

Gambling

Mapping the American Moral Landscape



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The Criminal Law of Gambling

A Puzzling History



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Beginning in the 1880s,¹ a series of moralist crusades produced federal criminal laws banning various alleged vices, or as much of the vices as the federal government was permitted to ban: polygamy in American territories (including Utah, where the then-polygamous Mormon church chiefly resided), the mailing and interstate transportation of lottery tickets, interstate movement for the purpose of engaging in illicit sex and, most famously, the manufacture and sale of alcoholic beverages. These crusades against plural marriage, gambling, prostitution, and liquor seem unsurprising to us now. Late nineteenth- and early twentieth-century politics were heavily influenced by Protestant evangelicals, the primary culture warriors of their day and ours. That constituency's political clout explains why American criminal law has traditionally been more moralist, more concerned with stamping out various forms of vice and sin, than the criminal laws of other Western nations. In the United States, theologically conservative Protestants have long been a powerful political force—much more so than elsewhere in the Western world. Moralistic politics follow naturally from a moralistic voting population.

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Except that the voting population is not so moralist as it seems—or should not be, given its religious beliefs. Theologically conservative Protestants (a constituency to which we both belong) believe in a theology that emphasizes grace, not law; their religious convictions ought to incline them toward skepticism about the power of laws and governments to transform cultures. That was as true a century ago as it is today. Catholicism, not Protestantism, is the branch of American Christianity that seems most comfortable with legal prohibition of conduct that the church condemns but that much of the population enjoys or tolerates. The behavior of those late nineteenth- and early twentieth-century culture warriors who were quick to translate their religious convictions into criminal prohibitions was thus more surprising than it at first appears.

For over a century, Congress has played a major role in the criminal law of vice, including the law of gambling. This too should seem strange. Vice markets are traditionally local,² and local norms with respect to the relevant vices vary from place to place. State and (especially) local governments could handle these subjects as they have historically handled the definition and punishment of violent felonies and felony thefts. Indeed, according to most theories of federalism, morals crimes like the ones listed above are precisely the sort of thing that state and local governments *should* handle so that communities with different moral visions can live under laws consistent with those visions. To make this pattern stranger still, the federal criminal law of vice arose at a time when the federal government was much smaller and its regulatory power much weaker than today. Congress's authority to regulate interstate commerce under the Constitution—the principal source of Congressional power today, and for most of American history—was construed quite narrowly throughout the nineteenth century. The federal government regulated gambling, prostitution, and the alcohol trade in an era when it regulated little else.

The puzzles do not stop there. Roughly fifty years after the antivice crusades that gave rise to federal lottery laws began, the most important of those crusades—Prohibition—collapsed. Culture wars politics collapsed with it, or seemed to. The division between the culturally conservative Protestant countryside

and more culturally liberal cities, which had defined American politics for a generation, appeared to pass from the political scene. Yet, save for the nationwide ban on alcohol, the federal vice laws that the earlier movement had spawned did *not* pass from the scene. Instead, the federal law of drugs and gambling continued to expand in the generation after Repeal,³ even as American politics grew more culturally tolerant. Drug laws made little difference in this period, but federal gambling laws were taken seriously; the federal law enforcement bureaucracy devoted more attention to these laws in the generation after the New Deal than before. Both gambling law and associated law enforcement appeared to grow more moralist at precisely the time when they should have grown more libertarian.

This law enforcement attention did not put a dent in the market for gambling: the more federal law enforcement expanded, the more gambling seemed to grow along with it. Of course, Prohibition had failed to stamp out the liquor trade. Perhaps all efforts to criminalize popular vices are doomed to failure. But the criminal law of gambling failed in different ways than Prohibition. Prohibition's failure was political: voters wrestled with the question whether criminalizing the alcohol trade was worth the costs that attended it and changed their minds about the right answer to that question. With respect to gambling, changed minds did not lead to changed laws, or not at first—rather, the laws grew more stringent in the 1950s and 1960s and were applied more frequently, but private conduct seemed unaffected. A federal government that battled the Depression and won a world war seemed unable to contain illegal lotteries and bookmaking.

This odd history has an odd coda. Over the course of the last generation, the culture wars of the 1920s seemed to reappear; as in the earlier period, theologically conservative Protestants have been eager to support criminal prohibitions against a variety of moral wrongs. But in the midst of this resurgent moralism, the criminal law of gambling collapsed. Federal gambling prosecutions all but ceased. State lotteries multiplied, riverboat and Indian casinos proliferated, and a large and growing market in Internet gambling arose. The religious right, which hardly seemed reticent about using law to stamp out immoral conduct, appeared resigned to—and at times even uninterested in—these developments.⁴

In short, the legal battle against gambling appeared when it should not have, was nationalized when it ought to have remained local, survived even though a similar moral crusade had just been rejected by overwhelming majorities, proved ineffective notwithstanding increased enforcement resources, and collapsed just when moralist politics were reviving. What explains this strange story, and what can we learn from it?

A Surprising Story

These five puzzles—the rise of gambling prohibition, the focus on federal law, the persistence and expansion of federal gambling law after Prohibition was abandoned, the ineffectiveness of federal law enforcement, and the lower priority with the religious right of a vice that once was at the core of its political agenda—largely define the history of the criminal law of gambling. Below, we unpack these questions. In the course of the unpacking, we draw some lessons about the nature of the Christian right and its relationship to law and politics, about the role of federal law in resolving contentious moral issues, and about the ability of criminal law enforcement to shape private conduct.

The Late Nineteenth-Century Rise of Gambling Prohibition

The late nineteenth-century Protestant evangelical campaign against gambling is more than a little surprising given the Protestant conception of sin. Protestants view sin as a singular noun: a disposition, not a discrete event. One reason Protestants do not confess sins to a priest as Catholics do is the Protestant belief in the priesthood of all believers. Jesus, the one who “has made us to be a kingdom and priests,” is for Protestants both necessary and sufficient to mediate between the individual and God.⁵ But another reason is the Protestant belief that the individual wrongs we commit are merely symptoms. The disease is the underlying disposition—and the disease matters far more than any of its symptoms. By disposition, Protestants mean something like motivation, but it is deeper than that: it is more like *inclination*, the direction in which and the object toward which (or toward whom) one’s heart inclines. After David committed adultery with Bathsheba, he begged God to “create in me a clean

heart,” and to “renew a right spirit within me.”⁶ It was his heart’s inclination and disposition, not the particular sin, that most concerned him.

If sin is a disposition rather than a discrete event, legal regulation would seem to be an unlikely savior. Law deals with events—not the inclinations of human hearts, which are unknowable by human judges and juries. Plus, law is in the business of drawing lines, separating innocent from guilty, distinguishing those who must pay damages from those who escape legal liability. Yet the disposition to sin is universal. The Bible emphasizes this point by showing that even its heroes are criminals: Abraham was a coward, Jacob a liar and fraud, David an adulterer and a murderer; Moses likewise had a homicide to his account. These tendencies did not disappear after Christ came. Paul was responsible for the stoning of Stephen—the first Christian who was martyred for professing his faith—and for Christians, it is hard to imagine a worse crime. Ours is not a creed that fits naturally with the enterprise of using law to separate the virtuous from the vicious. The disease is too pervasive and runs too deep.

American law itself long reflected this sensibility, as evidenced by its treatment of two of the sins that come closest to a person’s heart: disloyalty and dishonesty. Start with disloyalty. Christians worship a Savior who was betrayed by one close at hand, one who owed him fidelity. A Christianized legal system might be expected to include strong legal obligations of loyalty and severe penalties for treachery. But duties of loyalty were rare in nineteenth-century American law, and penalties for betrayal rarer still. Similarly, the Bible calls Satan “the father of lies” (John 8:44); a mostly Christian nation might be expected to criminally punish dishonesty of many different sorts. Yet until well into the twentieth century, lies told in court on the witness stand were the only significant class of falsehoods that yielded criminal penalties. Fraud—meaning, basically, stealing money through deceit—was defined so narrowly at common law that proving it was all but impossible.

If we consider the general orientation of criminal law, we find the same pattern. Motive is the legal concept that most nearly conforms to the idea of the heart’s disposition or inclination. In a legal system that sought to criminalize sin, defendants’

motives—the reasons why they committed their crimes—should be central to the definition of criminal offenses. Yet nineteenth-century criminal law looked to defendants' motive only as a means of *excusing* criminal defendants, not as a justification for condemning them. (The primary example of an exculpatory motive is self-preservation: the defenses of necessity, duress, and self-defense all permitted defendants to commit what would otherwise be criminal acts in order to protect themselves from harm—which hardly reflects Christian norms of self-sacrifice.) On a wide range of issues, nineteenth-century American law was decidedly libertarian, not moralist. Nor is the connection between Christians and this libertarian stance accidental: the law's libertarianism and related peculiarities were often attributed to America's Christian past.⁷

Why, then, did Protestant evangelicals become so concerned in the late nineteenth century to criminalize what appear to be low-level wrongs like gambling? Part of the answer lies in the historical moment when gambling prohibition took hold. The principal gambling prohibitions, such as the federal laws that criminalized lotteries in 1890 and 1895, arose in the generation after the Civil War and Reconstruction at a time when law and government seemed able to accomplish a great deal more than had seemed possible a few decades earlier. Like other Americans, Protestant evangelicals were optimistic about law's potential for good. This optimism was directed toward vices like gambling, prostitution, and alcohol because these vices could be defined (it was easy to identify just what the misbehavior was), because they seemed unconnected to other legitimate conduct, and because—like sin more generally—they seemed to enslave those who participated in them.

This last point is particularly important. The rhetoric of abolitionism, stressing the evils of slavery and the moral imperative to free those in bondage, ran through all the antivice movements of late nineteenth and early twentieth centuries. Gambling was no exception: prohibitions sought not so much to punish vice as to protect its victims, to save them from the dangerous scoundrels who tempted them to a life of dissipation. The late nineteenth-century crusades against gambling picked up on themes that had been sounded in literature and in moralistic prose for

much of the century. In *Seven Lectures to Young Men on Various Subjects*, for example, the Reverend Henry Ward Beecher, father of Harriet Beecher Stowe and himself a well-known evangelist, had warned that gambling “destroys all domestic habits and affections” and that gamblers “will stake their property, their wives, their children, and themselves.”⁸ There were complicating factors, to be sure. The threats to vulnerable youth were identified with the urban Northeast, which had seen a large influx of immigrants. Most of the immigrants were Catholic, and the anti-gambling campaign was tinged at times with anti-Catholicism. But the concerns were genuine; the issue was not simply a cover for religious or ethnic bigotry. To its proponents, vice regulation would safeguard the morals of the American people and thereby keep them free.

