

AGAINST THE PROFIT MOTIVE



The Salary Revolution in American Government, 1780–1940



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INTRODUCTION

THE ARGUMENT IN BRIEF

In America today, the lawful income of a public official consists of a salary. However, in the eighteenth century and often far into the nineteenth and early twentieth centuries, American law authorized a wider variety of ways for officials to make money. Judges charged fees for transactions in the cases they heard. District attorneys won a fee for each criminal they convicted. Tax investigators received a percentage of the evasions they discovered. Naval officers were awarded a percentage of the value of the ships they captured, plus bounties for the enemy sailors on board ships they sank. Militiamen enjoyed rewards for capturing Indians or taking their scalps. Policemen were allowed rewards for recovering stolen property or arresting suspects. Jailors collected fees from inmates for permitting them various privileges, and the managers of penitentiaries had a share of the product of inmates' labor. Clerks deciding immigrants' applications for citizenship took a fee for every application. Government doctors deciding veterans' applications for benefits did the same, as did federal land officers deciding settlers' applications for homesteads. Even diplomats could lawfully accept a "gift" from a foreign government upon finalizing a treaty.

What these arrangements had in common was that the officers' incomes depended, immediately and objectively, on the delivery of services and the achievement of outputs. By a gradual yet profound transformation extending from the late eighteenth century through the early twentieth century, American lawmakers abolished all these forms of income and replaced them with the fixed salaries that we now take for granted in government service, thus attenuating the relationship of officials' income to their conduct. In so doing, they made the absence of the profit motive a defining feature of government.¹

The key to comprehending this transformation is to understand the non-salary forms of pay that initially predominated. There were two basic types, which I term *facilitative payments* and *bounties*. A facilitative payment was a sum that an officer received for performing a service that the affected person wanted or needed, such as processing an application or issuing a permit.² A bounty was a sum that an officer received for performing a task that the affected person did not want and might resist, such as arresting a suspect, discovering tax delinquencies, or forcing an inmate to do hard labor.³

The two forms of payment tended to give rise to two very different social relationships between officials and the people with whom they dealt. The facilitative payment tended to promote reciprocal exchange between the officer and the recipient of the service, working to the benefit of both. It fostered mutual accommodation. The officer viewed service recipients as “customers” to be attracted, and service recipients viewed officers as vendors offering valuable benefits to be purchased. In contrast, the bounty tended to promote adversarialism. The officer gained by the affected person’s loss—by taking state-mandated action that the affected person wanted left undone. Affected persons typically found this an alienating experience: they were subject to the coercive power of a person whose interests were directly adverse to their own.

The two different social dynamics generated by facilitative payments and bounties inspired, respectively, two different arguments for why officials’ profit-seeking was incompatible with the needs and values of a liberal-democratic republic and therefore had to be abolished. The critique of facilitative payments was essentially that customer-seller accommodation no longer had a rightful place in government. At first, this critique aimed not at facilitative payments per se but at their relatively unregulated status. For centuries, the law had authorized a substantial amount of bargaining between individual officers and those who received their services. But lawmakers of the late 1700s and early 1800s, influenced by republican and liberal ideologies, came to believe that officers were not quasi-independent vendors entitled to strike variable and individualized bargains, but instead were creatures of a democratic legislature obligated to serve citizens equally—and to charge them prices that were uniform and reasonable. Thus, lawmakers and judges by the mid-1800s came to the conclusion that officers could legally take facilitative payments only when authorized and fixed by an act of the legislature. But officers and recipients often refused to get with the program. True to the essence of the facilitative payment, they continued to engage in reciprocal negotiation in ways that departed from the fixed prices. Judged against the new dogma that facilitative payments required legislative authorization, such negotiations were defined as “corrupt,” and lawmakers

reacted by banning facilitative payments altogether and replacing them with salaries, as a prophylactic against corruption.

Meanwhile, even in areas where officers and recipients conformed to the fixed uniform prices, facilitative payments still caused officers to view recipients, as a class, as their “customer base” and to focus on meeting the wishes of that base in handling public business. As a result, the critique of facilitative payments expanded by the late 1800s to condemn not merely unregulated exchange but also customer-oriented exchange of any kind, regulated or not. Treating public services as customer-seller transactions, said critics, harmed interests that were not represented in those transactions (much as economists today worry about externalities). For example, letting naturalization officers “sell” citizenship rights to immigrants harmed native-born Americans by diluting their voting power. Letting public-land officers “sell” homestead rights to settlers harmed future generations by depleting the public domain. Critiques like these came to the fore because, as mass democratic politics became more sophisticated and organized, relatively diffuse interest groups, such as nativists and conservationists, increasingly acquired the capacity to assert their claims. Thus arose the mass interest-group rivalry of modern politics. Government could no longer simply distribute resources to a customer class but had to balance rival mass claims to those resources. This required the replacement of facilitative payments with salaries, to sever the customer-seller bond between officialdom and service recipients. Severing this bond was a major step in the differentiation of the state from the persons with whom its officers dealt.

The critique of bounties was quite different. This is because bounties had far different implications for modern government than facilitative payments did. The clash between facilitative payments and the modern state was intuitive, even obvious: the will of a democratic government could not have much independent meaning if the officers charged with implementing it aimed primarily to meet the “customer preferences” of the particular individual or interest group immediately affected. But the clash between bounties and the modern state was not intuitive or obvious. On the contrary, bounties, ever since the Middle Ages, had held great promise as instruments to vindicate the directives of the sovereign, for they incentivized officers to enforce those directives in the face of the contrary preferences of those affected. After the age of revolution, with sovereignty vested in democratically representative legislators, the promise of bounties grew even brighter, for such legislators proved far more ambitious than the kings and oligarchs who preceded them in seeking to reform and improve society in novel, aggressive, and intrusive ways, and the bounty could motivate officials to do their duty in the face of resistance from particular communities

or individuals who resented the legislature's reforms and improvements. What better motivational fuel than a bounty to ensure that officers would faithfully carry out the great positivist endeavors of nineteenth-century lawmakers—to impose taxes at higher rates on novel bases to finance new public projects, to suppress drinking and gambling, to forcibly transform prisoners into productive workers, and so forth? As legislation reached new heights of ambition in the mid- to late 1800s, lawmakers experimented with using bounties more intensely than ever before.

But the very intensity of the experiment was the bounty's undoing: it led to such disappointing and perverse results that lawmakers soured on bounties and rejected them altogether. Yes, such payments instigated the aggressive exercise of coercive power. But the construction of a workable state (as lawmakers now concluded from experience) could not rest upon coercion alone, for it was impossible to deploy enough enforcers to achieve the requisite deterrence. The effective implementation of legislative will depended (and still depends) on a large degree of mass voluntary cooperation by the affected individuals, and bounties turned out to undermine such cooperation. The officer's monetary incentive to impose sanctions on laypersons placed him in such an adversarial posture toward them as to vitiate their trust in government and elicit from them a mirror-image adversarial response. In addition, officers' profit motive discouraged them from making the kind of subjective and discretionary decisions *not* to enforce the law that were (and are) necessary to sand off the hard edges of modern state power so it can win acceptance by the population. As lawmakers vested officials with more power and charged them with more ambitious missions, selflessness and forbearance became necessary to vest the officialdom with legitimacy and to foster the essential minimum of lay cooperation that makes the modern state workable.

Taken together, lawmakers' disillusionment with facilitative payments and with bounties resulted in a convergence upon the solution of paying officials by salary. The salary embodied a new state-society relationship, one that distanced the official from the wishes of the layperson (in contrast to the facilitative payment) without radically alienating the two from each other (in contrast to the bounty). Compared with the two old forms of compensation, the salary placed the official in a middle distance vis-à-vis the population.

PREVIOUS SCHOLARSHIP AND UNDERSTANDINGS

That American government made a transition from profit-seeking toward salaries is a story largely untold and unknown.⁴ There has never been a

comprehensive treatment of the transformation. Although Max Weber identified the move toward salaries as an aspect of the rise of modern government, he said nothing particular about the matter in the United States.⁵ Scholars have done some synthetic work on the old profit-seeking regime in English officialdom,⁶ but there is nothing comparable on the American side.⁷ Merely to realize the magnitude of the change (to say nothing of understanding it), one must consult numerous scattered monographs on particular American government functions in particular times and contexts. These works usually treat the subject of official income briefly and as a peripheral issue. A handful of function-specific studies go into somewhat greater depth, but very few give the matter the attention it deserves in its own right.⁸ The deepest function-specific histories are those by Allen Steinberg, on police magistrates and prosecutors in Philadelphia, which has helped inspire my analysis of facilitative payments,⁹ and by Rebecca McLennan, on Northern state penitentiaries, which forms the basis for one of my case studies of bounties.¹⁰ In addition, there are some important studies that, though mainly concerned with other subjects, shed light on the law and regulation of facilitative payments.¹¹

American government's transition from profit-seeking to salary calls not only for a synthesis of the scattered and mostly superficial secondary works but also for new primary research to produce a critical mass of new case studies geared directly toward the matter of compensation and its effect on how officers interacted with laypersons. Those are the tasks of this book.

On the basis of the secondary works and especially the new primary research, I depart from the common view of today's scholars (following Weber) that the "salarization" of modern government was all of a piece, consisting of the rejection of a single type of premodern official profit-seeking (or, alternately, of an undifferentiated hodgepodge of such profit-seeking).¹² On the contrary, there were two distinct though simultaneous transitions, each with its own inner meaning, that ended up in the same place: one rejecting the facilitative payment, which drew officials too close to the layperson, and the other rejecting the bounty, which alienated them too far from the layperson. It should be noted that, although modern scholars have ignored the distinction between facilitative payments and bounties, at least some contemporaries recognized it (if not in exactly the same terms). Among these was Jeremy Bentham, circa 1780, who denounced as bad policy the receipt of money by officers "from those who require their services" but who praised as good policy such practices as tax-farming and naval prize-hunting.¹³

My interpretation of the salary also departs from another common scholarly view: that premodern governments paid non-salary forms of compensation

mainly because they lacked the strong taxation and disbursement mechanisms necessary for salaries, so the shift toward salaries can be explained by the strengthening of those mechanisms.¹⁴ It is true that the weakness of taxation and disbursement mechanisms in Anglo-American government during the early modern period rendered the payment of salaries logistically difficult. It is also true that facilitative payments and bounties avoided the need for such mechanisms: the former could be paid from the pockets of the service recipients, and the latter could be extracted from the persons targeted (for example, a convicted defendant could be forced to labor to pay the bounty of the officer who arrested him).¹⁵ But while the strengthening of taxation and disbursement mechanisms during the nineteenth century may have been a necessary condition for the shift toward salaries,¹⁶ it certainly was not a sufficient one. This is evident from the fact that the U.S. government and many state governments assumed responsibility for paying facilitative payments and bounties to their officers out of general public revenue (mainly from taxes), often maintaining such arrangements for many decades and sometimes for more than a century.¹⁷ In other words, a government can make the leap to paying its officers out of general public revenue, yet still pay them by the task. The imperative to alter the format of compensation, rather than merely its source, arose from factors outside the history of governmental fiscal capacity. (Note that, even when the government assumed responsibility to pay facilitative payments and bounties out of general public revenue, the incentive properties and social dynamics associated with those payments could remain largely unchanged. For example, an officer entitled to a fee for providing a service at the request of a citizen would view that citizen as a customer regardless of whether the fee came from the citizen's pocket or from the government's coffers.)

