THE LEGISLATION OF CRIME AND DELINQUENCY: A REVIEW OF THEORY, METHOD, AND RESEARCH

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Nearly all of us will agree that "one case does not make a sample." Nonetheless, there is a tendency to disregard this advice when it comes to studying the historical origins of laws concerning crime and delinquency. This is understandable since it is generally acknowledged that the micro- and macro-level processes surrounding the origins of many such laws are so complex that they can only be examined case by case (e.g., Hall, 1952; Chambliss, 1964). But such an approach creates problems: although any single case study is clearly inadequate to support generalizations, strong theoretical inferences frequently *are* drawn, often violating the constraints adopted with more conventional data. This essay reviews a number of North American case studies in an attempt to clarify the theoretical and methodological limitations, prospects, and findings of the literature on criminal lawmaking.

I introduce this review by contrasting the two principal theoretical perspectives that guide such studies. I then discuss problems of evidence related to these rival theories, using an analysis of the origins of theft laws as my example. Following this, I review a large number of empirical studies concerned with the origin of laws that I have grouped into three categories: (i) delinquency and probation; (ii) alcohol and drug abuse; and (iii) prostitution and sexual psychopathy. Finally, I examine the implications of these and other legislative studies for future work in this important area of research.

I. TWO THEORETICAL PERSPECTIVES

Two dramatically different theoretical perspectives on the origins of penal legislation have influenced social scientific and legal research during the past half century. For ease of reference, as well as for emphasis, I will refer to them as "moral functionalism"[1] and "moral Marxism." My choice of these phrases anticipates my argument below that one disturbing similarity between these competing paradigms is their tendency to reduce important *empirical* issues to questions of *moral* judgment. First, however, I will review several premises that distinguish them.

The "moral functionalists," including Durkheim (1964), Pound (1943), Parsons (1951, 1966), Hall (1960, 1963), Bohannan (1965), and Friedman (1959), assert that Anglo-American laws

[1] The term "moral functionalism" is taken from Turk (1976).

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are an expression—at an institutional level—of values and customs that are widely shared in society and that reflect common interests. Thus Bohannan (1965: 36) regards the law as a form of "double institutionalization" in which "some of the customs of some of the institutions of society are restated in such a way that they can be 'applied' by an institution designed . . . specifically for that purpose." On a procedural level, this makes law a means of resolving disputes, a set of mechanisms "by which rights and wrongs can be decided without recourse to violence, and by which parties deemed in the wrong can be constrained from acting upon their interpretations, interests or sentiments at the expense of others" (Parsons, 1966: 14). On a substantive level, law is viewed as the outcome of negotiation among competing interests: "looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust . . . overlapping and often conflicting demands . . . to give effect to the greatest totality of interests that weigh most in our civilization, with the least sacrifice of the . . . whole" (Pound, 1943: 39). Quinney (1970) has labelled the latter viewpoint a "consensus theory of interests"; it might also be called a form of liberal pluralism. In any event, what unites these several formulations is the assumption that law functions to reconcile differing individual or group interests in favor of "the common good." It is in this sense that the theorists considered above can be grouped together as "moral functionalists."

Whereas the perspective we have just considered emphasizes the virtues of our legal system, the second alternative offers a less sanguine view. Thus the moral Marxists, including Quinney (1975a, 1975b), Platt (1975), Chambliss (1973, 1974), and Taylor, Walton, and Young (1973, 1975), assert that our laws express a *fusion* of economic and political interests to the *exclusion* of other concerns. For the moral Marxists there is only *one* prevailing interest: a "ruling" or "governing class interest" formed in an "alliance of capital and the state" (Taylor et al., 1973: 264). Quinney summarizes this viewpoint as it relates to criminal law:

> —The state is organized to serve the interests of the dominant economic class, the capitalist ruling class;
> —Criminal law is an instrument that the state and dominant ruling class use to maintain and perpetuate the social and economic order;
> —The contradictions of advanced capitalism . . . require that the subordinate classes remain oppressed by whatever means necessary, especially by the legal system's coercion and violence;
> —Only with the collapse of capitalist society, based on socialist principles, will there be a solution to the crime problem. [1975b: 291]

With specific reference to the origins of laws, then, "the legal system is an apparatus that is created to secure the interests of

the dominant class" (Quinney, 1975b: 192) or, said differently, "the criminal law is . . . first and foremost a reflection of the interests and ideologies of the governing class . . ." (Chambliss, 1974: 37).

Clearly, the moral functionalists and the moral Marxists have arrived at quite different judgments about the origins of our penal laws. Some of the claims advanced by each perspective are falsifiable, and some are not. Many that cannot be falsified demonstrate the tendency of both perspectives to strive to support moral prejudgments; advocates of each perspective tend to see any particular legal development as a "good" or "bad" solution to a set of social and/or economic problems. This point can be illustrated through a discussion of Hall's (1952) work on theft laws and through a consideration of the different inferences that have been drawn from his research.

II. THEFT LAWS AND BEYOND

Jerome Hall (1952) examined the origins of contemporary theft law in the Carrier's Case of 1473, the facts of which were as follows. A defendant hired to transport several "bales" broke them open and took the contents instead of delivering them. At the time, such an act was not clearly criminal since the defendant was *lawfully* in possession of property that had been assigned to him for the purpose of transportation. This contradiction was resolved by treating the rupture of the bales as the termination the defendant's legal possession. Although there was no precedent for this interpretation, "the door was opened to admit into the law of larceny a whole series of acts which had up to that time been purely civil wrongs" (Ibid.: 10).