The campaign to criminalize gambling and other vice was part of a larger vision. Nineteenth-century Protestant evangelical activism is often portrayed as having been obsessed with personal virtue but less interested in economic issues.⁹ This is to project the present back upon the past. To nineteenth-century evangelicals, gambling, prostitution, and the liquor trade *were* economic issues—and economic issues, in turn, were moral issues; the division between the two is an artifact of our intellectual world, not theirs. Vice happens in markets, with buyers and sellers: or, to prohibitionists, with victims and the victimizers who tempted them. The people who made the most money from these trades seemed guilty of exploiting society's most vulnerable members: factory workers drinking or gambling away their paychecks and starving their families, young girls lured into prostitution by dire economic circumstances, and so on. To voters and politicians alike, issues like these seemed more analogous to antitrust, railroad regulation, and labor law than to the laws against homicide, assault, and theft.

This explains why so much of the political rhetoric of antivice crusades focused on the money made from the trade, not on the vices themselves—and also why so much of the political argument surrounding the Sherman Act, the Interstate Commerce Act, and other economic regulatory legislation sounds, to twenty-first-century ears, remarkably moralist. Contemporary antitrust law stresses economic efficiency and maximizing consumer

choice. Those were not the goals of the early trustbusters. Rather, they sought to impose higher moral standards on those whom Theodore Roosevelt called “malefactors of great wealth.” The language is not so different from the terms used to characterize those who ran illegal lotteries or the liquor industry that fought to maintain urban saloons.

In all these areas, rural populists and progressives sought to regulate the behavior of wealthy market actors in order to protect their poorer customers from exploitation. Notice again the timing of the passage of the two main federal gambling laws of this period: the law banning the sending of lottery tickets through the mails was passed in 1890, three years after the Interstate Commerce Act—the first major federal railroad rate regulation—and the same year as the Sherman Act. The law banning interstate transportation of lottery tickets was passed in 1895 by a Congress that included the largest number of Populists in that movement’s history.

Each of these issues was a signature theme for William Jennings Bryan, the Populist leader, three-time Democratic presidential nominee, secretary of state, and most famous Protestant evangelical of the late nineteenth and early twentieth centuries. Bryan was a leading proponent of antivice laws; he later became a leading supporter of Prohibition because of his concerns about its effects on ordinary Americans. While “Anti-Saloon League Literature was filled with drawings of swarthy, mustachioed men luring fair-haired Americans into their lethal enterprises,” as Bryan’s biographer puts it, “Bryan avoided such nativist libels and kept his focus squarely on the capitalists, regardless of ethnicity, who ‘impoverish the poor and multiply their sufferings’ and ‘increase the death rate among the children.’”¹⁰ Bryan also campaigned against the corporate trusts that dominated many industries, complaining that they stifled individual opportunity and forced consumers to pay unconscionably high prices. “There can be no good monopoly in private hands,” Bryan warned in the 1890s, “until the Almighty sends us angels to preside over the monopoly.” Bryan called for aggressive regulation of the railroads for the same reasons, and for a time even advocated government ownership.¹¹ Bryan’s career suggests that the politics of vice were more linked with the politics of business regulation than we tend to imagine.

Bryan did not figure in the debates that led to the 1890 and 1895 gambling laws, largely due to the timing of his congressional service. He served two terms in the House of Representatives in the early 1890s—just after the first lottery bill was enacted and just before the second.¹² But he spoke out against gambling and in favor of gambling prohibition in the decades that followed. In a speech to Nebraska’s constitutional convention in 1920, for instance, he told the delegates that “I hope the constitution you are writing will put the seal of its condemnation upon all forms of gambling. . . . Chance should not be allowed to be substituted for honest industry; or children should know from their youth that there is at least one state in this union that makes no discrimination between kinds of gambling, high or low, large or small, but that all gambling is prohibited in Nebraska as far as law can prevent it.”¹³

In theory, religious voters who were concerned with the temptations vice markets create might have advocated civil regulation of gambling (or of some forms of gambling, such as the state lotteries) rather than criminal prohibition. But from the perspective of the time, civil regulatory legislation was a strange concept. The common law—doctrines inherited from England, made by judges, and developed by American courts throughout the nineteenth century—governed disputes between private parties (what lawyers call “private law”), including large corporations. Legislators attended to the relationship between those same private parties and the government: “public law,” to use the standard legal terminology. There were two chief bodies of public law in the late nineteenth century: criminal law and the law of taxation. The idea of civil government regulation, with legislatures and expert administrative agencies defining liability rules and enforcing those rules through mechanisms like corporate fines—a regulatory model that became quite common in the last two-thirds of the twentieth century—was, for the most part, foreign to this period. The few regulatory statutes that Congress did enact were anchored in the criminal law: criminal prosecutions were the Interstate Commerce Commission’s chief enforcement tool, and the Sherman Act criminalized monopolization of American industries. Even as late as the 1930s, New Deal regulatory statutes invariably included criminal penalties for noncompliance.

Several of the key Supreme Court cases testing the constitutionality of New Deal statutes were criminal prosecutions.

Of course, civil lawsuits were a possibility; in addition to criminal penalties, the Sherman Act provided for suits for treble damages against would-be monopolists. But this would have been a foolhardy strategy for legislators and judges seeking to rein in vice markets. Since buyers and sellers alike were viewed, under the legal standards of the time, as voluntary participants in those markets, they assumed the risk of any harms that came their way. Plus, many judges would have held that gamblers, drinkers, customers of prostitutes, or the prostitutes themselves—the chief victims of nineteenth-century vice markets—came to the courthouse with “unclean hands” and so could not seek legal remedies for their victimization. The spouses and families of working-class gamblers and drinkers and “johns” might have argued that the relevant vice markets deprived them of life’s necessities (a point that prohibitionists frequently stressed). But according to the governing legal doctrines of the nineteenth and early twentieth centuries, the sellers of the relevant products and services owed no legal duty to their customers’ families. Doctrines like assumption of risk, “unclean hands,” and narrow understandings of the scope of legal duty ensured that no plaintiffs could bring valid legal claims.¹⁴

Legislators or judges might have changed these legal doctrines. But that kind of change was nearly unimaginable in the legal world of a century ago. Before the New Deal, common-law doctrines like the ones mentioned in the preceding paragraph occupied a more exalted place in legal consciousness than they do today. Some judges believed that legislation overturning well-established common-law rules was unconstitutional because “due process of law” entitled every citizen to the full range of common-law rights and protections.¹⁵ That and similar views tended to push legislators eager to do something about gambling and other vice markets toward criminal prohibition.

So criminal laws banning gambling and other vices arose for much the same reason that laws regulating railroads and other powerful corporations arose: partly from the belief that criminal law was the only regulatory tool available and partly from a sense that the unscrupulous rich were exploiting the vulnerable

poor, tempting them into behavior harmful to themselves and to their families. The spirit of the late nineteenth-century law of vice seems to us moralistic, and it was—though no more so than was true of antitrust or railroad regulation. Likewise, the spirit of vice laws of the same period seems to us punitive, but it was not: the goal was more to protect the vulnerable than to punish those who exploited them.

Federalism and Vice

Then-Professor, now-Judge Michael McConnell famously argued for using state law, not federal law, to regulate ordinary vices:

Assume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A. In the absence of economies of scale in government services, significant externalities, or compelling arguments from justice, this is a powerful reason to prefer decentralized government. States are preferable governing units to the federal government, and local government to states. Modern public choice theory provides strong support for the framers’ insight on this point.¹⁶

This argument for state power as a means of maximizing preference satisfaction is particularly strong with respect to issues about which people in different regions and jurisdictions disagree—as was the case with gambling in the late nineteenth century when Congress enacted the first federal antilottery laws. McConnell’s argument was familiar to the politicians and lawyers who debated those laws (as his essay shows, the argument was equally familiar in Madison’s day). In *Champion v. Ames*, Chief Justice Melville Fuller used a version of it to argue in his dissenting opinion that the federal law banning interstate transportation of lottery tickets was unconstitutional.¹⁷

Fuller added an argument that was common in Supreme Court decisions a century ago: that the federal government was not permitted to regulate matters that had traditionally been

reserved to the states. Legal regulation of public morals, as in the federal antilottery laws, plainly fell within that category. In 1903, when Fuller pressed these arguments, the federal government regulated very little, partly because many politicians agreed with his view that the Constitution gave Congress only a small measure of power over the nation's economy (and essentially no power over anything else). It was also a time when federal judges—definitely including Supreme Court justices—were more than willing to strike down federal laws that, in the judges' view, exceeded that narrowly circumscribed constitutional authority. A few years before the decision in *Champion*, the justices had invalidated the federal income tax; a few years later, they overturned the federal government's ban on child labor.¹⁸

Why was federal gambling legislation enacted in this environment that seemed so unfriendly to it, and why was the legislation upheld by the courts? There are three answers. The first concerns a peculiar feature of American constitutional law: the power to regulate interstate commerce could be used to prohibit small slices—the portion that could be characterized as involving interstate commerce—of large vice markets. That is exactly what Congress did with its two lottery laws in the 1890s and again with prostitution in the Mann Act in 1910. Which leads to the second answer: A century ago, as today, the number of federal agents and prosecutors was small—far too small to tackle sizeable vice markets. Given the federal criminal justice system's small size, federal lawmakers knew that broad prohibitions would be enforced selectively, which made criminal prohibitions more politically attractive than they otherwise would have been. Federal criminal lawmaking was common in large part because it was cheap from the point of view of the politicians who defined federal crimes. The third answer concerns the character of American politics. Throughout our nation's history, contested moral issues have always moved from the state and local levels to national politics; such issues are not resolved locally, as McConnell's federalism argument suggests they should be. When resolving those issues, voters pay attention to moral principle, not just self-interest. In McConnell's example in the quoted passage above, a large fraction of the voters who want to see smoking banned would be displeased by the knowledge that some of

their fellow citizens—including those in other jurisdictions—are lighting up.

