

Creating the American Carceral State: The Evolution of Liberal Criminology

by

Shaun Williamson  
Bachelor of Arts, Honours, Mount Royal University, 2016

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## **Supervisory Committee**

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## **Abstract**

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This thesis explores mass incarceration in the United States as an outcome of the evolution of liberal penal theory over the last two centuries. The first chapter analyzes the work of the 18th century Italian legal theorist Cesare Beccaria. Within the context of the thesis, the exploration of Beccaria's work serves to describe many of the foundational principles and assumptions that arose out of liberal criminal theory in this period. This chapter demonstrates that in the minds of early liberal criminal theorists, such as Beccaria, the role of a justice system was not to merely punish those who break the law, but also to reform those found to have broken the law into productive members of society.

The second chapter jumps ahead almost 100 years to the beginning of the International Penitentiary Commission (IPC). This chapter demonstrates that the IPC was influential in entrenching incarceration as a foundational element in the liberal penal system, which the IPC was attempting to popularize and promulgate.

The final chapter follows the evolution of liberal penal theory in the United States following the Second World War. During this period, economists and neoliberal legal theorists, such as Milton Friedman, Gary Becker, and Richard Posner, dramatically altered the liberal consensus on crime and punishment. Whereas earlier liberal writers viewed the role of criminal punishment as a means of reforming prisoners into useful citizens, neoliberal criminal reformers theorized that it would be more efficient to view crime and criminal punishment as an economic problem, to be solved with the same tools that liberal economists used to examine the market economy. Instead of focusing on reforming the criminal, these theorists posited that the most effective way to decrease crime was to modify the criminal incentive structure.

Overall, this thesis follows the evolution of liberal penal theory in the United States and will demonstrate that what began as a noble attempt to create a more humane

and just penal system, focused on the reformation of the prisoner, became a behemoth of an institution that grew to an extraordinary level in an attempt to crackdown on crime. It will be argued that what was lost in this evolution of liberal criminal theory was the importance of social and economic context in the creation of criminal behaviour.

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## Introduction

During the Second World War, clashes between marginalized populations and police were common throughout America. In 1943, according to the Social Science Institute at Fisk University, 242 “racial battles” occurred across 47 American cities, many of which were sparked by publicized photos of police brutality towards African Americans.<sup>1</sup> In response, President Harry Truman launched the President’s Committee on Civil Rights in 1946, with the goal of restoring “domestic tranquility.”<sup>2</sup> The Committee offered various recommendations aimed at quelling tensions between marginalized groups and police. These recommendations included more rigorous training for police, additional funding, and higher salaries to attract better quality police officers.<sup>3</sup>

During the 1960s civil rights era, violent racial conflicts were once again common throughout American cities. In 1961 the United States commissioned another report that attempted to address the racial inequalities of the American justice system. Again, the solutions suggested in the report consisted of additional training for officers and increased funding to police departments.<sup>4</sup>

In 2014, the killing of Mike Brown at the hands of a Ferguson, Missouri police officer sparked a series of three conflicts throughout the city. In response to these

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<sup>1</sup> Harvard Sitkoff, “Racial Militancy and Interracial Violence in the Second World War”, *The Journal of American History*, 58, no.3 (1971), 671.

<sup>2</sup> U.S. President's Committee on Civil Rights. *To Secure These Rights: The Report of the President's Committee on Civil Rights* (New York: Simon and Schuster, 1947) 155.

<sup>3</sup> United States President's Committee on Civil Rights . *To Secure These Rights*, 155.

<sup>4</sup> United States Commission on Civil Rights, *Justice: 1961 United States Commission on Civil Rights Report 5*, 1961, 112. <https://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk5.pdf>.

conflicts an investigation led by the Justice Department recommended more rigorous police training, body cameras, and better supervision of officers.<sup>5</sup>

Common to all three of these attempts to address the inadequacies of the American justice system in its dealings with marginalized populations is a belief that by better training officers and giving them the funding that they desire, they will cease to police unfairly. Each of these attempts, in some way or another, led to more money being funnelled towards policing, and thus an expansion of the American carceral state. In the words of cultural theorist Michel Foucault, the United States has been in a loop of “utopian duplication,” doubling down on ideas that have proven to be unsuccessful.<sup>6</sup> This thesis attempts to explain how the United States has reached this point of utopian duplication, in which it is only capable of offering these same sets of solutions to inequalities in the justice system, despite the fact that when similar solutions have been enacted previously, the discrepancies within the justice system prevailed.

As of 2016, the United States maintains the world’s highest incarceration rate. The total correctional population of the United States is 6,740,300, or just over 2% of the nation’s population. American jails and prisons incarcerate 2,172,800 people. An additional 4,650,900 live under conditions of either probation or parole.<sup>7</sup>

In the last half of the 20th Century, the criminal justice system in the United States developed into a massive institution that impacts all levels of American society.

This thesis explores mass incarceration in the United States as an outcome of the

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<sup>5</sup> United States Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department*, 2015, [https://www.scribd.com/doc/257669295/DOJ-Ferguson-Police-report#download&from\\_embed](https://www.scribd.com/doc/257669295/DOJ-Ferguson-Police-report#download&from_embed), 93.

<sup>6</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1995) 271.

<sup>7</sup> US Bureau of Justice Statistics, *Correctional Populations in the United States, 2016*, 2018 <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

development of liberal penal theory in the last two centuries. It will be argued that penal theory in the United States has evolved into an ideology in which the major causes of criminal behaviour, as suggested by liberal theorists, have been marginalized in order to create a system of punishment that disregards all contexts aside from the specific criminal act in question. As a result of this evolution, criminals are punished in a manner that leaves unaddressed the root causes of criminality that have been recognized by liberal penal reformers. An over reliance upon imprisonment as a punishment for criminal activity, and the concurrent inability to address the systemic causes of criminal behaviour, have been exacerbated by the merger of liberal penal and economic theories. This evolution took place in the United States notwithstanding the fact that liberal penal theory arose as an attempt to create a justice system that was more just and humane for all.

Following the Second World War, liberal economic and legal theorists began to apply market logic to criminal policy. What began as a reasonable attempt to create a more just system of criminal punishment has been transformed, over the course of centuries, into a self-perpetuating system, which has ensnared millions of American citizens in a system of mass incarceration.

Many scholars have explored how and why the massive American carceral state was created. Within the extensive library of writings on the subject of mass incarceration in the United States, there is one book that towers over all others, measured by influence and readership, and that is Michelle Alexander's 2010 volume *The New Jim Crow*. The book is a study of mass incarceration within the United States, with a particular focus on the vastly disproportionate incarceration of African Americans. *The New Jim Crow* is

primarily a study of the modern-day system of mass incarceration, however it includes arguments based upon historical. Alexander argues that the criminal justice system has become a system for the social control of minorities for reasons largely unrelated to actual crime trends. The bureaucratization and privatization of the criminal justice system during the culture wars are important themes throughout Alexander's book. Alexander traces the cause of the massive increase in the incarceration of citizens, during the 1980s and 1990s, to the ramping up of the drug war and development of legislation providing for increased sentences for drug related crimes. The historical analysis within the book relies primarily upon a review of legislation and that legislation's impact once enacted. The one major component that is not explored to any great extent throughout the book is the social and political processes that created an environment in which the policies were created. Alexander's book focuses on the cultural origins of mass incarceration. In *The New Jim Crow*, American politics is portrayed as having become more inclusive of minority groups in the period preceding the Nixon administration. Alexander points to Nixon's "law and order" rhetoric, which was to appeal to disaffected, formerly Democratic, Southern voters as a primary reason for the rise in racialized incarceration.<sup>8</sup> According to Alexander, a racist constituency generated the political will to create increased sentencing legislation and launch a ramped-up version of the "war on drugs." Alexander acknowledges that there was a national surge in crime during the last half of the 20th century. However, she claims that the reaction to this increase in crime was fuelled by white supremacy and political cynicism. This narrative has become a

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<sup>8</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press), 2010.

fairly common explanation for the rise of the American carceral state. However, in recent years, this explanation has been challenged.

Naomi Murakawa's 2014 book, *The First Civil Right: How Liberals Built Prison America*, offers a different explanation for the rise of the carceral state. Seemingly inspired by studies of liberal exclusion, such as Uday Singh Mehta's *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*, Murakawa seeks to present the development of the prison system, not as an outcome of cultural conservatism, but rather as an outcome of decades of American liberalism. In doing so, Murakawa inverts the conclusion drawn from Alexander's work, writing that "the United States did not face a crime problem that was racialized; it faced a race problem that was criminalized."<sup>9</sup> Murakawa writes that "rising crime of the 1960s was not uniquely racialized as a conservative strategy to conflate civil rights with black criminality. Rather, the race 'problem' of the civil rights movement from the 1940s onward was answered with pledges of carceral state development—from racially liberal and conservative lawmakers alike."<sup>10</sup> Murakawa is careful to point out that narratives that centre the conservative political backlash on the civil rights era, like *The New Jim Crow*, are not invalid, but "rather... they are so overwhelmingly persuasive that they eclipse the specificity of racial liberalism against which they respond."<sup>11</sup>

In her book, Murakawa writes of a concept that she calls "liberal law-and-order."  
For Murakawa,

liberal law-and-order agendas flowed from an underlying assumption of racism: racism was an individual whim, an irrationality, and therefore racism could be

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<sup>9</sup> Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford: Oxford University Press, 2014), 3.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, 7.

corrected with ‘state-building’ in the Weberian sense—that is, the replacement of the personalized power of government officials with codified, standardized, and formalized authority.<sup>12</sup>

According to Murakawa, liberal penal reforms have expanded the carceral state. Liberal reforms have focused on eliminating the racism in individual components of the carceral system. As Murakawa writes

in the construction of liberal law-and-order, then, *racist* violence became *arbitrary* violence. Racism was an irrational belief, erratic and baseless, and therefore, correcting racial violence meant criminalizing ‘private’ acts, and, more significantly, modernizing carceral machinery to increase procedural protections, decrease discretionary decisions, and insulate the system from arbitrary violence.<sup>13</sup>

According to Murakawa, this expansion of the carceral state was accomplished by offering police nonlethal weapons and more social training, or by putting in place mandatory minimum sentences in order to reduce the influence of individual racist judges. Murakawa argues that the outcome of these policies has been to greatly expand the reach and bureaucracy of the carceral state.

Murakawa also claims that the liberal ideology is incapable of addressing systemic racism within the carceral system and can only attempt to alter the behaviour of individuals. So, according to the liberal law-and-order framework, the fact that African Americans are imprisoned at a grossly disproportionate rate to other ethnic groups is not in itself proof of racism. Racism can only be identified if an individual or an individual act can be proven to be racially motivated. Murakawa also argues that carceral and civil rights reform in the United States has not been due to benevolent liberal politicians like Harry Truman and Lyndon Johnson, but instead, civil rights reforms have been enacted in order to increase the perceived fairness of the system. Murakawa writes that many

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<sup>12</sup> *Ibid*, 10.

<sup>13</sup> *Ibid*, 11.

justice reforms and civil rights advancements have been the result of large waves of racial violence.

In a 2010 article entitled “Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History,” historian Heather Ann Thompson suggests that part of the unprecedented expansion of the American carceral state is due to what she calls the “criminalization of urban space.” Thompson describes this phenomenon as

a process by which increasing numbers of urban dwellers—overwhelmingly men and women of color—became subject to a growing number of laws that not only regulated bodies and communities in thoroughly new ways but also subjected violators to unprecedented time behind bars.<sup>14</sup>

For Thompson, this process has in many ways replicated the same tactics used to discipline African Americans during the Jim Crow period. Most articles on the creation of mass incarceration examine how American society created the carceral state. Thompson, however, takes a fairly novel approach by examining how the existence of a massive carceral state influenced the rest of American society. Thompson links mass incarceration to the decline of the labour movement following the civil rights era. Thompson explains that following the civil rights movement, and during the thoroughly explored conservative backlash of the 1970s, conservatives began to push for an increasingly privatized and free market economy and took aim at New Deal era laws restricting the use of extremely exploitative prison labour. This had the effect of undermining the traditional labour market and further reduced labour’s ability to demand higher wages.<sup>15</sup> As Thompson writes, prison labour had more benefits to capital than just

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<sup>14</sup> Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *The Journal of American History* 97, no. 3 (2010): 706.

<sup>15</sup> *Ibid.*, 716-726.

its low price: “they also did not have to deal with sick days, unemployment insurance, or workman’s compensation claims, and they had few liability worries when it came to toxins or accidents in prison workplaces.”<sup>16</sup> Thompson is keen to point out that the impact of prison labour on the free economy was much greater in areas in which prisons were located.

Thompson’s article also describes a type of feedback loop, in which policies that were connected to the growing prison population often created more crime. Thompson writes:

Not only were Americans less likely to be murdered in the 1960s than they had been in earlier decades, but they were more likely to be murdered *after* the nation began funding a more punitive law-and-order state. By creating urban crises and by undercutting gains made by the American working class, mass incarceration had created a greater crime problem in America. Prisons not only impoverished people, leading them to commit more crimes of necessity, but they also made people more violent and antisocial.<sup>17</sup>

This idea that the prison system led to increased crime will be explored throughout the remainder of this thesis.

Whereas, Alexander and Murakawa focus on the implications of criminal justice legislation on those who are deemed criminals and Thompson’s focus was the impact of mass incarceration on the rest of society, Radley Balko’s *The Rise of the Warrior Cop* focuses on the increase in the intensity and quantity of policing within the United States. Throughout his book, Balko usefully asks provocative questions about policing and how it affects society in general. Most notably, Balko explores whether or not police are constitutional. He argues that since the 1960s the United States has effectively eroded both the British Castle Doctrine and the American Third and Fourth Amendments. The

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<sup>16</sup> *Ibid*, 722.

<sup>17</sup> *Ibid*, 727-728.

result is that the police have become almost indiscernible from the military both in terms of their equipment and behaviour.<sup>18</sup> This conforms to Murakawa's analysis of carceral expansion due to liberal law-and-order. As mentioned, according to the liberal law-and-order framework, the best method of "correcting" racist individuals is through the process of state-building.

The approach of this thesis differs from many other works on the topic in that it does not directly address the vital racial issues in the criminal justice system. Rather than focusing upon the racial implications of criminal policy or the racist undertones impacting upon the issue of mass incarceration in the United States, this thesis attempts to explain the development of the American carceral state largely in terms, it is argued, that the criminal reformers would have accepted. Through this approach, what I trust is demonstrated is that the policies and principles that these criminal reformers forwarded, when enacted in a manner that they desired, created the system of mass incarceration. This thesis does not attempt to search for the hidden motives of liberal criminal reformers such as racism, as real as such motives may have been. Rather, the thesis explored in the pages that follow attempts to take those reformers at their word regarding their motives and explores the logical conclusions that their preferred policies and ideology imply. This thesis examines an ideology that, when combined with the already existing racism and inequality of American society that has been explored in many vital works, created the system of racialized mass incarceration. Instead of exploring specific policies at any great length, this thesis attempts to provide an explanation of the intellectual milieu from which these liberal solutions to problems within the justice system arose. As mentioned

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<sup>18</sup> Radley Balko, *The Rise of the Warrior Cop: The Militarization of America's Police Forces* (New York: Public Affairs), 2013.

above Murakawa describes mass incarceration as “a race problem that was criminalized.”<sup>19</sup> The focus of this paper is how liberals created a system of criminalization, and how they justified the system that they created.<sup>20</sup>

It is also significant to note that criminal behaviour is, and was throughout the period covered in this thesis, primarily a male endeavour. For example, in 2016 almost 13 times more males were sentenced for crimes than females. For the most part, the sources utilized in this thesis would refer to criminals, or the theoretical category of criminal with explicitly male pronouns. It is safe to assume that when the liberal criminologists discussed in this paper thought or spoke about criminals they were thinking primarily about men. However, despite the prevalence of men in the criminal justice system, it is notable that while the total of American males sentenced between 2006 and 2016 has slowly declined by a total of .02%, the total number of females sentenced has risen by a similar margin over the same period.<sup>21</sup>

This thesis paper also does not address the conditions in actual prisons. There is some discussion throughout the thesis that describes how criminal reformers thought inmates should be treated once incarcerated, but whether or not these policies were put into place, or functioned in reality like they did in the minds of prison reformers, is not explored. Also not explored in this thesis are groups and organizations who had differing, and often more radical, ideas regarding criminal reform.

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<sup>19</sup> Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford: Oxford University Press, 2014), 3.

<sup>20</sup> This thesis also does not delve deeply into the analytical categories of gender or sex. Again, the decision to largely ignore topics in this paper is not intended to suggest that such analysis lacks importance. Rather the approach is taken because these analytical categories have been extensively addressed by many academics in recent years including Regina Kunzel’s 2008 exploration of the prison’s impact on modern American sexual history entitled *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality*.

<sup>21</sup> US Bureau of Justice Statistics, *Prisoners in 2016*, 2018, <https://www.bjs.gov/content/pub/pdf/p16.pdf>

This thesis spans a large period of time. Three pivotal moments in the history of American liberal penal theory are explored in some detail. These key periods have been selected with the goal of following the development of liberal criminal theory from (1) its inception, through (2) its solidification as a coherent set of ideas and policies, and into (3) its culmination as the American carceral state. Each of the three chapters addresses a different point in the evolution of liberal criminal theory.

The first chapter analyzes the work of the 18th century Italian legal theorist Cesare Beccaria. Within the context of the thesis, the exploration of Beccaria's work serves to describe many of the foundational principles and assumptions within liberal criminal theory. While Beccaria was far from the first person to offer a liberal theory of criminal punishment, his work was the most directly influential on the thinking of many of the American founding fathers. Therefore, his work will be taken as representative of the field of early liberal criminal theory. This chapter examines the principles upon which Beccaria intended to base his preferred justice system and the goals that he hoped to achieve. As demonstrated in this chapter, for Beccaria, the role of a justice system was not to merely punish those who break the law, but also to reform those found to have broken the law into productive members of society.

The second chapter jumps ahead almost 100 years to the beginning of the International Penitentiary Commission (IPC). As was the case with the choice to examine the work of Beccaria, the IPC was not the only forum in which liberal criminal theory was discussed and debated. However, the exploration of the IPC's deliberations is used, in the context of this thesis, to examine how liberal penal reform became an internationally entrenched movement. The second chapter explores the various issues and

principles upon which the IPC was able to reach a consensus, and also examines the topics that remained controversial. The IPC was also concerned with the reformation of prisoners, as it spent much of its time debating which practices and policies helped turn criminals into productive citizens upon their release. This chapter also demonstrates that the IPC was influential in entrenching incarceration as a foundational element in the liberal penal system, which the IPC was attempting to popularize and promulgate.

The final chapter covers postwar America and the rise of neoliberal politics. Following the Second World War, economists and neoliberal legal theorists like Milton Friedman, Gary Becker, and Richard Posner dramatically altered the liberal consensus on crime and punishment. Whereas earlier liberal writers viewed the role of criminal punishment as a means of reforming prisoners into useful citizens, neoliberal criminal reformers posited that it would be more efficient to view crime and criminal punishment as an economic problem, to be solved with the same tools that liberal economists used to examine the market economy. Instead of focusing on reforming the criminal, these theorists posited that the most effective way to decrease crime was to modify the criminal incentive structure. These neoliberal theorists perceived of criminals as rational actors engaging in a cost benefit analysis. If the rewards for the crime were greater than the risk of being caught, or the penalty that one would suffer if caught, then one would be provided with an incentive for engaging in criminal activity. By increasing surveillance, the severity of the punishment, or both, it was theorized that criminal activity would be deterred. In the end, what began as a noble attempt to create a more humane and just penal system, focused on the reformation of the prisoner, became a behemoth of an institution that grew to an extraordinary level in an attempt to crackdown on crime. It

will be argued that what was lost in this evolution of liberal criminal theory was the importance of social and economic context in the creation of criminal behaviour.

Throughout the following three chapters there are many examples of liberal penal reformers acknowledging, to varying degrees, that criminal behaviour is born of economic deprivation and alienation from society. However, what is demonstrated is that, time and time again, when liberal criminal reformers actually proposed tangible policies, for the most part, such policies involved increasing the size of the penal state and isolating the criminal act from its context. As a result, the prison system in the United States has been used to house millions of people while what liberals acknowledge to be the root causes of criminal activity were left unaddressed.

## The Origins of Liberal Criminology

In 1764, an Italian jurist wrote a brief treatise that dramatically altered the way that Europeans, and eventually Americans, thought about criminal punishment. With his book, *On Crimes and Punishments*, Cesare Beccaria set out to demonstrate that the manner in which criminal punishment had been implemented throughout Europe was barbaric and logically inconsistent with the intellectual tradition of social contract theory. This chapter will discuss the origins of the liberal form of criminology. After briefly demonstrating Beccaria's influence on American legal reform, I will analyze Beccaria's motivation for writing his treatise and then delve into his prescriptions for fixing what he perceived to be the issues with the criminal justice system of his day.