Further, my story departs from two assumptions, common among social scientists, about the kind of organization in which salaried jobs tend to exist. The first of these two assumptions is that a salaried job is associated with secure tenure and career stability. This connection is prominent in Weber's ideal type of bureaucracy, which he describes as a hierarchical organization of salaried offices, with people in the higher offices directing those in the lower ones. Each office's salary matches its rank in the hierarchy, and incumbents are protected against firing so long as they fulfill their duties. Under these conditions, people enter the organization early in life and can expect to spend their whole careers there, working their way up toward more responsible and higher-salaried positions, by seniority, merit promotion, or both. Weber concludes that an organization's best strategy for being effective is to offer people "an assured salary

connected with the opportunity of a career.” In his ideal bureaucracy, an office is not “exploited for rents or emoluments in exchange for the rendering of certain services,” but instead entails “a specific duty of fealty to the purpose of the office . . . in return for the grant of a secure existence.”¹⁸ The secure tenure and career stability emphasized by Weber have been central to the historiography of American public administration, which has devoted great attention to the rise of civil service protection.¹⁹

The second of the two assumptions is that a salaried officer is typically subject to top-down control by a supervisor. This assumption, too, has its origin in Weber’s ideal type of bureaucracy, in which officers follow strict rules under the watchful eye of their boss. Salary reinforces top-down control, for it keeps the officer dependent upon the organization’s favor and ensures that the officer’s earnings are less than those of the boss or of any other superior.²⁰ Today’s institutional economists likewise view the salary as distinctly appropriate for agents under top-down control (as opposed to contractors paid by the task). The reasoning of these economists varies somewhat from Weber’s. They see the issue in terms of limits on the boss’s knowledge. Say an organization finds it hard to specify in advance the tasks it needs its agents to do, or to verify (after the fact) whether its agents have accomplished the needed tasks. In situations like these, argue the economists, the organization will typically address the problem by paying its agents a fixed sum to place themselves at its disposal for a set period of time, during which the agents follow whatever commands the organization gives, *ad hoc*, and submit to its constant supervision.²¹

Although these two assumptions might suggest that lawmakers converted officials to salaries as part of a program to provide them with secure tenure and career stability and place them under top-down control, the history of America does not really bear that out. On reflection, this mismatch is not very surprising. In comparison to the officialdoms of other developed nations, it has been (and remains) much less common for American officials to have stable, lifelong careers within an agency or to be situated in clear top-down hierarchies. In America, the public officialdom has more of a revolving door with the private sector, is less insulated from electoral politics, and is more decentralized and localized, with more entry points for disparate and clashing influences.²²

Historically, although some instances of American salarization did coincide with the advent of career stability and top-down control, this was far from the universal pattern. In many instances, career stability and top-down control never came at all, or they came by a gradual and halting process that only got going well after salarization had already occurred for independent reasons.²³

Relatedly, American civil service reform was not coextensive with the movement for salarization, and the two certainly cannot be understood as a single phenomenon. Civil service reformers usually supported salarization, but the movement for salarization was broader, and often advanced on an earlier timeline, than the one for civil service.²⁴ (Conversely, some eminent advocates for bounties during the Gilded Age were supporters of civil service reform,²⁵ which confirms that bounties for a time held promise as instruments to build a modern, effective, and efficient state.)

Nevertheless, Weber was absolutely right that Western governments shifted toward salaries in the course of the nineteenth and twentieth centuries, and the bare fact of salarization was as real in America as in any other Western nation. But we cannot adequately explain salarization (at least in America) as part of a package with the other aspects of bureaucratization to which Weber connected it, that is, career stability and top-down control. Rather, salarization arose (at least in America) mainly from causes independent of bureaucratization, which I stated at the outset of this Introduction. To repeat: as to facilitative payments, the causes were (1) the aversion to officer-layperson bargaining that arose from republican and liberal principles and (2) the aversion to “customer-serving” government that arose from the mass interest-group rivalry of modern democratic politics. As to bounties, the cause was the aspiration of lawmakers to foster mass lay cooperation with their increasingly ambitious and intrusive programs, coupled with their realization that the bounty placed laypersons and officials in an adversarial relation, which crippled any effort to build up the legitimacy of the state and the public’s trust in it.

In my analysis of bounties, I am invoking and extending another of Weber’s ideas: his insight that a government cannot rule by force alone but must find a way to elicit the voluntary compliance of its population—that is, to achieve legitimacy.²⁶ Although Weber identified salary as an element of modern government and legitimacy as an element of many kinds of government, he did not link the two. Instead, he connected salary only with intragovernmental organizational features like secure tenure and top-down control. One of my aims, therefore, is to demonstrate historically that these two Weberian themes—salary and legitimacy—are profoundly connected in a way that Weber did not discuss (or perhaps even notice). In that sense, this book is an effort to elaborate, refine, and deepen Weber’s ideas through empirical investigation. More broadly, the book seeks to further our understanding of how the modern state has sought and acquired legitimacy—a subject on which there is a burgeoning literature, but one that pays very little attention to the monetary incentives of the officials who make up the state.²⁷

THE ARGUMENT IN DETAIL

In the remainder of this Introduction, I set forth the argument of the book in detail. Some of the reasoning and evidence composing the argument only appears here in the Introduction, although most of it appears in the book's subsequent chapters. This Introduction includes summaries of those chapters and explains how each fits into the book's argument. Readers who absorb this Introduction will be able to delve into any chapter of the book, follow what is being said, and see how it figures in the story as a whole.

The book's argument consists of two parts, of which Part One covers the transition from facilitative payments to salaries (Chapters 1–4) and Part Two from bounties to salaries (Chapters 5–9). Though I think it best to treat each of the two forms of payment in its own separate part, I should note that the forms could sometimes overlap in certain ways. First, a single officer could receive facilitative payments for some acts and bounties for others. For instance, a customs official could take bounties for catching merchants who tried to circumvent the customhouse as well as facilitative payments from merchants who, submitting to the government's authority and passing their goods through the customhouse, wanted their goods processed in a prompt and friendly manner. Second, a single payment to a single official could simultaneously operate as both a facilitative payment (*vis-à-vis* one layperson) and a bounty (*vis-à-vis* a different layperson). For example, where the victim of a crime offered money to a constable for apprehending the perpetrator, that payment both encouraged the officer to accommodate the victim and spurred the officer to take an adversarial stance toward the suspect. In these overlap situations, facilitative payments and bounties were each still subject to their distinctive critiques, which might be leveled simultaneously at a single officer or single payment.

A Prefatory Note: The Utopian Ideal of Honorary Service

As Americans struggled with the choices among facilitative payments, bounties, and salaries, they often had in the back of their minds an unattainable ideal that officials should do their jobs for no pay at all. The civic republican dream of the revolutionary era was to divorce governmental power from individual self-interest, including pecuniary self-interest.²⁸ This meant that official service should ideally be honorary. Men should fill offices out of a sense of disinterested obligation toward the citizenry. They should receive no compensation, or so little as not to influence their desire for office or behavior in it. Said Montesquieu, “[I]n a republic under the reign of virtue, a motive that suffices in itself

and excludes all others, the state rewards only with testimonies to that virtue.”²⁹ In England, the honorary ideal resonated with a tradition, dating to the Middle Ages, under which local administrative power in the countryside resided mainly in the landed gentlemen of the locality, who performed offices like county sheriff or justice of the peace for no pay or little pay.³⁰ The tradition had analogues in some of the localities in the American colonies, where wealthy gentlemen filled offices out of noblesse oblige, or middling folk were required to serve on a short-term, rotating basis with little to no pay, under penalty of a fine.³¹ The Revolution itself further elevated honorary service as an ideal. George Washington, with his huge private fortune, pointedly refused all pay as commander of the Continental Army.³² At the Constitutional Convention in 1787, Benjamin Franklin, who like Washington possessed great private wealth, proposed that federal officers “receive no salary, stipend, fee, or reward whatsoever for their services.” If government offices were remunerative, warned Franklin, the public service would select for selfish and intemperate persons who would skew their decisions to serve themselves and engage in destructive factional rivalries to keep and accumulate power.³³

Beautiful though it was, the ideal of honorary service was not a practical plan for government as a whole. Even in Britain, the honorary ideal came near realization only in the local government of the countryside, not of the cities,³⁴ nor in national institutions like the customhouses, excise service, royal courts, army, navy, Treasury, Exchequer, and so on.³⁵ It was even further from realization in America, which did not have as many financially secure gentlemen as the mother country.³⁶ When Franklin made his proposal, the members of the Constitutional Convention, embarrassed at the practical difficulty of following their professed principles, deferred consideration of it and quietly refrained from ever taking it up.³⁷

But while the honorary ideal could not be directly implemented on a wide scale, it did, at times, exert a kind of gravitational pull on the debate over how best to structure compensation. As we will see in Chapter 2, the civic republican notion of official disinterestedness helped fuel the campaign in the late 1700s and early 1800s to ensure that facilitative payments be regulated. And, as we will see in Chapter 3, republicanism was the intellectual parent of nineteenth-century populist and reformist sentiments against official incomes becoming too high. These sentiments proved significant in the late 1800s, as rising business swelled the total sum that an officer could earn from facilitative payments. Official fortune-making became an argument in favor of the salary, which was a sure means to keep an officer’s income limited.

Part One: Facilitative Payments to Salaries

Part One tells the story of facilitative payments. These arose when individuals gave money to officers in exchange for their services. They were essentially the prices in a customer-seller relationship, with its attendant sense of reciprocity and mutual benefit. From the Middle Ages to the 1800s, the terms of these exchanges were often set without the involvement of the legislature. The common law—the body of legal principles that applied by default in the absence of a legislative act (statute)—effectively permitted officers and service recipients to make interchanges by agreement, much like bargains in the private economy. In this way, facilitative payments could “bubble up” organically from numerous decentralized negotiations between officers and the parties with whom they respectively dealt. Officers were quasi-independent vendors, as connected to their customers as to anybody else. They were not yet the creatures and dependents of a lawmaking body.

Chapter 1 identifies the common-law bases for negotiation between officers and service recipients in Britain and North America in the 1700s and early 1800s. We begin with the doctrine of extortion, which prohibited any officer from “tak[ing] unlawfully” a payment that was “not due.” Originally, a payment was “due” only if it was authorized by statute or by immemorial custom and usage. An undue payment was “taken unlawfully” if (1) the officer coerced the payor to make it, (2) he lied to the payor about the amount due, or (3) the payor intended the payment to induce the officer to breach his duty—what we today call bribery. But if none of these elements was present, the payment was lawful, even if undue. In other words, if an officer did his duty, and the service recipient, knowing that he or she owed nothing, voluntarily gave an unsolicited “gratuity” or “tip” for it, that was fine. Compared with us, people in the eighteenth century had a looser understanding of the scope of official duty and the meaning of voluntary action. If an officer offered to do his duty faster or more diligently in exchange for money, that was not a breach of his trust. And if a service recipient found it necessary to tip an officer to make him do his duty vigorously, the recipient was still said to pay “voluntarily.”

The lawfulness of gratuities opened the way for a good deal of negotiation between officers and recipients. Furthermore, if several recipients paid a gratuity at the same rate for a while, it could acquire the sanction of custom and usage. This meant that the payment became legally “due,” and the officer had a right to demand it. Gratuities were constantly evolving into customary fees. New gratuities would then arise on top of them and go through the same

process. To be sure, the doctrine of “immemorial” custom and usage, if applied strictly, meant that a payment was not lawfully “due” if anybody could prove that it had not been taken continuously since the beginning of legal memory (in the year 1189!). But practically, everybody realized that such strictness would be disruptive and unreasonable. Inquiries into the historical pedigree of fees, if made, usually went back only a few decades, if that. Thus, the doctrine of custom provided legal cover for the continuing evolution of payments through officer-recipient negotiation.

In addition to lawful gratuities and immemorial custom, there was another doctrine that helped justify negotiation: *quantum meruit*, the principle that any person who performs a valuable service for somebody else is entitled to reasonable recompense for it. If an officer provided a service to a recipient and there was no customary fee, he could still sue in *quantum meruit* for the service’s value. And, of course, he and the recipient could agree to settle the claim without litigation—to bargain in the shadow of the law.

To be sure, the British Parliament and colonial legislatures often enacted statutes to regulate the payments that officers could take for their services. But these statutes operated against the rich background of common-law doctrines that authorized bargaining as a default matter. In the same way that people today speak of statutory economic regulation “intervening” in a preexisting market constituted by common-law rules of property and contract, so were statutes regulating official fees in the eighteenth and early nineteenth centuries “intervening” in a preexisting universe of exchanges that were not established by statute yet were still lawful. Public offices were independent of legislative power in a way that seems strange to us today. They were freestanding vendors that the legislature might regulate but sometimes did not, just as it might or might not regulate a business today.

Prior to the early nineteenth century, statutory interventions in officer-recipient exchange were limited. It was difficult to enumerate officers’ services and fix prices for them in advance. Services often were idiosyncratic, required variable amounts of labor or speed depending on the circumstances, or reflected unanticipated changes in administrative methods or in the needs of service recipients. And even if a service were long-standing, stable, and familiar to officers and recipients, the legislature might accidentally forget to include it. (There is an analogy here to what economists call the incompleteness of contracts.) In several instances, lawmakers acknowledged these limitations by enacting statutes that fixed the fees for certain named services but left the pricing of all other services to the common law. Even when the wording of a statute did not clearly indicate such a limitation, officers and courts often interpreted

it that way. The assumption that statutes left common-law negotiation to thrive with respect to unenumerated services preserved a relatively unregulated “market” not only for truly unnamed services but also for named services that, because of circumstance, required more work than usual and could therefore be viewed (by some stretch of the imagination) as unnamed. The unusual aspect of the service could be hived off as a freestanding unenumerated item deserving extrastatutory compensation. In certain jurisdictions, the doctrines supporting negotiation proved so robust—and the regulatory efforts of legislators so imprecise, crude, and poorly updated—that regulatory statutes became dead letters whose obsolescence officers and courts openly proclaimed.