Take these points in turn. Since the end of Reconstruction, the constitutional power “to regulate commerce with foreign nations, and among the several states, and with Indian tribes”¹⁹ has been the chief source of congressional power to enact regulatory legislation. Most Progressive-Era legislation was based on the commerce power, as were the key pieces of the New Deal and the federal statutes regulating health, safety, and the environment. Antivice legislation like the federal lottery statutes and the Mann Act (which forbade interstate transportation with the intent to engage in illicit sex) fall within the same legal tradition. Politically, the most important feature of such laws may be their moralism—but legally, the crucial fact is that the vice markets they regulate are *markets*. Gambling is commerce, and some of that commerce takes place “among the several states.” This simple fact made the federal law of gambling possible.

One more step was necessary to justify federal laws like the ones banning interstate lotteries and the so-called white slave traffic (the Mann Act was popularly known as the White Slave Traffic Act). When James Madison and his contemporaries wrote and ratified the Constitution, they probably intended that the commerce power would distinguish between lines of business that are and are not subject to federal power. The transportation of goods and people could be regulated; local manufacturing and mining operations could not. Pre-New Deal law drew many such lines.²⁰ But Madison and his colleagues did not anticipate statutes like the antilottery laws and the Mann Act. At the time those statutes were passed, the large majority of gambling transactions were local (this is less true in the age of Internet gambling). The same was and is true of the market for prostitution, the chief subject of the Mann Act. But a small slice of those markets—the transportation of lottery tickets printed in one jurisdiction and sold in another, the transportation of prostitutes or their customers from one state to another—crossed state borders. Could Congress ban that small slice—the “federal” part of the market—while leaving the rest to the states? The legally correct answer was far from obvious. In *Champion*, Fuller's dissent argued that regulatory power was indivisible: that if states

had the power either to promote or to forbid lotteries (as they plainly did), the federal government could not interfere with that power by banning only a portion of the lottery market. Fuller's position was probably the conventional wisdom among lawyers of the time. But it lost: federal bans of small portions of large markets were deemed permissible in *Champion*, largely because the banned conduct was so morally problematic.²¹

This legal principle was crucial, for it permitted members of Congress to legislate in this area without preempting state legislation or local law enforcement. The federal lottery laws laid the foundation for the oddly designed federal criminal justice system. Instead of allocating some crimes to state law and others to federal law, the federal criminal code mostly covers state-law crimes with an interstate commerce element: some person or thing crossed a state border, or the crime victim ran an interstate business, or the crime itself affected interstate commerce in a significant way.²² Robbery, extortion, fraud, racketeering, the possession or sale of illegal drugs—these are the staples of federal criminal litigation, and all are crimes under state law as well. Within the criminal justice system, the line between federal and state power is not drawn crime by crime, but case by case—usually based on the presence or absence of a tie to interstate commerce.

This feature of the system made federal criminal laws cheap from the perspective of the politicians who enacted them—the second reason gambling regulation went federal. In 1910, fifteen years after the second of the two federal lottery laws were enacted, the federal government accounted for a mere 3 percent of the nation's prison population: fewer than two thousand federal prisoners in all.²³ Federal criminal statutes like the lottery laws and the Mann Act were largely symbolic: there were few federal prosecutions, because there were few federal officials to bring them.²⁴ This fact made it easy to win support for federal criminal prohibitions and hard to mount opposition to them.

Which leads to the last and most important reason for the federal ban on interstate lotteries: the voters who supported the ban cared about the symbolism and the moral ideals behind the ban, not about their own material well-being. Moral principle motivated them, not personal economic interest. This is a long-standing theme in American politics. Since the rise of the slavery

issue in the mid-nineteenth century, politicians seeking and holding federal office have been eager to take sides in the culture wars of the moment. A standard debate typically ensues. One side argues for tolerance and local control: live and let live; allow people in different parts of the country to resolve the relevant issue differently, according to their own preferences. The other side argues for a nationwide policy—often largely symbolic—because of the crucial nature of the moral interests at stake. Abraham Lincoln and Stephen Douglas made precisely those arguments as they battled for an Illinois Senate seat in 1858. Lincoln sought a clear national policy to put slavery on a path toward extinction; Douglas contended that North and South could have different policies, that what happened to blacks south of the Ohio River or west of the Mississippi was no business of Illinois voters. Douglas won that election, but Lincoln won the argument.

This argument has played out repeatedly over the past century and a half, usually with Lincoln's side winning the day. Slavery in the 1850s, gambling in the 1890s, prostitution in the 1910s, alcohol in the 1920s and early 1930s, abortion and gay rights in our own time—all these issues prompted large-scale disagreement; voters in different parts of the country reacted differently to them. According to the Madisonian theory of federalism, those issues ought to have been resolved locally. Douglas-style live-and-let-live arguments would maximize the number of voters living under rules they find congenial, as Judge McConnell correctly noted. But those arguments regularly lose in American politics; all the issues listed above were eventually governed, at least in part, by federal law. All were major issues in elections for federal office. Like Lincoln, many American voters—especially those who hold strong religious convictions—see such issues not as appropriate subjects for tradeoff and compromise but as matters of moral principle. One does not compromise with evil.

Ironically, the federal resolutions of these various issues usually *do* involve a large measure of compromise—but the compromise is hidden. The small number of federal agents and prosecutors means that federal bans on popular vices are rarely enforced in a consistent and systematic fashion. The vast majority of those who enjoy the relevant behavior will continue to do so without the interference of federal officials, even after a federal

ban is enacted. The nature of the compromise is not severe rules in some places and lax rules in others; rather, the usual bargain on contested moral issues combines universally severe federal rules with lax federal enforcement. The federal lottery laws helped to establish that pattern.

Only twice in the last century and a half did federal politicians deviate from the pattern: during Reconstruction, when the federal government sought (briefly) to systematically enforce laws protecting the rights of ex-slaves in the South, and again during Prohibition, when federal officials tried and failed to stamp out the alcohol trade in the United States.²⁵ Both times, the side that sought aggressive enforcement lost—and paid a large political price for the defeat. Politicians noticed. That is why the unprincipled, under-the-table compromise between seemingly strong legal bans and weak or inconsistent enforcement survives in federal criminal law today. This compromise, in turn, makes federal criminal prohibitions all too tempting, both for politicians and for moralist voters.

The Survival of Gambling Prohibition after Alcohol Prohibition Collapsed

For the politicians and religious voters who had led the bandwagon for criminalizing vice, Repeal was the great chastening. In 1933, a mere thirteen years after its triumphant passage, Prohibition collapsed. Alcohol use was more widely tolerated than it had been before the legal ban. Criminalizing vice seemed to be a losing strategy. The passing from the scene of leading culture warriors like William Jennings Bryan served to accent the point: Bryan's death shortly after the Scopes trial in 1925 is often identified as the date when Protestant evangelicals turned away from politics.²⁶ Given these developments, the same political wave that ended Prohibition should have brought down the federal criminal law of gambling. Why didn't it?

One answer is that New Deal-era politics were more religious—more “Bryanite”—than they seem in retrospect. No one had replaced Bryan himself, but Populist-inflected religious themes lingered in American political discourse. In one of the most important economic speeches of his 1932 campaign, Franklin D. Roosevelt aligned himself in opposition to the “Ishmael or Insull

whose hand is against every man's”—a reference that linked the bastard son of Abraham to the utility magnate Samuel Insull, whose spectacular collapse threatened the savings of ordinary investors who had bought his companies' bonds.²⁷ In his first inaugural address the following year, Roosevelt proclaimed that the “practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men.” Because they had “fled from their high seats in the temple of our civilization,” he continued, “we may now restore that temple to the ancient truths.”²⁸ The corporate and financial misconduct that Roosevelt denounced in such biblical terms bore an unmistakable resemblance to gambling and had long been analogized to gambling. For an administration committed to making the capital markets safe for ordinary investors by policing “corners” and other market manipulation, rolling back the federal laws against gambling would have seemed incongruous, and would have sent a contradictory message.

To put the point another way, the moralist politics that led to the federal lottery laws of the 1890s did not disappear after Repeal; rather, that politics migrated to other territory. Federal regulation of banking and the securities markets derived from the same moralist impulses, and were supported by the same voters, as the lottery bans.²⁹ The politics of gambling morphed for a time into the politics of financial regulation.

Something similar happened with respect to gambling itself—the kind gamblers engage in, not the kind stock traders do. The criminal law of gambling became, even more than it already was, an aspect of the law of business regulation. State laws grew more lenient: Nevada legalized casino gambling in 1931, and ten more states repealed at least some of their criminal prohibitions of the practice beginning in 1933. In a majority of the states that continued to criminalize the practice, enforcement all but ceased. This was natural: the federal government was the most aggressive regulator of business, not the states.

At the federal level, the lottery laws survived but were meaningless, either because few lottery tickets were shipped across state lines or because federal prosecutors no longer tried to find the ones that were. The chief federal gambling prohibition during the 1930s and 1940s came from the Federal Trade Commission,

an agency charged with the job of regulating business in order to prevent unfair methods of competition or, as the FTC customarily calls them, unfair trade practices. During the Hoover Administration, the FTC ruled that selling goods through “games of chance” constituted such an unfair trade practice. The first case challenging that rule, *Federal Trade Comm’n v. R. F. Keppel & Bro.*,³⁰ involved the sale of so-called break and take candy. The packages, which sold for a penny, had less than a penny’s worth of candy—but one of every thirty packages contained both candy and a penny. Other packages sometimes had prizes or tickets inside. These marketing devices were especially popular with children.

In *Keppel*, the candy manufacturer correctly noted that its marketing scheme involved no deception, and that competitors were free to adopt similar schemes in response. Consequently, the manufacturer argued, the scheme introduced no unfairness into the competitive process. The FTC did not disagree with the manufacturer’s claims—rather, it defended the ban on moral grounds:³¹ the banned conduct amounted to a lottery in disguise, and lotteries were contrary to public morals; worse, these lottery-like sales were often made to children. The Supreme Court upheld the ban unanimously, noting that the marketing practice in question “employs a device whereby the amount of the return [customers] receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community.”³² The requisite “condemnation” was not economic; it was moral.