Beccaria was a classical liberal, who was heavily influenced by the French physiocrats of the 18th century, and his work has been internationally influential since its release. In the American context, Beccaria's ideas about criminality and justice began to have an impact on some of the Founding Fathers almost immediately after the publication of the book. In fact, in 1770, when John Adams defended the British soldiers involved in the Boston Massacre in court, his opening words were:

May it please your honors, and you, gentlemen of the jury: I am for the prisoners at the bar, and shall apologize for it only in the words of the marquis Beccaria: If I can be the instrument of preserving one life, his blessing and tears of transport shall be a sufficient consolation to me for the contempt of all mankind.<sup>22</sup>

Beccaria's work was highly influential on the creation of prisons and limitation of the death penalty in Pennsylvania in 1786, which, due to its embrace of the use of prisons

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<sup>22</sup> Marcello Maestro and Norval Morris, *Cesare Beccaria and the Origins of Penal Reform* (Philadelphia: Temple University Press, 1973) 137.

and prison labour, was seen by many at the time as the most forward thinking colony on the issue of criminal justice.<sup>23</sup>

Thomas Jefferson appeared to be greatly influenced by many of Beccaria's arguments. In his famous *Commonplace Book*, Jefferson copied many excerpts of Beccaria's work in its French translation and also incorporated twenty-six passages from the original Italian. According to Gilbert Chinard, the editor of the *Commonplace Book*, Jefferson wrote these sections between the years of 1774 and 1776 when he was attempting to modify the legal system as a member of the Virginia Committee of Revisors.<sup>24</sup> When, in 1778, Jefferson finished writing his "Bill for Proportioning Crimes and Punishments in Cases heretofore Capital," Jefferson cited Beccaria five times in the footnotes.<sup>25</sup> In his autobiography, Jefferson described how Beccaria influenced his thinking:

Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the rightfulness and inefficacy of the punishments of crimes by death; and hard labor on roads, canals and other public works, had been suggested as a proper substitute. The Revisors had adopted these opinions; but the general idea of our country had not yet advanced to that point. The bill, therefore, for proportioning crimes and punishments was lost in the House of Delegates by a majority of a single vote... In the meanwhile, the public opinion was ripening, by time, by reflection, and by the example of Pennsylvania... In 1796 our legislature resumed the subject, and passed the law for amending the penal laws of the Commonwealth.<sup>26</sup>

Many of the major concepts in Beccaria's book can be seen in some form in the United States Constitution. As it will become clear, through an exploration of concepts

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<sup>23</sup> *Ibid*, 138.

<sup>24</sup> Maestro, *Cesare Beccaria and the Origins of Penal Reform*, 141.

<sup>25</sup> "Founders Online: 64. A Bill for Proportioning Crimes and Punishments in Cases H..." National Archives and Records Administration. Accessed September 28, 2017, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0064>.

<sup>26</sup> Thomas Jefferson, *Autobiography of Thomas Jefferson: 1743 - 1790 ; Together with a Summary of the Chief Events in Jefferson's Life*, intro. Paul Leicester Ford, forward George Haven Putnam (New York: Putnam, 1914). 73ff.

popularized by Beccaria such as trial by jury, limits on excessive bail, and the maintenance of a strong distinction separating executive and legislative powers from the judiciary, these are all elements that are prevalent in Beccaria's work and are still present, to some degree, today.

### **Social Contract Theory and Criminal Punishment**

In the early and mid 18th century, criminal punishment was fairly consistent throughout most of Europe and its colonies. For the most part, crimes were punished with torture or death, and often both. Beccaria's work was critical in shifting Western criminal policy away from the reliance on capital and corporal punishment and toward a form of punishment that was seen as aligning with social contract theory. This shift had altered society, as the move away from capital and corporal punishment, justified by the divine right of kings, and towards punishments based on the social contract was an explicitly secularizing transition. No longer were laws thought to be based on the word of God; instead, those who led this transition explicitly acknowledged that laws are, and should be, socially constructed for human society.

Beccaria had little sympathy for the legal system of his day describing it as "some remnants of the laws of an ancient conquering people, compiled on the orders of a prince ruling in Constantinople twelve centuries ago, later mixed with Langobardic customs and bound together in the sprawling volumes of private and obscure interpreters."<sup>27</sup> In *On Crimes and Punishments*, Beccaria systematically wrote about various aspects of criminal law. Throughout his book, he simultaneously attacked the current system of criminal

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<sup>27</sup> Cesare Beccaria, *On Crimes and Punishments and Other Writings*, ed. Aaron Thomas, trans. Aaron Thomas and Jeremy Parzen (Toronto: University of Toronto Press, 2008) 5.

punishments while making recommendations for a system that would be less barbaric, more secular, moderate, modular and, perhaps most importantly, stable. This last aspect is key for Beccaria, who writes on the first page of his book:

whoever might wish to honour me with his criticisms should, therefore, begin by clearly understanding the purpose of this work, a purpose that, far from diminishing legitimate authority, should serve to strengthen it, that is, if the opinion in men is more powerful than force, and if kindness and humanity can justify that authority in the eyes of everyone.<sup>28</sup>

Beccaria's task was not to weaken the power of the criminal justice system, but instead to alter it so that it would engender less protest, and, in the long run, preserve the system's stability.<sup>29</sup>

Beccaria's goal, of changing the legal system to strengthen legitimate authority by eliminating, or at least drastically reducing, capital and corporal punishment, is in line with the same impulses that social theorist Michel Foucault believed to undergird western criminal justice systems. In *Discipline and Punish*, Foucault argues that violent punishments, which had been common in Europe prior to the transition to criminal punishment based on the social contract, worked against the monarch, and destabilized the criminal system. Foucault writes that public violent punishment can "become a political danger" because:

the people never felt closer to those who paid the penalty than in those rituals intended to show the horror of the crime and the invincibility of power; never did the people feel more threatened, like them, by a legal violence exercised without restraint. The solidarity of a whole section of the population with those we would call petty offenders... was constantly expressed.<sup>30</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> Foucault, *Discipline and Punish*, "2. The spectacle of the scaffold"

<sup>30</sup> *Ibid.*, 63.

By creating a broader spectrum of punishment, Beccaria sought to eliminate a source of public dissent. However, in order to accomplish his goals, Beccaria needed to convince policymakers to secularize criminal punishment and limit the authority of monarchs.

Early in his book, Beccaria identifies three sources of “moral and political principles that govern men,” which include “revelation, natural law, and the artificial conventions of society.”<sup>31</sup> One would assume that, according to this categorization, only the third source could be altered, given the first two are divine and natural, respectively. However, Beccaria believed that even natural law and divine revelation “have been altered in a thousand ways in the depraved minds of men by false religions and arbitrary notions of vice and virtue,” and therefore they should be subject to political discussion.<sup>32</sup> It is clear that Beccaria did not believe that it was possible to ascertain what is truly prescribed by religious revelation or to discover the root of natural law. Therefore, all three sources are subject to the “arbitrary notions of vice and virtue” of a given society. He wrote, “care must be taken not to attribute to the word *justice* the notion that it is some real thing, such as a physical force or a living being. It is simply a human way of conceiving things, a way that infinitely influences the happiness of everyone.”<sup>33</sup> By rooting his project in this strong belief in social construction, Beccaria attempted to offer a secular critique of criminal law and punishment while neither renouncing religion nor offending religious practitioners and institutions.<sup>34</sup> He hoped to be understood, and

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<sup>31</sup> Beccaria, *On Crimes and Punishments*, 6.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 12.

<sup>34</sup> He failed. Beccaria originally published *On Crimes and Punishments* anonymously in hopes of avoiding religious backlash. Immediately the still anonymous work received criticism from religious circles including a lengthy retort from Christian Monk Ferdinando Facchinei entitled *Notes and Observations on the Book Entitled ‘On Crimes and Punishments,’* in which, somewhat famously, Facchinei accused

critiqued, on these terms: “instead of making me out to be either an unbeliever or a rebel,” he pleaded for interlocutors to “try to prove me a poor logician or a careless political thinker.”<sup>35</sup>

The idea that all three sources of criminal law are either directly the result of social relations or are at least in some way altered by social relations was very important for Beccaria, because it allowed him to assert that conventions “from the expressed or tacit pacts between men” mark “the limit of the force that can be exercised legitimately by one man over another without a special mandate from the Supreme Being.”<sup>36</sup> It was vital for Beccaria to argue that every aspect of the criminal justice system was the result of human actions because this allowed him to argue that every facet of the system could be subject to human intervention and change. This aspect of Beccaria’s argument will become extremely important later when discussing his opposition to torture and capital punishment.

Beccaria began his critique of the legal system by positing that the current laws, “which should be pacts between free men, have been for the most part the instrument of passions of the few or have arisen from a fortuitous and transient necessity.”<sup>37</sup> By contrast, Beccaria thought that laws should be constructed from what would now be called a utilitarian perspective: the objective of a legal system should be to create “the greatest happiness shared among the greatest number.”<sup>38</sup> In fact, Beccaria believed that

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Beccaria of attempting to be the ‘Rousseau of the Italians.’ Also, the importation of the book was blocked by The Venetian Inquisition. See: Beccaria, *On Crimes and Punishments*, xxiii-xxv.

<sup>35</sup> Beccaria, *On Crimes and Punishments*, 7.

<sup>36</sup> *Ibid*, 6.

<sup>37</sup> *Ibid*, 9.

<sup>38</sup> *Ibid*.

“the idea of common utility... is the foundation of human justice.”<sup>39</sup> Later in the book, Beccaria wrote in explicitly utilitarian terms:

One source of errors and injustices is the false ideas of utility that legislators dream up. False is the idea of utility that places particular inconveniences ahead of the general inconvenience, which commands feelings instead of exciting them, which says to logic: Obey! False is the idea of utility that sacrifices a thousand real advantages for a single imaginary or unimportant disadvantage, that would take fire away from men because it burns and water because it drowns, that remedies evils only through destruction.<sup>40</sup>

Beccaria’s primary aim was to create the most good for the greatest possible number of people while maintaining the stability of the then current power structure. This ideology is one that is discussed in detail in Geoff Mann’s book, *In the Long Run We Are All Dead*. Beccaria’s goals in his treatise can be classified as what Mann would call “Keynesianism.” For Mann, Keynesianism is an ideology that long preceded its namesake. The work of Keynes was merely one incarnation of Keynesianism, born out of the specific historical and material context of the era from which he wrote. The core of Keynesianism, Mann suggests, is not, as has often been stated, to save capitalism from itself, but instead to preserve Western civilization. Mann argues that Keynes believed that any revolution or great social upheaval would create mass violence, just as it had during the French and Russian Revolutions. Therefore, he believed that “it is our duty to prolong peace, hour by hour, day by day, for as long as we can.”<sup>41</sup>

What Keynes offered through his *General Theory* was a safety valve to let out the pressure within a capitalist system during times of crisis; releasing pressure within the criminal justice system through liberal reform was Beccaria’s goal. While Beccaria

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<sup>39</sup> *Ibid*, 20.

<sup>40</sup> *Ibid*, 77-78.

<sup>41</sup> Geoff Mann, *In The Long Run We Are All Dead: Keynesianism, Political Economy, and Revolution* (London: Verso, 2017) 23.

offered other justifications for his proposed reforms, the one reason that he states in the opening to his treatise, and repeatedly throughout the book, was to strengthen legitimate authority. Beccaria stood firmly within the lineages of both social contract theory and liberal utilitarianism.

Beccaria began his exploration of criminal punishment by offering his view of the origins of punishments. This section is clearly influenced by works of social contract theory, and, likely, specifically Thomas Hobbes' *Leviathan*. Beccaria writes that:

laws are the terms by which independent and isolated men united to form a society, once they tired of living in a perpetual state of war where the enjoyment of liberty was rendered useless by the uncertainty of preservation. They sacrificed a portion of this liberty so that they could enjoy the remainder in security and peace. The sum of all these portions of liberty sacrificed for each individual's benefit constitutes the sovereignty of a nation, and the sovereign is the legitimate keeper and administrator of those portions.<sup>42</sup>

These laws needed to be defended from "the private usurpations of each particular individual." For Beccaria, punishments are "tangible measures... established against lawbreakers."<sup>43</sup>

Later in the book, Beccaria wrote, "the right to inflict punishment does not belong to a sole individual, but to all the citizens or the sovereign. The individual can only renounce his portion of this right, but he cannot annul that of others."<sup>44</sup> In Beccaria's view, the sovereign was created through the development of the social contract. The legal system that Beccaria was attempting to devise was one that was explicitly anti-absolutist. The monarch's power stems from the citizenry and is not divinely inspired.

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<sup>42</sup> Beccaria, *On Crimes and Punishments*, 10.

<sup>43</sup> *Ibid*, 11.

<sup>44</sup> *Ibid*, 60.

Therefore, crimes were no longer to be seen as attacks on the power of the monarch, but instead attacks against the whole of society.

Next, Beccaria introduced a core tenet of his theory: “every act of authority of one man over another that does not derive from absolute necessity is tyrannical.”<sup>45</sup> Again, this is a liberal idea of society. The primary aim of a society, in Beccaria’s framework, is to protect the individual liberty of citizens. The only reason why someone living in the state of nature would surrender some amount of liberty in order to live in a society was so that the rest of his or her liberty would be protected. Beccaria posited that the root of crime and all infractions against the social contract stemmed from the fact that:

no man ever freely surrendered a portion of his own liberty for the sake of the public good; such a chimera appears only in fiction. If it were possible, we would each prefer that the pacts binding others did not bind us; every man sees himself as the centre of all the world’s affair.<sup>46</sup>

This line of thinking is an extension of the thinking of social contract theorists such as John Locke and Thomas Hobbes. Beccaria’s portrayal of man in what could be called a state of nature was an individual concerned only with self-preservation. The primary concern of this hypothetical man was his own individual wellbeing. The fundamental self-concern of the individuals comprising the social contract, for Beccaria, had implications for the application of criminal law:

the purpose of punishment, therefore, is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.<sup>47</sup>

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<sup>45</sup> Beccaria, *On Crimes and Punishments*, 11.

<sup>46</sup> *Ibid.*

<sup>47</sup> Beccaria, *On Crimes and Punishments*, 26.

He later wrote, “what is the purpose of punishments? To instill fear in others.”<sup>48</sup>

Therefore, the primary goal of criminal punishment is not merely the punishment of the criminal, but the protection of the social contract. For Beccaria, the ability to control criminal behaviour stems from the same impulse that brought people into society in the first place: the purpose of society and the purpose of criminal punishment is to limit arbitrary violence.

As a corollary to this belief, Beccaria expressed concern that societies tend to become increasingly violent in the penal sphere if left unchecked. He wrote:

As punishments become more cruel, the minds of men, which like fluids always adjust to the level of the objects that surround them, become hardened, and the ever lively force of passions is such that after a hundred years of cruel punishments, breaking on the wheel causes no more fear than imprisonment previously did.<sup>49</sup>

Beccaria later expressed a similar sentiment, writing that “left to their most natural feelings, men prefer cruel laws, although given that they are subject to these very laws, it would be in the interest of each individual that laws be moderate, for the fear of being injured is greater than the desire to do harm.”<sup>50</sup> Again, Beccaria saw fair and moderate laws based in the social contract as the only way of limiting criminal punishments and staving off society's descent into barbarism.

### **Legitimate Punishments**

Beccaria did not leave it to his reader to come up with practical ways to implement his theories. Beccaria supported a justice system in which laws were enforced rigorously, magistrates were timely and law-bound decision makers and punishments

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<sup>48</sup> *Ibid*, 33.

<sup>49</sup> Beccaria, *On Crimes and Punishments*, 50.

<sup>50</sup> *Ibid*, 70.

were moderate. In *On Crimes and Punishment*, he offered concrete solutions to the problems that he identified. In order to have the maximum legitimacy and impact on the criminal, Beccaria argued that punishment should happen as temporally close to the crime as possible. He wrote:

the swifter the punishment is and the sooner it follows the crime, the more just and useful it will be. I say more just, because it spares the criminal the useless and violent torments of uncertainty, which grow with the vigour of one's imagination and the sense of one's own weakness; more just, because the loss of liberty is itself a punishment and cannot precede the sentence, except when required by necessity.<sup>51</sup>

Beccaria knew that in some cases detention would have to precede full judgement of crimes committed. But even such detentions, he hoped, would be limited in duration and subject to law:

Detention is a punishment that, unlike every other, must of necessity precede conviction for a crime. But this distinctive characteristic does not dispense with another that is essential, namely, that law alone should determine the cases in which a man deserves punishment. The law, therefore, should indicate what kinds of criminal evidence justify the detention of the accused and make him subject to interrogation and to punishment.<sup>52</sup>

This view of detention as punishment represents another reason why Beccaria was so adamant about the necessity of having trials and punishments occur as soon after the crime as possible. Not only does this practice solidify the link between crime and punishment, but also reduces the amount of time citizens could spend incarcerated without having been convicted of a crime.

Beccaria also saw the creation of a cognitive link between crime and punishment as a vital method of discouraging non-criminals from committing crimes. He later wrote, "the proximity of crime and punishment is . . . of utmost importance if one wants the idea

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<sup>51</sup> *Ibid*, 39-40.

<sup>52</sup> *Ibid*, 58.

of punishment to be immediately associated in unsophisticated minds with the alluring picture of some gainful crime.”<sup>53</sup> Later in the book he expressed a similar sentiment:

One of the greatest checks on crimes is not the cruelty of punishments, but the inevitability of punishment, and this, therefore, requires the vigilance of the magistrates, as well as that kind inexorable judicial severity that, if it is to be a useful virtue, must be accompanied by mild legislation.<sup>54</sup>

At the end of his book, Beccaria reiterates the importance of creating a link between crime and punishment, writing that “in order that punishment should not be an act of violence committed by one or many against a private citizen, it is essential that it be public, prompt, necessary, the minimum possible in the given circumstances, proportionate to the crimes, and established by the law.”<sup>55</sup>

By expressing the need for criminal punishments to be swift, consistent and measured, Beccaria was stressing the importance of creating a concrete link between crime and punishment in a system of liberal penalty. If, as Beccaria argued, one of the primary goals of punishment is to implicitly threaten the rest of society, then removing any arbitrariness from the criminal justice system is essential. In Beccaria’s view, it was vital that each member of a society was aware of what actions were not allowed and what the consequences would follow from transgressions of law. Because the social contract was in place, each individual had implicitly agreed to the laws of the society in which he was residing, and therefore was subject to those laws.

In connection with this view of law, Beccaria argued that those who have not agreed to the social contract, those who are not a member of any given society, are

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<sup>53</sup> *Ibid.*, 41.

<sup>54</sup> Beccaria, *On Crimes and Punishments*, 49.

<sup>55</sup> *Ibid.* 86

therefore not subject to that society's laws. Such people should be exiled rather than punished with normal means. Beccaria writes:

A wicked man who has not broken the pacts of a society that he does not belong to may be feared and thus exiled and excluded by the higher authority of that society, but he may not be punished according to formal legal procedures, which safeguard social pacts but do not prosecute the intrinsic malice of human actions.

Criminals from outside of the society would not have implicitly agreed to the social contract of that society and therefore should not be subject to that society's system of criminal punishment.

Beccaria also linked social contract and criminal punishment in his denial of the legitimacy of the death penalty. Beccaria argued that no man "has ever given other men the authority to kill him." He went on to ask if "man is not free to take his own life" then how can he "surrender that right to others or to society as a whole?"<sup>56</sup> For Beccaria, if an individual cannot give up his life in the formation of the social contract, then the justice system, operating within the confines of the social contract, has no right to take any individual's life under any circumstance.

In the search for an alternative to violent penalty, Beccaria examined the usefulness of various other forms of criminal punishment. First, as mentioned above, Beccaria made a clear distinction between members of a society and foreigners. Incarceration and banishment are similar forms of punishment that both involve removing someone from society. For Beccaria, "anyone who disturbs the public peace, who does not obey the laws, which are the terms by which men mutually abide and defend themselves, should be excluded from society – in other words, he must be

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<sup>56</sup> *Ibid*, 52.

banished.”<sup>57</sup> According to Beccaria, banishment should be a punishment that was more frequently utilized in the case of non-citizens. Beccaria wrote that “the evidence would have to be more substantial in a case against a citizen than against a foreigner, and in a case against someone accused for the first time in a case against someone who has been charged many times.”<sup>58</sup> Beccaria also had a high regard for property, writing that “the loss of one’s possessions is a greater punishment than that of banishment; so there ought to be some cases in which, in proportion to the crime, there should be a partial or complete forfeiture of one’s possessions, and other cases in which there is no forfeiture at all.”<sup>59</sup>

Beccaria believed that a prerequisite for a just penal system, which involves incarceration, was that the convicted must be seen as categorically different than the accused. Beccaria declared, “a man accused of a crime, taken into custody, and then acquitted should not bear any trace of shame.” In Beccaria’s vision of a justice system, “squalor and starvation” would be “eliminated from prisons, and compassion and humanity” would “penetrate their iron gates and take control of the inflexible and hardened ministers of justice.”<sup>60</sup> However, Beccaria was aware that this is not how most prisons functioned. He believed this was because,

in the present criminal system, the idea of force and power prevails in common opinion over the idea of justice; because accused and convicted are thrown together into the same dungeon; because prison is more a punishment than a place to hold the accused in custody; and because the internal force that upholds the laws is separated from the external force that defends the throne and the nation when they should be united.<sup>61</sup>

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<sup>57</sup> *Ibid*, 45.