The practice of letting service recipients pay officers for their services, observed a parliamentary commission in 1787, brought the two “into a mutual relation,” promoting “habits of pecuniary obligation or exchange of private interest.”³⁸ To many, this seemed a good thing: as with any seller-customer relationship, the promise of payment induced prompt, attentive, and faithful service. And it was not just that the recipient paid the officer, but especially that the two could negotiate the transaction. The recipient’s freedom to adjust the price and the officer’s freedom to adjust the service opened the way for mutual benefit. In the eyes of many, bargaining between officers and recipients was not only convenient but also necessary to the continued functioning of government as the needs of service recipients evolved. This reasoning resonates with modern arguments that corrupt (that is, illegal) payoffs in developing countries may furnish a valuable and efficient degree of flexibility.³⁹ The key difference, of course, is that during the eighteenth century such payments frequently were legal, unhindered by the handicap of secrecy that comes with illegality.⁴⁰

But then things changed. As Chapter 2 demonstrates, the American regime of negotiation was outlawed through an ideological and political transformation that had precursors in the 1600s, gained ground in the 1700s, and greatly accelerated and culminated in the early 1800s. Up to the American Revolution, critics of negotiation made three arguments against the prevailing regime and in favor of tight statutory regulation. First was the idea that negotiation too often deteriorated into monopoly price-gouging. Though negotiation’s defenders believed that rising fees and extra charges resulted in faster or new-and-improved services, its critics insisted that such “adjustments” in price arose merely from the officer’s abuse of his monopoly over the service (or from the superior information that he enjoyed about the sum for which he was willing, or obligated by custom, to do the job).

The second argument for statutory control rested on legislative supremacy. Parliament in the 1600s and the colonial assemblies in the 1700s were on a quest

to set themselves up as the gatekeepers for all sources of funding by which the king might run the government. Negotiated fees threatened legislative power because they allowed the officialdom to support itself without the legislature's approval. Even more dangerous than negotiated fees—which arose organically from numerous decentralized officer-recipient relations—were fees that the king himself (or the royal governor) purported to authorize his officers to take by unilateral ordinance. Edward Coke argued in the early 1600s that such royally enacted fees were tallages (nonparliamentary taxes) and therefore unconstitutional. Colonists in the 1700s would stretch this argument to criticize all fees unregulated by statute, even if the king or governor had said nothing about them.

The third argument for statutory control arose from civic republican views of official duty and citizenship. The negotiation of fees meant that official service was a reciprocal exchange between officer and recipient. But civic republicans thought this was evil. To them, the recipient was a citizen enjoying a right to the service, and the officer was, ideally, a disinterested person whose sheer virtue motivated him to fulfill the service obligations of his position. The officer should, if possible, receive no compensation at all, thereby guaranteeing that his action arose from duty and not reciprocity. But if compensation were necessary, then it should be regulated rather than negotiated, since regulation provided less leeway for reciprocity.

All three arguments—anti-monopoly, legislative supremacy, and official disinterest—were associated with the strain of English political culture that originated with the opposition to the early Stuarts and briefly came to power under the English Commonwealth (1649–53), which, not coincidentally, saw valiant attempts to regulate fees, though these faded after the Restoration in 1660. Still, commonwealth ideology sprang up again repeatedly, most strongly in the assemblies of the American colonies in the 1700s, where it became the mainstream discourse, strengthening those elected bodies and pushing them to revolt in 1776. This radical Whig ideology manifested itself in the different colonial assemblies in different ways. In a few—those of Maryland, Virginia, and North Carolina—it took form in (among other things) a strong aspiration for legislative control of official fees. These three assemblies made the first concerted attempts to prohibit all negotiation and assert that fee-taking depended on statute alone. This view, complete with denunciations of nonstatutory fees as “taxation without representation,” became established in the revolutionary victory of 1783 in those new states.

This might imply that the positivist concept of fees—that officers could lawfully charge fees only with specific statutory authorization—arose automatically from the radical Whig ideology that fueled the Revolution. But it is not that

simple. Radical Whiggery happened to get coupled with fee regulation in the Upper South colonies, but in many others it did not, and in those other places, the nonpositivist concept of fees survived for longer. To wit, nonstatutory fees remained lawful, or at least legally ambiguous, until the 1810s in Pennsylvania, until the 1820s in Massachusetts and South Carolina, until the 1830s in New York, and until the 1840s in Louisiana and New Hampshire. Still, by about 1850, lawmakers and judges in all those states, indeed everywhere in the nation, came to embrace the same positivist view of official income as the Upper South had in the 1700s. The old doctrines of *quantum meruit* and custom lost their hold. Lawmakers rewrote statutes to prohibit charges for unenumerated services. And even when the text was not so clear, judges developed a general presumption that officers could charge money only when expressly authorized by statute.

The transformation of the 1810s to the 1840s arose from certain interrelated trends in the postrevolutionary development of American republicanism, liberalism, and democracy. We can identify these trends by considering the common themes that appear in the relevant statutes and cases: a distrust of officers and anxiety about their monopolistic and coercive powers; a strong preference for legislative authorization over official discretion; and an objectified understanding of official duty, in which the incumbent had little freedom in deciding what efforts to make when asked to perform a service. These themes resonate with larger changes in American political culture during the period. First, offices once held by aristocrats, who had ties to the community and enjoyed deference from their inferiors, now went to persons of lower status, with fewer such ties, less capacity to elicit deference, and time horizons shortened by the principle of rotation in office—changes that all made the new incumbents seem less trustworthy. Second, elite definition of the “rule of law” shifted from the participatory self-governance of local communities toward a more positivist view centered on the state legislature and on relatively objective, rule-bound claims to rights on the part of white male citizens. Third, lawmakers and judges became obsessed with imposing uniformity—a formal and legalistic equality—on all interactions between white male citizens and the government. Fourth, the old Anglo-American anxiety about monopoly reached unprecedented intensity, pushing lawmakers to guarantee open and equal access to all resources that were inherently monopolistic, including official services. These four factors all counseled in favor of a more objectified concept of office, one that had uniform, equal, and rule-bound relations with all service recipients, with no room for bargaining or ad hoc adjustment. The nineteenth century is remembered for its ideology of *laissez-faire*, but it would be more accurate to say that Americans of the period favored a sharpened public-private distinction, gravitating

toward the market on the private side but toward regulation on the public side. Officers had once been quasi-independent vendors who *could* be regulated by the legislature, but they were now reconceived as *creations* of the legislature, who had no lawful rights except those that the legislature established. Thus was born the foundational idea of today's administrative law: that administration is subsequent to legislation.

By reducing all facilitative payments to statutory schedules, Americans sought to preserve a mode of compensation that was pre-positivist in its history and essence but to regulate it and thereby render it compatible with a more modern institutional world. Interestingly, this program resonates with suggestions that are sometimes made, as in developing countries today, that certain payoffs should be legalized, regulated, and made transparent.⁴¹

That makes it all the more important for us to consider why American lawmakers ultimately found facilitative payments (even when regulated) to be so problematic that they had to be replaced by salaries. Nineteenth-century Americans hoped and expected that facilitative payments would continue their age-old function of motivating officers to render prompt and attentive service. But, as Chapter 3 demonstrates, the rigidity and clumsiness of the new statutory regulations became a major obstacle to their doing so. Statutory fee regulation compiled a sorry record from the mid-1800s (when it became established as a legal ideal) through the early 1900s. Lawmakers writing fee schedules too often forgot to price certain services, or crudely imposed a single price on a service that varied greatly in effort from case to case, or failed to anticipate new services that arose after enactment. Such mismatches between lawful prices and actual business generated two distinct dangers. First, the officer might conform to the statute but also to the irrational incentives that it created, allocating his effort disproportionately toward the subset of services that happened to be in the schedule. Alternately, the officer and the person seeking a service, in cases where the statute did not allow the latter to pay the former, might engage in extrastatutory negotiation to ensure the job got done, resulting in a payment that was now viewed as "corrupt." Such exchanges proved very common: after all, they had been the legal way of doing things for centuries prior to the novel aspiration for absolute statutory control. Such control became the stated ideal of lawmakers, judges, and the bien-pensant middle class, but in the workaday world, old habits died hard.⁴² The ancient legal justifications for nonstatutory charges—voluntariness, custom, just recompense, and statutory obsolescence—survived in the folk understandings of many officers and recipients. Plus, the officer and recipient could often cloak a negotiated payment by claiming that it comported with the schedule through some stretched interpretation whose bad

faith was not obvious to the casual observer. The legislature might play cat and mouse with the officers, monitoring their stretched constructions and amending the statute to close the loopholes. But it was a fool's game. The officers were always a step ahead.

Such dynamics fueled the perception, which became widespread by the late 1800s, that fee-based compensation of officers, even when formally regulated by a statute, led unavoidably to fee-taking that evaded the statute, which was now defined as "corruption." Reformers argued that, to stop officers from taking unlawful fees, one must prohibit them from taking *any* fees, placing them on salary instead. This argument came up again and again in the period circa 1870–1920.

To be sure, the substitution of salaries for statutory fees was not a panacea to the problem of unlawful fee-taking, since it was possible for a salaried officer to demand illegal payments for services. But salarization did remove a major aggravating factor. The statutory fee system had invited officers and recipients to agree upon unlawful charges because it created a particularized class of services that needed to be performed yet were uncompensated (or inadequately compensated) by law. It also signaled a generalized moral approval of exchange between officer and recipient, and it established, as a matter of office practice, a cash nexus between the two, which could be used as a cover for charges that pushed the edge of the law or went beyond it. It was much easier for enforcers, recipients, and officers themselves to recognize the illegality of exchanges when they were not allowed at all, as opposed to being allowed restrictively. Negotiation was the essence of the facilitative payment. It could not be eradicated unless the facilitative payment itself was eliminated.

In other words, facilitative payments proved fatally incapable of meeting Americans' aspirations for the subjection of government to law. The flight to salaries was an admission of law's weakness and failure. Statute drafters sought to enumerate and price services to provide fair compensation and to make things so transparent as to eliminate ingenious manipulations, but drafting was not precise enough to contain the wishes of officers and recipients to go their own way. Weber characterized modern government as both rule bound and salaried. But salaries, at least in the American story, are actually a concession to the inadequacy of rules to constrain self-interested human behavior, unless they are relatively crude and simple—"you can take nothing from the people you serve."

The effort to prevent corrupt exchange was not the only regulatory challenge that pushed lawmakers to give up on facilitative payments. There was the further challenge—also recounted in Chapter 3—of preventing each individual officer from earning too high an income in the aggregate, which became more

pressing in the second half of the 1800s as increases in population and improvements in office technology allowed many an officer to provide far more services than ever before, thereby earning a much greater total of facilitative payments. As these totals came to light, lawmakers came under pressure to regulate them, for they sparked populist resentment and excited fear that lucrative offices would attract unscrupulous candidates and corrupt the political process. Theoretically, lawmakers might have regulated each officer's total income by amending the statutory prices the officer could charge for individual services, but that proved unworkable, for reasons similar to those that hobbled the effort to regulate corrupt individual transactions: unforeseeable changes in business might swell the total once again, or the officer might stretch the meaning of the items in the amended schedule to swell the total himself. As with the regulation of corrupt individual transactions, the regulation of total incomes ultimately required salarization, a crude but sure solution to the problem.

In addition to the terrible difficulty of regulating individual facilitative payments (and the total incomes from them), there was one other reason that lawmakers rejected such payments in favor of salaries: they soured on the very idea that "customer service" was an appropriate paradigm for governance. That is the subject of Chapter 4. Although positive regulation constricted the legal space for reciprocity between officer and recipient, it did not eliminate it. Even after the law confined monetary exchange between officer and recipient to regular payments authorized by positive authority (by circa 1850), it was still possible for those legally authorized payments to foster a dynamic of mutual benefit between the two, particularly when the service was relatively familiar, standardized, and unchanging. The officer still had an interest in attracting as many customers as possible, which he could do by making his service as attractive to prospective claimants as possible. Thus, facilitative payments continued to imbue many officers with a customer service mentality, even when they obeyed the laws that told them not to create new charges or increase old ones. This dynamic was evident through the second half of the 1800s and sometimes into the early 1900s. Facilitative payments continued to facilitate.

Chapter 4 shows that fee-driven customer service flourished in several contexts from the mid-1800s onward, even within the bounds of positive regulation. It also shows why lawmakers reacted against it by the early 1900s. They came to condemn not merely unregulated payments but also reciprocity per se. Facilitative payments imbued officials with a narrow view of their jobs, in which they focused on meeting the needs of service recipients but paid comparatively little attention to other interests that were less immediate and more diffuse. Increasingly, however, this style of administration ran up against the mass interest-

group rivalry of modern politics. An increasing number of groups and movements were organizing themselves and entering the electoral and legislative arena to advocate for interests that had once been diffuse. These groups and movements criticized the narrow customer orientation of facilitative payments. Customer service, they said, came at the expense of other worthy interests. The solution was to embrace salaries, thus severing the bond of customer-seller reciprocity between the officer and the people who sought his services, providing the officer with the financial independence to say no. This opened the way for the officer to balance more diffuse interests against recipients' immediate wishes. This is not to say that salarization promoted an especially precise, careful, or sophisticated balancing of interests. At the very least, however, there was more attention to a wider range of interests than in the pre-salary era. In this respect, salarization reflected the rising complexity and multi-dimensionality of mass electoral politics. For the recipients themselves, the severing of the reciprocal bond was a profound loss. It psychologically estranged them from officials they had once viewed as solicitous and friendly.