Hall goes on to identify the political and economic conditions that influenced this reinterpretation. The Carrier's Case arose during a period when feudal relationships were giving way to a new and rising middle class associated with rapidly expanding trade. The accompanying changes in the social organization of everyday life were dramatic: the use of large amounts of capital and of credit facilities, the appearance of numerous middlemen, a division of labor, and the employment of hundreds of persons by single firms.

Previously it had been possible for those who wished to transport property to protect themselves by selecting trustworthy persons. With the expansion of trade this became more difficult, and merchants therefore sought the protection and control of the state. Indeed, Hall observes that the King of

England was himself a merchant, "carrying on many private ventures" (Ibid.: 28); the fact that the Carrier's Case was heard first in the Star Chamber "made the likelihood of royal control extremely probable" (Ibid.: 18). "The conclusion that the merchandise taken in the Carrier's Case was very probably wool or cloth means no less than that the *interests of the most important industry in England were involved in the case*" (Ibid.: 31, emphasis in the original). In short, the most powerful political and economic groups in England seemed able to determine the content of a significant legal decision.

Although the historical facts of this case study are clear, the theoretical inferences drawn from them differ dramatically. Hall himself interprets these facts from what I have called the "moral functionalist" viewpoint: "it makes sense to say that there are better and worse ways of solving problems and to speak of the 'function' of laws in relation to the values they reflect and serve" (1963: 108-09). Thus, Hall looks for the "needs served" or "problems solved" by laws and evaluates these resolutions as "good" or "bad," though he concedes that "it is not easy to determine the criteria of 'best solution' " (Ibid.). His response to the emergence of theft laws was one of resignation and acceptance verging on admiration.

> It was to be expected that a King who was so definitely and so greatly indebted to mercantile interests, both native and foreign, would be sympathetic to these interests; but that he should bring considerable ability to his participation in the economic life of the country and that he should persistently foster its development were rare qualities in an English monarch. [1952: 28]

Furthermore, Hall regarded laws of theft as part of the "natural" core of penal law: "The laws on homicide, theft, treason and incest, e.g., have not been arbitrarily imposed. . . . Not only are they among the norms which appear to be practically universal, they also have rational, normal interrelations with economic and political institutions and changes" (1960: 613).

Hall's findings have gone unchallenged, but they are now regularly given a different theoretical interpretation. Ironically, "moral Marxism" adopts some of the logic of functionalism, but the "problems solved" or the "needs served" are class-specific in character. In reinterpreting Hall's findings, Chambliss concludes that

> there was no possibility that the new law could be justified logically but it was possible for the judges to create legal fictions that justified the decision. In this way the interests of the new upper class were protected . . . through the "perceived need" of the judges sitting on the highest courts of the time. The "perceived need," of course, represented the mobilization of a bias which favored the interests of the dominant economic class." [1975: 25]

The Marxist interpretation offered by Chambliss again sees theft laws as serving a function, but now for one class in conflict with another, and he therefore evaluates them as a "bad" solution to the emerging problems of a capitalist society. Others have gone further in developing these conclusions (Quinney, 1975b: 49). What is significant from a theoretical and methodological viewpoint, however, is that neither value judgment is grounded in the facts of the case study. No evidence is offered to show that different classes experienced economic advantage or disadvantage because this *particular* solution was chosen. Nor is there any evidence for the contention that classes differed in their support of theft laws. Rather, each school of thought seems to base its theoretical inferences on implicit comparisons with alternative economic arrangements, one of which, feudalism, was vanishing, and the other of which, socialism, had not yet arrived. In any case, no comparative exercises are conducted before the moral judgments are rendered.

Functionalists and Marxists frequently move from limited case studies to moral inferences in a manner that overlooks some of the most significant issues in the law-creation process. Several of these are identified in Andrew Hopkins's (1975) excellent essay "On the Sociology of Criminal Law." For example, Hopkins notes that the Marxist approach is premised on the assumption that particular interests—specifically *business* interests—regularly prevail in the legislation of crime and delinquency.[2] In other words, this approach assumes an implicit or explicit alliance between capital and the state. Thus the specific role of capital in the legislative process deserves careful examination. Hopkins also suggests that the contrasting assumptions of the two perspectives should stimulate consideration of whether the interest groups involved exercise their influence with or without *opposition* from other groups and/or the community at large. Third, Hopkins emphasizes the importance of knowing whether those seeking to change the law appeal to *dominant social values* and whether their ability to do so affects their chance of success. I do not claim that exploration of these issues will resolve the moral dispute underlying the debate between moral Marxists

[2] Hopkins does not use the terms "Marxist" and "functionalist" in his essay but speaks instead of conflict and consensus. It is important to emphasize that not all conflict theorists are Marxists and that consensus theorists need not be functionalists. Nonetheless, for the purposes of making the points introduced in this paragraph, a correspondence is assumed between Marxian and conflict, and functionalist and consensus, ideas.

and moral functionalists. However, this type of analysis may tell us a good deal about how the legislation of crime and delinquency is accomplished and how aspects of these very different perspectives may be combined into theories of the law-creation process. The following review of case studies is organized to this end, although it necessarily considers many other issues as well. In my conclusion I will try to generate a focused set of suggestions for future research.

III. DELINQUENCY AND PROBATION LAWS

The origins of juvenile delinquency and adult probation laws have been analyzed often. Fifteen case studies are summarized in Table I. I have grouped delinquency and probation legislation together because (i) most juvenile court laws contained provisions for probation, (ii) many of the same reformers fought for both juvenile court and adult probation statutes, and (iii) themes of the Progressive Era were prominent in the successful passage and implementation of both types of laws.