<sup>58</sup> *Ibid*, 46.

<sup>59</sup> *Ibid*. 46

<sup>60</sup> *Ibid*, 58-59.

<sup>61</sup> *Ibid*, 58-59.

Beccaria believed that the current wretchedness of prisons was due to “the barbaric notions and fierce ideas of our ancestral northern huntsman” which “endure in the mind of the people, in customs and in laws, which are always more than a century behind the actual enlightenment of a nation.”<sup>62</sup> It is clear that Beccaria believed imprisonment should be utilized in a more limited manner than it has been utilized in the majority of modern penal systems. Beccaria believed that because imprisonment prior to trial is “essentially punitive, it should last the minimum time possible and should be as clement as possible... The strictness of incarceration should not exceed whatever is necessary to prevent escape or the concealment of evidence.”<sup>63</sup>

However, Beccaria did note one aspect of incarceration that was useful in creating a more scientific method of criminal punishment writing that:

I shall merely add that once a nation has recognized the utility of moderate punishments, laws that shorten or extend the period of time for the prosecution in proportion to the gravity of the crimes, and that include incarceration or voluntary exile as part of the punishment, will provide a simple classification of a few mild punishments for a great number of crimes.<sup>64</sup>

Beccaria believed that “the severity of punishment and the consequence of a crime should have the greatest impact on others and be as mild as possible for the man who suffers it, for a society cannot be called legitimate where it is not an unerring principle that men should be subjected to the least harm possible.”<sup>65</sup> This passage demonstrates Beccaria’s attempt to reconcile his two primary aims throughout his work, which are to lessen the brutality of criminal punishments, while at the same time creating a systematic and effective penal response to any criminal action.

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<sup>62</sup> *Ibid*, 59.

<sup>63</sup> *Ibid*, 40.

<sup>64</sup> *Ibid*, 62.

<sup>65</sup> *Ibid*, 40.

### **Institutional Arrangements of a Just Penal System**

Beccaria's ideal legal system would contain three distinct classes of people, legislators, judges and the rest of society. Within Beccaria's preferred legal system "laws alone can decree punishments for crimes" and "this authority can rest only with the legislator, who represents all of society united by a social contract," therefore, Beccaria wrote, "no magistrate (who is a member of a society) can justly impose punishments for another member of the same society."<sup>66</sup> In other words, magistrates are to apply the law as it is written by the legislators. At the same time magistrates and legislators must be separate:

the sovereign who represents society itself, can only fashion general laws that bind all members, but he cannot judge whether someone has violated the social contract, otherwise the nation would be divided into two points – one represented by the sovereign, who asserts the violation of the contract, and the other by the accused, who denies it. It is, therefore, necessary that there be a third party to judge the veracity of the facts; hence, the need for a magistrate whose verdicts, which are simply affirmations or denials of particular facts, cannot be appealed.<sup>67</sup>

In Beccaria's view, the legislator must be sovereign, and should not interfere with criminal trials. On the other hand, magistrates should be responsible for determining who broke the laws, and thus the social contract. The sovereign must also be subject to society's laws. For Beccaria, an unaccountable sovereign was a threat to the stability of the society. Unaccountable sovereigns create an antagonism within society between the sovereign and everyone else. This antagonism could lead to revolution, which was clearly Beccaria's greatest fear.

Beccaria developed this topic later in the book:

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<sup>66</sup> *Ibid*, 12.

<sup>67</sup> *Ibid*, 13.

Two questions remain for me to consider: the first is whether it is just that there be places of asylum and whether treaties between nations for the extradition of criminals are useful. Within a country's borders, there should be no place that is unregulated by laws. The power of the laws should follow every citizen like a shadow follows the body. Impunity and asylum differ only in degree, and just as the certainty of punishment makes more of an impression than its severity, asylums invite men to commit crimes more than punishments deter them. To multiply places of asylum is to create so many small sovereignties, for where laws are absent, new laws may take root that are opposed to the general laws and that thereby constitute a countervailing spirit to that of the whole body of society. All history shows that great revolutions, both in states and in the opinions of men, have been spawned from places of asylum.<sup>68</sup>

Beccaria refused to accept as justified institutionalized spaces of asylum for reasons that Mann describes as Keynesian. While liberalism was preferable for people like Beccaria and Keynes, some aspects of liberalism needed to be regulated and limited in order to achieve the greater goal of preserving the stability of liberal society. To use Mann's terminology, this trade-off can be seen as a Keynesian reform. Mann argues that Keynesianism can be seen as a more nuanced form of liberalism:

Keynesianism's approach to the relation between individual liberty and the social collective is that it neither refuses nor embraces the knee-jerk liberal response: an a priori prioritization of the individual (assumed to be the only subject of "freedom"), modified by a series of ad hoc qualifications. Instead, it accepts liberal premises as necessary but not sufficient. Keynesianism involves a combination of a modern commitment to individual liberty—and against, say, an account based in a Rousseauian "general will"—with a radical distrust of the formalisms or abstract universalisms that subtend the priority of either the general or the particular.<sup>69</sup>

Mann argues that this attempt at creating a compromise between collective security and the liberal subject was presented politically as a 'third way.' Mann does not mean a 'third way' in the sense that it is commonly used, to refer to the neoliberal politicians

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<sup>68</sup> *Ibid*, 72.

<sup>69</sup> Mann, *In The Long Run We Are All Dead*, 48-49.

who took power in the late 1990s and early 2000s, exemplified by Bill Clinton and Tony Blair, but instead to a dialectical middle road that is:

a simultaneous cancellation and preservation of the two previous moments in a new if not-necessarily-stable unity. In other words, the explicit goal of Keynesian reason is to expose the apparently ‘natural’ or ‘inevitable’ antinomy between individual liberty and collective solidarity as in fact merely a historical stage.

Thereby, Keynesianism proposes something that is not merely a mix between individualism and collectivism, but instead it offers a potential “means by which freedom, solidarity, and security can be fully realized at once in a rational social order.”<sup>70</sup>

Demonstrating what Mann would label as Keynesianism, throughout his book, Beccaria was concerned about a “dangerous clustering of popular passions.”<sup>71</sup> In order to avoid this situation, he suggested expanding the role of a novel institution that had recently been developed in France, the police. However, he insisted that if police were to have an expanded role they would need to act in accordance with an established legal code, because if they were to act in an arbitrary manner “the door is open to tyranny, which always lies just beyond the boundaries of political liberty.”<sup>72</sup>

In addition to being concerned about the legal immunity of sovereigns, Beccaria also believed that granting the sovereign the ability to issue pardons would weaken the liberal criminal justice system. In a society in which the laws are universally understood, any form of pardoning would be an implicit admission that the legal system is unjust.

Beccaria wrote:

As Punishments become milder, clemency and pardons become less necessary... Thus, clemency, a virtue that for sovereigns has sometimes served as a supplement to all of the duties of the throne, should be excluded from the perfect legal code, in

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<sup>70</sup> Mann, *In The Long Run We Are All Dead*, 49.

<sup>71</sup> Beccaria, *On Crimes and Punishments*, 25.

<sup>72</sup> *Ibid*, 25.

which punishments would be mild and the method of judgement regular and expeditious.<sup>73</sup>

While Beccaria viewed the sovereign as the lynchpin of the legal system, he did not believe that the sovereign should be given any power to alter judgements. Again, this is a demonstration of Beccaria's belief in the necessity of a clear distinction between the sovereign, or legislators and magistrates.

Beccaria suggested that the role of the judge should be to "examine the actions of citizens and to judge whether or not they are consistent with the law as written."<sup>74</sup> Laws should be written clearly, and they should be followed to the letter. Beccaria worried that attempting to follow the 'spirit of the law' would lead to varying outcomes depending on the individual judge. This reinforces Beccaria's belief in the socially constructed nature of society and his distaste for the attempt to achieve objectivity. Beccaria believed that one vital aspect for the correct operation of a legal system was that the laws had to be easily available and interpreted by all.<sup>75</sup>

Beccaria believed that creating a perfect system of criminal punishment, in which no one would commit crimes, was an impossibility. In light of that fact, Beccaria strove to create a utilitarian system that would be as beneficial as possible to the largest amount of people. In what was to become one of the most influential portions of the book, his discussion of "Proportionality between Crimes and Punishments," Beccaria acknowledged, "it is impossible to anticipate all of the misdeeds engendered by the universal conflict of human passions" and that "in the arithmetic of politics, the calculus

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<sup>73</sup> *Ibid*, 84.

<sup>74</sup> *Ibid*, 15.

<sup>75</sup> *Ibid*, 16.

of probabilities must replace mathematical exactitude.”<sup>76</sup> Later in the book he reaffirmed his belief that achieving perfect information is impossible and blamed this fact for the inability to end criminality, writing “every act of our will is always proportional to the force of the sensory impression from which it springs; and the sensory capacity of every man is limited.”<sup>77</sup> He went on to write:

That force, like gravity, pulls us towards our [personal] well-being can only be restrained to the extent that obstacles are set up against it... the legislator plays the part of the skilful architect, whose task is to counteract the ruinous pull of gravity and to align those forces that contribute to the strength of the building.<sup>78</sup>

For Beccaria, the conflict between the desires of individuals and the good of a society could only be stabilized by instituting a form of utilitarian legal reform. As Beccaria wrote, “out of the clash of passions and the opposition of interests, necessity alone gave rise to the idea of *common utility*, which is the foundation of human justice.”<sup>79</sup>

Beccaria believed that crimes would cease to exist in a world in which criminal punishments were dialled in precisely, and the laws were written clearly and understood by all within a society. However, as has been shown, he believed that it was impossible to create such a system, and therefore the role of the legislator, and more broadly, the role of the law should be to create “the greatest happiness shared among the greatest number.”<sup>80</sup> However, if the proportionality of a punishment was not calibrated correctly to the crime:

the incorrect distribution of punishments will give rise to that contradiction, as little noticed as it is common, that punishments punish the crimes that they have caused. If the same punishment is prescribed for two crimes that injure society in different

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<sup>76</sup> *Ibid*, 17.

<sup>77</sup> *Ibid*, 34.

<sup>78</sup> *Ibid*, 17-18.

<sup>79</sup> *Ibid*, 20.

<sup>80</sup> *Ibid*, 9.

degrees, then men will face no stronger deterrent from committing the greater crime if they find it in their advantage to do so.<sup>81</sup>

Beccaria wrote, “the true measure of crimes is, namely, the injury caused to society.”<sup>82</sup>

### **Limiting the Role of Property and Power**

Beccaria was also concerned with the fact that injustice could occur in a penal system due to economic inequality. He wrote:

the law whereby each man should be judged by his peers is a very useful one, for when a citizen’s liberty or wealth are at stake, those sentiments that inequality inspires should fall silent. Moreover, the sense of superiority with which the wealthy man looks down upon the wretched and the indignation with which the inferior views his superior should have no place in such judgements.<sup>83</sup>

Beccaria’s egalitarian instincts were also demonstrated in his discussion of the

differences between violent crimes and property crimes. He wrote:

some crimes are assaults against the person; others are offences against property. The former should always be punished with corporal punishments: the rich and the powerful should not be able to make amends for assaults against the weak and the poor by naming a price; otherwise, wealth, which is the reward of industry under the tutelage of the laws, becomes fodder for tyranny. There is no liberty whenever the laws permit a man in some cases to cease to be a person and to become a thing: then you will see the efforts of the powerful dedicated entirely to eliciting from the mass of civil relations those in which the law is to his advantage. This discovery is the magic secret that transforms citizens into beasts of burden and that, in the hands of the strong, is the chain that fetters the actions of the incautious and weak.<sup>84</sup>

Beccaria continued by expressing the view that in the case of theft:

the most fitting punishment shall be the only sort of slavery that can be called just: the temporary enslavement of the labour and person of the criminal to society, so that through his complete personal subordination he may make amends for the unjust despotism he has exercised against the social pact. But when the theft

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<sup>81</sup> *Ibid*, 19.

<sup>82</sup> *Ibid*, 20.

<sup>83</sup> *Ibid*, 30.

<sup>84</sup> *Ibid*, 41.

involves violence as well, punishment should be likewise a combination of corporal punishment and penal servitude.<sup>85</sup>

At the time in which the first edition of *On Crimes and Punishments* was published, Beccaria thought that citizens could be temporarily enslaved for compiling large amounts of debt or becoming bankrupt. However, in a later edition, he seems to have changed his mind on the subject writing “but what legitimate pretext, such as the security of commerce or the sacred right of property, could possibly justify depriving him of his liberty?”<sup>86</sup> Unlike many of his successors in the liberal criminal reform movement, Beccaria ultimately did not believe that debtors or bankrupt individuals should be incarcerated.

In a footnote, Beccaria commented on his support for the temporary enslavement of bankrupt citizens found in previous editions of his work with a great deal of regret. In the footnote, Beccaria made clear that commerce and market dynamics should never take the place of innocence and guilt before the law, writing:

Commerce and the ownership of goods are not the goal of the social pact, but they may be a means for achieving that end. To expose members of society to the evils to which so many circumstances give rise, would be to subordinate the ends to the means – a paralogism in all of the sciences, especially in the science of politics. I fell into this error in earlier editions, in which I said that the innocent bankrupt should be imprisoned as a pledge of his debts or made to work like a slave for his creditors. I am ashamed of having written in this way. I have been accused of irreligion and did not deserve it. I have been accused of sedition and I did not deserve it. I have offended against the rights of humanity, and yet no one has admonished me for it.”<sup>87</sup>

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<sup>85</sup> *Ibid*, 43.

<sup>86</sup> *Ibid*, 70.

<sup>87</sup> *Ibid*, 71 footnote.

Beccaria's concerns regarding how bankrupt people should be treated clearly stemmed from his belief, which was somewhat undeveloped in the first edition of his book, that market forces must be sublimated to human need.<sup>88</sup>

### **Potential Alternatives**

Near the end of his book, Beccaria offers one other method of fighting crime that has not been nearly as influential as his views on punishment. He wrote:

Another way of preventing crimes is to reward virtue. I observe that the laws of all nations today are totally silent on this matter. If the prizes awarded by academies to the discoverers of useful truths have multiplied both our knowledge and the number of good books, why should not prizes distributed by the beneficent hand of the sovereign likewise multiply virtuous actions? The coin of honour is always inexhaustible and productive in the hands of someone who knows how to distribute it wisely.<sup>89</sup>

This theory suggested a completely different method of fighting crime. However, rewarding virtue still forwards the notion, which will be explored later in this paper, that criminal justice is at its root an exercise in economics. The suggestion of rewarding virtue makes clear that to some degree, Beccaria viewed criminal justice as an economic calculation. Whereas harsher punishments theoretically increased the cost of committing crime, creating a system in which society rewarded someone for acting to whatever standards it claims to be "virtuous," simply increasing compensation for acting in accordance with the law. For either of these types of solutions to work, one has to assume that, prior to committing any crime, a criminal will undertake a cost-benefit analysis of committing the crime versus not committing the crime. It also assumes that everyone in society, including criminals, are to some degree rational economic actors

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<sup>88</sup> It can be argued that this belief that Beccaria held is the greatest point of distinction between him and neoliberal legal theorists of the 20th century.

<sup>89</sup> Beccaria, *On Crimes and Punishments*, 83.

who act primarily based on rational economic assumptions. Earlier in his book, Beccaria briefly mentions an aspect of liberal criminology that would be expanded on by the economic and legal theorists who are the subject of the next chapter. Beccaria states that,

for a punishment to achieve its objective, it is only necessary that the harm that it inflicts outweighs the benefit that derives from the crime, and into this calculation ought to be factored the certainty of punishment and the loss of the good that the commission of the crime would produce.<sup>90</sup>

This line of thinking would be replicated and expanded by later theorists in search of an economic approach to criminology.

## Conclusion

On 21 March 1979, Michel Foucault delivered a lecture at the Collège de France in which he outlined what he observed to be the four main elements of neoliberal criminal policy. Foucault wrote:

First, the crime must be defined as an infraction of a formulated law, so that in the absence of a law there is no crime and an action cannot be incriminated. Second, penalties must be fixed once and for all by law. Third, penalties must be fixed in law according to the degree of seriousness of the crime. Fourth, henceforth the criminal court will only have one thing to do, which is to apply to an established and proven crime a law which determines in advance what penalty the criminal must suffer according to the seriousness of the crime.<sup>91</sup>

These four tenets of neoliberal criminal policy are very similar to the ideas that Beccaria presented in *On Crimes and Punishments*. Beccaria also suggested that all crimes should be defined, and that something cannot be criminal unless it is an action against a previously formulated law. Beccaria believed that it was vital for a society to clearly state the punishments of bypassing a given law in order to create an unmistakable link

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<sup>90</sup> *Ibid*, 50.

<sup>91</sup> Foucault, *The Birth of Biopolitics*, 249.

between the crime and the punishment. By rejecting the absolutist system of punishments, which relied heavily on the death penalty and torture, in favour of a wider spectrum of punishments that could be modified to fit the severity of a given crime, Beccaria's ideas were in line with what Foucault identified as the third element of neoliberal criminal policy. The fourth element that Foucault identified would become increasingly important for liberal criminal reformers in the 20th century with the development of practices like mandatory minimum sentences.

## The Standardization of Liberal Criminology

In June of 1890, the United States sent a delegation led by Caleb D. Randall of Michigan to the Fourth Congress of the International Penitentiary Commission (IPC). According to the then U.S. Commissioner of Education, William Torrey Harris, Randall was “one of the leading authorities of this country on subjects connected with prison management and reform.”<sup>92</sup> The previous three Congresses, in London, Stockholm and Rome, respectively, had assembled hundreds of academics and practitioners from around the world, with expertise that crossed many fields relating with criminology. As will be demonstrated throughout this chapter, for most of the delegates to the various congresses held by the IPC, the primary purpose of criminal punishment was to reform the convict. While this goal was surely commendable, throughout the over 50-year span of the congresses, the increasing drive to reform prisoners would eventually come to undercut many of the basic principles of the liberal criminal reform movement, and reveal a fundamental conflict within the IPC’s conception of liberal penal policy. In the end, imprisonment emerged as essentially the only form of punishment that the IPC would recommend for serious crimes.

The Fourth Congress was held in St. Petersburg, Russia, a country that was seen as despotic by many observers and delegates from around the world. Randall described the reaction of his delegation, upon learning that the Congress was to occur in Tsarist Russia, writing that “in the minds of many of our people” Russia’s selection as the host country for the Congress “has created some surprise, for the reason that a sentiment,

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<sup>92</sup> Caleb D. Randall, *The Fourth International Prison Congress: St. Petersburg, Russia* (Washington D.C.: Government Printing Office, 1891) 3.

growing out of the publication of alleged cases of cruel treatment of criminals and politicals, has widely prevailed, causing an impression that there was no desire in [Russia] for humane prison management and that prison reform was substantially unknown.”<sup>93</sup>

### **What Was the IPC?**

The Commission was an explicitly liberal organization, often directly referencing the writings of authors such as Cesare Beccaria. To a liberal organization like the Commission, the inclusion of Russia, and to a lesser extent the siting of the Congress in Russia, caused conflict and consternation. Russia’s Tsarist government had little interest in any suggestion of being transformed into a form of liberal democracy. However, the Commission appeared to believe that by keeping Russia in the organization it could push Russia towards liberalization, at least on issues related to crime and punishment.

In an early session of the Fourth Congress, the Russian Minister of Police, Pyotr Dournova, stated that the purpose of the Congress was to “retain for imprisonment the severity of its penal character, to allay and diminish as much as possible its hurtful effects, to increase and strengthen its reformatory and regenerating influence.”<sup>94</sup> Randall notes that this portion of Dournova’s speech was “received with great applause.”<sup>95</sup> As will be explored below, by the time the Fourth Congress occurred, incarceration had already largely been cemented in as the foundation of liberal penal reform. The Congress

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<sup>93</sup> *Ibid*, 12.

<sup>94</sup> *Ibid*, 97.

<sup>95</sup> *Ibid*.

included topics such as how best to imprison criminals, how to best reform criminals while incarcerated, and how to reintroduce the formerly incarcerated back into society.

Randall saw certain aspects of the Russian criminological regime as particularly barbaric. One aspect was the Russian practice of “transportation,” by which Randall meant the practice of exiling or deporting criminals. He wrote of the practice “social science and public sentiment long ago condemned it. Its injurious effect on the convicts and on the colony and its admitted reflex influence on the country sending out its citizens are well established.”<sup>96</sup> However, displaying the reformatory attitude that many of the delegates took towards Russia, Randall wrote that “there are few nations for the past 100 years that have taken more intelligent interest in prison reform, nor is there any country which in that time has made greater advances.”<sup>97</sup> This instinct, to grant leniency to those who were displaying improvement and advancing towards what was seen by the Congress as reformation, was an ingrained element of the Commission.

