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# EUGENIC CRIMINOLOGY AND THE BIRTH OF PREDICTIVE ALGORITHMS IN CRIMINAL JUSTICE

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*This Article tells the story of the birth of predictive algorithms in criminal justice. Known as risk assessments, these tools are widely used today to make decisions about bail, sentencing, and parole. Their roots trace back to the 1920s, when statistical prediction tools were first proposed for use in criminal justice decision-making. In this Article, we show that risk assessment found its origins in the ideas of eugenic criminology: namely, that crime is mostly caused by an inferior subclass of humanity, tainted from birth. Risk assessment was conceptualized as a way of sorting between the “normals” who were amenable to reform and the “sub-normals” who, due to their inferior genes, were not. Such “born criminals” were seen as requiring indefinite confinement within isolated penal colonies in order to protect society from crime, prevent procreation, and provide care for those in need of paternalistic guidance.*

*We tell this story in part because it is a fascinating piece of history, marked by bigotry, bravado, and an almost fanatical optimism about mankind’s ability to engineer a perfect society. But we also tell it because the ideas and practices of eugenic criminology are not widely known. While “tainted origins” do not automatically condemn the ongoing use of risk assessment, understanding history can help identify ways that the past lives on in the present.*

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## I. INTRODUCTION

A computer-generated risk assessment algorithm declares that you are at a “high risk of new criminal activity.” What does that mean? One could provide a statistical answer to that question. For example, “high risk” could correspond to a 45% chance of being arrested for a new crime within a year. But what does that *mean*? Does that mean that you have some character trait which yields a 45% yearly rearrest rate? Or that if Myers-Briggs added a new dimension to their personality test—a crime dimension—you would be a “high crime” type? Perhaps even a “born criminal,” to use the old-fashioned phrase?

Or does “high risk of new criminal activity” say something about your situation? If you starve a person and leave them alone with a sandwich that does not belong to them, that person might be at “high risk” of sandwich theft. But that is a question of context, more than personality.

This may sound like abstract philosophizing. But one’s beliefs about the just and sensible way to respond to crime risk depends in part on how that risk is conceptualized. Incarcerating a person in an unfortunate situation is different from incarcerating a “born criminal,” even if both conceptualizations correspond with the same statistical likelihood of crime. For one, risk that arises from environmental context might be better addressed by changes to the environment. No one would suggest incarceration as the solution to the sandwich example above: just feed the person or at least get rid of the temptation.<sup>1</sup> For two, incarcerating someone on the basis of speculative future behavior is fraught. It may be more palatable if the person is thought to be inherently bad or defective as opposed to being a good person in a bad situation.

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1. We choose a very stylized example in which the source of crime risk is clearly situational to drive home the point that incarceration is not the natural answer to crime that stems from the socioeconomic context. *See, e.g., infra* notes 346–47 and accompanying text. A more real-life example, where crime risk stems from poverty and disadvantage, could be influenced by stereotypes about poor people being somehow to blame for their own situation. *See, e.g., infra* notes 139–40 and accompanying text.

This Article is about the birth of statistical crime prediction algorithms in the 1920s through the 1950s. It argues that these algorithms have their roots in the ideas and institutions of eugenic criminology. Put in simple terms, eugenic criminology is a bad apple theory of crime. It attributes crime to the inherent defects of certain subclasses of humanity, and downplays the role of social, economic, or contextual forces.<sup>2</sup> These beliefs about crime causation propelled a shift in criminal legal practice to focus more on preventive confinement, *i.e.*, locking people up before they could commit crime.<sup>3</sup> Preventive confinement also prevented procreation, making it an alternative to sterilization.<sup>4</sup>

When statistical risk assessment was first proposed in the 1920s, it was for purposes of determining parole in an indeterminate sentencing regime.<sup>5</sup> Criminal sentencing during that era gave wide latitude to parole boards to determine the effective length of the sentence.<sup>6</sup> Factors such as the severity of the offense or the mens rea of the defendant had little to do with the length of incarceration.<sup>7</sup> Rather, it was determined by an evaluation of the person's criminal "type" and whether they had been reformed.<sup>8</sup> The "normals" who committed crime in a moment of weakness were considered amenable to reform and often would be released after only a short stay.<sup>9</sup> Others, however, were deemed beyond reform due to inherent defect or degeneracy.<sup>10</sup> These individuals would face the maximum punishment allowed by law, which could be decades even if their original crime was minor.<sup>11</sup> Risk assessment was seen as a way of ranking people along the spectrum between normals and incorrigibles, thereby aiding the parole board in determining release.<sup>12</sup>