Thus Parker has argued:

> To a great extent, the history of child-saving in the twentieth century is not the history of improving the general conditions of child-life (because most of the battles had been won), or the history of juvenile institutions (which changed very little after the initial efforts of the founders of the House of Refuge and their imitators). It is not even the history of the juvenile court itself because it provided, as legal institutions tend to do, a purely symbolic quality to child work. The real history of the period is a history of probation. [1976b: 168]

Yet not all students of juvenile court legislation agree with this conclusion, and it is the quarrel over the role of probation in the juvenile court movement that focuses much of the debate in this area. Anthony Platt argues that the impetus for delinquency legislation flowed from close and compromising links between members of the middle and upper classes (1974: 369) and that "the juvenile court system was part of a general movement directed towards developing a specialized labor market and industrial discipline under corporate capitalism by creating new programs of adjudication and control . . ." (Ibid.: 377). Essential to this argument is Platt's (1969: Chap. 3) emphasis on the emergence of a "new penology" and his disregard for the expansion of probation. But Platt offers no evidence that passage of juvenile court legislation resulted in an increase in the proportionate number of juveniles institutionalized or that specific economic groups played any direct role in the passage of this legislation.

TABLE I

JUVENILE COURT AND ADULT PROBATION LAWS

Author(s)	Legislation	Place	Period	Causal Agent(s) Cited
Schlossman (1977)	Juvenile Court	Milwaukee	1825-1920	Benjamin Lindsey, progressive reformers, and advocates of probation
Lemert (1970)	Juvenile Court	California	1850-	Humanitarian concern; Puritan, Calvinist values; women and women's organizations
McFarlane (1966)	Adult Probation	Ontario	1857-	J.J. Kelso, W.L. Scott, and other urban reformers
Boyd (1978)	Probation	Canada	1857-1921	Middle-class reformers
Hagan & Leon (1977)	Juvenile Court	Toronto	1857-1952	J.J. Kelso, W.L. Scott, and advocates of probation
Young (1976)	Probation	England	1860-	Middle-class reformers responsible for social work innovation generally
Lou (1927)	Juvenile Court	United States	1869-1927	Industrial revolution and religious and moral revival; factory legislation and women's movement
Platt (1969)	Juvenile Court	Chicago		Native, feminist, middle-class reformers
Platt (1974)	Juvenile Court	United States	1870-	Upper-class interests operating through and with middle-class reformers
Parker (1976b)	Juvenile Court	Illinois	1880s-	Moral reformers, women's groups
Fox (1970)	Juvenile Court	Illinois	1899-	Urban reformers; private sectarian interests running institutions
Schultz (1973)	Juvenile Court	Illinois	1899-	Advocates of probation
Mennel (1973)	Juvenile Court	United States	1899-1940	Progressive reformers, Protestant children's aid societies, urban women's clubs
Bryant (1968)	Juvenile Court	Oklahoma	1904-15	National reform figures (Benjamin Lindsey, Kate Barnard); social workers, particularly women
Hagan (1979)	Federal Probation	United States	1915-	Urban status groups, Charles Chute, and the National Probation Association

Fox (1970) also focuses on juvenile court legislation and institutionalization but differs from Platt in important ways. He argues that the effort to enact delinquency law in Illinois was mainly an attempt to change existing institutional conditions and the role of private interests in operating these

institutions. He regards the failure of this effort as a "triumph of private enterprise and sectarianism" (Ibid.: 1224). Significantly, though, he attributes this outcome not to the influence of *elite* economic interests but to private sectarian interests that ran institutions in the state, and he does acknowledge that the "Illinois law spoke of probation for the first time . . ." (Ibid.: 1229).

Still, it is the lack of attention to probation that distinguishes Platt and Fox from other students of delinquency legislation. Schultz (1973: 463-65) notes that the very legislation Fox and Platt discuss had dramatic national implications for adults as well as adolescents.

> Although probation was never limited to juveniles before or after 1899, that date is almost as important to the growth of probation nationally as it is to the growth of juvenile courts. The use of probation had been sporadic and desultory until it became tied with the juvenile reform movement. It then spread to every state that enacted juvenile court legislation. By 1927, all but two states—Maine and Wyoming—had juvenile court laws, and every state except Wyoming had a juvenile probation system.

A more recent investigation by Hagan and Leon (1977) of the origin of delinquency legislation in Canada corroborates the findings of Schultz and Parker. Drawing on a lengthy correspondence between two key participants in the passage of the Canadian Juvenile Delinquents Act of 1908, we found an ongoing struggle between two professional groups, the police and the advocates of probation. The police argued for the continuation of an explicitly punitive approach based on institutionalization, whereas supporters of probation advocated a less formal set of arrangements directed toward the "treatment" rather than the "punishment" of juveniles. We found no evidence that institutionalization increased as a result of this legislation (although probation work clearly *was* growing) or that elite economic groups took any active interest in the legislation. Rather, the professional groups seemed to be the significant contestants in this struggle.

Schlossman suggests that the emphasis on probation within the juvenile court movement reflected the concern for the family that pervaded the Progressive Era: "Rehabilitation of delinquents in their own homes, as contrasted with the nineteenth-century preference for quick removal of problem youth to reformatories, was the primary goal of Progressive juvenile justice" (1977: 60). The result was the emergence of a system of social control that was less formal and less coercive but nonetheless more extensive, exerted over the families of the urban poor, often outside of court. Thus in Milwaukee

(Ibid.), as in Toronto (Hagan and Leon, 1977), probation officers soon expanded their influence not only within the structure of the court, but also outside it by handling cases that they themselves had generated. However, Schlossman also notes that the officers did little beyond making an initial inquiry and concludes that this new framework of social control was probably "more threatening in its potential than [in] its actual use" (1977: 53). Finally, Schlossman acknowledges that though few adolescents were institutionalized for lengthy periods during the early years of the Milwaukee Court (indeed, the number of such dispositions actually declined), and though the court relied heavily on probation during this era, it did impose an increasing number of short-term sentences in a newly built detention center. "[S]hort-term detention served as a mechanism of deterrence in a way that long-term reformatory committals could not, and it also served as an alternative—symbolically, perhaps, even as a rebuke—to the institutional approaches that had been so ineffective in curtailing delinquency during the previous century" (Ibid.: 156).