Russia was not the only member of the Commission that was seen to be instituting barbaric forms of punishment. In October 1910, when the Commission convened in Washington, DC, for the Eighth Congress, Sir Evelyn Ruggles-Brise, the leader of the British delegation, was startled by the conditions within American prisons. In particular, Ruggles-Brise condemned the conditions that he found when he visited a small city jail, writing:

The gaols and workhouses (or, as we should call them, local prisons) still remain under the control of the local authority. In America, under Federal law... prisoners are divided into misdemeanants and felons... Generally speaking, all misdemeanants, if sent to prison, would go to the City or County gaol, and in these gaols it is hardly too much to say that many of the features linger which called forth

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<sup>96</sup> *Ibid*, 12.

<sup>97</sup> *Ibid*.

the wrath and indignation... Until the abuses of the gaol system are removed, it is impossible for America to have assigned to her by general consent a place in the vanguard of progress in the domain of 'la science penitentiaire.'<sup>98</sup>

The IPC was a non-governmental organization, the members of which gathered every five or so years in order to share research related to criminality and penal science, and to set out a global agenda for liberal criminal reformers. The Congresses were attended by, in the words of Randall, "practical men, who were living constantly face to face with the dreary facts of pauperism and crime" and not "simple theorists, sentimental, and animated by false philanthropy."<sup>99</sup> Aside from providing a venue for sharing studies and displaying exhibitions related to the topic, the Congresses provided a forum for debating various specific questions and for crafting resolutions on behalf of the Commission. The resolutions were explicitly non-binding, meaning a country could maintain its membership in the Commission even if its laws did not completely adhere to the resolutions put forth by the Commission. Throughout its existence, the IPC contributed greatly to the development and solidification of liberal penal theories and practices. Analytical scholarship regarding the IPC Congresses is quite limited. Aside from the work of American criminologist Negley Teeters, who chronicled the activities and resolutions of the Congresses in the 1950s, only one other book delves into the Congresses at any length.

Boren Alper's 1972 book, *Crime: International Agenda*, offers a summary of the development of international criminal theory in the 19th and 20th centuries, and in doing so summarizes the work of the IPC during this period. While Alper's book is useful, in

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<sup>98</sup> Sir Evelyn Ruggles-Brise, *Report to the Secretary of State for the Home Department on the Proceedings of the Eighth International Penitentiary Congress Held at Washington D.C., October, 1910* (London: His Majesty's Stationery Office, 1911) 9.

<sup>99</sup> Randall, *The Fourth International Prison Congress*, 89.

that it provides the wider context within which the IPC undertook its work, it does not add meaningfully to the description of the manner in which the Congress operated from that which can be gleaned from the work of Teeters. The IPC is also briefly mentioned in many books detailing the development of international institutions in the early 20th century, but rarely in any significant detail. The majority of the sources utilized in this chapter are reports filed by American delegates about the Congresses held by the IPC.

In his report regarding the Seventh Congress, organized by the IPC in Budapest, Samuel Barrows, an American delegate to the Congress, reflected on the lineage of the type of liberal penal reform that was promoted by the IPC:

Less than a century and a half ago, before the days of Beccaria, the possible infliction of torture was common when torture was abandoned and the instruments which inflicted it were remanded to museums, then followed a period of neglect and indifference. The prisoner was not tortured, but he was left in prison under physical conditions which impaired his health. Then came an awakening as to improved physical surroundings, largely stimulated by the labors of Howard and Elizabeth Fry, and with it a new moral impulse as to the improvement of the prisoner.<sup>100</sup>

Barrows believed penal reform was heading in the right direction, and that it was the duty of the IPC to make recommendations that would aid in the creation of justice systems that could successfully reform the morals of criminals.<sup>101</sup>

The Commission held its first Congress in 1872. The Commission owes its origin to the work of an American, Enoch Cobb Wines, a member of the National Prison Association, an organization that was led by the soon to be president of the United States, Rutherford B. Hayes. Wines served as the president of the first Congress in London. At that Congress, Wines gave an opening speech in which he outlined many of the primary concerns of the Commission:

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<sup>100</sup> Barrows, *Report of Proceedings of the Seventh International Prison Congress*, 81.

<sup>101</sup> *Ibid.*

This congress is convoked in the interest of humanity, of civilization. It is composed of thinkers and workers in one of the great departments of social science and social reform, representative men and women gathered literally from the ends of the earth... The business of this congress, if I conceive it aright, is not to fritter away its time, strength, and zeal in minute details, and especially not to give expression to a preference for one penitentiary system over others, but to agree upon certain broad principles and propositions which may be made to underlie, permeate, vivify, and, above all, to tender fruitful any and all systems of criminal treatment.<sup>102</sup>

Wines' comments summarize what the delegates believed to be the purpose of the organization. It was to be a forward looking, rational, liberal organization, focused on big picture issues, which would allow room for countries and states to experiment and research various methods and theories. It is interesting to observe that within the reports written about each commission, criminals are assumed to be male.

However, notwithstanding the noble intentions of the Conference organizers and attendees, the First Congress of the IPC reached few conclusions. Resolutions were proposed, particularly by the American contingent, including a declaration of principles in line with the foundational principles of the National Prison Administration, but none were passed. No doubt attempting to portray his effort in the best light, Wines wrote, “[i]t has been stated that the Congress reached no conclusions, formulated no propositions, adopted no statement of principles. This is partly true, and partly not. It did not make any such declaration *eo nomine*, and yet it gave expression to its thought.”<sup>103</sup>

As G. W. Hastings, the leader of the British delegation, wrote:

The Committee did not think it advisable that votes should be taken on matters of opinion which were discussed in the sections. Such votes could have represented nothing but the personal views of those who happened to be present at any given moment in a fluctuating assembly largely composed of irresponsible persons, who

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<sup>102</sup> Enoch Cobb Wines, *Report on the International Penitentiary Congress of London, Held July 3-13, 1872* (Washington D.C.: Government Printing Office, 1873), 129-130.

<sup>103</sup> Negley King Teeters, *Deliberations of the International Penal and Penitentiary Congresses* (Philadelphia: Temple University, 1949) 19.

might or might not have had any real knowledge of the question under discussion.<sup>104</sup>

It is clear that many of the participating nations sent representatives who lacked the power to commit the nation they represented to a resolution or policy of any real significance. However, this First Congress did lay the foundation for future conferences. Also emerging from the Congress, the IPC became a permanent organization, which would aid in creating more productive future conferences.<sup>105</sup>

Unfortunately for those attempting to breathe life into the organization, the United States was very hesitant to officially join the IPC, and therefore it did not contribute to its funding. As a matter of fact, according to the former Secretary of State for the United States, Richard Olney, for at least the first five Congresses, the American delegates had to pay their own way to attend the Congresses. Olney was particularly bothered by the fact that the United States would not officially join or fund the IPC given that the Congresses began as an American initiative.<sup>106</sup> As penologist and chronicler of the IPC conferences Negley King Teeters writes, “repeated attempts were made between 1872 and 1895 to enlist the official and financial support” of the United States. According to Teeters, America’s initial hesitance to join the organization was a result of the assumption of American lawmakers that “formal acceptance by a country would bind it to the actions of its delegates.”<sup>107</sup> However, following the 1886 publication of the “Regulations with Explanatory Memorandum,” this fear was explicitly addressed when the IPC made clear that it was to play merely a consultative role. Notwithstanding this

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<sup>104</sup> Teeters, *Deliberations of the International Penal and Penitentiary Congresses*, 20.

<sup>105</sup> *Ibid*, 23.

<sup>106</sup> *Report of the Delegates of the United States to the Fifth International Prison Congress Held at Paris, France, in July, 1895* (Washington D.C.: Government Printing Office, 1896), 4.

<sup>107</sup> Teeters, *Deliberations of the International Penal and Penitentiary Congresses*, 26.

clarification, the United States did not join as a dues paying member for another ten years.<sup>108</sup>

### **Classification of Criminals and Crimes**

While the First Congress in London in 1872 is generally viewed as being unproductive, it did articulate many of the issues to which the IPC would repeatedly return in subsequent conferences. One of the topics discussed at the first Congress was the classification of crimes and criminals. The Congress would create a system in which individuals were categorized based upon various aspects of their crime, background and the probability that the justice system would be able to reform the individual. The system that the Congress promoted would be one in which magistrates could modify punishment recommendations based on how the individual fit into the various categories that it would eventually create. In the end, the system would be one in which the goal was to punish the individual but utilized categorization to make the system operate more efficiently.

Initially, this issue split the Congress. A few of the delegates believed that some form of classification was useful, others argued that classification was unavoidable, and a third group believed attempting to classify criminals and crimes to be an impossible endeavour. Among those who believed in the utility of some form of classification, there was disagreement about what form that classification should take. Some, such as Serjeant Cox of England and Dr. J.B. Bittinger of the Pennsylvania, believed that “the man who had committed a crime in hot blood, or while intoxicated, and the habitual criminal ought not to be treated alike in prison.”<sup>109</sup> M. Stevens of Belgium offered a different method of categorizing criminals. Stevens’ system of classification was one

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<sup>108</sup> Elmer Plischke, *U.S. Department of State: A Reference History* (Westport: Greenwood, 1999), 139.

<sup>109</sup> E. Wines, *Report on the International Penitentiary Congress of London*, 134-135.

based on the external conduct of the criminal, judged by three primary attributes of “obedience, submission, and industry.” Based on these criteria, criminals were placed into one of three categories: “the good, the passable and the bad.” Stevens believed this to be a superior form of categorization because the system supported by Cox and Bittinger “rests upon moral character, a much more difficult matter to ascertain, since God alone can judge the heart.”<sup>110</sup>

As indicated above, many at the conference believed that accurately classifying criminals was impossible. Dr. Fredric Mouat of England, for example, believed that “moral classification was impossible, and that a moral barometer was a chimera, since prisoners did their best to conceal their real character, lest they should suffer harsher treatment.”<sup>111</sup> Other individual delegates from England, the United States, and Germany supported Mouat’s position. Interestingly, in the minds of many of the delegates, who rejected any form of criminal classification, incarceration in individual cells was thought to be the only recourse. A representative from England, William Tallack, made this connection most clearly arguing “the impossibility of moral classification was one of the strongest arguments for the cellular system, under which every prisoner was a class by himself.”<sup>112</sup> Many of the criminal reformers in attendance saw the individual prison cell as the most fair and liberal form of punishment available. Each criminal would be treated as an individual and held responsible for their individual actions. This theory allowed those involved in criminal enforcement to treat the individual criminal in any manner that they believed most appropriate to that individual criminal.

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<sup>110</sup> *Ibid*, 134.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid*.

The topic of classification would once again be discussed at the Fifth Congress in Paris, France in 1895. While other systems were proposed, the Congress eventually settled on a bipartite division of felonies and misdemeanours because that division was seen as “scientific and rational.”<sup>113</sup> This system of classification was already in place in most countries in attendance and the Congress saw “no reason” to ask “the states which have adopted it to abandon it.”<sup>114</sup>

At the Seventh Congress in Budapest, Hungary, the IPC considered the question: “What are the best means of securing the moral classification of prisoners, and what are the different consequences which should attach to such classification?”<sup>115</sup> The delegates to the Budapest Congress more fully fleshed out their conclusions. First, the IPC reaffirmed that “the moral classification of prisoners is necessary.” The IPC determined that classification should be undertaken in accordance to the premise that “those who are recognized as the worst prisoners should be separated from the rest, either on arrival at the prison or in the course of their detention.” The IPC suggested that prisoners should be separated into three categories: “those whose conduct is exemplary,” “those whose conduct is good,” and finally “a class for the doubtful.”<sup>116</sup> It is important to note that this tripartite division applies to the behaviour of criminals within the justice system, not the crimes that they committed. The bipartite division of felonies and misdemeanours was still the IPC’s preferred system of classifying criminal activity. The IPC members saw the classification of prisoners based on their individual behaviour as a liberal practice,

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<sup>113</sup> *Report of the Delegates of the United States to the Fifth International Prison Congress*, 30.

<sup>114</sup> *Ibid.*

<sup>115</sup> Samuel J. Barrows, *Report of Proceedings of the Seventh International Prison Congress* (Washington D.C.: Government Printing Office, 1907) 59.

<sup>116</sup> Barrows, *Report of Proceedings of the Seventh International Prison Congress*, 74-75.

because it allowed for a more individualized form of punishment and reformation. The IPC concluded that:

Although the treatment should always tend to the improvement of each prisoner the means employed should differ according to the class. The discipline should be most severe for the worst prisoners. The efforts of prisoners' aid societies should be directed especially in behalf of the youngest and best prisoners to properly place them on their discharge.<sup>117</sup>

As would become clear in 1910, during the Ninth Congress, held in Washington D.C., one group, who were seen as deserving of specific classification, were “vagrants and mendicants.”

While my reference to classification of criminals based upon their individual behaviour may at first glance appear to contradict the idea that liberal penal reform was based around a desire to create an individualized regime of punishment, it needs to be understood that in referencing the categories and types of crimes, the categorization is nonetheless based upon the individual's actions because the classes and categories are applied to the person as a result of the individual's actions rather than based upon the individual's unique personal characteristics of race, age, etc. The only category inherent to an individual that the IPC thought should dictate an individual's punishment was nationality. However, an in depth exploration of liberal theories regarding the punishment of foreign criminals is outside of the scope of this chapter. Again, this is a classification based upon the actions of individuals, not a classification based upon inherent personal characteristics or traits. This form of classification is still motivated by the desire for individualized punishment. For practical reasons, justice systems often classify prisoners based on behaviour and background, but the focus of the punishment regime was still focused on the punishment and reformation of the individual.

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<sup>117</sup> *Ibid.*

For the Congress, the existence of people who wilfully remained unemployed or chose to beg was justification for workhouses to be established. Within the workhouses, classification of inmates should be made, separating the inmates requiring discipline from the other inmates, and providing a class, or classes for the more industrious or better behaved, with such inducements as are proper and conducive to the reformation and progress of the inmates toward rehabilitation.<sup>118</sup>

Again, it is important to note that the primary focus of the type of liberal penal reform the IPC was advancing through its Congresses was the reformation of the individual criminal. As mentioned, all of the classes and groups that the IPC believed should be considered in assigning a punishment to a criminal were groups or classes determined by the actions of their members. In all cases, what was to be considered, in assigning a punishment to an individual, were that individual's criminal actions, devoid of a consideration of the social context and motivations that the IPC acknowledged may have inspired the criminal behaviour.

In pursuing the goal of creating a system of punishment based upon the individual actions of the criminal, the IPC suggested that "workhouses should make a prominent feature of agricultural and industrial training, and the period of detention should be sufficiently long to provide a thorough training, and also to act as a deterrent to offenders."<sup>119</sup> It was considered important that the convicts learned skills that could be useful once they left prison. However, the IPC was careful to state that the prisoners could not be worked in a manner that was detrimental to their health and their "physical and mental condition" should "be carefully observed and studied. In order to completely tailor an individual's punishment regime to the magnitude of an individual's crime and to the individual's progress toward reform, the Congress suggested that "conditional

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<sup>118</sup> Ruggles-Brise, *Proceedings of the Eighth International Penitentiary Congress*, 26-27.

<sup>119</sup> *Ibid.*

liberation and a system of subsequent supervision, and, if possible, co-operation between official and outside charitable authorities are indispensable parts of a proper system of treating mendicancy and vagrancy.”<sup>120</sup> Not only should an individual’s progress toward reformation be enforced and observed in prison, but such progress should be also monitored once the individual returned to society.

The Ninth Congress, which took place in 1925, returned to London, England and reopened the discussion on the topic of classification of prisoners. This time, the IPC’s discussions included an exploration of how best to organize prisons to deal with different classifications of prisoners. One of the principles that the IPC put forward was that “the prevention of the contamination of the less criminal prisoner by those more experienced in crime is one of the first essentials in prison treatment.” The IPC’s resolution stated that, “after the necessary divisions according to age and sex have been made, and the mental status of the prisoner has been taken into account, classification should be according to character and ability to be reformed of each prisoner.” This meant “shorter term prisoners should be treated apart from those with longer sentences” because “a regime or course of training appropriate to the latter but not possible with the former may be applied.”<sup>121</sup>

According to the policies being promoted by the IPC, a criminal is someone who had made the choice, as an individual, to go against the rules of society, and because of this choice, the criminal needed to be reformed in a manner tailored to the individual. The IPC also put forward ideas respecting how to organize the physical space of the prison to ensure the most individualized form of punishment possible. First, the IPC

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<sup>120</sup> *Ibid.*

<sup>121</sup> Butler, “Ninth International Prison Congress,” 606.

recommended that “various classifications of prisoners should be located separately and, where possible, in different buildings on the same ground under one administrative head.” Secondly, the IPC stated that because “it is difficult to apply the necessary individual treatment of prisoners” in large numbers, it is best to limit the size of prisons to a capacity that does not exceed 500.<sup>122</sup> The Congress settled on a system under which every criminal would be treated as an individual. A criminal’s membership in a group or a class would impact the intensity of his or her punishment, but in the end their punishment would be based on the criminal’s own actions.

One issue that was raised and settled during the first London Congress in 1872 was the treatment of prisoners prior to conviction. The Congress chose to reaffirm the ideas expressed by Beccaria, and all in attendance agreed that the accused and the convicted needed to be housed separately.<sup>123</sup> At the Fourth Congress this policy was further elaborated upon, when the IPC stated that “it is desirable that special prisons be established for preventive detention as far as it is possible,” however, if that is not feasible “a special part of the institution [should] be designated for the imprisonment of the accused.”<sup>124</sup> In addition, accused prisoners should be held in “individual separation” and should not be made to mingle with other guilty, or potentially guilty, prisoners.<sup>125</sup>

### **The Entrenchment of Imprisonment as the Primary Liberal Form of Punishment**

It is apparent that at the Second Congress in Stockholm, which took place in 1878, the American delegation was granted more leeway and power from the national

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<sup>122</sup> Amos W. Butler, “Ninth International Prison Congress,” *Journal of Criminal Law and Criminology* 16, no 4, (1926): 606

<sup>123</sup> Teeters, *Deliberations of the International Penal and Penitentiary Congresses*, 37.

<sup>124</sup> Randall, *The Fourth International Prison Congress*, 178.

<sup>125</sup> *Ibid.*

government than had been the case during the London Congress. This was largely due to the ascendancy of Rutherford B. Hayes to the presidency in 1876. The other substantial change, which occurred between the two conferences, was that the Stockholm Conference was the first conference in which the Congress offered opinions as a whole. While there was dissent on most issues discussed, the Congress was able to offer majority opinions. Each official delegate voted on each proposition put forward by the Congress.

It was at this second Congress that the IPC raised another essential question that was addressed by the IPC through its many succeeding congresses. The IPC asked “[i]s it desirable to retain the various designations of penalties which consist in the deprivation of liberty? Or would it be better to adopt imprisonment as the only penalty, varied in respect of its durations and of the consequences of the prisoner, after his discharge?”<sup>126</sup>

The Second Congress’ conclusion was clear:

[e]xcept inferior and specific penalties for misdemeanors, not grave in themselves nor indicative of depravity in the offender, it is desirable, under any prison system, to bring about, as far as possible the legal assimilation of penalties involving the loss of liberty, without their distinction between them than their duration and the incidental consequences which they may subsequently entail upon the prisoner himself.<sup>127</sup>

This resolution by the IPC entrenched imprisonment as the only form of penalty for a major crime deemed appropriate by the international liberal penal reform community. While throughout its history the IPC habitually made resolutions only to modify or reverse such resolutions years later, the entrenchment of imprisonment was one position to which, for the most part, the IPC consistently adhered. This resolution was never reversed, and other forms of punishment were rarely even discussed

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<sup>126</sup> Fred H. Wines, *International Prison Congress Held at Stockholm, Sweden* (Springfield: Weber, Magie & Co., State Printers, 1879) 5.

<sup>127</sup> *Ibid*, 6.

throughout the subsequent nine Congresses. In the eyes of the IPC, at a base level, liberal criminal punishment methods needed to subject every criminal to the same method of punishment while at the same time allowing for individual modifications and intensities depending on the gravity of the crime. Prisons were the perfect tools to achieve these goals, all criminals convicted committing the same crime were treated in a similar manner, in the sense that all criminals were sent to prison, but their punishment was tailored to the specific crime in that the severity of their individual crimes could be addressed by adjusting their incarceration period.