To demonstrate how facilitative payments continued to promote a customer service ethos—and how lawmakers ultimately reacted against that ethos—Chapter 4 relies upon three case studies. They concern three of the most important federal decision-making systems of the nineteenth century. The first is the adjudication of immigrants' applications to become naturalized citizens, which were decided by federal and state judges and court clerks. I trace this system from the explosion of immigration in about the 1830s through the nativist reforms of the early 1900s. The second is the adjudication of veterans' claims for disability benefits by federal examining surgeons. I trace this system from its massive growth during and after the Civil War to its replacement by a more restrictive system during and after World War I. The third is the adjudication of Western settlers' claims for land under the Homestead Act and similar "settlement laws" by the registers and receivers of the federal land offices. I trace this system from the rise of the settlement laws in the 1840s through the conservationist reforms that took off in the early 1900s.

In each of the chapter's three case studies, I make the same four points, pegged to each case study's four numbered sections. First, I show that, in all three schemes in the pre-salary period, the law vested adjudicators with discretion to treat applicants stringently or liberally and that, in fact, they treated applicants liberally. The wideness of the adjudicators' discretion arose from a couple of factors. For one, the statutory criteria for whether to confer the benefit (e.g., citizenship, pension, land) were vague. Also, proceedings in each of the three systems were one-sided: there was nobody to oppose the applicant's claim,

so the outcome depended largely on whether the adjudicator chose to believe the applicant's story. In practice, officers in all three systems became famous (or notorious) for indulging applicants. Judges and court clerks gave Irish and Germans the benefit of every doubt as to whether they had lived in the United States for the requisite period, were attached to the U.S. Constitution, and so on. Examining surgeons gave Civil War veterans the benefit of every doubt as to whether they were truly "disabled" and how badly. Land-office registers and receivers gave homestead applicants the benefit of every doubt as to whether they were really working the land.

Second, I argue that a major factor motivating the liberality of adjudicators in all three systems during the pre-salary period was their desire to maximize their facilitative payments. Court clerks (and sometimes judges) were entitled to a fee every time they granted citizenship to an immigrant, and registers and receivers enjoyed a fee every time they granted a settlement-law application. The incentive for these officers to grant applicants' claims was obvious, and contemporary observers confirmed it. Examining surgeons had a somewhat different pay structure: they received a fee for every veteran who came to them seeking a pension (or a pension increase), regardless of how they decided the veteran's application. Nevertheless, the surgeons had a pecuniary stake in encouraging veterans to seek them out and (therefore) in maintaining a reputation for generosity, as contemporaries confirmed. Further, in all three systems, competition increased the pressure on adjudicators to meet the wishes of "customers." It was common for multiple naturalizing courts to be located near one another, and immigrants could decide where to take their business. Examining surgeons, likewise, were often only a short distance apart, and veterans had much freedom in deciding whom to patronize. In the case of land offices, competition was less direct, since each office was a monopolist within its own geographic area, yet competition probably still existed, for Western migrants were mobile and could choose between districts in deciding where to make claims. In addition, adjudicators in all three systems had their liberality monitored and encouraged by private intermediaries who made it their business to drum up applicants and channel them toward adjudicators.

Third, I note that, throughout the pre-salary era in each of the three systems, congressmen were aware of the system's liberality and rejected administrative reforms that would make it operate less liberally. This explains why fee-driven liberality lasted for so long. It also helps us assess the ethical status of fee-driven liberality. It is tempting to dismiss such liberality as corrupt, as moralistic contemporaries sometimes did. But how do we define "corruption"? Obviously, corruption involves the exercise of public power for a private interest, but that

is too broad as a definition, since almost nobody expects public servants to act completely without reward. We might attempt a definition by saying that the exercise of public power for private interest is corrupt when it violates the public interest or violates public sentiment, but those concepts are too vague. Alternately, we might adopt a definition used by many scholars: that the exercise of public power for private interest is corrupt when it violates applicable law.⁴³ But by that standard, much of the liberality in naturalization, pensions, and homestead claims was not corrupt, since fee incentives simply channeled the discretion that adjudicators exercised by virtue of vague laws. One might argue that adjudicators somehow violated the law by allowing their statutory discretion to be influenced by pecuniary considerations, but that argument is weak, for (1) the fees were instituted by law and (2) lawmakers knew of, and acquiesced in, the liberality of the three systems, which predictably resulted from the fees. Yet another possibility is to characterize the fees as corrupt according to the definition set forth by James C. Scott, who describes corruption as a variety of influence over policy outcomes that postdates the enactment of the relevant legislation—an influence that tends to be particularist, adjusting general statutory mandates to the peculiar needs of individuals or local groups.⁴⁴ But again, this does not quite fit. The effect of facilitative payments on naturalization, pensions, and land claims was to *systemically* shift policy outcomes *nationwide*, generally in a single direction (favorably toward applicants as a class), in a way that members of Congress understood.

In my view, fee-driven liberality should not be understood as corrupt at all, but as an example of what Terry Moe calls “the politics of structural choice”—a feature of a statute’s implementation scheme that is mandated by the legislature and can channel policy outcomes just as strongly and systemically as the substantive terms of the statute do.⁴⁵ We cannot understand facilitative payments, at least in the mid-1800s and later, as a primitive phenomenon that predates the generality of modern legislative policy-making. On the contrary, facilitative payments in the 1800s became instruments of that kind of modern policy-making, insofar as the legislature wanted to shift outcomes systemically in favor of service recipients. (It is only the earlier variety of facilitative payments—those negotiated ad hoc at common law in the 1600s and 1700s between an individual officer and a few service recipients—that we can justly understand as particularist and premodern.)

That lawmakers systematically channeled outcomes in favor of the recipient class reflects the importance, during the mid- to late 1800s, of what Theodore Lowi calls “distributive policy.” This is policy that “in the short run . . . can be made without regard to limited resources,” so that “the indulged and the

deprived, the loser and the recipient, need never come into direct confrontation.”⁴⁶ Distributive policy was unusually prominent (though not, of course, exclusively dominant) in America during this period.⁴⁷ In many major areas, lawmakers perceived the age as one of inexhaustible resources, so government could afford to be generous. Policies in naturalization and veterans’ benefits fit the distributive definition well. Liberality to the recipient class came at a cost, but that cost was so diffuse that the millions of people who bore it were unconscious of their burden. To wit: the cost of easy naturalization was the dilution of native-born Americans’ votes. The cost of generous veterans’ benefits was a heightened federal tax burden, in the form of the tariff—invisible to the consumers on whom it fell. For the settlement laws, the distributive designation also fits well, insofar as we focus on the federal district land offices and their fee-paid personnel, whose job was to decide rights to federally owned land as between the U.S. government and prospective white users. The cost of indulgence toward white settlers’ claims to federally owned land was the depletion of that land for future generations—a very diffuse and unconscious interest through the late nineteenth century. Of course, if we widen our focus to consider how land entered the federally owned category to begin with, the distributive designation does not fit, for then we confront the work of separate agencies—the military and the Bureau of Indian Affairs—tasked with expropriating land from Indians. That task imposed very concentrated costs. Consistent with this, officers in the military and the bureau did not live by facilitative payments and did not treat Indians as customers. Still, the accomplishment of Indian expropriation created a widespread perception of open land among white politicians, which inclined them toward liberality in settlement-law administration.⁴⁸

We come last to the fourth point in each of the three case studies: the reaction against customer service and the abolition of facilitative payments. Legislative decision-making in the early 1900s saw intensified interest-group rivalry, an increasing sense of scarcity, and a decline of free-and-easy distributive policy in many areas where it once prevailed.⁴⁹ More than before, politicians saw the disbursement of every government benefit as coming at the expense of some other value or interest. In the realm of naturalization, nativists gained more clout and exerted unprecedented pushback against the easy admission of foreigners to the polity, which they insisted was degrading the electorate. In the realm of veterans’ benefits, the fiscal challenge of World War I and the replacement of the (nearly invisible) tariff by the (highly visible and concentrated) income tax made tax dollars seem scarcer. Taxpayers and budget-conscious lawmakers therefore demanded closer scrutiny of claims on the Treasury. In the realm of

land policy, the newly ascendant conservation movement warned that land was not inexhaustible. Distribution to settlers had to be more closely scrutinized and targeted—and in some cases stopped altogether, to let the government manage land for sustainable use.

Congress proved very responsive to these three movements in the early 1900s. It put the brakes on the distribution of public largesse. Some of the response came in the form of changes to substantive law, though these were relatively minor.⁵⁰ The main thing Congress did was to revamp the administrative machinery for deciding claims, to make it less claimant-friendly. Lawmakers transferred (or encouraged agencies to transfer) real power away from fee-paid officers and toward salaried ones. Applicants for citizenship, benefits, and lands now faced gatekeepers who had no pecuniary interest in letting them through the gate. Congress thereby established a government capable of saying no to service recipients in a way that acknowledged (if crudely) rival mass claims to public resources—nativism, fiscal conservatism, and conservationism.

Service recipients who lived through this transition felt profoundly estranged. They had once been treated as customers, with courtesy, solicitude, and expedition. Now they increasingly faced indifference, suspicion, and delay. It is tempting to think that salaries gave officers the independence to evaluate every application objectively and impartially, thus guaranteeing faithful execution of the law. But that is naive. The statutory criteria for naturalization remained vague, and officers in the first several years after salarization did little to fill them in with uniform guidelines. The same is true of World War I disability determinations, which remained quite subjective, especially given the uncertainty of newly discovered neurological disorders. Also, the disappearance of customer service incentives for naturalization and veterans' benefits subjected applicants to long delays that caused many of them to give up, regardless of the merits of their claims. Adjudications under the settlement laws probably saw a greater increase in objectivity, but they still involved subjective judgments of "good faith." In all three systems, the most verifiable effect of salarization was not to make decisions more accurate but to make them less generous. That is no surprise, for salarization in each case arose from the demands of newly ascendant interest groups that wanted the government to be stingier. Salarization may have brought administration nearer to Weber's ideal of being a "precision instrument" for the accurate implementation of policy,⁵¹ but it is more certain that it symbolized the government's acknowledgment of the ever-stronger tug of rival interest groups that came with modern legislative politics. Customer service was too simple and narrow a paradigm for the modern political world.⁵²

Part Two: Bounties to Salaries

Facilitative payments encouraged officers to perform acts that recipients wanted. By contrast, bounties—the subject of Part Two—encouraged them to perform acts that the affected persons did not want and were likely to resist. Going back to the Middle Ages and through the early modern period, such rewards held a special attraction for lawmakers, for they could provide the motivational fuel to enforce novel, ambitious, and intrusive legislative programs that sought to override and change the existing norms and preferences of the population. As such ambitious legislative endeavors reached unprecedented heights between about the mid-1800s and the early 1900s, American lawmakers experimented with using bounties more intensely than ever before. But the very intensity of the experiment was the bounty's undoing: it led to such disappointing and perverse results that lawmakers soured on bounties and rejected them altogether, concluding that such rewards undermined the legitimacy, trust, and cooperation that were necessary for a workable modern state.

Familiar Imposition, Alien Imposition, and Motivational Fuel. To understand bounties, we must begin by thinking through the different ways in which a government may impose its will. It helps to think in terms of two ideal types: (1) familiar imposition, which was characteristic of early modern governance, and (2) alien imposition, which arose in many isolated pockets during the early modern period and then spread dramatically in the nineteenth century to become the overriding mode of governance in modern life.