A diminished reliance on institutions combined with increased control, particularly through the use of probation personnel, is apparent in other fragmentary data. The prominent reformer Frederic Almy wrote from Buffalo that "the . . . Juvenile Court has not quite completed its first year, and no definite records have been compiled, but two results are already notable—the decrease in the number of commitments to the truant school and to reformatories, and the increase in the number of children arrested" (1902: 281). Haller observes that in Chicago "between 1913 and 1914 the number of delinquents referred to court rose from 1,956 to 2,916, an increase of nearly 50 percent in the delinquency rate for Cook County. The reason for the increase was that twenty-three additional probation officers were hired in 1914 . . ." (1970: 629). Finally, Parker (1976: 169) argues that

> Massachusetts had the most advanced system of probation. The number of children under the direct care of the State Board of Lunacy and Charity as 'minor wards of the state' had increased from 2065 in 1866 to 3004 in 1897. . . . The numbers in institutions had been reduced from fourteen hundred in 1866 to about four hundred in 1897. [1976: 169]

A general picture begins to emerge out of these studies of juvenile court and adult probation legislation. The Progressive Era was characterized by a widely shared view that rehabilitation should be family-centered. Advocates of such legislation therefore focused on the offender's home as the locus of treatment and on the probation officer as the key

remedial agent. Among the most vigorous proponents were members of women's groups and persons who eventually became the "professionals" charged with responsibility for probation (see Table I). Juvenile courts and probation officers exerted new forms of social control that were disproportionately targeted at the urban poor. What remains unclear, however, is what inferences we can fairly draw from the increased attention to this group.

Although there is evidence that wealthy individuals contributed money and volunteered their time to the early juvenile courts, there is little concrete information about the motives for this "philanthropy" or the unique benefits they thereby obtained. Furthermore, there is much to suggest that the families who received judicial attention were not reluctant to obtain it. Schlossman comments on "the willingness of many poor parents to use the court to unburden themselves of child-rearing responsibilities" (1977: 188), and Schultz similarly suggests that "the greatest obstacle to interpreting juvenile court acts as instruments of class oppression is the evidence that *parents* liberally availed themselves of the court's broad jurisdiction and easy access by turning in their own children" (1973: 472, emphasis in original). An alternative hypothesis that accomodates these data is that families of the urban poor, particularly those who were most desperate, presented an inviting object for the "help and treatment" that middle-class women's and professional groups were anxious to extend. This does not deny the ominous *potential* of these laws for class control, but it may explain why these efforts were so successful in building bureaucracies and so superficial in responding to problems of the poor.

IV. ALCOHOL AND DRUG LAWS

I have grouped together the fifteen case studies of alcohol and drug legislation (see Table II) not only because they all involve legal attempts to control the production, distribution, and use of chemical substances, but also because some of the most important North American alcohol and drug statutes developed alongside one another during the Progressive Era as part of a cross-national effort to protect middle-class values against the alleged threat posed by users of habit-forming chemicals. These studies raise a number of important issues without resolving them: Why did the prohibition of narcotics outlast the prohibition of alcohol? What roles did interest

TABLE II

ALCOHOL AND DRUG LAWS

Author(s)	Legislation	Place	Period	Causal Agent(s) Cited
Sinclair (1962)	Alcohol prohibition	United States	1784-1933	Progressive politicians, medical researchers, W.C.T.U., Anti-Saloon League, "Old Order of the Country"
Gusfield (1963)	Alcohol prohibition	United States	1826-1933	Rural, populist, Protestant native Americans; W.C.T.U.; Anti-Saloon League
Musto (1973)	Opiates and marihuana	United States	1832	Southerners' and westerners' hostilities toward Blacks and Chinese, State Department
Duster (1970)	Opiates	United States	1856-	Medical practitioners
Reasons (1974)	Opiates	United States (state and federal)	1870-	Charles Brent, Hamilton Wright, hostility toward Chinese and Blacks, Treasury Department
Odegard (1928)	Alcohol prohibition	United States	1874-1928	The Anti-Saloon League
Timberlake (1963)	Alcohol prohibition	United States	1900-20	Old stock, middle-class Protestants; W.C.T.U.; Anti-Saloon League
Cook (1969; 1970)	Opiates	Canada	1908-23	Hostility toward Chinese
Bonnie & Whitebread (1974)	Marihuana	United States	1911-	Prejudice against Mexican-Americans, Federal Bureau of Narcotics
Dickson (1968)	Marihuana	United States	1913-44	Bureau of Narcotics
Lindesmith (1959)	Opiate legislation as interpreted by the courts	United States	1914-59	Treasury Department, Federal Bureau of Narcotics
Lindesmith (1967)	Opiate legislation	United States	1914-	Treasury Department, Federal Bureau of Narcotics
Becker (1963)	Marihuana	United States	1925-51	Values regarding self-control, ecstasy, and humanitarianism; Federal Bureau of Narcotics
Galliher & Walker (1977)	Marihuana	United States	1930s	Symbolic reassurance
Galliher, McCartney, & Baum (1974)	Marihuana revision	Nebraska	1968-	Spread of marihuana use to middle class

groups, elites, moral entrepreneurs, and the media play in the generation of these laws?

Bonnie and Whitebread (1974) offer a convincing explanation of why narcotics laws outlasted alcohol prohibition.

