

# WHAT'S LEFT OF THE NEW DEAL STATE?

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NEW DEAL LAW AND ORDER: HOW THE WAR ON CRIME BUILT THE MODERN LIBERAL STATE. By *Anthony Gregory*. Harvard University Press. 2024. Pp. 473. \$45.

## INTRODUCTION

A vast body of scholarship situates itself in the New Deal era. Another extensive collection explores the history of criminal justice in the United States. To date, however, there has been little effort to bring these conversations together.<sup>1</sup> *New Deal Law and Order*, written by legal historian Anthony Gregory,<sup>2</sup> fills this conspicuous gap. Gregory remarkably narrates the New Deal era through the lens of President Franklin Roosevelt's "war on crime" (p. 1), challenging how we think about both the New Deal's legacy and the foundations of the modern security state.

In recent years, scholars have called on their community to pay greater attention to the "second face" of the American state—that is, the governing institutions involved in social control and coercion.<sup>3</sup> Such focus would reveal that the current assault on the administrative state "is really an attack on only one half of it."<sup>4</sup> Carceral and national security activities have continued much the same, while agencies responsible for economic and social regulation have faced relentless judicial attack.<sup>5</sup> Meanwhile, the Trump administration—

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1. For one exception, see Daniel Richman & Sarah A. Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 STAN. J. C.R. & C.L. 421 (2022).

2. Hoover Fellow, Hoover Institution.

3. Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race—Class Subjugated Communities*, 20 ANN. REV. POLIT. SCI. 565, 567 (2017) (noting "that mainstream research on US politics has largely ignored a second face of the American state that is at least as significant in the political lives of communities like Ferguson: the activities of governing institutions and officials that exercise social control and encompass various modes of coercion, containment, repression, surveillance, regulation, predation, discipline, and violence").

4. Jessica Bulman-Pozen & Emily Chertoff, *The Administrative State's Two Faces*, LAWFARE (Feb. 24, 2025, 8:00 AM), <https://www.lawfaremedia.org/article/the-administrative-state-s-two-faces> [<https://perma.cc/N9ZF-S5SA>].

5. *Id.* See also K. Sabeel Rahman, *After Chevron: Political Economy and the Future of the Administrative State*, LPE PROJECT (July 23, 2024), <https://lpeproject.org/blog/after-chevron>.

through its “Big, Beautiful Bill,”—has brought the fiscal picture in line with the judicial one: unprecedented outlays for state violence paired with severe austerity for social welfare provisioning.<sup>6</sup> Political theorist Melinda Cooper has aptly recognized that these multi-pronged efforts are part of a right-wing movement toward an “antisocial state,”<sup>7</sup> an idea similar to what Ruth Wilson Gilmore has called the “anti-state state.”<sup>8</sup> This new equilibrium threatens to further entrench and compound America’s “penal exceptionalism,”<sup>9</sup> which now features U.S. Immigration and Customs Enforcement (ICE) in a starring role.

For those seeking to reconstruct disappearing forms of state capacity, the simultaneously ambitious and responsible statecraft of the New Deal era has provided a key source of inspiration.<sup>10</sup> *New Deal Law and Order*, however, significantly complicates that history. The now hypertrophied, repressive second face of government was already present, in robust form, at the founding of the modern liberal state. In fact, according to Gregory, it wasn’t so much a *second* face as an inextricable, even outsized, piece of the broader New Deal project.<sup>11</sup> That era, thus, is as much a story of the state’s expanding capacity for coercion as it is of its efforts to enable human flourishing. Gregory’s deeply researched book allows us to revisit the New Deal era as an object of critique and assemblage of contradictions, with the twin problems of state violence and “security” at its center.

Part I of this Review summarizes some of the book’s key contributions, including Gregory’s notion of war-on-crime federalism and his portrait of the

political-economy-and-the-future-of-the-administrative-state/ [https://perma.cc/ZWT9-BHKY] (describing how recent Supreme Court decisions impact the administrative state).

6. Camilo Montoya-Galvez, *Trump’s “Big, Beautiful Bill” Gives ICE Unprecedented Funds to Ramp Up Mass Deportation Campaign*, CBS NEWS, <https://www.cbsnews.com/news/ice-funding-big-beautiful-bill-trump-deportations/> [https://perma.cc/T8MZ-UN7Z] (last updated July 10, 2025); Kennedy Andara et al., *The Implementation Timeline of the One Big Beautiful Bill Act*, CTR. FOR AM. PROGRESS (July 29, 2025), <https://www.americanprogress.org/article/the-implementation-timeline-of-the-one-big-beautiful-bill-act/> [https://perma.cc/J8JV-9RXN].

7. Melinda Cooper, *Trump’s Antisocial State*, DISSENT (Mar. 18, 2025), [https://www.dissentmagazine.org/online\\_articles/trumps-antisocial-state/](https://www.dissentmagazine.org/online_articles/trumps-antisocial-state/) [https://perma.cc/2F7Y-5286] (defining the antisocial state as “a state that has downsized its redistributive functions, converted much of its welfare arm into punitive and carceral functions, privatized or outsourced as many of its services as possible, and multiplied its guarantees to private operators”).