The defining feature of familiar imposition was that the enforcer, the enforcee, and the norm being imposed all had reference to a single face-to-face community and its shared set of social expectations (or, at least, to the ongoing compromises and accommodations its inhabitants made, avoiding disruption in their shared social life). The enforcer and the person he targeted usually knew each other, as they lived in a community where everybody knew just about everybody else. High-level enforcers, such as justices of the peace, were leading gentlemen of the locality (“local notables,” as Weber called them). Low-level enforcers, such as the town constable or town assessor, were middling persons who took turns filling the office when pressured to do so by their neighbors. The norm enforced often took the form of custom or common law (or, if reduced to an enacted text, was vague), thus allowing the enforcer to adjust it according to the individuals involved, the community's attitude toward them, and the possible need to soften enforcement to accommodate any potential divisions in the community. Responsibility for initiating enforcement and providing the

information on which to base it rested largely with lay community members themselves, either when they personally suffered a wrong and came forward to air their grievance or when they served in short-term, rotating bodies like the grand jury, whose members kept an ear open to the troubles of their neighbors, sorted through them, and together “presented” the transgressions that they felt demanded admonition or reprimand. Under these conditions, the exercise of official power was generally in equilibrium with the expectations of the local polity. An officer was disinclined to take coercive action unless it was against no more than a few recognizable deviants, to avoid the resentment of any significant part of the community in which he was so enmeshed.⁵³

Though familiar imposition predominated in Anglo-American governance during the early modern period, there were also many instances of alien imposition, which appeared episodically and in isolated pockets. (Alien imposition would later proliferate dramatically in the nineteenth century—the concept is largely synonymous with modernity—but we shall defer that part of the story till a bit later.) Imposition was alien when a sovereign external to the community demanded compliance with directives that violated the social expectations of the people governed. The sovereign might be a monarch, or a legislature representing an electorate larger and more diverse than any individual community. The sovereign could also be a local government, if the locality’s population had grown large and diverse enough to encompass distinct communities. The sovereign’s command characteristically took the form of an enacted text, lacking the built-in adjustability of custom and common law. To do the work of enforcement, local-resident officers with ties to the community were unpromising candidates, for they would be disinclined to force alien directives on their friends and neighbors. Outsiders lacking social ties were better suited to the job. And given the foreign nature of the demands, it was hard to rely upon community members to initiate enforcement and provide information about violations. In fact, violations of many sovereign directives were “victimless.” They harmed no particular individual but instead some abstract sovereign interest, like the public revenue, or national economic policy, or a certain concept of public morality. The initiative for enforcement—and the gathering of information about violations—would have to come from the sovereign’s agents themselves, since neighbors were not going to come forward.⁵⁴

Familiar and alien imposition are ideal types, not exclusive categories. Although the distinctive features of each type reinforced one another, it was possible for a regime of governance to include some elements fitting one type and some the other. Thus, it was possible for a formally alien law—that is, a text enacted by a faraway sovereign—to be implemented by local-resident officers,

enmeshed in the community, who would interpret it loosely to accommodate their neighbors' views of what was reasonable. Such a law would therefore seem familiar to the people who lived under it.⁵⁵

With our concepts defined, let us now consider enforcers' motivations and incentives. To a large degree, familiar governance provided its own motivational fuel. Members of the community, whether playing the role of officers, grand jurors, or individual complainants, were engaged in the common project of running their local affairs as they believed they ought to be run. This helps explain why rural justices of the peace, constables, grand jurors, and other such actors often did their jobs for little or no pay.⁵⁶ Men served in these offices to meet the expectations of their neighbors and to have their "say" in how their community was governed. Indeed, one reason for the prestige of honorary service was its association with participatory communal self-governance and therefore with English liberty or, in postrevolutionary America, republican liberty.

By contrast, alien governance did not provide its own motivational fuel. Whereas enforcers under the familiar regime went after isolated deviants and enjoyed the backing of their neighbors, enforcers under the alien regime faced a community in which most or all of the inhabitants were violators or sympathetic to violators. Indeed, the population might not even recognize the sovereign demand as "law."⁵⁷ Facing such intransigence, it was natural and common for kings and legislatures to adopt a strategy of coercion—the detection and punishment of noncompliance. But they realized that the enforcer under these circumstances would need some external motivation to do the detecting and punishing. They often found this external motivation in the bounty. Cash would guarantee the alignment of enforcer incentives with sovereign interests that community self-government failed to deliver.

The peculiar attraction of bounties for sovereigns making alien impositions is evident in the many *qui tam* statutes, stretching from the Middle Ages through the early modern period, in which Parliament and later the colonial legislatures banned certain conduct and offered a share of the penalty to any individual (the "informer") who successfully prosecuted a violator. Take, for example, the regulation of wool, then England's principal commodity, in the 1500s. Originally, wool made its way from landlords to cloth makers via dealers, most of whom were small time. But a sudden contraction in the export market for cloth prompted Parliament, in 1552, to restrict the purchasing of wool to a national cartel of big dealers (or to the few additional dealers who obtained a license directly from the crown) and to cloth makers themselves, of whom only the big ones had the capacity to buy without the aid of dealers. The idea was to prop up the strongest segments of the cloth-making and wool-buying industries.

This highly innovative legislation threatened not only the small dealers but also the landlords and small cloth makers who used them, plus all communities that depended on such economic actors.⁵⁸ Many landlords and small dealers ignored the law and went on with their accustomed transactions.⁵⁹ The statute included an informer provision, which proved to be commonly invoked over the rest of the century.⁶⁰ The government had to rely on informers to prosecute small dealers who bought from landlords, for it could not rely on the local justices of the peace to do so, seeing as how justices in the wool-selling areas were themselves landlords and therefore sympathetic to business practices in which their neighbors (or they themselves) had long engaged.⁶¹

For another example in the same period, consider the regulation of skilled trades. Initially, it was customary in many trades for a person to serve an apprenticeship of some years, but the terms were a matter of familiar governance, decided by the local tradespeople or commercial town. But in 1563, Parliament—anxious about industrial growth, poverty, vagrancy, and labor unrest—imposed a “one-size-fits-all” term of seven years on all trades, unprecedented in its uniformity and inflexibility.⁶² As with wool-dealing, the statute’s provision for informers resulted in far more prosecutions than came from local officers like justices of the peace.⁶³

The same pattern obtained in the administration of royal customs duties and the regulation of foreign trade during the 1500s. Officials in that context, though appointed by the king, were drawn from the very merchant communities they were supposed to police, and they were complicit in local cultures of smuggling and evasion. Informers provided one of the few promising avenues for replacing local-official accommodation with an incentive to vindicate the crown’s revenue interest.⁶⁴ (A later one, tried intermittently from the 1570s to the 1670s, was tax-farming.)⁶⁵

The alien cast of regulation in wool-dealing, apprenticeship, and foreign trade extended to *qui tam* statutes pretty broadly, it seems. Through the 1600s, these enactments generally focused on business regulation and taxation, areas in which the prohibitions were likely to be *malum prohibitum*, that is, premised on sovereign edicts unrooted in the moral views of the community where violators lived. Some proscribed nonestablished religious worship, which might be considered morally right in some communities. Informer provisions in the 1700s covered many of the same subjects but also expanded to victimless “vice” offenses like selling gin, running a gambling house, and so on.⁶⁶ Many of these statutes were likewise at odds with the social expectations of local communities, as evidenced by popular riots in London against informers operating under the unprecedentedly strict Gin Act of 1736.⁶⁷ A sampling of informer provisions

enacted by the Virginia legislature in the 1740s and by the U.S. Congress in the 1790s indicates a similar focus on business regulation and taxation.⁶⁸ In the early 1800s, the Boston district attorney John T. Austin (later attorney general of Massachusetts) characterized informers' bounties as especially linked to the "multitude" of offenses "which regard the peace, comfort, and good morals of society, without being particularly injurious to any one [person] more than another, and those acts which become criminal only by positive prohibitions," such as market regulations, road regulations, liquor regulations, or gambling regulations, in contrast to "cases in which public opinion, or individual interest is excited," such as murder or other violent crimes, when "there is generally an alacrity of pursuit after the offender" without any governmental inducement.⁶⁹

The English government also offered bounties, at times, for the private prosecution of certain crimes that were, admittedly, *malum in se* (proscribed by morality, not merely by sovereign edict). These English rewards took off in the 1690s and were made by statute and royal proclamations; they lasted until the government ended the proclamation rewards in the 1740s and repealed the statutes in the 1810s. Note, however, that the rewards, far from covering all *malum in se* crimes, focused on a selected set of newly prevalent property offenses, particularly highway robbery and burglary.⁷⁰ And they aimed mainly at such conduct in and around London,⁷¹ which was an extremely unusual place. In the 1690s, London was far more populous than any city in the Western world except Paris, which was nearly as big, though London was growing much faster, because of record immigration,⁷² which coincided with never-before-seen unemployment, thus undermining familiar patterns of community and governance and demanding radical measures to fill the vacuum.⁷³ The rewards aimed to govern a social world so disintegrated that any peacekeeping would have to be alien. Coupled with a radical expansion of capital punishment, the rewards were an innovative and positivist response of a central state facing an unprecedented challenge.⁷⁴

Though bounties offered by the *qui tam* statutes and reward statutes were formally available to all individuals, ordinary people did not go around seeking them casually. They were often the preserve of enforcers who, though private, were specialized and invested in their roles. On this point, we observe two mutually reinforcing dynamics: (1) enforcers of alien impositions tended to elicit the distrust, resentment, scorn, and violent resistance of the communities in which they operated; and (2) social outsiders to a community were more effective at imposing alien law than were social insiders, since they had no friends or reputation to lose, meaning that they could focus coldly on the money.

Informing meant risking one's social ties and respectability in exchange for cash. To make that investment pay, it was best to go whole hog, committing oneself to an outsider status that provided the perfect launching point for profitable operations. This helps explain why the English *qui tam* statutes gave rise to the "professional informer," who often brought cases across multiple localities,⁷⁵ achieving social distance on his targets. It also helps explain why the rewards gave rise to London's specialized "thief-takers."⁷⁶ Occupying the role of bounty seeker might be remunerative, but it invited social odium. These enforcers suffered physical attacks by riotous mobs and epithets such as "base," "lewd," or "viperous vermin"—and those were only the epithets used by judges!⁷⁷

As in England, so in America. A scholar of colonial New England concludes that informing "fell into equally low repute" there as in the mother country.⁷⁸ Legislators did sometimes try to integrate bounties into regimes of familiar governance and thereby render those regimes more exacting, as when the Massachusetts legislature offered an informer's share to every "tythingman" (neighborhood liquor watchman) who prosecuted a seller of alcohol not licensed by the local justices of the peace. In Boston and other towns, however, it proved impossible to find community members willing to serve on a rotating basis in neighborhood posts where they would be identified as bounty-seeking enforcers.⁷⁹ This is not to say there was no enforcement, only that it likely took different forms, such as grand jury presentment, or prosecutions by more "professional" informers, such as the colony's excise commissioners, each of whom worked a whole county, not just a town or neighborhood. But even these "professionals" had to struggle with local social constraints: in the 1760s, one ceased his enforcement campaign during his later years in office, "perhaps as a concession to opposition," and left the colony a few years after that.⁸⁰

Social suspicion of bounty-seeking persisted in postrevolutionary America. When the New York City Council in 1817 resolved to stamp out the old and pervasive custom of keeping pigs in the streets, it repeatedly offered bounties for catching them, but "[n]eighborhood solidarity almost certainly made the risks of pignapping far higher than the rewards."⁸¹ In 1830, Austin, the Boston district attorney, observed that in areas like liquor regulation, reward-seeking informers often suffered "something like public indignation," and their work "most commonly raises a question in the public mind, whether it be not better that an offender should escape, than that an informer make money by telling of his crime."⁸² The illustrious law reformer Edward Livingston, discussing the code he drafted for Louisiana in 1833, urged rewards for exposing certain offenses (including giving or accepting a challenge to duel, which many people thought the state had no business regulating), but he worried about whether the bounty

would “attach any odium to the performance of the duty” and admitted that “[p]ublic prejudice is against it: this cannot be denied.”⁸³

Bounty-driven enforcement of alien law, if taken to its logical extreme, could be so adversarial that it might seem like a kind of war between the sovereign and the populace. Not coincidentally, the other realm where bounties were most prominent, apart from domestic law enforcement, was in actual war against foreign countries, in which alienation between the sovereign’s agents and the targets was taken for granted—hence the Anglo-American law of “prize,” in which a ship capturing an enemy vessel could keep a percentage of the proceeds.⁸⁴ On land, colonial governments fighting Indians offered bounties for prisoners and scalps.⁸⁵

Bounty-seeking had a complex and changing relationship with officeholder status. As already noted, bounty offers were often the sovereign’s response to the unreliability of officers who were enmeshed in local patterns of familiar governance and therefore reluctant to enforce alien law. At the same time, however, it was common for public officeholders to be included within the larger universe of individuals who were lawfully eligible to win bounties. Bounty eligibility could even be specifically or exclusively coupled with officeholder status—a linkage that appears to have become more common over time. For example, when colonial governments fighting Indians made offers of bounty to all comers, many of those seeking the rewards were part of special public militia units known as “rangers.”⁸⁶ At sea, proceeds of prizes were actively sought by the crews not only of privateers but also of public naval ships,⁸⁷ and, seeing as how Britain and the United States licensed no privateers after 1815, the rewards went exclusively to public naval personnel from that date onward. The English government’s offer of cash for catching and prosecuting perpetrators of certain crimes in the 1700s was open to everybody, including constables, and while most of them sought to serve out their brief terms “as quietly as possible,” a few decided to make a living of the post, served repeatedly, and aggressively sought rewards, often in cooperation with professional thief-takers.⁸⁸ Legislatures of the early American republic went further in this direction, establishing fees for arrests for constables exclusively.⁸⁹ In the realm of the customs, shares of forfeitures were initially available to everybody, including customs officers. Then in 1662, Parliament declared that, in English ports, only customs officers could make the requisite seizures (though officers could make side payments to informers),⁹⁰ whereas in the colonies it seems that rewards remained directly available to officers and laypeople alike.⁹¹ When the new U.S. Congress took over the customhouses in 1789, it strengthened the officers’ bounty rights, making those in charge of a port the default claimants for all forfeitures and

granting them a substantial automatic share even when some other informer was involved.⁹²