Narcotics legislation had its roots in a moral consensus directed against isolated minority groups, particularly Chinese, black, and Mexican Americans. In contrast, the prohibition of alcohol never attained consensual support, largely because it was aimed at urban immigrants who, though poor, had access to power through urban machine and union politics.

There is little doubt that narcotics legislation was partly an expression of hostile attitudes toward minority groups associated with drug use. Musto observes that "in the nineteenth century addicts were identified with foreign groups and internal minorities who were already actively feared and the objects of elaborate and massive social and legal constraints" (1973: 5). For example, the Chinese were associated with opium (Musto, 1973; Cook, 1969, 1970; Reasons, 1974), southern Blacks with cocaine (Musto, 1973), and Mexicans with marihuana (Bonnie and Whitebread, 1974). MacKenzie King, later prime minister of Canada, acquired much of his early reputation by lobbying for passage of Canada's first narcotics legislation in terms of the "threat" posed by Asian immigration. It made little difference in Canada or the United States that the "evidence clearly indicates that the upper and middle classes predominated among narcotic addicts in the period up to 1914" (Duster, 1970: 9). Only after the passage of the Harrison Act in the United States in 1914 did this picture seem to change, so that "by 1920, medical journals could speak of the 'overwhelming majority [of drug addicts]' from the 'unrespectable parts' of society" (Ibid.: 11). By persuading the public to associate narcotics use with disenfranchised minorities, lobbyists laid a foundation for legislative prohibition. The campaign was also advanced by the facts that regardless of the class distribution of users, use was still a minority phenomenon (Musto cites estimates that 2 to 4 percent of the population was addicted in 1895) and that opiate use was known to produce pronounced physiological consequences within a fairly short period of time (i.e., the withdrawal effects were pronounced). However, we remain uncertain of the relative significance of these factors. Nor is it clear why the association between the Chinese and opium has been a much more transient stereotype than that between other minority groups and drugs. Finally, we do not know why a change in the class composition of marihuana users seems to be producing a relaxation of the marihuana prohibition (Galliher et al., 1974), whereas a similar change in the

composition of cocaine consumers has yet to have much effect.[3]

Alcohol prohibition reflects a different combination of factors. Most conspicuously, Prohibition followed from the well-organized lobbying activities of the Women's Christian Temperance Union and the Anti-Saloon League. Of course, this lobby did not work in a vacuum. Gusfield (1963) explains that temperance legislation grew out of a variety of status-group conflicts between native and immigrant Americans, Protestants and non-Protestants, and rural and urban residents. This contrasts sharply with the finding of Bonnie and Whitebread that "narcotics policy . . . was supported by a latent popular consensus" (1974: 13). Undoubtedly, a major portion of the difference derives from the widespread use of alcohol in America, which had developed over a considerable period of time. Therefore, although a concerted attempt was made to link alcohol with poverty, crime, and insanity, organized resistance was possible.

Thus Timberlake (1963: 99) observes that although wage earners were unable to thwart the enactment of temperance legislation, they were strong enough to ensure its ultimate failure. "Many workingmen . . . opposed prohibition because it smacked of paternalism and class exploitation. To them it was a hypocritical and insulting attempt to control their personal habits in order to exact greater profits for their employers, who themselves had no intention of giving up liquor" (Ibid.: 93). As much as 81 percent of the A.F. of L. was wet (Ibid.: 95), which is consistent with the claim of Samuel Gompers that the great majority of the membership opposed Prohibition.

Economic considerations may also have affected the rise and fall of Prohibition, but they were often in conflict. Some businessmen believed that temperance would increase industrial efficiency, redistribute money spent on liquor, decrease welfare expenditures on crime and poverty, and reduce threats of disorder during strikes. Others argued that Prohibition would diminish public revenues, increase unemployment in liquor and related industries, shift political power balances, and increase government regulation of business. World War I seemed to strengthen the former set of arguments, but this balance was to shift again during the depths of the Depression (Timberlake, 1963). The

[3] One can, however, speculate on the last two points. The stereotyping of Chinese Americans as narcotics addicts may have diminished because they lost their visibility as a group; the difference in reactions to marihuana and cocaine may be explained by the number of users and the length of time use has been widespread.

contradictory nature of these arguments does much to support Gusfield's assertion that symbolic considerations were more important than instrumental motives. The passage of Prohibition appears to be explained by the perception that urban, immigrant alcohol use threatened the status of native, middle-class, Protestant Americans rather than the economic foundations of capitalism.

Perhaps the most interesting debate in the area of alcohol and drug legislation involves the role of the media in molding public and political opinion. Two progressive journals, *The Outlook* and *The Independent*, and two popular muckraking periodicals, *Collier's Weekly* and *McClure's Magazine*, cultivated popular support for alcohol prohibition. Timberlake writes that

> because they enjoyed a nation-wide circulation, these large middle-class journals were more powerful molders of public opinion than the newspapers. But the latter also continued to exert an important influence and, like the periodicals, soon began to devote increasing attention to the liquor question. Superintendent Baker remarked upon this at the Anti-Saloon League's national convention in 1907 and noted with approval that more than one-half of the nation's press was friendly. [1963: 156]

Thus there is little doubt that the media contributed significantly to the passage of temperance legislation.

We are much less clear about the influence of the media upon narcotics laws. Research has focused on the role of the Federal Bureau of Narcotics and its Director, H.J. Anslinger, in propagandizing against narcotics. In various ways and with different emphases Becker (1963), Lindesmith (1967), Reasons (1974), Musto (1973), and Bonnie and Whitebread (1974) all argue that the media molded public opinion about narcotics. Yet Galliher and Walker (1977) have demonstrated that most of this media attention followed rather than preceded the passage of marihuana legislation. Still, Bonnie and Whitebread (1974) are able to show that Anslinger and the Bureau used newspaper articles and editorials to their advantage in Congressional testimony. But we are not yet able to separate the influence of these media materials from that of the factors that provoked their publication. Whether the influence of the media upon the passage of drug and other similar laws is direct or indirect, conditional or unconditional, are issues that have not been widely addressed, much less resolved.