Our story begins in Part II by laying the conceptual and institutional foundations from which risk assessment grew. Section II.A provides a brief history of eugenic criminology, using three threads within that history to convey its basic tenets: institutes for the feeble-minded, the Italian positivists, and the multifactor approach to crime. Section II.B presents a history of indeterminate sentencing

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2. NICOLE HAHN RAFTER, *CREATING BORN CRIMINALS* 6 (1997) [hereinafter RAFTER, *CREATING BORN CRIMINALS*] ("Because second-stage versions of born-criminal theories all built to some degree on eugenics principles, it seems useful to group them under the general heading of *eugenic criminology*.").

3. See *infra* Section II.B.

4. See *infra* notes 234–41 and accompanying text; Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 *DUKE L.J.* 417, 438 (2018).

5. See Ernest W. Burgess, *Part IV: Factors Determining Success or Failure on Parole*, in ANDREW A. BRUCE, ERNEST W. BURGESS & ALBERT J. HARNO, *THE WORKINGS OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS: A REPORT TO THE HONORABLE HINTON G. CLABAUGH* 205, 246–49 (1928) [hereinafter Burgess, *Part IV: Factors*]

6. John Landesco, *Part III: Parole and Rehabilitation of the Criminal*, in ANDREW A. BRUCE, ERNEST W. BURGESS & ALBERT J. HARNO, *THE WORKINGS OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS: A REPORT TO THE HONORABLE HINTON G. CLABAUGH* 121, 123 (1928).

7. See, e.g., Burgess, *Part IV: Factors*, *supra* note 5, at 221.

8. See *infra* Section II.B.

9. See *infra* Section II.B.

10. See *infra* Section II.B.

11. See *infra* Section II.B.

12. See *infra* Section II.B.

and parole, showing how the ideas of eugenic criminology influence sentencing practices. Section II.C describes how a large part of early mathematical statistics was developed in pursuit of eugenic goals. These three factors set the stage for the emergence of statistical risk assessment.<sup>13</sup> Eugenic criminology informed how people understood crime, indeterminate sentencing was seen as the way to prevent it, and statistics became the way to implement indeterminate sentencing.<sup>14</sup>

We then move on to discuss the emergence of statistical risk assessment in the 1920s and its early stages of development in the 1930s–1950s.<sup>15</sup> To a modern reader of early risk assessment studies, the influence of eugenic criminology may not be immediately obvious.<sup>16</sup> For the most part, early writing on risk assessment did not explicitly declare that the tools were to be used to distinguish between born criminals and normals so that the former could be quasi-permanently segregated from society.<sup>17</sup> We seek to demonstrate the influence of eugenic criminology in more indirect ways, through the language and ideas referenced in risk assessment writing, the function it was supposed to accomplish, and the beliefs of its progenitors. The ideas of eugenic criminology formed a shared space of social meaning, a set of background assumptions about the causes of crime, the goals of indeterminate sentencing, and the purpose of statistics.<sup>18</sup> That shared space of meaning made the deployment of statistical risk assessment seem like a natural progression of technology and society.

We discuss the emergence of risk assessment in Part III. Early risk assessment research formed two distinct camps, one of which consisted of the husband-and-wife team of Eleanor and Sheldon Glueck and their lab at Harvard.<sup>19</sup> Of all risk assessment pioneers, the Gluecks were perhaps the most explicit in endorsing the ideas of eugenic criminology.<sup>20</sup> They believed that some people were born with criminal tendencies that could be observed both in their personality traits and their physical types.<sup>21</sup> If such persons made it to adulthood without proper adult guidance, they were generally irredeemable.<sup>22</sup> The Gluecks advocated for the use of tribunals that could identify such individuals and incarcerate them for life, a process that they believed should be outside of the slow-moving and cumbersome constraints of the criminal proceeding.<sup>23</sup> If such proto-criminals were identified at an early enough age, however, the Gluecks believed that

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13. See discussion *infra* Part II.

