorably that it outweighs any unfavorable aspects of criminal behavior. These labels are transmitted

⁷⁶⁸ Clifford Shaw and Henry McKay, “Are Broken Homes a Causative Factor in Juvenile Delinquency?,” *Social Forces* 10, no. 4 (1932): 514–24.

within groups, including business organizations, which are isolated from competing perspectives. Sutherland posited that individuals learn the values and techniques that drive crime from their narrowly contained social circles.⁷⁶⁹

A famous take on symbolic interactionism was labeling theory, which first appeared in Frank Tannenbaum's 1938 book *Crime and the Community*. Tannenbaum emphasized the labels imposed on individuals by social control agencies. In the book, he claimed that police interventions change an individual's conception of the self. By segregating people for incapacitation, criminal punishment constitutes a "dramatization of the evil," forcing people into isolation in which they form relationships with similarly defined individuals. This becomes a severe problem when adolescent street culture views some behaviors as normal while those outside the community view them as a threat. The consequent spectacle of punishment *creates* the criminal in Tannenbaum's work, upending deterrence logics of punishment.⁷⁷⁰

Labeling theory was not a positivist theory, as it was concerned with how punishment influences self-conceptions rather than empirically identifying the causes of crime. But unlike many other explanations of crime, it offered the basis for a general theory with explanatory power reaching across social strata. It would later inform Sutherland's theory of white-collar crime and analyses of business culture by Donald Cressey in the 1970s.⁷⁷¹ However, as criminology returned to emphasizing individualism,

⁷⁶⁹ Edwin Sutherland, *Principles of Criminology* (Chicago: J.B. Lippincott, 1924).

⁷⁷⁰ Frank Tannenbaum, *Crime and the Community* (New York: Columbia University Press, 1938), 20.

⁷⁷¹ Sutherland, *White-Collar Crime*; Donald Ray Cressey, *Other People's Money : A Study in the Social Psychology of Embezzlement* (Belmont: Wadsworth Pub. Co, 1971).

labeling theory became more closely associated with street criminality, drug use, and juvenile delinquency.

The third and final major school of criminology to emerge during mid-century was conflict theory. Influenced by Marxist ideology, conflict frames directed attention onto how dominant social groups used the power of criminalization to control subordinate groups. Conflict theories explain criminality as a social construct that is shaped by social, economic, and political power differentials.

Georg Rusche and Otto Kirchheimer's 1939 book *Punishment and Social Structure* is the seminal Marxist analysis of crime as a social, economic, and political construct. Rusche and Kirchheimer rejected the emphasis on the atomized individual prevalent in criminology and paved the way for the rise of radical criminology by amalgamating conflict theory and crime theory. They argued that instantiations of punishment systems have historically corresponded to the prevailing means of production at a given moment, tracing the evolution of fines, corporal punishment, prison labor, and containment from the Middle Ages through the era of industrial capitalism. Rusche and Kirchheimer saw punishment as a species of class domination integral to the state's class control matrix. They concluded that punishment provides "the illusion of security by covering the symptoms of social disease with a system of legal and moral value judgments." The criminal law was produced by an alliance between capital and the state and detracted from the structures causing crime by emphasizing the individual's faults.⁷⁷²

⁷⁷² Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York: Columbia University, 1939), 207.

Rusche and Kirchheimer's work received little attention upon its release.⁷⁷³ But by the 1950s and 1960s, it became foundational to the school of radical criminology. Unlike structural functionalism and symbolic interactionism, conflict criminology had a theoretical basis ill-disposed to a reorientation towards the individual. A case in point is George Vold's work in 1958, which depicted criminality as a value judgment placed on subordinate groups. For Vold, the difference between losing and winning in business-labor or revolutionary conflicts was the difference between punishment or glorification, as he stated that "a successful revolution makes criminals out of the government officials previously in power, and an unsuccessful revolution makes its leaders into traitors."⁷⁷⁴ In 1969, Austin Turk defined criminality as a social status dependent on how dominant decision-making authorities perceive inferiors, leading poor and nonwhite populations to have high rates of criminalization.⁷⁷⁵ Richard Quinney's social realist theory argued that elites define crimes in ways that produce the "social reality of crime." Because the disadvantaged are not involved in the writing of laws, their behavioral patterns are likely to be defined as criminal in elite discourse.⁷⁷⁶

The work of these scholars had significant influence in academic circles, but not on policy. Radical criminologists, like most Marxist scholars, have struggled to reach political circles, since they have had had few political allies to transmit their ideas to policy arenas. Thus, while Hagan's review of conflict theory is an accurate account of the

⁷⁷³ David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 2012), 98–116.

⁷⁷⁴ George Bryan Vold, *Theoretical Criminology* (New York: Oxford University Press, 1958), 214; discussed and cited in Hagan, *Who Are the Criminals?*, 90–91.

⁷⁷⁵ Austin T. Turk, *Criminality and Legal Order* (Chicago: Rand McNally, 1969).

⁷⁷⁶ Richard Quinney, *The Social Reality of Crime* (New Brunswick: Transaction Publishers, 1970), 23.

theoretical principles of this school, his conclusion that conflict theories fostered more attention to “white-collar and political crimes” primarily applies to academic contexts.⁷⁷⁷ As conflict criminologist William Chambliss admitted, “Criminological conflict theory has had notable consequences in terms of subsequent theorizing and rethinking within mainstream criminology but has had relatively little direct impact on social policy.”⁷⁷⁸

Crime Theories in the Latter New Deal

As the New Deal shifted away from a class-based politics towards an individualistic politics of micro-empowerment, theories of criminality followed suit as criminology drifted back to its deterministic and individualistic roots. An emphasis on the inclinations of individuals reemerged as scholarship refocused on promoting rational treatment programs. During the middle decades of the century, criminological science reaffirmed its aim to perfect a program of individualized treatment, mirroring the resurgence in political attention to the rehabilitative ideal.⁷⁷⁹

Structural functionalism lost its Mertonian emphasis on class dynamics in favor a focus on the relationship between individual expectations and criminality. One of the most influential and distinctive variants of structural functionalism came from Sheldon and Eleanor Glueck. Their book *Unraveling Juvenile Delinquency* (1950) combined Shaw and McKay’s emphasis on anomie within the family, individualized treatment, and predictive targeting. They constructed a prediction table built on a five-factor scale to

⁷⁷⁷ Hagan, *Who Are the Criminals?*, 89, 100.

⁷⁷⁸ William Chambliss, “Social Power and the Construction of Crime: Conflict Theory,” in *Criminological Theory: Context and Consequences*, ed. Robert Lilly, Cullen, Francis T., and Richard Ball, 6th ed. (New York: SAGE, 2015).

⁷⁷⁹ Walker, *Popular Justice* chapter 8 discusses the push in criminological circles to make individualized treatment a reality.

predict the likelihood of an individual's criminality. The five factors included "discipline of boy by father," "supervision of boy by mother," "affection of father for boy," "affection of mother for boy," and "cohesiveness of family."⁷⁸⁰ The Gluecks' work received a lot of attention, particularly in California. Leading the way in the rehabilitative ideal's revival and individualizing treatment, the state constructed a table of "base expectancy rates" built on the Gluecks' prediction tables to guide judicial sentencing decisions for individual offenders.⁷⁸¹

Also fitting into the structural functionalist tradition and its focus on anomie were cultural theories of crime. Like their Progressive Era predecessors, cultural theories were rooted in essentialized and deterministic understandings of racial difference. One of the earliest cultural theories came from Frederick Thrasher in 1927, whose analysis of gang culture in Chicago concluded that disorderly economic, moral, and social forces reinforced individual tendencies towards criminal behavior.⁷⁸² While Thrasher's was the most famous, his was not the only work to reexamine cultural theory. In a 1938 article titled, "Culture Conflict and Crime," Thorsten Sellin argued that crime was generated by "a conflict of conduct norms" between different cultural systems.⁷⁸³ That same year in *Crime and the Community*, Frank Tannenbaum argued that, "crime is a maladjustment

⁷⁸⁰ Sheldon Glueck and Eleanor Glueck, *Unraveling Juvenile Delinquency* (New York: Commonwealth, 1950).

⁷⁸¹ John Coffee, "The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice," *Michigan Law Review* 73, no. 8 (1975): 1361–1462; Walker, *Popular Justice*, 214.

⁷⁸² Frederic Thrasher, *The Gang: A Study of 1,313 Gangs in Chicago* (Chicago: University of Chicago Press, 1927).

⁷⁸³ Thorsten Sellin, "Culture Conflict and Crime," *American Journal of Sociology* 44, no. 1 (1938): 97–103.

that arises out of the conflict between a group and the community at large” and that some cultural groups are “maladjusted to the larger society” and “at war with society.”⁷⁸⁴

Thrasher, Sellin, and Tannenbaum were preoccupied with identifying groups likely to conflict with prevailing culture. Their work foreshadowed delinquent subculture theories that emerged in the 1950s and stigmatized certain cultures as pathologically deviant. Albert Cohen’s 1955 book *Delinquent Boys* sparked this trend. In the book, Cohen argued that disadvantaged classes adopt delinquent subcultures due to their individual failings. He argued that young boys in urban areas engaged in gang behavior as a collective reaction to their dissatisfaction with their unsuccessful efforts to adjust to middle-class norms. In this perspective, a sense of frustration drove delinquent subcultures to repudiate the middle-class standards giving them a sense of inadequacy.⁷⁸⁵

Delinquent subculture theories of criminality were often built on assumptions about the pathological nature of lower-class culture. In a 1958 article, Walter Miller highlighted how this strand of thought divorced an understanding of lower-class crime from structural inequality. He wrote that the values of delinquent subcultures were a byproduct of the lower-class system, which include, “trouble, toughness, smartness, excitement, fate,” and “autonomy.” He concluded that, “Following cultural practices which comprise essential elements of the total life pattern of lower class culture

⁷⁸⁴ Tannenbaum, *Crime and the Community*, 8–9.

⁷⁸⁵ Albert K. Cohen, *Delinquent Boys: The Culture of the Gang* (Glencoe: Free Press, 1955); see Hunter Thompson, *Hell’s Angels: A Strange and Terrible Saga of the Outlaw Motorcycle Gangs* (New York: Random House, 1967) for a classic analysis of gang subculture in the Hell’s Angels motorcycle gang.

automatically violates certain legal norms.”⁷⁸⁶ His work pathologized lower-class culture as something deviant and viewed it through a deterministic lens.

Delinquent subculture theory bore similarities to a simultaneously emerging theoretical explanation of poverty, the culture of poverty theory. This school argued that poverty was a function of deviant subcultures that warped values and family structures. Coined in the late 1950s by Oscar Lewis, the phrase initially referred to a “way of life” adopted by marginalized communities to cope with “feelings of hopelessness and despair” upon recognizing the “improbability of their achieving success in terms of the prevailing values and goals.”⁷⁸⁷ In this sense, Lewis’s theory was a model of Marxist anomie theory. He described the culture as “an adaptation and a reaction of the poor to their marginal position in a class-stratified, highly individuated, capitalistic society.”⁷⁸⁸ He claimed that the poor are mislabeled as “shiftless, mean, sordid, violent, evil and criminal” without recognition of the “irreversibly destructive effects of poverty on individual character.”⁷⁸⁹ Lewis’s theory eschewed an emphasis on individual faults and directed attention onto the structural dimensions of poverty. However, his theory would quickly be warped by scholars who merged it with individualistic theories of inequality.

For instance, in their 1960 book *Delinquency and Opportunity*, Richard Cloward and Lloyd Ohlin meshed an individualized structural functionalist theory with culture of poverty theory. Their “differential opportunity theory” contended that to understand various forms of crime, one must consider different types of legitimate and illegitimate

⁷⁸⁶ Walter Miller, “Lower Class Culture as a Generating Milieu of Gang Delinquency,” *Journal of Social Issues* 14, no. 3 (1958): 7, 18.

⁷⁸⁷ Oscar Lewis, “The Culture of Poverty,” *The Scientific American* 215, no. 4 (1966): 21.

⁷⁸⁸ Lewis, 21.

⁷⁸⁹ Lewis, 19.

opportunities available to those seeking their way out of disadvantaged environments. They emphasized three ways people adapted to their differential opportunity structures. Some communities had stable criminal subcultures, in which there was a high degree of coordination between legitimate and illegitimate sectors like the police and criminal underworld, which produced an organized crime culture. A second was a conflict subculture, in which conflict and violence disrupted legitimate enterprises and obstructed state efforts at social control. The third was a retreatist subculture, in which individuals who failed in their opportunity structures retreated to drug abuse.⁷⁹⁰

John Hagan has shown that while working for the Johnson Administration, Ohlin embedded differential opportunity theory into Great Society policy, which he calls the “peak influence of a progressive crime theory.”⁷⁹¹ But the influence of Cloward and Ohlin’s ideas on policy was not straightforward. Assistant Secretary of Labor Daniel Patrick Moynihan’s 1965 report *The Negro Family* highlights how policymakers meshed Cloward and Ohlin’s theory with culture of poverty theory to target the black poor. This underscores that there was not a straight line from Lewis to Moynihan. Rather, Lewis’s structural account of the culture of poverty was altered by scholars and policymakers who interpreted his work through the lens of individualism.

Moynihan concluded that, “inability to delay gratification” explains “immature, criminal, and neurotic behavior” among blacks. High crimes rates among black youth were attributed to unstable home lives, and Moynihan cited “family disorganization” as

⁷⁹⁰ Richard Cloward and Lloyd Ohlin, *Delinquency and Opportunity: A Theory of Delinquent Gangs* (Glencoe: Free Press, 1960), 161–86.

⁷⁹¹ Hagan, *Who Are the Criminals?*, 74; Walker, *Popular Justice*, 204.

the main cause of black crime.⁷⁹² This is why Hagan admits that, “the eventual implementation of Cloward and Ohlin's ideas bore a tenuous connection to their original theory.”⁷⁹³ Lawmakers modified the ideas of Cloward, Ohlin, and Lewis to suit their political needs. Although all three claimed that their theories applied to society, not individuals, their ideas were worked into policy in ways that focused on individual-level dynamics.

By the 1960s, structural functionalism had completed a reorientation towards individual level processes rather than social ones. Travis Hirschi’s social control theory highlights the nature of this change. His 1969 book *Causes of Delinquency* argued that all that is necessary to explain crime is the absence of a bond to social institutions. He argued that weaknesses in any combination of four social bonds (attachment to family or friends, school or activities, values or principles, and commitments or goals) produced criminality.⁷⁹⁴ In social control theory, no special strain had to exist between goals and means to produce deviance. All that was necessary was a reduction in constraining social bonds. Hirschi’s theory emphasized personal responsibility by assuming a natural tendency towards deviance that required restraint through such bonds.⁷⁹⁵

⁷⁹² Daniel Moynihan, *The Negro Family: The Case for National Action* (Washington: Government Printing Office, 1965), 34, 39, 48; see Daniel Moak, “Supply-Side Education: Race, Inequality, and the Rise of the Punitive Education State” (Doctoral Dissertation, University of Pennsylvania, 2016) chapter 5 for an analysis of how culture of poverty theory influenced Great Society social policy and the Moynihan Report.

⁷⁹³ Cloward and Ohlin, *Delinquency and Opportunity*, 74.

⁷⁹⁴ Travis Hirschi, *Causes of Delinquency* (Berkeley: University of California Press, 1969).

⁷⁹⁵ A famous extension of this theory came in 1990 from Hirschi and his coauthor Michael Gottfredson, who theorized that low self-control in the individual is the key predictor of criminal behavior. They wrote that “people who lack self-control will tend to be impulsive, insensitive...risk-taking, [and] short-sighted” and thus tend to “engage in criminal and analogous acts.” In their work, the authors use the terms criminality and self-control interchangeably. See Michael R. Gottfredson and Travis Hirschi, *A General Theory of Crime* (Stanford: Stanford University Press, 1990), 90–91, 137. When quoting an

These shifts towards individual-level dynamics in structural functionalism mirrored shifts in Keynesianism, culture of poverty theory, and other strands of political and economic thought. The development of human capital theory—the idea that individual traits or skills determine one’s potential capital accumulation—had also begun in the late 1930s, gaining political traction in the 1960s through the work of Chicago school economists.⁷⁹⁶ Human capital theory presented poverty as a result of personal failures to invest in enhancing one’s own productive capacities, by which logic social assistance produced perverse incentives discouraging self-improvement. In the 1960s, human capital theory meshed with an individualized culture of poverty theory, differential opportunity theory, and social-control theory by putting the onus on individuals to reform and correct for social and economic inequalities.

Symbolic interactionist research experienced similar shifts. In his 1963 book *Outsiders*, Howard Becker provided the foundation for modern labeling theory, writing that “deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender.’”⁷⁹⁷ But by the 1960s, labeling theory and variants of symbolic interactionism almost entirely focused on street criminality. For instance, David Matza and Gresham Sykes’s “neutralization theory” posited that delinquent youths drifted into deviance through a process of rationalization. They claimed that juvenile delinquents adhered to prevailing norms of conduct in their

older publication of theirs, they wrote that “Criminality (self-control)...refers to stable differences across individuals in the propensity to commit criminal (or equivalent) acts.”

⁷⁹⁶ Jennifer Breen, “Capitalizing Labor: What Work Is Worth and Why, from the New Deal to the New Economy” (Doctoral Dissertation, University of Pennsylvania, 2011), 68–70, 106, chapter 2 generally.

⁷⁹⁷ Howard Saul Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: Free Press of Glencoe, 1963), 9.

beliefs but drew on “subterranean traditions” of their subculture to “neutralize” those norms by denying their responsibility and the legitimacy of those condemning them.⁷⁹⁸ Edwin Sutherland’s ventures into symbolic interactionism offered a basis to expand beyond street criminality, as he extended his work into corporate boardrooms in his 1949 book *White-Collar Crime*.⁷⁹⁹ But in general, labeling theory focused on juvenile delinquency in the latter twentieth century.⁸⁰⁰ Its emphasis on the social construction of crime has even led it to be derided in mainstream criminological circles for lacking a positivist bent. Without any theoretical consideration of the origins of deviance, it has been criticized as untestable.⁸⁰¹ As a result, symbolic interactionist criminology has received less political attention than variants of structural functionalism.

Research in criminology influenced waves of correctional reform in the New Deal and postwar periods, but the relationship between crime theory and policy operated differently during these years than it did in the late nineteenth and early twentieth centuries. While the work of scholars like Merton, Shaw, and McKay made meaningful distinctions from earlier brands of crime theory, their ideas were reinterpreted within an institutional context that changed their meaning. Policymakers operated within an institutional network infused with rehabilitative premises that transformed these new ideas to focus on individual rather than class dynamics. As political discourse evolved in

⁷⁹⁸ David Matza and Gresham Sykes, “Juvenile Delinquency and Subterranean Values,” *American Sociological Review* 26, no. 5 (1961): 712–19.

⁷⁹⁹ Donald Cressey, “Forward,” in *White-Collar Crime*, by Edwin Sutherland (New York: Holt, Rinehart, and Winston, 1961), iv–xii. Sutherland’s book had little impact on criminology at the time, and only had an effect on academic criminology several decades after its publication.

⁸⁰⁰ For instance, see David P. Farrington, “The Effects of Public Labeling,” *The British Journal of Criminology* 17, no. 2 (1977): 112–25.

⁸⁰¹ Ken Plummer, “Labeling Theory,” in *Encyclopedia of Criminology and Deviant Behavior*, ed. Bryant Clifford (New York: Routledge, 2001), 191–94.

the 1940s and 1950s, criminology followed suit, solidifying its focus on identifying and correcting the micro-level causes of individual criminal behaviors. This illustrates that the window of opportunity during which new ideas could have led to meaningful reform was narrow. The way in which the potentially radical ideas of the 1930s were constrained by institutional contexts and rehabilitative ideological parameters is especially clear in the reports and documents of the Wickersham Crime Commission.

III. The Wickersham Commission, the UCR, and Ideational Modification

In operation from 1929 to 1931, the Wickersham Commission was established by President Herbert Hoover to investigate an array of issues related to criminal justice. An 11-person committee led by former Attorney General George Wickersham and staffed by prominent legal experts including Roscoe Pound, Newton Baker, and Ada Comstock, the Commission published fourteen volumes examining a broad range of issues related to crime. Building on the success of the state crime commissions of the 1920s, the Commission addressed these questions with the help of leading social scientists including Clifford Shaw, Henry McKay, Edwin Sutherland, and Thorsten Sellin.

Fueled by anxieties over gangland murders and organized crime, one of the Commission's most anticipated volumes was on Prohibition. However, the Commission's immediate impact on policy was relatively moderate and it did not resolve issues surrounding alcohol.⁸⁰² This is not to suggest that the Wickersham Commission was insignificant. Its final reports reveal crucial dynamics about New Deal era crime politics and the way policymakers explained and conceptualized criminality. Further, while its

⁸⁰² See Walker, *Popular Justice*, 173–75 for overview of Wickersham Commission's creation and impact.

volume on Prohibition was underwhelming, other volumes had more impact. The Commission's most famous report was its eleventh volume on "Lawlessness in Law Enforcement," which documented the frequency of police abuse referred to as the "third degree" to obtain confessions. This fueled public resistance to policy brutality and spurred public support for legal controls on police behavior. The Commission's failure to address racial inequalities in the use of "third degree" tactics also galvanized the NAACP in its fight for antilynching legislation. And in many ways, the Commission has had long-term impacts on crime policy. Khalil Muhammad has argued that the Commission disregarded evidence of racism in the justice system by ignoring how racial biases were embedded into the police reports that informed the UCR, thus embedding "invisible layers of racial ideology" into the data.⁸⁰³

In certain regards, the Wickersham Commission marked a sort of New Deal for criminology. But its reports also demonstrate how the class ideology of rehabilitation constrained the potential for criminology's New Deal. Several of the Commission's volumes endorsed rehabilitative ideology and the instruments of individualized treatment. Its ninth volume on penal institutions, parole, and probation restated the philosophy of Zebulon Brockway, arguing that "Individualization is the root of adequate penal treatment and the proper basis of parole."⁸⁰⁴ Its thirteenth volume on the causes of crime and third on crime statistics both built on the presumption that the causes and solutions to criminal behavior can be found within the individual. The Commission's analyses of

⁸⁰³ Gottschalk, *The Prison and the Gallows*, 61–62; Walker, *Popular Justice*, 173–80; Muhammad, *The Condemnation of Blackness*, 266–67, 270–77.

⁸⁰⁴ U.S. National Commission on Law Observance and Enforcement, *Report on Penal Institutions, Probation, and Parole*, 172.

crime statistics and the causes of crime were both oriented towards perfecting a program of individualized treatment based on rehabilitation. It was these currents in New Deal era discourse that divorced social-structural theories of crime from their political economic implications, tying them to an individualistic and deterministic ideology of rehabilitation.

In its analysis of crime statistics, the Commission critiqued granting the Bureau of Investigation the power to collect and disseminate crime data given that the agency's vested interests could encourage it to politicize crime in selective ways. Nonetheless, the Commission signed off on the new *Uniform Crime Reports* (UCR) created in 1930, even though the Bureau was made the clearinghouse for the dataset. The UCR was the product of a lobbying campaign led by the International Association of Police Chiefs (IACP), Social Science Research Council (SSRC), and Laura Spelman Rockefeller Memorial Foundation (LSRM). While the SSRC suggested that the dataset be based off of comprehensive records from courts, prison, and police, the IACP offered the only means of coordinating multiple state and local actors to collect the requisite data, ensuring that the statistics were compiled based on police reports. The dataset consequently only counted seven "index crimes" included in police data to measure criminal activity that were all violent and property offenses.⁸⁰⁵

Lawrence Rosen's work offers insights into the politics that created the UCR but the Wickersham Commission's analysis of the data provides a different perspective on how the UCR translated into national crime politics. The Commission's records show how lawmakers interpreted the statistics and reveal processes of ideational modification through which political elites reinterpreted prevailing ideas about criminality. To

⁸⁰⁵ Rosen, "The Creation of the Uniform Crime Report."

understand how ideas about criminality related to New Deal politics, it is more useful to examine how the UCR were interpreted rather than what went into their creation.

For two reasons, lawmakers interpreted the UCR in ways that changed the meaning of prevailing ideas of criminality. First, the state saw the collection of crime statistics as a means to an end. The systematic compilation of data offered a way to empirically test theories about the causes of crime and identify avenues for treatment, so the UCR was designed to be a testable dataset that could produce a composite picture of the likely criminal. When the Commission reviewed the UCR and the causes of crime, it reinterpreted structurally oriented theories of criminality within an individualistic framework geared towards identifying likely criminals for rehabilitation or punishment. Second, by focusing on individuals and police data, the UCR neglected to include corporate convictions and data from regulatory agencies. Federal agencies have quasi-policing functions to regulate industry, but the data they produce often reflects the biases of the agencies' staff.⁸⁰⁶ Without including regulatory crimes and corporate convictions, entire categories of offenses were absent from the reports, reaffirming the longstanding construct of the criminal as a poor street offender driven by personal faults and flaws.

Just as the Commission legitimized layers of racial ideology within crime statistics, it also legitimized the layers of class ideology in the UCR. The Commission endorsed the UCR as an integral part of the state's rehabilitative programming. The UCR was thus designed within and interpreted through rehabilitative frameworks. It focused entirely on street crimes and was viewed as a means of identifying the individual factors

⁸⁰⁶ Bierne and Messerschmidt, *Criminology*, 27–57; Barak, *Theft of a Nation*, 31–49, 117–20. Whether an action is categorized as criminal or not often depends on how the agency chooses to respond to it.

that cause criminal behavior. This affirmed rehabilitative ideology's class skewed premises. By excluding corporate crime from the data and reinterpreting New Deal era theoretical criminology through rehabilitative frameworks, the UCR hardened the class distinctions in political constructions of criminality.

To understand how theories of crime were reshaped by political discourse requires an analysis of the Commission's report on the causes of crime and its report on crime statistics. An analysis of public and professional input to the Commission also sheds light on the character of New Deal era crime politics. The Commission received thousands of letters from citizens and legal professionals providing information, advice, and explanations for the apparent increase in crime. The Commission directly solicited input from judges and prosecutors, valuing their perspectives as frontline crime fighters. Given that U.S. judges and district attorneys stand at the intersection of crime policy and electoral politics and have strong incentives to sell themselves as law-and-order candidates, their responses reveal which framings of criminality appealed to political actors in the New Deal period.⁸⁰⁷ The subsequent analysis thus draws on an assessment of the Commission's reports as well as a survey of letters from district attorneys and judges written to the Commission held in the National Archives.

The Wickersham Commission's "Report on Criminal Statistics," its third volume, leveled numerous critiques at the UCR. It called the reports "unsystematic," saying they

⁸⁰⁷ Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York: Oxford University Press, 2007); Joan Jacoby, *The American Prosecutor: A Search for Identity* (Lexington: Lexington Books, 1980); Gregory A. Huber and Sanford C. Gordon, "Accountability and Coercion: Is Justice Blind When It Runs for Office?," *American Journal of Political Science* 48, no. 2 (2004): 247–63; Sanford C. Gordon and Gregory Huber, "The Effect of Electoral Competitiveness on Incumbent Behavior," *Quarterly Journal of Political Science* 2, no. 2 (2007): 107–38.

were “often inaccurate” and “incomplete.”⁸⁰⁸ It criticized the UCR’s reliance on police statistics, noting that precincts’ reports were laden with inconsistencies and rarely recorded information about dispositions after arrest.⁸⁰⁹ The Commission suggested that court statistics about prosecution were better indices for measuring crime rates, but noted that a comparable lack of standardization in court records also prevented them from having any immediate utility to federal officials. The Commission thus expressed serious skepticism towards using police reports to tabulate the data but was not confident in any proposed alternative. As a result, the report concluded that police data were “of doubtful statistical value,” but expressed fear that changing the basis of the UCR without a viable alternative “would undo the work so well begun under the auspices of the International Association of Chiefs of Police.” The Commission also criticized the fact that the Bureau of Investigation was granted authority to collect the data, arguing that the Bureau of the Census would serve this function in a more disinterested way. The report concluded that despite its flaws, the UCR “should be conserved” and “perfected as much as possible,” until it could be transferred to the Bureau of the Census and incorporate a wider array of sources than just police reports.⁸¹⁰

Scholars in APD have noted that timing and sequence are crucial to understanding how developmental pathways are formed. In the case of the UCR, had the Wickersham Commission’s reports been published a few years earlier, competing proposals to authorize a more comprehensive statistical program from a variety of sources may have

⁸⁰⁸ U.S. National Commission on Law Observance and Enforcement, *Report on Criminal Statistics*, 3 (Washington: Government Printing Office, 1931), 3.

⁸⁰⁹ U.S. National Commission on Law Observance and Enforcement, 32–34, 43–53.

⁸¹⁰ U.S. National Commission on Law Observance and Enforcement, 12–13, 15, 35, 40.

gained momentum over proposals to rely on police statistics.⁸¹¹ Further, had the reports been published earlier, the dataset may have been housed in the Census Bureau rather than FBI, separating the dissemination of national crime data from the political interests of the FBI. But the institutional linkages formed between police, the FBI, and the UCR proved difficult to reverse even shortly after they were established.

The Commission viewed the UCR as a means of scientifically discovering the causes of crime and predictively identifying likely criminals. The Commission thus interpreted the UCR in ways that emphasized targeting individuals for reform or punishment rather than addressing structural contributors to crime. This was particularly clear at the end of the report on statistics, which concluded with a piece written by Morris Ploscowe entitled, “A Critique of Federal Criminal Statistics.” Ploscowe criticized the use of police data as a metric for measuring criminality just as the main report did, but also noted that collecting crime data was necessary for identifying the causative factors in criminal behavior and for rehabilitating offenders.⁸¹² He stated that criminal statistics were essential for producing a “composite picture of the types of individuals” that are likely to turn to crime. He wrote that,

The fundamental need is for more knowledge concerning the elements entering into the crime problem, and the most important of these elements is the individual delinquent. Statistics relating to the individual delinquent will not in and of themselves enable us to understand the causes of criminality, but by revealing the most frequently recurrent phenomena they can indicate broad trends which should be bases for further investigation.⁸¹³

⁸¹¹ Rosen, “The Creation of the Uniform Crime Report,” 228.

⁸¹² U.S. National Commission on Law Observance and Enforcement, *Report on Criminal Statistics*, 159–64.

⁸¹³ U.S. National Commission on Law Observance and Enforcement, 183.

Ploscowe concluded that statistics should serve the purposes of “scientific penology” which, “demands individualization in the treatment of the prisoner.”⁸¹⁴

Ploscowe’s points mirrored claims in the primary report, which opened by stating that among the core principles shared by the Commission’s members was the idea that crime statistics should be centralized and published in order to create “a comprehensive plan for an ultimate complete body of statistics, covering crime, criminals, criminal justice, and penal treatment.”⁸¹⁵ The first page of the report stated that, “Statistics are needed to tell us, or at least to help tell us, what we have to do, how we are doing it, and how far what we are doing responds to what we have to do.”⁸¹⁶ Not only did the Commission argue that the data was to be used to detail “the volume and character of the offenses committed,” but also to get an idea of, “what persons or types of persons, if the types may be differentiated, commit these offenses.”⁸¹⁷ It is at this juncture that the Commission’s thirteenth volume, its, “Report on the Causes of Crime,” becomes crucial.

The volume on the causes of crime consisted of two parts—one dissenting piece written by Henry Anderson on the grounds that the primary report failed to adequately specify the causes of criminality, and a majority report written by Ploscowe and the remainder of the Commission. With chapters dedicated to biology, mental health, social factors, economics, and politics, Ploscowe’s majority report opened and closed by noting that nearly all theoretical explanations reviewed had some power in explaining crime to

⁸¹⁴ U.S. National Commission on Law Observance and Enforcement, 191.

⁸¹⁵ U.S. National Commission on Law Observance and Enforcement, 6.

⁸¹⁶ U.S. National Commission on Law Observance and Enforcement, 3.

⁸¹⁷ U.S. National Commission on Law Observance and Enforcement, 4.

varying degrees and in varying contexts.⁸¹⁸ But the report emphasized that, “The soundest approach to the problem of the causation of crime...lies through a study of the individual criminal.”⁸¹⁹ In the Commission’s analysis, new ideas associated with structural functionalist criminology were interpreted to focus on individual level faults rather than structural political economic forces.

Interestingly, the first chapter in the majority report examined “Morphological and Physiological Factors.” It was a straightforward reexamination of Lombrosian theory. The Commission attacked the school of thought, arguing that Lombroso and his adherents failed to identify any causal relationship between biology and crime. However, they emphasized that Lombroso moved criminological thought in an important direction, “By centering attention on the criminal rather than the crime committed.”⁸²⁰ The emphasis on the focal individual in academic analyses of crime was thus not an inadvertent or accidental legacy of Lombrosian theory. Even Lombroso’s foes acknowledged that his emphasis on the individual criminal rather than his or her crime was the most fundamental contribution of his work to criminology.