8. Ruth Wilson Gilmore, *The Problem With Innocence*, INQUEST (May 12, 2022), <https://inquest.org/ruth-wilson-gilmore-the-problem-with-innocence/> [https://perma.cc/BNR7-XZRQ] (identifying “mass incarceration” and “devolution—the offloading to increasingly local state and non-state institutions responsibility for thinning social welfare provision” as two key, complementary features of the anti-state state).

9. David Garland, *Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism*, 22 PUNISHMENT & SOC’Y 321, 322 (2020).

10. For a collection of essays, each thinking toward the future remaking of the American state, that draw inspiration from the New Deal era, see *Restoring Economic Democracy: Progressive Ideas for Stability and Prosperity*, ROOSEVELT INST. (Apr. 29, 2025), <https://rooseveltinstitute.org/publications/restoring-economic-democracy/> [https://perma.cc/8MCF-WGWQ].

11. See *infra* Part I.

singular Homer Cummings, Roosevelt's attorney general, who was the main architect of the era's anti-crime campaigns and a leading figure of New Deal legal thought. Part II emphasizes the race and class dimensions of state violence under New Deal liberalism by zooming in on the more marginal groups within the law-and-order coalition Roosevelt led.

Part III challenges the book's conclusion. Contrary to what Gregory suggests when he discusses the National Security Act of 1947, I argue that the liberal security state had not yet coalesced into a stable form in the immediate postwar "reconversion" period. That period is worth attending to today both as a source of concrete policy ideas and as inspiration for an oppositional politics and culture that might conceive of "security" in radically different ways.

Some political alliances, bringing together labor and civil rights groups, emphasized the incompleteness of the New Deal project. They saw the need for even more ambitious state building to guarantee full and fair employment and to provide for collective goods, like housing. But this wasn't just a critique of economic policy. These groups saw risks to U.S. democracy and the entire social order, things that the New Deal's war on crime and the emergent security state should have safeguarded. For them, the modernization and growth of capacities for state violence did little to secure domestic stability. Echoes of such a political vision could be felt in New York City's recent mayoral primary, where Democratic candidate Zohran Mamdani's focus on economic security apparently resonated with voters.<sup>12</sup> Mamdani's plan for public safety, meanwhile, deemphasized existing capacities for state violence and focused more on the need to provide direct social services through a government oriented toward care.<sup>13</sup>

Another line of critique was prominently advanced through *An Appeal to the World!*, which W.E.B. Du Bois and the National Association for the Advancement of Colored People (NAACP) delivered as a petition to the recently formed United Nations in 1947.<sup>14</sup> This remarkable text embodied an anti-imperial internationalism, evinced commitments to class struggle, and understood the New Deal as failing to break from the broader arc of the American project.<sup>15</sup> The petition warned that Jim Crow and industry's combined power over the domestic political system threatened to radiate outward and destabilize the emerging U.S.-led international order.<sup>16</sup> With today's frequent flouting

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12. John Cassidy, *The Case for Zohranomics*, NEW YORKER (June 30, 2025), <https://www.newyorker.com/news/the-financial-page/the-case-for-zohranomics> [<https://perma.cc/M9VH-M38Z>].

13. Emma G. Fitzsimmons, *A Bigger N.Y.P.D.? Mamdani Has a Different Idea.*, N.Y. TIMES (Apr. 1, 2025), <https://www.nytimes.com/2025/04/01/nyregion/zohran-mamdani-crime-plan.html> [<https://perma.cc/E8F3-PKDY>].

14. W. E. BURGHARDT DU BOIS, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, *AN APPEAL TO THE WORLD!* (1947) [hereinafter *AN APPEAL TO THE WORLD*].

15. See *infra* Part III.

16. *Id.*

of international law,<sup>17</sup> attempts to radically remake patterns of global trade,<sup>18</sup> and mass deportation efforts enlisting more and more third countries,<sup>19</sup> that prophecy has become reality, and has even boomeranged back home.

### I. THE MEANING OF NEW DEAL LAW AND ORDER

Amid a world-historic crisis of capitalism and grave uncertainty around the future of American democracy, “law and order became good national politics” (p. 2). *New Deal Law and Order* shows that this convergence wasn’t coincidental. As part of a deliberate project to legitimate the centralization and extension of state power more broadly, “New Dealers popularized law and order and placed its reforms at the center of their agenda” (p. 116). The success of this project was visible as much in the expanding law enforcement capacities of Treasury as it was in the strengthening of J. Edgar Hoover’s Division of Investigation (p. 171). Federal governing institutions grew in unprecedented ways<sup>20</sup> as an emerging war-on-crime federalism fueled the reconstitution of American liberalism.

Widespread “lawlessness” and weak state capacity had defined prior decades (p. 6). The New Deal buildup of law and order thus marked a dramatic reversal, even though recent history had cast doubt on the viability of such efforts. During Prohibition, a fragile coalition attempted to expand national power and construct a more cooperative, crime-fighting federalism. These efforts proved both ineffective and deeply unpopular: “Prohibition produced lawlessness all the way down . . . worsen[ing] and expos[ing] law enforcement uncertainty, systematic corruption, and violence” (p. 57).