From this point on, it is clear that, within the liberal penal reform movement, imprisonment became entrenched as the foundation upon which the punishment for crimes would be based. To the IPC, prison was a form of punishment that would treat all inmates in a similar manner. In other words, if any two people were convicted of the exact same crime, and behaved exactly the same once incarcerated, they would be subjected to the exact same treatment. The IPC wrote:

In countries where the cellular system exists, it may be applied without distinction of race, of social condition, (rural or urban), or of sex, but in its details, the right must be reserved to the administration to pay regard to certain special conditions of nationality or rank. The only exception relates to juvenile offenders; where these are subjected to solitary imprisonment, it should be of a sort not detrimental to their physical and mental development.<sup>128</sup>

This is a system, in which every criminal is punished in a similar manner that reflects the individual nature of the crime. Under this framework, nothing about the criminal's life, the context of his crime, or the type of person he was, should impact his punishment. All that mattered was what the criminal's infraction was, and what the law says should be the length of his or her incarceration.

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<sup>128</sup> *Ibid*, 7.

The Fourth Congress asked whether or not life-long or long-term incarceration, which was defined as exceeding five years, was qualitatively different from short-term incarceration. It is clear that the Congress believed that longer terms of incarceration allowed the prisoners the best chance to achieve reformation within the prison system.

The Congress concluded:

In the infliction of penalties intended at the time to punish the guilty, to place him beyond the possibility of wrong doing, and to give him means to reinstate himself, and the punishments of long duration permitting more than others the hope of the reformation of the condemned; the organization of these punishments should be inspired by principles of reform, which regulate punishments of short duration.<sup>129</sup>

However, the concept of life sentences caused some ethical problems for members of the IPC. How could the Congress reconcile its belief that one of the primary purposes of incarceration was to reform the criminal with the concept of life imprisonment? Is it not the case that life imprisonment, at least from the standpoint of these reformation-minded, liberal penal reformers, is a practice akin to the death penalty in that it does not offer the criminal any chance to achieve reformation? Unfortunately, these questions were left unresolved, as the Congress could not reach a resolution.<sup>130</sup>

While alternatives were rarely explored, the IPC did not merely take the utility of individual, cellular imprisonment as an absolute tenet. As with most other aspects of criminology, the IPC continued to commission reports discussing the utility of imprisonment. Prior to the assembly of any of the Congresses in the selected host city, the IPC would always circulate to member countries and their delegates the primary questions that were to be addressed at the conference and also a number of reports and studies about specific issues in criminology.

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<sup>129</sup> Randall, *The Fourth International Prison Congress*, 177.

<sup>130</sup> *Ibid.*

After much study, the Sixth Congress in Brussels revisited the utility of cellular imprisonment asking if cellular confinement achieved what it was designed specifically to do regarding “its influence on the state of criminality and of a relapse into crime in the countries where it is wholly or partially applied... [and] With reference to its consequences upon the moral and physical health of persons who are subjected to it during a term more or less prolonged.”<sup>131</sup> The IPC was pleased with the reformatory results that had been observed from the study of cellular imprisonment stating that “the Congress holds that the results of the cellular system as to criminality and relapses into crime, so far as they have been verified by experiment, respond to the expectations of the promoters of this form of imprisonment to the degree that is possible in prison administration.”<sup>132</sup> In addition, the IPC saw no detrimental impacts on those subjected to long-term imprisonment writing

the result of the experience in Belgium shows that cellular imprisonment even prolonged ten years or beyond, assuming the previous subsequent elimination of certain elements, has no more unfavorable effect upon the physical or mental health of prisoners than any other mode of imprisonment.<sup>133</sup>

These studies further entrenched imprisonment as the foundation of criminal penal policy.

The IPC’s commitment to treating prisoners equally was again expressed when the Fourth Congress took up the issue of recidivism. The IPC asked, “[s]hould recidivists be subjected to a disciplinary regime more severe than that applied to prisoners sentenced for the first time, and what should be the nature of this regime?”<sup>134</sup> The Congress offered

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<sup>131</sup> Samuel J. Barrows, *The Sixth International Prison Congress: Report of its Proceedings and Conclusions* (Washington D.C.: Government Printing Office, 1903), 50.

<sup>132</sup> *Ibid.*, 54.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

a clear rejection of the possibility of more severe treatment for recidivists resolving that “the Congress holds that the internal regime of prisons should be as severe as possible during the first commitment, and not admit of other mitigations than those exacted by moral and physical hygiene, and that consequently recidivists can not be subjected to a more severe regime.”<sup>135</sup>

At the Ninth Congress in London in 1925, the IPC considered alternatives to imprisonment for petty offences. The IPC suggested two alternatives that would not “constitute a danger to public security.” These two alternatives were probation and fines. The IPC was clear in stating that “machinery for payment of fines should be developed so as to eliminate as far as possible imprisonment in default of payment.”<sup>136</sup> Throughout its history, the IPC constantly moved towards the conclusion that imprisonment should be the primary method of punishing any individual found guilty of a serious offence. This entrenchment of imprisonment as the foundation of liberal criminal punishment would continue to influence criminal reformers in the United States for the remainder of the century.

### **The Indeterminate Sentence**

One of the most controversial topics addressed by the IPC that demonstrated the uniqueness of the United States’ ideas of penal reform in comparison to the rest of the IPC was the idea of an indeterminate sentence. The concept of a sentence that would be comprised of an indefinite period of time spent in prison was first discussed in 1900 at the Sixth Congress in Brussels. According to the leader of the American delegation, Samuel Barrows, the indeterminate sentence was an issue that was actively discussed by

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<sup>135</sup> *Ibid*, 58.

<sup>136</sup> Butler, “Ninth International Prison Congress,” 604.

the American contingent as the United States “has had, if not a wider discussion, at least a wider application than in Europe.”<sup>137</sup> The Congress decided that “[w]ith reference to the application of indeterminate sentences there is ground for distinguishing penalties properly considered, educative measures, measures of protection and public safety, and the pathological treatment of delinquents.” However, “as to penalties, the system of the indeterminate sentences is inadmissible. It may be advantageously replaced by conditional liberation combined with a progressive cumulative sentence for recidivists.”<sup>138</sup>

While the indeterminate sentence was clearly rejected in Brussels, the Americans were not deterred from pressing the issue. The topic arose once again when the United States finally played host to the Congress in 1910. As Negley Teeters wrote, “for three mornings at this Congress the merits and shortcomings of the indefinite sentence were vigorously debated.”<sup>139</sup> The Americans’ support of the indeterminate sentence became a point of separation between the American penal system and the rest of those who were members of the IPC. In his report on behalf of the government of the United Kingdom, Sir Evelyn Ruggles-Brise wrote at length about America’s stance on the indeterminate sentence:

In all States the maximum is fixed by law for each kind of crime, and in many the minimum also. The term ‘indeterminate sentence’ only designates the tendency towards which public opinion in America is moving. Its meaning is to deprecate what is known as the ‘retributory’ element in the punishment of crime, *i.e.*, to take away from the judge the power to inflict a definite sentence for a definite offence; to make, not the guilt of the offender, but his potentiality of reform, the index of the duration of punishment; to confer on executive officers, *i.e.*, boards of parole, who

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<sup>137</sup> Barrows, *The Sixth International Prison Congress*, 35.

<sup>138</sup> *Ibid*, 38-39.

<sup>139</sup> Teeters, *Deliberations of the International Penal and Penitentiary Congresses*, 133.

become cognizant *after conviction* of the character of the criminal, the power to say at what moment he can be released without danger to the community.<sup>140</sup>

As Ruggles-Brise suggests, the indeterminate sentence was not merely another form of imprisonment. As has been mentioned throughout this chapter, the IPC consistently attempted to institute a set of policies that were centred upon the reformation of the prisoner. It can be argued that what the American delegation was doing, by suggesting the indeterminate sentence, was taking this principle to its logical conclusion. If prison was meant to reform the prisoner, than why not hold prisoners in prison until they have been deemed to be reformed? Ruggles-Brise was well aware of the enormity of the suggestion, writing:

This rejection of the ‘time’ or ‘definite’ sentence, as the penalty for anti-social conduct, has a much more than juristic interest. It is a great deal more than a change of criminal procedure. It is a new mental attitude towards the conception of punishment on the part of a large section of the English-speaking race.<sup>141</sup>

Ruggles-Brise went on to claim that by suggesting a place for the indeterminate penalty, America was displaying issues at the core of the concept of America as a nation. For Ruggles-Brise, this policy was a result of a wayward drift in American intellectual life:

We may account for it partly by a distrust of the judiciary, which has not the strength, or character, or tradition, which belongs to it in Europe, partly by a reaction against the startling want of uniformity in the criminal codes of the different States of the Union, whence arises an inequality of punishment which cannot fail to strike the imagination of a race which, in its quick-march towards progressive ideas, takes an almost childish pleasure in defying tradition: and this especially in the domain of criminal law... It may be a bold generalization to say that the civic spirit has become the religion of America, but the idea of recreating criminal man to honest citizenship—this, rather than his conversion into a religious man—lies at the root of the modern doctrine of reformation as the primary object of punishment.<sup>142</sup>

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<sup>140</sup> Ruggles-Brise, *Proceedings of the Eighth International Penitentiary Congress*, 3.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

Ruggles-Brise was shocked by the American approach to the indeterminate sentence, and he wrote:

Certainty and Fixity of punishment, with a guarantee that the punishment shall not be modified, except by authority of the Government, seems so obvious, and to result so naturally from the necessity of maintaining the system of social rights, that one is puzzled to account for what appears to be the indifference on the part of the American public as to any proportion between crime and penalty.<sup>143</sup>

However, Ruggles-Brise was not completely at odds with American policies. He seems to have seen the benefits of treating states like laboratories of democracy writing that:

[i]n America laws are repealed as easily as they are made, and if an experiment is not satisfactory, it is abandoned. Out of this multitude of ideas and of experiments, scattered and broadcast by innumerable pamphlets and conferences, there evolves gradually a settled opinion, which is common to all States, and universally endorsed by the general sentiment.<sup>144</sup>

While it is clear that Ruggles-Brise had issues with the direction in which criminal punishment was headed in the United States, he clearly respected the process through which legislative change occurs in the United States.

The question that was posed to the Eighth Congress was:

Assuming that a rational relation exists between the principle of Indeterminate Sentence and the fundamental principles of criminal jurisprudence: What class of delinquents should be submitted to, and what class excluded from its application? How may a sentence of this kind, without minimum or maximum limits, be applied without danger to individual liberty?<sup>145</sup>

This question resulted in significant debate that lasted three days. However, the Congress was able to reach certain resolutions regarding the indeterminate sentence. First, the Congress overturned its previous policy that rejected indeterminate sentencing writing,

the Congress approves the scientific principle of the ‘indeterminate’ sentence. The ‘[i]ndeterminate’ sentence should be applied to moral and to mental ‘defectives.’ It should be applied also as an important part of the reformatory system to criminals

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<sup>143</sup> *Ibid*, 4.

<sup>144</sup> *Ibid*, 1.

<sup>145</sup> *Ibid*, 13.

who require reformation, and whose delinquencies are due chiefly to circumstances of an individual character.<sup>146</sup>

However, the IPC did not reverse its decision without hesitation. It defined a specific set of circumstances in which an indeterminate sentence would be deemed acceptable.

Firstly, the “individualised treatment of the offender” had to “be assured.” Secondly, “the Board of Parole” was to “be so constituted as to exclude all outside influences, and should consist of a Commission on which would serve at least one representative of the magistracy, of the prison administration, and of medical science, respectively.” Finally the IPC reaffirmed the primacy of reformation in its recommendations by advising that one should “inflict the maximum penalty only in cases where it may be necessary, either on account of the novelty of the experiment, or a lack of experience.”<sup>147</sup>

Once the policy of indeterminate sentencing was established, the IPC began to look for cases in which it would be appropriate. At the Ninth Congress in London, the IPC raised the question, “[w]ould it be possible, and within what limits, to apply the principle of the indeterminate sentence in the struggle against recidivism, not only as far as grave offences are concerned, but also for any other case?”<sup>148</sup> By this time, 15 years after the previous conference, it appears that the indeterminate sentence had been normalized within the IPC.<sup>149</sup> The Ninth Congress resolved that “[t]he indeterminate sentence is the necessary consequence of the individualization of punishment and one of the most efficacious means of social defence against crime,” therefore, “[t]he laws of each country should determine whether and for what cases there should be a maximum duration for the indeterminate sentence fixed beforehand. There should in every case be

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<sup>146</sup> *Ibid*, 15.

<sup>147</sup> *Ibid*.

<sup>148</sup> Butler, “Ninth International Prison Congress,” 604.

<sup>149</sup> The Congress took a fifteen year break due to the First World War.

guarantees and rules for conditional release with executive adaptations suitable to national conditions.”<sup>150</sup>

### **Economics and Criminality**

As discussed in the next chapter of this paper, perhaps the primary single principle of liberal criminal theory supported by the IPC, which would be eliminated with the rise of neoliberal criminal theory, is the importance of the economic conditions in the development of criminal behaviour. Exploring the IPC’s discussion on this matter assists in revealing one of the more significant conflicts within liberal criminal policy.

At the Second Congress in Rome, the IPC asked, “[w]hat are the most efficient means to prevent and combat vagrancy?”<sup>151</sup> The Congress’ opinion on the matter was divided into two parts. First the Congress suggested that “[p]ublic assistance should be so regulated that every indigent person may be certain to obtain a living, but only in compensation for work adapted to his physical possibilities.”<sup>152</sup> This is a fairly remarkable statement. The Congress was here suggesting that in order to combat crime and vagrancy, governments should introduce what essentially amounts to workfare.

However, there was another side to the issue of vagrancy. The Congress stated, “[i]ndigent persons who, notwithstanding assistance so regulated, surrender to vagrancy and consequently fall under the provisions of the law, should be severely punished by compulsory labor in workhouses.”<sup>153</sup> It was clear that, while the Congress supported aid to the poor, if those receiving aid did not find work they should be forced to work by the state. The Congress believed that there should not be the option of living off of whatever

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<sup>150</sup> Butler, “Ninth International Prison Congress,” 606.

<sup>151</sup> Teeters, *Deliberations of the International Penal and Penitentiary Congresses*, 60.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

meagre aid was offered other than imprisonment. At the Fourth Congress, the IPC went so far as to state that aid should be extended to foreigners, and that governments should “ensure repatriation of discharged prisoners if they so desire, or to secure work for them in another place.”<sup>154</sup>

In 1900, at the Sixth Congress in Brussels, the IPC resolved that in order to “fulfill effectively their work of charity, and to secure the success of their social mission, the prevention of crime, aid committees for discharged prisoners should have recourse to employment offices, which undertake gratuitously to furnish information and to secure employment.”<sup>155</sup> In 1905, at the following Congress in Budapest, the IPC raised the subject of indemnities asking, “[u]pon what principles, in what cases, and on what basis should indemnities be allowed to prisoners, or to their families in consequence of accidents arising in penal labor?”<sup>156</sup> The author of the American report on the Budapest Congress, Samuel Barrows, argued in favour of offering some form of indemnities and in doing so offered a brief history of the liberal criminal reform movement and expressed his view that merely considering this question showed an advancement in society:

The consideration of this question marks a distinct ethical advance in modern civilization... Work, at first used as a form of slavery, became afterwards a moral agency for the development of the prisoner, and now the obligation of the state to indemnify prisoners injured by prison labor grows out of the recognition of the rights which are due to the free laborer. The mere fact that the State takes the person out of society because he has violated the law does not absolve society from duties toward him and if society has any duty to fulfill it is to turn him out a better person physically, morally, and intellectually. In such a condition he is not only worth more to himself but worth more to society.<sup>157</sup>

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<sup>154</sup> *Ibid*, 79.

<sup>155</sup> Barrows, *The Sixth International Prison Congress*, 76.

<sup>156</sup> *Ibid*, 79.

<sup>157</sup> *Ibid*, 81.

By considering indemnities, the Congress was acknowledging the economic ramifications of imprisonment. The IPC eventually concluded that indemnities were recommended in limited circumstances. One instance in which indemnities were suggested was “in case of accidents incurred during penal labor indemnity should be accorded to prisoners or to their heirs dependent upon them for subsistence, on the condition that the incapacity continues after release.” However,

the right to indemnity is excluded if the accident is caused voluntarily, or through serious disobedience to the rules, or through gross carelessness. The indemnity should be strictly confined to an allowance for subsistence, fixed within maximum and minimum limits, determined according to the gravity of the incapacity due to the accident.<sup>158</sup>

In 1930, at the Tenth Congress held in Prague, Czechoslovakia, the Congress put forward a plan to assist former prisoners to re-enter society. The IPC stated, “the aim toward which the efforts of all must be directed is the establishment of a régime in which the granting of freedom forms only a part of a precise method of improvement and in which the occupation of a paroled prisoner is a sequence to his penitentiary treatment.”<sup>159</sup> The IPC suggested that any organization formed to help aid prisoners return to society should seek to “influence public opinion to awaken interest in the reform of discharged prisoners; distinguish those amenable to betterment from those who are irreclaimable, for example by means of a trial period (*traitement d'épreuve*) controlled by a society of patronage, and recommending only those amenable to reform” and finally “individualize by selecting the occupation of the liberated prisoner in view of the nature of his offense according to his social condition.”<sup>160</sup>

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<sup>158</sup> *Ibid*, 82.

<sup>159</sup> Teeters, *Deliberations of the International Penal and Penitentiary Congresses*, 173.

<sup>160</sup> *Ibid*.

For many associated with the IPC, class and criminality were inextricably combined. Ruggles-Brise expressed this view in his report on the Washington, DC Conference writing that: “[t]he punishment of the individual however elaborately and humanely organized, is of little importance relatively to the removal of the social conditions, which impel to crime.”<sup>161</sup>

The IPC as an organization expressed time and time again the view that addressing the social and material conditions that produce criminals was essential to reducing crime and creating a lawful society. In fact, Caleb Randall, whose critique of the Russian prison system was discussed at the beginning of this chapter, observed in 1891 that the largest issue with the then current prison system in the United States was the lack of an emphasis on the reformation of prisoners. He wrote that the American system “is very simple. It arrests, tries, convicts, imprisons, and then abandons. It is the doctrine and practice of riddance.”<sup>162</sup>

For members of the IPC such as Sir Evelyn Ruggles-Brise and Caleb Randall, when assessing the cause of a crime, the social class from which the perpetrator comes was of greater importance than any decision that the individual took. However, the IPC’s chosen method for punishing crime, imprisonment, could only hope to reform the ideas and mind of the individual prisoner and not the conditions under which he lives. In other words, the root causes of crime, which the IPC believed to be primarily the social conditions of the criminal, were not being addressed by the IPC’s recommended method of criminal punishment.

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<sup>161</sup> Ruggles-Brise, *Proceedings of the Eighth International Penitentiary Congress*, 1-2.

<sup>162</sup> Randall, *The Fourth International Prison Congress*, 28.

This deficiency in the IPC's concept of the criminal system is, in essence, the fundamental conflict at the heart of liberal penal policy. How can one reconcile the belief in the foundational nature of material conditions that impact upon the decision making process of criminals with a system of punishment that does little or nothing to aid in bettering those material conditions? As will be demonstrated in the next chapter, the neoliberal penal theorists, who would shape post-World War II America's ideas and policies regarding crime and punishment, did so by attempting to, as much as possible, devalue in the legal process the context from which offenders committed their crimes. These thinkers would dissociate the ideas of justice and penology by placing all authority in the decision making process under the purview of 'the market.'

## **Conclusion**

The IPC was a fascinating organization that did important work in spreading and solidifying liberal ideas about crime and punishment. However, the Organization's resolutions were completely non-binding. While the IPC helped unify liberal penology rhetorically and ideologically, in reality many countries that formed its membership maintained and created laws and practices in direct opposition to the IPC.<sup>163</sup> The IPC suggested a justice system aimed at the reformation of individual criminals. However, for the sake of creating policy that could operate smoothly, the IPC created various means of classifying crimes and criminals. In the end, the system was proposed by the IPC contained various tensions. Should the system focus more on reformation or

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<sup>163</sup> It is notable that the history of the IPC, spanning from 1872 to 1935, almost perfectly coincided with the Jim Crow Era in the United States. During this period, nothing approaching equality before the law existed in the United States. As has been demonstrated, the hypocrisy of the American penal system did not escape the delegates the were sent to the IPC conferences. The IPC would eventually reconvene in 1950, after a 15 year break, under the auspices of the United Nations.

punishment? Should criminals be treated as individuals or classified into more manageable groups? These large questions were never conclusively resolved by the IPC. However, the IPC did unambiguously provide several key premises from which liberal criminal policy would continue to develop. Most importantly, the IPC helped to entrench incarceration as the primary means of punishment within a liberal justice system. The other important premise established by the IPC is that crime, for the most part, is the result of social and economic conditions. These two premises lead to another tension that was not resolved by the IPC: incarceration is a form of punishment that does not positively alter the social conditions of the criminal. While the IPC understood crime as something that stems from social conditions, by promoting incarceration as the primary means of criminal punishment the IPC could only hope to reform the individual criminal's disposition, not their socio-economic conditions. The next chapter will explore how the belief of the primacy of social conditions in creating criminal activity and the drive to reform incarcerated people was removed from liberal criminal policy by those seeking to create an economic system of criminal punishment.