A number of points emerge from the studies we have considered. First, middle-class concern for the supremacy of its values is seen by most researchers as the primary explanation for the passage of alcohol and narcotics legislation. This class

base of support was mobilized by powerful organizations, the W.C.T.U. and the Anti-Saloon League in the case of alcohol prohibition, and the Treasury Department and its Federal Bureau of Narcotics in the case of narcotics. Although the latter organization clearly had its own bureaucratic interests, the former private organizations might appear to have been dominated by elite philanthropists. But Timberlake reports that "the [Anti-Saloon] league always received the bulk of its funds from people of modest means who customarily pledged from 25 cents to $2.00 a month" (1963: 136). Yet if the proponents of this legislation were not all upper class, its objects were uniformly poor. However, differences emerge even here: when alcohol prohibition attempted to criminalize the mass of the poor, it ran into the opposition of unions and urban political machines. In contrast, narcotics legislation focused more narrowly, and more successfully, on minorities of the poor who could be defined as disreputable. "Increasingly associated with the slothful and immoral 'criminal classes' who degraded the nation's cities, narcotics use threatened to retard national growth with pauperism, moral degeneracy, and crime. A consensus had emerged: the nonmedical use of 'narcotics' was a cancer which had to be removed entirely from the social organism" (Bonnie and Whitebread, 1977: 17). There is evidence that the media were used strategically to create this image, but the form of their influence is not well understood.

V. SEXUAL PSYCHOPATH AND PROSTITUTION LAWS

Laws governing sexuality are subject to radical change. Only a small part of the sexual behavior punished by criminal law in North America today was similarly punished in Tudor England. For example, Ploscowe (1960: 218) notes that though forcible rape, sexual intercourse with a female under ten, the sexual corruption of children, lewd and indecent acts in public, bestiality, and buggery were punishable under old English criminal law, large areas of sexual behavior, such as fornication, adultery, incest, fellatio, cunnilingus, and mutual masturbation, were treated as sins or ecclesiastical offenses by the Church of England. That much of the latter behavior has since come under the criminal law suggests an important area of research. Yet only two types of sex laws, those concerning sexual psychopaths and prostitution, have received sustained and detailed historical consideration (see Table III).

TABLE III

SEX LAWS

Author	Legislation	Place	Period	Causal Agent(s) Cited
Davis (1966)	Sex laws generally	Cross-cultural	Broadly historical	Maintenance of the family
Pivar (1973)	Prostitution	United States	1868-1900	Purity reformers, the women's movement, urban progressivism
Holmes (1972)	Prostitution	United States	1892-	Society of Sanitary & Moral Prophylaxis, Bureau of Social Hygiene, American Social Hygiene Association, Illinois Vigilance Association, New York Society for the Prevention of Crime, women's groups
Lubove (1962)	Prostitution	United States	1894-1921	Vice commissions, progressive reformers
Anderson (1974)	Prostitution	Chicago	1910-15	Chicago vice commission, the muckrakers, the social hygiene movement, prominent Chicago philanthropists, concern about the family
Feldman (1967)	Prostitution	United States	1910-15	Nativists and antinativists, feminists
Waterman (1932)	Prostitution	New York City	1910-31	Health interests of the community
Sutherland (1951)	Sexual psychopath	United States	1937-50	Community panic following serious sex crime(s) given media publicity and followed by community activity
Tappan (1950)	Sexual psychopath	United States	1939-50	Public anxiety about serious sex crimes
Sutherland (1950)	Sexual psychopath	United States	to 1950	Ideological myths about "sexual psychopaths" spread through the media
Swanson (1960)	Sexual psychopath	United States	to 1957	News media, desire to protect society and rehabilitate offenders
Roby (1969)	Prostitution	New York State	1962-65	A variety of interest groups including Judge Murtagh and his supporters, lawyers, American Social Health Association, hotels and businessmen, civil liberties groups, police
Roby (1972)	Prostitution	New York State	1961-69	As above, with particular emphasis on lawyers with expertise seeking clarification of the law

Sutherland observes that "although . . . sexual psychopath laws are dangerous in principle, they are of little importance in practice" (1950: 553) because they have seldom been used. Why, then, were these laws passed in the first place? Three (Swanson, 1960; Sutherland, 1950, 1951) of the four studies

summarized in Table III emphasize the activities of the news media and community groups. And Tappan's conclusions are at least consistent: "it is the public anxiety about serious sex crimes that has motivated new legislation on the sex problem" (1950: 34).

Michigan enacted the first sexual psychopath law in 1937, and other states quickly followed suit. Sutherland (1951) saw in the diffusion of these laws a recurring pattern: a community is thrown into panic by a few serious sex crimes that are given widespread publicity; the community responds in an agitated fashion, and a variety of proposals are made; a committee is appointed to study the situation and make recommendations; finally, the committee recommends a sexual psychopath law as a "scientific" crime control procedure that is presumably consistent with a preference for treatment over punishment. Sutherland did not deny that serious sex crimes occur, but he questioned the ideology (promulgated by people like J. Edgar Hoover) that surrounded these crimes. This ideology maintained that (1) serious sex crimes are prevalent and increasing; (2) nearly all are committed by "sexual psychopaths"; (3) the latter continue to commit serious sex crimes throughout their lives; (4) sexual psychopaths can be identified accurately before the crimes occur; (5) society fails in its responsibilities when it allows the early release of such persons; (6) long confinement is the solution to the problem; and (7) psychiatrists should be the source of professional advice on the diagnosis, treatment, and release of these "patients." Sutherland criticized this ideology as inconsistent with known facts about serious sex offenders. Yet neither he nor others who have studied the passage and administration of these laws conclude that they reflect political, economic or even professional interests.[4] Rather, they are seen mainly as a response to panic, albeit a panic aggravated and focused by the news media. The question of the media's motivation in giving so much attention to sexual crimes (e.g., whether the primary intent is increased circulation) has not been fully explored.