In contrast, the New Deal saw war-on-crime federalism (i.e., robust federal law enforcement power applied cooperatively alongside state and local governments) achieve stable footing. Part of this was a response to popular demand. Crime panics dominated the news during Roosevelt’s first term, bolstering his “mandate against lawlessness” (p. 78). The administration institutionalized that mandate with striking speed. The spring and summer of 1934 saw a proliferation of crime bills that ranked among “the most radical expansions of national power in US history” (pp. 98–99). This included legislation

17. Editorial Board, *The Guardian View on Trump Bombing Iran: An Illegal and Reckless Act*, GUARDIAN (June 22, 2025, 1:11 PM), <https://www.theguardian.com/commentis-free/2025/jun/22/the-guardian-view-on-trump-bombing-iran-an-and-reckless-act> [https://perma.cc/WH5F-DHLR].

18. See Danielle Kurtzleben, *Here’s a List of Where Trump’s Tariff Threats — and Trade Deals — Stand*, NPR, <https://www.npr.org/2025/07/12/nx-s1-5463818/trump-tariff-rate-letters> [https://perma.cc/6QGU-LRC7] (last updated Aug. 7, 2025, 1:37 PM).

19. See *South Sudan Says 8 Men Deported From the US Are Now in Its Custody*, AP, <https://apnews.com/article/us-south-sudan-immigration-deportations-b4c657794b2d29cc25fec9bc516eded5> [https://perma.cc/G97S-NGYZ] (last updated July 8, 2025, 5:45 PM).

20. See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 36 (2013) (describing how “the New Deal substantially increased the domestic scope of government”).

prohibiting possession and sale of certain firearm classes, which Gregory observes was “a remarkable step toward the creation of something representing an actual national state with a monopoly on legal force” (p. 103). That same year concluded with a pivotal National Crime Conference, which brought together a prominent group of seventy-three organizations and individuals. One evening, Roosevelt himself addressed the gathering with a speech that would be published on the front page of the *New York Times*.<sup>21</sup> The outsized attention the conference drew signaled that the “traditionally local issue of crime was now a national matter” (p. 110).

This was perhaps most apparent in the case of marijuana prohibition, through which New Dealers established a cooperative federalism among law enforcement, as they gave early energy to a longer war on drugs (p. 168). The marijuana ban also reflected shifts in constitutional understanding. Whereas alcohol prohibition had been implemented via constitutional amendment, the “national crusade” against marijuana arrived, without controversy, through ordinary legislation (p. 150). Far-reaching projects of federal criminal law enforcement had apparently attained a presumption of constitutional legitimacy.

The main architect of this emerging war on crime, and primary protagonist of Gregory’s account, was the little-known Homer Cummings. Cummings, who devoutly practiced a “living constitutionalism” (p. 147), was set to become the colonial governor-general of the Philippines when Roosevelt’s first pick for attorney general suddenly died. Roosevelt then asked Cummings to assume the role (pp. 80–81). Cummings would not only end up playing a central role in Roosevelt’s ambitious law-and-order campaign; he “became the lead authority of New Deal legal thought” (p. 93). Cummings advised Roosevelt on key appointments, executive orders, and statutes; fielded jurisdictional questions from administrative agencies; and even became a leading expert on money appropriations, all while favoring “expansive executive power” (p. 94). Yet Cummings steadfastly held that the most pressing issue confronting the nation was crime. In addition to advancing crime legislation through Congress and organizing the National Crime Conference, Cummings left his mark on criminal procedure reform. With Roosevelt’s support, he strengthened “prosecutorial advantages in federal and, most effectively, state courts” (pp. 126–27). This aim aligned with Cummings’s broader belief in a living constitution. He felt that, as society’s needs changed, antiquated procedural protections often stood in the way of substantive justice (p. 128). In fact, Cummings thought about Roosevelt’s court-packing plan, which he himself had a hand in developing, in these same terms (pp. 124, 137).

The book’s historiography challenges common narratives around the modern carceral state’s roots. Rather than arising from political

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21. See *The President’s Address*, N.Y. TIMES, Dec. 11, 1934, at 1.

conservatism,<sup>22</sup> entrenched racism,<sup>23</sup> or as a complement to “free” market neoliberalism,<sup>24</sup> today’s system of criminal law enforcement has its roots in an “ecumenical” New Deal liberalism (p. 11). Such liberalism achieved impressive unity and legitimacy across a broad coalition, whose range was underscored by its inclusion of both “white supremacists and racial liberals” (p. 346). This heterogeneous coalition carried diverse aims. Gregory describes the “carceral liberalism” that coalesced as “ambivalent,” with New Dealers having “tendencies toward both strengthening and lessening America’s reliance on prisons” (p. 236). However, this ambivalence about prisons nonetheless involved a shared presumption that some form of correctional supervision was necessary. What’s more, both repressive and welfarist aims could be channeled through a totalizing social project of “crime prevention,” a phrase that gained significant purchase during this period, and whose chief proponent was Duke Law School Dean Justin Miller (pp. 203, 245). Ultimately, these disparate impulses reinforced one another, encouraging an *overall* increase and diversification of carceral capacity (p. 234). Much like the idea of reformist reforms today,<sup>25</sup> ostensibly rehabilitative aims translated into a more resilient and complete carceral web.