As a matter of state-building, it made sense to focus bounty eligibility on officeholders: bounty-seeking tended to estrange the enforcer from the community of targets, so a bounty-seeking officialdom would tend to be more separated from society and faithful to the sovereign's alien commands. But while monetary incentives had the potential to drive official behavior, they did not determine it automatically all by themselves. For example, it appears that, throughout the colonial era and into the early national period, bounty offers to customs officials were feeble counterweights to the persistently strong pressure that local port communities exerted on officials to refrain from strict enforcement.⁹³

The Modern Spread of Alien Imposition and the Promise of Bounties. Now that we have a sense of bounties' place in early modern governance, we shall consider their role amid the vastly accelerated changes that occurred in governance between about the mid-1800s and the early 1900s. Whereas alien impositions had once occurred in isolated pockets of public policy, they now proliferated dramatically, dominating American government as never before.⁹⁴ The main cause of this spread was the rising ambition of lawmakers, emboldened by new ideas of mass democracy and Promethean progress, to legislate in ways that would deliberately change the societies they governed. Their positivist aspirations covered both the direct regulation of people's behavior (e.g., to stamp out drinking and gambling, to mandate new health precautions, to make convicts into useful workers), as well as taxation at higher rates and on novel bases, to finance larger public projects (e.g., bigger wars, better roads, universal schools, and the like). Innovative regulations and taxes meant that a growing percentage of proscribed conduct was *malum prohibitum* and that a growing percentage of law was textual and rigid, rather than customary and adjustable, thus pushing law further out of phase with everyday morality. As challenges seemed bigger, lawmaking gravitated toward higher and more distant levels of government—town to county to state to Congress. And even when local bodies acted, they represented larger and more diverse populations and therefore were more socially distant from the persons they oversaw.

Lawmakers' unprecedented aspiration to impose alien law, starting in about the mid-1800s, created a greater demand than ever before for officers to violate the social expectations of the persons with whom they dealt. Historically, the bounty had been a common way of meeting this kind of demand. Yet it had always been somewhat difficult to find agents who would respond to the

bounty, for anyone who did so risked losing social ties. However, the nineteenth century also witnessed several trends—rising population, the growth of cities, and increases in geographic mobility—which meant that officers were more likely than ever before to be strangers to those with whom they dealt. In other words, offices were increasingly filled by the very types of people who were historically most susceptible to bounty incentives. An additional trend that sometimes converted officers into strangers was the decline of the “local notable” and the rise of the “spoils system,” in which persons won offices not by virtue of their privileged positions in the community’s organic social hierarchy but instead by virtue of their positions in a rationalized party organization that might transcend the community (particularly in federal offices).⁹⁵

Not only were officers increasingly strangers, but the information on which to base enforcement increasingly manifested itself in forms that were legible to strangers.⁹⁶ In the eighteenth century, familiar institutions like the grand jury were relatively well suited to law enforcement, since neighborly gossip was among the best available sources of information about deviancy. During the nineteenth century, however, ever more data about people’s conduct and property took written form and were centrally stored, meaning that those data could be discovered, communicated, and used by less-personal enforcers of the type attracted to bounties. For example, the surveillance of taxpayers became a very different game as businesses engaged in more elaborate and standardized record-keeping and as wealth migrated from real estate toward bank deposits, stocks, bonds, and other institutional forms.

In light of these factors, the bounty held great promise as an instrument to effectuate the rise of alien imposition—and therefore of positivist governance, state-building, and modernity itself. In 1848, a federal judge, interpreting an ambiguous statute to offer bounties to a wide range of customs officers, explained that “the enforcing of fines and forfeitures is always attended with more or less odium, and sometimes with danger, and . . . the legislature has thought it expedient to stimulate the activity and quicken the diligence of the revenue officers in doing what is sometimes an ungrateful service, by offering them a share in the forfeitures.”⁹⁷ In 1887, U.S. Representative Thomas Brackett Reed, the House Republican leader and one of the era’s most formidable lawmakers, endorsed the award of bounties to customs officers, federal prosecutors, and federal marshals and their deputies. He powerfully articulated bounties’ potential as offsets to social pressure:

[I]n order to prevent [crimes] the United States must make it for the interests of its officials to look them up and to destroy them.

. . . [T]he crimes against the State and the crimes against the United States are entirely different in their character. Crimes against the State are crimes which are under the common law, and every lawyer knows that crimes which are punished by the common law have in their punishment and in their detection the support of every individual in the community. The officers of the law are there sustained by a vigorous and healthy sentiment, whereas the crimes against the United States are not those which are universally recognized as moral criminalities.

The whole community is awake to detect murder and to punish theft. But what community ever bestirred itself against frauds on the internal revenue, against moonshine distilleries, against smuggling, against a hundred things which are crimes against the United States? What, then, do you need in order to bring your criminals against the United States laws to detection? You need to have the officials stimulated by a similar self-interest to that which excites and supports and sustains the criminal.⁹⁸

Reed identified state law with familiar imposition and federal law with alien imposition, and that identification was surely exaggerated. But Reed perfectly captured the peculiar importance of bounties for alien imposition. To engage in alien imposition was anti-social behavior, and bounties were rewards for being anti-social.

The Intense Modern Experiment with Bounties and Its Negative Conclusion: Lawmakers' Realization of the Need for Legitimacy. Amid the unprecedented escalation of alien imposition that began in the mid-1800s, lawmakers in numerous instances relied on bounties to effectuate their novel demands upon society—as previous sovereigns had done, but on a larger scale. Yet the very intensity of this experiment led to bounties' demise: the results left lawmakers so disappointed, disillusioned, and disturbed that they rejected bounties altogether. In particular, lawmakers banished bounties completely from the all-important realms of taxation and criminal justice, where they had episodically played a role for hundreds of years and seemed—for a few climactic decades in the late 1800s—to be playing a bigger role than ever.

What did lawmakers discover to be wrong with bounties? Recall that bounties were offered for the enforcer's success in detecting a violation and imposing a sanction for it. If you make the Benthamite assumption that people obey the law only insofar as they fear detection and punishment, then incentivizing enforcers to detect and punish is all the state can do to elicit mass compliance. That was the theory of bounty-based enforcement. But American lawmakers of

the late 1800s and early 1900s concluded—sometimes through dumb trial and error but sometimes articulately—that they had to bolster their new demands with something more than coercion in order to achieve mass compliance. They needed what we today call legitimacy.

Legitimacy, as one study aptly defines it, “is a quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directives voluntarily,” that is, above and beyond their fear of detection and punishment.⁹⁹ Obviously, some directives are legitimate because they match moral precepts that people would generally obey even if the directive were suddenly repealed, like the taboo against incest. But the legitimacy of many other directives depends on their status as enacted law. An example is the U.S. income tax today. It enjoys legitimacy, in the sense that people comply with it at a substantially higher rate than can be explained by the probability that the government will detect and punish their evasion.¹⁰⁰ But if the tax were repealed, people would not generally continue to pay it. That kind of legitimacy—premised on positive enactment yet not dependent solely on state deterrence—is our particular concern here. Crucially, an imposition can acquire this kind of legitimacy yet still be alien. Such is the case with the income tax. Its rates and base are defined by exact and uniform rules. They do not arise from any organic face-to-face community but from the enactments of a Congress that is far away from the typical taxpayer and well beyond his or her influence or meaningful participation. The tax is administered by a centralized group of strangers who possess the independent capacity and motivation to surveil the population. Yet the tax still enjoys a degree of legitimacy, in the sense of compliance above the level explicable by state deterrence. Alien impositions are illegitimate if they operate solely by fear of punishment but legitimate insofar as they operate by more than that.¹⁰¹

How does an alien imposition attain legitimacy? This is an important question, for the process is critical to state-building, because the state cannot practically rely on coercion as the sole means to vindicate its positivist demands. It cannot put a police officer on every corner.¹⁰² But the question is also a difficult one, for the process depends on numerous factors that are partly contingent on historical and cultural context. Some of the potential sources of legitimacy have to do with the structures of the state itself, including its macrostructures like democratic elections, as well as microstructures, such as how officers treat individual laypersons.¹⁰³ My aim in Part Two is to analyze one particular source of legitimacy in the American story: lawmakers’ decisive turn in favor of “not-for-profit” enforcers. Legislators seeking legitimacy for their unprecedented alien impositions decided, after much experimentation, that bounties were not good

instruments to achieve legitimacy for such impositions, that the rewards might well be sapping legitimacy, and that the state's agents needed to be deprived of any pecuniary benefit from detection and punishment if things were to improve. I do not claim that lawmakers were necessarily correct in their understanding of how bounties affected legitimacy; the correctness of a view like that is probably unknowable. But I do believe their view was plausible.

It was plausible in part because it resonates with two insights of present-day social science. The first of these comes from the psychologists Tom Tyler and Yuen Huo. In a study of American policing and criminal courts (which they argue is applicable to frontline public officers more broadly),¹⁰⁴ Tyler and Huo find that individuals are more likely to comply voluntarily with the law when they have “motive-based trust” in those who enforce it. Motive-based trust is “trust in the benevolence of the motives and intentions of the person with whom one is dealing.”¹⁰⁵ Tyler and Huo distinguish this variety of trust from other kinds, such as confidence that the authorities possess technical competence, that they will make objectively correct decisions, or that each specific action they take will be predictable. Motive-based trust, by contrast, involves the citizen's perception of the enforcer's subjective aim or desire, and especially whether that aim or desire is to do what is best for the citizen, as a trustee would. We have motive-based trust in an enforcer when we expect that the enforcer “will act out of goodwill and do those things that he or she thinks would benefit us”—that enforcers are “motivated by the desire to do what is right for the people with whom they are dealing and whose interests they represent.” “An inference of trustworthiness, in the motive-based sense,” explain Tyler and Huo, “always reflects the belief that a particular authority . . . is not using his or her authority for personal gain.”¹⁰⁶ Tyler and Huo say very little about authorities' monetary compensation.¹⁰⁷ But it is fair to assume that, if citizens are facing alien impositions of uncertain legitimacy, the knowledge that authorities stand to profit personally from punishing noncompliance with those impositions would undermine the citizens' motive-based trust in the authorities.¹⁰⁸ Citizens would therefore be less inclined to comply voluntarily.¹⁰⁹

The second of the two insights comes from the economist Ian Ayres and the sociologist John Braithwaite, in a study of business regulation, primarily in America and Australia. Ayres and Braithwaite start from the notion that every person has “multiple selves.” Laypersons who are subject to regulation, such as corporate executives or other businesspeople, “are not just value maximizers—of profits or of reputation. They are also often concerned to do what is right, to be faithful to their identity as a law abiding citizen, and to sustain a self-concept of social responsibility.”¹¹⁰ Which of the layperson's “selves” comes to the fore

depends in part on the attitude that regulators take. If the regulators are quick to attribute bad conduct to laypeople and to resolve doubts in favor of maximal punishment or the threat of it, this dissipates the layperson's intrinsic motivation to abide by the law for its own sake, and the adversarial attitude elicits an adversarial response, in which the layperson no longer views the enforcers as purveyors of shared norms but simply as opponents to be outwitted and defeated, often through a game of "cat-and-mouse,"¹¹¹ in which the layperson has many informational advantages. For the regulator, the key to greater compliance is not to be adversarial but to nurture the law-abiding and cooperative identities of laypersons, which the regulator can do by starting from a presumption of their good faith, finding bad motives and imposing punishments only in measured fashion, and constantly seeking to return to the cooperative equilibrium.¹¹² This model is applicable to many areas of government beyond business regulation.¹¹³ Though Ayres and Braithwaite say nothing about the compensation of enforcers, it is obvious that bounties—which reward the finding of a violation and the imposition of a punishment for it—would not only push enforcers toward excessively punitive and therefore counterproductive behavior but also send a signal to the population that the officialdom is eager for citizens to violate the law and be punished. This is not a recipe for mass cooperation.