The media were also prominently involved in the development of prostitution laws. Prostitution became an issue of public debate during the first decade of this century, assisted in large part by the revelations of the muckrakers. In a famous

[4] This is not to deny that such factors have played a role in the passage and administration of *other* kinds of sex laws. For example, there is persuasive evidence that racial bias has played a significant role in the imposition of the death penalty in interracial rape cases in the American South (Wolfgang and Riedel, 1973).

McClure's Magazine article (1907), George Kibbe Turner captured a ready audience with provocative descriptions of prostitution in Chicago. Louis Filler (1950: 288) wrote in his history of the muckrakers that "the effect of this single article was indescribable." This and later articles stressed the prevalence of prostitution and the accompanying dangers of disease. But the call for action met with an ambivalent response, which we cannot understand without first considering the circumstances surrounding prostitution at the turn of the century.

Waterman (1932) points out that prostitution was not an offense in either English or American common law. It was only when activities associated with prostitution annoyed others that legal action was justified. For example, an early New York statute defined as a disorderly person "every common prostitute or night-walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of inhabitants or passersby" (quoted in Waterman, 1932: 12). Such provisions reflected the American (and European) preference at the turn of the century for regulating rather than repressing prostitution. The result was well-known areas of prostitution in most large American cities: New Orlean's Basin Street, San Francisco's Barbary Coast, Denver's Market Street Line, and New York's Bowery and Five Points (Holmes, 1972: 85). The muckrakers, purity reformers, and urban progressives were determined to change all this.

The large number of interest groups enumerated in the last column of Table III and cited by analysts of prostitution law suggests the diversified support for the movement to criminalize prostitution. It included groups as far apart as those who had advocated the abolition of slavery (Pivar, 1973) and those who fought against immigration and for the integration of the foreign born into American society (Feldman, 1967). It is not surprising, then, that a basic ambivalance characterized this social movement.

This is clearly recognized in the work of Feldman (1967), Anderson (1974), and Pivar (1973). Holmes distinguishes two forces: the "humanitarians" and the "control group" (1972: 84). "The purpose of the one was the rescue of misguided girls; the purpose of the latter was the preservation and protection of the 'moral upper classes' from a potentially expandable and 'dangerous class.'" Both agreed, however, that prostituion threatened the physical health of individuals and, even more

significantly, the social health of the family. "A deep concern for the family, in some cases a conviction that family discipline could not 'cope with existing social conditions,' inspired much of the agitation against prostitution" (Anderson, 1974: 223; cf. Davis, 1966). This agitation manifested itself in the formation of vice commissions in many American cities and in the generation of considerable publicity.

Laws were also passed: The Injunction and Abatement Act (often called the Red Light Abatement Act) was first enacted in Iowa in 1909. It provided that any private citizen could maintain an equitable action to close a house of prostitution without having to show any particular damage or injury. Between 1911 and 1915, twenty-one states and the District of Columbia passed similar laws, and in 1910 the federal Mann Act made it illegal to import aliens for immoral purposes and permitted the deportation of aliens engaged in prostitution. Nineteen states promulgated antipandering statutes during the same period (Anderson, 1974). Many new laws controlled the prostitute and dealt with her health, but throughout this period more laws were directed against the procurer and brothel keeper than against the prostitute herself (Holmes, 1972). This may reflect the activity and influence of humanitarian reformers like Jane Addams (1912). Nonetheless, laws against "panderers and procurers"—not to mention their clients—have rarely been enforced (e.g., Roby, 1969, 1972). In the end, repression replaced regulation in North America, and its weight fell most heavily on prostitutes who practiced openly: those who could not afford, or did not wish, to be less visible or more discreet in their activities.

Finally, there is considerable evidence about the characteristics of the purity reformers. They were, in large part, the same kind of people, and in some cases the very same individuals, who were involved in temperance work. Most were drawn from the middle and upper classes, including a substantial number of doctors, lawyers, social workers, probation workers, and wives of professional men (see Holmes, 1972; see Pivar, 1973; Anderson, 1974). Women predominated among the humanitarian group, whereas the control group contained more administrators of training schools, mental hospitals, and clinics (Holmes, 1972); the participation of the latter suggests that professional interests may also have played an important role in the development of prostitution laws.

VI. CONCLUSIONS

Although this review of North American research on the legislation of crime and delinquency has been selective, it has included those laws most frequently examined and those studies most widely cited. The subjects and time periods of these studies are themselves of interest: they focus disproportionately on laws against victimless crimes enacted during the Progressive Era and have been published since the mid-1960s. The obvious temptation is to link this scholarly emphasis to the political and social turmoil of the sixties and the rebellion of youth against established norms, including those victimless crimes created during the Progressive Era. It may also be that progressivism has attracted study because of the abundance of primary source material and because attitudes toward victimless crimes have changed rather steadily since that period. In any case, the resultant body of research offers a unique and important opportunity to expand our theoretical understanding of laws governing crime and delinquency.

In reviewing this research, I tried to resist the tendency of both moral functionalism and moral Marxism to characterize crime and delinquency laws as good or bad solutions to "problems." I sought, instead, to analyze the influence of business or capitalist interests on the passage of these laws, the opposition or support these laws received, and the role of dominant societal values in their passage. Some tentative conclusions can be offered.