A few scholars have made similar arguments about American liberalism and the tangled development of the carceral and welfare states. Naomi Murakawa has argued, for example, that postwar civil rights liberalism helped construct today’s carceral state.<sup>26</sup> Murakawa picks up the story where Gregory leaves off. She highlights the Truman Administration’s civil rights report, *To Secure These Rights*, which placed the “right to safety” in the “pantheon of civil rights.”<sup>27</sup> Such a right, most consequentially, demanded protection against arbitrary, private violence; but this, Murakawa argues, left open the possibility that “the carceral state was permitted limitless violence so long as it conformed to clearly defined laws, administrative protocol, and due process.”<sup>28</sup> Elizabeth Hinton stresses a later point of origin, arguing mass incarceration began to

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22. This narrative often centers the election of President Nixon and his “law and order” strategy. See Josh Zeitz, *How Trump Is Recycling Nixon’s ‘Law and Order’ Playbook*, POLITICO (July 18, 2016), <https://www.politico.com/magazine/story/2016/07/donald-trump-law-and-order-richard-nixon-crime-race-214066/> [<https://perma.cc/R2QT-6DZC>].

23. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019).

24. BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 52 (2011).

25. See Amna A. Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2520 (2023) (“[R]eformism consolidates the hand of those in power and deepens preexisting inequalities.”).

26. See generally NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

27. *Id.* at 40–41.

28. *Id.* at 43.

surface through President Lyndon Johnson's Great Society.<sup>29</sup> As Johnson's War on Poverty "feebly attacked" the causes of economic and social insecurity, "federal policymakers supported the influx of more police officers and military-grade weapons on the streets."<sup>30</sup> Law enforcement would ultimately fuse with the anti-poverty programs of the Great Society, placing police "in the halls of urban schools, in the elevators of housing projects, and in the reception rooms of welfare offices."<sup>31</sup>

The New Deal involved analogous but distinct dynamics. By 1939, the Public Works Administration, one of the key New Deal agencies, had "provided over \$14 million to the Federal Bureau of Prisons, more than its assistance to the Post Office or to the Departments of Agriculture, Commerce, or Interior," and over \$24 million at the local level for 126 prisons and jails (p. 218). The Works Progress Administration, meanwhile, "furnished labor and funding to the building and renovation of 760 penal institutions . . . a considerable impact on the carceral state" (p. 219). Another signature New Deal agency, the Tennessee Valley Authority (TVA), developed its own security forces and cooperated extensively with state and local law enforcement. In other ways, for example through its expropriation and displacement of Black families, the TVA also reflected the profound race and class limits to this law-and-order coalition (p. 195). It is these limits that I turn to next.

## II. RACE AND CLASS LIMITS TO ROOSEVELT'S WAR ON CRIME

New Deal liberals offered "flashes of hope" to Black Americans when it came to law and order (p. 177). The bar, however, was exceptionally low. "Hope" meant gesturing toward reining in terroristic lynching—without genuinely threatening the South's racial order.

Events surrounding the 1934 National Crime Conference starkly illustrated this imbalance. The gruesome October 1934 lynching of Claude Neal, which the NAACP called "one of the two or three most horrible lynchings in the history of America or the world," had revived a wave of support for anti-lynching legislation (pp. 178–80). Yet Cummings's National Crime Conference, held just a month and half later, effectively excluded lynching from the agenda. The silence came even as the NAACP and other groups picketed and criticized the gathering and after the NAACP had shared with Cummings and his staff a comprehensive legal memo on federal enforcement opportunities (pp. 180–81). Despite his tireless advocacy for a powerful federal government, Cummings's Justice Department "respected a federalism that deemed lynching [] a local issue" (p. 178).

Given this and other examples, it's surprising Gregory insists on describing Black Americans as *part* of this law-and-order coalition, even if only in a

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29. See generally ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).

30. *Id.* at 13.

31. *Id.* at 14.

marginal and transient sense. Moments of modest civil rights progress pointed less to the status of Black Americans as marginal coalition partners and more toward the importance of movement pressure from below, including from groups like the Southern Tenant Farmers Union and other organized workers (pp. 192–93). Some sections of the book also tend to flatten the NAACP, even as they correct dominant narratives around the storied civil rights organization. Gregory applies the phrase “pragmatic liberalism”—a phrase he also attributes to Cummings and Roosevelt (p. 92)—to describe the NAACP’s “strategically narrow” law-and-order activities (p. 185). In contrast, legal historian Kenneth Mack has described how, during this same period, the NAACP attempted to fuse together liberal legalism and a more radical mass politics that embraced class struggle “into a new civil rights paradigm.”<sup>32</sup> For instance, NAACP lawyers, including Charles Houston and Thurgood Marshall, cooperated with the International Labor Defense (ILD) in the 1930s, using litigation as a form of “coalition building” with left-wing radicals.<sup>33</sup>

In the book, labor similarly serves as an occasional coalition partner. American Federation of Labor President William Green, for example, strongly supported marijuana prohibition, declaring that “organized labor can be enlisted 100% in the fight against dope” (p. 166). And the American Civil Liberties Union (ACLU), in the context of growing labor militancy and the accompanying countermovement of state and vigilante violence, hoped that federal law enforcement could protect workers’ civil rights (p. 273). Yet other examples from this period point toward intense skepticism around the New Deal’s law enforcement-empowering federalism. In his famous 1937 *Labor and the Nation* speech, John L. Lewis, president of the Congress of Industrial Organizations,<sup>34</sup> rebuked Ohio Governor Martin Davey’s use of state police against striking workers at the Republican Steel and Youngstown Sheet and Tube companies. Lewis underscored that “[n]early half of the staggering military expenditure incident to the crushing of this strike in Ohio was borne by the federal government through the allocation of financial aid to the military establishment of the state.”<sup>35</sup>

Gregory does note that law enforcement remained “structurally anti-labor” through its commitment to protecting private property rights, a core liberal value (p. 279). But he nevertheless understates the precise legal significance of this fact, including in relation to his focus on federalism. Though the Supreme Court’s landmark decision in *NLRB v. Jones & Laughlin Steel Corp.* affirmed the constitutionality of the Wagner Act and the National

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32. Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941*, 93 J. AM. HIST. 37, 39 (2006); see also Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 306–08 (2005).

33. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941*, *supra* note 32, at 53.

34. John L. Lewis, AFL-CIO, <https://aflcio.org/about/history/labor-history-people/john-lewis> [https://perma.cc/594S-NFUN].

35. John L. Lewis, *Labor and the Nation* (Sept. 3, 1937), <https://www.americanrhetoric.com/speeches/johnlewisrightsoflabor.htm> [https://perma.cc/4L8W-PF4B].



Labor Relations Board (NLRB),<sup>36</sup> subsequent decisions would assert the supremacy of *local* criminal law over *federal* labor law in setting the boundaries of lawful strike activity.<sup>37</sup> *NLRB v. Fansteel Metallurgical Corp.*<sup>38</sup> and *Southern Steamship Co. v. NLRB*<sup>39</sup> made it clear that police could oust as trespassers strikers attempting to seize the workplace, which is precisely what the wave of famous sit-down strikes from 1936 to 1938 involved.<sup>40</sup> More broadly, these decisions ultimately meant, as legal scholar Ahmed White observes, that, though workers had a formal right to strike, they did not have the right to an *effective* strike—in other words, the right to strike in such a way that prevents the use of scab workers or otherwise stops production through property seizure.<sup>41</sup> In the realm of labor relations, criminal law quickly established its “unilateral function . . . as a tool for enforcing employers’ rights.”<sup>42</sup> This was a less apparent, but extremely consequential, way in which labor saw its interests undercut at the height of the New Deal era.

### III. THE EMERGING SECURITY STATE AND PATHS NOT TAKEN

The New Deal’s war on crime would eventually merge into the liberal security state, whose formation accelerated during World War II (p. 318). Perhaps more than anything else, the seemingly indifferent attitude of many left wing and civil rights groups toward Japanese internment suggested the inevitability of the security state’s rise and entrenchment. Even the most intense repression of a growing security apparatus was apparently not a “deal breaker” (pp. 340–41).<sup>43</sup> But it helped that progress seemingly marched alongside

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36. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 3 (1937).

37. Ahmed A. White, *The Crime of Staging an Effective Strike and the Enduring Role of Criminal Law in Modern Labor Relations*, 11 J. LAB. & SOC’Y 23, 27 (2008).

38. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939).

39. *S. Steamship Co. v. NLRB*, 316 U.S. 31, 48 (1942).

40. White, *supra* note 37, at 28.

41. *Id.* at 26 (“In this sense, strike-related crimes are at least as much assertions of an alternative view of labor rights as they are crimes in the traditional sense, and are at least as laden with issues of class conflict and domination as they are morality and public safety.”)

42. *Id.* at 39.

43. See also Cheryl Greenberg, *Black and Jewish Responses to Japanese Internment*, J. AM. ETHNIC HIST., Winter 1995, at 3, 3–4 (1995) (exploring why Black and Jewish civil rights groups did not meaningfully protest Japanese internment). There were exceptions, of course. See, e.g., Harry Paxton Howard, *Americans in Concentration Camps*, 49 THE CRISIS 281, 281 (1942), [https://archive.org/details/sim\\_crisis\\_1942-09\\_49\\_9/page/280/mode/2up](https://archive.org/details/sim_crisis_1942-09_49_9/page/280/mode/2up) [<https://perma.cc/Z9TG-FEEX>]. Others warned what Japanese interment could mean for Black Americans in ways that foreshadowed the era of mass incarceration. Marjorie McKenzie, *Pursuit of Democracy: Supreme Court’s Okay of Removal of Japanese Can Affect Negro Rights*, PITTSBURGH COURIER, Jan. 6, 1945, at 6 (criticizing the *Korematsu* decision and remarking: “Who knows when the commanding general for the area in which Detroit or any other American city is located may find it urgently required for the general welfare and the maintenance of uninterrupted war production that all Negroes be removed to some other place lest they riot or be rioted against?”).

repression. The same day the Supreme Court added *Korematsu*<sup>44</sup> to the constitutional anticanon, the Court also decided *Steele v. Louisville & Nashville Railroad Co.*—a landmark case that declared unlawful the racially discriminatory practices of two railroad labor unions<sup>45</sup>—which many interpreted as a major win for Black Americans.<sup>46</sup>

Internment, of course, had support from the political establishment, whose policy aims were reinforced by a liberal legalism.<sup>47</sup> The renowned legal scholar Herbert Wechsler, best known among critical race theorists for his critique of the Supreme Court's reasoning in *Brown v. Board of Education*,<sup>48</sup> played a key role in crafting arguments against legal challenges to the administration's internment policy (p. 342). Wechsler, notably, would also play a prominent role in the development of U.S. criminal law as the "principal architect" of the Model Penal Code.<sup>49</sup> He even laid the foundation for the instruction of criminal law in U.S. law schools—what Alice Ristroph has criticized as a decidedly "pro-carceral" curriculum<sup>50</sup>—when he published in 1940 (along with his coauthor Jerome Michael) *Criminal Law and Its Administration*.<sup>51</sup>