Consistent with these present-day studies, the bounty in the centuries leading up to the 1800s had always been a double-edged sword. It could spur the courageous enforcement of law in the face of community hostility, yet bounty-paid enforcers were usually distrusted, scorned, and despised. Edward Coke encapsulated this tension. On the one hand, he said of informers, "Their office, I confess, is necessary."¹¹⁴ Yet on another occasion he coined the phrase "viperous vermin" to condemn them.¹¹⁵ Bentham, the prince of positivists, recognized the "prejudice which condemns mercenary informers" and deeply regretted the way that it undermined their obvious potential to vindicate positive legislation: the prejudice was "an evil" and "a consequence of the inattention of the public to their true interests, and of the general ignorance in matters of legislation."¹¹⁶ To be sure, some degree of distaste for bounty seekers was inevitable, because the bounty's purpose was so often to effectuate laws that were unpopular to begin with. But the works of Tyler, Huo, Ayres, and Braithwaite suggest that the enforcers' profit-seeking status—by undermining motive-based trust and eliciting an adversarial response—*aggravated* the preexisting legitimacy deficit of alien law. This is consistent with the pervasive social hostility (noted earlier) that greeted professional informers from the 1500s through the 1800s. In her book on English apprenticeship regulation in the period 1563–1642, Margaret Davies briefly but incisively touches on this point: "The informer was not a

good advertisement for his wares; contempt for the individual was transferred to the function.” Thus, “distaste for a principal method of enforcement came to taint the whole concept of regulation by the state.”¹¹⁷ In 1830, Austin, the Boston district attorney, warned that the employment of bounty-seeking informers “brings on the law itself the stigma of a mercenary spirit, discreditable to its character, and, in a free state, unfriendly to its influence.”¹¹⁸

The tension between the bounty’s good tendency (to motivate enforcers) and its bad tendency (to undermine legitimacy) reached a crisis amid the dramatic rise of alien impositions between about the mid-1800s and early 1900s. A short-lived but spectacular example of the tension arose when Congress, as part of the Compromise of 1850, attempted to effectuate the right of Southern masters to take back fugitive slaves in the Northern states. Northern communities were content to let masters own slaves within the South, but they objected to the intrusion of slave catchers in their midst—an objection reflected in Northern state laws that erected various legal obstacles to the fundamentally alien process of slave-catching, including a role for local juries (well known as guarantors of familiar governance). In 1850, however, Congress imposed on the Northern states a new corps of federal fugitive-slave commissioners, aiming to make slave rendition independent of local actors.¹¹⁹ Bounty-seeking formed part of the scheme: the commissioners were to receive double the ordinary fee in cases where they decided that the person in custody was a fugitive.¹²⁰ The extra cash may have encouraged the commissioner to stand up against community hostility. Yet, as so often, it was a double-edged sword, making the commissioner seem more illegitimate and untrustworthy in the eyes of Northerners than he otherwise would have.¹²¹ That illegitimacy was a problem for effective enforcement, for slave catchers needed the cooperation of local deputies,¹²² and they could be deterred by local hostility.¹²³

Though the Civil War mooted the question of how to return fugitive slaves, alien imposition in most areas of life kept growing inexorably. The unprecedented prevalence of such impositions meant that bounties were more important and more salient than ever, yet the threat they inherently posed for legitimacy—combined with the fact that lawmakers’ positivist ambitions made the need for legitimacy more urgent than ever—ultimately led to their demise.

Chapter 5 presents a case study of this dynamic in operation. It focuses on taxation at the state and local level, and particularly on the most important levy at those levels during the nineteenth century: the property tax. In the early 1800s, the administration of this tax was a familiar imposition. In each locality, people’s tax liabilities (for both state and local purposes) were decided by a single assessor who was elected by the locality and served part-time for a small

daily wage. This officer was closely enmeshed in the social and political life of the local community. The people he assessed were his neighbors and his constituents. Assessing them was a matter of face-to-face accommodation and compromise. This consensualist approach to taxation worked fine, because, at the time, the financial needs of states and localities were small, and because most people's property took the form of land and livestock, which was plainly visible to everybody in the community, so there was a focal point to foster agreement about each person's share of the burden. Intangible assets like bank accounts and securities were comparatively rare and much harder for the assessor to find, and a social expectation developed that (practically) they would not be taxed at all.

But starting in the mid-1800s, taxation went from familiar to alien. State legislators and local lawmakers became far more aggressive in their tax demands. They felt the need for much bigger sums of revenue, to pay for new initiatives in sanitation, public health, policing, schooling, and highways. And as agriculture and rural life gave way to industry and cities, intangibles overtook land as the primary form of wealth. Now that intangible property was so prevalent, lawmakers decided they had to tax it. But the new imperative to reach intangibles ran up against the expectation of its owners, built up over the preceding years, that their wealth was protected by a tax-free zone of privacy. Thus, by about the 1860s, lawmakers were demanding more taxes than ever before, and especially from owners who expected that they did not have to pay at all. This was taxation as alien imposition.

These novel attempts at alien imposition initially met such widespread resistance that they were, for their first several years, a dead letter. Lawmakers' campaign to tax intangibles could not get off the ground because they continued to rely on the local assessors, whose offices had been structured to engage in familiar imposition, not the intrusive and feather-ruffling investigations that lawmakers now wanted. Local assessors were accountable to the taxpayers who elected them, through a neighborly hand-shaking politics. Such officers were reluctant to draw the ire of any of their constituents, and so they refused to upset the settled expectation of intangibles owners that their property was tax-free. Thus evasion remained rife.

Bent on making the owners of intangibles pay, lawmakers resorted to bounty-seeking as a promising means. Starting in the 1870s, legislatures in ten states—plus localities (often large cities) in ten others—hired “tax ferrets,” that is, agents with the mission to discover tax liabilities that the ordinary assessors had missed, in exchange for a share of the proceeds. The tax ferrets were generally persons from outside the localities to be investigated, thus replacing familiar

neighborly accommodation with the coldhearted maximization of profit (and revenue). Accordingly, the tax ferrets devised innovative and intrusive methods of surveillance against the owners of intangibles, aggressively searching various sources of personal financial data.

But lawmakers' intense experiment with bounty-seeking ultimately led to their disillusionment with it. They learned from experience that the tax ferrets, in seeking to achieve compliance through coercion and deterrence, in fact yielded at best a modest increase in compliance and perhaps even a reduction. Lawmakers thus came to believe that a sound tax system depended on a high degree of voluntary taxpayer compliance—legitimacy—which the ferrets did not foster and might well undermine. Because the owners of intangible assets could easily conceal or move their property, taxing such property was impossible without a substantial amount of taxpayer goodwill. Starting around 1900, reformers proposed a method for winning that goodwill: to “classify” intangible property as a special category enjoying a lower rate that would “coax” its owners to pay tax on it. In the reformers' view, laypersons were not narrowly selfish tax minimizers but instead had some intrinsic desire to be law-abiding, so long as the law seemed reasonable and worthy of cooperation. By this thinking, bounty-seeking enforcement was counterproductive. It meant that state agents benefited when citizens violated the law and were then forced to comply. This placed state and citizen in an adversarial relation and alienated them from each other, sapping the intrinsic desire of citizens to comply with law for its own sake and undermining their trust in the state. From the 1910s onward, in state after state, lawmakers embraced this program to elicit taxpayer cooperation, rejecting the tax ferrets and classifying intangibles at a lower rate.

Chapter 6 addresses similar themes in a case study of taxation at the federal level, and Chapter 7 does the same for criminal prosecution at both the federal and state levels. Besides elaborating on the problems of motive-based trust and adversarialism initially raised in Chapter 5, Chapters 6 and 7 introduce an additional and related issue: the tension between bounty-seeking and the exercise of enforcement discretion.

Before I summarize Chapters 6 and 7, I must say a word about discretion as a general matter. As noted already, the rise of alien imposition meant that lawmakers subjected people's behavior to ever more specific regulation through more elaborate written rules. One might assume (following Weber) that, concurrent with this trend, official behavior became ever more exact and rule bound.¹²⁴ Ironically, the truth is nearer the opposite: the proliferation of elaborate restrictions on conduct required those who administered such restrictions to exercise ever-greater subjective judgment, discretion, and forbearance in imposing—or,

more accurately, refraining from imposing—the sanctions for such conduct. As early as the seventeenth century, a member of Parliament warned that, if regulatory statutes were enforced “to the utmost, it would be unsufferable.”¹²⁵ Then, as now, no rule could describe with perfect accuracy the conduct that lawmakers intended to proscribe, so lawmakers commonly wrote an overly broad rule whose sharp edges could be “sanded off” through selective nonenforcement.¹²⁶ And even if lawmakers intended a prohibition to be as broad as they wrote it, a good deal of “sanding off” might be necessary as a concession to the brute political preferences of the affected population.¹²⁷ Without these kinds of forbearance, alien governance could become so radically divorced from prevailing moral sentiment or so practically unbearable that it would lose even the grudging cooperation of the populace. (It could also become fiscally burdensome, insofar as the state picked up the costs of enforcement or punishment.)¹²⁸ The exercise of judgment to temper harsh rules took at least two forms: (1) the rules themselves might say that the proscribed conduct was punishable only if the person engaging in it did so with bad intent, so the officials had to make an inherently subjective judgment as to the inner thoughts of the accused; or (2) the rules might contain no intent requirement, so the officials had to exercise “raw” prosecutorial discretion, that is, judge which legally guilty persons did not deserve punishment as a matter of policy and morals, irrespective of the letter of the law.¹²⁹ In either case, bounty-seeking rendered it very difficult for enforcers to make subjective judgments in a sound way. The profit motive pushed them, consciously or not, to resolve doubt in favor of punishment.¹³⁰ Bounties’ tendency toward untempered enforcement—plus their apparent potential to vitiate motive-based trust and to elicit adversarial responses—made them dangerous to legitimacy. Weber viewed rule-boundedness and salarization as twin pillars of modern government, but it would be more accurate to say that salarization fostered the necessary softening of rule-boundedness that has made it bearable.¹³¹

Chapter 6 explores the subject of bounties—with emphasis on the problems of discretion and subjective judgment just discussed—through a case study of federal taxation, particularly the most important federal tax of the nineteenth century: the customs duty. Customs officers were entitled to a share (moiety) of all goods that were forfeited for intentional evasion. The 1860s and 1870s saw an unprecedented spike in forfeitures and moieties, and there was a sudden flood of complaints that these incentives were pushing officers to construe every mistaken underpayment as intentional, thereby putting officers and merchants in an adversarial posture toward each other and destroying the trust and confidence between them. At first glance, the timing of these events presents a

puzzle, for customs officers had been eligible for moieties since colonial times. Why did persistent problems arise only in the 1860s and 1870s?

The reason is that moieties' effect depended on the larger governance structure of which they were a part, and that structure changed over time. Recall (as noted earlier) that customhouse moieties for most of their history had been a feeble counterweight to a regime of imposition that was familiar, not alien. During the eighteenth century and into the early nineteenth, the typical customs officer was appointed from the ranks of local notables who lived at the port and had strong social connections to the port's merchants—ties the officer was not about to jeopardize to earn a quick buck. Furthermore, customs law itself was not at all harsh: rates of duty were generally low, the legal formula for calculating a forfeiture was forgiving toward the merchant, and the officers had almost no legal power to force the merchants to cough up the kind of information that would help build a case. Under these conditions, officers administered the law in a mild and indulgent manner, and merchants, thinking the government's demands were reasonable, complied willingly, if loosely.

But then, between the 1820s and 1860s, familiar imposition gave way to alien imposition. The rise of nationally organized political parties in the 1820s and 1830s meant that customs officers came to be appointed not from the social network of the port but from the ranks of the party machine, thereby weakening the social ties between merchants and officers that had constrained bounty-seeking. Then, in the 1860s, Congress acquired a ferocious new appetite for high tariffs (these were initially to meet the Civil War emergency, but the ascendancy of protectionist Republicans ensured that rates would remain high even when peace returned). To make the high rates stick, congressmen imposed more draconian forfeiture rules and empowered customs officers to search merchants' books and papers, thus opening up vast new stores of information in which to find accusatory evidence. As the government made unprecedented pecuniary demands on the merchants and peered more intrusively into their affairs, it enthusiastically embraced bounties as a promising means to ensure that the new demands would be met and the new powers exploited to their potential. Thus, Congress in 1867 reaffirmed and expanded the moiety incentive system, and in 1869 the Treasury Department began hiring full-time customs detectives, nicknamed "moiety men." The bounty was no longer a feeble counterweight to a regime of familiar governance. It had instead become the motivational engine for a new regime of alien governance.

Integrated into this more modern regime, the bounty proved terrifyingly effective at motivating enforcement. Seeking profit, officers went after the

merchants as never before, pressing them to agree to harsh settlements, quite often in cases in which the underpayments turned out to be innocent mistakes.

As these results became clear in the early 1870s, congressmen concluded that they had created a monster. The bounty had come to seem dangerous not just to the merchants but also to the workability of modern government. Congressmen very much wanted to maintain the protective tariff, and they knew that high rates, serious punishments, and intrusive surveillance would be necessary to do that. Yet Congress feared that, if officers continued to operate the ambitious new revenue system in such an adversarial and narrowly self-interested manner, they would make it impossible for the merchants to maintain trust and confidence in the government. The merchants' trust and confidence, as congressmen came to believe, were necessary for the system to work. There were too many imports and not enough officers for the government to rely on coercion alone. Mass compliance required the merchants' voluntary cooperation and goodwill. To foster that, congressmen in 1874 abolished moieties, believing that nonprofit officers would be more likely to exercise forbearance in making the delicate, subjective judgment of whether an underpayment was an innocent mistake or a fraud. By making such judgments with care and good faith, officers would be more likely to elicit the trust of the merchants, and the government would have the benefit of a more cooperative taxpaying population. In other words, it would acquire legitimacy.