While throwing doubt onto Lombroso’s claims about atavism, the Commission recognized that Lombrosian theory undergirded promising new research. On the first page of the chapter, the Commission wrote that the “fundamental idea of Lombroso,” that a man’s conduct “find[s] expression in his physical constitution...still underlies present research.” The Commission praised work in the field of endocrinology that linked

⁸¹⁸ U.S. National Commission on Law Observance and Enforcement, *Report on the Causes of Crime*, vol. 13 (Washington: Government Printing Office, 1931), 5, 139–41.

⁸¹⁹ U.S. National Commission on Law Observance and Enforcement, 13:16.

⁸²⁰ U.S. National Commission on Law Observance and Enforcement, 13:19.

endocrine pathologies to crime. The authors wrote that analyses of “the functions of glands of internal secretion in determining body build and personality” have the potential to provide an explanation of criminality “in terms of physical and organic conditions.”⁸²¹

Regarding psychology, the report closely examined Bernard Glueck’s research at Sing Sing that pointed to the prevalence of psychopathy as a driver of crime.⁸²² But the report offered stinging critiques of this strand of theory. It warned against the circular logic of psychological theories of crime since crime is viewed as evidence of psychopathy and psychopathy is viewed as a cause of crime. The authors wrote that this “fallacy seems to underlie the whole psychiatric approach to the problem of crime” and concluded that the psychological approach to studying crime is just a “modern manifestation of Lombroso’s idea that the criminal is a separate type.”⁸²³ Nonetheless, the chapter on psychology ended on a surprisingly positive note given its overall critical tone, with the Commission defending psychology as “in its infancy.” The authors wrote that the school’s, “approach to the problem of crime through the study of the reactions of the individual criminal may yet prove fruitful.”⁸²⁴

It was not only the Commission that offered support for biological and psychological theories of crime. In response to mailers from the Commission requesting their input, numerous judges and district attorneys wrote letters endorsing biological theories of criminality. S.E. Metzler, the D.A. in Humboldt County California,

⁸²¹ U.S. National Commission on Law Observance and Enforcement, 13:19–36; citing Ivo Geikie Cobb, *The Glands of Destiny: A Study of the Personality* (New York: MacMillan, 1928).

⁸²² U.S. National Commission on Law Observance and Enforcement, *Report on the Causes of Crime*, 13:50–60.

⁸²³ U.S. National Commission on Law Observance and Enforcement, 13:56, 60.

⁸²⁴ U.S. National Commission on Law Observance and Enforcement, 13:61.

exemplified this trend. He informed the Commission that “the greatest number of criminals with whom the prosecutor has to deal, is born a criminal, he is a congenital criminals [sic], he is defective from the day that he is delivered, and he will remain a criminal all of his life.”⁸²⁵ County Attorney Ernest Jenkins of Payne County, Oklahoma identified heredity as the primary cause of crime, claiming that “to substantiate that statement I would refer my readers to the famous Jukes family.”⁸²⁶ He endorsed sterilization as a means of remedying the problem of “habitual criminals.” Governor Douglas Buck of Delaware similarly told the Commission that “sterilization appeals to me as the best means” the states have to “curtail the breeding of criminals.”⁸²⁷

The Commission clearly did not ignore biology, psychology, and Lombroso. These ideas had meaningful sway both among the Commission’s members and political actors operating within the criminal justice system. What is most telling, however, are the Wickersham’s Records regarding social, economic, and political theories of crime. The report on social factors included an entire sub-volume by Shaw and McKay that focused on the role of broken homes in driving juvenile delinquency and particularly how black homes were likely to produce delinquent children.⁸²⁸ The chapter on crime’s social causes blamed criminality on the absence of adequate parental supervision and also cited cultural theory, suggesting that immigrant children are prone to crime due to parents who raise them in cultural conflict with American society. The Commission cited scholarship

⁸²⁵ S.E. Metzler, “Records of the National Commission on Law Observance and Enforcement,” October 26, 1929, RG 10, Box 66, National Archives II, College Park, MD.

⁸²⁶ Ernest Jenkins, “Records of the National Commission on Law Observance and Enforcement,” December 6, 1929, RG 10, Box 66, National Archives II, College Park, MD.

⁸²⁷ Douglas Buck, “Records of the National Commission on Law Observance and Enforcement,” June 26, 1929, RG 10, Box 67, National Archives II, College Park, MD.

⁸²⁸ U.S. National Commission on Law Observance and Enforcement, *Report on the Causes of Crime*, 13:67–68.

about Polish immigrants that blended determinism and social disorganization theory by arguing that, “the natural tendencies of an individual, unless controlled and organized by social education, inevitably lead to a behavior which must be judged as abnormal.”⁸²⁹

The chapter concluded that social structures and community institutions inhibit natural tendencies towards crime within individuals, a conclusion that was not implicit in Shaw and McKay’s original work. The Commission argued that without the relationships outlined by Shaw and McKay, some communities are high-risks for becoming criminal, drawing on Thrasher’s work to argue that gangs emerge to fill the vacuums left in communities by shuttered schools, churches, and other institutions. The chapter contended that the breakdown of community and family institutions contributed to criminality but argued that more research is needed to link these processes to the race, nationality, and psychology of specific communities.⁸³⁰

The letters written to the Commission help to explain how and why the Commission viewed both structural functionalist and biological theories as valid. A good case in point is a letter written to the Commission from Judge J.B. Williams of Guadalupe County, Texas. Williams wrote to the Commission that he believed, “that the tendency to crime is innate or inborn in a child.” However, Williams went on to state that two other central causes of crime include “extreme poverty and too much indulgence by parents and a lack of co-operation in the selection of their associates.”⁸³¹ Similarly, a letter from Assistant DA A.L. Betke in Denver wrote that while crime can be caused by

⁸²⁹ U.S. National Commission on Law Observance and Enforcement, 13:72–73, 80.

⁸³⁰ U.S. National Commission on Law Observance and Enforcement, 76–82, 94–96.

⁸³¹ J.B. Williams, “Records of the National Commission on Law Observance and Enforcement,” November 8, 1929, RG 10, Box 70, National Archives II, College Park, MD.

the environment in which one is raised, heredity is also a crucial factor, claiming that most criminals “are inferior mentally and physically to the average man.” He said that “with a casual glance [one] can see that these men are considerably different from other men.” Betke pointed to the shape of men’s heads and bodies as indicators of their criminal nature shortly after discussing how their upbringing and various social forces contribute to criminality.⁸³² A Solicitor General in Alabama made a comparable argument, emphasizing that lack of employment opportunities is a central driver of criminality, but that there are also “our natural criminals as well as their children who have a tendency toward crime from the beginning.”⁸³³

This highlights an important pattern both in the letters written to the Commission and the Commission’s reports. Structural functionalist theories of criminality and determinist conceptions of innate criminality were not interpreted as mutually exclusive. The Commission’s reports partially endorsed social-structural schools of criminology and biological ones, and letters from prosecutors and judges often endorsed both. It is critical to remember that Merton, Shaw, McKay, and other social-structural scholars were explicitly aiming to undermine and refute biological theory. But when their ideas translated into politics, many policymakers endorsed both, exhibiting a belief that both theoretical perspectives could be valid without discrediting the other.

Structural functionalist accounts were clearly appreciated by the Commission. But by insisting that they link their findings to race, psychology, and continuing to grant

⁸³² A.L. Betke, “Records of the National Commission on Law Observance and Enforcement,” July 10, 1929, RG 10, Box 66, National Archives II, College Park, MD.

⁸³³ JN Mullins, “Records of the National Commission on Law Observance and Enforcement,” October 21, 1929, RG 10, Box 70, National Archives II, College Park, MD.

support to biological theories, the Commission reinforced the idea that crime was pathological among certain populations. These connections revealed an important reinterpretation of structural functionalism. The Commission did not view poverty or structural disadvantage as conditions conducive to criminality, as Shaw, McKay, and others suggested. From the perspective of the Commission, poverty and structural disadvantage were correlates of crime associated with other causal connections between criminality, psychology, and racial difference. The Commission overlooked the emphasis on class dynamics in the works of Merton, Shaw, McKay, and others, instead opting to refocus their theories on the focal individual.

Conflict theories directly challenged these sorts of assumptions, but the Commission gave little credence to economic and political factors. The report's chapter on economics called research linking crime and socioeconomic factors "superficial," suggesting that it was overbroad to generalize any direct links between crime and poverty.⁸³⁴ The chapter on politics stated that crime should not be understood as a political construct driven by the choices of police, prosecutors, and political elites. The report actually claimed that the biggest political factor shaping perceptions of crime was that most crime went unnoticed by the state. Citing the Illinois Crime Commission, the commission argued that police only catch about 20% of felons. This, the Commission stated, contributed to an excess of crime in America relative to other countries.⁸³⁵

The Commission concluded that most of the factors they examined played some role in causing crime, noting that there was no singular "criminal psychology" driving all

⁸³⁴ U.S. National Commission on Law Observance and Enforcement, *Report on the Causes of Crime*, 13:116–17.

⁸³⁵ U.S. National Commission on Law Observance and Enforcement, 13:120.

types of criminals. Consequently, the conclusion stated that “this report recommends further study of the individual criminal,” particularly suggesting that each criminal type—such as the property criminal, sex offender, and murderer—be studied in isolation.⁸³⁶ By focusing on the atomized individual, the Commission disregarded major contributions from structural functionalism, conflict theory, and labeling theory. The report assumed that criminal types could be categorized into discrete groups that could only be understood with reference to an analysis of individuals, reinforcing a disregard for a structurally contextualized understanding of crime even though they were testing structurally-oriented theories of criminality.

Ploscowe and the commissioners recommended that Congress provide funds for “the establishment of a criminological laboratory where certain selected prisoners might be more intensively studied for the light they may throw upon the elements entering into the causation of crime.” A laboratory geared towards the “thorough study of the individual criminal...could not fail to provide a body of knowledge of the individual criminal from which considerable advance in the ascertainment of causes of crime might be made.”⁸³⁷ This did not pan out as the Commission hoped, but it is a telling recommendation. The Commission was far less concerned with structural inequality as a cause of crime than it was with studying the individual delinquent and the micro-level causes of their individual behavioral patterns.

The Commission’s reports made it clear that crime statistics were designed to test prevailing theories of scientific penology in order to improve the state’s responses to

⁸³⁶ U.S. National Commission on Law Observance and Enforcement, 13:139–42.

⁸³⁷ U.S. National Commission on Law Observance and Enforcement, 13:141–42.

crime. But by interpreting prevailing theories of criminal behavior through rehabilitative frameworks designed to identify likely criminals and determine their reformatory capacity, lawmakers reinforced a stereotype of the likely criminal reflecting class biases. Rather than viewing poverty and social disadvantage as a cause of crime, the Commission interpreted the UCR and prevailing theories of criminality through the lens of rehabilitative ideology. This encouraged lawmakers to view socioeconomic disadvantage not as a structural contributor to criminality, but as a personal trait associated with the criminal disposition.

Input from judges and prosecutors demonstrate a revealing pattern that sheds light on the Commission's perspective on structural functionalism. A large number of public officials utilized the language of structural functionalism to explain crime's causes, often alongside biological explanations of criminality. But in deploying structuralist functionalist language, they rarely advocated for structural reform, instead opting for punitive policy. For example, C.W. Barrick, a DA in Oregon, claimed that research indicated that the cause of crime was a troubled upbringing and home. But he stated that paroles are "over done" and that only the worst offenders receive incarceration due to overcrowding, meaning that the state ends up "paroling large numbers from the bench who should be incarcerated."⁸³⁸ District Attorney G.G. Jewel of Eaton, Ohio spoke in language reminiscent of Mertonian strain theory, stating that the "desire to make up a deficit" and "obtain additional money" drives people to crime. However, he reinterpreted strain theory through an individualized framing, claiming that offenders are driven to

⁸³⁸ CW Barrick, "Records of the National Commission on Law Observance and Enforcement," November 1, 1929, RG 10, Box 66, National Archives II, College Park, MD.

steal money “since their abilities to earn it are none too great,” a logic he used to suggest that courts and prosecutors should work more speedily to put people behind bars where they “should be taught something useful that will stand them in stead [sic] after their release.”⁸³⁹ This reveals that structuralist functionalist theory was not linked to structural reform in the New Deal political zeitgeist. Rather, policymakers rationalized structural functionalist theory as complementary to the punitive prong of the rehabilitative ideal.

It is worth remembering that structural functionalism did not offer a general theory of crime. The notion that socioeconomic disadvantage generates criminality ignores crimes committed by people from upper socioeconomic strata. Theories about broken homes, poverty, and crime had explanatory value only applicable to lower-class offenders. That is why the Commission’s recommendations for “further study of the individual criminal,” was so problematic. By reinterpreting structural theories to focus on the individual, the Commission reaffirmed the idea that the likely criminal was poor. In its analyses and recommendations for future work, the Commission ignored anyone that did not fit the politically constructed image of the “individual criminal” frontloaded into its analysis. In an institutional context in which the individualization of punishment was the central goal of the criminal justice system, the social-structural crime theories of the New Deal were imbued with the individualistic and deterministic flavor of the rehabilitative ideal in ways that compromised their political economic foundation.

IV. Indeterminate Sentencing, Individualizing Treatment, and Habitual Offenders

In the 1940s, attempts to contextualize crime and inequality in social structure

⁸³⁹ GG Jewel, “Records of the National Commission on Law Observance and Enforcement,” December 20, 1929, RG 10, Box 66, National Archives II, College Park, MD.

were regularly dismissed in political debates. The disbanding of the NRPB in 1942 serves as a case in point. In its report *Security, Work, and Relief Policies*, the NRPB wrote that the problems of juvenile delinquency and crime “are traceable to widespread unemployment among young people.” It argued that the state could help check the crime problem through the provision of education, health services, public housing, and social welfare.⁸⁴⁰ Upset with the board’s recommendations, congressional conservatives immediately disbanded the board.⁸⁴¹ In the 1940s, this sort of structurally contextualized understanding of crime was political anathema.

While some early New Deal policies exhibited structural understandings of criminality—such as the Civilian Conservation Corps or deferred prosecution agreements—latter New Deal discourse focused on the individual. An emphasis on due process, rehabilitation, and individualized treatment drove 1940s crime politics.⁸⁴² These shifts affected the general development of American criminal justice but their impact is particularly clear in three policy areas that are explored in this section. The first section analyzes the spread of indeterminate sentencing during mid-century, paying attention to developments in the 1940s that hardened the penal system’s emphasis on individuals. Linked to rehabilitative ideology, reforms in indeterminate sentencing brought promises of reform and harsh justice, and policymakers reinterpreted structural theories of crime to be consistent with the individualized treatment model. The second section explores how Conrad Printzlein’s deferred prosecution plan was modified by the Department of Justice

⁸⁴⁰ U.S. National Resources Planning Board, *Security, Work, and Relief Policies* (Washington: Government Printing Office, 1942), 97, 267, 461, 513.

⁸⁴¹ Collins, *The Business Response to Keynes*, 13; Domhoff, *The Myth of Liberal Ascendancy*, 33–34.

⁸⁴² Murakawa, *The First Civil Right*; Walker, *Popular Justice*.

to be consistent with discursive shifts emphasizing the individual offender. The final section examines New York's Baumes laws, a series of statutory reforms passed in New York in 1926 targeting recidivists. The Baumes laws prompted the spread of habitual offender laws across the states from the 1930s through 1960s. Analyses of the Baumes laws and state court rulings upholding habitual offender laws reveals how they were justified as part of rehabilitative programs taking hold in state penal systems.

The Spread of the Indeterminate Sentence and Revival of Individualization

As the linchpin of rehabilitative reform, indeterminate sentencing spread through mid-century. Premised on the individualized treatment of the offender, the indeterminate sentence subsumed structurally oriented theories of crime into its individualistic framework, limiting their connection to structural reform. To understand how this happened, it is useful to start with the 1949 Supreme Court case *Williams vs. New York*.

In *Williams*, the Supreme Court upheld the constitutionality of indeterminate sentencing. In the case, a sentencing judge in New York imposed the death sentence on a defendant based on information not presented to a jury, which had only recommended life imprisonment. The Supreme Court upheld the sentence and drew on rehabilitative logic to do so. Justice Black wrote that because, "[r]eformation and rehabilitation of offenders have become important goals of jurisprudence," the "punishment should fit the offender and not merely the crime." He concluded that as a result, judges should be virtually unlimited in what they can consider during sentencing. Even conduct not presented to juries and unrelated to the conviction at hand could be relevant factors in individualizing a sentence to a defendant's rehabilitative potential. That is why Justice Black wrote that, "Today's philosophy of individualizing sentences makes sharp

distinctions between first and repeat offenders.”⁸⁴³ That Black connected the logic of individualization and rehabilitation not only to recidivism but also to capital punishment reveals how deep the link was between rehabilitative ideology and punitive politics.

Black stated that “highly relevant—if not essential” to determining a defendant’s sentence and rehabilitative potential was “the fullest information possible concerning the defendant’s life and characteristics.” He wrote that judges should rely on the presentence report written by probation officers when sentencing defendants. Probation in America dated to the 1840s but became prominent with the rise of the rehabilitative ideal. Probation officers supervise offenders released from prison or sentenced to non-custodial sanctions. In the early twentieth century, most states passed probation laws to accompany their indeterminate sentencing statutes, and Congress passed a Federal Probation Act in 1925.⁸⁴⁴

By the mid-twentieth century, probation officers in most jurisdictions became regularly involved in preparing presentence reports (PSRs) for judges. PSRs included recommendations regarding sentencing decisions and provided background information on offenders for sentencing judges to consider. It was these reports that Black referred to in *Williams*, noting that they outline a range of factors that judges should consider in determining appropriate sentences and treatments. Black specifically cited a publication from the Administrative Office of the U.S. Courts summarizing the purpose and design of the PSR. The report indicated that the PSR was aimed towards improving individualized

⁸⁴³ *Williams v. New York* (U.S. 1949).

⁸⁴⁴ Petersilia, Joan, “Community Corrections: Probation, Parole, and Prisoner Reentry,” in *Crime and Public Policy*, ed. James Wilson and Petersilia, Joan (New York: Oxford University Press, 2011), 504; Allen, *The Decline of the Rehabilitative Ideal*, 41.

treatments and sentences. It stated the following:

Its [the PSR's] primary object is to focus light on the character and personality of the defendant, to offer insight into his personality needs, to discover those factors underlying the specific offense and his conduct in general, and to aid the court in deciding whether probation or some other form of treatment is for the best interests of both the offender and society.⁸⁴⁵

The report, the authors said, would assist in “rehabilitative efforts” and help reformatories “in their institutional classification and treatment programs.”⁸⁴⁶

It is telling that the publication opened by stating that the PSR was designed to uncover information about the “character and personality of the defendant” and “his personality needs.” The PSR focused on the individual’s personal rehabilitative potential and needs, so factors connected to poverty or social inequalities were not understood as structural problems but as factors that created personality faults requiring individual level interventions or mitigated sentences. The report stated that the PSR should consist of 13 sections analyzing a defendant: “(1) Offense; (2) Prior Record; (3) Family History; (4) Home and Neighborhood; (5) Education; (6) Religion; (7) Interests and Activities; (8) Health; (9) Employment; (10) Resources; (11) Summary; (12) Plan; and (13) Agencies Interested.”⁸⁴⁷ These factors were emphasized with an eye towards “an interpretation of the defendant’s problems and needs” and an “evaluation of [the] defendant’s personality.”⁸⁴⁸

The consideration of an individual’s prior criminal record and behavioral history was particularly crucial. The authors not only clarified that a record of prior criminal

⁸⁴⁵ Richard Chappell and Victor Evjen, “The Presentence Investigation Report,” Publication 101 (Washington: Administrative Office of the United States Courts, 1943), 1.

⁸⁴⁶ Chappell and Evjen, 1.

⁸⁴⁷ Chappell and Evjen, 2.

⁸⁴⁸ Chappell and Evjen, 5.

convictions mattered to individualizing the sentence, but also noted that, “a long succession of misdemeanors, even though the final disposition was ‘discharged,’ tells a lot about the defendant.”⁸⁴⁹ This emphasis on the individual’s background and offense history was a legacy of rehabilitative ideology embedded into the indeterminate model. The consideration of past convictions, personal traits and background, and even charges of which the defendant was acquitted were considered relevant as evidence of his or her rehabilitative potential in addition to factors like physical health and I.Q.⁸⁵⁰

Socioeconomic status, educational background, family life, and neighborhood conditions were all key considerations in the PSR. The authors noted that a probation officer should address questions like, “is the neighborhood a delinquent area” and which “races, nationalities, and culture predominate” the community. Questions about the individual’s educational background were unrelated to the quality of schooling, but rather the “defendant’s own reaction to school; his likes and dislikes” and “history of truancy.” Questions about religion were premised on the notion that “religion may be a significant, decisive factor in enabling an individual to overcome his difficulties,” reflecting the presumption that criminality was a function of an individual’s lack of moral sense. Issues related to employment did not consider the job opportunities in a community, or lack thereof, but rather, “what kind of work is he [the defendant] best adapted? What field of employment would he like to follow? What occupational skills has he,” and, “What is the employer’s evaluation of the defendant’s personality, capabilities, punctuality, reliability?” In addressing reasons for unemployment, the report suggested that these

⁸⁴⁹ Chappell and Evjen, 7.

⁸⁵⁰ Chappell and Evjen, 11.

problems are often personal handicaps that should be addressed in the “health” section of the report.⁸⁵¹ Employment status was primarily regarded as evidence of an individual’s merit, health, and character. The idea that the absence of a wage labor market in a community could contribute to unemployment or criminality went unaddressed.

A revised version of the report in 1965 made similar interpretations. It stated that the PSR’s main objective was to “present the respective problems and needs of the individual offender in a meaningful way,” including his or her “needs, capacities, and problems.”⁸⁵² The report repeatedly contended that details relating to an individual’s family background and employment history “have relatively little value unless they are interpreted in relation to the defendant and how he thinks, feels, and behaves.”⁸⁵³ These factors only matter in the sense that a “history of employment instability, family discord, similar types of offenses, inability to tolerate tedium, and the need to be on the go, do, of course, throw light on the defendant.”⁸⁵⁴ The 1965 PSR was a useful metric of how courts implemented the indeterminate sentence, since by 1970 every state and the federal system was using the indeterminate model.⁸⁵⁵

The emergence of probation officers and the use of the presentence report fit into broader political trends in mid-century crime politics. The enhanced importance of PSRs as a part of the indeterminate sentencing process fit into shifts towards promoting a procedurally fair justice system in the 1940s. But socioeconomic disadvantage was not

⁸⁵¹ Chappell and Evjen, 9–12.

⁸⁵² Administrative Office of the United States Courts, *The Presentence Investigation Report* (Washington: US Government Printing Office, 1965), v, 1.

⁸⁵³ Administrative Office of the United States Courts, 3, 13.

⁸⁵⁴ Administrative Office of the United States Courts, 18.

⁸⁵⁵ Kevin Reitz, “Sentencing,” in *Crime and Public Policy*, ed. James Q. Wilson and Joan Petersilia (New York: Oxford University Press, 2011), 467–98.

viewed as a structural cause of crime like theorists such as Robert Merton intended. Rather, these factors became incorporated into a rehabilitative framework emphasizing individualized treatment, individual faults, and individual-level solutions. Rehabilitative frameworks neutralized the potential for a more progressive crime politics rooted in political economic reform offered by new theoretical perspectives on crime.

The Evolution of Deferred Prosecution

Before they became one of the Justice Department's primary tools in corporate prosecutions, the deferred prosecution agreements originally envisioned by Printzlein changed radically in the 1940s. In 1946, U.S. Attorney General Tom Clark authorized a committee of Senior Circuit Judges to evaluate Printzlein's program. The committee's final report, presented in September of 1947, suggested that the program had a bright future. The judges wrote that they saw great value in the Printzlein program and believed that its use "should be encouraged."⁸⁵⁶

The DOJ's endorsement came with serious alterations to Printzlein's vision. The committee wrote that "the plan should never be used except for first offenders," and claimed that recidivists deserved additional punishment. The report stated that deferred prosecution should not be used "where there is a strong likelihood that the juvenile has sustained delinquency traits and, although technically not a first offender, is actually a recidivist who has been caught for the first time." And for first-time offenders, the committee argued that deferred agreements should only be offered "in cases where there

⁸⁵⁶ Harold Kennedy, "Report of the Committee on Probation with Special Reference to Juvenile Delinquency," *Federal Probation* 12 (1948): 7.

is a reasonably good home background.”⁸⁵⁷

These constituted crucial changes from Printzlein’s original proposal. Printzlein’s plan was designed to give disadvantaged juveniles a second chance. However, the judicial committee believed that such deals should only be offered for individuals that come from a “reasonably good home background,” which the committee saw as an indicator of rehabilitative potential. This implied that deferred agreements should be denied to the very people Printzlein wanted to help—juveniles from disadvantaged backgrounds. The committee’s understanding of rehabilitative potential was built on class assumptions that limited the program’s applicability.

Second, the report stated that deferred agreements should not be offered to individuals with clean records *if* judges believed the individual might have committed prior offenses for which he or she was not caught. This proposition hinged the entire implementation of the program on subjective character judgments of individual defendants made by sentencing judges. Two first-time defendants could be brought before a judge for the same offense, but if the judge believed that one *probably* had committed crimes before—despite no convictions, charges, or compelling evidence on the person’s record—he or she should receive a more severe sentence while the other could receive a deferred prosecution agreement. Again, this countered the original aims of Printzlein’s proposal. Instead of giving individuals an opportunity to avoid exposure to the justice system, this approach denied people that opportunity based on a judicial evaluation of their personal background and character. The 1946 investigation led the DOJ to formalize Printzlein’s practice in 1964 as a rehabilitative tool of the Justice

⁸⁵⁷ Kennedy, 7.

Department, laying institutional groundwork for the deferred prosecution model to become a core strategy of the DOJ's approach to prosecuting corporate crime.⁸⁵⁸ These modifications completely upended the initial reformist spirit of Printzlein's program.

The deferred prosecution system was retooled to look more like the indeterminate sentencing model. It was reformed to emphasize an individual's background, personal traits, and behavioral history in order to tailor punishment, reflecting the assumption that these factors were strong indices of an individual's rehabilitative capacity. This infused Printzlein's program with the class biases of rehabilitative ideology, suppressing his program's social-structural basis.

The Baumes Laws and the Spread of Habitual Offender Statutes

Rehabilitative ideology translated across time not only through the persistence of its cornerstone policy innovation, the indeterminate sentence, but also through its inseparable counterpart, the habitual offender law. Beginning in the 1920s, habitual offender laws targeting recidivists with longer terms of incarceration spread across the states. New York ignited the movement with the famous Baumes laws in 1926. Sponsored by state Senator Caleb Baumes, these reforms abolished good behavior early release incentives, increased sentences for repeat offenders, and instituted life sentences for fourth felony convictions. Rebecca McClellan has presented these reforms as consistent with the rise of managerial penology, a philosophy of prison management more concerned with keeping inmates complacent than reforming them.⁸⁵⁹ In some ways this is true, but rehabilitative ideology was fundamental to their design.

⁸⁵⁸ Rackhill, "Printzlein's Legacy" discusses the 1964 formalization of the procedure by the DOJ.

⁸⁵⁹ McClennan, *The Crisis of Imprisonment*, 448–62.

This is clear in the statements of Baumes himself. He defended the laws by stating that their purpose was “protection to the public” against “incurable” offenders, not prison management.⁸⁶⁰ In 1927 the New York State Crime Commission reiterated Baumes’ arguments, claiming that law’s purpose was to contain offenders who “cannot be changed by reform,” not to promote efficient prison administration. The Commission’s report noted that the laws implemented ideas criminologists had long articulated about individualization, particularly that, “punishments should be made to suit the criminal, not the crime.”⁸⁶¹

The Commission stated that, “there is nothing new about this statute” because it simply replicated New York’s 1907 habitual offender law that had gone unenforced due to poor record-keeping and failures in communication between prosecutors, police, and courts.⁸⁶² For years preceding New York’s passage of the initial law in 1907, the New York State Board of Charities advocated for it by drawing on rehabilitative penology. The 1905 SBC report cited Brockway, who served on the Board, for using the indeterminate sentence to release reformed offenders and provide “permanent detention” to “those who by defect of character or constitution” required containment. The SBC concluded that a habitual offender law was necessary because “incorrigible offenders should be permanently segregated by the state” and that the indeterminate sentence “should be relieved of its maximum limit” to contain incorrigibles.⁸⁶³ The SBC’s 1907

⁸⁶⁰ Quoted in “Court Treatment of General Recidivist Statutes,” *Columbia Law Review* 48 (1948): 238.

⁸⁶¹ New York State Crime Commission, *New York State Crime Commission Report* (Albany: J.B. Lyon, 1927), 10, 13.

⁸⁶² New York State Crime Commission, 13.

⁸⁶³ New York State Board of Public Charities, *Annual Report of the State Board of Charities for the Year 1905* (Albany: Brandow Printing, 1906), 795, 798, 804.

report expressed support for the law, citing Dugdale and Lombroso as proving that habitual criminals are a “distinct class” requiring restraint, and praised the law for instituting a “genuinely indeterminate sentence” for incorrigibles.⁸⁶⁴

That the Baumes laws replicated the 1907 statute underscores its connections to rehabilitation. This was noticeable in the first case prosecuted under the law. After being arrested for holding up a store, a 21-year old man was sentenced to life imprisonment under the law in August of 1926. His judge had this to say during his sentencing hearing:

Hanson, you have four other complaints against you in addition to the one older offense. You had punishment when you were sent to Elmira Reformatory. It did you no good. You are no good to yourself or society. I sentence you to life imprisonment and direct that you be kept there for the natural extent of your life.⁸⁶⁵

In design and implementation, the Baumes’ laws were tied to evaluations of rehabilitative potential. Journalist Robert Quillen defended it by writing that some offenders are “natural-born rebels” who “do not desire the opportunity to reform” and “can not be reformed.”⁸⁶⁶ Baumes made comparable claims before the New York State Bankers’ Association, stating that the laws that bore his name were designed “not so much for the punishment of the criminal as the protection of society. They are not retributive nor vindictive...These laws may provide the last and only chance for the redemption of hardened criminals, because if these men go to prison for life they must go to church.”⁸⁶⁷

In response to public uproar after the laws’ passage, New York reinstated early

⁸⁶⁴ New York State Board of Public Charities, *Annual Report of the State Board of Charities for the Year 1907* (Albany: JB Lyon, 1908), 643–68.

⁸⁶⁵ “Gets Life Sentence Under Baumes Law for a \$51 Hold-Up: Youth Who Robbed Brooklyn Store the First to Draw the Maximum Penalty,” *New York Times*, August 21, 1926.

⁸⁶⁶ Robert Quillen, “Habitual Criminals,” *Washington Post*, November 29, 1927.

⁸⁶⁷ “Baumes Talks to Bankers: New Criminal Law Are for Society’s Protection, He Says,” *New York Times*, January 18, 1928.

release incentives and replaced the life sentence with a fifteen-year minimum in 1931.⁸⁶⁸ But the damage had been done. Over the next two decades, forty-three states passed legislation based on the Baumes laws. Twenty-nine authorized judges to issue life sentences for third or fourth time offenders.⁸⁶⁹ Five states attempted to pass versions of the Baumes laws only one year after New York.⁸⁷⁰ These proposals were similarly justified through rehabilitative ideology. For example, in 1927 the county prosecutor in Minneapolis said that the state's proposed version of the Baumes laws "gives prosecuting attorneys the power to deal severely with the man who will not reform."⁸⁷¹ Prosecutors and judges in Pennsylvania fought for a Baumes law in the late 1920s, going "on the record in favor of a new law fixing punishment for crime on the principle that confirmed criminals should be 'permanently removed as a menace to society.'"⁸⁷²

As of 1950, forty-two states had statutes that increased sentences for recidivists. Thirty-two authorized life sentences in varying circumstances with different degrees of judicial discretion. Table 6.4 below outlines these variations. As Professor George Brown of St. Lawrence University observed in 1945, the laws were typically, "regarded as a reformatory measure" that "contemplates an enhanced punishment for a party who...does not reform, but persists in committing other offenses of a like character."⁸⁷³

⁸⁶⁸ McClennan, *The Crisis of Imprisonment*, 458.

⁸⁶⁹ Paul Tappan, "Habitual Offender Laws in the United States," *Federal Probation* 13 (1949): 28-31; "Court Treatment of General Recidivist Statutes."