At the conclusion of *New Deal Law and Order*, Gregory notes that the National Security Act of 1947 codified the basic architecture of the security state, achieving a sense of permanence, stability, and broad political legitimacy (p. 347). But despite liberal support for the new U.S. security state, there was no such stability in the period immediately following the war. The book's coda thus exaggerates how settled basic matters of governance were in the reconversion period after the war, during which the United States faced the challenge of reorienting its political economy toward peacetime.<sup>52</sup>

44. *Korematsu v. United States*, 323 U.S. 214 (1944).

45. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202–03 (1944).

46. Venice T. Spraggs, *Supreme Court Swats Lily-White Rail Unions: Negro Firemen Win Historic Decision*, CHI. DEF., Dec. 23, 1944, at 1.

47. For discussion of liberal legalism and the distinction between left legalism and liberal legalism, see Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM/LEFT CRITIQUE* 1, 5–16 (Wendy Brown & Janet Halley eds., 2002).

48. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 519 (1980); see also Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428–30 (1960) (identifying a principled basis for the decision in *Brown*).

49. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1644 (2020).

50. *Id.* at 1652.

51. *Id.* at 1644–48.

52. President Harry S. Truman, Special Message to the Congress Presenting a 21-Point Program for the Reconversion Period (Sept. 6, 1945), <https://www.trumanlibrary.gov/library/public-papers/128/special-message-congress-presenting-21-point-program-reconversion-period> [<https://perma.cc/6C9A-LVSZ>] (describing reconversion as "a time of great emergency" and noting that the "process of reconversion will be a complicated and difficult one").

Indeed, a dramatic sense of *fragility* marked the immediate postwar social order. Class conflict intensified, as evidenced by the 1945–1946 strike wave. There were nearly five thousand work stoppages in 1946, and the roughly 4.6 million workers involved in those stoppages amounted to “a larger number than in any previous year on record.”<sup>53</sup> In December 1945, labor and civil rights groups joined elected officials at an emergency gathering for “Jobs and Security,” where demands ranged from planning for full employment, providing housing, strengthening price controls, and eliminating discrimination in all its pernicious political and economic forms.<sup>54</sup> The project of remaking U.S. governing institutions remained substantially incomplete. Philip Murray, president of the CIO, emphatically asserted that, “[t]oday we are threatened with an economic disaster which can shake the foundations of our democratic way of life.”<sup>55</sup> Walter Reuther, president of the United Auto Workers, separately argued that the twin pushes for full and fair employment legislation at the national level represented vital assaults on widespread “economic prejudice.”<sup>56</sup> Such expressions of solidarity against race discrimination were among the reasons W.E.B. Du Bois reflected in 1948 that “the greatest and most effective effort toward interracial understanding among the working masses [in the last thirty years] has come about through the trade unions.”<sup>57</sup>

This, however, indicated a different sort of fragility for the South. Labor historian Nelson Lichtenstein notes that, under conditions of full employment and a surging labor movement, efforts to combat race discrimination by wartime bodies like the War Labor Board and the Fair Employment Practices Committee “generated something close to a social revolution.”<sup>58</sup> A decade before the Supreme Court decided *Brown v. Board of Education*,<sup>59</sup> that almost-revolution in the South shook the confidence of Jim Crow’s proponents and destabilized the New Deal coalition. Indeed, the passage of the Taft-Hartley Act in 1947, which unions condemned as a “slave labor” law,<sup>60</sup> drew vital

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53. U.S. DEP’T OF LAB., BUREAU OF LAB. STAT., BULLETIN NO. 918, WORK STOPPAGES CAUSED BY LABOR-MANAGEMENT DISPUTES IN 1946 1 (1947), <https://www.bls.gov/wsp/publications/annual-summaries/pdf/work-stoppages-1946.pdf> [<https://perma.cc/976K-9NXF>].

54. Ralph Matthews, *Jobs for All Essential to Peace and Prosperity*, AFRO-AMERICAN, Dec. 15, 1945, at 20.

55. *Id.*

56. Lillian Scott, *UAW Sees Double Attack on Employment Discrimination*, CHI. DEF., Dec. 28, 1946, at 3.

57. W.E.B. Du Bois, *Race Relations in the United States 1917-1947*, 9 PHYLON 234, 236 (1948). Of course, many unions were not perfect partners and themselves maintained racially discriminatory practices, including within the left wing of the labor movement. See Michael Goldfield, *Race and the CIO: The Possibilities for Racial Egalitarianism During the 1930s and 1940s*, 44 INT’L LAB. AND WORKING-CLASS HIST. 1, 1 (1993).