First, although there is evidence that business or capital took an active interest in the passage of some of this legislation, we cannot conclude that this influence predominated. In fact, the clearest finding to emerge from the summary tables is the large number of interest groups that took part in these legislative activities. The picture is further complicated by the fact that these groups and their members often differed on the issues that confronted them. Gusfield (1963) observes a fundamental ambivalence among temperance forces, Hagan and Leon (1977; see also Hagan, 1979) identify a basic division of views on the character of delinquency legislation, and Holmes (1972) outlines an important disparity in legislative approaches to prostitution. Furthermore, we lack a clear understanding of the connections among such groups, particularly during the Progressive Era. Knowledge of these connections could help us to understand similarities and

differences among these groups and the degree of influence or indifference that characterized their relationships.

The problems of identifying relationships between active interest groups pale in comparison with the difficulties of discovering the opposition or support these legislative efforts elicited in the general population. There is simply very little evidence on this issue. Of the laws I have considered, only Prohibition is known to have encountered concerted opposition, and of course it was ultimately repealed. This renders ambiguous the theoretical meaning of the otherwise significant fact that almost all the legislation I examined appears to have been directed against portions of the urban poor. The problem is that it is just as plausible to assume that legislation (other than Prohibition) received passive acceptance, or even support, from the urban poor as it is to assume that a substantial number of citizens offered active resistance to passage of these laws. This raises the question of why so few resisted the incursion of criminal law into what were previously noncriminal domains.

One part of the answer may be the role of dominant societal values in legislation. Delinquency, probation, and prostitution laws were all justified as essential to the preservation of the family, and alcohol and drug laws were also associated with general middle-class values. The Progressive Era was a period in which these values were challenged by urbanization and rapid social change. The real issue, then, is how these values were connected to various legislative reform efforts in the public mind.

The linchpin is the media. Delinquency, alcohol, drug, sexual psychopath, and prostitution laws all received considerable media attention. My review has repeatedly noted this publicity; indeed, much of the research is itself based on contemporary publicity in newspapers and magazines. What remains in doubt is the causal significance of the media and the factors that influence media attention, as we have noted in the debate over the role of the media in the passage of marihuana legislation in the United States.

A larger problem illustrated by the above discussion is the lack of clarity in many attempts to explain the legislation of crime and delinquency. These studies frequently vacillate between an effort to provide a comprehensive *description* of the passage of a law and an attempt to *explain* in causal terms why it was passed. This problem is neither new nor unexpected (see Abel, 1973). As I noted at the outset of this

review, the micro- and macro-level processes involved in crime and delinquency legislation are complex. Detailed description of these processes can be an ambitious task in itself. Yet causal language is so heavily embedded in common discourse, as well as in policy making and scholarly research, that movement from description to explanation is difficult to resist. My argument is not that it should be resisted, but that it should be made explicit.

There is at least one outstanding example of a successful synthesis of description and explanation: the recent study by Berk, Brackman, and Lesser (1977) of changes in the California Penal Code from 1955 to 1971. This volume unites detailed qualitative-historical exposition with a quantitative multivariate analysis. Its findings bear directly on the issues in this review. For example, it agrees with my conclusion that business and capital were only some among a number of comparable interests: "the quantitative trends and qualitative historical analyses indicate that no single faction was consistently able to alter the Penal Code" (Ibid.: 281). Similarly, the authors conclude that "organizationally shaped interests and general beliefs about criminal justice are important determinants of legislative initiatives" (Ibid.: 289). Thus, a plurality of interest groups is involved in this legislation, and generalized values and beliefs place at least some constraints on what kinds of laws receive serious consideration: "While few might agree on the proper penalty for stealing a car, for example, few would seriously propose that the offense be ignored" (Ibid.: 277).

Most significantly, however, the study reports one very provocative finding. Editorials published in the *Los Angeles Times* had a persistent, nonspurious, and substantial correlation with legislative outcomes. Specifically, the number of column inches in *Times* editorials devoted to crime-related issues anticipated by one year each of the following: greater increases in criminalization, greater increases in the severity of penalties, greater increases in the rights and resources provided for prosecutors, and smaller increases in the rights and resources provided for defendants. These researchers then note that the *Times* is an influential paper published by a prominent family closely linked to elite circles of policy discussion, if not policy decision. Yet Berk and his colleagues acknowledge that problems remain in spelling out the causal implications of this situation: "it was often not at all clear to us which *specific* criminal justice proposals automatically favored

business interests, and we suspect that economic elites frequently confront similar complexities" (Ibid.: 294, emphasis in original). Still, this research demonstrates that the influence of the media can be analyzed in causal terms. The task is now to formulate more elaborate models of the lawmaking process and to gather the data necessary to test them.

One can speculate on how this might be done. A key problem will be the connection between interest-group activities, elites, and the cultural material—particularly values and beliefs—that surround them. To date, most attention has been directed toward the way in which one group uses law instrumentally to control another. But there are other possibilities. For example, attitudes toward these laws may be part of larger status cultures that help to identify the location and facilitate the mobility of individuals in society. Thus Hagan, Silva, and Simpson (1977) have recently argued that repressive attitudes toward "consensus crimes" and permissive attitudes toward "conflict crimes" are elements of contemporary "elite culture" that, in its larger form, influences income and mobility. This approach offers a more plausible account of why elites may take an interest in issues of criminal law that otherwise have no direct bearing on them. The study of crime and delinquency legislation could usefully look beyond the very direct and immediate consequences of these laws. In so doing, we may be able to develop more adequate theories that pull together the factors I have emphasized in this review: interest-group activities, elites, dominant social values, the media, and the legislation of crime and delinquency. The explicit linking of these variables in causal terms remains the primary goal in this growing area of research.

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