⁸⁷⁰ George Brown, "The Treatment of the Recidivist in the United States," *Canadian Bar Review* 23 (1945): 643; those states were Oregon, Florida, North Dakota, Minnesota, and Vermont.

⁸⁷¹ "Minnesota Has Its Baumes Law: 'New Measure Rids Society of Criminals' Menace,' Official Declares," *The Christian Science Monitor*, April 22, 1927.

⁸⁷² "Oppose Baumes Act for Pennsylvania: But Conference of Judges and District Attorneys Approves Principle of the Law," *New York Times*, April 7, 1928, 2.

⁸⁷³ Brown, "The Treatment of the Recidivist in the United States," 657.

FIGURE 6.4: State Habitual Offender Laws (1949)

| Type of Law | No. of States | States |
|---|---------------|--|
| Life sentence, 2 felonies (Discretionary) | 3 | AZ, ME, OK |
| Life sentence, 3 felonies (Discretionary) | 7 | CA, ID, IL, KS, LA, UT, VA |
| Life sentence, 3 felonies (Mandatory) | 6 | IN, KY, MI, TX, WA, WV |
| Life sentence, 4 felonies (Discretionary) | 5 | MN, ND, OR, PA, SD |
| Life sentence, 4 felonies (Mandatory) | 10 | CO, FL, MO, NJ, NM, NY, OH, TN, VT, WY |
| Life sentence, 5 felonies (Mandatory) | 1 | NV |
| Increased terms of confinement | 11 | AL, CT, DE, DC, GA, IA, MA, NE, NH, RI, WI |

*Compiled by tracing statutory citations from the following three sources: “Court Treatment” (1948); Tappan (1949); and Brown (1945).

At the conclusion of his analysis, Brown noted that habitual offender laws can be severe, but tied them to the logic of rehabilitation:

...the indeterminate sentence affords the best opportunity for the treatment of the recidivist at this time. For those recidivists who are reformable, the parole techniques...become increasingly important... For those lacking reformable characteristics, it seems quite possible that the indeterminate sentence can restrain them for a period long enough to prevent active danger on their release... If their attitudinal distortions or other mental anomalies can be acceptably changed, they too would be given consideration for release. If not, they would be restrained for life.⁸⁷⁴

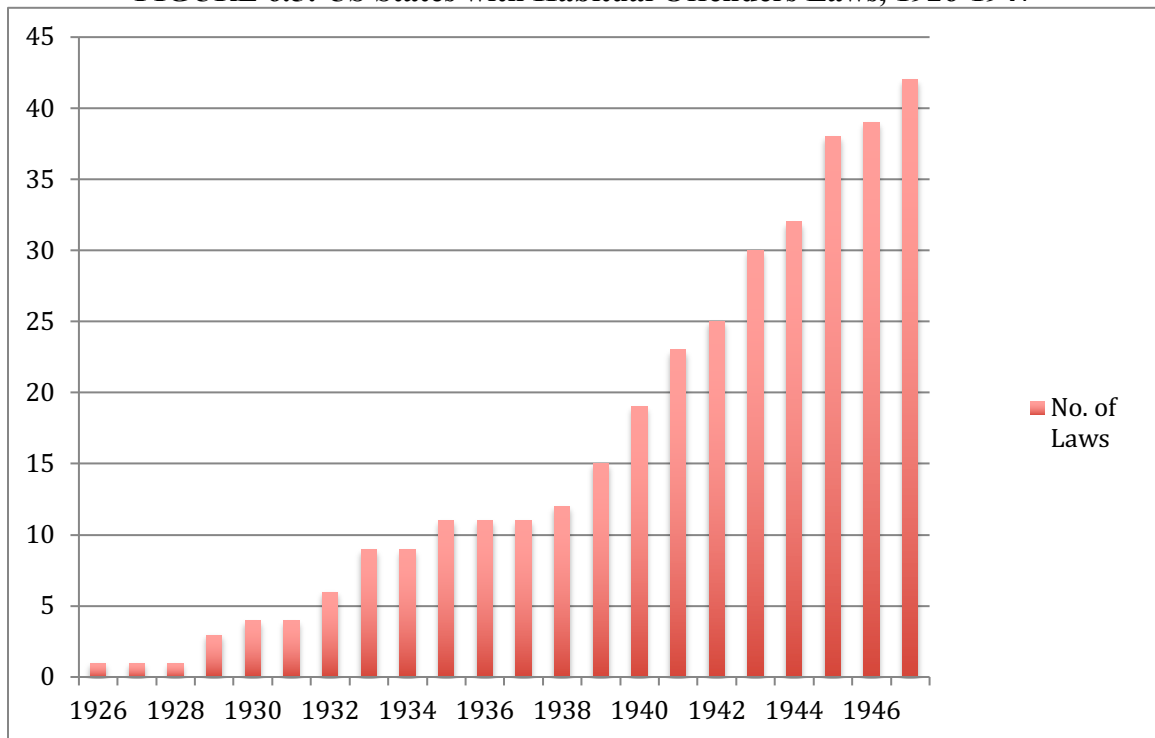
Brown went on to directly attribute the spread of these habitual offenders’ laws to the

⁸⁷⁴ Brown, 672–75.

ideas of Lombroso. He argued that precursors to habitual offender laws could be traced to 1817 but noted that these laws only punished the re-commission of the same crime(s). By 1900, “No doubt as a result of the work of Lombroso, the rising popularity of the ‘habitual criminal’ caused a change in this situation.” Lombrosian theory encouraged lawmakers to apply the label “habitual” to any recidivist, regardless of the crimes he committed, shaping the political construction of the “habitual offender” in America.⁸⁷⁵

Despite numerous proposals, few states initially succeeded in passing their own versions of the Baumes laws in the 1920s. Figure 6.5 below shows that states generally did not succeed in passing such proposals until the mid 1930s and 1940s.

FIGURE 6.5: US States with Habitual Offenders Laws, 1926-1947



*Chart tabulated from three sources: Tappan, Brown, and “Court Treatment.”⁸⁷⁶

⁸⁷⁵ Brown, 644.

⁸⁷⁶ Tappan, “Habitual Offender Laws in the United States”; Brown, “The Treatment of the Recidivist in the United States”; “Court Treatment of General Recidivist Statutes.” There were some discrepancies between the three, and I only included statutes I traced down and confirmed in the data presented here.

Even though many states immediately praised the laws after their passage, the rapid spread of habitual offender laws coincided with discursive shifts towards individualism in the latter stages of the New Deal. Habitual offender laws manifested as the punitive prong of rehabilitative ideology in the 1940s during a renewed push towards individualized treatment and indeterminate sentencing.

Two states led the way in penal reform in mid-century. New York, which had been recognized as a leader in corrections since Brockway's term at Elmira, regained national attention for the passage of the Baumes laws. California's Youth and Adult Authorities made the state a leader in penal reform, and while the Authorities were ostensibly progressive and geared towards rehabilitative programming through sentencing individualization, California saw its prison population spike after their creation from 5,700 in 1944 to 19,202 in 1958.⁸⁷⁷ As a result, close analyses of the habitual offender laws in New York and California offer insight into the rationale behind the laws and their connection to rehabilitative ideology. Judicial rulings from the two state court systems are particularly useful, since state legislative records from this period are not consistently available and SBCs were no longer in operation.⁸⁷⁸ Given developments in procedural justice in the 1940s, courts were hearing more cases regarding criminal justice than ever before. As leaders of penal reform, the California and New York court systems thus provide meaningful insight into how habitual offender laws

⁸⁷⁷ See Walker, *Popular Justice*, 208–15 on the important role California played as a leader in criminal justice reform from the 1940s through 1960s.

⁸⁷⁸ I could not find SBC reports from this era. They may have been in operation, but at the very least they declined in prominence to such an extent that I could not find their reports. This suggests that their reports would not have been meaningful metrics for state-level political decision-making at this time.

fit into broader currents in crime politics in mid-century.

When the New York Court of Appeals first upheld the Baumes laws, it did so by linking them to rehabilitative purposes. In the ruling, the Court wrote that rehabilitation is one of the primary goals of incarceration, stating that early release incentives for good behavior often “works for the rescue and reformation of the individual.” But the court qualified this by stating that, “the laws enacted for the reformation of the criminal should be administered with caution and circumspection” to ensure that punishment is meted out when necessary. The court stated that in determining a sentence, the defendant’s past convictions and behavior “have much to do with the way he should be treated.” The Court presented the Baumes laws as a necessary complement to New York’s rehabilitative programming for individuals who did not deserve another chance.⁸⁷⁹

Only three year later, the Supreme Court of New York struck down a sentence under the Baumes statutes in a ruling that tied the laws to rehabilitative logic. In *People v. Spellman*, a judge sentenced a defendant who had committed three felonies at the same time to a life sentence under the Baumes laws. The individual had no priors, but the judge determined the three offenses constituted the three strikes necessary for a life sentence. The state Supreme Court reversed, stating that the law “humanely and justly required a mandatory life sentence only after three or more fully completed, legal, prior judgments of conviction, separated sufficiently to offer opportunity for the felon to reform.”⁸⁸⁰ The striking down of Spellman’s conviction underscored that the justification for a life sentence under the Baumes laws was premised on having multiple opportunities to

⁸⁷⁹ *New York v. Gowasky*, 244 N.Y. 451 (1927).

⁸⁸⁰ *People v. Spellman*, 136 N.Y.S. 25 (1930).

rehabilitate. The habitual offenders law was not seen as in conflict with rehabilitation, but as an integral part of the state's rehabilitative programming. In the 1950s, the Supreme Court of New York again recognized that the Baumes laws were grounded on rehabilitative theory, noting that the "theory of...the so-called Baumes Laws...is that they [repeat offenders] have not reformed since their first offense but have persisted in breaking the law."⁸⁸¹

The California courts upheld the state's habitual offender law on similar grounds. In the 1946 case *People v. Richardson*, a state Court of Appeals upheld the law in the face of challenges that it violated double jeopardy. Dismissing arguments that being punished more severely for previous behavior constituted double punishment for the same crime, the Court ruled that habitual criminality was not an offense but a status.

Allegations of previous convictions, and that an accused is an habitual criminal, are not allegations of a substantive crime, but are a status which, in the eyes of the law, aggravates the position of the perpetrator of the primary offense alleged in the indictment in the sense that he comes within the classification of those who probably may never be reformed. He has evidenced a predilection to commit certain offenses which has become a settled custom, indicating a tendency toward repetition. Such an offender, so the Legislature has decreed, is subject to the infliction of a longer term of imprisonment.⁸⁸²

Despite the fact that *People v. Richardson* came from a lower appellate court, it still had significant sway. It was cited 58 times between 1946 and 2013, and 43 of those instances occurred before 1970 during the proliferation of habitual offender laws. California courts have long since ruled against claims that habitual offender laws violate double jeopardy, deciding that the laws do not create an offense but a status for those "who have proved

⁸⁸¹ Hogan v. Bohan, 101 N.Y.S. 866 (1951); *People v. Tramonti*, 275 N.Y.S. 517 (1934).

⁸⁸² *People v. Richardson*, 74 Cal. App. 2d 528 (1946).

immune to lesser punishment” and require more severe sanction.⁸⁸³ State courts in Washington, Minnesota, Nebraska, and New Jersey rejected double jeopardy challenges on grounds similar to those deployed by the New York and California court systems.⁸⁸⁴

In 1967, the California Court of Appeals rendered a ruling that was almost a replica of the New York Supreme Court’s 1930 ruling in *People v. Spellman* in which a defendant was sentenced to life after committing three offenses simultaneously. Noting that the label of habitual criminality could only be earned through “separate trials,” the court ruled that for the habitual offender law to apply, a defendant’s convictions must be separated to provide “two chances of rehabilitation.” The court ruled that the purpose of “any” habitual offender law “is not obscure.” Such a law serves two purposes: “(1) to act as a deterrent to repeated criminal acts while affording the criminal two...opportunities to rehabilitation, and (2) to protect society against the incorrigible recidivist.” The court concluded that concurrent crimes should not count as proof of habitual criminality, ruling that the label only applies to those who have experienced, “separate terms...for separate offenses separately sentenced,” that “have been followed by separate chances at rehabilitation.” But the court recognized that, “the third time around defendant, to adopt the vernacular, ‘has had it.’”⁸⁸⁵ The California Supreme Court ruled little differently, stating one year earlier that the primary purpose of the law was “to protect society from

⁸⁸³ *In re McVickers*, 29 Cal. 2d 264 (1946); *In re Harincar*, 29 Cal. 2d 403 (1946); *In re Bramble*, 31 Cal. 2d 43 (1947); *In re Wolfson*, 30 Cal. 2d 20 (1947); *People v. Stein*, 52 Cal. 2d 250 (1948); *In re Tartar*, 52 Cal. 2d 250 (1959).

⁸⁸⁴ *Washington v. Edelstein*, 146 Wash. 221 (1927); *Washington v. Hensley*, 20 Wn. 2d 495 (1944); *Hansen v. Rigg*, 258 Minn. 388 (1960); *Davis v. O’Grady*, 137 Neb. 708 (1940); *Goodman v. Kunkle*, 72 F.2d 334 (1934); *New Jersey v. Tuddles*, 38 N.J. 565 (1962); *New Jersey v. Van Buren*, 29 N.J. 548 (1959).

⁸⁸⁵ *People v. Reed*, 249 Cal. App. 2d 468 (1967).

incurable criminals.”⁸⁸⁶ These statutory precursors to three strikes laws defined strikes not as three crimes, but as three opportunities to rehabilitate.

Habitual offender laws are odd and underappreciated features of the U.S. criminal justice system. To this day, the American justice system’s emphasis on an individual’s background and criminal history as sentencing considerations is attributable to the influence of rehabilitative ideology and the indeterminate model. Contemporary variants of habitual offender laws, including career criminal or three-strikes laws, are common in American states. But they are remarkably unusual in comparison to countries in Europe, Asia, and Scandinavia, which rarely consider an individual’s background or personal history in making sentencing decisions. Nonetheless, in American jurisdictions, a prior record can have a greater impact on an individual’s sentence than the offense committed. The reliance on criminal history embedded into American sentencing systems is a legacy of rehabilitative ideology’s emphasis on predictive incapacitation and rehabilitative potential.⁸⁸⁷ Even after the criminal justice system became untied from biological ideas of criminality, this is how notions of innate criminality remained embedded in the fabric of the penal system. The deterministic and individualistic aspects of rehabilitative ideology’s punitive features have infected how justice is meted out in America even while biological theory has waxed and waned in influence.

It is unsurprising that habitual offender laws flourished next to state statutes that also conceptualized criminality in terms of biology. Well into mid-century, at least a

⁸⁸⁶ *In re Smith*, 64 Cal. 2d 437 (1966).

⁸⁸⁷ Tonry, *Sentencing Fragments*, 51–63.

dozen states continued to authorize sterilization for criminal offenders.⁸⁸⁸ It is true that support for criminal sterilization soured in the 1940s after the Supreme Court struck down an Oklahoma law in 1942 in *Oklahoma vs. Skinner* that authorized compulsory sterilization of habitual offenders.⁸⁸⁹ But this supposed repudiation of the eugenics tradition was weaker than many observers suggest. *Skinner* did not overturn or limit *Buck v. Bell* but struck down the Oklahoma law for not differentiating crimes of “moral turpitude” from other offenses in defining the “habitual offender.” Justice Douglas, the decision’s author, elsewhere stated he thought sterilization statutes were constitutional if they contained appropriate “careful procedural safeguards.” Extant research shows that sterilization rates actually rose in the years immediately following *Skinner*, remained high through the 1950s, and only noticeably declined in the 1960s.⁸⁹⁰

Beginning in the 1940s, American penology renewed its push to perfect the system of individualized treatment. The spread of indeterminate sentencing brought with it an emphasis on providing sanctions tailored to the individual, stunting the progressive potential of new social-structural explanations of criminality. Rehabilitative institutions and practices—including indeterminate sentencing, presentence investigation reports, and habitual offender laws—served as frameworks through which new ideas were channeled and modified. Practices and premises associated with rehabilitative ideology and notions of innate criminality were embedded into these institutions. Given the unity of individualistic and deterministic assumptions in rehabilitative frameworks, structural theories of crime lost their progressive bite. While some theoretical criminologists

⁸⁸⁸ Laughlin, *Bulletin No. 10B*.

⁸⁸⁹ *Oklahoma v. Skinner*, 316 US 535 (1942).

⁸⁹⁰ Cohen, *Imbeciles*, 317–19; Black, *War Against the Weak*, 398.

viewed poverty and structural disadvantage as causes of crime rooted in economic and class relations, policymakers viewed them as individual level faults requiring micro-solutions through rehabilitative reforms rather than broad-based political economic ones.

V. Conclusion

By the onset of the Great Society, every state and the federal system had an indeterminate system and almost every one experimented with a habitual offender law. Numerous scholars have thus claimed in the 1960s, the rehabilitative ideal of American criminal justice reigned supreme. They then conclude that the political repudiation of rehabilitation in the 1960s and 1970s was a key driver of punitive politics that precipitated the onset of mass incarceration.⁸⁹¹

What this chapter has illustrated is that the rehabilitative ideal played a significant role in laying institutional and ideological groundwork for mass incarceration. The politics of the 1960s and 1970s should not be viewed as “rejecting” the rehabilitative ideal. The punitive politics associated with mass incarceration was in part driven by an increased emphasis on one part of the ideal’s dual logic. Increased sentences for recidivists, three-strikes laws, and efforts to preemptively identify criminals based on criminal histories, socioeconomic backgrounds, and personal traits were not new in the latter twentieth century. Rather, they were integral to the spread of rehabilitative programming throughout the twentieth century. The onset of mass incarceration was not ignited by a rejection of rehabilitation; it was marked by a capitalization on an underappreciated punitive facet of rehabilitative logic.

⁸⁹¹ Allen, *The Decline of the Rehabilitative Ideal*; Garland, *The Culture of Control*; Tonry, *Sentencing Fragments*.

Ira Katznelson has argued that the political economic reforms of the Great Society should be understood in terms established by the reforms of the postwar era, which he argues undercut the prospects for a robust social democratic politics in the U.S.⁸⁹² Katznelson's argument also applies to crime policy, as the opportunities for the Great Society to promote structural reform as a solution to crime were limited by the resurgence of the rehabilitative ideal the 1940s. Any potential to link an understanding of criminality to social and economic dynamics was compromised by a revival of rehabilitative ideology that led policymakers to reinterpret macro-level crime theories in light of individual level dynamics. This laid crucial institutional and ideological groundwork for the crime politics and policies of the 1960s that directly preceded the onset of mass incarceration.

⁸⁹² Katznelson, "Was the Great Society a Lost Opportunity?"

CHAPTER 7: BUSINESS POWER, KEYNESIANISM, AND CORPORATE CRIMINALITY IN MID-CENTURY

“I suppose there is no agency in the world that can prevent crookedness.”
- Richard Whitney, President of the New York Stock Exchange, 1933⁸⁹³

The relationship between the politics of street crime and corporate crime in mid-century did not illustrate the pattern visible in Gilded Age and Progressive Era politics because they were not driven by a common set of ideas and ideologies. There is no set of thinkers or ideational trends that produced divergent constructions of both street and corporate criminality in the 1930s through 1960s. However, developments in the punishment of corporate crime during this period were connected to changes in New Deal politics that were also mirrored in the politics of street crime. Particularly, the politics of corporate crime during these years reflected the New Deal regime’s shift away from its social democratic basis in the 1930s to its more moderated version in the 1940s.

The story of corporate crime politics during the New Deal and postwar years is not one in which evolving ideas and ideologies contributed to policy change, as earlier chapters outline. Rather, it is one in which political actors operated within an institutional context that had been built upon certain practices, premises, and ideologies over time. Coupled with an evolving alignment of political forces, this tied New Deal political leaders in the executive branch and in Congress to a durable governing class ideology that was embedded into regulatory arrangements, economic policy, and the corporate criminal law. This is particularly clear in how policymakers articulated the language of “respectability” in defense of business leaders in securities, investment banking, and

⁸⁹³ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 6 (Washington: Government Printing Office, 1933), 2223.

other industries that caused the Great Depression. This language was nearly identical to political defenses of business leaders rooted in biological, anthropological, and eugenic theories of human behavior. This exhibits a degree of continuity in the state's approach to monitoring corporate crime. Because this posture took shape earlier in the century and was embedded into institutions, notions that the "respectability" of individual corporate actors warranted a different response to their criminal actions became an institutionally grounded idea that was untied to biological ideologies. These ideas about corporate crime were institutionally entrenched in ways that kept their ideological power the same even though they were no longer explicitly rooted in bio-essentialism.

These prevailing institutional and ideological frameworks shaped interest group politicking and the policy choices of leaders of the New Deal coalition. Even during a period of substantial change in American politics, this governing class ideology conditioned how the state responded to the abuses, frauds, and scandals that precipitated the Great Depression. This was significant; in the wake of the Depression, there was tangible outrage at the financial industry for facilitating the crisis. The explosive findings of the Pecora Commission, a congressional inquiry that investigated the causes of the Depression, provided a political basis for the state to crack down on the abuses of Wall Street and finance in new ways. But it did not produce those changes given how leading business interests and New Deal political leaders politicized corporate crime.

Once again, political change related to corporate criminal law and regulatory policy can only be understood upon acknowledging shifts in the political economy. In the New Deal period, the financial sector had become a dominating force in the American economy. As the growth of the investment banking and securities industries took off in

the 1920s, debates about corporate crime became centralized in these sectors of the political economy. As a result, business leaders in investment banking, securities, and exchanges became the primary interest groups that carried ideas about corporate criminality into mid-century debates.

Investment bankers and leaders of securities exchanges defused the potency of the Pecora Commission's findings by articulating a defense of the familiar brand of regulatory ideology traceable to debates over the Interstate Commerce Act. Defenses of the character of businessmen, concerns about a vindictive public, and an emphasis on the complexity of the financial system all justified a regulatory approach to monitoring the industry in debates over the Securities and Securities Exchange Acts. But bankers, exchanges, and executives gave regulatory ideology a crucial twist by adapting it to the political context of the 1930s. They argued that too much criminalization or regulation of industry would impede progress at a time when the economy was struggling to pull out of the depression. In this sense, these legislative debates mirrored what David Vogel found between the 1960s and 1980s—that the political power of big businesses actually *increases* during economic downturns, when the public and policymakers are fearful of impeding economic revitalization through too much intervention.⁸⁹⁴ By adapting regulatory ideology to the context of the 1930s, investment bankers and exchange executives convinced lawmakers to rely on a familiar regulatory ideology to monitor markets rather than act on the populist impulses inflamed by the Pecora Commission.

Preexisting institutional arrangements not only shaped the politics of industry leaders, but also of leaders of the New Deal coalition. This is particularly clear in the

⁸⁹⁴ Vogel, *Fluctuating Fortunes*.

politics of the era's most prominent trustbuster, Thurman Arnold. Although FDR appointed him to run the Justice Department's antitrust division from 1938 to 1943, Arnold's personal writings and statements before the Temporary National Economic Committee in the 1940s belie his image as a fervent trustbuster. He regularly demonstrated a hesitance to use the prosecutorial powers of the antitrust division in lieu of civil or administrative interventions. Other members of FDR's inner circle like James Landis and William O. Douglas, both of whom served as chair of the Securities Exchange Commission, were similarly reluctant to challenge the prevailing institutional structures in which they operated, which separated corporate crime from the criminal justice system through regulatory institutions.

By the late 1940s, the New Deal regime's initial emphasis on regulation gave way to an emphasis on "commercial Keynesianism," a variety of economic thought articulated by corporations and conservatives that emphasized the state's capacity to tax and spend as the way to promote economic stability rather than robust regulation. In the 1940s and 1950s, this shift away from regulatory politics discouraged state monitoring of exchanges and investment banking in ways that curbed earlier New Deal reforms.

Even though developments in street and corporate crime were not rooted in shared wells of political thought during this period, the evolution of both strands of politics bear similarities rooted in the nature of New Deal political discourse. First, in both cases, there was an opportunity for a radical change in the New Deal's earliest stages. Second, in both cases, appeals to older ideas, ideologies, and institutional dynamics channeled those impulses for change into directions that reaffirmed older trends. In the case of street crime, ideas emphasizing structural dynamics were reinterpreted through rehabilitative

frameworks in ways that emphasized the individual. In the case of corporate crime, the Pecora Commission's potential to foster penalization of exchange officials and investment bankers was checked when bankers, exchange leaders, and executives channeled those impulses into regulatory ideology, imbuing them with a new political significance during the economic crisis. Third, by the 1940s, the prospects for radical change in both domains had been diminished by broader shifts in New Deal political and economic discourse as the regime's statist instincts weakened.

The chapter begins by analyzing the place of finance and banking in the New Deal coalition, reviewing the shifting relationship between the state and core industries in the political economy from the 1930s through 1950s. Section II then examines changes in the ideational and political construction of criminality in the New Deal period. Section III examines how investment bankers and exchanges extinguished the prospects for radical reform coming out of the Pecora Commission by reframing regulatory ideology within the context of the Great Depression. This produced changes in the Securities Act and Securities Exchange Acts that favored financial interests and reflected older varieties of regulatory ideology. Section IV explores how shifts towards commercial Keynesianism in the 1940s entailed changes in the way corporate criminality was conceived. This neutralized any remaining potential for the New Deal coalition to promote robust statist reform in the realm of regulation or corporate criminal law. The section explores the findings of the Temporary National Economic Committee, the passage of the Administrative Procedure Act (1946), and the Justice Department's antitrust case against an investment banking trust in *U.S. v. Morgan* (1953).

I. The Place of Business in the New Deal Coalition

Accounts presenting the New Deal as having ushered in an industrially regulated state often assume that leading business interests of the era were hostile to the regime. Such scholarship suggests that the New Deal tamed these industries, as the regulatory logic of New Deal policy was founded on older progressive imperatives to order business-state relations.⁸⁹⁵ For instance, Fred Block's neo-Marxist account suggests that the Great Depression neutralized conservative forces and created room for liberals and labor to promote regulatory change. Arthur Schlesinger's seminal work argues that the New Deal was simply a vote-getting response to discontent with market failures in the wake of the collapse.⁸⁹⁶

For other observers, this narrative is too simple. Many argue that as businesses mobilized in more coordinated ways in the latter twentieth century, they dismantled the New Deal's achievements.⁸⁹⁷ Power elite theorists, new left historians, and scholars like Colin Gordon, William Domhoff, and Thomas Ferguson have made the case that capital-intensive industries or financial interests worked with the New Deal coalition to stabilize the capitalist order.⁸⁹⁸ Theda Skocpol alternatively suggests that it was not the

⁸⁹⁵ Postel, "The American Populist and Anti-Populist Legacy"; Postel, "TR, Wilson, and the Origins of the Progressive Tradition."

⁸⁹⁶ Block, "The Ruling Class Does Not Rule"; Schlesinger, *The Coming of the New Deal* especially pp. 301-02, 311-13, 423-88; Leuchtenburg, *Franklin D. Roosevelt*; Leuchtenburg, *In the Shadow of FDR*; Hagan, *Who Are the Criminals?*, 69-100; Amitai Etzioni and Derek Mitchell, "Corporate Crime," in *International Handbook of White-Collar and Corporate Crime*, ed. Henry N. Pontell and Gilbert Geis (New York: Springer, 2007), 187-99.

⁸⁹⁷ Vogel, *Fluctuating Fortunes*; Hacker and Pierson, *Winner-Take-All Politics*, 95-97, 117 especially; Phillips-Fein, *Invisible Hands*, 262-69.

⁸⁹⁸ Colin Gordon, *New Deals: Business, Labor, and Politics in America, 1920-1935* (New York: Cambridge University Press, 1994); Bernstein, "The New Deal"; Ferguson, "Industrial Conflict"; Bernstein, "Why the Great Depression Was Great"; Domhoff, *The Myth of Liberal Ascendancy*;

mobilization of any specific business interests that limited the New Deal's reforms, but rather the way popular demands were channeled through rigid institutional machinery in ways that led to "piecemeal reforms and...partially successful efforts" to promote economic recovery.⁸⁹⁹

Much of this work highlights how the New Deal coalition accommodated and acquiesced to sectors of industry over time in ways that explain shifts in the regime's political commitments. This chapter is thus contextualized within research identifying the postwar period as a critical juncture in the political development of New Deal liberalism.⁹⁰⁰ Examining the four phases of the New Deal outlined in the previous chapter illustrates key dynamics in the regime's evolving relationship to banking and finance.

Regulatory Policy in the Early New Deal, 1933-1937

The early choices of the Roosevelt Administration were largely conservative ventures to save capitalism through emergency bills to stabilize the economy. The Glass-Steagall law, the Securities and Securities Exchange Acts, and the National Industrial Recovery Act were all written with the assistance of financial interests. With the support of virtually all non-Morgan investment bankers, Glass-Steagall and the New Deal's

Domhoff and Webber, *Class and Power in the New Deal*; this school of thought broadly builds on Mills, *The Power Elite*; Peter Swenson, "Arranged Alliance: Business Interests in the New Deal," *Politics and Society* 25, no. 1 (1997): 66–116; Sasha Munnich, "Interest-Seeking as Sense-Making: Ideas and Business Interests in the New Deal," *European Journal of Sociology* 52, no. 2 (2011): 277–311; Moran, "The Rise of the Regulatory State."

⁸⁹⁹ Theda Skocpol, "Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal," *Politics and Society* 10, no. 2 (1980): 155–201; Finegold and Skocpol, *State and Party*.

⁹⁰⁰ Domhoff, *The Myth of Liberal Ascendancy*; Collins, *The Business Response to Keynes*; Lichtenstein, "From Corporatism to Collective Bargaining"; Brinkley, "The New Deal and the Idea of the State"; Katznelson, "Was the Great Society a Lost Opportunity?"

securities reforms secured a place for finance in the New Deal coalition while becoming durable fixtures of American financial law.⁹⁰¹

Arguments from Block, Schlesinger, and others that the Depression depleted the political strength of financial interests and created an opportunity for liberal and labor militancy to drive reform assume that the public's perception of corporate power soured in the 1930s.⁹⁰² There is certainly reason to believe this was the case. In the wake of the Depression, the Senate Committee on Banking and Currency authorized an inquiry into the causes of the crash. Called the Pecora Commission for its chief counsel and former New York Assistant DA Ferdinand Pecora, the commission uncovered a range of abusive and fraudulent practices in the securities industry. In his sweeping historical analysis of investment banking in America, Vincent Carosso suggests that investment bankers had their reputations destroyed by the hearings. But Carosso also notes that many bankers insisted that some regulatory interventions were necessary.⁹⁰³ This complements historical accounts that non-Morgan bankers played key roles in the passage of the Glass-Steagall Act, since they viewed the separation of commercial and investment banking as a way to destroy the foundation of Morgan hegemony in American finance.⁹⁰⁴

The claim that the public was disillusioned with corporate power in the 1930s is notably qualified by Louis Galambos. In his research, Galambos reveals that there were five cycles of anti-business opinion from 1880 through 1940, with the Great Depression

⁹⁰¹ Ferguson, "Industrial Conflict," 14–15, 19–24; Domhoff and Webber, *Class and Power in the New Deal*, 24–26; Domhoff, *The Myth of Liberal Ascendancy*, 24–25.

⁹⁰² Block, "The Ruling Class Does Not Rule"; Schlesinger, *The Coming of the New Deal*; Carosso, *Investment Banking*, 300 says the reputation of investment bankers was destroyed by the crash.

⁹⁰³ Carosso, *Investment Banking*, 322–51.

⁹⁰⁴ Ferguson, "Industrial Conflict," 14–17.

sparking the final one. In a quantitative analysis of eleven public interest magazines, Galambos finds that there was a decline in public attitudes towards corporate power after the collapse, but that across the five cycles of anti-business opinion each successive one saw less hostility, with the 1930s being the weakest. His work shows that in spite of the collapse, the public remained generally accepting of the corporate order.⁹⁰⁵ It would thus be hasty to view the New Deal's initial regulatory policies as manifestations of radical anti-business impulses, as investment bankers were crucial to shaping debates over the Securities and Securities Exchange Acts.⁹⁰⁶

Historian Michael Parrish called the New Deal's securities reforms "a conservative revolution which nonetheless horrified a great many conservatives." New Dealers like Frankfurter, Landis, Cohen, and Corcoran designed the Securities Act to prop up the economy while minimizing state intervention into markets. Passed within the first hundred days, there was little time for bankers and securities officials to mobilize effectively, and the law did not reflect many of their core concerns. But by the passage of the Securities Exchange Act of 1934, bankers and exchange leaders were able to mobilize even more successfully. The New Dealers involved in drafting the law wanted to empower the Federal Trade Commission to regulate the securities industry, but investment bankers and exchange officials led by Richard Whitney, head of the New York Stock Exchange, pushed for a separate commission to regulatory and flexibly work

⁹⁰⁵ Louis Galambos, *The Public Image of Business in America, 1880-1940* (Baltimore: Johns Hopkins University Press, 1975), 222–49, 262–63.