That moral condemnation was crucial to the outcome of the case. Sixteen months after *Keppel* was handed down, the Court issued another, more famous unanimous decision in *Schechter Poultry Corp. v. United States*.³³ *Schechter Poultry* invalidated the National Industrial Recovery Act, the New Deal legislation that authorized the writing of industry codes of conduct for the sale of a wide range of products bought and sold in interstate commerce. The government defended the NRA codes by relying, in part, on *Keppel*: just as the FTC had broad authority to define “unfair methods of competition,” so the industry representatives who wrote the code for sale of poultry had similarly broad discretion for the same end. But the codes were very different, as

the opinions in *Schechter Poultry* emphasized. The FTC banned “oppressive” or “fraudulent” or “abus[ive]” conduct (the language comes from Justice Cardozo’s concurring opinion)—that is, it banned conduct that was morally wrong. The NRA codes banned morally neutral or even admirable conduct: in *Schechter Poultry*, the owners of a chicken slaughterhouse were convicted of ten misdemeanor counts for permitting buyers to select individual chickens for purchase, rather than selling the chickens in bulk as the governing NRA code required.³⁴

Something similar happened in several other Court decisions invalidating New Deal legislation. The plaintiff in *Panama Refining Co. v. Ryan*³⁵ sued to enjoin prosecution for the “crime” of selling more oil than the relevant industry code allowed; the code was designed to limit supply and hence to prop up the price of oil. The defendant in *United States v. Butler*³⁶ was a cotton processor charged with a tax under the first Agricultural Adjustment Act; the real parties in interest were the cotton growers who were denied federal subsidies—in effect forcing them from the market—unless they limited the amount of cotton their farms produced. Chicken sellers were penalized for accommodating chicken buyers, sellers of oil were punished for selling too much oil, and cotton farmers for growing too much cotton: hardly the sort of immoral business practices that Populists like William Jennings Bryan and Progressives like Theodore Roosevelt had condemned. The gap between the collusive regulation of the NRA and the AAA, designed not to punish wrongdoing but to put more money in businessmen’s pockets, and the moralist rhetoric used to justify that regulation had more than a little to do with the Supreme Court’s initial hostility to the New Deal.³⁷

No such gap appeared in the cases challenging the FTC’s ban on lotteries and gambling-like marketing practices. Consequently, a federal judiciary that was eager to strike down innovative forms of business regulation found no difficulty enforcing this particular innovation. The FTC appears to have enforced its ban regularly and, so far as one can tell from the available materials, successfully. Moralist regulation of gambling survived, and survived at the federal level, both because it *was* moralist—the regulation’s rationale rested on the moral condemnation of games of chance—and because it took the form of business regulation.

The Ineffectiveness of Federal Law Enforcement

Beginning in 1951, both the federal criminal law of gambling and the resources and energy devoted to enforcing it expanded. Tougher laws and tougher enforcement, taken together, sound like a recipe for law enforcement success. But the gambling laws of the 1950s and 1960s failed, and failed badly.

The core reason for the failure was indirection. Before the 1950s, the criminal law of gambling targeted gambling; after that date, the law targeted a particular class of gamblers: chiefly Mafia bosses who ran numbers rackets in cities across the country. The difference sounds small, even trivial—*of course* gambling prosecutions target gamblers; what else are prosecutors supposed to do? But this is more than semantics: there is a real and important difference between using criminal law to define crimes and using it to punish particular criminals. American criminal law began to shift its focus in the mid-twentieth century from the first purpose to the second. The consequences of this change have been enormous. The criminal law of gambling played a significant part in it.

The story starts with Estes Kefauver, one of the more interesting characters in the history of American politics. In 1950 Kefauver was in the second year of his first term in the United States Senate. He gained his seat by beating Tom Stewart, a two-term Tennessee senator who first won fame as the lead prosecutor in the Scopes trial.³⁸ In five terms in the House of Representatives, Kefauver's signature issue had been corporate misconduct; he sought more aggressive enforcement of the antitrust laws. But antitrust was not an issue on which to build a national political career in mid-twentieth-century America. So, early in his first term in the Senate, Kefauver persuaded the Democratic leadership to let him chair a committee investigating interstate gambling. Kefauver was given the job because it was thought that he would not make waves. Senate Republicans were eager to use the inquiry to examine corrupt urban Democratic machines; Kefauver's job was to head them off.³⁹

He did not do his job. Kefauver mostly did what Republicans wanted, highlighting links between organized crime and big-city politicians and police officials, nearly all of them Democrats. But his chief focus was neither cops nor politicians. Rather, his

committee hearings were America's first real look at the Mafia. Kefauver took the committee on the road, visiting fourteen cities and generating headlines wherever he went. His timing was good: television was coming into widespread use in America at that time, and the networks were scrambling to fill the airspace with programming. Kefauver's hearings were a godsend for the networks. The country watched, especially when the hearings moved to New York in March 1951. Kefauver drew more viewers than that year's World Series, and more than the Army-McCarthy hearings that brought down the Wisconsin senator three years later.⁴⁰

The Kefauver committee drew two crucial links: one between illegal gambling and Mafia bosses like Frank Costello (head of the Genovese family in New York and the committee's star witness), and another between those Mafia bosses and the local politicians whose protection they needed and bought. Members of Congress were not eager to expand the criminal liability of fellow politicians, but they were happy to go after Mafia dons. In 1951, Congress criminalized the interstate shipment of a wide variety of gambling-related paraphernalia, including slot machines.⁴¹ In 1961, in response to lobbying from Robert Kennedy's Justice Department, Congress added two more criminal prohibitions to the prosecutors' arsenal: a ban on gambling transactions using interstate phone lines and the Travel Act, which bars crossing a state line with the intent to violate state laws banning gambling, extortion, or blackmail.⁴²

Until the 1980s—well after the passage of the Racketeer Influenced and Corrupt Organizations Act in 1970—these statutes were the chief legal means of attacking the Mafia, which became a major federal enforcement priority.⁴³ Since the laws in question were designed to make proof of guilt easy, nearly all federal prosecutions were successful. Yet these antigambling laws failed spectacularly: both the Mafia and illegal gambling thrived during these years.

To see why, consider the difference between the Mafia families that federal prosecutors targeted in the generation after World War II and the candy manufacturers and grocery stores the FTC targeted in the 1930s and 1940s. The latter were legitimate businesses that violated particular legal rules. The former

were criminal enterprises; their very existence constituted a criminal conspiracy. Legal businesses form in order to share information and thereby reduce transaction costs. Criminal enterprises form in order to *hide* information—as a means of monitoring their members' silence and of shielding one another, and especially shielding the men at the top of the organization chart, from criminal punishment. Police and prosecutors have a limited array of tools for gathering the evidence that criminal enterprises seek to conceal. The FBI is constrained in its ability to tap phones and bug offices as it wishes. Under *Miranda* doctrine, a suspect savvy enough to use the magic words upon his arrest—"I want to see a lawyer"—cannot be questioned by the police. The upshot is that defendants, especially high-ranking ones, cannot be convicted without the testimony of other members of the organization. Punishing the men who ran major gambling enterprises required threatening their underlings not just with criminal liability (the foot soldiers who ran the numbers business were used to that), but with the kind of liability that leads to the severest possible sanctions. The law must overpunish the small fry in order to land the big fish.

This proposition became law enforcement conventional wisdom in the 1950s and 1960s and has remained so ever since. Over the course of the last half century, federal criminal law has become more and more focused on organized crime: Mafia families, drug-dealing gangs, terrorist cells. The standard approach in all these settings is the one first crafted in gambling cases: roll up the organization from the bottom. Line up the dominoes—the first one to fall fingers the next, who will turn on the one after that, and so on up the chain of command.

That strategy has three large problems. First, success is self-defeating. Even when the government manages to convict and punish mob chiefs like Costello, rivals are quick to take their positions. Criminal punishment becomes a weapon in criminals' turf wars. Second, the domino theory of criminal prosecution inevitably leads to perverse criminal punishment. Plea bargains in organized crime cases are designed not to obtain guilty pleas but to buy information: the government trades immunity or charging concessions for tips and testimony. Those who receive the most favorable bargains are those who have the most information to

sell—and the greatest willingness to sell it. The reverse is also true: those members of the criminal enterprise who have little information to sell or who refuse to sell what they have, often out of loyalty to their friends and lovers (girlfriends of drug dealers regularly serve long prison terms for failing to testify against their boyfriends), receive the *least* favorable bargains. Big fish can usually hand over still bigger fish, and so escape punishment themselves. Less prominent—and less culpable—defendants have less leverage, and so may face worse punishment.

The third problem is the most serious. Over time, the domino tactic makes criminal law strategic. Lawmakers come to see criminal statutes not as legal rules but as prosecutors' tools, and prosecutors come to see those statutes solely as means of achieving desired litigation outcomes. A speech by then-Attorney General John Ashcroft captures the sensibility:

Attorney General [Robert] Kennedy made no apologies for using all of the available resources in the law to disrupt and dismantle organized crime networks. Very often, prosecutors were aggressive, using obscure statutes to arrest and detain suspected mobsters. One racketeer and his father were indicted for lying on a federal home loan application. A former gunman for the Capone mob was brought to court on a violation of the Migratory Bird Act. Agents found 563 game birds in his freezer—a mere 539 birds over the limit. . . .

Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.⁴⁴

Ashcroft's comments did not come as news to the members of Congress who drafted the Migratory Bird Act or the ban on fraudulent loan applications. (Nor, one suspects, did Robert Kennedy's.) When federal prosecutors use criminal prohibitions strategically, members of Congress write them strategically. The consequence is more broadly defined crimes with more severe punishments attached—and greater levels of prosecutorial discretion.

These strategically defined crimes and punishments probably do more to harm deterrence than to strengthen it. As Tom Tyler's scholarship has shown, people obey legal rules (when they do so) not primarily because they fear punishment, but because they find both the rules and the system that enforces them legitimate.⁴⁵

Justice systems seem legitimate to individuals tempted to commit crimes when those systems treat criminal defendants fairly, distinguish between more and less culpable conduct, and offer those charged with crime the opportunity to make reasonable arguments in their defense. The federal justice system that Kennedy and Ashcroft described—and helped to create—meets none of those conditions. Criminal laws designed to produce easy convictions may accomplish their goal, but only at the cost of the law's moral credibility.

This loss of credibility probably contributed to the law's failure to contain illegal gambling markets in the mid-twentieth century. But the phenomenon is broader than that. The same features that characterized gambling cases in the 1960s—strategically defined criminal prohibitions, excessive punishments attached to minor offenses, and efforts to “roll up” criminal organizations from the bottom—also characterized drug law and drug cases in the 1980s and 1990s. The chief difference is that all the relevant practices grew more extreme: drug laws are designed to make criminal convictions automatic, and the punishments attached to those laws are more draconian than even prosecutors wish to impose. (Prosecutors use those draconian laws chiefly to extract information; the worst penalties are imposed on those unfortunate defendants who refuse to bargain with the government.) The results have been no better. In the past thirty years, the drug prisoner population has grown tenfold, to nearly half a million inmates. The number of drug offenders has grown as well. Strategic lawmaking and law enforcement do not work—a lesson that might have been learned from the failed efforts to shut down Mafia-run gambling operations in the 1950s and 1960s.