## **The Postwar Evolution of Liberal Criminology**

Following the Second World War, liberalism underwent a series of dramatic developments. Liberal concepts of criminology were deeply influenced by this evolution in liberal thinking that ultimately evolved into what is now considered to be its neoliberal form. The totalitarian regimes that fostered so much misery during the war produced a response by liberal economists and legal theorists. This evolution in liberal thought was led by thinkers such as Friedrich Hayek, John Maynard Keynes, Richard Posner and Gary Becker.

The postwar period should be seen as an inflection point in liberal thought. During this period, one could posit that liberalism was divided into two camps, the free market fundamentalists, exemplified by Hayek, Milton Friedman and others, and the liberal interventionists, who emerged from the work of Keynes. While the two camps had radically different approaches to economic and political theory, both the Keynesian and Hayekian forms of liberalism took similar approaches to topics related to crime and punishment. In the United States, the criminological solutions offered by liberal thinkers helped contribute to the creation of the crisis of mass incarceration.

In recent decades, both the emergence of the system of racialized mass incarceration in the United States and the development of neoliberalism have been the subjects of many separate studies. Most of these studies have treated the two phenomena as unrelated. Studies of neoliberalism often sought to understand the development of massive levels of income inequality and the increased financialization of the economy characteristic of the neoliberal era. Studies of mass incarceration have often looked at the impact of what historian James Hunter termed the ‘culture wars’, or the political

popularity of “law and order” rhetoric, on the development of mass incarceration.

However, few have attempted to examine the primacy of neoliberal economic theory in American society to determine if it should be viewed as an important contributing factor to the development of mass incarceration.

Utilizing the theories of Michel Foucault, this chapter will demonstrate that the expansion of mass incarceration in the United States is inherently tied to a shift towards neoliberal economic thought, and the application of that thought in areas outside of what is traditionally thought of as the economy. In addition, throughout this period lawmakers continually attempt to reform the justice system through expansion. The thesis of this chapter is that, within Foucault’s theory of what he calls anarcholiberalism, exists the basis for the racialized system of mass incarceration. The use of Foucault’s theory will primarily focus on his notion that in anarcholiberalism the laws enacted establish and enforce the rules of the game that is the economy. However, prior to embarking on the substance of this analysis, it is important to briefly describe the historical context within which this neoliberal reform occurred.

### **Postwar Conflict**

Following the end of Reconstruction, white politicians and plantation owners attempted to resolve the labour shortage created by the emancipation of the slaves by using vagrancy laws and the legal and penal systems to tie recently freed African Americans to plantations. An individual could be deemed a vagrant if he or she could not prove at a given moment that he or she were employed. In the eyes of the law, former slaves were no longer "employed" and were as a result considered to be vagrants. In

effect, they were returned to a state akin to slavery and could be rented out to private businesses through the convict lease program.<sup>164</sup>

This systematic use of the vagrancy laws to “re-enslave” black Americans, alongside legally unsanctioned violence of private citizens, in the forms of lynching, torture and beating, policed the southern racial hierarchy. In the north, racial conflicts were very common throughout the Jim Crow era and escalated as black veterans returning from the two world wars found their place within society unchanged. Often, in northern regions of the country, race riots took the place of lynching as a method of extralegal punitive social control of African Americans.

Comparing race riots to traditional lynching in 1952, H. Otto Dahlke wrote, “the struggle with regard to superordination and subordination is thus carried from the country into the urban centers where it continues on a group rather than on an individual basis.”<sup>165</sup> According to the Social Science Institute at Fisk University, “242 racial battles” were reported “in forty-seven cities throughout the nation in 1943 alone,” a large portion of which were sparked in part by highly publicized photos of police brutality towards black people.<sup>166</sup> This response to race riots led to the first attempts to fundamentally alter the penal system and end the Jim Crow system.

Harry Truman’s administration created the President’s Committee on Civil Rights in 1946. The preamble to the executive order that launched the Committee posited that racial tensions were a threat to “domestic tranquility, national security, the general welfare, and the continued existence of our free institutions.” Truman believed that the

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<sup>164</sup> Douglas A. Blackmon, *Slavery By Another Name* (New York: Anchor Books, 2008).

<sup>165</sup> H. Otto Dahlke, “Race and Minority Riots-A Study in the Typology of Violence,” *Social Forces*, Vol. 30, no. 4 (1952), 422.

<sup>166</sup> Harvard Sitkoff, “Racial Militancy and Interracial Violence in the Second World War”, *The Journal of American History*, 58, no.3 (1971), 671.

problem, caused by the racist justice system and the arbitrary racist violence in the south, was not the racism in itself, but rather the threat to domestic tranquility that racist acts inspired. Notably, the concern regarding racist acts was not derived from a belief that acts of racism are inherently unjust, rather the focus was that racial violence upset, or had the potential to upset, American society. The measures proposed by Truman's Committee to address the perceived problems included the putting into place of strong anti-lynching legislation and focusing on "the increased professionalization of the state and local police forces" by instituting "police training programs" that would "indoctrinate officers with an awareness of civil rights problems," the encouragement of "proper treatment by the police of those who are arrested and incarcerated," and higher "salaries that will attract and hold competent personnel." These actions were not designed specifically to deal with the racist outcomes of the justice system, but to lend more legitimacy to the enforcement of the current rules.<sup>167</sup>

Another notable aspect of these measures was that for the most part they consisted of increasing the funding of the police, in other words, reform through expansion. An underlying principle of these reforms was that the best way to address racism within the justice system was to address the racial prejudice of each individual actor within the justice system. These changes were not enacted under Truman, but provided the basis for many American liberal reforms to the carceral state.<sup>168</sup> Before returning to the evolution of mass incarceration in the United States, it is important to consider the evolution in liberal thinking that explains this development.

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<sup>167</sup> United States President's Committee on Civil Rights, *To Secure These Rights*, 155.

<sup>168</sup> *Ibid.*

## The Emergence of Neoliberal Criminal Reform

Arguably, the first scholar to directly address neoliberalism as a coherent ideology was Michel Foucault. In Foucault's 1978-1979 lecture series, entitled *The Birth of Biopolitics*, the cultural theorist discusses how classical liberalism has evolved into neoliberalism. Foucault usefully identifies two forms of neoliberalism. The first form, evolving primarily from the Freiburg School following the Second World War, Foucault labeled ordoliberalism. Foucault writes that ordoliberalism "is linked to the Weimar Republic, the crisis of 1929, the development of Nazism, the critique of Nazism, and, finally, post-war reconstruction."<sup>169</sup> The second form of neoliberalism that Foucault identified was called anarcholiberalism. Foucault writes that anarcholiberalism:

is a neo-liberalism defined by reference to the New Deal, the criticism of Roosevelt's policies, and which, especially after the war, is developed and organized against federal interventionism, and then against the aid and other programs of the mainly Democrat administrations of Truman, Kennedy, Johnson, etcetera.<sup>170</sup>

Common to Foucault's interpretations of both variants of neoliberalism is the assertion that they are primarily constructed as reactions to what liberal thinkers saw as the excesses of state intervention, and especially state intervention in the economy.

Anarcholiberalism, largely developed within the economic and legal departments of the University of Chicago, was heavily inspired by Friedrich Hayek's 1944 polemic against the concept of the welfare state, *The Road to Serfdom*, with a specific focus on the United Kingdom.

Likely attributable to the time frame in which Foucault's analysis was produced, the late 1970s, many of what have come to be seen as important elements of

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<sup>169</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the College De France: 1978-1979*, trans. Graham Burchell (New York: Picador, 2008) 78.

<sup>170</sup> *Ibid*, 78-79.

neoliberalism were left unexplored. Some argue that neoliberalism was implemented a few years prior, during the New York City fiscal crisis of the mid 1970s.<sup>171</sup> Others argue it was not fully implemented in the United States until 1979 when the Federal Reserve dramatically raised interest rates, thereby contracting the economy in order to, in the words of the then chair of the Federal Reserve Paul Volcker, “slay the inflationary dragon.”<sup>172</sup> Either way, it is clear that the implications of the American variant of neoliberalism, which Foucault termed anarcholiberalism, were not yet fully understood when Foucault undertook his analysis.

One vital aspect of American neoliberalism, which had not yet become fully evident when these lectures were given, was the evolution of the racialized system of mass incarceration. While Foucault discussed the economic approach to crime that was developed alongside American neoliberal thought, he did not explicitly suggest that this new approach to crime and punishment had the potential to evolve into one of the most expansive and intrusive carceral states in history.

Before delving into the implications of neoliberal economic theory on the development of neoliberal criminology, it is useful to examine some of the foundational premises of neoliberal economic theory, as Chicago school theorists presented it. As is referenced multiple times in Foucault’s *The Birth of Biopolitics*, beginning in the late 1960s, anarcholiberalism was essentially formulated in the University of Chicago’s law and economics departments by economists and legal scholars such as Friedrich Hayek, Milton Friedman, Gary Becker, Ronald Coase and Richard Posner.

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<sup>171</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) 27.

<sup>172</sup> Paul Volcker *Changing Fortunes: The World’s Money and the Threat to American Leadership* (New York: Three Rivers Press, 1993) 170.

In *The Road to Serfdom*, Hayek's thesis was that welfare states are the first step toward the development of a left wing totalitarian system of government. Hayek believed that the origin of the Nazi regime was socialism. Expressing a now prevalent opinion among many in American society, Hayek writes, in reference to the United Kingdom:

The increasing veneration for the state, the admiration of power, and of bigness for bigness' sake, the enthusiasm for "organisation" of everything (we now call it planning), and that "inability to leave anything to the simple power of organic growth," which even H. v. Treitschke deplored in the Germans sixty years ago, are all scarcely less marked in this country now than they were in Germany.<sup>173</sup>

Arguably in part due to these origins, neoliberalism is often seen by proponents of neoliberal theory as a defensive set of policies and ideals in opposition to potentially encroaching fascism and communism, both seen by neoliberals as potential outcomes of a large state and planned economies.

However, it was not just fear of totalitarianism that inspired the neoliberal desire for an economy based on the concept of the 'free market.' Hayek argued that a free market, in which transactions could occur smoothly within the legal limits of the market, was the most efficient means of allocating resources. In his 1945 article "The Use of Knowledge in Society," Hayek argued that:

The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.<sup>174</sup>

To state this concept in terms more specifically focused upon economics, no single agent, be it an individual or a government, can ever hope to keep up with the price fluctuations within an economy, especially in a large economy in which millions of transactions are

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<sup>173</sup> Friedrich Hayek, *The Road to Serfdom* (Routledge Classics, 2001) 187.

<sup>174</sup> Friedrich Hayek, "The Use of Knowledge in Society," *Library of Economic Freedom*, accessed 5 April 2018, para 3.

being conducted every day. However, the price assigned by a market to a commodity is much more organic and responsive to fluctuations within various elements of the economy because it is the end result of everyone in society making decisions and undertaking transactions.

In the abstract, one can think of the price of a commodity in a free market as a price based upon the sum of all of the knowledge within a society. This, in Hayek's mind, leads to the most adaptable and fair price possible. Hayek also outlined what he believed to be the central problem of economics, which is: how does the economic "system secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality."<sup>175</sup>

Together, these two theories underpin an ideology in which government intervention in the economy should be avoided. In Hayek's mind, not only does government intervention potentially lead to a totalitarian regime, it is also an extremely inefficient means of distributing resources.

Ronald Coase's 1960 article "The Problem of Social Cost" debuted what would come to be known as the Coase Theorem. At its most basic level, the article attempts to solve the issue of externalities in economic production. As Coase writes, a standard example of this problem "is that of a factory the smoke from which has harmful effects on those occupying neighbouring properties." Coase argued that often, legislators and regulators have applied a simple solution that, in Coase's words, "tended to obscure the nature of the choice that has to be made." The common solution to the issue, that Coase

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<sup>175</sup> *Ibid.*

argues against, is that, in the case of the factory, “it would be desirable to make the owner of the factory liable for damage caused by the smoke, or alternatively, to place a tax on the factory owner varying with the amount of smoke produced and equivalent in money terms to the damage that it would cause, or finally, to exclude the factory from residential districts.”

In Coase’s mind, any type of regulation or limitation placed on the polluting factory is beneficial for the victims of the pollution. In other words, it may seem as though this problem is a simple issue “in which A inflicts harm on B” and therefore regulators need to find a way to restrain A; however, Coase claims that the problem is actually one of a reciprocal nature. For Coase, “to avoid the harm to B would inflict harm on A.” Therefore, “the real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?”<sup>176</sup>

In the article, Coase positions himself as a disinterested party whose only concern is what is the best outcome for the whole of society. Therefore, when discussing another example of externalities – “the problem of straying cattle which destroy crops on neighbouring land” – Coase argues the choice inherent in this problem is clear: “meat or crops.”<sup>177</sup> A regulation restricting the rancher’s ability to have his cattle feast on his neighbour’s crops would have the side effect of forcing the rancher to have less cattle. The article argues that in a world of no transaction costs, the market would be the best means of allocating resources to the highest value user. While Coase acknowledged that his hypothetical world of no transaction costs did not exist, this fact did not dramatically alter his policy prescriptions. He said, “[i]t is my belief that economists, and policy-

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<sup>176</sup> Ronald Coase, “The Problem of Social Cost,” *Journal of Law and Economics*, Vol. 56 (November 2013), 837.

<sup>177</sup> *Ibid*, 838.

makers generally, have tended to overestimate the advantages which come from governmental regulation. However, this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn.”<sup>178</sup> Notwithstanding the fact that this is a liberal argument against the need for private actors to limit their externalities, Coase claims that the moral rationale behind his solution is based on the needs of society, not the liberal individual.

So what does the Coase Theorem mean for criminology? Coase proposes that the best way to run an economic system is to ensure that there is as little friction within the market relationship between buyer and seller as possible. As will be demonstrated, the solution posed by anarcholiberals, in order to lower transaction costs as much as possible, was to begin to conceptualize the market as a game. According to this conceptualization, the role of the law should be to define the rules of the game. Within the game, economic actors should be able to behave as freely as possible with little or no government regulation or interference.

Since its publication, “The Problem of Social Cost” has become the most cited law article of all time.<sup>179</sup> The policy recommendations produced by this paper in part led to massive deregulation of the economy and disinvestment in the welfare system, disproportionately hurting African American and other minority populations by increasing income inequality and poverty levels.

The most famous member of the Chicago School is Milton Friedman. His 1962 collection of lectures, entitled *Capitalism and Freedom*, brought the Chicago school’s

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<sup>178</sup> *Ibid*, 853.

<sup>179</sup> “The Problem of Social Cost,” *The University of Chicago Law School*, accessed March 26, 2016, <http://www.law.uchicago.edu/lawecon/coaseinmemoriam/problemofsocialcost>.

ideas to the mainstream. Friedman's prose is very accessible and his work can be easily understood by people with little to no background in economic theory. His book sold more than 400,000 copies in the eighteen years following its publication.<sup>180</sup> Nothing in the book is particularly unique or innovative. In the preface to his book, Friedman acknowledged that much of the content of his work was comprised of ideas that he borrowed from his colleagues at the University of Chicago.<sup>181</sup> However, for many in the general public, this was the first work of neoliberal economic theory to which they would have been exposed.

In *Capitalism and Freedom*, Friedman argues that economic freedom, which for him could only be achieved within a free market economy, is a prerequisite to political freedom. Friedman further argues that “[t]he kind of economic organization that provides economic freedom directly, namely, competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other.”<sup>182</sup> Expanding upon Hayek's argument, respecting the utility of decentralization of the economy, Friedman wrote that “[v]iewed as a means to the end of political freedom, economic arrangements are important because of their effect on the concentration or dispersion of power.”<sup>183</sup> In fact, Friedman goes as far as to state that political freedom “clearly came along with the free market and the development of capitalist institutions.”<sup>184</sup> However, Friedman does allow for the fact that

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<sup>180</sup> Milton Friedman, *Capitalism and Freedom: Fortieth Anniversary Edition* (Chicago: University of Chicago Press, 2002), xi.

<sup>181</sup> Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) ‘Preface.’

<sup>182</sup> *Ibid.*, 9.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, 9-10.

it is “clearly possible to have economic arrangements that are fundamentally capitalist and political arrangements that are not free.”<sup>185</sup>

Friedman’s arguments beg the question, what is the role of the government in the type of free society that he envisions? According to Friedman, the role of government is “to provide a means whereby we can modify the rules, mediate differences among us on the meaning of the rules, and enforce compliance with the rules on the part of those few who would otherwise not play the game.”<sup>186</sup> For neoliberals, like Friedman and the rest of the Chicago School, the economy is best envisioned as a game in which the government defines a set of rules and allows the market to function ‘freely’ within the highly restricted and regulated space that they call the market.

Gary Becker’s 1968 article “Crime and Punishment: An Economic Approach” evolved from and reinforced the free market enthusiasm of other neoliberal theorists and was the impetus for the dissociation of the concepts of justice and context from law enforcement. The preface to the book, which contains Becker’s article written by Becker’s co-editor William Landes, states that “at least since the time of Adam Smith’s analysis of the Navigation Act in England, economists have used the tools of economic theory to understand and evaluate the effects of laws and alternative legal arrangements on the workings of an economic system.” However, Landes continues, “both the theoretical and quantitative investigations have generally taken for granted the question of enforcement. Laws are assumed to be enforced.”<sup>187</sup> It is this type of assumption that Becker investigates in his article. As Becker writes, the primary purpose of his essay “is

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<sup>185</sup> *Ibid*, 10.

<sup>186</sup> *Ibid*, 25.

<sup>187</sup> William M. Landes, Gary S. Becker, *Essays in the Economics of Crime and Punishment* (New York: Columbia University Press, 1974) xiii.

to answer normative versions of these questions, namely, how many resources and how much punishment should be used to enforce different kinds of legislation?" Becker believed, "a useful theory of criminal behavior can dispense with special theories of anomie, psychological inadequacies, or inheritance of special traits and simply extend the economist's usual analysis of choice."<sup>188</sup>

Becker's work reveals many other underlying assumptions that cannot be overlooked. Becker fails to support with any evidence the idea that criminological theory should rid itself of the need to take into account the specifics of a criminal or an offence. The claim is merely made in order to enable Becker to proceed with his argument. Further, Becker's theory assumes that, prior to committing a crime, a criminal engages in a cost-benefit analysis to assess the economic efficiency of committing the crime.

According to Becker, his approach:

implies that there is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables, such as the income available to him in legal and other illegal activities, the frequency of nuisance arrests, and his willingness to commit an illegal act.<sup>189</sup>

Becker's writing can be viewed as an extension of rational choice theory into the realm of criminology. These are not small assertions that may impact Becker's findings at the margins, they are vital components of the model that he attempts to create. For Becker, the idea that humans are inherently atomized liberal subjects is a presupposition so basic that it warrants no explanation or argument. Another assumption that Becker makes is

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<sup>188</sup> Gary S. Becker, "Crime and Punishment: An Economic Approach," in *Essays in the Economics of Crime and Punishment* (New York: Columbia University Press, 1974) 2.

<sup>189</sup> Becker, "Crime and Punishment," 9.

that the laws governing society are largely correct and just. As will be demonstrated below, the legitimacy of the laws is not a concern to anarcholiberals like Becker.<sup>190</sup>

Becker suggests that if the penalty for the crime, or the likelihood of getting caught were low, and if the profits of the crime were high, then criminals would engage in a criminal act. Of the two aforementioned deterrents to crime, the penalty and the likelihood of getting caught, Becker believed it was most economically efficient to increase the penalty because the cost of increasing surveillance was too high.<sup>191</sup> Becker believed that crime was just like any other economic problem where, as punishment (costs) increased, crime would diminish. As Becker wrote, “[t]he anticipation of conviction and punishment reduces the loss from offenses and thus increases social welfare by discouraging some offenders.”<sup>192</sup>

Another premise that Becker employed was related to the relationship between spending on policing and criminal punishment and the results produced by that spending. Becker states “the more that is spent on policemen, court personnel, and specialized equipment, the easier it is to discover offenses and convict offenders.”<sup>193</sup> This assertion implies an almost direct relationship between spending and outcomes.

The foundational premise of Becker’s analysis is the belief that criminology can be analyzed as an economic problem. Early in the article, Becker explains his approach:

The approach taken [in this article] follows the economists’ usual analysis of choice and assumes that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities.

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<sup>190</sup> Ibid, xiv.

<sup>191</sup> Ibid, 17-18.

<sup>192</sup> Ibid, 40.

<sup>193</sup> Ibid, 7.