58. NELSON LICHTENSTEIN, *LABOR’S WAR AT HOME: THE CIO IN WORLD WAR II*, at xii (2003).

59. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

60. Nelson Lichtenstein, *Taft-Hartley: A Slave Labor Law?*, 47 CATH. U. L. REV. 763, 789 (1998).

support from Southern Democrats who were beginning to realign with the Republican Party.<sup>61</sup>

The story around the National Security Act of 1947, meanwhile, was more complex. That legislation arrived alongside efforts to restore fiscal discipline. Rather than producing cohesion among the security state's component parts, the move toward austerity created ruinous competition.<sup>62</sup> Just one year later, those same efforts at reining in federal spending would contribute to an eleven-month-long recession.<sup>63</sup> By the end of the decade, the stability and legitimacy of this new security state were far from certain.<sup>64</sup>

It was amid this unstable period of austerity-induced recession, heightened class conflict, and political realignment that the NAACP petitioned the recently formed United Nations with its remarkable *An Appeal to the World!*, radically critiquing the U.S. project on a global stage.<sup>65</sup> In his introductory chapter, Du Bois warned that “as democracy fails to function in the leading democracy in the world, it fails in the world.”<sup>66</sup> The question of race discrimination in the United States, Du Bois argued, “becomes inevitably an international question and will in the future become more and more international, as the nations draw together.”<sup>67</sup> He went on:

In this great attempt to find common ground and to maintain peace, it is therefore, fitting and proper that the thirteen million American citizens of Negro descent should appeal to the United Nations and ask that organization in the proper way to take cognizance of a situation which deprives this group of their rights as men and citizens, and by so doing makes the

61. KATZNELSON, *supra* note 20, at 396 (noting Southern Democrats “offered indispensable support for this law in order to restrict union penetration into their region, broaden the exclusion of farmworkers, and make it possible for unions to continue to practice racial discrimination without federal restriction”); see also Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. IN AM. POL. DEVEL. 1, 7 (2005) (“The tight labor market of World War II, we argue, by facilitating the penetration of unions, some of which were racially integrated, within the South, was the most fundamental cause of this southern readjustment.”).

62. See generally Anand Toprani, ‘Our Efforts Have Degenerated into a Competition for Dollars’. *The ‘Revolt of the Admirals’, NSC-68, and the Political Economy of the Cold War*, 30 DIPL. & STATECRAFT 681 (2019).

63. U.S. *Recessions Throughout History: Causes and Effects*, INVESTOPEDIA, <https://www.investopedia.com/articles/economics/08/past-recessions.asp> [<https://perma.cc/82EU-FERN>] (last updated Mar. 20, 2025).

64. It was only after the famous National Security Council Paper 68 and through U.S. participation in the Korean War that a more durable security state took hold, solidified through a fiscal program of military Keynesianism. See Tim Barker, *Cold War Capitalism: The Political Economy of American Military Spending, 1947-1990*, DASH (May 6, 2022), <https://dash.harvard.edu/server/api/core/bitstreams/0d45e79c-e8d3-4c87-a8e9-877881136a92/content> [<https://perma.cc/KN9L-MLAZ>] (Ph.D. dissertation, Harvard University).

65. AN APPEAL TO THE WORLD, *supra* note 14.

66. *Id.* at 6.

67. *Id.* at 13.

functioning of the United Nations more difficult, if not in many cases impossible.<sup>68</sup>

Race discrimination in the United States thus threatened to destabilize the entire international legal order. The petition, however, did not have complete support from NAACP leadership, reflecting a schism between liberals and more militant members.<sup>69</sup> The organization's head, Walter White, took a more moderate stance. He maneuvered to ensure the Truman administration's civil rights report, *To Secure These Rights* (the document Naomi Murakawa critiques in her account of the carceral state<sup>70</sup>), was released first, out of concern that the petition to the United Nations would not be well received by the administration.<sup>71</sup>

Nevertheless, as historian Sam Klug notes, it was significant that the NAACP as an organization "endorsed Du Bois's and [Rayford] Logan's portrayal of the American state as an outgrowth of European colonialism and an instrument of racial domination in such a public forum."<sup>72</sup> The document expressed little faith in New Deal liberalism. Instead, it directly rebuked the entire history of U.S. legal development. Key arguments explicitly focused on class struggle. In his section on the "Present Legal and Social Status of the American Negro," legal scholar William Ming, who went on to be a member of the *Brown* litigation team, argued that "[the] most important area in which the law furnishe[d] no protection" for Black Americans was "in that of economic activity."<sup>73</sup> This of course was a major handicap "in the economic struggle which characterizes an industrial civilization."<sup>74</sup>

Du Bois similarly made sure to situate the petition in a longer arc of racialized class struggle and the development of U.S. and global capitalism. He noted Black slaves were in fact "the first in America to stage the 'sit-down' strike, to slow up and sabotage the work of the plantation;"<sup>75</sup> that following Reconstruction "the power of Southern land owners soon joined with Northern industry" to subordinate and disenfranchise Black labor;<sup>76</sup> and that presently in the South there existed "a reservoir of labor, more laborers than jobs,

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68. *Id.*

69. CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, at 102–08 (2003).

70. MURAKAWA, *supra* note 26, at 40–41.

71. SAM KLUG, THE INTERNAL COLONY: RACE AND THE AMERICAN POLITICS OF GLOBAL DECOLONIZATION 61 (2025).

72. *Id.*

73. AN APPEAL TO THE WORLD, *supra* note 14, at 47, 56. See also *Learn More About Brown v. Board of Education*, LDF, <https://www.naacpldf.org/brown-vs-board/learn-brown-v-board-education/> [<https://perma.cc/W97E-A7WR>].