The Strange Collapse of Gambling Prohibition

In the last thirty years, moralist politics and gambling regulation seem to have moved in oddly divergent directions: the former revived while the latter collapsed. After the 1930s, Protestant evangelicals put their cultural weapons down, and (mostly) retired from the moral campaigns of the past. But beginning in the 1970s, moralism returned with a vengeance, beginning with the advent of the pro-life movement and later extending to opposition to gay rights and a range of other issues. The words

“religious right” entered American political discourse—and so did the words “moral majority.”⁴⁶ One might have expected the resurgence in politically active evangelicalism to inject new life into the campaign against gambling and other vices.

Some of that resurgent moralism may have affected the battle against illegal drugs, which has been far more punitive than similar legal battles in the past. But the broad antivice campaigns of the late nineteenth and early twentieth centuries did not reappear in the late twentieth century. The rise of the Christian right coincided with the rise of a massive market in Internet pornography and a marked coarsening of the culture of public entertainment. Legalized gambling has become ubiquitous at the state level, and with few exceptions (really only one: Internet gambling), federal lawmakers and law enforcers have done nothing to interfere with it. Indeed, they have lent proponents a helping hand by exempting state-sponsored lotteries from federal antilottery laws.⁴⁷ Why, in an age of religion-based moralist politics, is there so little interest in stamping out gambling?

If Christian politics seems different in this “great awakening” than in the last, perhaps that is because Christian voters have different theological beliefs—which imply a different moral agenda—than the beliefs and agenda to which William Jennings Bryan's followers adhered a century ago. Bryan's version of theologically conservative Protestantism was both optimistic and paternalistic. The optimism was associated with the eschatological perspective known as postmillennialism, which holds that Christ will return at the end of a thousand-year period in which goodness abounds and the church is supreme.⁴⁸ The Civil War and Reconstruction seemed to reinforce this optimism, suggesting that the federal government could be a powerful force for cultural reform.

This last factor, the belief in the utility of law and government as agents of reform, was not limited to those who supported emancipation and radical Reconstruction. The two sides in the generation-long struggle over union, slavery, and civil rights differed about much, but they held one conviction in common: the belief that law and government mattered enormously. The Civil War was prompted by a debate about the legal status of slavery in American territories in which almost no slaves

lived. Legal creeds, not practical consequences, dominated the argument. Likewise, Reconstruction was an often-murderous debate about law: about federalism and democracy, civil rights and citizenship. No generation in American history—not even the generation that survived the Articles of Confederation and wrote and ratified the Constitution—engaged so passionately in contests of legal principle. They did this because they believed in law, because they believed that it stood for large ideals and could achieve large goals.

The generation after Reconstruction saw a revolution of its own as the spread of industry and factories turned Jefferson's simple agrarian nation into a major industrial power. It was natural that, when the battle over black civil rights ended (with a victory by the side that lost the war), American Christians, like the rest of their countrymen, turned their attention to economic issues. For Bryan and for many nineteenth-century evangelicals, the goal of reform was to protect ordinary Americans from the depredations of the more powerful, from both corporate robber barons and the purveyors of vice. In Bryan's view and in the view of his millions of Protestant followers, power meant *economic* power; it was closely connected to the world of business and finance. Gambling was a natural target for these cultural warriors.

Today's warriors are different: the evangelical Protestant moralism of the late twentieth century is neither optimistic nor paternalistic. Evangelical Protestants invariably characterize their activism as defensive, as a battle to preserve traditional values in the face of cultural erosion.⁴⁹ (The "majority" in "moral majority" is ironic: the energy in religious right politics stems in large part from the belief that religious voters are an embattled *minority*.) In theological terms, today's evangelicals are more likely than their counterparts in the past to hold to the premillennial view—the view that Christ will return before the thousand-year reign of the church, at a time when society remains deeply infected by sin.⁵⁰ In addition to its cultural pessimism, the new moralism does not aim to protect ordinary Americans against exploitation—especially not against economic exploitation. Were it otherwise, opposition to state lotteries would figure much more prominently in the movement, and campaigns against gay rights less so. Instead of paternalism, the new Protestant evangelical

moralism is more concerned with justice—or, from the perspective of its opponents, with judgment or judgmentalism. The abortion debate is a good illustration: while the pro-life movement has employed paternalist-sounding arguments—for example, the emphasis on protecting vulnerable unborn babies—its core objective is to stop a perceived injustice. The goal is to save lives, not to save the culture.

One mark of the difference between this version of politicized evangelicalism and the last is Christian voters' stance on economic issues. Economic exploitation plays nearly no role at all in the politics of the Christian right. Even ministries that focus on the urban poor seem more concerned with relieving individuals' distress—with saving lives—than with the larger economic forces that contribute to that distress. An administration and a Congress supported by the Christian right enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which made it harder for bankrupt debtors to have their debts discharged. The contrast with the past could not be starker. In his first run for the presidency, the core plank in William Jennings Bryan's political platform was inflation as a means of debtor relief—putting more silver currency in circulation so that indebted farmers could pay creditors cheaper dollars than they borrowed. Bryan opposed the legislation that became the Bankruptcy Act of 1898 for the same reason: he feared it might jeopardize the homes of financially precarious farmers. One reason today's evangelicals are less invested in battling gambling and state lotteries is that they are less invested in battling economic oppression more generally.

Nor is this generation of evangelicals notably optimistic about the power of law and government to effect large-scale social reform. This is one reason why Christian conservatives have found it so easy to ally themselves with libertarian free-marketeters. Legal optimism is associated with the Left; social conservatives are more inclined to embrace the legal and political pessimism of Richard John Neuhaus or Robert Bork.

This pessimism feeds the defining goal of late twentieth-century evangelicals: saving lives. The pro-life movement was born of crisis and defeat, not progress. Abortion was already becoming a common means of birth control when the Supreme Court legalized the practice in *Roe v. Wade*.⁵¹ To those who

believed that fetuses had the moral status of born children, the consequence was mass slaughter: by the late 1970s, more than one million abortions were performed each year in the United States. This was a radical change from even a single generation earlier. In this respect, the pro-life movement was quite different from the antivice movements of the late nineteenth century or the abolitionist movement that led to slavery's end. Those earlier political movements sought to right wrongs that had long existed. Participants in them believed in social progress; they assumed that society was growing morally healthier as well as more prosperous, and this assumption fueled their political movements. To pro-lifers in the post-*Roe* generation, society seemed in a state of permanent decay. Moral decline, not social betterment, seemed the norm.

A historical coincidence helped to shape this sensibility. The 1960s and 1970s—the same decades during which the abortion rate rose steeply—saw another kind of homicide rate reach record levels. The murder rate in the nation as a whole rose two-and-a-half times in those twenty years, a larger increase than in any comparable period in the past. In cities outside the South, the rise in violence was steeper still. Murders tripled in Chicago, quintupled in New York and Los Angeles, and multiplied seven times in Detroit. Nothing like that had ever happened before. To make matters worse, the 1960s and early 1970s saw not only steeply rising crime (the increases were not limited to homicide) but also steeply falling prison populations. Illinois' imprisonment rate—the number of prisoners per unit population—fell by one third; Michigan's and New York's, by 40 percent; California's, by nearly half. Nothing like *that* had ever happened before either.⁵²

Nationwide, the decline in imprisonment hit its trough in 1972;⁵³ *Roe* was handed down in January 1973. To conservative evangelicals, it seemed that America's legal system had lost the capacity to punish even the worst crime—homicide—and no longer protected even the most basic human right: the right to live. The moralism of the pro-life movement can fairly be seen as an effort to recapture that capacity.

The tide of murderous violence that engulfed American cities also helps explain the staggeringly punitive approach to drug crime after 1970. Drug crimes were punished far more severely

than similar vices were punished in earlier generations. But then, those other vices were not punished as means of punishing other, more violent crimes. Drug charges, by contrast, were—and still are—regularly used as proxies for violent crime charges that prosecutors find difficult to prove. If the drug war has been fought harder and with many more casualties than earlier vice wars, that may be because, to the lawmakers and law enforcers who have done the fighting, it has seemed more like a real war: the kind that yields body bags.⁵⁴

Whatever its other faults, gambling produces fewer casualties than the drug war. When violent crime rates skyrocketed in the 1960s, the Mafia seemed less frightening than before: voters feared getting mugged, not dealing with the local numbers racket (which usually offered better payout rates than today's state-run lotteries). In a violent age, gambling and illegal lotteries seemed like relatively harmless vices—far less harmful than drugs, given the violence of urban drug markets.

Together, the shift in the orientation of evangelical Protestants and the growing violence of American city streets dissipated much of the energy behind gambling prohibition. At the same time, the fiscal benefits of state-sponsored gambling made legalization of casinos and lotteries politically irresistible.⁵⁵ Although the payout on state lotteries is abysmally low and the money disproportionately comes from the poor and lower middle classes, state politicians have cleverly linked the lotteries to popular middle-class initiatives such as education funding and subsidies for the elderly.⁵⁶ Protestant evangelicals are still much more likely to disapprove of gambling than other Americans, and they have led the opposition to new lotteries and casinos. But gambling no longer ranks near the top of evangelical concerns. With evangelicals having thrown up their hands, and with the declining usefulness of gambling prohibitions to federal law enforcers, gambling has become a familiar presence in nearly every state.

Lessons

Drawing lessons from history is always risky, and it is made riskier when the history is as sweeping and sketchy as are the discussions above. Nevertheless, the post-Civil War history of the criminal law of gambling seems to suggest three main lessons.

The first has to do with the link between the legal regulation of gambling and other forms of economic regulation. The tendency today is to lump vice with traditional crimes or with morally charged topics like abortion. Historically and politically, vice laws had more in common with the Sherman Act and the Pure Food and Drug Law—early Progressive-Era legislation regulating business—than with laws on those other topics. Christians believed in legal regulation of vice markets because they believed in regulating markets more generally. And both voters and politicians supported using criminal law as a regulatory tool because, in the late nineteenth and early twentieth centuries, criminal law seemed to be the most natural means for the government to regulate businesses of all sorts.