14. See discussion *infra* Part II; Burgess, *Part IV: Factors*, *supra* note 5, at 205–14.

15. See discussion *infra* Part III.

16. See, e.g., *infra* note 329 and accompanying text.

17. See *infra* notes 46–52 and accompanying text.

18. See *infra* Part III.

19. See *infra* Section III.A.

20. See *infra* Section III.A.

21. See *infra* notes 390–396 and accompanying text.

22. See *infra* notes 393–94 and accompanying text.

23. See *infra* notes 362–67 and accompanying text.

state intervention could provide the guidance and discipline necessary to steer them from a life of crime.<sup>24</sup>

The second camp consisted of Ernest Burgess and his graduate students at the University of Chicago, where they formed part of the renowned Chicago School of Sociology.<sup>25</sup> While this school was known for emphasizing social and environmental causes of crime—seemingly at odds with biological determinism—their approach did not actually reject eugenic thinking.<sup>26</sup> Instead, their sociological theories worked alongside beliefs about innate human defects, giving eugenic ideas a more modern spin.<sup>27</sup> This influence was clearly apparent in Burgess’s risk assessment tool, which incorporated eugenic criminology’s concepts and language.<sup>28</sup> Burgess’s risk assessment was the first to be adopted as an aid to the parole decision, and it was used in Illinois for decades.<sup>29</sup>

We tell this story partly because of the complexity of the characters and ideas: at once vividly idealistic and abhorrently bigoted. But, most importantly, we tell it because we believe the nefarious origins of risk assessments provide greater insight into current debates about the morality and relevance of their use today. Statistical crime prediction tools—also known as predictive algorithms or risk assessments—are now widespread throughout criminal justice.<sup>30</sup> They are used in many states and at many stages of the criminal proceeding.<sup>31</sup> Though today’s methods are more sophisticated than their early counterparts, they retain the same basic framework: analyzing big data sets to predict future criminal behavior based on demographics, personality traits, socioeconomic factors, and criminal records.<sup>32</sup> Judges then consult the risk assessment when making decisions about bail, sentencing, parole, probation conditions, and prisoner placement.<sup>33</sup> Those rated by the algorithm as high risk of committing new crime are incarcerated as a way of preventing this future crime.<sup>34</sup>

When the incarceration decision is made at least in part on inference about future behavior, as in the case of risk assessment use, this poses serious challenges to civil liberties. In a legal system that emphasizes the presumption of

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24. See *infra* note 395–96 and accompanying text.

25. See *infra* Section III.B.

26. See *infra* note 456 and accompanying text.

27. See *infra* note 456 and accompanying text.

28. See *infra* notes 481–84.

29. See *infra* notes 494–95.

30. See *infra* notes 567–71 and accompanying text.

31. See *infra* notes 567–73 and accompanying text.

32. See Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 509–16 (2018) (providing an overview of risk assessment tools).

33. *Id.* at 515.

34. A number of recent studies have shown that risk assessments should not be thought of as neutral, scientific objects. Rather they are cultural artifacts that embed societal biases and subjective norms. See, e.g., Ngozi Okidegbe, *Discredited Data*, 107 CORN. L. REV. 2007, 2010–11 (2022); Sean Allen Hill II, *Bail Reform & the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 912 (2021); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 63–64 (2017); Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 64 (2018).

innocence,<sup>35</sup> incarcerating someone on the basis of something they have not done yet is unsettling and infringes on our personal freedom. Yet this practice is widespread. Pretrial detention—which constitutes roughly 20% of the total incarcerated population<sup>36</sup>—is considered legally justified based on preventive rationales.<sup>37</sup> Prevention also plays an important role in sentencing, parole, juvenile justice, and civil commitment.<sup>38</sup>

Statistical risk assessment was originally developed as a tool to achieve a dream society of racial purity, free from crime and disease. Nevertheless, it should not automatically be condemned just because it has unsavory origins.<sup>39</sup> Nor does it necessarily pose more problems than crime prediction based on the judges' intuitions alone. But it is worth considering whether our practice of labeling people "high risk," disproportionately classifying groups historically considered "racially inferior" within this category, and detaining them for crimes they have not yet committed echoes a reinvention of the born-criminal framework. Does eugenic criminology live on in modern, sanitized language and practices?<sup>40</sup> Given the scale of preventive confinement and the deplorable conditions in which people are confined, we see important parallels between history and the uncomfortable present.