74. AN APPEAL TO THE WORLD, *supra* note 14, at 56.

75. *Id.* at 3.

76. *Id.* at 5.

and competing groups eager for the jobs,” which industry encouraged to “hate and fear each other.”<sup>77</sup>

With this history and present reality in mind, Du Bois appealed not to an enlightened federal government practicing New Deal liberalism but to an anti-imperial and anti-racist internationalism. Because the Jim Crow South had combined with industry to exercise vastly disproportionate influence over the U.S. political system,<sup>78</sup> these two orientations were, for Du Bois, at fundamental odds.<sup>79</sup> A more systematic critique remained essential, especially as the United States had taken the lead in shaping the legal architecture that would now govern the world. Like his assessment of the domestic political structure, Du Bois argued against the basic state-based representation system now practiced by the United Nations and against efforts to artificially separate domestic and international questions, which together served to entrench racial hierarchy within the United States and across the world.<sup>80</sup>

Occurring before Cold War liberalism had firmly entrenched itself within U.S. politics,<sup>81</sup> this episode, along with the broader reconversion period, provides a useful point of comparison for social movements today. Basic dilemmas, such as whether questions around domestic social policy and foreign and immigration policy can be separated, are alive in ways reminiscent of this past, which saw dividing lines among concepts like democracy, economy, and security constantly contested. Relatedly, an urgent question for legal scholars seems not to be *whether* but *how* to think about today's connections between domestic and international law and the simultaneous breakdown of each.

#### CONCLUSION

The New Deal no doubt remains a rich source to mine for progressive policy ideas and for imagining an ambitious social agenda. But only by foregrounding New Deal liberalism's limitations, omissions, and repressive

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77. *Id.* at 10.

78. *Id.* at 95 (displaying a map emphasizing the stark differences in relative political power across three U.S. regions).

79. *Id.* at 11 (“The federal government has for these reasons continually cast its influence with imperial aggression throughout the world and withdrawn its sympathy from the colored peoples and from the small nations. It has become through private investment a part of the imperialist bloc which is controlling the colonies of the world . . . We joined Great Britain in determined refusal to recognize the equality of races and nations; our tendency was toward isolation until we saw a chance to make inflated profits from the want which came upon the world.”).

80. AN APPEAL TO THE WORLD, *supra* note 14, at 12–14. *See also* Adam Dahl, *Appealing to the World: Du Bois and the Transnational Politics of Petition*, 123 S. ATL. Q. 485, 491 (2024) (noting “Du Bois correctly anticipated that imperial powers like the United States, Britain, France, Holland, and Belgium would protest not only that colonial peoples were incapable of intelligent self-rule but, more significantly, that their representation in the General Assembly would constitute an invasion of national sovereignty . . . By limiting substantive representation in the UN to sovereign equals, imperial powers further shield colonial rule from international scrutiny by hardening the bifurcation of international law and internal state sovereignty.”).

81. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2011).

elements can one who is committed to returning to something resembling the New Deal project fully diagnose and face the political pathologies of our present. Recent legislation committing \$75 billion to ICE (part of \$170 billion set aside for immigration enforcement and border security more broadly), alongside the gutting of the social safety net, marks a new phase in the development of the carceral-security-warfare state.<sup>82</sup> In this moment, for many, the so-called “second face” of government looks like the only face.<sup>83</sup> Whether to return to something resembling the constructive work of the New Deal era is an easy question. The harder one, around which left-liberal agreement may be harder to sustain, is whether one can do so without dramatic confrontation with the state’s coercive apparatus, whose overwhelming capacities for violence threaten to shatter the rule of law.<sup>84</sup> Renewed calls to “abolish ICE”<sup>85</sup> may in fact reflect a pragmatic orientation to our present, at least more so than efforts to triangulate supposedly humane, yet simultaneously hardline, border and immigration policies.

Separating these two orientations are radically different conceptions of security. The latter tracks the New Deal liberalism of Gregory’s book. The former points more toward an anti-racist universalism reminiscent of struggles during the reconversion period. Certainly, there is a utopian element here. But the time may be ripe to fasten onto the national consciousness a new (or perhaps I should say old), radically transformed notion of security as we continue down a path of profound uncertainty as to everything but the fact of state violence.

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82. Montoya-Galvez, *supra* note 6; Andara et al., *supra* note 6.

83. See *supra* note 3 and accompanying text.

84. Abrego Garcia v. Noem, No. 25-1404, 2025 WL 1135112, at \*3 (4th Cir. Apr. 17, 2025) (“Now the branches come too close to grinding irrevocably against one another in a conflict that promises to diminish both. This is a losing proposition all around. The Judiciary will lose much from the constant intimations of its illegitimacy, to which by dint of custom and detachment we can only sparingly reply. The Executive will lose much from a public perception of its lawlessness and all of its attendant contagions. The Executive may succeed for a time in weakening the courts, but over time history will script the tragic gap between what was and all that might have been, and law in time will sign its epitaph.”).

85. Mehdi Hasan, *ICE Has Become Trump’s Private Militia. It Must be Abolished*, THE GUARDIAN (May 13, 2025, 9:20 AM), <https://www.theguardian.com/commentis-free/2025/may/13/democrats-abolish-ice-trump> [https://perma.cc/36FS-JE4N].