Despite their similar origins, business regulation and vice prohibition evolved in different ways—thanks in part to *civil* regulation. Lawsuits by customers or competitors of alleged antitrust violators were not the key focus of political debate when the Sherman Act was passed, but those lawsuits have proved more important—and much more frequent—than criminal antitrust prosecutions. Similar stories could be told about a range of different regulatory statutes that govern businesses. Vice laws are different. Nearly always, they consist solely of criminal prohibitions and, sometimes, government-prosecuted civil fines and forfeitures. The government's monopoly on criminal law enforcement permits the kind of enforcement tactics seen in the battles against Mafia-run gambling enterprises in the 1960s and against drug-dealing gangs in the 1980s and 1990s. These enforcement tactics, in turn, invite the strategic lawmaking that has so characterized the war on drugs. Similar developments were far less common in securities or antitrust law because those areas have been shaped more by private litigation.

The treatment of Internet gambling may be powerfully affected by this historical link between vice and criminal law—not civil regulation and litigation. Over the past decade, Internet gambling has been the target of a sustained campaign aimed at criminal prohibition. But enforcing criminal bans against Internet-based gambling seems like an impossible task since gambling Web sites can be established in countries that do not prohibit them and since such Web sites are difficult to block in legal systems that

protect free speech as aggressively as ours does.⁵⁷ As one commentator wrote in a dismissive review of Congress' recent effort to stymie Internet gambling, the "temptation for good citizens to ignore a stupid law is encouraged when it is unenforceable. In this, the attempt to ban Internet gambling is exemplary."⁵⁸ A different regulatory strategy—more like the licensing used by the Food and Drug Administration than like the federal criminal prohibition of lotteries—could prove more effective at addressing the harms most often associated with Internet gambling, such as addictive behavior and the risk of fraud. If qualifying Internet gambling sites were given licenses, they could be monitored by regulators and customers could police fraud and other misconduct through private litigation. One of the chief obstacles to this approach and others like it is the ease and familiarity of criminal prohibitions. In this area, at least, Congress tends to do what it has done in the recent past. Path dependency is powerful, regulatory innovation rare. In short, vice law arose from origins similar to antitrust and securities law. But while those regulatory fields soon transcended their criminal justice origins, the law of vice never has.

The second lesson concerns the tendency of vice prohibitions to evolve in different directions than their supporters expect or intend. The politicians who enacted the antilottery laws of the 1890s would likely have found the Federal Trade Commission's ban on lottery-style marketing strategies surprising. Both those earlier politicians and FTC regulators would have found Kefauver's crusade against Mafia-run gambling astonishing. Needless to say, none of these government officials anticipated the massive punishments imposed on drug defendants during the last three decades—even though the punishments were, in large measure, the consequence of those earlier regulatory developments. The FTC's regulation seemed to follow from the merger of the late nineteenth century's moral condemnation of lotteries and the New Deal's emphasis on centralized regulation of interstate businesses. Estes Kefauver's and Robert Kennedy's focus on the Mafia seemed a natural next step in a society in which the business enterprises that ran most gambling operations were *criminal* enterprises, not legal manufacturers and chain stores. The strategic use of laws like the Travel Act to nail mobsters was likewise

natural, a logical response to the difficulty of proving criminal bosses like Frank Costello guilty of ordinary crimes.⁵⁹ Once the notion of using some criminal statutes to enforce others was well established, it seemed natural to use easily proved drug offenses as a means of punishing harder-to-prove violent crimes—to punish violent drug dealers not for their own drug crimes but for the violence of their drug markets.

No one planned this progression. Politicians and prosecutors alike used the tools that seemed most readily available to respond to the challenges they faced. The character of these tools in turn depended on the nature of the choices made by the previous generation's politicians and prosecutors. The end products of these unplanned, path-dependent choices may be—and in twenty-first-century America, almost certainly are—quite different than voters or government officials would choose were they to design the relevant laws and procedures today, from scratch. Criminal justice is an evolutionary process, and in the political realm, such processes are not necessarily adaptive: progress is not the inevitable consequence of this particular form of evolution. The legal regulation of gambling needs a new design, a different path. Criminal law enforcement has failed. A more classically civil regulatory strategy akin to the regulation of *legal* drugs (perhaps backed up by controls over the payment systems that cover debts incurred on the Internet) might do better. It could hardly do worse.

The third lesson follows from the second. Moral principles do not translate neatly into effective legal prohibitions. Lotteries may be bad public policy, but criminal bans may be even worse policy. Law is a less powerful tool than Christians of past generations, and perhaps many in this generation as well, suspect. The recent history of abortion suggests as much. No one knows precisely how many illegal abortions were performed in the United States before *Roe v. Wade*, but based on conventional estimates, the number of abortions mushroomed throughout the 1960s—when abortion was a crime in all fifty states. Since 1980, the abortion rate has fallen nearly 30 percent. Abortion grew more frequent when it was criminalized, and more rare when it was constitutionally protected.

The lesson applies to more than the usual list of vices and morals offenses. The 1970s and 1980s saw criminal punishment for violent crime rise steeply—while violent crime itself continued to rise.⁶⁰ Rates of criminal violence fell after 1990 when American cities hired more police officers, not so that more offenders could be arrested and punished—arrest rates fell, and arrests of African Americans fell even more—but so would-be offenders could be persuaded to make different and better choices.⁶¹ Softer, less coercive forms of policing have proved more effective in fighting crime than the severe criminal punishments to which Americans have become accustomed—just as crisis pregnancy centers have proved more effective means of battling abortion than pro-life legal arguments and political campaigns. Legal compulsion is a clumsier weapon than it at first appears. Often it backfires, harming the side that most wishes to use it. The pro-life movement may be better off for having lost most of its legal battles over the past thirty-five years. The great misfortune of the movement to stop gambling in the United States may be that it had too much legal success too soon.

- 23 Lorraine Daston, *Classical Probability in the Enlightenment* (Princeton: Princeton University Press, 1988), 149.
- 24 Lears, *Something for Nothing*, 150.
- 25 Scott Cutler Shershow, *The Work and the Gift* (Chicago: University of Chicago Press, 2005), 92.
- 26 Jean-Joseph Goux, “General Economics and Postmodern Capitalism,” *Yale French Studies* 78 (1990): 215.
- 27 George Gilder, *Wealth and Poverty* (New York: Basic Books, 1981), 296, quoted in Goux, “General Economics,” 213.
- 28 Goux, “General Economics,” 217.
- 29 Jean Baudrillard, *The Mirror of Production*, trans. Mark Poster (St. Louis, Mo.: Telos, 1975), 144–45.
- 30 Goux, “General Economics,” 222.
- 31 Lears, *Something for Nothing*, 194.
- 32 See John A. Ryan, “The Ethics of Speculation,” *International Journal of Ethics* 12, no. 3 (1902): 335–47; and Frank N. Freeman, “The Ethics of Gambling,” *International Journal of Ethics* 18, no. 1 (1907): 76–91.
- 33 Lears, *Something for Nothing*, 19.
- 34 Lears, *Something for Nothing*, 325; it should be noted, however, that Lears thinks this view does not sufficiently appreciate the “vernacular culture of chance.”
- 35 Kavanagh, *Enlightenment*, 97.
- 36 Pascal, *Pensées*, 66.
- 37 Ivan Light, “Numbers Gambling among Blacks: A Financial Institution,” *American Sociological Review* 42, no. 6 (1977): 892–904; Milton Friedman and L. J. Savage, “The Utility Analysis of Choices Involving Risk,” *The Journal of Political Economy* 56, no. 4 (1948): 279–304; Alex Rubner, *The Economics of Gambling* (London: Macmillan, 1966), 48–52.
- 38 Rubner, *Economics of Gambling*, 50.
- 39 Tillotson, *Works*, 22–26.
- 40 Søren Kierkegaard, *Fear and Trembling*, trans. Walter Lowrie (Princeton: Princeton University Press, 1941), 33.
- 41 Kierkegaard, *Fear and Trembling*, 59.
- 42 Pascal, *Pensées*, 292.
- 43 Freeman, *Ethics of Gambling*, 79.

Chapter 11

- 1 The timing roughly corresponds to the timing of what Robert William Fogel calls the Third Great Awakening. See Robert William Fogel, *The Fourth Great Awakening and the Future of Egalitarianism* (Chicago: University of Chicago Press, 2000).
- 2 The statement is less true of gambling markets today, given the role of the Internet in those markets. Still, the rise of the Internet is a recent phenomenon; the story we focus on here is a very old one. We return to the Internet at the end of the article.

- 3 The *state* criminal law of gambling contracted during the 1930s: Nevada reintroduced casino gambling in 1931, and ten states legalized gambling in the years after 1933.
- 4 It is important not to overstate this last point. Theologically conservative Protestants are still the principal opponents of legalized gambling. But gambling occupies a much lower priority in the evangelical political agenda than it once did.
- 5 Rev 1:6.
- 6 Ps 51:10.
- 7 See, e.g., Roscoe Pound, “Puritanism and the Common Law,” *Proceedings of the Kansas State Bar Association*, 45 (1910). Pound attributes the late nineteenth-century hostility to legislation and emphasis on individualism to the legacy of Puritanism.
- 8 Henry Ward Beecher, *Seven Lectures to Young Men on Various Important Subjects* (Indianapolis: Thomas B. Cutler, 1844), 116–18. For an excellent cultural history of gambling in nineteenth-century America, see Ann Fabian, *Card Sharps and Bucket Shops: Gambling in Nineteenth-Century America* (New York: Routledge, 1999).
- 9 See, e.g., Gaines M. Foster, *Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865–1920* (Chapel Hill: University of North Carolina Press, 2002).
- 10 Michael Kazin, *A Godly Hero: The Life of William Jennings Bryan* (New York: Alfred Knopf, 2006), 256.
- 11 Kazin, *A Godly Hero*, 96 (quoting Bryan on regulation of the trusts), 146 (railroads).
- 12 One issue that did arise during Bryan’s time in Washington directly linked gambling and finance. In 1894 Congress debated legislation aimed at restricting speculation in commodity futures. Bryan strongly supported the legislation, arguing that if “gambling in these products” altered the price of a commodity, it necessarily hurt either the buyer or the seller. “By the strong arm of the law,” he concluded, “we can restrain man from inflicting on his fellow-man any injury dictated by that selfishness which must ever be restrained, if man is to be fit for society and citizenship.” William Jennings Bryan, *Congressional Record* 26 (June 18, 1894): 1074, 1077.
- 13 William Jennings Bryan, “A People’s Constitution: Address Delivered Before the Constitutional Convention of Nebraska at Lincoln,” January 12, 1920, William Jennings Bryan Papers, Library of Congress, Container No. 49. See also William Jennings Bryan, *The Commoner*, October 1920. In this column, Bryan argued that the baseball players who were paid by gamblers to “fix” the 1919 World Series “could not be expected to resist so great a temptation as the gamblers set before them,” arguing for legal prohibition, and concluding, “Remember that the women vote now; they will use their votes to protect their boys.”
- 14 See, e.g., G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 1981).
- 15 Roscoe Pound, who later became dean at Harvard Law School, analyzed and criticized this tendency in one of the most famous law review articles of the early twentieth century. “One cannot read the cases in detail