Chapter 7 is a case study of bounties for another important class of officers: public prosecutors, at the federal and state levels. When these officers first emerged at the state level in the late 1700s and early 1800s, they inhabited a regime of familiar imposition. Typically, they received a fee for every case they brought to trial, regardless of whether the defendant was convicted or not. Laypersons would come forward claiming to be victims of crime, and the district attorney maximized his fees by bringing all their accusations to trial without much scrutiny, essentially holding the courthouse door open for them and allowing them to tell their stories to the jury. This arrangement motivated the public prosecutor to impose *some* hardship on defendants, in that he forced them to go through the hassle of a trial, but he had no incentive to convict them. Defendants experienced prosecutions not as governmental attacks but as complaints of fellow laypersons in their neighborhood (whom they could prosecute right back, if they wished). This effectively allowed the lay inhabitants of a neighborhood to control the machinery of criminal justice and collectively define "crime" for themselves. It was familiar imposition.

But then, in the decades leading up to the 1860s, more than half the states changed public prosecutors' fees so that they were available only if the officer

won a conviction (or were much higher if he won a conviction). Instead of holding open the courthouse door for anybody who wanted to accuse, the district attorney now had an incentive to scrutinize private accusations, concentrate his efforts on cases that he judged to be winners, and shut the door to the accusers whose cases looked like losers. And once the officer picked a case as a winner, he had the incentive to win it—to get the defendant convicted and punished. Thus, the conviction fee was a bounty. The district attorney was no longer a conduit for the aggregate complaints of the community, but a proactive gatekeeper. Defendants experienced prosecution not as a neighbor-to-neighbor dispute but as an intervention by a more independent and external force—alien imposition. In addition to this, legislatures by the 1860s moved toward alien imposition in another way: they enacted more aggressive laws criminalizing victimless conduct and pushing against the norms and expectations of certain communities, especially stricter laws about liquor, gambling, taxes, concealed weapons, and business regulation. To punish these victimless *malum prohibitum* crimes, legislatures had to rely on public officers, and they often granted public prosecutors the very highest fees for winning such convictions.

To illustrate how lawmakers initially put their faith in bounties but ultimately became disillusioned with them, the chapter culminates with a case study of federal prosecutors. Like many states, the federal government in the 1850s began offering conviction fees. Commentators considered the rewards especially promising as motivators for the enforcement of *federal* criminal law, which was almost always alien, cutting against local communities' norms and wishes. This federal-local tension was most intense in the case of the new excise tax of the 1860s that imposed draconian anti-evasion regulations on the folk practice of making and selling whisky in the South and West. Yet after a few decades of experience under this regime, Congress concluded that it was backfiring and converted the U.S. attorneys to salaries in 1896, much as legislators did with the tax ferrets and the moiety men. Conviction fees, concluded congressmen, pushed prosecutors to focus too much on piling up convictions for extremely minor and technical offenses, since the perpetrators were easy to round up and convict, given the overly broad nature of the law. The defendants were guilty, yes, but usually of violations so picayune that punishing them only increased local contempt for federal law. As statutes got harsher, they had to be tempered with a less adversarial mode of enforcement, including a good deal of discretionary nonenforcement. So long as people who lived in “moonshine country” could cynically attribute all enforcement to the narrow self-interest of the officers, it would not be possible for federal law to achieve legitimacy, for the officialdom to win the trust of the population, or for community sentiment

to develop in favor of voluntary cooperation. For these things to happen, bounties had to go.

The tension between bounties and enforcement discretion ranged well beyond the tax investigators and public prosecutors discussed in Chapters 6 and 7. For example, in far-flung states, one finds complaints about the unwarranted pursuit of “trivial” or “technical” offenses by police and other law enforcement officers who made (or approved) arrests and received fees for doing so.¹³² In that vein, let me here briefly discuss a variation on the theme of Chapters 6 and 7, using as an example the abolition of arrest fees in Birmingham, Alabama, which occurred in 1919, as explained in Carl V. Harris’s insightful history of the city. This story is of interest because of the radical alienation between the white power holders and the black labor force in the Jim Crow South. Under such a regime, it would be impossible for the state to get black workers to “trust” its motives, or to convince them of its legitimacy, in Tyler and Huo’s sense. Yet even so, Birmingham’s power holders sought to reform the incentives and actions of their agents in the hope of inducing compliance that was voluntary in a weaker sense. The aim of Birmingham’s businessmen was to ensure that African Americans lived in the area and provided labor. To this end, businessmen pressed for enforcement of the vagrancy statute, but the typical deputy instead focused his attention on *employed* African Americans, who congregated near the industrial sites where they worked, hoping to catch them in “trivial” or “petty” offenses—often customary but illegal acts like crap-shooting. Focusing on work sites made it possible to arrest several men (and accrue several bounties) in one trip, and it meant that the bounties would be paid instantly by the employer, so the officer did not have to wait for the arrested man to earn cash through convict labor. This maximized income for the officers, but it caused free black workers to leave Birmingham in search of locales where they could avoid fee-driven arrests, and it lowered the morale of workers who stayed. To make officers forbear in their policing of employed African Americans, the business community mounted a successful campaign to replace officers’ fees with salaries. The purpose of salarization was to provide these employees with assurances against at least some forms of state molestation, in hope of inducing them to stay in the area.¹³³ While the Jim Crow state would never win the motive-based trust of its black inhabitants, it could at least temper its adversarialism so as to appeal to them at the level of expediency—“stay and work, you won’t be harassed.”¹³⁴ Implicit in this appeal was a grudging recognition of the autonomy of the black population: despite employers’ vocal support for vagrancy enforcement, they knew such coercion was useless against African

Americans who departed the city altogether, so they banished the profit motive to make governance bearable enough that more (so they hoped) would stay.

Thus far, my discussion of bounties has focused on their power to incentivize the aggressive enforcement of alien laws and their consequent tendency to promote adversarialism between officialdom and population. Under certain circumstances, however, it was possible for bounties to have the opposite effect, that is, to promote cooperation between officers and the affected population, but in a perverse way that turned the intent of the legislature on its head.¹³⁵ The pattern went like this: in a community where violations of law were rife, an enforcer would periodically round up small-time violators to win bounties, but he would not dare take action that would permanently suppress violations (for example, by prosecuting ringleaders instead of small fry), since the pervasiveness of violations was a steady source of income for him. This pattern could be the result of explicit collusion between enforcers and violators, or it might be a tacit understanding. When perverse cooperation arose in bounty schemes, it provided yet another argument in favor of salaries, since such cooperation obviously went against any plausible public-regarding legislative purpose, and it did nothing to legitimate alien governance, which the affected population came to view merely as a racket.

Such perversions became more likely when (1) the punishment was mild, or could be rendered mild with the enforcer's help; (2) the amount of the bounty stayed flat as the severity of the violation increased, so that enforcers, to maximize their profits, wanted violations to be numerous; and (3) the enforcer was elected by a polity that included prospective violators or their sympathizers, thus giving him an incentive to figure out a way to make money from bounties without alienating that section of the electorate. There is very little evidence of such perversities in the cases of tax ferrets and moiety men, likely because, in those cases, punishments and rewards rose with the size of the evasion (at least roughly), and the enforcers were not elected. There is more evidence of such perversities among some U.S. attorneys and state-level district attorneys (as Chapter 7 discusses), likely because punishments were light, rewards consisted of flat fees, and the enforcers (at the state level) were elected. Conversely, it seems likely that bounties drove Birmingham deputies toward true adversarialism in part because their African American targets were disenfranchised, just as other bounty-seeking enforcers notoriously selected nonvoting immigrants as their prey.¹³⁶

The essential pattern that we observe in Chapters 5, 6, and 7—that lawmakers strove for alien imposition, experimented intensely with the bounty, and then

were disillusioned by experience—also obtained in the realm of incarceration, as Chapter 8 documents. The principal eighteenth-century carceral institution was the local jail. Typically, jail time was not itself a punishment, for the jail was a holding area for people awaiting trial or corporal punishment, or unable to pay debts. Confinement in this holding area was familiar imposition, for the jail was remarkably open to the surrounding community and to inmate preferences. The inmates effectively governed the place, asserted customary rights, and took advantage of a free flow of resources from persons on the outside. In keeping with this, the jailor routinely sold inmates a variety of privileges (e.g., nicer beds, glasses of beer) in exchange for facilitative payments. But around the turn of the nineteenth century, American states undertook a major experiment in alien imposition: they imposed confinement itself as a punishment, for long terms at hard labor, aiming to reform the convicts. The managers of the new “penitentiaries” were not to cater to inmates’ wishes but instead force them to work. Hence lawmakers banned facilitative payments and adopted various combinations of salaries and bounties, often salarizing the warden and guards while inviting contractors inside the prison walls to extract the inmates’ labor, sell what they produced, and take the profit. This mixed regime of salaries and bounties had become well established by the 1850s, and its operation was fairly stable.

But in the 1870s, state governments—swayed by the promise of for-profit contractors to keep inmates disciplined and productive—hired bigger contractors and gave them more complete power over the management of the penitentiary, including corporal punishment. It was now the profit-seeking extractors of labor, not the salaried warden and guards, who controlled inmates’ lives. Given this extreme convergence of power and profit motive, the penitentiary became a kind of dystopia in which the contractor relied almost exclusively on naked threats of physical pain to squeeze the last ounce of labor from inmates. This was alien imposition of the most extreme and adversarial kind, virtually denying the humanity of the governed. In reaction to this, inmates rioted in unprecedented numbers. The riots contributed powerfully to legislative decisions starting in the 1880s to expel the contractors from the prisons and rely solely on salaried staff. Lawmakers and officials came to realize they could not maintain order within the prisons through simple coercion and fear but instead needed to adopt less adversarial methods that would elicit inmate cooperation. Thus, the “managerial penology” of the early twentieth century would seek to accommodate and win over the inmate population through recreational activities, “good time” credits, and the like. Even in prison, power needed legitimacy and voluntary cooperation, which required banishing the profit motive.

Finally, in Chapter 9, we close Part Two with a discussion of alien imposition, bounty-seeking, and legitimacy in the context of naval warfare. To see the commonality between the navy's story and those of the preceding case studies of bounties, we must appreciate a peculiar aspect of military power in American political culture. From the revolutionary period through most of the nineteenth century, Americans were terrified of alien imposition by the military—not only foreign militaries but also their own military. They therefore emphatically rejected the buildup of a European-style permanent military establishment, fearing that such an institution would be fatal to their republican ideal of self-government by local communities. A permanent military establishment would demand high taxes by the most distant level of government; raise up a quasi-aristocratic officer class alienated from civil society; and subject the American people to the alliances and rivalries of the European powers, thus dragging them into frequent and costly wars. To avoid these horrors, Americans kept their permanent army and navy small. Still, within its confined institutional space, it was fine for the U.S. Navy to imitate the other navies of the world. Thus, the U.S. Navy—following the universal practice of its bigger European counterparts—motivated its officers and seamen by offering a percentage of the value of merchant ships they captured (prize money), plus rewards for every sailor on board an enemy warship they sank (head money, nicknamed “blood money”). In the nation's infrequent naval conflicts—the War of 1812 and the Civil War—naval personnel won very large sums. But the navy remained very small in peacetime (after the Civil War, it shrank dramatically), so nobody thought much of it. Congressmen in the Civil War era were well aware of prize money and head money and generally considered them just rewards for fine patriotic work.

Yet in 1899, immediately after the navy's signal victory in the Spanish-American War, Congress suddenly and unanimously abolished prize money and head money. So far as U.S. lawmakers knew, their country was the first in the world to do so. (The British—the world's experts at naval war—reaffirmed naval profit-seeking in 1900 and abolished it only gradually between the 1910s and 1940s.) Congressmen in 1899 were responding to a sudden wave of popular American revulsion against naval profit-seeking. This wave arose because the victory against Spain had given the United States an overseas empire that everybody realized would require a huge permanent navy to maintain. This was an exciting change, but a wrenching and alarming one, for it portended the dangers of a permanent military establishment. To allay these anxieties and legitimate the new imperial navy—both for the public and for themselves—the hawks focused on the purity of the navy's motives. They trumpeted the

humanitarian justification for the war with Spain (to save Cuba from oppression) and cast the navy as an instrument of selfless humanitarianism and civilization. In this quest to build up the mass public's trust in an alien institution, naval profit-seeking was a major embarrassment, and it had to go. Nonprofit status meant that newly empowered naval personnel would have no monetary incentive to start wars, and it also fit with a simultaneous U.S. initiative to immunize civilian ships from capture on the high seas, thereby promising an apprehensive public that war would become less destructive even as the United States became a more engaged global actor. Lawmakers thus invoked official selflessness as a means to win trust for the officialdom and legitimate its unprecedented power.