The research for this Article is based on a close reading of both primary and secondary sources. Risk assessment's progenitors have not yet been the subject of focused biographical research. The closest related history is the first part of Bernard Harcourt's seminal book, *Against Prediction*.<sup>41</sup> Harcourt provides an

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35. Hill, *supra* note 34, at 939.

36. ZHEN ZENG, BUREAU OF JUST. STAT., NCJ 307086, JAIL INMATES IN 2022—STATISTICAL TABLES 1, 3 (2023), <https://bjs.ojp.gov/document/ji22st.pdf> [<https://perma.cc/S4RP-H5X7>]; E. ANN CARSON & RICH KLUCKOW, BUREAU OF JUST. STAT., NCJ 307149, PRISONERS IN 2022 - STATISTICAL TABLES 1 (2023), <https://bjs.ojp.gov/document/p22st.pdf> [<https://perma.cc/HW55-H6GZ>] (table used to make calculation).

37. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 718–27 (2022) (describing the legal principles evoked to justify pretrial detention and other forms of preventive confinement as a consequentialist balancing between costs of lost liberty and benefits of averted crime).

38. Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1278–81 (1973) (describing various types of preventive confinement).

39. Despite its eugenic origins, risk assessment certainly could be used in a manner that is much less resonant with eugenic criminology: to provide supportive services, for instance. Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2286 (2019) (arguing that concerns about bias with risk assessment would be minimized if the tools were used for supportive services). Conversely, one could replace statistical risk assessment with judges' subjective evaluation of risk and still see the same eugenic logic at play. Our concern is not with the tool in the abstract, but on how a particular conceptualization of crime and human nature may inform its use and relationship between the criminal legal system and contemporary structural inequities.

40. Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135, 2138 (2006) (arguing that incapacitation theory rests on a set of beliefs that trace back to Cesare Lombroso, namely that "crimes are committed by a distinguishable group of persons with a proclivity toward law-breaking and that crime control policies should seek to isolate and repress these dangerous classes").

41. BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 2–3 (2006) [hereinafter HARCOURT, *AGAINST PREDICTION*] (arguing that prediction tools in criminal justice entrench inequality and may not improve public safety).

overview of the history of risk assessment, which introduces many of the characters we focus on in this Article.<sup>42</sup> Yet Harcourt's book does not cover the conceptual origins of risk assessment beyond describing how it arose from a turn towards individualization in punishment.<sup>43</sup> It focuses more on breadth, covering risk assessment use from the 1920s through the twenty-first century.<sup>44</sup> Our article contributes by providing an in-depth portrait of the ideas, institutions, and characters that formed the origins of risk assessment.<sup>45</sup>

## II. CONCEPTUAL AND INSTITUTIONAL FOUNDATIONS

This Part describes the conceptual and institutional foundations behind risk assessment's birth. It starts with an overview of eugenic criminology, then shows how the ideas of eugenic criminology influenced the development of indeterminate sentencing. It discusses the various classification systems that formed as a conceptual precursor to risk assessment and then shows how deeply connected early mathematical statistics was to eugenics.

The goal of this Part is to lay the groundwork for the birth of statistical crime prediction tools in the 1920s. The ideas of eugenic criminology influenced how crime and its causes were perceived.<sup>46</sup> These ideas helped frame indeterminate sentencing as a way of sorting between the "normals" who could be released and the "sub-normals" who required indefinite confinement.<sup>47</sup> Statistical risk assessment emerged to serve this function.<sup>48</sup> Understanding the birth of risk assessment therefore requires understanding the nexus of eugenic criminology, indeterminate sentencing, and early mathematical statistics.

The historical information provided in this Part is not the primary contribution of this article, but the story it tells is not widely known.<sup>49</sup> Historical narratives of eugenics have underplayed the extent to which incarceration was used as

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42. Harcourt's early history mostly focuses on various methodological approaches. In this, he closely followed the framework presented in several earlier histories of risk assessment. *See, e.g.*, Robert M. Allen, *A Review of Parole Prediction Literature*, 32 J. CRIM. L. & CRIMINOLOGY 548, 554 (1942); Karl F. Schuessler, *Parole Prediction: Its History and Status*, 45 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 425, 430 (1954–1955).