Some persons become ‘criminals,’ therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ.<sup>194</sup>

For the rational economic man at the center of Becker’s analysis, criminal law is treated almost identically to the treatment afforded by any other type of economic regulation. If a person believes he or she will gain from committing an offense, then, according to Becker, one should assume that the person would commit the offense. He continues:

I cannot pause to discuss the many general implications of this approach, except to remark that criminal behavior becomes part of a much more general theory and does not require ad hoc concepts of differential association, anomie, and the like, nor does it assume perfect knowledge, lightning-fast calculation, or any other caricatures of economic theory.<sup>195</sup>

In this section of his article, Becker is stating his belief that the justice system should not factor in an individual’s background or social conditions in the decision making process. Instead, all that needs to be considered are the facts directly related to the crime. In essence, Becker was attempting to reduce criminal justice to a binary equation, either an infraction occurred or it did not, no other elements should be considered. Becker continued to develop his approach, suggesting that criminology can in large part be boiled down to a cost-benefit analysis:

This approach implies that there is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables, such as the income available to him in legal and other illegal activities, the frequency of nuisance arrests, and his willingness to commit an illegal act.<sup>196</sup>

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<sup>194</sup> Ibid, 9.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

Similarly to Beccaria, Becker understood that criminal punishment implicates “not only offenders but also other members of society.”<sup>197</sup> However, Becker understood this dynamic in primarily an economic context. Unlike Beccaria, who focused on the impact that criminal punishment can have on the actions of other members of society, in terms of limiting future criminal activity, Becker was interested in the actual economics of criminal punishment, such as the cost of incarceration and capture, and the allocation of funds collected as a result of fines. Throughout his article, Becker describes crime as just another form of economic activity. He writes that “‘crime’ is an economically important activity or ‘industry.’”<sup>198</sup>

Perhaps the clearest distillation of Coase’s and Becker’s work into a comprehensive theory of anarcholiberal criminal law policy was presented by their colleague at the Chicago School, legal theorist and judge, Richard Posner, who stated that:

The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange--the “market,” explicit or implicit--in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange... When transaction costs are low, the market is, virtually by definition, the most efficient method of allocating resources. Attempts to bypass the market will therefore be discouraged by a legal system bent on promoting efficiency.<sup>199</sup>

For the proponents of this type of law and economics, crime was inefficient behaviour that interrupted the invisible hand of the market. In that way, crime had a lot in common with government regulation. Having briefly reviewed the evolving neoliberal theory, I

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<sup>197</sup> Ibid, 13.

<sup>198</sup> Ibid, 3.

<sup>199</sup> Richard Posner, “An Economic Theory of the Criminal Law.” *Columbia Law Review* 85, no. 6, (October 1985): 1195.

will now consider how the evolution of neoliberal theory impacted the development of criminal punishment system in the United States.

### **Post War Criminal Reform**

Many of the neoliberal modifications to the justice system that would be instituted in the latter half of the 20th century had their roots in policies and ideas that had been prevalent in American liberal discourse for decades. On 5 August 1946, President Harry Truman received a letter from the Southern Conference for Human Welfare that demanded a “stop [to] all manifestations of fascism” and for “federal anti-lynch laws [to] be enacted.”<sup>200</sup> Later that month, John Sengstacke, a newspaper publisher, who would go on to work with Truman to desegregate the military and the White House press corps, warned Truman that “a veritable reign of terror exists... in the southern section of the United States... which threatens government by law” and that “negroes are becoming increasingly resistive” and “may decide to protect themselves by taking the law into their own hands.”<sup>201</sup>

The increasing pressure put on Truman eventually led to his establishment of the President’s Committee on Civil Rights through the issuance of Executive Order 9808. When announcing the Committee, Truman said, “[i]n some places, from time to time, the local enforcement of law and order has broken down, and individuals -- sometimes ex-

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<sup>200</sup> “Flyer Regarding a Funeral March in Washington,” D. C., August 3, 1946, *Official File, Truman Papers*, accessed March 22, 2016, [http://www.trumanlibrary.org/whistlestop/study\\_collections/civilrights/documents/index.php?documentdate=1946-08-03&documentid=4-4&pagenumber=1](http://www.trumanlibrary.org/whistlestop/study_collections/civilrights/documents/index.php?documentdate=1946-08-03&documentid=4-4&pagenumber=1).

<sup>201</sup> “John H. Sengstacke to Harry S. Truman,” August 13, 1946, *Official File, Truman Papers*, accessed March 22, 2016, 4-5, [http://www.trumanlibrary.org/whistlestop/study\\_collections/civilrights/documents/index.php?pagenumber=2&documentdate=1946-08-13&documentid=](http://www.trumanlibrary.org/whistlestop/study_collections/civilrights/documents/index.php?pagenumber=2&documentdate=1946-08-13&documentid=).

servicemen, even women -- have been killed, maimed, or intimidated.”<sup>202</sup> The preamble to the executive order posited that racial tensions were a threat to “domestic tranquility, national security, the general welfare, and the continued existence of our free institutions.” To Truman, the problem caused by the racist justice system was not the racism in itself, but rather the threat to “domestic tranquility” it inspired. The Committee was given the task to “inquire into and to determine whether and in what respect current law-enforcement measures and the authority and means possessed by Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of the people.”<sup>203</sup> A primary focus of the Committee was reducing or eliminating lynching in order to reduce racial tensions.

In the eyes of the Committee, black victims of lynching and race riots were “victims of prejudice and public excitement.”<sup>204</sup> This assertion had important and far-reaching implications. The Committee believed that the cause of the riots in the North, the lynchings in the South, and the racial discrepancies in the criminal justice system as a whole, was largely individual human prejudice. The Committee wrote:

Freedom can only exist where the citizen is assured that his person is secure against bondage, lawless violence, and arbitrary arrest and punishment... Where the administration of justice is discriminatory, no man can be sure of his security... Where a society permits private and arbitrary violence to be done to its members, its own integrity is invariably corrupted. It cannot permit human beings to be imprisoned or killed in the absence of due process of law without degrading its entire fabric.<sup>205</sup>

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<sup>202</sup> “Assignment from the President”, in United States, President's Committee on Civil Rights, *To Secure These Rights: The Report of the President's Committee on Civil Rights* (New York: Simon and Schuster, 1947), vii.

<sup>203</sup> Harry S. Truman, “Executive Order 9808 - Establishing the President's Committee on Civil Rights,” *The American Presidency Project*, December 5, 1946, <http://www.presidency.ucsb.edu/ws/?pid=60711>.

<sup>204</sup> United States President's Committee on Civil Rights, *To Secure These Rights: The Report of the President's Committee on Civil Rights* (New York: Simon and Schuster, 1947), 29.

<sup>205</sup> *Ibid*, 6.

This statement presents a similar rationale for instituting liberal criminal policy as Cesare Beccaria offered 180 years prior. The primary impetus for reform, in both cases, was to create a more stable society by enacting liberal criminal policies. Both the Committee and Beccaria believed that a justice system that was seen as being illegitimate by large portions of the population was a threat to the stability of any society. In the case of Jim Crow America, punishments that took place outside of the official criminal justice system, like lynching, severely damaged the legitimacy of the state.

The reforms of the 1940s set important precedents for those of the neoliberal era. Truman's administration proposed reform through expansion. The reforms attempted to remove individual bias from the legal and penal systems. The hope was that this would make the justice system more fair and unbiased and would make the system more legitimate, leading to less crime, less racial tension, and fewer riots. The success of reform would not be measured against normative benchmarks of equality or justice. Instead, success would be measured by a decrease in violent racial confrontations sparked by the "private" acts of violence. It is clear that prior to the 'neoliberal era', liberals already had developed tools and techniques for reforming the justice and carceral systems through expansion.<sup>206</sup>

The government reaction to the Civil Rights Movement and the riots of the 1960s was very similar to the response to the racial riots of the 1940s. In 1961, the United States Commission on Civil Rights produced a comprehensive five-volume report. The Report was separated into five topics: voting, education, employment, housing and justice. The justice volume examined "unlawful police violence" and "private"

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<sup>206</sup> Senate and House of Representatives of the United States of America in Congress, *Public Law 90-351*, June 19, 1968, 198, <https://www.gpo.gov/fdsys/pkg/STATUTE-82/pdf/STATUTE-82-Pg197.pdf>.

violence.”<sup>207</sup> The approach and biases of the Commission are apparent by looking at the different ways that police violence and private violence were treated. The “unlawful police violence” section focused on ten cases of deviant police procedure. The report identified four subdivisions of the problem of unlawful police violence:

The first involves the use of racially motivated brutality to enforce subordination or segregation. The second, a not altogether separate category, entails violence as a punishment. The third relates to coerced confessions. The last and largest entails the almost casual, or spontaneous, use of force in arrests. Only the first category necessarily involves racial discrimination. In the others it may, or may not, be present, but Negroes are the victims with disproportionate frequency.<sup>208</sup>

Like the *1947 Civil Rights Report* from the Truman presidency, the focus of the unlawful police section of the 1961 report was on individual instances of racial prejudice and not systemic issues within the criminal system. To the Commission, systematic racial discrepancies in the victims and outcomes of police procedure were not sufficient to compel structural or systemic change. Only if individual actors could be explicitly observed as racist, as was the case in the first category outlined above, would their action be deemed racist. Therefore, the racist implications of the other three categories were largely ignored.

To the authors of the Report, police brutality was an issue because it created “negro distrust of the police.”<sup>209</sup> The Commission acknowledged that brutality played a large role in social control of the black population writing, “the primary motivation for police brutality in the cases [in which police brutality is visibly apparent] seem to have been a desire to ‘keep the Negro in his place.’”<sup>210</sup> However, the Commission found the

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<sup>207</sup> United States Commission on Civil Rights, *Justice: 1961 United States Commission on Civil Rights Report* 5, 1961, iii. <https://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk5.pdf>.

<sup>208</sup> *Ibid*, 5.

<sup>209</sup> *Ibid*, 27.

<sup>210</sup> *Ibid*, 12.

impetus for police brutality in the same place as had the aforementioned *1947 Civil Rights Report* writing, “police brutality—the unnecessary use of violence to enforce the mores of segregation, to punish, and to coerce confessions—is a serious problem in the United States. Much of it occurs when an ill-trained or prejudiced policeman first comes in contact with a suspect.”<sup>211</sup>

The Commission believed that the prejudices of individual officers caused police brutality. In part because it mimicked the logic of the 1947 report, it also offered similar resolutions. The Commission advocated for increased funding to state and local governments for “the development and maintenance of... recruit selection tests and standards,” more expansive training programs, and “college level schools of police administration.”<sup>212</sup> The proposed solutions can be boiled down to the need for increased professionalization of police in order to attempt to legitimize the police force in the minds of the majority of African Americans. This was important because an illegitimate police force was believed by the Commission to cause riots and racial tension.

The “‘private’ violence section” of the report contained a much more substantive critique of incidents of private violence. The regional focus of this section was the southern states. The Commission understood that in a justice system like that of the Jim Crow South, where oftentimes police officers joined others in acts of “unofficial” private racial violence, suspicion of the police was produced and “also ha[d] the effect of perpetuating deep fears among many Negroes that should violence strike, the police will

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<sup>211</sup> *Ibid*, 28.

<sup>212</sup> *Ibid*, 112.

side with the mob.” This situation discredited law enforcement. The Commission stated, “no American citizen should have to live with such fears.”<sup>213</sup>

Many civil rights demonstrations and actions were similarly portrayed at that time as criminal rather than political acts. Many white Americans believed that federal authorities were being too lenient towards civil rights protesters. During this period, in which race politics and civil rights actions moved to the forefront of the national agenda, the crime rate spiked in America. Many conservative leaders conflated the Civil Rights Movement with this jump in crime more generally. For example, in 1965 former Supreme Court Justice Charles Whittaker commented that the rise in the crime rate was:

fostered and inflamed by the preachments of self-appointed leaders of minority groups ... [who told their followers]... to obey the good laws but to violate the bad ones.... This simply advocates the violation of the laws they do not like... and the taking of the law into their own hands.<sup>214</sup>

In his speech accepting the 1964 Republican nomination for president, Barry Goldwater made a similar connection, calling civil rights leaders “bullies and marauders,” and criticized Johnson’s response to the riots stating, “Security from domestic violence, no less than from foreign aggression, is the most elementary and fundamental purpose of any government, and a government that cannot fulfill this purpose is one that cannot long command the loyalty of its citizens.”<sup>215</sup> In September of 1964, while on the campaign trail, Goldwater, referring to Johnson’s attempts to pass civil rights legislation, expanded on his earlier claims saying, “choose the way of this

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<sup>213</sup> *Ibid*, 44.

<sup>214</sup> “Lawlessness in U.S.-Warning From a Top Jurist,” *U.S. News and World Report*, 27, quoted in Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (Oxford: Oxford University Press, USA, 1999), 31.

<sup>215</sup> Barry Goldwater, “Speech Accepting the Republican Presidential Nomination,” *American Rhetoric*, July 16, 1964, <http://www.americanrhetoric.com/speeches/barrygoldwater1964rnc.htm>.

present administration and you will have mobs in the street, restrained only by the plea that they wait until after election time to ignite violence once again.”<sup>216</sup>

In 1965, Johnson put the United States Commission on Civil Rights’ recommendations for increased funding of state and local police forces into legislation with the *Law Enforcement Assistance Act*. The purpose of this Act was “to provide assistance in training State and local law enforcement officers and other personnel and in improving capabilities, techniques, and practices in, State and local law enforcement and prevention and control of crime, and for other purposes.”<sup>217</sup> In March 1967, the Katzenbach Report was released. In the Report, the Committee, led by the Under Secretary of State Nicholas Katzenbach, declared the root of crime to be poverty and racial exclusion. The solutions that the Committee offered were, just as in the 1940s, based upon the premise that a further expansion of the justice system would allow for better policing of the actions of actors within the system and thereby remove any racial prejudice. The Committee wrote that:

[e]very part of the system is undernourished. There is too little manpower and what there is is not well enough trained or well enough paid. Facilities and equipment are inadequate. Research programs that could lead to greater knowledge about crime and justice, and therefore to more effective operations, are almost nonexistent. To lament the increase in crime and at the same time to starve the agencies of law enforcement and justice is to whistle in the wind.<sup>218</sup>

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<sup>216</sup> Barry Goldwater, “Peace through Strength” in *Vital Speeches of the Day*, vol 30 (New York: City News, 1964), 744.

<sup>217</sup> U.S. Committee on the Judiciary, *Law Enforcement Assistance Act of 1965: Hearings Before a Subcommittee of the Committee on the Judiciary United States Senate Eighty-Ninth Congress First Session on S. 1792 and S. 1825*, July 22, 1965, 1, <https://www.ncjrs.gov/pdffiles1/Digitization/134199NCJRS.pdf>.

<sup>218</sup> The President’s Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington: United States Government Printing Office, 1967) 15. <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

Again, what is being suggested is reform through expansion. The racist outcomes that the system produces should be rectified by increasing the resources and training of individual actors within the system.

The following year, many of the theories and solutions posited by the Katzenbach report were restated and expanded upon by the Kerner Commission. The Kerner Commission was a politically motivated project designed to deal with the ramifications of the riots of 1967. The night that President Lyndon Johnson announced the formation of the Commission, Johnson appeared on television and declared that “even before all the evidence is in... there are some things we can tell.” Johnson continued, saying “[a]ll of us know” that “ignorance, discrimination, slums, poverty, disease, not enough jobs” are “the conditions that breed despair and violence.”<sup>219</sup> The Commission, led by the Governor of Illinois, Otto Kerner Jr., was staffed with what were considered to be, at the time, the political moderates from both sides of the aisle.

The report produced by the Commission, as intended, fit in with the majority of the liberal reports on the topic of racial violence commissioned throughout the era. The Report offers a simple, and fairly convincing assessment of causes of these conflicts. To put it simply, for the authors of the Report, racism caused poverty, and in turn poverty caused violence. This line of reasoning is consistent with the long line of liberal criminal thought that has been explored throughout this paper.

However, since the issue of the Report, it has been argued by many scholars that to suggest that the only cause of urban riots was poverty is over simplistic. In his 2014 book entitled *The Long Hot Summer of 1967*, historian Malcolm McLaughlin points out

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<sup>219</sup> Malcolm McLaughlin, *The Long, Hot Summer of 1967* (New York: Palgrave MacMillan, 2014) 22-23.

that the Report neglected many causes of distress for these impoverished communities. For example, the Report neglected to mention the Vietnam War, and the backlash to it from many in the African American community.

According to McLaughlin, perhaps the largest oversight by the Kerner Commission was failing to look beyond poverty in search of a cause for the violence and failing to examine issues regarding “power and democracy.”<sup>220</sup> The Report also did not seriously engage with Black Power activists. By failing to engage with Black Power activists, the Kerner Commission was also implicitly dismissing the foundations of the critique that was being posited by the Black Power movement, namely that the African American community was being treated as a colony that needed to be controlled. The critique of internal colonization is a more extensive critique than simply blaming poverty for sparking violence. Internal colonization also implied powerlessness, oppression, and a state policy of containing and depriving the African American community.

At the end of the Report, the Commission provided seemingly useful social democratic solutions to the issues of poverty and racism, advocating for more investment in housing, education, welfare and employment opportunities.<sup>221</sup> However, as political scientist Adolph Reed Jr. points out, the recommendations that called for further investment to fix inequality were largely ignored in favour of the recommendations that called for the expansion of the carceral state.<sup>222</sup>

One of the outcomes of the studies of racial violence in major cities, such as the Katzenbach Report and the Kerner Commission, was the *Omnibus Crime Control and*

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<sup>220</sup> McLaughlin, *The Long, Hot Summer of 1967*, xi.

<sup>221</sup> *Report of the National Advisory Commission on Civil Disorders* (Washington: U.S. Govt. Print. Off., 1968) 229-265.

<sup>222</sup> Adolph Reed Jr., "The Kerner Commission and the Irony of Antiracist Politics," *Labor: Studies in Working-Class History of the Americas* 14, no. 4 (2017): 33-35.

*Safe Streets Act* of 1968. By passing this Act, Congress was declaring crime to be primarily a state and local issue. As the Act states, “[i]t is therefore the declared policy of the Congress to assist State and local governments in strengthening and improving law enforcement at every level by national assistance.”<sup>223</sup> This policy was to be achieved by encouraging “States and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement,” authorizing “grants to States and units of local government in order to improve and strengthen law enforcement,” and finally, encouraging “research and development directed toward the improvement of law enforcement and the development of new methods for the prevention and reduction of crime and the detection and apprehension of criminals.”<sup>224</sup> Common to Katzenbach Commission, the Kerner Commission and the 1968 *Safe Streets Act* is viewing the racial discrepancies in the justice system as the result of individual actors within the system. Both the Reports and the *Safe Streets Act* saw increasing funding for the justice system at its various levels as an essential component of combating the individual racists within the system. These reforms, similar to those proposed in the 1940s, attempted to remove individual bias from the legal and penal systems. The hope was that these reforms would make the justice system more fair and unbiased and would make the system appear more legitimate, leading to less crime, less racial tension, and fewer riots.

As was the case in the 1940s, the success of these reforms would not be measured by increased equality, or by a reduction in the disproportionately high numbers of incarcerated African Americans. Instead, the success of the reforms would be measured

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<sup>223</sup> Senate and House of Representatives of the United States of America in Congress, *Public Law 90-351*, June 19, 1968, 198

<sup>224</sup> *Ibid.*

against an anticipated decrease in violent racial confrontations sparked by the “private” oppression of African Americans by unprofessional rogue policemen and racist judges.

In her 2014 book, *The First Civil Right: How Liberals Built Prison America*, political scientist Naomi Murakawa writes of the concept of liberal law and order, which, as she posits, transformed into the idea that “racism could be corrected with ‘state-building’” and bureaucratization during the Civil Rights era.<sup>225</sup> As Murakawa writes, “the problem [liberal reformers] identified was not violence. The problem was ‘lawless violence’ - violence absent of state officials and legal conformity. To be killed by private persons or a mob was cruel; to be imprisoned or killed through due process of law preserved the nation’s moral fabric.”<sup>226</sup> Within the liberal penal system, not only were criminals to be treated as individuals, but so were all of those in charge of the enforcement of the laws. Everyone within the system, from police officers to judges, was to be thought of as an individual and held accountable for his or her individual actions. Creating a system in which those in charge of law enforcement are held accountable for their individual actions, as the rest of society is, aids in achieving the primary goal set out by Beccaria and the various aforementioned commissions, which was to create a stable society.

A similar concept can be found in the early work of Michel Foucault. In his 1975 book, *Discipline and Punish: The Birth of the Prison*, Foucault introduces his theory of utopian duplication. After describing the failure of the prison system to achieve its perceived goals—reducing crime, transforming prisoners into functioning members of society, ending recidivism—and after describing the common methods of prison reform

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<sup>225</sup> Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford: Oxford University Press, 2014), chap. 1, sec. 2.