⁹⁰⁶ Carosso, *Investment Banking*, 353–68; 376–81. Drafted by New Dealers James Landis, Benjamin Cohen, and Thomas Corcoran, many prominent financial leaders supported the laws as ways to save the industry's reputation, although there was disagreement over the details.

with industries. The compromise that emerged with a Securities Exchange Commission showed that Congress was willing to accommodate entrenched economic interests.⁹⁰⁷

The second New Deal from 1935-37 witnessed the passage of cornerstones of American social policy including the National Labor Relations Act, Fair Labor Standards Act, and Social Security Act.⁹⁰⁸ But Thomas Ferguson's work shows how economic elites from capital-intensive industries where labor was a small expenditure and labor turbulence a minor concern allied with Roosevelt by supporting this pro-labor legislation in exchange for free trade policy.⁹⁰⁹ As a result, even the second New Deal helped to buttress the capitalist order by evening out competitive disparities resulting from private experimentation with benefits and garnering support for free trade. Peter Swenson has also argued that support for New Deal social policy among business can be understood as "post-facto cross-class alliances." While some sectors of the economy supported New Deal social policy from the outset, politicians anticipated a process of policy feedback in which those in opposition would eventually realize how these reforms promoted healthy competitive dynamics.⁹¹⁰

It was in this context that several major regulatory reforms were passed in which debates about criminal behavior among firms were a major issue. Section III of this chapter examines this trend in the passage Securities and Securities Exchange Act. The post-Depression political context offered some opportunities for a break from past

⁹⁰⁷ Michael Parrish, *Securities Regulation and the New Deal* (New Haven: Yale University Press, 1970), 4, chapters 3 and 5.

⁹⁰⁸ Cowie, *The Great Exception*, 118–113; Domhoff, *The Myth of Liberal Ascendancy*, 25; Collins, *The Business Response to Keynes*, 23–52.

⁹⁰⁹ Ferguson, "Industrial Conflict", esp. pp. 19-20. He particularly points to Standard Oil and General Electric.

⁹¹⁰ Swenson, "Arranged Alliance," 102–5; Gordon, *New Deals*, 4, 31, 287–88.

approaches to regulation and criminalization, especially given the findings of the Pecora Commission. However, investment bankers, brokers, and exchange officials appealed to persistent ideological constructions of corporate criminality in ways that led to familiar outcomes—the creation of a regulatory agency with wide discretion to respond to crime through an assortment of non-criminal sanctions.

Mirroring David Vogel's analysis of business-state relations from the 1960s through 1980s, the legislative record reveals that investment bankers, exchange officials, and securities brokers had significant political power during the Depression because policymakers were reluctant to over-regulate the economy in ways that might inhibit recovery.⁹¹¹ In the wake of the Depression, regulatory ideology appealed to policymakers who were afraid to obstruct economic progress. Demands for criminalization of the securities industry were checked by an impulse to give regulators discretion to work cautiously with the industry and get it back on its feet. This serves as a testament to the institutional and ideological precedents of the regulatory state. The construction of corporate criminality built into regulatory ideology had political purchase even in the wake of the nation's greatest economic crisis.

The Development of Commercial Keynesianism

The New Deal regime found itself in retreat in 1937 as Roosevelt's new pump priming approach to economics foreshadowed postwar Keynesian policies of demand management. Insistent on returning to fiscal orthodoxy, Roosevelt facilitated a recession by cutting public investment and pursuing a balanced budget. As southern Democrats and Republicans coalesced with financial moderates in response, a conservative coalition

⁹¹¹ Vogel, *Fluctuating Fortunes*.

emerged to challenge the New Deal.⁹¹² This coalition was able to dial back some of the New Deal's regulatory successes in the late 1930s.⁹¹³ The Temporary National Economic Committee (TNEC) was the final gasp of the New Deal's potential to promote a robust regulatory politics. When Congress created the committee in 1938 to study economic concentration, it appeared to mark a revival of anti-monopolism, but the TNEC praised industrial consolidation as efficient while defending state regulation of markets to monitor concentration. The TNEC attracted little attention when it published its report in 1941, as anti-monopolist attitudes faded in the 1930s.⁹¹⁴

G. William Domhoff's analysis shows that the liberal-labor coalition at the heart of the New Deal began losing to a corporate-conservative bloc in the late 1930s. He illustrates how these coalitions were in conflict from the New Deal's origins, but that conservative victories became more frequent after 1937. By drawing on Keynesian theory, many corporations advocated a moderate conservatism that countered the orthodox conservatism of major business networks like the Chamber of Commerce. These corporate moderates aligned with a coalition of Republicans and Democrats from southern states to block liberal-labor initiatives and secure compromises on business regulation and taxation.⁹¹⁵

There was clearly a spectrum of opinions among corporate interests and business organizations regarding economic policy in mid-century. However, historian Robert

⁹¹² Cowie, *The Great Exception*, 115–18; Ferguson, “Industrial Conflict,” 4–6; Domhoff, *The Myth of Liberal Ascendancy*, 27–28.

⁹¹³ Carosso, *Investment Banking*, 383–407.

⁹¹⁴ Brinkley, “The New Deal and the Idea of the State,” 89–92; Carosso, *Investment Banking*, 408–30.

⁹¹⁵ Domhoff, *The Myth of Liberal Ascendancy*, 2-19 for summary. They also won compromises on union rights, civil rights, and more.

Collins has shown how the Committee for Economic Development (CED) emerged in 1942 as a particularly influential and coordinated voice that represented a variety of businesses and industries and championed business-friendly economic policy. A business-led public policy organization, the CED was designed to help the state manage its transition to a peacetime economy. The CED accepted core precepts of Keynesianism, like occasionally using deficit spending to promote economic recovery, while rejecting hard left interpretations of Keynes from New Dealers like Alvin Hansen who defended progressive taxation, public investment, and redistributive policy. The CED was a major force in cultivating business support for a new economics rooted in a moderated Keynesianism in the postwar period.⁹¹⁶

Scholars have different ways of explaining the subsequent postwar shifts in economic policy. Most call the corporate-conservative bloc's version of Keynesianism that prevailed "commercial Keynesianism." While the early New Deal was characterized by a social democratic Keynesianism, this variant was more amenable to private enterprise and relied on state manipulation of the money supply to promote growth. A bipartisan persuasion, it encouraged the state to abandon the political commitments inherent to social democratic Keynesianism, including the pursuit of full employment, significant public investment, and the use of redistributive policy to bolster the purchasing power of the poor and middle classes. While commercial Keynesianism accepted some features of its social democratic counterpart, such as economic management and occasional deficit spending, it relied on bolstering growth by encouraging private investment rather than stimulating demand. This meant lowering

⁹¹⁶ Collins, *The Business Response to Keynes* especially first three chapters for a broad overview.

taxes on corporations and the wealthy, cutting social spending, and relying on automatic stabilizers like unemployment insurance to counteract the ups and downs of the business cycle. The war and postwar years were characterized by a debate between these two visions of governance—a statist one promoting social welfare and regulation and a moderated one emphasizing taxing and spending.⁹¹⁷

The New Deal's original social democratic Keynesianism relied on an administrative politics regulating capital structures. New Dealers like Corcoran, Landis, and Cohen believed in mature economy theory, which was premised on the assumption that all the basic industries had developed and the nation would be trapped in stagnation without statist economic policy. But WWII prompted economic recovery in a single stroke, robbing mature economy theory of its credibility. Further, the ineffectiveness of the War Production Board diminished the public's faith in the administrative state. These developments re-legitimized the public's faith in capitalism, and defenders of social Keynesianism began to lose debates to corporate moderates and conservatives championing commercial Keynesianism.⁹¹⁸

As the political climate shifted, the commercial Keynesianism articulated by the CED took root. The CED claimed that the state should only act in compensatory ways to redress imbalances in the private economy without challenging capitalism. It pushed for a politics aiming to enhance growth through tax cuts to encourage private investment in

⁹¹⁷ Kazin, Edwards, and Rothman, *The Concise Princeton Encyclopedia of American Political History*, 46–47; Brinkley, “The New Deal and the Idea of the State” calls this a shift from social Keynesianism to commercial Keynesianism; also see Collins, *The Business Response to Keynes*; Domhoff, *The Myth of Liberal Ascendancy*; Brinkley, “The New Deal and the Idea of the State”; Lichtenstein, “From Corporatism to Collective Bargaining” for similar analyses.

⁹¹⁸ Brinkley, “The New Deal and the Idea of the State,” 98–109.

lieu of pursuing stability through state spending on welfare and public projects.⁹¹⁹ This pushed monetary policy into the center of economic debates, deprived regulatory impulses of their urgency, and fused social policy to a vision of sustained economic growth driven by private investment. This stripped New Deal liberalism of its regulatory and collectivist instincts by replacing demands for state-led economic planning and regulation with compensatory policies to correct for the inequalities of capitalism.⁹²⁰

This variant of Keynesian theory was more individualistic than social democratic Keynesianism. It turned the “forgotten men” of the New Deal into a mass of atomized consumers and viewed private investment as the key to spurring growth.⁹²¹ This politics was thus directed towards corporate development and the promotion of consumer culture rather than promoting any sort of communal vision of social welfare.⁹²² Efforts to revive social Keynesianism were routinely dismissed in the 1940s, as evidenced by conservatives’ quashing of the NRPB in 1943, which made room for the CED and Business Advisory Council (BAC) to gain power. The BAC, which also endorsed a compensatory version of Keynesianism amenable to capital, was created in 1933 in the hope that it could harmonize the Roosevelt Administration’s relationship with business and finance.⁹²³ As these organizations grew in influence in the 1940s, they hardened the conservative version of Keynesianism.⁹²⁴ The corporate-conservative coalition was

⁹¹⁹ Brinkley, 87–97; Collins, *The Business Response to Keynes*, 116–72.

⁹²⁰ Brinkley, “The New Deal and the Idea of the State,” 98–112.

⁹²¹ See Cowie, *The Great Exception*, 96–97 for a good summary of these phases.

⁹²² Cowie, 145–48.

⁹²³ Collins, *The Business Response to Keynes*, 53–70 on the role of the BAC in the Roosevelt administration.

⁹²⁴ Collins, 13, 78–112, 129–41; Domhoff, *The Myth of Liberal Ascendancy*, 33–34. Both scholars address the role of the BAC and the CED extensively through their work.

consequently able to win major legislative victories on regulation, spending, labor organizing, and taxation.⁹²⁵

Historian Robert Collins argues that by 1948, “The American business community had at last domesticated Keynes.”⁹²⁶ The CED had worked with economists to promote rightward shifts in Keynesianism, leading Collins to conclude that economics is “partly a vehicle for the ruling ideology of each period as well as partly a method of scientific investigation.”⁹²⁷ The Justice Department’s attempt to file a high-profile antitrust suit against seventeen major investment-banking firms in the late 1940s and early 1950s backfired, and Eisenhower directly followed the recommendations of the CED in responding to fluctuations in the business cycle.⁹²⁸ The economic vision that prevailed in the 1940s embraced the revenue rather than spending side of Keynes’ theory and accepted a modicum of unemployment in exchange for tax reductions and increases in private spending. This turned the state into a technocratic manager of the economic order, limiting the capacity for Great Society reforms to promote regulatory reform.⁹²⁹ By the 1960s, the state could only correct for capitalist structures on the margins without challenging them, since commercial Keynesianism relied heavily on private investment.⁹³⁰

⁹²⁵ Domhoff, *The Myth of Liberal Ascendancy*, 62, 65, 67; Cowie, *The Great Exception*, 160.

⁹²⁶ Collins, *The Business Response to Keynes*, 137.

⁹²⁷ Collins, 19, 156–57, 171–72.

⁹²⁸ While latter sections of the chapter explore the hearing more in depth, see Carosso, *Investment Banking*, 458–95 for a good review of the case; see Collins, *The Business Response to Keynes*, 152–58 on Eisenhower and the CED.

⁹²⁹ Collins, *The Business Response to Keynes*, 16–18, 198–99, 208; Lichtenstein, “From Corporatism to Collective Bargaining,” 122, 134–36.

⁹³⁰ Fraser, “The Labor Question,” 57; Katznelson, “Was the Great Society a Lost Opportunity?”; Cowie, *The Great Exception*, 149–50; Domhoff, *The Myth of Liberal Ascendancy*, 44–48, 71–73, 107–10.

Regulatory reforms in the 1940s and 1950s entailed debates about crime in ways that mirrored the rise of commercial Keynesianism. In the early New Deal, major sectors of business supported regulatory reforms to save industries as long as they were not so strict as to obstruct economic revitalization. But by the 1940s, commercial Keynesianism became dominant and administrative politics were seen as hostile to progress. The Administrative Procedures Act was passed in 1946 to make sure that businesses could protect themselves against an overbearing regulatory state by infusing regulatory proceedings with the adversarial elements of American legalism. When the Justice Department filed a suit in 1947 against a combination of investment bankers, the defendants secured a favorable precedent in the 1953 ruling *U.S. v. Morgan*, which discredited the negative images of finance fostered by the Pujio Committee, Pecora Commission, and TNEC.⁹³¹

II. Regulatory Discourse and Constructing Corporate Criminality in the New Deal

In 1949, Edwin Sutherland upended orthodox criminology in his book *White-Collar Crime*, which emphasized how business practices that were legally punishable under criminal law were typically dealt with as civil or regulatory infractions. Sutherland defined white-collar crime as “a crime committed by a person of respectability and high social status in the course of his occupation.”⁹³² This constituted the first intellectual attempt to systematically define the concept. While his definition was problematically broad, his emphasis on the crimes of powerful economic actors was a definitive turn

⁹³¹ While latter sections of the chapter explore the hearing more in depth, see Carosso, *Investment Banking*, 458–95 for a good review of the case.

⁹³² Sutherland, *White-Collar Crime*, 9.

away from criminology's focus on lower-class crime.⁹³³ And although his book was called *White-Collar Crime*, it could have more appropriately been titled *Corporate Crime* given his emphasis on the crimes committed by corporations.

Studying 980 legal decisions brought against seventy large corporations, Sutherland argued that at least 779 of the 980 cases in his sample included grounds for criminal charges. However, he found that only 158 decisions—or 20% of the criminally punishable cases—were brought in criminal court. The remaining 80% were handled through regulatory or civil procedures. Sutherland pointed to the Sherman Antitrust Act as establishing this precedent. The law defined antitrust violations as criminal, but as a “second thought” authorized non-criminal procedures such as injunctions for handling antitrust cases. This, Sutherland argued, was mirrored in all subsequent regulatory legislation.⁹³⁴ He also recognized that corporations were among the worst recidivists, but that because their behavior was channeled through civil and regulatory channels, most avoided the repercussions of a single conviction.⁹³⁵

While the roots of the regulatory pattern Sutherland discovered are really in the Interstate Commerce Act, his book outlined a rough case for the path dependent nature of the regulatory state. But he downplayed the institutional and ideational implications of his arguments. He did not discuss the favorable construction of corporate criminality embedded into the state's regulatory machinery and left unaddressed the fact that the

⁹³³ The central problem with his definition is that it is so broad that it encompasses a range of behavior that would normally not be considered white-collar crime. For example, under his definition, an accountant pickpocketing a client's wallet during a meeting would technically be considered white-collar crime.

⁹³⁴ Sutherland, *White-Collar Crime*, 22–35, 40–43. The Federal Trade Commission Act and Clayton Act are two specific examples he cites as following the Sherman precedent.

⁹³⁵ Sutherland, 22, 218–23.

regulatory state shaped how policymakers conceptualized corporate criminality. Instead, he made an individualized psychological argument that politicians handled white-collar criminals leniently due to the fact that they typically come from similar social strata, have friends in business, rely on business for money, and hope to secure private sector employment should they lose election.⁹³⁶ These are not trivial points, but Sutherland missed important historical, institutional, and ideological aspects of his own research.

White-Collar Crime has been praised in subsequent decades for its path-breaking approach to examining an understudied type of crime, but at the time it had almost no impact on the discipline of criminology. Without a clear violation of criminal law, a finding of guilt, and subsequent punishment, many of Sutherland's contemporaries felt that the behavior he studied could not be considered "crime" and were dismissive of his work.⁹³⁷ It was little different in political venues. While the Wickersham Commission employed Shaw and McKay to draft reports and state legislators cited the Gluecks, Sutherland's research was completely absent in these circles.

Hagan suggests that *White-Collar Crime* was a reflection of the era's anti-business climate, but the limited impact of *White-Collar Crime* tells us more about its relationship to American political development than its publication does on its own.⁹³⁸ Unlike many academic disciplines, criminology has been relevant to American politics, and in mid-century policymakers drafted reports and policies that drew on and modified prevailing criminological theories. But *White-Collar Crime* was ignored, despite being

⁹³⁶ Sutherland, 248–49.

⁹³⁷ Paul Tappan, "Who Is the Criminal?," *American Sociological Review* 12 (1947): 96–102; Robert G. Caldwell, "A Reexamination of the Concept of White Collar Crime," *Federal Probation* 22 (1958): 30–36; Cressey, "Forward."

⁹³⁸ Hagan, *Who Are the Criminals?*, 44, 80–82.

published by one of the era's most prominent scholars, indicating that Sutherland's ideas did not cleanly fit into mid-century political discourse. While his book marked a significant moment for criminology, that it had virtually no impact while other leading criminologists were cited by state reformers and federal crime commissions suggests that his book should be viewed as an outlier rather than a reflection of the era's politics.

Examining the texts and speeches of prominent New Dealers reveals that they did not share the perspective of corporate criminality articulated by Sutherland, because political change during the New Deal was not influenced by concurrent shifts in ideational constructions of corporate criminality. Rather, New Deal politicians operated within institutional networks in which certain ideas associated with regulatory ideology had been embedded. This shaped the politics of these individuals assumed to be fervent trustbusters, as they spoke in terms defending the "respectability" of powerful corporate actors while suggesting that prosecution was an inappropriate way to monitor their behavior. Reluctant to challenge capital structures or the basic design of state administrative agencies, the supposed trustbusters of the New Deal exhibited a reluctance to prosecute corporate crimes because the institutions they operated within kept them tied to the tenets of regulatory ideology.

William O. Douglas is a good case in point. A key member of Roosevelt's inner circle, Douglas was the SEC's chair from 1937 to 1939. His tenure is often depicted as characterized by fights against Wall Street speculators.⁹³⁹ But his words belie his political posturing as an anti-business crusader. In a speech he delivered in 1938, Douglas described the SEC as a "mechanism of democratic government whereby capitalism can

⁹³⁹ Stuntz, *The Collapse of American Criminal Justice*, 187.

discipline and preserve itself,” and one that was designed “to meet business on business terms.”⁹⁴⁰ He repeatedly insisted that exchanges were capable of self-regulation, and that businessmen had “sufficient brains, courage, and integrity” to monitor themselves. The government and the SEC, Douglas concluded, should only play a supervisory or “residual role.”⁹⁴¹

One can look to the work of Douglas’s predecessor as SEC Chair, James Landis, for similar arguments. Landis viewed the creation of the administrative state as the answer to an institutional problem. He argued that agencies were designed to handle issues that courts and Congress were ill equipped to address. But he explicitly differentiated agencies from criminal justice venues. He claimed that commissions take on “less the appearance of a tribunal and more that of a committee charged with the task of achieving the best possible operation” of industry. He argued that agencies like the ICC should conceive their purposes “in terms of management rather than of police.”⁹⁴² He described the Securities Exchange Commission similarly, arguing that the 1933 Securities Act was ineffective because it gave insufficient discretion to the FTC to enforce the law. The SEC, however, was given “powers to exempt securities from the operation of the 1934 Act” among other broad discretionary controls, making it a more flexible institution responsive to the demands and needs of the securities industry.⁹⁴³

⁹⁴⁰ William Douglas, *Democracy and Finance: The Addresses and Public Statement of William O. Douglas as Member and Chairman of the Securities and Exchange Commission* (New Haven: Yale University Press, 1940), 264.

⁹⁴¹ Douglas, 64, 82, 130, 264.

⁹⁴² James Landis, *The Administrative Process* (New Haven: Yale University Press, 1938), 13.

⁹⁴³ Landis, 52–55.

Perhaps the most telling statements come from Thurman Arnold, who ran the antitrust division of the Department of Justice from 1938 to 1943. Arnold filed and won more antitrust cases than the Department of Justice initiated in its entire previous history.⁹⁴⁴ However, his celebrated 1937 book *The Folklore of Capitalism* adopted a perspective that consolidation in industry was beneficial and ironically bemoaned antitrust laws as meaningless. He described them as “the answer of a society which unconsciously felt the need of great organizations” but wanted to “deny them a place in the moral and logical ideology of the social structure.”⁹⁴⁵ Arnold favored an expansion of the state’s regulatory powers, but specifically cautioned against prosecution. He wrote that an antitrust violation “is not an ordinary crime” because antitrust laws are “violated by respectable people.” Such a violation is thus “an economic offense, the seriousness of which is not related to the moral turpitude of the offender” which is why antitrust law “is different from ordinary criminal law” in its use of civil, regulatory, and criminal proceedings.⁹⁴⁶ For Arnold, only activities that artificially inflated consumer prices were appropriate targets for prosecution. In this sense, he viewed antitrust laws as vehicles to expand the state’s regulatory capacity only with an eye towards enhancing consumer purchasing power, not as tools to challenge the structure of the economy.⁹⁴⁷

Even the era’s leading trustbuster adopted a politics antithetical to Sutherland’s claims. Arnold’s emphasis on using regulatory power rather than prosecution completely

⁹⁴⁴ Brinkley, “The New Deal and the Idea of the State,” 90–91.

⁹⁴⁵ Thurman W. Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), 137.

⁹⁴⁶ Thurman Arnold, *The Bottlenecks of Business* (New York: Harcourt Brace Jovanovich, 1940), 135, 152.

⁹⁴⁷ See Brinkley, “The New Deal and the Idea of the State,” 89–91 for a good summary of Arnold’s thinking; also see Thurman Arnold, “Feathers and Prices,” *Common Sense*, July 1939, 6; Thurman Arnold, “Confidence Must Replace Fear,” *Vital Speeches*, July 1, 1942, 561; Arnold, *The Bottlenecks of Business*; Thurman Arnold, “The Abuse of Patents,” *Atlantic Monthly*, July 1942, 16.

accepted the existing institutional structures Sutherland was so intent on challenging. The statements of Arnold, Landis, and Douglas illustrate how New Deal reformers were more likely to uncritically accept the regulatory ideology embedded within the institutions they ran rather than challenge those institutional structures. This institutional context kept them wedded to the basic assumptions of regulatory ideology.

In the wake of the war, leaders of business and finance endorsed commercial Keynesianism in ways that quelled demands for federal regulation in order to allow business to lead the economic conversion. Essential to this political campaign was a justificatory rhetoric that rationalized businessmen as natural leaders that should not be impeded by the state. For instance, BAC members Henry Dennison, Lincoln Filene, Ralph Flanders, and Morris Leeds enlisted John Kenneth Galbraith to help them publish their 1938 book, *Toward Full Employment*. The authors argued that stronger use of monetary controls would enable the state to reduce its regulatory role. Although admitting that some businesses required monitoring, the authors wrote that those few businesses “can be controlled only because the mass of business remains relatively free.” They went on to claim that, “were more direct and detailed controls to be applied to the majority of business,” economic growth would become “impossible.” Thus, loosening the state’s regulatory reins in favor of an emphasis on monetary policy would effectively promote growth.⁹⁴⁸ The CED made similar arguments in *Markets After War* (1943), which stated that business “must assume a large share of the responsibility” for getting the economy back on its feet after the war. To do so would require “the best brains” to focus on these problems, and they wrote that the “courage, imagination and ingenuity” of

⁹⁴⁸ Henry Dennison et al., *Toward Full Employment* (New York: McGraw-Hill, 1938), 146, 149.

businessmen would promote growth more than statist regulation.⁹⁴⁹ The CED emphasized that it was “essential for the government, in cooperation with business” to “provide an economic environment favorable both to the expansion of production and the maintenance of profitable markets.”⁹⁵⁰

These trends in discourse about regulation did not reflect concurrent developments in criminology, but rather a continuity with older varieties of regulatory ideology. Sutherland’s lack of impact during a period in which criminology and politics were closely connected illustrates that his work was an outlier. Douglas, Landis, and Arnold could not hear his arguments given that Sutherland’s book was published after these men were in positions of power, but their words illustrate crucial dynamics about New Deal discourse as related to corporate criminality. While they adopted a comparatively more aggressive posture in relation to business than their predecessors, they also accepted the institutional structures in which they operated and the separation of regulation from criminal justice. It was these institutional designs that shaped their politics and perceptions of corporate criminality, keeping them committed to the basic facets of regulatory ideology.

III. Securities Reform During the New Deal

In the wake of the stock market collapse in 1929, President Herbert Hoover warned the New York Stock Exchange (NYSE) that it would have to adopt its own measures to curb fraud, thrift, and abuse, or his administration would push for legislation.

⁹⁴⁹ Committee for Economic Development, *Markets After War: An Approach to Their Analysis* (Washington: Government Printing Office, 1943), 5, 52.

⁹⁵⁰ Committee for Economic Development, *The Problem of Changeover Unemployment: A Statement on National Policy* (Washington: Government Printing Office, 1945), 10.

The exchange did not budge, and President of the NYSE Richard Whitney insisted that the industry had no major problems. What followed was a congressional inquiry exploring the causes of the Depression. Led by chief counsel Ferdinand Pecora, the “Pecora Commission” shed light on the fraud and exploitative practices so pervasive on Wall Street. The revelations of the hearings provided crucial insights leading to the Glass-Steagall Banking Act, Securities Act, and Securities Exchange Act.⁹⁵¹

Three things are clear in the Pecora hearings, debates over the Securities Act of 1933, and debates over the Securities Exchange Act of 1934. First, disagreements emerged across and within sectors of industry in how they politicized corporate criminality. While some industry leaders insisted they were innocent, others endorsed securities reform as necessary for reining in their most ruthless competitors. Second, and related, legislators, investment bankers, securities brokers, and exchange officials perceived the law primarily as a way to protect business, viewing investor protection as a secondary concern. The laws were built to revive business and protect industries from uninformed investors that might push frivolous suits on good honest businessmen. Thus, familiar dynamics associated with regulatory ideology characterized debates over securities reforms. But a third critical current, particularly present in legislative debates, was a concern shared by financial industry leaders and legislators that excessive regulation would impede economic recovery following the Depression. Just as David Vogel has found during other economic downturns in American history, the public and

⁹⁵¹ Domhoff and Webber, *Class and Power in the New Deal*, 24–26; Carosso, *Investment Banking* chapter 16.

policymakers were desperate to encourage growth and job creation, apt to listen to business's demands, and hesitant to overregulate the economy during the Depression.⁹⁵²

By reframing regulatory ideology within the context of crisis, leaders of finance derailed attempts to articulate new framings of corporate criminality. While much research on the New Deal suggests that populist outrage led to crackdowns on Wall Street, lawmakers' concerns with restoring prosperity trumped populist impulses to penalize business. The Pecora hearings revealed truly explosive findings, but bankers, brokers, and exchange officials were able to extinguish their political potency with appeals to older facets of regulatory ideology during legislative debate.

The Pecora Commission

The Pecora Commission opened its inquiry March 4, 1932, and hearings began little more than one month later on April 11. It was initially meant to be an investigation into short selling, a practice that is criminalized in many countries, but not the U.S. One of the Commission's most frequent visitors was Richard Whitney. President of the NYSE, Whitney testified regularly on a range of issues, including short selling. He defended it as both a moral activity and "a necessary part of the security market."⁹⁵³ To ban it, Whitney suggested, would force the American economy "100 years" backwards.⁹⁵⁴

⁹⁵² Vogel, *Fluctuating Fortunes*. Vogel's work only goes back to the 1960s, but debates over these 1930s reforms seem to demonstrate dynamics similar to the ones he discovered from the 1960s through 1980s.

⁹⁵³ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 1 (Washington: Government Printing Office, 1932), 196.

⁹⁵⁴ U.S. Senate Committee on Banking and Currency, 1:273–74; U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency*,

The Commission did not maintain a focus on short selling for long, broadening its scope during its two years of operation to explore a variety of fraudulent and abusive practices on Wall Street. Only a few months into its inquiry, the Committee revealed serious sins among members of the Radio Corporation of America (RCA). A hot technology stock in the 1920s, RCA saw its share prices skyrocket in a few months preceding the 1929 crash. The Pecora Commission uncovered that its values were falsely inflated by a group of investors dubbed the “Radio Pool,” who bought and sold RCA shares among themselves to create an appearance of activity that drove up their value. Once they pumped up the shares’ value, the pool’s operators pushed the stocks onto unsuspecting investors and paid newspapers and radio announcers to recommend the stock to the public.⁹⁵⁵

Shining a light on the Radio Pool’s abuses pushed the Commission’s hearings into the public spotlight. Thomas Bragg, one of the managers of the pool, insisted that the pool’s activities should not be construed as “manipulation,” stating that they simply intended “to go out and buy stock in the open market, and to sell it at a higher price to make a profit.”⁹⁵⁶ Similarly, after the Commission’s legal counsel William Gray called the activities of RCA “purely manipulation,” George Breen, a securities dealer involved with RCA, insisted they were no more than “buying and selling.”⁹⁵⁷ Whitney even reappeared before the Committee to defend pooling as an appropriate practice “for the purpose of making a profit.” He insisted that even if pools resort to fictitious transactions

United States Senate, vol. 2 (Washington: Government Printing Office, 1932), 729 for similar testimony from John Rakob, Director of General Motors, who said “there is no crime in short selling.”

⁹⁵⁵ Carosso, *Investment Banking*, 324–25.

⁹⁵⁶ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1932, 2:418, 478.

⁹⁵⁷ U.S. Senate Committee on Banking and Currency, 2:560.

to drive up share prices, it is no use to regulate them, since Whitney concluded “there is no agency in the world that can prevent crookedness.”⁹⁵⁸

The defenses offered up by those in the RCA pool did not hold up to the public. A front-page *Chicago Tribune* piece lambasted the arguments of Bragg, Breen, and other members of the RCA pool shortly after their testimony. Critical of the pool’s scheme, the piece highlighted that in one week in March of 1929, the pool orchestrated enough deals to net over \$5.5 million in profits. The article noted that Bragg, Breen, and James McConnachie (another one of the pool’s members) all were compelled during their testimonies into admitting that Gray’s allegations were “probably right” that their activities constituted manipulation rather than honest buying and selling.⁹⁵⁹

With the public’s support, the Pecora Commission challenged additional activities common on Wall Street, including the practice of officers and executives of a company investing in their own stock. Interrogating Henry Warner, the President of Warner Brothers Inc., Senator James Couzens (R-MI) discussed the practice of officers buying and selling their own company’s stock in rapid succession to inflate share value in a way that did not reflect market conditions. Warner insisted that such a practice was both “ethical and helpful” to the industry, even if unsuspecting investors were left paying the cost when the activity ceased and the value dropped.⁹⁶⁰ William Fox of the Fox Film Corporation stated that he “manipulated,” his own stocks, that he was “proud of it,” and

⁹⁵⁸ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1933, 6:2222–23.

⁹⁵⁹ “Reveal Stock Pool Clears 5 Million in Week: Senators Learn of Radio Bull Coup,” *Chicago Tribune*, May 20, 1932, sec. 1-2.

⁹⁶⁰ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1932, 2:649, 653.

would “continue to do it” as long as “the stock exchange permits him to.”⁹⁶¹ Other brokers and executives insisted that the practice was not unethical, even when designed to create the false appearance of activity to excite the public.⁹⁶²

Perhaps the most explosive findings of the Commission came in regard to National City Company, a security affiliate of the National City Bank of New York. The Commission uncovered that National City routinely led investors into purchasing securities while providing little information as regards to their quality. National City regularly gave out large loans to questionable borrowers, including \$8 million to Minas Geraes (a state in the Brazilian Republic known as a negligent borrower), \$90 million in loans to Peru (which National City executives recognized as “an adverse moral and political risk”), and another \$50 million to companies in Cuba and Chile without informing their investors.⁹⁶³ As the nation’s largest investment banking house, National City speculated on exchanges, participated in copper pool operations, and traded in its own stock up to 30 to 40 thousand times per day to inflate its value.⁹⁶⁴

⁹⁶¹ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 3 (Washington: Government Printing Office, 1932), 984.

⁹⁶² U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 14 (Washington: Government Printing Office, 1934), 6360 for comments of Seton Porter, President of the National Distillers Product Corp. U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 13 (Washington: Government Printing Office, 1934), 6146 for the comments of Charles Wright, a New York stockbroker.