43. HARCOURT, *AGAINST PREDICTION*, *supra* note 41, at 41–43 (describing the turn towards individualized punishment).

44. *Id.* at 37.

45. Two other related studies bear mention. BENJAMIN WIGGINS, *CALCULATING RACE: RACIAL DISCRIMINATION IN RISK ASSESSMENT* 8, 33–34, 77 (2020) [hereinafter WIGGINS, *CALCULATING RACE*] (showing how racial classification was essential to risk assessment in criminal justice, life insurance and housing policy); Morgan Jane Shahan, *Getting Out: Parole Politics and Risk Assessment before the Carceral State, 1895–1939*, at 14 (Aug. 2020) (Ph.D. dissertation, Johns Hopkins University) (JScholarship) (providing a history of parole and risk assessments in Progressive Era Chicago).

46. *See infra* Section II.A.

47. HASTINGS H. HART, *THE EXTINCTION OF THE DEFECTIVE DELINQUENT: A WORKING PROGRAM* 4–5 (1913) [hereinafter HART, *DEFECTIVE DELINQUENT*].

48. *Id.* at 4.

49. The primary scholar of late nineteenth and early twentieth century criminology is Nicole Rafter, whose work remains somewhat obscure. *See, e.g.*, Nicole Hahn Rafter, *Criminal Anthropology in the United States*, 30 CRIMINOLOGY 525, 526 (1992) [hereinafter Rafter, *Criminal Anthropology*].

a reproductive tool, not just as a site for forced and coerced sterilization, but also as a mechanical way of preventing men and women from having sex.<sup>50</sup> Similar omissions have distorted the historical narrative of Progressive Era criminal legal reform. Many accounts often highlight liberal aspects of the era, such as the focus on rehabilitation, the use of probation as an alternative to prison, and the move towards professionalization and expertise.<sup>51</sup> These accounts downplay its repressive and authoritarian side, particularly the widely shared belief that large swaths of the population should be isolated in gender-segregated penal colonies.<sup>52</sup> There are some notable exceptions. For instance, Michael Willrich has documented the influence of eugenics on Progressive Era criminal justice reforms in Chicago.<sup>53</sup> Jonathan Simon, Laura Appleman, and others have written about how biological theories of crime live on in modern criminal justice practices.<sup>54</sup> But there is still substantial work to be done in understanding how eugenic criminology helped form the criminal legal system we have today.

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50. See, e.g., DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 108 (1985) (mentioning incarceration only as a site where sterilization occurred); WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* (2001) (a word search of this book reveals incarceration mentioned 4 times, as compared to 133 times for sterilization); PHILIPPA LEVINE, *EUGENICS: A VERY SHORT INTRODUCTION* (2017) (no mention of incarceration in the index).

51. We provided the AI Claude the following prompt—"Can you tell me about criminal justice in the Progressive Era?"—as a way of summarizing information on this topic available on the Internet. The key reforms highlighted were: 1) an approach to prison reform that emphasizes rehabilitation, education, job training, and improved conditions; 2) the establishment of a juvenile justice system and separate facilities for juveniles, emphasizing reform over punishment; 3) the professionalization of law enforcement; and 4) the introduction of probation, parole, public defender offices, reforms to reduce corruption and greater emphasis on defendants' rights. The only negatives mentioned were that reforms often reflected racial and class biases of the era, benefits weren't equally distributed across social groups, some reforms had unintended negative consequences, and many changes were implemented unevenly across different regions. Claude, ANTHROPIC, <https://www.anthropic.com/claude> [<https://perma.cc/LAD6-6LL3>] (last visited Dec. 14, 2025) (on file with author). For more formal citations, see, for example, Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 719 (2020) ("The Progressive Era reformers introduced the notion promoted by current progressive prosecutors that crime is a social phenomenon, which community services are better equipped to address than prisons. The Progressive Era movement also sought to implement professional norms and practices to promote the values of fairness and proportionality."); Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 312 (2013) (citation omitted) ("More salient, the Progressive Era—roughly the first quarter of the 1900s—was the 'age of reform' in which calls for progress were not only made but answered. During this period, probation, parole, indeterminate sentencing, and the juvenile court went from the exception to close to the rule. These reforms constituted a coherent effort to implement the rehabilitative ideal.").