<sup>226</sup> Murakawa, *The First Civil Right*, chap. 2, sec. 6.

that have been implemented supposedly to achieve those goals, Foucault comes to the realization that prison reform is based on “idealism,” and is a form of what Foucault calls “utopian duplication.”<sup>227</sup>

The focus on creating stability has led reformers to continually expand the justice system. As was detailed in the previous chapter, liberal reformers like the IPC often saw socio-economic issues as the root cause of criminal behaviour. However, since the IPC also worked to entrench incarceration as the primary form of criminal punishment, all criminal reformers could do was to expand the justice system to fill the voids caused by socio-economic inequality. The standard prison reforms designed to achieve the perceived goals of the prison—increasing sentences, modulating sentences based on the severity of the crime, prison labour, prison education, increased surveillance, et cetera—are instituted because, in theory, they should reform the criminal, notwithstanding the fact that the United States has maintained a recidivism rate above 60% over at least the last three decades.<sup>228</sup>

The *Safe Streets Act* was a policy of utopian duplication. It attempted to correct the justice system by increasing the resources. By establishing a direct relationship between police spending and policing results, Becker encourages the continuation of utopian duplication in the criminal justice system. As was demonstrated in the previous chapter, by the time that neoliberalism began to be implemented in United States’ government policy, incarceration had largely been cemented as the primary method of

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<sup>227</sup> Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1995), 271.

<sup>228</sup> US Bureau of Justice Statistics, “Reentry Trends in the United States,” last revised 29 July 2018, <https://www.bjs.gov/content/reentry/reentry.cfm>; US Bureau of Justice Statistics, “Recidivism Of Prisoners Released In 30 States In 2005: Patterns From 2005 To 2010 - Update,” <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>.

criminal punishment accepted by the international liberal penal reform community. With all alternatives largely rejected, any of the reforms that were proposed were based in a further expansion of the prison system.

### **Neoliberal Era Criminal Reform**

Richard Nixon had an approach to crime and punishment that differed markedly from those of his Democratic predecessors. Johnson and Truman based their law and order and police reform policies on the assumption that black violence and crime were largely a response to racist acts perpetrated against African American people by individual bad actors that discredited the law. Nixon believed “that you have to face the fact that the whole problem is really the blacks,” and that “the key is to devise a system that recognizes this while not appearing to.”<sup>229</sup> Truman and Johnson believed the problem was racist individuals who persecuted African Americans leading to violent backlash and crime. Nixon simply believed that African Americans caused crime.

In 1971, Nixon declared a new campaign in the ongoing *War on Drugs*. During the speech introducing his escalation of the war, Nixon said, “I intend to take every step necessary to deal with this emergency, including asking the Congress for an amendment to my 1972 budget to provide an additional \$155 million to carry out these steps.”<sup>230</sup> Nixon, occasionally being a man of his word, aimed to increase security by raising law enforcement expenditures by 32 per cent in the 1972 budget, effectively increasing both surveillance and punishment which were the two variables that Becker believed could be altered to reduce the crime rate. The additional funds were to be used to “destroy major

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<sup>229</sup> H.R. Haldeman, *The Haldeman Diaries: Inside the Nixon White House* (New York: G.P. Putnam’s and Sons, 1994), 53.

<sup>230</sup> Richard Nixon, “203 - Special Message to the Congress on Drug Abuse Prevention and Control,” *The American Presidency Project*, June 17, 1971, <http://www.presidency.ucsb.edu/ws/?pid=3048>.

criminal systems that import and distribute narcotics and dangerous drugs.”<sup>231</sup> This budget initiated the era of mass incarceration to follow.

By 1976, what would have been the end of Nixon’s second term had he not been forced to resign under a cloud of shame, the total incarcerated population in the United States had grown from 196,092 in 1972 to 262,833.<sup>232</sup> According to Dan Baum, during a 1992 interview for his book on the history of the drug war entitled *Smoke and Mirrors*, Nixon’s top domestic affairs aide, John Ehrlichman, claimed:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar Left, and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black. But by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.<sup>233</sup>

In fact, this program, which conflated hippies and African Americans with drugs and crime, was also part of a broader Nixon initiative. The rise of mass incarceration was intrinsically linked to the rise of neoliberalism espoused by Nixon during that time. The ideology of unfettered free market capitalism, which became more common during the 1970s, was partly a result of the Goldwater “revolution” of 1964. Throughout Goldwater's presidential campaign, he consistently tied three themes together: devotion to the concept of free markets, disdain for government spending on social services and specifically the welfare system, and support for the expansion of law and order. During his nomination acceptance speech, Goldwater declared, “We Republicans seek a

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<sup>231</sup> *The Budget of the United States Government: Fiscal Year 1972*, [https://fraser.stlouisfed.org/docs/publications/usbudget/bus\\_1972.pdf](https://fraser.stlouisfed.org/docs/publications/usbudget/bus_1972.pdf), Washington D.C.: U.S. Government Printing Office, 1971, 22.

<sup>232</sup> Bureau of Justice Statistics, *Prisoners 1925-81*, 1982, 2, <http://www.bjs.gov/content/pub/pdf/p2581.pdf>

<sup>233</sup> Dan Baum, “Truth, Lies & Audiotape,” in *The Moment: Wild, Poignant, Life-Changing Stories from 125 Writers and Artists Famous & Obscure*, ed. Larry Smith (New York: Harper Perennial, 2012), para 4.

government that attends to its inherent responsibilities of maintaining a stable monetary and fiscal climate, encouraging a free and competitive economy, and enforcing law and order.”<sup>234</sup>

Richard Nixon was one of the few pre-1964 Republican leaders who stood by the unorthodox Republican nominee for President in 1964, Barry Goldwater, despite Goldwater’s extreme policies and looming obvious defeat. Nixon understood, better than any other Republican leader that, even though it was clear Goldwater would lose in the November 1964 election, the delegates and army of eager volunteers assembled by the Goldwater campaign would still be around to assert their power on the 1968 Republican nomination process and beyond. By the end of Goldwater’s campaign, Nixon had given 156 speeches in thirty-six states, while his potential competition for the 1968 nomination made little to no effort to show support for their candidate.<sup>235</sup>

The result was that, when Nixon won the nomination in 1968, he echoed many of the same ideas that Goldwater had championed four years earlier. Common between the speeches made by Nixon and Goldwater were the themes of free markets and a disdain for public spending except to support the expansion of law and order. Nixon announced that “the nation with the greatest tradition of the rule of law is plagued by unprecedented lawlessness.” Nixon went on to advocate restoring “respect for law in America,” and “instead of government jobs, and government housing, and government welfare, let government use its tax and credit policies to enlist in this battle the greatest engine of

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<sup>234</sup> Barry Goldwater, “Goldwater 1964 Acceptance Speech,” *C-SPAN*, July 16, 1964, <http://www.c-span.org/video/?4018-1/goldwater-1964-acceptance-speech>.

<sup>235</sup> Rick Perlstein, *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* (New York, Nation Books, 2009), 505.

progress ever developed in the history of man -- American private enterprise.”<sup>236</sup> Nixon understood that maintaining a stable society was necessary for the operation of a free market system unencumbered by New Deal reforms and later liberal initiatives.

The racial connotations of political rhetoric regarding ‘law and order’ had become clear by the time that Nixon took power. Since the early 1960s, due to the backlash to the Civil Rights Movement and the race riots of the 1960s, welfare and ‘law and order’ had become shorthand for anti-black sentiment. This was so much the case that Nixon felt the need to address the racial implications of the term “law and order” directly in his 1968 nomination acceptance speech saying, “to those who say that law and order is the code word for racism, there and here is a reply: Our goal is justice for every American. If we are to have respect for law in America, we must have laws that deserve respect.”<sup>237</sup>

Ronald Reagan’s presidency expanded on many of the core concepts of Nixon’s approach to criminal reform. Reagan’s second Attorney General, Edwin Meese III, clarified how the ideas behind his version of criminal reform, writing in his memoirs that “at the Reagan justice department, my predecessor and I carried on a continuing crusade against these problems, arguing for tougher and more effective sentencing, stressing protective rather than the ‘rehabilitationist’ model of penology, and pushing for construction of additional prison space so that convicted criminals could be kept away from society.”<sup>238</sup> The more effective sentencing that Meese attempted to institute was likely inspired by Becker’s economic approach to crime. As Meese states, his theory of

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<sup>236</sup> Richard Nixon, “Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida,” *The American Presidency Project*, August 8, 1968, <http://www.presidency.ucsb.edu/ws/?pid=25968>.

<sup>237</sup> Ibid.

<sup>238</sup> Edwin Meese III, “The Pursuit of Justice,” in *With Reagan: The Inside Story* (Washington D.C.: Regnery Publishing, 1992).

criminal justice was explicitly disinterested in the rehabilitation of incarcerated people. Meese's statement demonstrates how far penal reformers had drifted from the rehabilitationist goals promoted by the Beccaria and the IPC upon which liberal penal theory was developed. However, like Beccaria before him, Meese's primary focus was societal stability and safety. It is fairly clear that the Reagan administration saw increasing sentences as the most effective way to manage crime. Now, at least according to Reagan's Attorney General, under neoliberal penology, the motive behind incarceration was punitive and not rehabilitationalist.

In 1982, Reagan declared his own *War on Drugs*. At the time, less than 2 percent of the American population viewed drugs as the most important issue to be addressed.<sup>239</sup> Notwithstanding that fact, under Reagan the FBI's anti-drug spending increased from \$8 million in 1980 to \$95 million in 1984. Over the same period, Drug Enforcement Agency (DEA) spending increased from \$215 million to \$321 million. Total law enforcement spending increased from \$2.2 billion in 1980 to \$5.6 billion in 1991. At the same time, spending on non-punitive government anti-drug programs was drastically cut. The funding for the National Institute on Drug Abuse was reduced from \$274 million to \$57 million between 1981 and 1984, and the drug education budget of the Department of Education was cut from \$14 million to \$3 million over the same time.<sup>240</sup> These policies were consistent with Reagan's general theory that the government should reduce its presence in all activities aside from law enforcement. Throughout the Reagan administration, the total prison population increased from 503,600 in 1980 to 950,400 in

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<sup>239</sup> Alexander, *The New Jim Crow*, 49.

<sup>240</sup> Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (Oxford: Oxford University Press, 1999), 52-53.

1988.<sup>241</sup> As was the case with the policies of the Nixon administration, these policies increased both factors that Becker believed could help curtail crime, surveillance and the intensity of the punishment. When a democratic administration regained power in 1992, the neoliberal criminal ideas of the Nixon and Reagan Administration continued to influence the policies of the American government.

Bill Clinton had learned the lessons of Michael Dukakis' failed 1988 campaign. Perhaps the biggest single reason why Dukakis was unsuccessful was that he was seen as "weak on crime." Dukakis had bragged about being a "card-carrying member of the American Civil Liberties Union" and not supporting the death penalty, and the Bush campaign slammed him with criticism about his attitudes towards crime and punishment.<sup>242</sup> This process culminated in the infamous Willie Horton campaign ad, which told the story of Willie Horton, an African American man sentenced to life in prison who utilized the weekend furlough program while Dukakis was Governor of Massachusetts. He escaped while on furlough and went on to rape a woman and brutally assault her fiancé. The ad was highly successful in stirring-up white fears of black crime, and driving many to vote for Bush.

In contrast, Clinton began his campaign by saying that Democrats should also get tough on crime and "no longer feel guilty about protecting the innocent."<sup>243</sup> Clinton enacted two policies that furthered Reagan's neoliberal policies: the *Violent Crime Control and Law Enforcement Act* of 1994 and the *Personal Responsibility and Work Opportunity Reconciliation Act* of 1996. When the *Enforcement Act* was originally

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<sup>241</sup> U.S. Bureau of Justice Statistics, "Estimated number of persons under correctional supervision in the U.S., 1980-2013."

<sup>242</sup> Joe Klein, "Dear Duke," *New York Magazine*, September 19, 1988, 35-36.

<sup>243</sup> Andrew Hartman, *A War for the Soul of America: A History of the Culture Wars* (Chicago: University of Chicago Press, 2015), 120.

proposed, Clinton was unsuccessful in gaining the votes of ten members of the Congressional Black Caucus (CBC). While the CBC supported the gun control measures in the bill, it did not support the expansion of the death penalty. Clinton was then faced with a decision; he could either make the bill more liberal, appealing to the ten CBC members, or make it more conservative, appealing to Republicans. Clinton took the latter approach. With the passing of the Bill, three billion dollars were cut from social programs while punitive measures were increased.<sup>244</sup> The Bill instituted stronger mandatory minimums, including the three strikes policy that demanded life sentences for some three-time offenders. As was the case with Truman and Johnson, mandatory minimums were perceived by many liberals to be a solution to sentencing discrepancies between black and white defendants.

According to the Justice Policy Institute, the “Clinton Administration’s tenure resulted in the largest increases in federal and state prison inmates of any president in American history.”<sup>245</sup> Over the course of the Clinton administration, the prison populations expanded from 1,295,200 in 1992 to 1,945,400 in 2000. According to Human Rights Watch, by the end of the Clinton administration, notwithstanding being only around 13 percent of the population, African Americans made up “30 percent of people arrested, 41 percent of people in jail, and 49 percent of people in prison.” In 1995, “one in three black men between the ages of 20 and 29 [were] either in jail or prison, or on parole or probation.”<sup>246</sup>

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<sup>244</sup> Paul Frymer, *Uneasy Alliances: Race and Party Competition in America* (Princeton: Princeton University Press, 1999) 175-176.

<sup>245</sup> The Justice Policy Institute, “Too Little Too Late: President Clinton’s Prison Legacy,” (Feb 2001) 3, [http://www.justicepolicy.org/uploads/justicepolicy/documents/too\\_little\\_too\\_late.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/too_little_too_late.pdf).

<sup>246</sup> Human Rights Watch, “Incarceration and Race,” accessed March 26, 2016, <https://www.hrw.org/reports/2000/usa/Rcedrg00-01.htm>.

The welfare bill “imposed a five-year lifetime limit on welfare assistance, as well as a permanent, lifetime ban on eligibility for welfare and food stamps for anyone convicted of a felony drug offense.”<sup>247</sup> By 1996, the United States was spending twice as much on prisons as it was on food stamps or aid to families with dependent children. During the Clinton years, public housing was cut by 61 per cent while corrections spending were increased by 171 per cent, “effectively making the construction of prisons the nation’s main housing program for the poor.”<sup>248</sup>

It is occasionally argued that African Americans experienced an increase in their economic power during the Clinton administration. During this period, African American unemployment, as it is traditionally measured, did decrease. If one compares the years 1990-1994 to the 1983 peak of unemployment during the Reagan era, it appears that male African American unemployment fell from 19.1 percent to 11.3 percent. However, according to a 1999 study by sociologists Bruce Western and Katherine Beckett, if one were to include the imprisoned population among the unemployed, the improvement is less commendable, decreasing from 22.9 per cent in 1983 to 18.8 percent from 1990-1994. During this same period joblessness among African Americans, including incarceration, only fell from 41.7 percent to 38.5 percent.<sup>249</sup>

## Conclusion

By the end of the Nixon administration, neoliberalism had become the hegemonic ideology of the American government, across both parties. The devotion to the concept

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<sup>247</sup> Alexander, *New Jim Crow*, 56.

<sup>248</sup> Loic Wacquant, “Class, Race & Hyperincarceration in Revanchist America,” *Daedalus* 139, no.3 (2010): 77.

<sup>249</sup> Bruce Western, and Katherine Beckett, “How Unregulated Is the U.S. Labor Market? the Penal System as a Labor Market Institution,” *American Journal of Sociology* 104, no. 4 (1999): 1043.

of free markets, displayed by Goldwater, Nixon, Reagan and Clinton, had inspired the government to drastically reduce the social safety net, a policy that the members of the IPC would have understood would create more desperate people, and therefore more crime. As a result of this process, liberal reformers attempted to address the crime rate and maintain stability by vastly expanding the capabilities of law enforcement.

Criminology, based in neoliberal economic theory, had both created an increasingly unequal society, in which crime was more likely, and a justice system that could only offer solutions in the form of expanding the carceral state.

## Conclusion

At the root of liberal criminal policy is the desire to maintain the liberty of law abiding individuals. However, within the penal system that developed, the liberty and safety of most individuals is secured by the deprivation of liberty from a minority defined as criminal. Through the work of groups like the IPC, this dynamic, in which the freedom of most individuals is secured by incarcerating others, has been entrenched in American liberal thought and continues to exist to this day.

While some elements of liberal criminal policy have remained relatively constant over the last few centuries, other elements of what a liberal criminal theorist, such as Cesare Beccaria, would have seen as inherent to liberal criminal policy, have been reduced or removed from modern liberal theory. Most notably, Beccaria and the IPC believed that aside from protecting the public, the other main purpose of a liberal justice system should be to reform criminals. However, in the decades following the Second World War, reformation was given less priority in favour of attempting to create what was seen as a more economically efficient and effective penal state. As was demonstrated in the third chapter, economic theory was applied to the criminal justice system with the goal of reducing crime. While the recommendations offered by economic criminologists did coincide with a reducing crime rate, they also helped to create the largest carceral state on the planet.

In more recent decades, economic theory has increasingly been applied to not only policing, but also the functioning of prisons and other detention centres. Increasingly, prisoners are held in private facilities owned by government contractors. According to the Washington based research organization The Sentencing Project,

between the years of 2000 and 2015, “the number of people housed in private prisons has increased by 45%.”<sup>250</sup> According to that same study, inmates housed in private prisons made up 8% of the total American prison population. However, this population of prisoners held in private facilities is not evenly distributed. The prevalence of private prisons depends largely on State law. Therefore, prisoners in some states are far more likely to be held in private prisons. For example, in Montana and New Mexico private prisons hold over 40% of the state prison populations. The expansion of private prisons can be viewed as an extension of economic criminology that was explored in the third chapter and has been analyzed in the work of scholars like Ruth Wilson Gilmore.<sup>251</sup>

While it may appear that for-profit incarceration centres represent a relatively small portion of the American prison system, they are far more present in the field of immigration policing. As of 2015, 72% of the beds in immigration detention centres were located in private facilities.<sup>252</sup> While immigrant detention was not the focus of this thesis, the logic behind neoliberal criminology clearly has been carried over into the rapidly expanding privatized immigrant detention complex. The 2015 data remains the most recent that I have seen published, however, it is likely no longer an accurate depiction of the immigration detention system given the recent policies of the Donald Trump administration.

This paper demonstrates that the liberal criminal justice system in the United States been refined and narrowed to a point at which policymakers are stuck in a loop in which a crisis or a perceived crisis occurs in the justice system and reformers attempt to

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<sup>250</sup> The Sentencing Project, “Private Prisons in the United States,” 28 August 2017, <https://www.sentencingproject.org/publications/private-prisons-united-states/>.

<sup>251</sup> Ruth Wilson Gilmore, *Golden Gulag*. Berkeley (Berkeley: University of California Press., 2007).

<sup>252</sup> *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers*, Penn State Law: Center for Immigrants’ Rights Clinic (May 2017) 1-25.

address it by doubling down on previous solutions. Examples of this included the crime wave of the 1970s and 1980s and urban uprisings such as that which occurred in Ferguson, Missouri in 2014. Policy makers' attempts to reform the system in response to such crises usually result in further growth of the carceral state. This cycle perpetuates as liberal reformers continuously resort to the same failed solutions. The continued adherence to same set of policy recommendations that were used to create the carceral state on the part of criminal justice theorists in the United States is the primary flaw of neoliberal criminal justice.

The root cause of crime, as was recognized in earlier generations by liberal theorists such as Beccaria and organizations such as the IPC, cannot be addressed by warehousing those who commit infractions. Crime results from underlying societal issues. The root issues are marginalization, alienation, and poverty. However, as demonstrated in this paper, scholars and policymakers have, over a very long period, gradually reduced the extent to which the welfare and reformation of prisoners is prioritized. According to the neoliberal thinking of economists explored above, such as Becker, once incarcerated an individual is largely ignored.

The state of the American criminal justice system is bleak. Aside from the massive size of the system, and the millions of people who are incarcerated, the system fails in many other ways. Perhaps, most notable among these failures is the rate of recidivism, which is the result of the current system's failure to address core issues such mental health, alienation and economic deprivation in a meaningful way and the failure of the justice system to equip convicted criminals with the tools need to enable them to re-enter society in a sustainable manner.

A recent study by the American Bureau of Justice Statistics examined prisoners from 30 states released from their sentences in the year 2005 and analyzed their criminal histories in the years between 2005 and 2014. The study found that within the first year, 43% of those released had been arrested again. Within the first three years following their release 68% had been rearrested. After nine years, at the end of the study, 83% of inmates released in 2005 had been rearrested.<sup>253</sup>

In the United States, once freed, many prisoners return to the same alienated, marginalized and impoverished existences that originally compelled them to commit crime. It is a system that does not seek to reform criminals, and does not help those incarcerated to gain an opportunity to better themselves once released. Instead, criminals leave, just as poor if not more so, and have an even harder time gaining legitimate employment than before they were arrested. It is a justice system that does not address the root causes of crime, but merely warehouses people who cannot find a role in the legal economy.

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<sup>253</sup> US Bureau of Justice Statistics, “2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014),” 2018, 4 <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

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