⁹⁶³ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1933, 6:2082–87, 2137; Ferdinand Pecora, *Wall Street Under Oath: The Story of Our Modern Money Changers* (New York: A.M. Kelly, 1939), 92, 96–100.

⁹⁶⁴ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 4 (Washington: Government Printing Office, 1933), 1166–67; U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Report of the Committee on Banking and Currency* (Washington: Government Printing Office, 1934), 166–73; Pecora, *Wall Street Under Oath*, 95, 110–12.

National City executives routinely unloaded millions of dollars of securities backed by bad loans onto the public, and Charles Mitchell, the President of National City, saw no reason to change the company's ways. When confronted with arguments from the Commission that publicizing the company's spreads and information about its securities would stabilize the market, Mitchell insisted it would not. He said, "I can not yet conceive myself that the American practice has been wrong" in not publicizing the details of a company's finances to investors.⁹⁶⁵ He argued that it was his "duty" to sell shares as long as customers viewed them as worthy investments, even when National City did not reveal it was unsound stock.⁹⁶⁶ Mitchell stated that letting executives share in the net earnings of a company's financial maneuverings while insulating them from its losses encouraged an "esprit de corps" among officers, although he admitted it may have had "some influence" on the fact that 20% of the company's securities were in default.⁹⁶⁷ Ultimately, sharing information with the public would have served no purpose according to Mitchell. He concluded that, "there is no investor that I know of who would have had the slightest interest, or whose judgment would have been in the least affected" had the company publicized information about its questionable loans.⁹⁶⁸

Not everyone in the financial sector proffered up blanket defenses of the industry. In opposition to many of his colleagues, President of Chase National Bank Winthrop Aldrich took a different tack with the Commission and demanded greater federal regulation of the investment banking industry. He particularly directed his ire against the

⁹⁶⁵ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1933, 6:1803-4.

⁹⁶⁶ Pecora, *Wall Street Under Oath*, 95.

⁹⁶⁷ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Report*, 206; also see Carosso, *Investment Banking*, 333-34.

⁹⁶⁸ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1933, 6:2137.

tendency to combine investment and commercial banking in single entities, which had been essential to the consolidation of power by the Morgan Empire. Winthrop's hostility was largely directed towards Morgan. When he was called to testify, Winthrop stated that he regulated his own business according to "a code of professional ethics and customs" that differentiated him from those he criticized.⁹⁶⁹

While he insisted on regulation and separation of the two forms of banking, Winthrop also informed the commission that investment banking should be regulated with "as little restriction" as possible.⁹⁷⁰ He walked a careful line, telling the commission that prohibiting clearly harmful business practices was "sound" and "wise," but qualified that "business enterprise, initiative and courage flourish in an atmosphere of the utmost freedom compatible with protection of the public interest." He said the public is too eager to "blame all financial evils upon bankers," but that regulation was necessary within limitations.⁹⁷¹ His final recommendations for regulating investment and commercial banking were so severe that Senator Glass, who put his name on the bill that ultimately separated the two, described Aldrich's proposals as "a straight-jacket" built on the assumption that bankers "are addicted to those excesses...of immoral greed." Nonetheless, both Aldrich and Glass agreed that it was unfair to assume that all bankers were immoral but that regulation was necessary to some extent nevertheless.⁹⁷² While his colleagues lashed out against any political calls for regulation of industry—a strategy that

⁹⁶⁹ *Hearings on S. Res. 84 and S. Res. 56: Part 1* (Washington: Government Printing Office, 1933), 3.

⁹⁷⁰ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 8 (Washington: Government Printing Office, 1933), 3978, 3980.

⁹⁷¹ U.S. Senate Committee on Banking and Currency, 8:3990–91.

⁹⁷² U.S. Senate Committee on Banking and Currency, 8:4017, 4021.

would prove futile—Aldrich foreshadowed the industry’s eventual embrace of regulatory ideology as an alternative to criminalization.

The Pecora Commission inflicted serious damage on the reputation of stock exchanges, investment bankers, and Wall Street. But the hearings revealed splits among Wall Street leaders, with some offering strong defenses of their actions and others supportive of a moderate level of regulation. In debates over the Securities and Securities Exchange Acts, corporate interests either opposed the laws or viewed them as necessary to regulate a small handful of individuals and businesses. But both sides agreed on two things. First, they concurred that the state’s response to the crisis should be designed to protect business, not the consumer. Second, both camps agreed that legislation should not damage the already weakened economy. However, leaders of finance who made these arguments by drawing on regulatory ideology were more successful than their colleagues who opposed the laws entirely. By defending the character of bankers and exchanges officials while voicing concerns about an uninformed public armed with the power of prosecution, politically savvy bankers, brokers, and exchange leaders adapted regulatory ideology to the political context of the 1930s. This convinced lawmakers to rely on familiar concepts of regulation rather than try something new during the crisis. Again, this illustrates that business has to work within prevailing discourses to achieve its goals. Strict opponents of the New Deal’s securities reforms failed to achieve their goals, but leaders of finance who favored regulatory ideology secured laws designed to support industry, restore investor confidence, and promote growth while extinguishing the potency of the Pecora Commission’s findings.

The Securities Act of 1933

Passed within the first hundred days of Roosevelt taking office, the Securities Act was designed to ensure that buyers of securities received accurate information before investing in a security. The law required companies to write up a registration statement and a prospectus outlining relevant information about a given security and the corporation itself, including its financial statements, before issuing a security on the market. By providing transparency, the theory behind the law was that it would inhibit firms from engaging in fraud and help potential investors make informed decisions.

With prominent New Dealers from Roosevelt's inner circle leading the push for reform (including Corcoran, Cohen, Landis, and Frankfurter), the Securities Act was proposed to comprehensively monitor securities markets. The bill they drafted empowered the Federal Trade Commission to regulate the securities industry by monitoring corporations' registration statements and prospectuses. Their bill quickly moved through Congress and Roosevelt signed it on May 27. It included civil and criminal provisions for the making of false or misleading statements, and it held the company, underwriter, and any individuals who signed the registration statement liable for falsehoods. Viewing the law as laying an even competitive floor under American business, Frankfurter, Landis, and the other New Dealers involved thought it would get the securities market back on its feet.⁹⁷³

In the wake of the Pecora hearings, there was a push in Congress for criminal justice reform in securities markets. Testimonies before the House Committee on Commerce from members of the FTC asked for the law to "have teeth in it," claiming

⁹⁷³ Parrish, *Securities Regulation*, chapter 3 for a good historical review of the law's passage.

that the law should give the commission more than investigatory powers.⁹⁷⁴ There was even support for criminal justice reform from others within the financial community beyond Winthrop Aldrich. Representing the Investment Bankers Association of America (IBA), a prominent network of the nation's largest investment banking firms, attorney William Breed told the committee that "the penalties for fraud should be broadened," and supported giving the FTC powers to investigate fraud and enjoin securities sales.⁹⁷⁵

That the IBA came out in support of the Securities Act, even in part, is significant. It shows that there were meaningful splits among businesses. The IBA was one of the most unified voices for the investment banking industry at the time, and its statements reveal the deep support for reining in industry through regulatory reforms that included penalization.⁹⁷⁶ But the IBA's support for the law was qualified by its other demands. Breed criticized the law's strict liability provisions, contending that the law should only punish willful false statements and not accidental negligence. And while he endorsed penalties for fraud, he argued against subjecting violations of FTC rules to criminal sanction.⁹⁷⁷ Breed concluded by stating that the law should be written so as to "not cover the honest issuer or the honest director."⁹⁷⁸

Opponents of the law advanced similar arguments that the law was going to hurt people who ran their businesses honestly. Concerns about interfering with honest business focused on the strict liability provisions punishing negligence and willful fraud

⁹⁷⁴ U.S. House Committee on Interstate and Foreign Commerce, *Federal Securities Act* (Washington: Government Printing Office, 1933), 212, 240–41.

⁹⁷⁵ U.S. House Committee on Interstate and Foreign Commerce, 173–74.

⁹⁷⁶ See Carosso, *Investment Banking*, chapter 8 for a summary on the IBA's formation.

⁹⁷⁷ U.S. House Committee on Interstate and Foreign Commerce, *Federal Securities Act*, 174–93.

⁹⁷⁸ U.S. House Committee on Interstate and Foreign Commerce, 174.

equally. Senator Thomas Gore (D-OK), one of the most outspoken critics of Wall Street during the Pecora hearings, even mentioned this. Justice Department attorney Alexander Holtzoff tried to argue that the law should not just monitor dishonesty, “but also negligence and carelessness.”⁹⁷⁹ Gore was unconvinced, replying that the law “bristled a little too much with punishments and penalties,” and would, “frighten everybody out of business.” He said the law should be fashioned so as “to deal with the dishonest minority and...not to frighten the honest” out of the market.⁹⁸⁰ Arthur Dean, counsel for a group of investment bankers, argued that the law should mirror the English Companies Act by allowing executives to prove that their behavior was an honest mistake or else the law would impede business among “responsible houses” and “encourage irresponsible houses.”⁹⁸¹

Ollie Butler, legal counsel in the Department of Commerce, also stated that criminal penalties should only apply in the case of willful fraud. By imposing strict liability, “honest well-intentioned men” would be tepid in their business transactions for “fear of unintentional violation.” Meanwhile, “the clever crook or weakly dishonest person” would dominate the market. He warned the Senate Banking Committee that, “The popular dislike of investment bankers” should not lead them to the “hasty adoption of legislation which may superficially appear to be punishing the investment bankers but which upon analysis is in fact injuring the country as a whole.”⁹⁸² Butler did not disagree with the bill’s inclusion of criminal penalties or its basic goal but feared that it could

⁹⁷⁹ U.S. Senate Committee on Banking and Currency, *Securities Act* (Washington: Government Printing Office, 1933), 205–7.

⁹⁸⁰ U.S. Senate Committee on Banking and Currency, 128, 205–7.

⁹⁸¹ U.S. Senate Committee on Banking and Currency, 159.

⁹⁸² U.S. Senate Committee on Banking and Currency, 280–81, 284.

injure the country by impeding business among honest bankers. His logic was built on certain facets of regulatory ideology—including a character defense of bankers to rationalize his opposition to criminal punishment—but like Gore, Dean, and others, he did not couple his critique of the law with clear proposals for regulatory policy.

Wound up in arguments about impeding economic recovery were familiar claims that executives' actions should not be viewed as criminal by virtue of their character. Testimony from Penn Harvey, Vice President of Chase Harris Forbes in New York, illustrates this dynamic. He claimed that, “there are a great many honest men in the investment banking business” and that if legislators could “mingle” with the “financial men in New York,” they would conclude that they are “ordinary, good, [and] honest.” He did admit that there was a dishonest element that needed to be regulated “out of the business” to have “business restored to the confidence of the country.” However, he stated that this element “is a minority” and that Congress should not punish the whole industry “because of some one act that some person may have committed.” He said the law should promote “greater confidence” among the public in bankers but not be so stringent that good men “cannot do business and make an honest living.”⁹⁸³

Members of key House and Senate Committees heard business's demands and presented the law less as a way to protect consumers and more to restore business confidence. In an April report, the Senate Committee on Banking and Currency stated that the bill had several aims, one of which was to “prevent further exploitation of the public,” from unsound securities by providing them “adequate and true information.” But all other listed aims were geared towards protecting business. They included “to protect

⁹⁸³ U.S. Senate Committee on Banking and Currency, 295–98, 305–6.

honest enterprise,” “to restore the confidence of the prospective investor,” and encourage business investment since they have “grown timid to the point of hoarding.”⁹⁸⁴

Deliberations took a turn when the bill reached the floor of Congress, where debate was animated by outrage at big business and an insistence that criminalization was necessary. Democratic Majority Whip Arthur Greenwood (D-IN) argued that the average banker “no longer has a strict sense of ethics.”⁹⁸⁵ Ernest Gibson (R-VT) called executives of banking houses “criminal,” saying that their crimes of “burglary, robbery, larceny, and fraud” cost the public \$10 million annually.⁹⁸⁶ James Beck (R-PA) claimed that the corporate form “dissipates moral responsibility.” He stated that presidents of major corporations “will at times do things of an immoral character” because they viewed themselves as “the trustee for the stockholders,” even if it meant acting in financial irresponsible ways. His demands to put “predatory millionaires in jail” were met with applause on the House floor.⁹⁸⁷

Other legislators took a different approach. For instance, James Parker (R-NY), a member of the House Interstate Commerce Commission, presented the bill’s primary aim as promoting economic recovery, leading him to conclude that it should not be too severe. He claimed that the bill does “two things.” One was “to protect the gullible investor,” but that, “more important is the protection of the honest business man upon the success of whose business depends the success of the country.” He stated that lawmakers

⁹⁸⁴ U.S. Senate Committee on Banking and Currency, *Regulation of Securities: Report*, Report No. 47 (Washington: Government Printing Office, 1933), 1; see U.S. House Committee on Banking and Currency, *Federal Supervision of Traffic in Investment Securities in Interstate Commerce*, Report No. 85 (Washington: Government Printing Office, 1933), 2 for similar arguments.

⁹⁸⁵ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Seventy-Third Congress, First Session*, vol. 77 (Washington: Government Printing Office, 1933), 2914.

⁹⁸⁶ U.S. Congress, 77:2944.

⁹⁸⁷ U.S. Congress, 77:2937–38.

have been too “apt to think only of the man who has lost his money” and not “the men who are trying to do business and do business honestly.”⁹⁸⁸ Parker’s claims explicitly suggested that promoting economic recovery, not investor protection, was the law’s central purpose.

Parker’s statements underscore a dynamic that has long distinguished the politics of corporate crime from the politics of street crime. While crime politics in America has often been victim-centered, debates about corporate criminality have instead painted industry leaders as the real victims of an ignorant public, a state too eager to meddle in their affairs, or the few bad men in business. In the New Deal era, this logic took on a special meaning. The protection of honest business from unscrupulous competitors and excessive state intervention became paramount to getting out of the Depression. For instance, much like Parker, Virgil Chapman (D) of Kentucky said the two purposes of the law were to protect the investing public and “at the same time to protect honest corporate business,” and the law should be written so businessmen had “no fear” of the law.⁹⁸⁹ Clyde Kelly (R-PA) similarly stated that the bill protects “honest and legitimate industry” which has too often been “the victim of greedy and ruthless investment bankers.”⁹⁹⁰ In the Senate, Burton Wheeler (D-MT) outlined the law’s “general purpose” as “to protect the investing public and honest business.” He stated that by protecting enterprise, the law would ignite recovery by promoting business confidence, spurring employment, and restoring the public’s faith in securities markets. The notion that the law should protect

⁹⁸⁸ U.S. Congress, 77:2920.

⁹⁸⁹ U.S. Congress, 77:2935.

⁹⁹⁰ U.S. Congress, 77:2925.

the investing public mattered, but Wheeler stated that protecting investors only mattered if it was tied to “restoring buying and consuming power” among the public.⁹⁹¹

Representative James Mott of Oregon (R) pointed out how putting business before the investor mattered. He noted the Securities Act’s information provision requirements required corporations to give public investors detailed statements that rendered the seller only liable for actual fraud by making the buyer responsible for their purchase. Mott emphasized that this overlooked the fact “the average investor cannot read and interpret a balance sheet” and is largely unfamiliar with the financial structures of big business. A balance sheet can be technically accurate, but still “convey to the untutored investor the idea that an unsound company is sound.”⁹⁹² In this way, the Securities Act differed from state “blue-sky” laws that protected investors against securities fraud by requiring sellers to register their securities, publish relevant financial details, and go through a merit review in which state agents determined if the security was of reasonable enough quality to be deemed a fair offering.⁹⁹³ The Securities Act gave firms protection by not including a merit review and instead applying the standard of caveat emptor, making the buyer responsible for understanding all relevant information. As a result, a firm could issue low-quality securities, but as long as it provided adequate information in its statements, they were legal to sell on the open market.

Mott’s insistence to write the law to be more like a blue-sky law was dismissed by his colleagues. As member of the House Interstate Commerce Committee Charles Wolverton (R-NJ) stated, “the theory that underlies this proposed legislation is

⁹⁹¹ U.S. Congress, 77:2983–84.

⁹⁹² U.S. Congress, 77:2948.

⁹⁹³ Carosso, *Investment Banking*, chapter 7.

different...from that which forms the basis of many of the so-called ‘blue-sky’ laws.” Wolverton stated that merit reviews would end up “hampering developments” in industry. He said such reviews would discourage innovation and investment, which is why the law placed responsibility with the buyer.⁹⁹⁴

The final law included criminal provisions in addition to civil and regulatory ones—including a \$5,000 fine or five years in prison for false statements—but was written with an eye towards minimizing state intervention into markets, as Congress chose not to model it after state blue-sky laws. Thus, neither opponents nor supporters of the law were entirely happy. Representative Carroll Breedy (R-ME) bemoaned that the administration “has listened to the representatives of big business” while Mott fruitlessly insisted on including stronger liability sections and blue-sky provisions.⁹⁹⁵ Investment bankers and exchanges secured some concessions and thought the Act was workable to an extent, but many believed its civil and criminal provisions amounted to strict prohibitions on necessary business practices. As a result, large sectors of the financial community perceived it as a sensationalistic reaction to the Pecora hearings.⁹⁹⁶

The Securities Act was pushed through Congress in the first hundred days, giving business little time to mount a coordinated response. Alternatively, the Securities Exchange Act gave the financial community adequate time to mobilize and advocate. By framing their goals more clearly within the parameters of regulatory ideology—defending the character of businessmen and expressing concerns about frivolous prosecutions while advocating for regulatory commission—leaders of industry were more successful in

⁹⁹⁴ U.S. Congress, *Cong. Rec.*, 1933, 77:2914–15, 2935, 2949–50; 2930-31 for Wolverton quotes.

⁹⁹⁵ U.S. Congress, 77:2947–48, 2952–53.

⁹⁹⁶ Parrish, *Securities Regulation*, chapters 3-5, esp. pp. 70-71, 110-13, 136, 143.

debates about the Securities Exchange Act. Investment bankers and exchange officials argued that a regulatory approach would protect industries first and foremost while not impeding economic recovery during the Depression. By arguing that regulatory discretion be vested in a separation commission, leaders of finance were able to secure the creation of a regulatory body to work with the industry in its interests.

The Securities Exchange Act of 1934

Michael Parrish's account of the New Deal's securities reforms illustrates how the Securities Act was written and passed within the span of a couple of months. The legislative record was characterized by diverse responses from various sectors of finance and industry. However, one demand voiced by several leaders of industry—the creation of a separate commission to monitor exchanges rather than the FTC—was not met. Further removed from the first hundred days and with more time to mobilize, the exchange officials and investment bankers who favored a commission mounted a more successful political campaign in 1934, championing regulatory ideology to pursue their goals.⁹⁹⁷

The initial Securities Exchange bill written by the team of Landis, Cohen, and Corcoran empowered the FTC even more than the Securities Act did. Their bill banned the use of wash sales, matched orders, and joint trading accounts to create the appearance of market activity. It separated the functions of brokers, dealers, and underwriters while restricting the availability of credit for exchange trading, defining the permissible activities of exchange members, scrutinizing trading by directors, and making various financial affairs of listed corporations a matter of public record.

⁹⁹⁷ Parrish, 108–13.

Thomas Corcoran, legal counsel for the Reconstruction Finance Corporation at the time, was the administration's chief advocate of the law. He defended the law's strict liability provisions that upset many in the financial community, arguing that like manslaughter, the behaviors targeted by the law should be criminal regardless of whether intent was present or not. He told the Senate Banking Committee that he believed it was no longer a "norm of the criminal law" to require proof intent, given the number of things that can be considered crimes "which are sheer matters of negligence." He suggested that the reforms favored by Wall Street would limit regulators so much that it would amount to putting "a baby into a cage with a tiger to regulate the tiger."⁹⁸ His proposal included a \$25,000 fine and 10 years of imprisonment as punishment not just for any violation of the statute, but also for any violation of FTC created rules.

Representative Sam Rayburn (D-TX) in the House was the legislative advocate for the New Dealers' proposal. But in conference negotiations, Rayburn eventually accepted the creation of a five-person commission in exchange for other concessions on the law's specifics. As the first major confrontation Roosevelt had with big business separated from the chaos of his first hundred days, the law was significant, but it also represented a reluctance to offend entrenched economic interests. By giving a new commission rulemaking authority, Congress avoided difficult statutory decisions regarding floor trading, short sales, over the counter markets, and other issues that it left to the newly minted Securities Exchange Commission.

⁹⁸ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 15 (Washington: Government Printing Office, 1934), 6508–10, 6463–67, 6506–9, 6576–77.

The first draft put forward by the New Deal team was broadly met with disdain from the securities industry, investment banks, and exchanges. For months, leaders of American finance appeared before the Senate Committee on Banking and House Committee on Commerce to attack the law, with Richard Whitney leading the bill's staunchest opponents. He told the Senate Committee that regulating the exchanges through a "new board of seven members" drawn from the exchanges and including the secretaries of treasury and commerce would enable regulation of exchanges to be more "flexible and mobile." He similarly told the House Committee that a separate commission could write rules that they "can immediately change" if necessary.⁹⁹⁹

Leaders of banks and exchanges put forward arguments that corporations had long deployed in defense of regulatory ideology. For instance, many argued that the bill only regulated economics and not morality, rendering criminal provisions inappropriate. This is why the NYSE's attorney Roland Redmond objected to criminally punishing violations of the commission's rules, stating that such sanction should be restricted only to "what are really in their nature crimes."¹⁰⁰⁰ Michael O'Brien, an official of the New York Stock Exchange, stated that while legislators might believe certain transactions on the exchange are wrong, "We believe they are necessary to orderly markets."¹⁰⁰¹ Woodlief Thomas of the Federal Reserve said that he viewed the law through the lens of "economic

⁹⁹⁹ U.S. Senate Committee on Banking and Currency, 15:6582–85, 6734.

¹⁰⁰⁰ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 16 (Washington: Government Printing Office, 1934), 7562, 7572.

¹⁰⁰¹ U.S. House Committee on Interstate and Foreign Commerce, *Stock Exchange Regulation* (Washington: Government Printing Office, 1934), 350.

matters rather than morals,” and that from an “economic standpoint, gambling is not bad.”¹⁰⁰²

The unity among financial interests in giving the initial bill a chilly reception marked a significant difference from earlier debates over securities reforms. Even Paul Shields, a prominent New York commission broker who opposed Richard Whitney and represented Wall Street’s more moderate elements, said that the New Dealers drafting the bill went “way too far” and failed to “recognize that there are honest, decent people in this business, and that such people should not be destroyed” through too much regulation.¹⁰⁰³ Legislators who thought the law did regulate morality even agreed that economic issues should trump moral ones. Edward Kenney (D-NJ) conceded that while exchange regulation “presents a moral problem,” questions about the financial structure of the economy “should be prominently brought to the front” of the debate.¹⁰⁰⁴ In front of the Pecora Commission, Corcoran presented his proposal as “not at all a moral proposal” but rather “the result of the economic judgment of the community,” revealing that the depth of agreement regarding the bill’s economic rather than moral aims.¹⁰⁰⁵

In defending regulatory ideology as an alternative to Corcoran’s proposal, agents of the financial industry built on familiar claims about the character of businessmen, ignorance of the public, and complexity of markets. But wound up in these arguments was a unique appeal to lawmakers’ concerns about economic recovery. Bankers, exchanges, brokers, and other interested parties discouraged lawmakers from appealing to

¹⁰⁰² U.S. House Committee on Interstate and Foreign Commerce, 64.

¹⁰⁰³ Parrish, *Securities Regulation*, 122, 129 quoting personal correspondence of Shields.

¹⁰⁰⁴ U.S. House Committee on Interstate and Foreign Commerce, *Stock Exchange Regulation*, 731.

¹⁰⁰⁵ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 15:6493–94, 6552.

populist impulses to crack down on industry by reframing regulatory ideology as a way to monitor markets without obstructing their revival.

Richard Whitney's testimony exemplified how this was done. Whitney informed the Senate Banking Committee that he was "in entire agreement with the proponents of the bill." But while he favored some monitoring of exchanges, he feared that excessive punishment "would seriously disrupt our organized security markets and American business." This was a recognizable aspect of regulatory ideology—that too much state intervention would hurt business. But Whitney went further. He warned the committee that without a separate commission, the law's strict provisions would not only "punish stock exchanges for imaginary offenses," but also would "throttle industry...and postpone the return of prosperity."¹⁰⁰⁶ Whitney thus linked his defense of regulatory ideology and attacks on the law's strictest provisions to broader concerns about the state of the economy as the nation climbed out of depression. The NYSE's legal counsel similarly stated that "general regulation" alone could achieve the law's basic aims without criminal sanction. He said if Congress empowered a separate commission, they will "have accomplished all of the same possibilities of regulation without in any way hampering ordinary and legitimate business transactions."¹⁰⁰⁷

Major players in the securities industry and other exchanges shared Whitney's concerns. Frank Hope, President of the Association of Stock Exchange Firms, informed the Senate Banking Committee that a separate commission specifically built to monitor exchanges would have the "elasticity and discretion" necessary to "practicably meet

¹⁰⁰⁶ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 16:7484–85, 7538.

¹⁰⁰⁷ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 15:6512.

situations as they arise.” He condemned Corcoran’s proposal, saying it “unnecessarily and dangerously” went beyond what was necessary. But Hope’s orthodox case for regulatory ideology was also tied to the economic climate. He insisted that Corcoran’s severe proposal would only cause further “confusion, conflict, and disorder” in the financial system, and that it could ultimately “regulate it out of existence.”¹⁰⁰⁸

Howard Butcher, the Vice President of the Philadelphia Stock Exchange, offered a stinging critique of Corcoran’s proposal before the Pecora Commission. He argued that Corcoran failed to adhere to Roosevelt’s demands in writing the bill, stating that,

It seems to me that the bill does not take into consideration what President Roosevelt has repeatedly said, that we must go forward in a united group, that we must fight the depression, that we must make a united effort towards recovery. And I do not believe there has been any group of men who have responded more readily and more thoroughly than stockbrokers to that desire expressed by the president.¹⁰⁰⁹

Butcher’s statements went on to articulate a character defense of bankers, brokers, and exchange officials that was explicitly framed within, as he argued, making a “united effort towards recovery.” He claimed that most members of exchanges “have the highest standard of ethics there is,” but that in Corcoran’s bill, “we are to be treated as a bunch of criminals,” because Congress has focused its criticism on “one or two men,” paying no attention to the “250 of 253 other men who have rendered outstanding service.”¹⁰¹⁰ Butcher claimed that it is “entirely unfair to take a group of men who have had an honorable existence” and punish them for actions that have previously been considered a

¹⁰⁰⁸ U.S. Senate Committee on Banking and Currency, 15:6901, 6904, 6907, 6910–13, 6916.

¹⁰⁰⁹ U.S. Senate Committee on Banking and Currency, 15:6964–65.

¹⁰¹⁰ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 16:7459, 7463; see U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings Before a Subcommittee on Banking and Currency, United States Senate*, vol. 5 (Washington: Government Printing Office, 1933), 1615–16 for similar arguments from Harold Stuart of Halsey, Stuart and Co.

“routine matter of business...that is not adverse to the public interest...individual morals...[or] the law of our land.”¹⁰¹¹ This led Butcher to insist on the creation of a regulatory body “conversant with the technical problems” associated with the exchanges, which could institute “reasonable limitations” on business. Without a commission to work with rather than against industry, he stated that the law took men “whom have honorable records” and turned them into “an unholy class,” grouped with people who are “undeserving of the confidence and respect of the Nation.”¹⁰¹²

Many of the arguments made before House and Senate Committee facially read as standard cases for regulatory ideology, suggesting that criminal penalties would create more problems than they would solve. For instance, prominent investment banker G. Hermann Kinnicutt informed the House Commerce Committee that the bill’s “effort to cure a lesser evil will create a greater one.”¹⁰¹³ Theodore Gould of the Baltimore Stock Exchange stated that the law would “destroy all that is good in our markets.”¹⁰¹⁴ Eugene Thompson, President of the Associated Stock Exchanges, stated that the law attempted to correct a problem unique to the NYSE but in doing so overlooked the “damage that is going to occur to local exchanges” due to the law.¹⁰¹⁵ Frank Altschul, the Chairman of the NYSE’s Committee on Stock List, contended that Corcoran’s proposal would create so many “burdens and hazards” that it would force “the more responsible persons” to quit

¹⁰¹¹ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 16:7456.

¹⁰¹² U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 15:6964–65.

¹⁰¹³ U.S. House Committee on Interstate and Foreign Commerce, *Stock Exchange Regulation*, 359–60; U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 15:6862.

¹⁰¹⁴ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 15:6738.

¹⁰¹⁵ U.S. Senate Committee on Banking and Currency, 15:6994. Thompson called the proposal “an opening for persecution”; also see p. 6924 for testimony of John C. Legg of Mackubin, Legg & Co. for similar concerns about small brokers; U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 16:7535.

because the law would “hamper the conduct of honest business.”¹⁰¹⁶ John Hancock of Lehman Brothers wanted to narrow the law’s penalties so that it only regulated the vices of industry without “touching the good” while the Secretary of the L.A. Stock Exchange said the law should not “unduly” penalize the whole industry “for the acts of the minority.”¹⁰¹⁷ While these arguments read as orthodox defenses of regulatory ideology, it is important to understand the unique political meaning they had in 1934. By highlighting the instability of the early 1930s U.S. economy, major players in banking and securities convinced lawmakers to rely on regulatory ideology rather than try something different for fear of hampering economic recovery.

The legislative record indicates that members of Congress internalized these concerns. In its initial report on the bill, the House Committee on Commerce stated that the law represented “the pleas of the representatives of the stock exchanges for the vesting of broad discretionary powers” in an agency. The committee stated that representatives of exchanges had “insisted that the complicated nature of the problems justified leaving much greater latitude of discretion with the administrative agencies than would otherwise be the case.” The report stated that “for that reason,” the law “leaves to the administrative agencies the determination of the most appropriate form of rule or regulation to be enforced.”¹⁰¹⁸

On the floor of Congress, legislators argued that the bill should be moderate and reflect the interests of finance given their ongoing efforts to restart the economy.

¹⁰¹⁶ U.S. Senate Committee on Banking and Currency, *Stock Exchange Practices*, 1934, 15:6678, 6698.

¹⁰¹⁷ U.S. House Committee on Interstate and Foreign Commerce, *Stock Exchange Regulation*, 464–66.

¹⁰¹⁸ U.S. House Committee on Interstate and Foreign Commerce, *Securities Exchange Bill of 1934*, Report No. 1383 (Washington: Government Printing Office, 1934), 5–6.

Representative John Cooper (R-OH), a member of the House Commerce Committee, utilized this line of argument. He said that most businessmen were “honest and sincere men” who “suffered tremendous losses during the last 3 years of economic depression.”

Cooper stated that,

Industry and business today want to be let alone for a little while. They want to try to get on their feet. They are trying to recover. They are doing everything that is humanly possible to try to bring our country back to a sound economic situation again; but they are afraid that the restrictions placed upon them in this bill will retard economic recovery and not assist it.¹⁰¹⁹

Cooper claimed that the businessmen who managed to keep the economy afloat during the crisis were now “afraid of this bill” and the way it empowered the FTC. He suggested that the law should not target the honest businessman and “destroy his standing and reputation,” saying that the “mere indictment of a prominent citizen is a sad thing” that hurts both him and his community.¹⁰²⁰

Representative Elmer Studley (D-NY) warned that empowering the FTC to monitor securities markets would reignite the depression. Saying that the men operating on exchanges were not “just a lot of bad boys” but “the most resolute and resourceful element of our people,” Studley claimed that “Wall Street will go to Canada” if Corcoran’s proposal became law. He concluded that should the bill succeed, “again we shall find ourselves the victims of our own folly.” He painted a bleak picture drawing on dark imagery, suggesting that the nation’s “most prolific source of revenue will be dried up and our business structure reduced to ashes.”¹⁰²¹

¹⁰¹⁹ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Seventy-Third Congress, Second Session*, vol. 78 (Washington: Government Printing Office, 1934), 7690.

¹⁰²⁰ U.S. Congress, 78:7930, 8113.

¹⁰²¹ U.S. Congress, 78:7943.