- without feeling that the great majority of the decisions are simply wrong,” he wrote, “not only in constitutional law, but from the standpoint of the common law, and even from that of a sane individualism.” Roscoe Pound, “Liberty of Contract,” *Yale Law Journal* 18 (1909): 1485.
- 16 Michael W. McConnell, “Federalism: Evaluating the Founders’ Design,” *University of Chicago Law Review* 54 (1987): 1484, 1494.
 - 17 See *Champion v. Ames*, 188 U.S. 321 (1903).
 - 18 The two cases were *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895); and *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
 - 19 The language is taken from Article I, Section 8 of the Constitution, which lists the permissible subjects of congressional legislation.
 - 20 For an excellent discussion of pre-New Deal doctrine on this point, see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998). The key point is that, for the most part, the law drew lines between industries—railroads were fair game; mining was not—not between different parts of the *same* industry.
 - 21 Justice Harlan’s majority opinion in *Champion*, upholding the antilottery law, refers to lotteries as a “widespread pestilence” that was “injurious to public morals,” and from which ordinary citizens need “protection.” *Champion* 188 U.S. at 356–57.
 - 22 On crossing a state border, see, e.g., *Scarborough v. United States*, 431 U.S. 563 (1977). Scarborough was convicted under the federal law banning possession of firearms by felons. Federal jurisdiction existed because the guns Scarborough possessed had crossed state borders in the past. On running an interstate business, see, e.g., *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006). The crime in *Jimenez-Torres* was robbery—a classic state-law offense. Federal courts had jurisdiction because the robbery victim owned a gas station, which closed because of the robbery. On the crime itself affecting interstate commerce, see, e.g., *Perez v. United States*, 402 U.S. 146 (1971), in which the Supreme Court found that loan-sharking sufficiently affected interstate commerce to justify federal jurisdiction.
 - 23 Margaret Werner Cahalan, *Historical Corrections Statistics in the United States: 1850–1984* (Washington, DC: Bureau of Justice Statistics, 1987), 30, table 3-3.
 - 24 With the federal antilottery laws, the principal objective was simply to shut down Louisiana’s state lottery. See, for example, Ezell, *Fortune’s Merry Wheel*. Once this effort succeeded, the laws seem to have been largely ignored.
 - 25 On the first of those exceptions, see Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials: 1871–1872* (Athens: University of Georgia Press, 2004). On the second, see David E. Kyvig, *Repealing National Prohibition* (Chicago: University of Chicago Press, 2000). Drug enforcement might seem a third exception to this longstanding pattern; the federal government has prosecuted drug cases aggressively, and defendants in those cases are often sentenced to long prison terms. But the pattern holds for drugs as well. Federal cases account for roughly 5 percent

- of felony drug convictions nationwide. See Bureau of Justice Statistics, “Sourcebook of Criminal Justice Statistics—Online,” U.S. Department of Justice, tables 5.10.2006, 5.44.2004, available at <http://www.albany.edu/sourcebook/>.
- 26 See, e.g., Mark A. Noll, *The Scandal of the Evangelical Mind* (Grand Rapids: Eerdmans, 1995), 164–65.
 - 27 Franklin D. Roosevelt, “New Conditions Impose New Requirements upon Government and Those Who Conduct Government,” in *The Public Papers and Addresses of Franklin D. Roosevelt*, ed. Samuel I. Rosenman (New York: Random House, 1938), 742, 755.
 - 28 Franklin D. Roosevelt, “First Inaugural Address,” delivered March 4, 1933, available at <http://www.bartleby.com/124/pres49.html>. The biblical reference is to Christ’s chasing the moneychangers from the temple, as recounted in the Gospels. See, e.g., Matt 21:12.
 - 29 One might say the same thing about the New Deal’s redistributive tax and spending policies. The Second New Deal, notably more redistributive than the first—which saw the creation of the WPA, the passage of the Social Security and Wagner Acts, plus steep tax hikes on the wealthy, all of which were instituted in 1935 and 1936—was in large measure a response to Huey Long’s popular Share Our Wealth program. Long’s speeches supporting that program, and advocating the expropriation of large fortunes to be distributed among the poor, were riddled with biblical references to the Year of Jubilee and to God’s special concern for the poor and oppressed. Both the Second New Deal and Long’s program were especially popular, not in the urbanized northeast, but in the Farm Belts of the South and West—the Bible Belt jurisdictions where Bryan had won the most support.
 - 30 *Federal Trade Comm’n v. R. F. Keppel & Bro.*, 291 U.S. 304 (1934).
 - 31 The Court of Appeals for the Third Circuit had invalidated the FTC’s rule in *R. F. Keppel & Bro. v. FTC*, 63 F.2d 81 (3d Cir. 1933). In dissent, Judge Woolley contended that the Commission’s moralist stance had led to its defeat.
 - 32 *Keppel*, 291 U.S. at 313.
 - 33 *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
 - 34 The name by which *Schechter Poultry* was known at the time—the “sick chicken case”—was unfair to the Schechters. Only one count of a sixty-seven-count indictment (the defendants were convicted on eighteen counts) charged the sale of a sick chicken, and that count was not the reason charges were brought. The Schechters were hauled into court not because they cheated their buyers, but because they treated buyers *too well*—which made life more difficult for their competitors. Cardozo emphasized this point in his concurrence. See *Schechter Poultry*, 295 U.S. at 552–53. Chief Justice Hughes’ majority opinion strikes the same note, a bit more subtly: Hughes distinguished *Keppel* by noting that the FTC’s regulatory process was designed to define wrongful conduct, while the process by which NRA codes were written—for the most part, industry representatives agreed on terms of competition that would benefit the relevant industry—was designed not to stamp out immoral business practices

but to make business more convenient and profitable. See *Schechter Poultry*, 295 U.S. at 531–37.

35 *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

36 *United States v. Butler*, 297 U.S. 1 (1936).

37 The Court of the early- and mid-1930s included three distinct voting blocs. Four conservatives—Justices Butler, McReynolds, Sutherland, and Van Devanter, sometimes called the Four Horsemen, both at the time and in the historical literature—were fairly reliable votes to overturn any innovative or expansive regulatory scheme. Three justices on the Left—Brandeis, Cardozo, and Stone—were generally pro-New Deal, though not consistently so: note that all three of the Court’s liberals found the NRA objectionable. Two centrists, Chief Justice Hughes and Justice Roberts, held the swing votes in most contested cases. Hughes and Roberts voted with the conservatives in *Butler* and *Panama Refining*; in *Schechter Poultry*, all nine justices voted to strike down the NRA.

The Court’s conservatives were not particularly receptive to moralist arguments like the FTC’s argument in *Keppel*. In their view, the common law’s traditions formed the key limits on government power (federal and state alike); the arguments of moralist reformers were largely irrelevant. For both the Court’s liberals and its moderates, these arguments were crucial. Hughes first gained prominence as an investigator exposing corruption and misconduct in the insurance industry. Brandeis won fame as an advocate for the interests of employees and consumers victimized by powerful corporations. Cardozo’s pre-Court career as a state judge was marked by his eagerness to require businesses to bear responsibility for the injuries they caused, along with a willingness to ignore traditional common-law doctrines that seemed to protect dishonest or unfair business practices. Stone was the attorney general who replaced the corrupt Harry Daugherty and restored integrity to the Justice Department after the Harding administration scandals. Roberts prosecuted corrupt Harding cronies. These justices embodied the application of high moral standards to government service. Each of them formed his political and legal beliefs in the Progressive Era, which emphasized moralist arguments for regulation far more than did the New Dealers of the 1930s. It was the opposition of (some of) these justices, not the opposition of the Court’s conservatives, that put the New Deal in legal jeopardy in the 1930s.

38 Stewart was endorsed by Tennessee’s Democratic boss, former congressman and Memphis Mayor Ed Crump—who, until Kefauver’s successful campaign, had controlled Tennessee’s Senate elections for three decades. Crump accused Kefauver of being in league with Communists and of having the deceitful character of a raccoon. Kefauver made the attack a badge of honor, saying: “I may be a pet coon, but at least I’m not Boss Crump’s pet coon.” From then on, Kefauver wore a coonskin cap at all his campaign appearances. The campaign is recounted in Joseph Bruce Gorman, *Kefauver: A Political Biography* (New York: Oxford University Press, 1971).

39 One of the Republican senators who was most interested in the gambling inquiry was Joe McCarthy, who was up for reelection in 1952 and looking

for a campaign issue. Only after he was passed over for one of the Republican slots on Kefauver’s committee did McCarthy turn his attention toward the issue that would make him famous, and infamous. For details, see Gorman, *Kefauver*, 74–80; William Haas Moore, *The Kefauver Committee and the Politics of Crime* (Columbia: University of Missouri Press, 1974). McCarthy’s speech in Wheeling, West Virginia, charging the State Department with harboring dozens of known Communists, was delivered soon after Kefauver’s crime hearings began.

40 Those viewers must have liked what they saw. In 1952 Kefauver knocked Harry Truman out of the presidential race, becoming the first politician to defeat a sitting president in the New Hampshire primary. He led on the first ballot of that year’s Democratic convention, but lost the presidential nomination to Adlai Stevenson.

41 These prohibitions, and their origins in the Kefauver Committee hearings, are described in G. Robert Blakey and Harold A. Kurland, “The Development of the Federal Law of Gambling,” *Cornell Law Review* 63 (1978): 923, 960–62.