Things were little different in the Senate, where the interpretation of the law was widely pro-finance. Frederic Walcott (R-CT) of the Senate's Banking Committee informed his colleagues that the law must be carefully written so that it promoted "a recovery in our business institutions." Without a separate commission to moderate the law's provisions, Walcott called the proposal "a black eye to business" that would do "a great injury" to the economy. He concluded that a moderate law including a separate exchange commission was "important and vital to the recovery of business."¹⁰²² Another committee member Hamilton Kean (R-NJ) advanced similar claims, calling Corcoran's proposal "a hindrance to business" that would be "detrimental" to the economy.¹⁰²³ Senator Millard Tydings (D-MD) was convinced by these arguments, arguing that the Corcoran proposal would contribute to an "atmosphere of insecurity" that was "stopping the revival of many businesses."¹⁰²⁴

The Chair of the House Commerce Committee Sam Rayburn (D-TX) stated on the floor that Congress heard the concerns of business and responded by taking "much of this so-called 'fright' out of the bill" by reducing the criminal penalties from 10 years and a \$25,000 fine to 2 years and a \$10,000 fine. He said that, "the vast majority of business in this country is high-minded and honest." To design the law with the interests of reputable businesses in mind, Rayburn framed the law as a protection for "the man who wants to conduct a straightforward and honest business" from the "desperadoes" in the

¹⁰²² U.S. Congress, 78:8770-01.

¹⁰²³ U.S. Congress, 78:8669.

¹⁰²⁴ U.S. Congress, 78:8709.

industry.¹⁰²⁵ To Rayburn, the main point of the law was to protect honest businessmen from “desperadoes” making it impossible for them to succeed while abiding by the law.

When the House and Senate passed their versions of the bill and it went into conference, Rayburn endorsed the Corcoran proposal. However, he gave into the Senate’s demands to create a separate exchange commission. When the conference committee submitted its final bill, it included a separate 5-person Securities Exchange Commission.¹⁰²⁶ The final law made a violation of any of the law’s provisions susceptible to 5 years imprisonment and/or a \$25,000 fine, but the Senate successfully ensured that violations of rules and regulations created by the Commission (and any false or misleading statements filed under a rule or regulation) could only be punished with a \$10,000 fine and no prison time. And like previous regulatory laws, it granted the Commission to respond to behavior legally defined as criminal through a variety of administrative and civil sanctions.¹⁰²⁷

The securities industry secured major concessions in the Securities Exchange Act, not the least of which was the creation of a separate commission. The SEC became a technical way of handling economic problems somewhat insulated from politics and, more importantly, of resolving industry problems on business terms. Jerome Frank, SEC Commissioner from 1937-1939 and its chair from 1939-1941, said that the SEC existed “primarily to preserve the capitalist form.”¹⁰²⁸ William O. Douglas, SEC chair from 1937

¹⁰²⁵ U.S. Congress, 78:7700–7702.

¹⁰²⁶ U.S. Congress Committee of Conference, *Securities Exchange Act of 1934: Conference Report*, Report No. 1838 (Washington: Government Printing Office, 1934), 30; Parrish, *Securities Regulation*, 140–41.

¹⁰²⁷ U.S. Congress Committee of Conference, *Securities Exchange Act of 1934: Conference Report*, 38.

¹⁰²⁸ Parrish, *Securities Regulation* chapters 1, 3, and 5. Quotes on pp. 4, 170.

to 1939, stated that the SEC should “meet business on business terms” and leave it to exchanges to primarily self-regulate.¹⁰²⁹

In the wake of the SEC’s creation, radical Keynesians were disappointed with the agency’s hesitance to intervene in the economy directly. Meanwhile, conservative critics mounted publicity campaigns panning the commission for slowing recovery by impeding private investment. As the recession of 1937 began, the financial community attacked the SEC by suggesting that it was responsible for obstructing growth. Congress responded with the Maloney Act of 1938. Heeding the considerations of over-the-counter market brokers and dealers, the law gave the SEC the authority to register voluntary national securities associations that worked to prevent fraudulent and manipulative practices in OTC markets. While subject to SEC review, the commission essentially handed exchanges discretion to self-regulate and write their own codes of conduct.¹⁰³⁰

By the end of Roosevelt’s second term, securities regulation had been modified in the interest of core financial interests and was enthusiastically supported by large segments of the financial industry. Despite some commonalities in their arguments, the bankers and financial leaders who fought the Securities Act were not as successful as those who lobbied for a regulatory commission in the Securities Exchange Act debate. Those who opposed criminal intervention into markets without offering an alternative during the Securities Act debates failed to situate their goals within discourses and ideological frameworks that were widely accepted and amenable to policymakers. By positioning their arguments within the parameters of regulatory ideology and framing the

¹⁰²⁹ Parrish, 181, 184–85, 214–15, 228.

¹⁰³⁰ Parrish, *Securities Regulation*, chapters 7 and 8.

regulatory model to have particular appeal during the Great Depression, the industry leaders who fought for the creation of the SEC appealed to prevailing political and economic discourses in ways that enabled them to achieve favorable policy outcomes.

IV. Commercial Keynesianism and Regulatory Development

While the early New Deal was animated by debates over regulatory policy, the 1940s were driven by a shift towards commercial Keynesianism. Economics became more about monetary policy and less about regulation. How this affected the state's perception of corporate criminality and regulation can be seen in the trajectory of three developments—the Temporary National Economic Committee, the Administrative Procedures Act, and the antitrust suit *US v. Morgan* (1953).

The Temporary National Economic Committee

In 1938, Congress created the Temporary National Economic Committee (TNEC) as an investigatory body to study the causes and effects of economic concentration. Prominent members of Roosevelt's inner circle including Arnold and Douglass led the TNEC's investigation. They defended a robust statist vision of regulatory Keynesianism, so the committee seemed to be a strong revival of anti-monopolism. But by the time its final reports were published in 1941, popular anti-monopolist attitudes had faded and the committee's final reports garnered little attention.¹⁰³¹ Even if they had, the men leading the investigation were not the staunch anti-monopolists they were feared to be. The committee's final report defended concentration as inevitable while revealing a hesitance to prosecute corporate violations in lieu of opting for regulatory approaches.

¹⁰³¹ Brinkley, "The New Deal and the Idea of the State," 89–92 for a summary of the TNEC.

In statements during the TNEC's hearings, the FTC was often praised. Because it had a limited capacity to pursue prosecution, it was commended for working with businesses without penalizing them. William O. Douglass, who was just finishing his term as the SEC Chairman, lauded the FTC for its tendency to "cooperate with business by not making the corrective activity too severe."¹⁰³² Erwin Douglas, one of the FTC's commissioners, said he and his colleagues "are glad we don't" have the authority to impose penalties or pursue imprisonment. He insisted, "we don't want it," and argued that the matters the FTC monitors "generally do not pertain to criminal matters in the ordinary acceptance of that term."¹⁰³³ Members of the TNEC were content with the fact that they lacked powers to prosecute anti-competitive practices because they did not think they were "ordinary" criminal actions.

William Douglas emphasized that the state's regulatory powers had become generally overgrown. He lamented that the principle in criminal justice that it is better to "allow nine guilty persons to escape than to punish one innocent person" was abandoned in the regulatory system. He argued that regulatory expansion empowered the state to "take every violator by the back of his neck and rub his nose in the sand, regardless of the effect upon the innocent." He said that, "because the innocent have been compelled to suffer along with those have violated" the law, there is "fear among many businessmen of what they call Government regulation."¹⁰³⁴

¹⁰³² U.S. Temporary National Economic Committee, *Investigation of Concentration of Economic Power: Hearings before the Temporary National Economic Committee*, vol. 5 (Washington: Government Printing Office, 1939), 1756.

¹⁰³³ U.S. Temporary National Economic Committee, 5:1756-57.

¹⁰³⁴ U.S. Temporary National Economic Committee, 5:1850.

Jerome Frank, also serving on the SEC, had similar anxieties. Instead of bemoaning the growth of the regulatory state, he made a plea for more procedural reforms to administrative law. He informed the committee that, “we need to safeguard against the abuse of the innocent” who have been victimized by the regulatory state. He argued that the regulatory process required “more safeguards...to prevent the abuse of criminal enforcing powers in the hands of prosecutors.”¹⁰³⁵ His plea foreshadowed reforms that would take shape in the Administrative Procedures Act of 1946.

Thurman Arnold, at the time running the Justice Department’s antitrust division, advocated for greater use of civil proceedings in administrative cases. He said they provided “a speedier and more equitable method” than criminal charges while avoiding the difficulties of prosecution through criminal courts.¹⁰³⁶ Arnold concluded that in antitrust cases, the state is generally “not dealing...with the criminal class” but with “ordinary law-abiding citizens.” Antitrust enforcement, according to Arnold, was designed to give “assurance” to men in business “that they will not be forced into illegal practices” by their competitors.¹⁰³⁷

The TNEC’s preliminary report, written in 1939, criticized the DOJ for making criminal proceedings a “normal procedure” for enforcing antitrust laws. The report stated that criminal remedies made it “extremely difficult to keep clearly before the public, the business community, and the courts the all-important fact that the antitrust laws must be

¹⁰³⁵ U.S. Temporary National Economic Committee, 5:1851.

¹⁰³⁶ U.S. Temporary National Economic Committee, *Investigation of Concentration of Economic Power: Hearings before the Temporary National Economic Committee*, vol. 11 (Washington: Government Printing Office, 1939), 5155.

¹⁰³⁷ U.S. Temporary National Economic Committee, *Investigation of Concentration of Economic Power: Hearings before the Temporary National Economic Committee*, vol. 21 (Washington: Government Printing Office, 1939), 11314.

regarded primarily as an economic instrument and not as a moral tract.” The TNEC argued that the “connection between the idea of criminality and the idea of some sort of moral obloquy is deeply rooted both in the law and the national psychology.” As a result, it was misguided to pursue convictions for actions that “have a pernicious economic effect” but are committed “by responsible and reasonably well-intentioned men.”¹⁰³⁸ This again illustrates the deep ways regulatory ideology was intertwined into regulatory mechanisms. What was reputed as a fervently anti-monopolist investigatory commission led by prominent trustbusters ultimately defended regulation over prosecution for corporate crime by suggesting that the character of the individuals involved excused their actions as legal, but not moral, wrongs.

The TNEC made the case that criminal antitrust charges were fundamentally unfair because of the “stigma of indictment” they carried. The committee emphasized that news of an indictment could ruin a business’s reputation, but that later acquittals are rarely treated as newsworthy. This was “extremely unfair,” especially to those facing charges only because they were forced into anticompetitive practices “by the necessity of survival in a complex business structure.” The TNEC’s preliminary report suggested that criminal penalties should be left unchanged, but that civil remedies should be made more available so that criminal charges can be pursued more selectively. The commission concluded that even in cases where criminal charges might be warranted, the lower

¹⁰³⁸ U.S. Temporary National Economic Committee, *Investigation of Concentration of Economic Power: Letter from the Chairman, Transmitting a Preliminary Report Pursuant to Public Resolution No. 113* (Washington: Government Printing Office, 1939), 18–19.

standards of proof in civil law and the absence of any stigma associated with being indicted made civil actions preferable.¹⁰³⁹

The TNEC's final report and recommendations had only slight differences. It did recommend an increase in the maximum fine for a criminal antitrust violation from \$5,000 to \$50,000. Nonetheless, the committee endorsed its earlier recommendations to include more civil penalties as options given the "inappropriateness of the criminal remedies in many cases."¹⁰⁴⁰ Included in the report was a statement from Thurman Arnold promising corporate executives that the DOJ would not bring them to Washington "with a gun at their heads." He said that the antitrust division is not "trying to regulate the industry," because "we are so meticulous and so sensitive to those charges that we never even suggest what business ought to do." He concluded that, "courts are properly reluctant" to pursue imprisonment, promising that the Justice Department had no intention to aggressively use the criminal features of antitrust law.¹⁰⁴¹

The TNEC was a final gasp of regulatory Keynesianism. Meant to revive anti-monopolist sentiment, it only reaffirmed the idea that economic concentration was necessary, beneficial, and inevitable. Most importantly, New Dealers on the TNEC defended moderate regulatory responses to industrial combination because they feared that antitrust prosecutions made a moral statement they did not wish to make. This was a legacy of regulatory ideology embedded into the state's regulatory framework, one which drove New Deal reformers to defend regulatory over criminal sanctions in antitrust cases

¹⁰³⁹ U.S. Temporary National Economic Committee, 19–20.

¹⁰⁴⁰ U.S. Temporary National Economic Committee, *Investigation of Concentration of Economic Power: Final Report and Recommendations of the Temporary National Economic Committee* (Washington: Government Printing Office, 1941), 40.

¹⁰⁴¹ U.S. Temporary National Economic Committee, 110–11, 137, 270.

by promoting the assumption that industry leaders' virtuous characters gave their arguably criminal actions non-criminal meanings. Although relatively unnoticed at the time, the TNEC's case to limit the reach of the criminal provisions of antitrust law reveals important and underappreciated dynamics of New Deal era politics.

The Administrative Procedure Act (1946)

Passed in 1946, the Administrative Procedure Act (APA) reformed the way regulatory and administrative agencies propose, write, and enforce rules. One of the core pieces of American administrative law, it applies to federal executive departments and to independent agencies in four ways: it requires agencies to inform the public as to their organization and procedures; provides means for public participation in rulemaking through public commenting; articulates uniform standards for rulemaking and adjudication; and subjects agency decisions and actions to judicial review. The law concentrated the Executive's authority to coordinate the administrative state, opened up the rulemaking process to the public, and established uniform standards for rulemaking and adjudication.¹⁰⁴² As a result, the law reshaped the relationship between the state and corporations by outlining procedural protections in regulatory proceedings.

The APA had its roots in 1939 when Roosevelt asked his Attorney General Frank Murphy to form a committee to study the operation of administrative law. The committee's final report detailed its conclusions and recommendations, which served as the basis for several reforms to U.S. administrative law. Among its conclusions was an emphasis on the need for uniformity in administrative procedures given the vast

¹⁰⁴² David Rosenbloom, "1946: Framing a Lasting Congressional Response to the Administrative State," *Administrative Law Review* 50, no. 1 (1998): 173–97.

differences across executive departments and regulatory agencies in how they made rules, adjudicated disputes, and rendered decisions.¹⁰⁴³ The report particularly noted that some agencies had effectively adopted the “adversary characteristics” of a courtroom. The committee praised this practice because it afforded the accused rights similar to those they would receive in a legal setting, such as apprising them of charges and evidence so they have adequate time and information to prepare a defense. When the committee argued that “there is need for procedural reform” in the administrative process, their aim was to protect those being charged through standardizing proceedings.¹⁰⁴⁴

By standardizing the administrative process, the APA outlined specific rights for anyone subjected to regulatory oversight. On the floor of the Senate, Chair of the Senate Judiciary Committee Pat McCarran (D-NV) described the APA as “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government.” He stated that it was “designed to provide guaranties of due process in administrative procedure.”¹⁰⁴⁵ Similarly, Representative John Gwynne (R-IA) said the law was designed to make regulatory hearings look more like legal ones by “bring[ing] into the practice of these bureaus and tribunals those principles of due process that we understand and that have been enforced in the courts.”¹⁰⁴⁶ ICC Commissioner Clyde Atchinson even informed the House Committee on the Judiciary that administrative procedures would be greatly improved if

¹⁰⁴³ U.S. Attorney General’s Committee on Administrative Procedure, *Final Report of Attorney General’s Committee on Administrative Procedure*, 1941, 11–14, 25, 35, 44–45, 55–56, 59–60.

¹⁰⁴⁴ U.S. Attorney General’s Committee on Administrative Procedure, 61–62, 70.

¹⁰⁴⁵ U.S. Congress, *The Congressional Record: Containing the Proceedings and Debates of the Seventy-Ninth Congress, 2nd Session*, vol. 92 (Washington: Government Printing Office, 1946), 2149.

¹⁰⁴⁶ U.S. Congress, 92:5656.

they were made more comparable to “an adversary proceeding,” with all the rights, procedures, and protections that come with it.¹⁰⁴⁷

Reports from the House and Senate Judiciary Committees both described the law as a bill of rights in regulatory proceedings. The Senate Committee took the position that “the bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to or changes in present administrative operations.”¹⁰⁴⁸ The bill, it wrote, “is designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected.”¹⁰⁴⁹ The House Committee described the bill as “an outline of minimum essential rights and procedures” that “affords private parties a means of knowing what their rights are and how they may protect them.”¹⁰⁵⁰

Standardizing regulatory and administrative procedures for the sake of those being monitored was a worthy reform, especially given the vast disparities in how agencies operated. But by infusing regulatory processes with the dynamics of adversarial legalism, the APA made litigation a prominent way of shaping the relationship between the regulatory state and industries. By importing elements of legal culture into regulatory operations, adversarial argument between opposing parties became a mechanism for determining administrative outcomes and establishing precedent for regulatory enforcement.¹⁰⁵¹ This uniquely American system of regulation, reliant on legalistic rules,

¹⁰⁴⁷ U.S. House Committee on the Judiciary, *Administrative Procedure: Hearings Before the Committee on the Judiciary House of Representatives* (Washington: Government Printing Office, 1945), 54–55.

¹⁰⁴⁸ U.S. Senate Committee on the Judiciary, *Administrative Procedure Act: Report of the Committee of the Judiciary on S. 7*, Report No. 752 (Washington: Government Printing Office, 1946), 5.

¹⁰⁴⁹ U.S. Senate Committee on the Judiciary, 7.

¹⁰⁵⁰ U.S. House Committee on the Judiciary, *Administrative Procedure: Hearings*, 16–17.

¹⁰⁵¹ Moran, “The Rise of the Regulatory State,” 388–89.

complicated regulatory proceedings and fostered a hostile relationship between business and the state. Well-resourced corporations have as many benefits in adversarial settings as they do in legislative ones, so while the APA constituted a noble attempt to standardize regulatory procedures, it also gave industry the opportunity to use litigation to secure favorable precedent and victories that were unattainable in other contexts.

By the late 1940s, state regulation was viewed as a threat to business-led progress rather than an effective way of managing the economy. In this context, any remaining hostilities to corporate concentration that flourished in the 1930s were quieted. This dynamic is particularly clear in the Justice Department's failed suit against a group of investment banking firms in the case *U.S. v. Morgan*.

The Decision in U.S. v. Morgan (1953)

In October of 1947, the Justice Department filed a civil complaint against seventeen of the nation's top banking firms and the Investment Bankers Association (IBA). The suit, billed by Attorney General Tom Clark as one of the most important cases ever initiated under the Sherman Antitrust Act, was brought in the Southern District of New York and dragged on for six years.¹⁰⁵² The outcome highlights how by the 1950s, the power of antitrust law had been remarkably weakened and the negative image of bankers created by the Pecora hearings was largely discredited.

¹⁰⁵² See Carosso, *Investment Banking*, chapter 21 for a detailed historical review of the case. The seventeen firms included: Morgan Stanley & Co.; Kuhn, Loeb & Co.; Smith, Barney & Co.; Lehman Brothers; Glore, Forgan & Co.; Kidder, Peabody & Co.; Goldman, Sachs & Co.; White, Weld & Co.; Eastman, Dillon & Co.; Drexel & Co.; The First Boston Corporation; Dillon, Read & Co. Inc.; Blyth & Co. Inc.; Harriman Ripley & Co. Inc.; Stone & Webster Securities Corporation; Harris Hall & Co. Inc.; and Union Securities Corporation.

The trial ran from 1950 to 1953. The state repeated the allegations of the Pujo Investigation, the Pecora Commission, and the TNEC in arguing that the seventeen firms named had combined and conspired to monopolize America's financial markets. To those who were convinced of Wall Street's corruption by these preceding investigations, the suit promised to deliver the final blow to one of the greatest monopolies in American business. The government alleged that the seventeen firms in the suit and the IBA monopolized underwriting and impeded competition in securities markets.¹⁰⁵³

Wall Street accepted the suit with a telling response. John Hancock of Lehman Brothers declared that the charges were "based on ignorance of how business is done" and was initiated for reasons, "that will not stand the light of day" in court. Hancock insisted that Wall Street was already so well regulated that the securities industry essentially operates "in a goldfish bowl." A spokesman for Glore, Forgan & Co. hearkened back to arguments advanced in the wake of the Great Depression, arguing that the state's stringent monitoring of the securities industry was creating a climate similar to "the dark days of the Early Thirties."¹⁰⁵⁴ What was most noteworthy is that investment bankers felt that courts would serve as a good venue in which to prove their innocence. A spokesperson for Kuhn, Loeb & Co. asserted that the suit was driven by "political reasons," and concluded that it would be "constructive to have the issues in this case decided by our courts" so that the case could "end the long-continued efforts to harass a

¹⁰⁵³ Carosso, 458–61, 466.

¹⁰⁵⁴ "Investment Bankers Lash Back At Charges in Government Action: Underwriting Business Most Competitive and Regulated in U.S., They Say--Some See Political Aim--War Service Recalled," *New York Times*, October 31, 1947.

business which plays so vital a part in our entire economy.”¹⁰⁵⁵ Murray Hanson, counsel to the IBA, framed his response in legalistic terms, stating that the charges constituted an “attack upon the members of the association for having individually and collectively exercised their constitutional rights of petition and free speech.”¹⁰⁵⁶

During the opening statements of the trial, it became clear that the defendants’ use of legalistic language was not just a rhetorical weapon. Arthur Dean, attorney for the defendants, clarified how the case differed from the Pujio, Pecora, and TNEC investigations. He stated that those committees were always able to “select their own documents and their own witnesses to support their own theory.” In these instances, Dean said, “counsel for those under investigation...have been limited,” while the bankers were “denied the right to object or question other witnesses.” Dean emphasized that this was the first case in which investment bankers were able to tell their side of the story.¹⁰⁵⁷

Well-resourced and well-financed, the defendants successfully dismantled the government’s case, providing statistical evidence of market competition and attacking the government’s evidence for being incomplete.¹⁰⁵⁸ On February 5, 1954, Judge Harold Medina ruled in favor of the firms and IBA, writing that he saw no evidence of combinations or conspiracies. He stated that the concentration in the investment banking industry was a “gradual, natural and normal” development. He wrote that it was produced by the, “Securities and Banking Acts...State Blue Sky laws...[and] SEC, ICC, FPC and

¹⁰⁵⁵ “Investment Bankers Lash Back.”

¹⁰⁵⁶ “Investment Banking Firms Deny Monopoly Charges; Suit Called ‘Utter Nonsense’ and ‘Fantastic,’” *Wall Street Journal*, October 31, 1947.

¹⁰⁵⁷ “Core of Trust Suit Put Under Attack: Bankers’ Lawyers Cite Cases to Disprove Argument That They Refused to Compete,” *New York Times*, December 12, 1950.

¹⁰⁵⁸ Carosso, *Investment Banking*, 460–89.

various state commissioners.” Medina concluded that the economic system that led to this concentration among banks was “the product of legislation by the Congress and administrative rulings by those functioning under the authority of Congress.”¹⁰⁵⁹

The case gave investment bankers an opportunity to defend themselves and decimate the state’s case in court. Investment banking historian Vincent Carosso’s detailed account of the case concludes that the “image of the investment banker that emerged” after the ruling “was entirely different one the one that had existed before the trial started.” The trial gave bankers the chance to convince the public that the reports of the Pujo, Pecora, and TNEC commissions were built on misconceptions. What began as one of the most important suits ever filed under the Sherman Antitrust Act ended in an outcome that “shattered the old myth of a Wall Street money monopoly.”¹⁰⁶⁰

V. Conclusion

By the 1950s, regulation was the state’s main response to corporate wrongdoing. Any potential in the earlier stages of the New Deal to create a new way of overseeing corporate crime was extinguished by bankers, exchange officials, industry executives, and legislators who appealed to older regulatory ideologies. By the 1940s and 1950s, shifts towards commercial Keynesianism ensured that the state not only viewed the prosecution of corporations as rarely appropriate, but also saw too much regulation as hostile to economic progress.

¹⁰⁵⁹ United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y 1953); Medina’s decision was praised as as “‘must’ supplementary reading” for anyone interested in the history of U.S. investment banking. See “The Medina Opinion,” *New York Times*, October 15, 1953.

¹⁰⁶⁰ Carosso, *Investment Banking*, 495.

The political development of the regulatory state during the New Deal and mid-century mirrors the story David Vogel tells about the latter twentieth century. During a period of economic crisis, legislators and the public were keen to listen to the demands of industry. At a moment where there was tremendous fear of over-burdening the businesses trying to recover from the Depression, the voices of the primary sectors of the economy were amplified in the political arena. Industry leaders used this opportunity to good effect, reframing regulatory ideology to have a specific appeal in the political and economic climate of the Great Depression.

Most importantly, the story of the New Deal illustrates how deeply entrenched regulatory ideology was in political institutions. Policymakers intent on pushing back on the status quo who had reputations for cracking down on corporate power—like Thurman Arnold, William O. Douglas, and Thomas Corcoran—were in positions of power in the 1930s and 1940s. Still, they remained wedded to the basic precepts of regulatory ideology that shaped the institutions they operated within. By the time political actors seeking real change secured real power, the regulatory approach to monitoring corporate wrongdoing had firmly established itself as a common-sense approach.

The regulatory state was designed within a specific set of ideological parameters that hardened over time. The regulatory state sends an ideological message that the corporate actor who commits a crime is tangibly different from the “common criminal,” and his or her actions therefore take on a unique and more favorable meaning. This system exists next to a criminal justice system that expresses the ideological message that the poor are pathologically dangerous. Beginning in the 1960s, these two institutional arrangements worked in tandem to promote the class-based brand of punitive politics that

drove mass incarceration by channeling street criminality into criminal justice institutions and corporate criminality into regulatory arrangements separated from the dynamics of carceral growth.

CHAPTER 8: THE MUTUAL CONSTITUTION OF CLASS AND CRIME IN AMERICAN POLITICAL DEVELOPMENT

“We are the good guys... We are on the side of the angels.”
- Jeffrey Skilling, former Enron CEO, in
the wake of Enron’s collapse (2002)¹⁰⁶¹

When Jeffrey Skilling told a Senate Committee shortly after Enron’s collapse that the company’s leadership consisted of “the good guys,” he made a familiar appeal. He defended his arguably criminal actions through reference to the good character and intentions of business leaders. But his statement also made an assumption—the assumption that everyone knew who the “bad guys” were.

It is thoroughly documented that the U.S. is the world’s leader in incarceration and has also historically struggled to prosecute corporate crime. This project has illustrated how these phenomena are related. Distinctive ideational constructions of street and corporate criminality have been entrenched into U.S. regulatory and carceral apparatuses, but both reflect and reinforce a common set of ideas about who the “bad guys,” or the real “criminals,” are.

The state’s approaches to monitoring street and corporate criminality are products of a shared set of political and ideological forces. In the late nineteenth century, regulatory and rehabilitative ideologies were built around a common conception of criminality that poor, low-income, and socially marginalized populations fit and corporate leaders did not. These ideologies have travelled over time and been embedded into carceral and regulatory institutions that have hardened in ways that legitimize this politically constructed idea of criminality. This dissertation has shown how this idea

¹⁰⁶¹ ABC News, “Enron’s Ex-CEO Skilling on Hot Seat.”

originated and, at formative junctures, was embedded into the state's criminal justice and regulatory machinery.

This project makes several contributions to diverse academic literatures that are reviewed in section I. Section II explores how this leads to reinterpretations of several literatures in these fields. This is followed in section III with a review of directions for future research before finishing in section IV with an account of its policy implications.

I. Overview of Primary Contributions

The findings presented in this dissertation make contributions to several literatures in political science and criminology. Particularly, the project speaks to research regarding ideas and institutions in American political development, the carceral state, corporate crime, the regulatory state, and business-government relations.

Ideas and Institutions

The rise of rehabilitative penology reoriented American criminal justice. An emphasis on the criminal rather than their crime, as well as assumptions about who the likely criminal was, were rooted into the criminal justice system and the regulatory state.

Rehabilitative and regulatory ideologies embedded practices and premises into institutions that have kept policymakers tied to a durable governing class ideology of punishment. This was clear in the mid-twentieth century. New Deal era structural theories of crime lost their emphasis on class and social relations as they were channeled through rehabilitative frameworks, defusing the potential for the ideas of Robert Merton, Clifford Shaw, and Henry McKay to link criminal justice reform to social and economic reform. While ideas can shape political development, politics can also modify ideas as they are repurposed and channeled through preexisting institutional and ideological settings.

At the same time, political power cannot operate in isolation of prevailing ideational patterns. Chapters three, five, and seven illustrate how historically, business interests have strategically framed their goals within predominant discourses about criminality. Politically savvy business leaders have remained aware of how the public perceived corporate power and regularly relied on prevailing discourses related to crime and economics to articulate their goals. This underscores how dominant ideational and ideological currents of a political climate can delimit and condition the range of policy outcomes that can be pursued, even for powerful political actors.

These conclusions comport with the spiral model of political development outlined by Rogers Smith. Conceptualizing political actors as operating within a context of preexisting institutions and ideas which they modify and use to form coalitions and pursue policy change, the model conceives of development as a cyclical process in which each cycle of development begins with a modified institutional and ideational context. In this framework, ideas, interests, and institutions are mutually constitutive forces that shape and are shaped by one another.¹⁰⁶² This project shows the spiral in operation, stressing how varied interests have used ideas about crime to drive political change and how institutional contexts have modified and altered ideas at different times.

The Carceral State and American Political Development

Political science research often emphasizes how law-and-order campaigns through U.S. history have stigmatized the poor and people of color as dangerous

¹⁰⁶² Smith, "Ideas and the Spiral of Politics."

criminals while building up the carceral state.¹⁰⁶³ With leading scholars suggesting that the rejection of rehabilitation in the 1960s was a trigger for mass incarceration, this research has overlooked the influence of rehabilitative ideology on political development.

Chapter two demonstrated how the rehabilitative ideal reoriented the focus of American criminal justice from punishing the crime to punishing the criminal. The degree of rehabilitative treatment or punishment meted out to an individual hinged on a subjective judgment of his or her rehabilitative potential. Individualizing punishment in this way meant that whether an individual personally fit prevailing constructs of criminality became more important than their actions in determining how the state should respond to their behavior. Reforms to indeterminate sentencing statutes, vagrancy laws, the southern Black Codes, and crackdowns on labor mobilization hinged on the class-skewed ideational construction of criminality attached to rehabilitative ideology.

Notions of natural criminality carried into schools of cultural, psychological, and eugenic crime theory in the early twentieth century. By the New Deal, social structural explanations of criminality were unable to dismantle rigid institutional frameworks and established practices that had been shaped by rehabilitative ideology and ideas of innate criminality. The deterministic understandings of crime articulated by Lombroso and Brockway had long been abandoned by penologists, policymakers, and scholars. But the policy innovations those men created, like the indeterminate sentence, were built around those ideas and had become firmly entrenched into America's system of criminal justice.

¹⁰⁶³ Scheingold, *The Politics of Street Crime*; Gottschalk, *The Prison and the Gallows*; Weaver, "Frontlash"; Joe Soss, Richard C. Fording, and Sanford F. Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (Chicago: University of Chicago Press, 2011); Murakawa, *The First Civil Right*.

Long before incarceration rates skyrocketed in the 1960s, the institutional and ideological scaffolding for mass incarceration had been laid. Rehabilitative ideology was essential to this process. Rehabilitative thought facilitated the passage of habitual offender laws, the institutional precursors to contemporary three-strikes laws. Modern guidelines schemes and mandatory sentencing statutes are often written to increase terms of incarceration for repeat offenders. While punishing recidivism seems to be common sense to Americans, the U.S. is unusual in how heavily it considers a person's criminal history in sentencing. This is a legacy America's emphasis on the rehabilitative ideal and individualization of punishment. Defenses of contemporary banishment laws even bear resemblances to late nineteenth and early twentieth century justifications for vagrancy law reform—the poor are prone to crime and their socioeconomic status is an indicator that they will likely commit serious crime even if they have not yet.

Assumptions about who can and cannot be rehabilitated and who is or is not likely to commit crime still color the way punishment is meted out in America. Ideas about innate criminality and predictive containment are central to the politics that have driven and maintained mass incarceration just as they drove brands of punitive politics earlier in the century. Even in the absence of the biological ideas that initially fueled rehabilitative ideology, key features of American criminal justice reflect the premises of rehabilitative ideology and carry class-skewed ideas about criminality into the twenty-first century.

The Regulatory State and American Crime Politics

The development of indeterminate sentencing, vagrancy laws and their contemporary variants, and other legal structures shaped by rehabilitative ideology show how people who fit prevailing ideational constructs of criminality have historically been

punished because of who they were in fear of what they might do. But in debates over regulatory law since the late nineteenth century, industry leaders who did not fit this idea have gone unpunished because of who they were in spite of what they actually did.

Literature on mass incarceration has drawn attention to the politics of street crime at the expense of ignoring varieties of crime not punished harshly by the state. While criminologists recognize that regulatory bodies rather than traditional law enforcement agencies monitor corporate crime, political scientists describe this network of agencies as the “regulatory state” without any discussion of its relation to crime politics.¹⁰⁶⁴ But the regulatory state is a relative of the criminal justice system and the political development of both institutions have been related processes. The regulatory state must be analyzed as a product of crime politics to fully appreciate its institutional design, purpose, and impact.

Even though it is under-addressed in political science scholarship, it is underwhelming to claim that the state channels street criminals into the criminal justice system and corporate criminals away from the prison. What is more important to understand is how and why a common politically constructed understanding of criminality has shaped both criminal justice and regulatory institutions. Chapters two and three illustrate how this common idea was sewn into rehabilitative and regulatory ideologies, which guided reforms to the criminal justice system and the initial political choices in the regulatory state’s design. Chapters four through seven demonstrate how carceral and regulatory frameworks have hardened over time in ways that legitimize the shared understanding of criminality embedded into both sets of institutions.

¹⁰⁶⁴ Skowronek, *Building a New American State*; Berk, *Alternative Tracks*; Bense, *The Political Economy of American Industrialization*; Berk, *Louis D. Brandeis*; DeCanio, *Democracy and the Origins of the American Regulatory State*.

Opportunities to adopt new political approaches to monitoring corporate crime have been constrained by these institutional and ideological factors. Chapter seven details how reforms to regulatory policy and the corporate criminal law in the New Deal were not driven by a new ideational pool, as was the case in the Gilded Age and Progressive Era. Rather, major interests from the financial sector reframed regulatory ideology to have particular appeal to policymakers during the Great Depression, convincing them that a familiar regulatory approach would be the safest way to monitor the economy during the crisis. Further, policymakers who would be likely advocates of criminal sanction for executives, including Thurman Arnold and William O. Douglas, operated within an institutional environment built on practices shaped by regulatory ideology that kept them committed to a regulatory rather than criminal approach.

Carceral and regulatory institutions operate together in ways that reinforce a message that only certain people count as criminal and deserve punishment. The poor and people of color can commit three property crimes and get locked up for life, whereas executives can perpetrate multiple frauds without sanction. This is a testament to the class biases inherent to the political construction of criminality. To reform the carceral state, the regulatory state, and the inequalities of U.S. crime policy, it is necessary to recognize how these institutions relate to one another and produce and legitimate those inequalities.

Corporate Crime and Deterrence

Politicians repeatedly rediscover the problem of corporate crime in the wake of financial crises, prompting them to reinvent the wheel and seek new solutions to the problem. But despite these recurrent cycles and political campaigns to combat corporate wrongdoing, the state has never cultivated the consistent power to deter corporate crime.

Existing research demonstrates that regulators have historically been inconsistent in how they exercise discretion in responding to corporate crime. Agencies have tended to rely on regulatory responses over criminal ones to monitor business. Sutherland first found this in 1949, when he discovered that only 20% of prosecutable actions by corporations were charged criminally.¹⁰⁶⁵ It is little different today. A 2011 *New York Times* piece found that while the SEC discovered 51 cases of securities fraud committed by 19 prominent firms between 1996 and 2011, the agency initiated zero prosecutions.¹⁰⁶⁶

Contemporary studies of corporate crime deterrence concur that the state's inconsistent enforcement of the corporate criminal law has rendered both regulation and prosecution weak deterrents, but this is not to suggest that corporate offenders should be subjected to the dynamics driving mass incarceration. Scholars in this literature generally endorse the responsive regulation model as a framework for guiding the state's response to corporate crime.¹⁰⁶⁷ Braithwaite and Ayres's responsive regulation model suggests that the state should monitor corporations through regulatory tools before escalating to punitive sanctions for serious or repeated infractions.¹⁰⁶⁸ This project complements their proposal. Braithwaite, Ayres, and contemporary analysts of corporate crime deterrence agree that regulation only has deterrent force if the criminal law constitutes a credible threat that firms will face should they fail to follow the law or modify their behavior.¹⁰⁶⁹ Overreliance on regulatory sanctions not only masks corporate criminality and reinforces

¹⁰⁶⁵ Sutherland, *White-Collar Crime*, 6–9, 22–35, 40–43.

¹⁰⁶⁶ Edward Wyatt, "Promises Made, and Remade, in S.E.C. Fraud Cuases," *The New York Times*, November 7, 2011, sec. Business Day.

¹⁰⁶⁷ Schell-Busey et al., "What Works?"; Braithwaite, "In Search of Donald Campbell"; Paternoster, "Deterring Corporate Crime."

¹⁰⁶⁸ Braithwaite and Ayres, *Responsive Regulation*.

¹⁰⁶⁹ Braithwaite and Ayres; Schell-Busey et al., "What Works?"

a class-biased conception of crime, but also it weakens the deterrent force of the criminal law and regulatory interventions.

This indicates that pursuing harsh sentences for every executive in every case of wrongdoing is not necessary for regulators to achieve deterrence. As Schell-Busey et al.'s 2016 research found, too much emphasis on any one type of sanction—regulatory, civil, or criminal—had poor deterrent power. A mix of sanctions applied consistently, as the responsive regulation model suggests, was the only enforcement pattern with any statistically significant deterrent value.¹⁰⁷⁰ What is necessary is not severe sentencing for corporate crimes, but clearer standards for when agencies plan to escalate to punitive sanctions accompanied by a willingness to follow through and adequate funding for agencies to pursue difficult cases. Specific guidelines on when to deploy regulatory sanctions or refer cases to the Justice Department and consistent enforcement of existing laws would create more certainty of criminal sanction. Empirical analysis indicates that making criminal prosecution a credible threat in this way would improve the deterrent force of both the criminal law and regulatory and administrative sanctions.

Business-Government Relations in America

Scholars of business-government relations in the U.S. have made claims ranging from sweeping assertions about the almost unchecked capacity of big business to constrain democratic institutions to nuanced claims about the specific ways in which businesses have used their political might to secure their policy preferences. Universal in

¹⁰⁷⁰ Schell-Busey et al., “What Works?”

this literature is an emphasis on how corporations have regularly exerted enormous political influence in American politics.¹⁰⁷¹

Research on the development of business-state relations in the U.S. often points to conflicting junctures as “the moment” when large corporations organized in a coordinated fashion. David Vogel emphasizes the 1960s as a period when business interests mobilized in their own defense while William Domhoff argues that the New Deal was undone by the late 1930s as corporations coalesced to facilitate a shift to pro-corporate governance.¹⁰⁷² However, most scholars agree that business was unorganized in the late nineteenth century and thus mounted an insufficient defense against the Populists. Unable to counter distaste for free markets through a coordinated response, a common conclusion is that business lost in the face of a push for an administrative state.¹⁰⁷³

This project illustrates that corporations were not on the run in the nineteenth century and how they managed to secure some of their most significant goals. This revises accounts from scholars like Steve Fraser who stress the rise of populist aversion to wealth inequality in the Gilded Age by illuminating how and why populist rhetoric failed to produce policy change.¹⁰⁷⁴ The idea that businesspeople were staunchly opposed to the regulation of free markets does not play out in the legislative history. Focusing on the role of crime politics in regulatory debates clarifies that railroads got what they wanted. They supported free markets in rhetoric but in practice preferred a minimal

¹⁰⁷¹ Lindblom, *Politics and Markets*; Bernstein, *Regulating Business*; Kolko, *Railroads and Regulation*; Carpenter and Moss, *Preventing Regulatory Capture*; Werner and Wilson, “Business Representation in Washington, DC”; Baumgartner et al., *Lobbying and Policy Change*.

¹⁰⁷² Vogel, *Fluctuating Fortunes*; Vogel, “Why Businessmen Distrust Their State”; Domhoff, *The Myth of Liberal Ascendancy*; Domhoff and Webber, *Class and Power in the New Deal*.

¹⁰⁷³ Fraser, *The Age of Acquiescence*; Vogel, “Why Businessmen Distrust Their State.”

¹⁰⁷⁴ Fraser, *The Age of Acquiescence*.

regulatory state as an alternative to statutory criminal prohibitions on industry practices. Even in the absence of business advocacy groups to coordinate large-scale mobilization of various corporations, individual businesses and certain prominent sectors of the economy were able to effectively take political action in their own interests.

As the political economy evolved, various industries become more or less dominant. Consequently, different coalitions of corporate powers carried and modified ideas associated with regulatory ideology and corporate criminality across time. While railroads promoted the regulatory approach in the late nineteenth century, financial interests carried regulatory ideology into Progressive Era policy debates. And in the New Deal and postwar years, it was Wall Street financiers and bankers who drew on familiar elements of the regulatory approach to pursue their policy goals.

Business's political power has never been absolute. Businesses often secure their favored policies, but their ability to do so is constrained within a window defined by the discursive and ideological contours of the political climate. Chapters three and five show that corporations were aware that they were popularly condemned and accordingly framed their goals in policy debates within language about crime and economics that had popular appeal. Chapter seven illustrates how business reframed regulatory ideology to have a unique significance during the Great Depression. Big businesses do not simply hold vetoes over public policy. Rather, successful corporate interests have tended to frame their political goals within prevailing political discourses and ideological currents.

The Mutual Constitution of Class and Crime

The role of ideas about crime in APD and associations between carceral and regulatory development shed light on the mutual constitution of class and crime in

America. Inequality, class difference, and crime have long been theorized as phenomena rooted in a shared set of personal individual pathologies. Exploring the nexus of criminology, political economy, and political development reveals how class and criminality have been mutually constitutive constructs in American politics.

The persistent power of rehabilitative ideology has embedded a naturalized understanding of criminality into class relations. Rehabilitative and regulatory ideologies both treat an individual's social or economic condition as a determinative factor in shaping the state's response to his or her behavior. Behaviors common among the urban poor have been criminalized to preemptively detain individuals deemed prone to crime, while executives have been viewed as inherently good in ways that imbue their arguably unethical actions with positive meanings. These distinctions have been presented as natural rather than socially and politically constructed, turning a class ideology of punishment into a common-sense approach to governance and social control.

Naturalizing class and crime produced a cycle that drove twentieth century political development. Chapters two and three show how rehabilitative and regulatory ideologies were embedded into institutions and chapters four through seven show this cycle at work. As carceral and regulatory frameworks expanded and complexified, the ideological constructions of criminality embedded into them were reproduced and legitimated by governing institutions. This project thus builds on critical criminological scholarship by showing how carceral and regulatory institutions are instilled with class-skewed understandings of criminality that they have reinforced over time.

The label of criminality has had broad political purchase beyond class. Terms like "incorrigible," "born criminal," "habitual offender," and similar variants have historically

been used as receptacles into which any undesirable population can be placed. The unity of individualism and determinism in rehabilitative ideology has legitimated multiple prejudices. The project thus highlights how varying ideologies of oppression, including racism, nativism, and classism, cannot be wholly understood in isolation in the context of American crime politics. Discourses that naturalize and link inequality and crime have legitimized a range of ascriptive ideologies. The class skew of the prison population can only be understood if we recognize how political constructions of class and criminality have been interrelated in American political development and how the carceral and regulatory states have internalized and reproduced these constructions.

II. Implications for Existing Literatures

This project prompts a rereading of extant research on a number of topics in law and American politics. First, it promotes a reinterpretation of literature on the carceral state's development. Second, it alters understandings of regulatory reform in the second half of the twentieth century. Third, the project challenges arguments that the rise of mass incarceration has been characterized by a full rejection of the rehabilitative ideal.

The Political Development of the Carceral State

Leading scholars often identify the 1960s as a trigger for the onset of mass incarceration, emphasizing conservatives' backlash to civil rights and the Great Society as a spark for carceral growth. They conclude that this led to a rejection of rehabilitation and the proliferation of punitive reforms.¹⁰⁷⁵ This project adds to the work of scholars

¹⁰⁷⁵ Flamm, *Law and Order*; Weaver, "Frontlash"; Tonry, *Sentencing Fragments*; Tonry, *Punishing Race*; Garland, *The Culture of Control*; Allen, *The Decline of the Rehabilitative Ideal*; Ruth and Reitz, *The Challenge of Crime*.

who challenge this narrative by pointing to developments in earlier periods that shaped the institutional and ideological context out of which the carceral state developed.¹⁰⁷⁶

Three-strikes laws, harsh sentencing for career criminals, and the promulgation of strict guidelines designed to predict a defendant's criminal tendencies and calculate their sentence were not entirely new in the second half of the twentieth century.¹⁰⁷⁷ These policies were connected to older ideas associated with rehabilitation. Risk assessments were fundamental to the rehabilitative ideal, as indeterminate sentences were designed to match an evaluation of a defendant's criminal tendencies and rehabilitative potential to an individualized sentence. Indeterminate sentencing was built on a dual logic to reform and release some inmates while indefinitely containing incorrigibles, and laws resembling three-strikes statutes were rationalized as extensions of rehabilitative logic as early as 1907. In the 1950s, California even experimented with a system resembling a risk-assessment guidelines model that predicted defendants' criminal tendencies through a multi-factor schematic based on an individual's personal traits and history. The state explicitly presented it as part of its commitment to the rehabilitative ideal.

This sheds new light on current crime politics. Contemporary risk assessment measures, such as guideline calculations of defendants' criminal history scores, reflect a punishment calculus that estimates an individual's criminal predilections. Harsh sentences for three-strikes offenders reflect the notion that recidivists are incurably

¹⁰⁷⁶ Muhammad, *The Condemnation of Blackness*; Murakawa, *The First Civil Right*; Gottschalk, *The Prison and the Gallows*.

¹⁰⁷⁷ Hagan, *Who Are the Criminals?*, 101–53 on “career criminals” and U.S. crime politics; for analyses of the rise of sentencing guidelines, see Stith and Cabranes, *Fear of Judging*; Tonry, *Sentencing Fragments*; Michael Tonry, *Sentencing Matters* (New York: Oxford University Press, 1996); for an analysis of three-strikes, see Zimring, Hawkins, and Kamin, *Punishment and Democracy*.

criminal and the only solution is incarceration. It is easy to take these policies for granted as common sense, but in global perspective, America is highly unusual in how heavily state and federal jurisdictions rely on criminal history as a factor in criminal sentencing.¹⁰⁷⁸ The popularity of such policies is a legacy of the rehabilitative ideal and its emphasis on tailoring punishment to the rehabilitative potential of each individual.

Evaluations of rehabilitative potential are subjective and often rest on considerations of an individual's socioeconomic background, behavioral history, and personal traits. With poverty, class inequality, and criminality all treated as linked phenomena, the poor and low-income classes have been disproportionately subjected to the rehabilitative ideal's punitive aspects geared towards predictive incapacitation. While vagrancy laws were used to punish the poor in the nineteenth and twentieth centuries, modern banishment laws reflect the same premise that punishing the poor for minor crimes will incapacitate the "incurable" before more they commit more serious crime.

This reveals how class-skewed ideologies about inherent criminality that undergirded punishment in the late nineteenth century still infect the justice system with naturalized understandings of criminality. Because white-collar offenders are seen as neither requiring rehabilitation nor carrying traits warranting enhanced sentences, they remain insulated from the punitive prong of rehabilitative ideology. The punishment calculus of rehabilitative ideology shapes the class profile of the prison population by reserving the labels of habitual criminal and three-strikes offender for lower class and low-income individuals. Although the criminal justice system today does not reflect bio-determinist understandings of crime to the extent that it did in the nineteenth century,

¹⁰⁷⁸ Tonry, *Sentencing Fragments*, 51–63.

central features of American criminal justice are relics of the rehabilitative ideal and have transmitted notions of innate criminality into the twenty-first century.

It is important to realize that these policies are not entirely new innovations of the carceral state, but rest on core facets of rehabilitative ideology. We can only make sense of the rise of mass incarceration if we recognize that the politics for this brand of punitiveness has been around for a long time. Late nineteenth century shifts towards rehabilitation pushed policy in both benevolent and punitive directions in ways that have had a durable impact on the development of American crime politics. The onset of mass incarceration was not marked by a rejection of rehabilitative logic, but a reframing of it emphasizing the ideal's punitive prong at the expense of downplaying its reformatory aspects. Pushing rehabilitation as a way to check carceral growth is likely to exacerbate punitive aspects of contemporary crime policy shaped by rehabilitative ideology.

Reassessing Consumerism and Regulatory Reform in the 1960s

Scholars often argue that the 1960s were a critical period for consumer protection. Criminologists suggest that Ralph Nader's *Unsafe at Any Speed*, Rachel Carson's *Silent Spring*, and the fallout Ford suffered after the Pinto recall provided impetus for reforming the corporate criminal code.¹⁰⁷⁹ Political scientists view these developments as reshaping the federal bureaucracy without any recognition of their relationship to crime politics. While some scholars argue that these constituted meaningful consumer reforms,

¹⁰⁷⁹ Foroohar, *Makers and Takers*, 75–87; Etzioni and Mitchell, “Corporate Crime”; Michael Woodiwiss, *Organized Crime and American Power: A History* (Toronto: University of Toronto Press, 2001), 325–33.

others suggest that corporate interests effectively ensured that agencies like OSHA and the EPA were vested with vague mandates leaving them vulnerable to capture.¹⁰⁸⁰

The failure of these literatures to contextualize these developments within a broad understanding of American crime politics is a significant flaw. This project's historical scope provides new insights into how these developments were related to and distinct from general currents in crime politics. Various coalitions have modified regulatory ideology in debates about crime depending on historical and economic circumstance, but by depicting corporate criminals as sympathetic figures, regulatory ideology limits the capacity to label those hurt by corporate actions as victims. In the 1960s, the nation's network of criminal justice institutions ensured that voices demanding criminal justice reform, including otherwise liberal groups like the victims' rights movement, were channeled into promoting harsh justice.¹⁰⁸¹ Literature on regulatory reform during the 1960s shows how the institutional structures constituting the regulatory state channeled voices demanding shackles on corporate crime into regulatory directions.

In the context of this project, these literatures take on a new significance. An institutional context designed to promote a class-skewed brand of punitive politics had begun to take shape well before the 1960s, with roots dating back to the regulatory state's origins and the rise of the large corporation in the nineteenth century. But public attitudes hostile to corporate power in the 1960s were separated from the punitive impulses driving

¹⁰⁸⁰ Vogel, *Fluctuating Fortunes*, especially chapters 3-5; Terry Moe, "The Politics of Bureaucratic Structure," in *Can the Government Govern?*, ed. John Chubb and Paul Peterson (Washington: Brookings, 1989), 267-329.

¹⁰⁸¹ Gottschalk, *The Prison and the Gallows*, chapter 4.

mass incarceration not only because those voices were channeled through institutions separated from the justice system. They were also separated from the victims' movement.

The public has historically been labeled consumers rather than victims in instances of corporate wrongdoing. Regulatory ideology has actually depicted corporations as the real victims of an ignorant public that frivolously demands prosecutions. Assumptions that consumers' policy preferences about the economy are based on uninformed beliefs and would unfairly hurt business have been central to regulatory ideology and have helped to limit the state's power to prosecute corporate crime. This project illustrates how and why demands to restrain corporate power in the 1960s were disconnected from the era's victims' movement that was directed towards criminal justice reform, leaving these voices directed into regulatory reform.

Rehabilitation, Political Discourse, and Criminology

Existing literature on mass incarceration mischaracterizes the role rehabilitative ideology has played in advancing the prison boom and driving punitive politics, but the rehabilitative ideal has also shaped the development of the discipline of criminology. As the Wickersham Commission noted, perhaps the single greatest contribution Lombroso made to criminology was "centering attention on the criminal rather than the crime committed."¹⁰⁸² The rehabilitative ideal brought two new analytic foci to the study of crime—an individualistic framework and deterministic assumptions about human behavior. The rehabilitative ideal served a project of individuation and was built on the assumption that certain people were innately predetermined to commit crime.

¹⁰⁸² U.S. National Commission on Law Observance and Enforcement, *Report on the Causes of Crime*, 13:19.

These assumptions about individualism and determinism shaped alternative variants of crime theory in the Progressive Era, including eugenic science and cultural theory. Even into the New Deal, emphases on the individual faults of offenders were difficult for crime theorists to dislodge in their attempts to focus on social and economic contributors to criminal behavior. Scholars have addressed how prevailing governing ideologies are related to simultaneous patterns in criminological research, but this project shows nuances in how these relationships operate.¹⁰⁸³ There is a connection between political discourse and crime theory, but criminology is in some sense its own path dependent phenomenon. There are moments where new ideas mark larger or smaller breaks from prevailing trends, but rehabilitative ideology and its focus on personal traits, determinism, and risk assessment has conditioned the development of criminological theory. The positivist bent to contemporary criminology, specifically its emphasis on identifying the causes of individual-level behavior, is partially a legacy of how Cesare Lombroso, Zebulon Brockway, and other architects of the rehabilitative ideal redirected criminology to focus on studying the individual criminal rather than the crime.

III. Future Research

There are several avenues for extensions of the project, including analyses of the ideational and ideological currents of latter twentieth century politics and the politics of street and corporate crime from the 1960s to today.

Ideas and Ideologies

¹⁰⁸³ Hagan, *Who Are the Criminals?*; Joachim Savelsberg, “Knowledge, Domination and Criminal Punishment,” *The American Journal of Sociology* 99, no. 4 (January 1994): 911–43.

Three ideologies have shaped political debates about inequality in the second half of the twentieth century—human capital theory (HCT), culture of poverty theory, and neoliberalism. HCT is the oldest, as it began to take shape in the 1930s and became prominent ideology in the 1960s.¹⁰⁸⁴ HCT posits that human resources, including skillsets and personality traits, are forms of capital that dictate the worth of labor one brings to the marketplace. Chicago school economists, notably Gary Becker, popularized HCT by using it to justify the inequalities of liberal capitalism.¹⁰⁸⁵ Culture of poverty theory's clearest basis was in Oscar Lewis's work, in which he described the lifestyles adopted in historically marginalized communities. While his initial theory mirrored a Marxist anomie theory, sociologists and policymakers warped his theory in the 1960s to mesh with delinquent subculture theory and focus on individual-level dynamics.

Ideological commitments to human capital and culture of poverty theories primed American politics for a transition to neoliberal governance. Neoliberalism is an ideological framework in which market schemas are used to rationalize all aspects of human life. Logics of market choice and competition become organizing principles for all public policy. Although neoliberalism is philosophically committed to less government, this does not always manifest in neoliberal policy, which often repurposes the state to impose market dynamics into areas of life in which markets do not exist. Neoliberalism became particularly dominant in the 1980s after the collapse of the New Deal order.¹⁰⁸⁶

¹⁰⁸⁴ Breen, "Capitalizing Labor," 68–70.

¹⁰⁸⁵ Gary Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (New York: Columbia University Press, 1964); Gary Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1965).

¹⁰⁸⁶ See Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Cambridge: MIT Press, 2015), for a good overview of neoliberalism's development; for other strong analyses of neoliberalism, see Wendy Larner, "Neo-Liberalism: Policy, Ideology, and Governmentality," *Studies*

Prevailing governing ideologies are linked to patterns in criminological research, so the current revival of bio-criminology should be considered in conjunction with the consolidation of neoliberalism.¹⁰⁸⁷ Research over the past twenty years has focused on psychophysiology, neurology, and genetics in explaining crime while endorsing policies similar to the eugenic ones advocated by nineteenth century scholars.¹⁰⁸⁸ The implications this project has for the revival bio-criminology will be discussed in a latter section.

Neoliberal politics has been especially favorable to aspects of regulatory ideology.¹⁰⁸⁹ Many scholars point to the post-1980s financialization of the economy as a trigger for an uptick in corporate criminality.¹⁰⁹⁰ These scholars agree that financialization has glorified the pursuit of profits to the extent that illicit tactics, corporate rapacity, and market manipulation are viewed as laudable actions done in the name of growth.¹⁰⁹¹ It seems counterintuitive that neoliberalism would accept any aspect of regulatory ideology given its promotion of regulatory rollback. But while the idea that corporate lawbreakers are properly understood as upright and enterprising as opposed to “criminal” has been at the heart of regulatory ideology for a century, the neoliberal

in *Political Economy* 63 (2000): 5–25; David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005).

¹⁰⁸⁷ For contemporary analyses of bio-criminology, see Christopher Patrick, “Psychophysiological Correlates of Aggression and Violence: An Integrative Review,” *Philosophical Transactions of the Royal Society* 363 (2008): 2543–55; Adrian Raine, *The Anatomy of Violence: The Biological Roots of Crime* (New York: Pantheon, 2013); Olivia Choy et al., “Explaining the Gender Gap in Crime: The Role of Heart Rate,” *Criminology* 55, no. 2 (2017): 465–87.

¹⁰⁸⁸ Raine, *The Anatomy of Violence*, 249–50, 341–51, 360–64.

¹⁰⁸⁹ On the neoliberal rollback of regulations, see Barak, *Theft of a Nation*; Tillman, Pontell, and Black, *Financial Crime and Crises*; Taibbi, *The Divide*; Hagan, *Who Are the Criminals?*

¹⁰⁹⁰ Krippner, “The Financialization of the American Economy,” 174.

¹⁰⁹¹ Foroohar, *Makers and Takers*; Tillman, Pontell, and Black, *Financial Crime and Crises*.

moment and celebration of market ideologies has amplified these biases as part of the process of financialization.

Rehabilitative ideology also reinforces neoliberal political imperatives by locating the causes of behavior and inequality in individuals. This masks the social and economic factors that drive inequality and emphasizes personal responsibility as the solution. Along with biological explanations of crime and inequality, rehabilitative ideology legitimizes the neoliberal notion that social assistance is a misguided attempt to aid people who are irredeemable. Together, bio-criminology and rehabilitative ideology justify the neoliberal agenda of welfare retrenchment and carceral expansion, which produces disadvantaged neighborhood loaded with obstacles to upward social and economic mobility.

A sizable literature explores how mass incarceration is linked to neoliberalism.¹⁰⁹² However, future extensions of this project can illustrate how regulatory reform, rehabilitative ideology, and bio-criminology are connected to these shifts and how durable class ideologies of punishment have carried into twenty-first century politics.

Trends in Street Crime

There are many ways in which culture of poverty, human capital, and neoliberal ideologies related to rehabilitative ideology and developments in the politics of street crime from the 1960s to today. Liberal discourse revived the rehabilitative ideal in the 1960s.¹⁰⁹³ Then in 1974, Robert Martinson published his famous article concluding that rehabilitative interventions had little to no effects on recidivism reduction, which

¹⁰⁹² Gottschalk, *Caught*; Soss, Fording, and Schram, *Disciplining the Poor*; Wacquant, *Punishing the Poor*; Flamm, *Law and Order*; Garland, *The Culture of Control*; Tonry, *Punishing Race*.

¹⁰⁹³ For instance, see U.S. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington: Government Printing Office, 1967), 297; Von Hirsch and Committee for the Study of Incarceration, *Doing Justice*.

conservatives interpreted as proof that “nothing works” to rehabilitate inmates.¹⁰⁹⁴ Conventional narratives often end here, concluding that this constituted an abandonment of rehabilitation in favor of a harsh ethic of punishment. Ostensibly this seems true, as scholars of the 1970s defended deterrence and retributivist penologies while rejecting the utility of rehabilitation, pushing scholars and politicians on the left like Marvin Frankel and Ted Kennedy to join the chorus rejecting the rehabilitative ideal.¹⁰⁹⁵ The bipartisan breadth of this alliance made being anti-rehabilitation the only viable political position.

While this moment constituted a reframing of criminality, this reactionary politics did not wholly reject the rehabilitative ideal. Many of the reforms associated with the carceral state’s rise drew on logic only found in rehabilitative ideology. Rehabilitation was not necessarily the foremost cause of mass incarceration, but it has been overlooked as a contributor to it. In spite of policymakers’ rejections of rehabilitation, sentencing guidelines and three-strikes laws were built on core aspects of rehabilitative ideology.

The federal guidelines, published in 1987, quantified offense seriousness and criminal history into scores which were used to calculate ranges within which judges could sentence defendants.¹⁰⁹⁶ The House and Senate insisted that rehabilitation was an inappropriate rationale for incarceration, but that rehabilitation should still be a goal of

¹⁰⁹⁴ Robert Martinson, “What Works?-Questions and Answers about Prison Reform,” *The Public Interest* 35 (1974): 22–54; Ruth and Reitz, *The Challenge of Crime*, 83–84.

¹⁰⁹⁵ James Wilson, *Thinking About Crime* (New York: Basic Books, 1975); Von Hirsch and Committee for the Study of Incarceration, *Doing Justice*, 6; Marvin Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1973); Charles E. Silberman, *Criminal Violence, Criminal Justice* (New York: Random House, 1978).

¹⁰⁹⁶ States constructed similar systems as they abolished parole and cut early release incentives. See Ruth and Reitz, *The Challenge of Crime*, 474–75.

the justice system under the guidelines.¹⁰⁹⁷ As a result, “Rehabilitating the offender” was listed among the primary goals of the justice system in the 1987 guidelines manual published by the U.S. Sentencing Commission, which Congress charged with writing the guidelines.¹⁰⁹⁸ The logical reciprocal to rehabilitation—the predictive incapacitation of incorrigibles—thus manifested in the guidelines regime. The Commission defended scoring criminal histories by arguing that, “Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.”¹⁰⁹⁹ Judges were also allowed to consider non-carceral sentences issued for rehabilitative purposes as well as uncharged, dismissed, or acquitted conduct in determining a defendant’s rehabilitative potential.¹¹⁰⁰

The Armed Career Criminal Act of 1982 similarly used behavioral histories to judge a defendant’s rehabilitative potential. The law instituted extended sentences for those convicted of multiple firearm offenses. The Senate Judiciary Committee endorsed the law by stating that the armed career criminal was “effectively beyond rehabilitation,” rendering it “necessary to terminate his career by lengthy incarceration.”¹¹⁰¹

States witnessed similar developments. For instance, California was a national

¹⁰⁹⁷ U.S. Senate Committee on the Judiciary, *Sentencing Reform Act of 1983: Report of the Committee on the Judiciary on S. 688* (Washington: Government Printing Office, 1983), 73; U.S. House Committee on the Judiciary, *Sentencing Revision Act of 1984, Report of the Committee on the Judiciary* (Washington: Government Printing Office, 1984), 40.

¹⁰⁹⁸ U.S. Sentencing Commission, *United States Sentencing Commission Guidelines Manual* (1987, n.d.), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Guidelines_Manual_Full.pdf, part 1, p. 1. The other listed purposes were deterrence, incapacitation, and justice.

¹⁰⁹⁹ U.S. Sentencing Commission part 4, p. 1.

¹¹⁰⁰ On diversionary dispositions, see James Shapiro, “Comity of Errors: When Federal Sentencing Guidelines Ignore State Law Decriminalizing Sentences,” *Akron Law Review* 41, no. 1 (2008): 231–47; See *US v. Watts*, 519 U.S. 148 (1997) which upheld the relevant conduct provision regarding uncharged and acquitted conduct through reference to the 1949 case *Williams v. NY*, which upheld indeterminate sentencing and endorsed rehabilitative logic .

¹¹⁰¹ U.S. Senate Committee on the Judiciary, *Report to Accompany S. 1688 Armed Career Criminal Act of 1982* (Washington: Government Printing Office, 1982), 14, 66–67, 76, 81.

leader in promoting three-strikes laws in the 1990s.¹¹⁰² Two years after the state passed its three-strikes law in 1994, the state Department of Corrections did a retrospective analysis of the law and linked it to rehabilitative ideology. The report quoted Los Angeles Deputy DA Matt Hardy as saying that the law targeted individuals “who are never going to change.” DA Bill Gravin even defended the sentencing of Jerry Williams, who stole a slice of pizza and got 25-to-life due to his previous convictions, by arguing that he “has been given numerous opportunities by the court to change his criminal behavior.”¹¹⁰³

Another example of the dual prongs of the rehabilitative ideal at work was in the treatment of juveniles in the 1990s. While the super-predator scare drove harsh justice for youths deemed irredeemable, these reforms were coupled with increases in community-based services to reform juveniles. These practices were seen as complementary, highlighting how the contradictory logic of the rehabilitative ideal persisted over time.¹¹⁰⁴

The history of the eugenics movement indicates that the current renaissance of bio-criminology could augment the punitive aspects of rehabilitative ideology. This is especially clear in Adrian Raine’s 2013 book *The Anatomy of Violence*. Raine is perhaps the leading scholar of bio-criminology today. His book was so well-received that it was adapted into a pilot for a CBS series about tracking criminals through biological analysis, highlighting how biological constructs of criminality can seep into popular discourse.¹¹⁰⁵

¹¹⁰² Zimring, Hawkins, and Kamin, *Punishment and Democracy*.

¹¹⁰³ California Department of Corrections, *Three Strikes, You’re Out: Two Years Later* (California Department of Corrections: Office of Planning and Research, 1996), 6–7.

¹¹⁰⁴ Sarah Cate, “The Politics of Prison Reform: Juvenile Justice Policy in Texas, California and Pennsylvania” (Doctoral Dissertation, University of Pennsylvania, 2016), 204–12.