42 Blakey and Kurland, “Development,” 964–77.

43 James B. Jacobs and Lauryn P. Gouldin, “Cosa Nostra: The Final Chapter?” *Crime and Justice* 25 (1999): 148–52.

44 John Ashcroft, “Prepared Remarks for the U.S. Mayors’ Conference,” remarks prepared for the Mayors Emergency, Safety and Security Summit, Washington, D.C., Oct. 25, 2001, available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm.

45 Tom R. Tyler, *Why People Obey the Law* (New Haven, Conn.: Yale University Press, 1990).

46 Both words in that second phrase should trouble Christians. The word “moral” seems to imply that Christians occupy a higher moral plane than unbelievers—which seems contrary to the Apostle Paul’s self-description as “the worst of sinners.” See 1 Tim 1:16. In this context, the word “majority” suggests that most American voters are observant Christians—which, if church attendance is any measure, was not true in the 1970s (when the phrase was coined) and is not true now.

47 See Blakey and Kurland, “Development,” 950–54 (describing 1975 legislation enacted in order to exempt state lotteries from the federal prohibitions).

48 The postmillennial perspective (like the principal alternative, premillennialism) is based on, among other things, an interpretation of prophetic passages in the book of Revelation. For a brief discussion of the influence of postmillennial optimism in the late nineteenth and early twentieth centuries, see George M. Marsden, *Understanding Fundamentalism and Evangelicalism* (Grand Rapids: Eerdmans, 1991), 39, 92.

49 “Most people who comment on the evangelical movement picture it as an offensive movement,” Paul Weyrich, a prominent early figure in the movement, said in the early 1990s. “It is not. It is a defensive movement. The people who got involved . . . got involved very reluctantly.” Michael Cromartie, ed., *No Longer Exiles: The Religious New Right in American*

- Politics* (Washington, D.C.: Ethics and Public Policy Center, 1993), 25 (remarks of Paul Weyrich).
- 50 Premillennialism is the view that animates the popular *Left Behind* series, which portrays a coming judgment in which believers will be caught up in the Rapture while nonbelievers suffer eternal torment. Many evangelicals remain postmillennial in orientation, but premillennialist pessimism is much more pervasive than in the nineteenth century.
- 51 *Roe v. Wade*, 410 U.S. 113 (1973).
- 52 Both New York and national crime data are taken from figures assembled by the late Eric Monkkonen data and used in Eric H. Monkkonen, *Murder in New York City* (Berkeley: University of California Press, 2000); the data are available through the National Archive of Criminal Justice Data, at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/03226.xml>. Crime data from other cities mentioned in this paragraph are taken from the annual volumes of Federal Bureau of Investigation, *Uniform Crime Reports*, U.S. Department of Justice, available at <http://www.fbi.gov/ucr/ucr.htm>. The imprisonment rates are taken from annual volumes of U.S. Bureau of the Census, *Statistical Abstract of the United States* (Washington, D.C.: U.S. Department of Commerce, 2006); and from Cahalan, *Historical Corrections Statistics*, 30, table 3-3.
- 53 Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics: 1991* (Washington, D.C.: U.S. Department of Justice, 1992), 637, table 6.72.
- 54 This argument is developed in more detail in William J. Stuntz, “Unequal Justice,” *Harvard Law Review* 121 (2008): 1969.
- 55 In his characteristically incisive contribution to this volume, Alan Wolfe points out that both political parties are too dependent on the revenues from gambling to seriously challenge the legalization trend; Democrats because they want to finance spending and Republicans because of their aversion to tax increases.
- 56 On the low payouts, see Lawrence Zelenak, “The Puzzling Case of the Revenue-Maximizing Lottery,” *North Carolina Law Review* 79 (2000): 1. On the disproportionate use by those on the lower reaches of the income ladder, see Clotfelter et al., *State Lotteries at the Turn of the Century*.
- 57 Although the blanket ban has not passed, Congress enacted a reform prohibiting banks and credit card companies from sending payments to illegal Internet gambling sites in 2006. *Unlawful Internet Gambling Enforcement Act of 2006*, Pub. L. No. 109-374, 120 Stat. 1884. For an earlier argument that Internet gambling could and should be prohibited under existing federal criminal law, see Bruce P. Keller, “The Game’s the Same: Why Gambling in Cyberspace Violated Federal Law,” *Yale Law Journal* 108 (1999): 1569.
- 58 Charles Murray, “The G.O.P.’s Bad Bet,” *The New York Times*, October 19, 2006.
- 59 Years after Kefauver’s hearings, Costello was prosecuted and convicted—of income tax evasion, the only crime federal prosecutors could prove. See *Costello v. United States*, 350 U.S. 359 (1956).

- 60 America’s imprisonment rate stood at 96 per 100,000 in 1970, rising to 297 in 1990. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics: 2003* (Washington, D.C.: U.S. Department of Justice, 2005), 501, table 6.29. America’s murder rate stood at 8.3 per 100,000 in 1970, rising to 9.4 in 1990. See Monkkonen, *Murder in New York City*, 9, fig. 1.1.
- 61 On the 1990s rise in the number of urban police officers, see the annual volumes of Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States*, U.S. Department of Justice. On the dramatic drop in violent crime, see Franklin E. Zimring, *The Great American Crime Decline* (New York: Oxford University Press, 2006).

Chapter 12

- 1 Ken Maguire, “Struggling Bingo Games Brace for Casino Impact,” *Boston Globe*, September 13, 2007.
- 2 “La vegilla de Nabadat, e el dia, que sean sueltos de jugar porque en tal noche nascio Nuestro Sennor Iesu Cristo, e es pascua bendita e de auer cada vno alegria en su posada.” Robert A. MacDonald, ed., “*Libro de las Tahurerias*”: *A Special Code of Law, Concerning Gambling, Drawn Up by Maestro Roldán at the Command of Alfonso X of Castile*, Hispanic Seminary of Medieval Studies, Legal Series 19 (Madison, Wisc.: Hispanic Seminary of Medieval Studies, 1995), 292. My translation.
- 3 “And these are ineligible [to be witnesses or judges]: a gambler with dice, a usurer, a pigeon-trainer, and traders [in the produce] of the sabbatical year.” Isidore Epstein, ed., *The Babylonian Talmud: Tractate Sanhedrin*, trans. Jacob Shachter (London: Soncino, 1987).
- 4 Leo Landman, “Jewish Attitudes toward Gambling: The Professional and Compulsive Gambler.” *Jewish Quarterly Review* 57, no. 4 (1967): 298–318, at 299–301.
- 5 Robert W. Henderson, “Moses Provençal on Tennis,” *Jewish Quarterly Review*, n.s., 26 (1935): 1–6.
- 6 Landman, “Jewish Attitudes toward Gambling,” 308.
- 7 Leo Landman, “Jewish Attitudes toward Gambling II: Individual and Communal Efforts to Curb Gambling.” *Jewish Quarterly Review* 58, no. 1 (1967): 34–62, at 39.
- 8 Landman, “Jewish Attitudes toward Gambling,” 312.
- 9 See, in this regard, Mark R. Cohen, *The Autobiography of a Seventeenth-Century Venetian Rabbi: Leon Modena’s “Life of Judah”* (Princeton: Princeton University Press, 1988).
- 10 Cohen, *The Autobiography*, 137.
- 11 The account is found in *cantiga* 214, Alfonso X, el Sabio, *Cantigas de Santa María*, ed. Walter Mettmann (Madrid: Castalia, 1988), 2:270–72.
- 12 “Se quer que seja / Deus que o jogo gãedes, esta ygreja levade.” Alfonso X, *Cantigas de Santa María*, 2:271. All translations of this *cantiga* are mine.
- 13 “Venced’ o jogo e a eigreja fillade.” Alfonso X, *Cantigas de Santa María*, 2:271.

- 14 “Assi gannou a eigreja Santa Maria por sua.” Alfonso X, *Cantigas de Santa María*, 2:272.
- 15 Ca se Deus deu aas gentes jogos pera alegria
averen, todo o tornan elas en tafuraria,
e daquesta guisa queren gäär; mais Santa Maria
non lle praz de tal gaança, mais da que é con verdade.
- “Although God gave people games so they might be happy, they turn everything into gambling, and this is the way they wish to win. But Holy Mary dislikes such winning, and desires only that which is done truthfully.” Alfonso X, *Cantigas de Santa María*, 2:270.
- 16 The catalogue of laws is conveniently summarized by MacDonald in his edition of the *Libro de las Taburerías*, 2–5.
- 17 MacDonald, *Libro de las Taburerías*, 26–28; Dwayne Eugène Carpenter, “Alea Jacta Est: At the Gaming Table with Alfonso the Learned,” *Journal of Medieval History* 24 (1998): 345.
- 18 *Libro de las Taburerías*, 293 (law no. 32).
- 19 Jorge Luis Borges, *Obras completas: 1923–1972* (Buenos Aires: Emecé, 1974), 813.

Chapter 13

- 1 Walter Cronkite, “The Dice Are Loaded,” Discovery Channel Special, November 12, 1994. <http://news.rutgers.edu/focus/>.
- 2 Cronkite, “The Dice Are Loaded.”
- 3 Theodor Reik, “The Study in Dostoyevsky,” in *From Thirty Years with Freud*, trans. R. Winston (New York: Farrar & Rinehart, 1940), 170. I have made the argument outlined in the rest of this paragraph at length in Lears, *Something for Nothing*.
- 4 William Safire, “Now: Bet While You Booze,” *The New York Times*, January 11, 1993.
- 5 Michael Marriott, “Fervid Debate Over Gambling: Disease or Moral Weakness?” *The New York Times*, November 21, 1992.
- 6 Marc N. Potenza, “Gambling and Morality: A Neuropsychiatric Perspective,” chap. 7 in this volume.
- 7 David A. Skeel and William Stuntz, “The Criminal Law of Gambling: A Puzzling History,” chap. 11 in this volume.
- 8 Steve Fraser, *Every Man a Speculator: A History of Wall Street in American Life* (New York: HarperCollins, 2005), chaps. 15–16.
- 9 Bill Gates, *The Road Ahead* (New York: Penguin, 1995); Thomas Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York: Anchor, 2000); Thomas Friedman, *The World Is Flat 3.0: A Brief History of the Twenty-first Century* (New York: Picador, 2004). Bush’s views are evident in almost every one of his public utterances, but the most expansive version is his second inaugural address, reprinted in *The New York Times*, January 21, 2005.
- 10 Jack Richardson, *Memoir of a Gambler* (New York: Vintage, 1979), 15.