¹¹⁰⁵ Harrison Fallon, “Penn Professor’s Book Inspires TV Show: Raine’s Book Will Be Adapted for a Pilot Production on CBS,” *The Daily Pennsylvanian*, March 25, 2013, <http://www.thedp.com/article/2013/03/penn-professors-book-inspires-tv-show>.

In the book, Raine claims to uncover connections between violent crime and neurological factors.¹¹⁰⁶ He endorses mandatory treatment and incarceration for at-risk adults and juveniles, thus mirroring the duality of rehabilitative ideology, while describing crime as a “biosocial” phenomenon driven by biological and social forces. While some of the social factors he discusses warrant attention, like lead exposure, others disregard how crime is tied to economic relations. For example, he emphasizes how unstable homes and low parental supervision are correlated with juvenile delinquency, leading him to defend the eugenic proposal of requiring people to apply for state licenses to have children.¹¹⁰⁷ This evades an analysis of what causes parental absenteeism, neglecting that the poor often work multiple jobs, suffer from higher death rates, and disproportionately face incarceration. By neglecting these details, Raine overlooks how social disadvantage is produced and how his solutions would exacerbate those problems by ostracizing people from their families and communities.¹¹⁰⁸

Bio-criminology and eugenics are not isolated to academia. At least nine states have legislation permitting the use of chemical or surgical castrations for sex offenders.¹¹⁰⁹ Since 2015, state authorities in California and Tennessee were found to have been illegally coercing inmates and defendants into sterilizations.¹¹¹⁰ Non-profits

¹¹⁰⁶ Raine also breathes life into the discredited XYY theory, the idea that males with an extra Y chromosome are more prone to violent crime, and that individuals with lower heart rates are prone to crime because risky behavior gives them a sense of arousal.

¹¹⁰⁷ Raine, *The Anatomy of Violence*, 249–50, 260–64.

¹¹⁰⁸ Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006) shows that incarceration decreases one’s potential to secure work and maintain healthy personal relationships.

¹¹⁰⁹ Gottschalk, *Caught*, 373. While presented as a voluntary condition of release, they are coercive in practice.

¹¹¹⁰ Hunter Schwartz, “Following Reports of Forced Sterilization of Female Prison Inmates, California Passes Ban,” *Washington Post*, September 26, 2014, [https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/following-reports-of-forced-](https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/following-reports-of-forced-sterilization-of-female-prison-inmates-california-passes-ban/)

like the MacArthur Foundation also keep bio-deterministic understandings of criminality alive in seemingly progressive circles by utilizing research about brain development to promote juvenile justice reform. While seeking to minimize sanctions for juveniles, this strategy inadvertently reinforces deterministic understandings of juvenile criminality.¹¹¹¹

Analyses of the Armed Career Criminal Act of 1982, Sentencing Reform Act of 1984, state three-strikes laws, and the revival of eugenic politics are potential routes for assessing how the rise of mass incarceration has been linked to rehabilitative ideology. Exploration of how organizations like the MacArthur and Heritage Foundations rely on bio-criminology could provide insights into the networks that keep these ideas politically relevant in progressive and conservative circles. Additional research could also study how courts are increasingly relying on risk assessment scores calculated by private companies to make parole, probation, and sentencing decisions in individual cases.¹¹¹²

Trends in Corporate Crime

There are numerous directions for future analysis of corporate crime politics from the 1960s to today. A good starting point would be David Vogel's research, which shows how the wave of regulatory laws passed in the 1960s constituted a form of entrepreneurial politics driven by savvy lawmakers who realized that the public would

sterilization-of-female-prison-inmates-california-passes-ban/; Associated Press, "Nashville Assistant DA Fired amid Reports of Sterilization in Plea Deals," *CBS News*, April 1, 2015, <http://www.cbsnews.com/news/nashville-prosecutor-fired-amid-reports-of-sterilization-in-plea-deals/>; in 2017, one Tennessee county authorized a program in which inmates could undergo elective birth control treatments to reduce their sentences. See Amanda Jackson, "Tennessee County Inmates Offered Reduced Jail Time for Getting a Vasectomy," *CNN.Com*, July 20, 2017, <http://www.cnn.com/2017/07/20/us/white-county-inmate-vasectomy-trnd/index.html>.

¹¹¹¹ Cate, "The Politics of Prison Reform," 329–30.

¹¹¹² NPR.org, "The Hidden Discrimination In Criminal Risk-Assessment Scores," accessed June 19, 2018, <https://www.npr.org/2016/05/24/479349654/the-hidden-discrimination-in-criminal-risk-assessment-scores>.

support them once mobilized. He concludes that this spate of reforms were passed because of the economy's health, which made it hard for corporations to oppose regulations on the grounds that they could not afford them.¹¹¹³ Future research could examine the passage of the Financial Institutions Supervisory Act of 1966, which expanded the enforcement powers of federal banking agencies, to see if and how lawmakers politicized regulatory ideology during these debates.

Future analysis would also have to examine the 1980s, when both the left and right accepted financialization as a business unto itself rather than a catalyst for other businesses to grow. Rana Foroohar has shown how Reagan-era reforms led businesses to prioritize risky financial ventures over investments in product quality and job creation. For instance, she discusses the SEC's 1982 legalization of share buybacks, through which companies can repurchase shares of their own stock, which were previously considered an illegal form of market manipulation since they gave firms a way to inflate their share prices.¹¹¹⁴ This is just one way in which financialization prompted firms to focus on increasing share value over growing their companies by decriminalizing market activities in the name of the neoliberal "bigger is better" and "markets know best" ethos.

There are numerous examples of how the political shifts of the 1980s through 2000s unleashed America's financial institutions and resulted in crises. The Savings and Loan Crisis of the 1980s was precipitated by the passage of the Garn-St. Germain Depository Institutions Act of 1982, which allowed operators of thrift institutions to

¹¹¹³ Vogel, *Fluctuating Fortunes*, 38–42, chapter three.

¹¹¹⁴ Foroohar, *Makers and Takers*, 52, 125–28.

profit while shielding themselves from detection for undercapitalizing bad loans.¹¹¹⁵ The Financial Institutions Reform, Recovery, and Enforcement Act was passed in 1989 as an attempt to correct this problem.¹¹¹⁶ The story of energy-trading company Enron in the 2000s followed a different trajectory. After accounting firm Arthur Andersen helped Enron perpetrate a massive accounting fraud, Andersen was criminally convicted and received 5 years of probation, a \$500,000 fine, stripped of its licenses, and forbidden from doing accounting for public companies. The conviction was reversed on appeal, but the prosecution destroyed Andersen and the reversal hurt the DOJ's reputation. After the Sarbanes-Oxley Act was passed in 2002 to monitor corporate accounting and disclosure, federal prosecutors were reluctant to pursue corporate prosecutions out of fear that they could face backlashes for destroying firms and then having those convictions reversed.¹¹¹⁷

Brandon Garrett has shown how after Andersen, prosecutors began using deferred prosecution agreements in cases of corporate wrongdoing. DPAs, which were designed for juveniles in the 1930s, have been adapted for corporations in the modern era. They allow firms to avoid convictions by mandating reforms to internal compliance systems and instituting fines far smaller than the damage caused without requiring admissions of guilt. They enable prosecutors to score public relations victories by imposing fines that appear massive without alienating corporate interests and are issued regularly to repeat

¹¹¹⁵ Hagan, *Who Are the Criminals?*, 170–80.

¹¹¹⁶ Tillman, Pontell, and Black, *Financial Crime and Crises*, 1.

¹¹¹⁷ Garrett, *Too Big to Jail*, 25–41; Tillman, Pontell, and Black, *Financial Crime and Crises*, 1–2.

offending corporations.¹¹¹⁸ A close look at DPAs, which are essentially rehabilitative opportunities for corporate bodies, would be a promising direction for future research.

The familiar story of the S&L and Enron scandals also played out in the lead up to the Great Recession. Many experts agree that the repeal of Glass-Steagall laid crucial groundwork for the 2008 collapse.¹¹¹⁹ The Financial Crisis Inquiry Commission did not shy from condemnatory language in studying the collapse, using the word “fraud” over 150 times in its final report to describe what caused the crisis. But in John Hagan’s words, the Commission’s influence was “uninspiring.”¹¹²⁰ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 it helped create left the “tough work” of writing regulations to the Federal Reserve and Securities and Exchange Commission, where the bill was kept in a crippled state. As of 2013 less than half of the two hundred regulations necessary to enforce it were in place. Firms hired armies of lobbyists and regulatory lawyers to delay its implementation and “defang” the law of its bite.¹¹²¹

How these debates about regulatory reform from the 1960s through today reflected tenets of regulatory ideology would be the focus of future analysis. An analysis of Justice Department policy would also be promising, particularly exploring the rise of “too big to fail” politics as exemplified in Eric Holder’s 1999 Justice Department memo declaring that prosecutors should consider the collateral consequences of corporate

¹¹¹⁸ Garrett, *Too Big to Jail*, 5–7, 13, 35, 68–70, 165–66, 172–92.

¹¹¹⁹ Hagan, *Who Are the Criminals?*, 176–87, 206; Rakoff, “The Financial Crisis”; Taibbi, *The Divide*, 350; Wilson, Graham and Wyn Grant, “Introduction,” in *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation*, ed. Wyn Grant and Graham Wilson (New York: Oxford University Press, 2012), 7.

¹¹²⁰ Hagan, *Who Are the Criminals?*, 180.

¹¹²¹ Gary Rivlin, “How Wall Street Defanged Dodd-Frank,” *The Nation*, May 20, 2013, <https://www.thenation.com/article/how-wall-street-defanged-dodd-frank/>; Wyn Grant et al., “Preface to the Paperback Edition,” in *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation* (New York: Oxford University Press, 2012), viii–ix.

convictions. Realistically only a small sample of these topics could be subjected to meaningful scrutiny, but all are promising avenues for analysis.

IV. Policy Implications

A number of policy implications follow from this work. They regard the revival of the rehabilitative ideal, the resurgence of bio-criminology, how to reform the regulatory state, and ways to reform the criminal justice system.

The Rehabilitative Ideal and American Crime Politics

In recent years, numerous policymakers have expressed support for a return to the rehabilitative ideal. Barack Obama, Hillary Clinton, and Bernie Sanders have all spoken of rehabilitation as an alternative to mass incarceration.¹¹²² This is a perspective shared by those on the right, including conservative operative Grover Norquist.¹¹²³ Georgia's Republican Governor Nathan Deal has even received praise as a national leader in criminal justice reform for investing \$17 million into measures partially designed to rehabilitate low-risk non-violent offenders.¹¹²⁴ And public opinion research indicates that the public in deep-red Texas supports rehabilitative measures for those behind bars.¹¹²⁵

¹¹²² Hillary for America, "Criminal Justice Reform," The Office of Hillary Rodham Clinton, n.d., <https://www.hillaryclinton.com/issues/criminal-justice-reform/>; Friends of Bernie Sanders, "Sanders: Our Criminal Justice System Is Broken, Ending Private Prisons Is a Good First Step Forward," Bernie Sanders, n.d., <https://berniesanders.com/press-release/ending-private-prisons/>; The White House, Office of the Press Secretary, "Presidential Memorandum -- Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals" (Memorandum for the Heads of Executive Departments and Agencies, April 29, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/29/presidential-memorandum-promoting-rehabilitation-and-reintegration>.

¹¹²³ Grover Norquist, "Conservative Principles and Prison," *National Review*, February 10, 2011, <http://www.nationalreview.com/article/259263/conservative-principles-and-prison-grover-norquist>.

¹¹²⁴ Naomi Shavin, "A Republican Governor Is Leading the Country's Most Successful Prison Reform," *New Republic*, 2015, <https://newrepublic.com/article/121425/gop-governor-nathan-deal-leading-us-prison-reform>.

¹¹²⁵ Angela J. Thielo et al., "Rehabilitation in a Red State," *Criminology & Public Policy* 15, no. 1 (February 1, 2016): 137–70.

There is good reason to be cautious about a revival of the rehabilitative ideal. The resurgence of rehabilitation has historically been coupled to bursts of punitive policies framed as necessary complements to rehabilitative measures. It is thus unsurprising to hear President Trump state that “We will be very tough on crime, but we will provide a ladder of opportunity to the future,” in the same breath while endorsing policies to rehabilitate federal inmates.¹¹²⁶ Research has expressed surprise that public support for rehabilitation coexists alongside public support for punitiveness, but these are not mutually exclusive positions.¹¹²⁷ The theoretical structure of rehabilitative ideology entails support for both. Rehabilitative measures have been implemented next to harsh justice practices in the past and there is no reason to think they would not now.

Social and economic inequalities have long shaped criminal justice outcomes in the U.S., but scholars have not recognized how the rehabilitative ideal has naturalized rather than combatted those inequalities. It has promoted a project of class control by rationalizing the economic condition and criminal behavior of the poor as natural phenomena rooted in unfixable individual defects. By conceptualizing criminality as a function of personal faults among the poor that can only be treated through micro-interventions, rehabilitative ideology has hardened class distinctions and legitimized punishment over social assistance as the optimal way to address inequality and crime.

¹¹²⁶ Ledyard King, “Trump Administration Wants to Help Prisoners Re-Enter Society Sooner, If They Deserve It,” *USA Today*, February 27, 2018, <https://www.usatoday.com/story/news/politics/2018/02/27/trump-administration-wants-help-prisoners-re-enter-society-but-wont-reduce-include-sentencing-reform/378922002/>.

¹¹²⁷ Francis T. Cullen, Bonnie Fisher, and Brandon Applegate, “Public Opinion about Punishment and Corrections,” in *Crime and Justice: A Review of Research*, ed. Michael Tonry, vol. 27 (Chicago: University of Chicago Press, 2000), 1–79.

This is not to say that rehabilitative interventions have no value. In-prison educational opportunities, vocational training, and good behavior incentives have intrinsic worth. To promote reentry, it is reasonable to make incarceration as much like life in society as possible. But reformers must recognize the dangers inherent in rehabilitative ideology. Now as in years past, rehabilitative discourse obscures the structural, social, and economic forces that contribute to what gets labeled and punished as crime by promoting an emphasis on personal responsibility and self-improvement. This masks how the state's abandonment of low-income communities contributes to crime. A focus on correcting individuals can lead to complacency in demanding structural reform and ultimately feed the politics of law-and-order advocates.

It is problematic when the effectiveness of rehabilitative measures is measured by their impact on recidivism reduction. A serious commitment to lowering crime rates must recognize that criminality is not just a function of personal agency that can be corrected by reforming individuals, but a product of social and economic forces. Meaningful crime reduction also requires political economic reform, like adequately funding public education so that inmates do not need to receive their GED during a prison term. Public investment in neglected communities should be used to create jobs so that inmates reentering society can actually use the educational or vocational training they receive behind bars. Bulking up public housing and guaranteeing ex-felons access to it would guarantee that reentering offenders would not sleep on the street while looking for work.

Rehabilitation is a political form of punishment that allows the state to grant certain individuals social and political equality over others while limiting the weapons in the state's crime reduction toolkit to micro-interventions. It absolves the state of any

responsibility for pursuing comprehensive reforms that could make a deep and tangible difference in former inmates' lives. Rehabilitative discourse today is likely to generate the same dual tracks of policy we have seen in the past. Whatever rehabilitative measures may be implemented will be reserved for inmates only "if they deserve it."¹¹²⁸ Those who do not will be subjected to severe sanctions that will be presented as complementary to rehabilitative programs. Without a politics aiming to reform the deeper social and economic inequities that shape U.S. crime policy, the rehabilitative ideal will again promote a project of individuation designed as both remedial and repressive.

The Resurgence of Bio-Criminology

Advocates of rehabilitative reform should be cautious at a moment when genetics research is growing in influence. A growing body of bio-criminology linking crime to congenital biological and genetic factors presents its policy implications as both punitive and therapeutic and thus reinforces the abusive facets of rehabilitative ideology. Rehabilitation's relationship to eugenics suggests that a joint revival of bio-criminology and rehabilitative ideology could lead to more support for the eugenic practices that have already been implemented in many states.

Rehabilitative ideology's class-skewed philosophy has long been disguised by scientific clothing. Repeatedly, theoreticians of crime have explained the "rehabilitative ideal" and its reciprocal punitive aspects as parts of the same whole by relying on disputable empirics infected with a class ideology. From Brockway through Raine, biological research has provided "proof" that the Anglo-Saxon upper class is different,

¹¹²⁸ King, "Trump Administration Wants to Help Prisoners Re-Enter Society Sooner, If They Deserve It."

and largely superior, to others. This has provided an empirical basis for rationalizing the criminality and economic condition of undesirables as natural while turning the label of criminality into a catchall category into which any population deemed offensive to bourgeois sensibilities can be contained. These accounts have hardened the link between a facially progressive rehabilitative discourse and the criminal justice system's class biases by masquerading long-standing prejudices as facts.

This underscores connections between race and the development of American criminal justice. Much like nineteenth race scientists sought to hierarchically organize humanity based on racial traits, contemporary bio-criminologists argue that criminality is a naturally occurring trait in certain people. But labels of natural criminality have evolved and been populated with different "inferior" racial categories over time. Blacks, Italians, Irish, and other immigrants were treated as natural criminals in the nineteenth century, and scholars like Raine populate the category with undesirables today by hiding their ideological commitments underneath technical language. The science of race and science of crime have long worked in tandem to justify control of marginalized populations, and racial categories have served to distinguish gradations of inferiority and criminality.

The rehabilitative ideal is built on these brands of scientific theory reflecting a class-biased and racially skewed understanding of who counts as a "criminal." This has had counterintuitive implications for offenders who do not require rehabilitation, including corporate defendants. Since executives do not fit the image of the criminal type requiring rehabilitation or control, they cannot be labeled incorrigible. They do not require compulsion to work, sterilization to prevent future criminality, or enhanced punishments for repeat offending to learn. This is because their behavior has consistently

been attributed to structural forces rather than personal traits.

Corporate criminals are hard to prosecute for many reasons, but their exclusion from rehabilitative discourse and bio-criminological research has worked to their advantage by insulating them from labels of incorrigibility. The few modern bio-criminological projects that do study white-collar criminals reinforce favorable perceptions. While not intended to present white-collar criminals in a flattering light, a 2011 study comparing the brain functionality of white-collar to street criminals concluded that “white-collar criminals have better executive functioning, enhanced information processing, and structural brain superiorities” than street offenders, creating a sharp contrast from the notion of pathological deviance associated with crime.¹¹²⁹

It is a testament to the class biases of our prevailing political understanding of criminality that poor offenders can commit three minor offenses and get incarcerated for life, whereas wealthy ones can commit multiple far more damaging offenses without ever being sanctioned. The class ideology of the rehabilitative ideal has ensured that labels like “habitual criminal” and “three-strikes” offender have been reserved for lower class offenders. The biological study of crime has ensured that the state’s most severe sanctions are only directed at the poor and low-income classes.

*What the Regulatory State Can Learn from the Criminal Justice System:
How to Punish Corporate Crime Without Contributing to Mass Incarceration*

There are two trends in criminological research within which this project’s implications about regulatory ideology should be assessed. First is the literature on corporate crime deterrence. Academics have long debated whether the corporate criminal

¹¹²⁹ Adrian Raine et al., “Increased Executive Functioning, Attention, and Cortical Thickness in White-Collar Criminals,” *Human Brain Mapping* 33, no. 12 (2012): 2932–40.

law is such a weak deterrent that regulation should be prioritized over prosecution or whether the criminal law, when used effectively, can deter corporate law breaking.¹¹³⁰

Those who endorse Braithwaite and Ayres's model of responsive regulation contend that the consistent use of criminal sanction could deter corporate crime and enhance the efficacy of regulatory measures by backing them with credible threats of prosecution.¹¹³¹

Again, this project complements the responsive regulation model by emphasizing the need for consistency and clarity in agency responses to corporate crime. It also notes that empirical deterrence studies suggest that a consistent mix of responses based on the sanctions pyramid is the best way to promote deterrence.¹¹³² These analyses indicate that optimal deterrent effects follow the use of a healthy mix of sanctions, including the consistent and regular use of prosecution by regulators, rather than an overreliance on prosecution or the meting out of a few wildly severe sentences.

This connects to a different literature consisting of accounts from academics, journalists, and other observers who offer stinging critiques of Wall Street and demand to subject white-collar criminals to lengthy prison terms.¹¹³³ But visceral outrage at the likes of Martin Shkreli and Bernie Madoff fuels a rhetoric that can, if unchecked, be counterproductive. It is true that deploying more criminal sanctions in response to

¹¹³⁰ For various perspectives in this debate, see Stone, *Where the Law Ends*; Hawkins, "Compliance Strategy"; Croall, *Understanding White Collar Crime*, 133; William Chambliss, "Types of Deviance and the Effectiveness and Legal Sanctions," *Wisconsin Law Review* 43, no. 4 (Summer 1967): 703–14; John Braithwaite and Gilbert Geis, "On Theory and Action for Corporate Crime Control," *Crime and Delinquency* 28, no. 2 (1982): 292–314.

¹¹³¹ Braithwaite and Ayres, *Responsive Regulation* chapter 2; Schell-Busey et al., "What Works?"; Braithwaite, "In Search of Donald Campbell"; Paternoster, "Deterring Corporate Crime"; Yeager, "The Elusive Deterrence of Corporate Crime."

¹¹³² Schell-Busey et al., "What Works?"

¹¹³³ Ferguson, *Predator Nation*; Morgenson and Story, "In Financial Crisis, No Prosecutions of Top Figures"; Rakoff, "The Financial Crisis"; Taibbi, *The Divide*; Tillman, Pontell, and Black, *Financial Crime and Crises*.

corporate frauds that inflict magnitudes more damage than street crime could help the economy by encouraging healthy market conditions, despite the pleas of business that it would obstruct the engines of growth.¹¹³⁴ But those who evaluate corporate crime in isolation from the broader character of American crime politics often endorse a “lock ‘em up” mentality. Punishing every executive for every crime with savagely long terms just to satiate our outrage is an impulsive and dangerous position to take.

When the state gives in to punitive instincts in corporate cases, it produces a few high-profile convictions in which defendants get sentences so severe they defy sensibility. The 845-year sentence meted out to Sholam Weiss and Bernie Madoff’s 150-year sentence are two examples of this dynamic at work.¹¹³⁵ This satiates the public’s demands for punishment while obscuring structural problems with the regulatory state, corporate criminal law, and political economy. For example, Madoff’s sentence distracted the public from the fact that the SEC failed to uncover his Ponzi scheme after initiating five inquiries into his operations over sixteen years. Punitive responses discourage public conversations about more difficult topics, like how the underfunding of agencies like the SEC encourages regulators to focus on easy cases rather than more serious and challenging ones so their statistics look good when they submit funding requests to Congress.¹¹³⁶ And ratcheting up every corporate case to the level of Madoff or Weiss would be a reckless answer, as subjecting every corporate criminal to such extreme sentences would only exacerbate the problems of mass incarceration. This is why the

¹¹³⁴ See Mokhiber, “20 Things You Should Know About Corporate Crime”, for information on the damage inflicted by corporate and white-collar crime generally.

¹¹³⁵ Henning, “Sentences Get Harsher in White-Collar Cases”; Rakoff, “The Financial Crisis”; Garrett, *Too Big to Jail*, 271.

¹¹³⁶ Goldfarb, “The Madoff Files.”

responsive regulation model—which emphasizes consistency in prosecution rather than severity and has received support from empirical analysis—is a better model for deterring corporate crime than ruthless sentencing.

While consistency in criminal sanction would encourage deterrence, reactive responses are also not a complete solution to reducing corporate crime. Much like with rehabilitative interventions, reforms to regulatory policy and the corporate criminal law will only work in conjunction with changes to the political economy. Some prosecutions could help the economy if they are used as complements to regulatory tools, but only relying on these types of reactive interventions overlooks how financialization has heightened the criminogenic tendencies of industries. Rana Foroohar has argued that America should “put finance back in service to business and society.” She suggests that simplifying banks, reducing their debt, structuring corporations to act in the public interest, and incentivizing companies to seek growth strategies outside of finance would promote such change.¹¹³⁷ These types of reform, however, are unlikely in the near future.

A more immediate way to address these problems is to recognize that clarity and consistency in criminal sanction are the keys to deterrence over severity. Changes to the economy and reformation of a business culture that glorifies fraud are fundamental ways to reduce corporate criminality, but an increased focus on clarity and certainty in prosecution could have immediate deterrent effects right now.¹¹³⁸ This would require more federal funding for agencies; clearer agency guidelines on when to escalate sanctions; a dedication among regulators to follow those guidelines; and an increased

¹¹³⁷ Foroohar, *Makers and Takers*, chapter 11.

¹¹³⁸ Tillman, Pontell, and Black, *Financial Crime and Crises*, chapter six particularly highlights how financialization has created an organizational culture prone to criminality in major corporations.

allocation of resources to the Justice Department's white-collar crime division to enable prosecutors to pursue prosecution rather than DPAs.

*What the Criminal Justice System Can Learn from the Regulatory State:
Contextualizing and Decriminalizing Poverty and Homelessness*

It is true that social and economic reform would help check carceral growth, but this has unrealistic short-term prospects as a reform strategy given how out of step it is with basic facets of American political culture and its emphasis on individual responsibility. However, there are two ways in which the criminal justice system can learn from the regulatory state to make immediate progress in scaling back the carceral state. This includes directing attention to correcting structural conditions conducive to crime and decriminalizing behaviors that do not deserve punishment.

First, it is not impossible to imagine policy responses to crime that reflect a structurally contextualized understanding of criminal behavior. This is clear in the regulatory approach to punishment, which conceptualizes criminality as a function of market structures and industry dynamics that agencies are designed to monitor more than the people operating businesses. By locating the causes of crime in market conditions, agencies are built to encourage healthy behavior among firms through regulatory interventions. The FTC's design is a clear example of this. As Brandeis said, the FTC was built to focus on "preventing the conditions which lead to the criminal tendency."¹³⁹ If one were to read his comments out of context they would seem spectacularly out of step with the typical currents of American crime politics. That is because his philosophy

¹³⁹ U.S. House Committee on Interstate and Foreign Commerce, *Hearings on Interstate Trade Commission*, 89–90.

reflects a distinctive approach to monitoring crime unique to regulatory ideology—as something rooted in structural factors and economic conditions rather than individuals.

It is not unprecedented to adopt this kind of approach to street crime. A case in point is deferred prosecution agreements. The DPA model theoretically escalates sanctions dependent on severity and recurrence, but in its original form, it recognized the deeper structural factors that contributed to crime. DPAs constituted an attempt to channel disadvantaged juveniles away from the justice system, aware that exposure to the prison could encourage future offending. DPAs today have been divorced from their socially attentive basis and are primarily used for corporations, but the early form DPA model reveals that it is possible to implement policy responses to street crime that are cognizant of how structural dynamics outside of the individual contribute to criminality. Still, a revival of DPAs as a response to street crime would only be a small step forward.

It is admirable to advocate reforms recognizing that crime is linked to social and economic forces, but this is unlikely to lead to short-term solutions for those currently ensnared in the carceral state. Treating structural inequalities as the cause of carceral growth promotes long-term commitments that are unlikely to garner much political support or reduce prison growth now. Marie Gottschalk has highlighted how this progressive “root cause” discourse obscures other problems with the prison crisis by overshadowing America’s tendency to mete out ruthlessly long sentences for behavior that goes unpunished in many other countries. She defends direct reforms to penal policy as more effective solutions, include slashing sentences for minor crimes and for violent and sex offenders who cease to pose threats to public safety over time; a constitutional

amendment to protect human dignity and improve the conditions of U.S. prisons; and the elimination of barriers to public services, voting, and employment for ex-felons.¹¹⁴⁰

This highlights a second lesson the criminal justice system can learn from the regulatory state. Focusing on political economic reform as the way to reform mass incarceration overshadows America's penchant for criminalizing an overwhelming array of behaviors common among the poor that are simply not criminalized elsewhere. Whereas regulatory ideology dictates that behaviors not deemed inherently wrong should not be criminalized, victimless crimes unavoidable for poor and low-income populations are criminalized with cruel severity in America. From the age of anti-tramp acts to their contemporary banishment law variants, states and localities have long punished the poor for behaviors that are inescapable parts of their daily lives. America should treat crimes associated with poverty the way it treats crimes associated with markets—as behavior driven by structural forces that do not reflect the personal depravity of individuals.

A good place to start would be the repeal of banishment laws. Politically justified by the notion that neighborhood deterioration is a precursor to serious crime, banishment laws are modernized versions of vagrancy laws designed to criminalize behaviors common among the poor.¹¹⁴¹ Katherine Beckett and Steve Herbert have detailed a variety of legal tools used by cities that blend criminal, civil, and administrative law to keep the poor out of certain public and private spaces in cities after they commit minor offenses

¹¹⁴⁰ Gottschalk, *Caught*, chapter 12.

¹¹⁴¹ Beckett and Herbert, *Banished*; Beckett and Herbert, Steve, "Penal Boundaries"; McGinnis, "Exile in America"; Goluboff, *Vagrancy Nation*; *Papachristou v. City of Jacksonville*, 405 U.S.

like sleeping in public or panhandling.¹¹⁴² This is not just a trend present in a few cities. As of 2014, over 400 cities had various criminal restrictions and bans on sleeping in public, begging, and loitering.¹¹⁴³ The spread of these laws has been connected to broken-windows policing and the criminalization of “quality-of-life” offenses while causing public defenders’ misdemeanor caseloads to skyrocket.¹¹⁴⁴

Banishment laws share affinities with the anti-tramp acts of the late nineteenth and early twentieth-centuries. Both subject the urban poor to increased police monitoring for victimless behavior that are unavoidable parts of their daily lives. Both also depict poverty and homelessness as precursors to serious criminal behavior that warrant preemptive criminal responses. While political economic reform would improve the lives of those in disadvantaged communities, we should not divert attention away from the hyper-criminalization of victimless behaviors among the poor. Misdemeanor convictions often carry the same collateral consequences as felony convictions, and overburdening public defense systems deprives many offenders, including those facing serious prison time, of a meaningful defense by directing public resources into defending minor crimes.

There must be a tremendous scaling back of laws criminalizing homelessness and poverty. In this sense, the regulatory approach provides a useful model. Sleeping in

¹¹⁴² Beckett and Herbert, *Banished*, 4–7, 49–55, 74–75, 96–97; Beckett and Herbert, Steve, “Penal Boundaries,” 7–9. For example, 43 businesses form Seattle’s Rainer Beach Trespass Program, and 320 form the West Precinct Parking Lot Trespass Program. They also discuss how people are banned from parts of cities for other crimes, including drug offenses or prostitution.

¹¹⁴³ National Law Center on Homelessness and Poverty, “No Safe Place: The Criminalization of Homelessness in U.S. Cities,” 2014, https://www.nlchp.org/documents/No_Safe_Place.

¹¹⁴⁴ George Kelling and Catherine Coles, *Fixing Broken Windows* (New York: Kressler Books, 1996); Robert Boruchowitz, Malia Brink, and Maureen Dimino, “Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts” (Washington, DC: National Association of Criminal Defense Lawyers, 2009), http://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf.

public or begging for money are inexorable parts of being homeless. Under the regulatory approach, these behaviors would never be criminalized in the first place. Resources would instead be directed towards monitoring the economic conditions that cause poverty, homelessness, and these attendant behaviors so as to prevent their occurrence.

This is a more useful model for how street criminality should be monitored. Structural reform is a noble goal but requires long-term commitments that are unlikely to provide immediate relief for populations subjected to carceral scrutiny. An emphasis on correcting the social and economic factors that produce homelessness should not cause us to overlook the callous way the criminal justice system punishes poverty. Large-scale decriminalization of loitering, panhandling, sleeping in public, and similar offenses would reduce the state's abusive over-criminalization of poverty in the short-term.

V. Conclusion

It is crucial for scholars to understand how rehabilitative ideology, regulatory ideology, and the class biases of American criminal justice are related. It is also necessary for policymakers to understand that while long-term commitments to political economic reform would help to ameliorate problems of street and corporate criminality, these solutions overlook immediate and pressing problems. Clarity and consistency in enforcement of the corporate criminal law by regulators and radical decriminalization of behaviors among the poor are necessary steps to helping people currently trapped in the carceral state while deterring crime in corporate boardrooms.

Most fundamentally, there needs to be a recognition that carceral and regulatory institutions work together to reinforce a message that only certain people count as “criminal” and deserve punishment. It is a testament to the class biases inherent in the

American political understanding of criminality that a California man can get sentenced to 25-to-life for stealing a pizza but major corporations can commit devastatingly harmful frauds again and again without consequence. To meaningfully reform the carceral state, the regulatory state, and the deep inequalities of American crime policy, we must recognize how these institutions have internalized, reproduced, and legitimized a common politically constructed understanding of criminality.

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