52. KEVLES, *supra* note 50, at 93.

53. MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 242 (2003) (showing how progressive reforms were entangled with eugenics).

54. See, e.g., MIROSLAVA CHÁVEZ-GARCÍA, *STATES OF DELINQUENCY: RACE AND SCIENCE IN THE MAKING OF CALIFORNIA'S JUVENILE JUSTICE SYSTEM* 3–4 (2012); Simon, *supra* note 40; T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 J. CRIM. L. & CRIMINOLOGY 111, 115 (2013); Jonathan Simon, "The Criminal Is to Go Free": *The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 796 (2020); Laura I. Appleman, *Eugenics and the Carceral State: Progressive Era Reform and the Creation of the Modern Criminal Justice System* (2025) (unpublished manuscript) (on file with author); Daniel Loehr, *The Eugenic History of Habitual Offender Laws*, 68 HOW. L.J. 233, 233 (2025); Appleman, *supra* note 4, at 417.

A. *What is Eugenic Criminology?*

According to the National Human Genome Research Institute, “Eugenics is a discredited belief that selective breeding for certain inherited human traits can improve the ‘fitness’ of future generations. For eugenicists, ‘fitness’ corresponded to a narrow view of humanity and society that developed directly from the ideologies and practices of scientific racism, colonialism, ableism and imperialism.”<sup>55</sup> As we use this phrase in the paper, the term “eugenic criminology” refers to a set of beliefs, common in the early twentieth century, that attribute crime to inherent defects in the body and mind.<sup>56</sup> This set of beliefs was influenced by the eugenics movement of that era, and many of its advocates did indeed support sterilization or other population control measures.<sup>57</sup> For our purposes, however, eugenic criminology is a type of *criminology* and a way of thinking about crime and its causes, rather than about reproductive policy.<sup>58</sup>

Eugenic criminology referred to a constellation of ideas that revolved around the central belief that crime was caused by hereditary and biological tendencies. Some believed criminals to be a distinct physical class easily identifiable by the shape of the skull, nose, or ears.<sup>59</sup> Others located the defect more in the intangible mind.<sup>60</sup> Some saw degrees of defectiveness; others perceived it more as a binary.<sup>61</sup> People also varied in the extent to which they attributed crime solely to inherent, biological defects or instead saw such defects as one of many factors that contribute to criminal behavior.<sup>62</sup> Many acknowledged that “normal” people could occasionally also commit crime, either due to passion, momentary weakness, or unfortunate circumstance.<sup>63</sup> Reform eugenicists believed that inherent defects could be exacerbated or mitigated by environmental circumstances or training.<sup>64</sup>

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55. *Eugenics*, NAT'L HUM. GENOME RSCH. INST., <https://www.genome.gov/genetics-glossary/Eugenics> [<https://perma.cc/ZK5R-K9US>] (last visited Dec. 14, 2025).

56. We follow Nicole Rafter, the foremost scholar of eugenic criminology, in the use of this term. As she notes, the ideas of eugenic criminology began before the term “eugenics” was coined in 1883. RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2, at 6.

57. *Id.* at 124.

58. *See* Section II.A.

59. CESARE LOMBROSO, *CRIMINAL MAN* 304 (Mary Gibson & Nicole Hahn Rafter trans., Duke Univ. Press 2006) (“The study of cranial anomalies suggests that the criminal is closer to the savage than to the madman, particularly in the frequency of large jaws, jutting brows, and the median occipital fossetta.”).

60. *See infra* note 178 and accompanying text.

61. *See, e.g.*, E.W. Burgess, *The Study of the Delinquent as a Person*, 28 AM. J. SOCIO. 657, 659–60 (1923) [hereinafter Burgess, *The Study of the Delinquent*].

62. *See, e.g.*, WILLIAM HEALY, *THE INDIVIDUAL DELINQUENT* 130 (1915).

63. ENRICO FERRI, *CRIMINAL SOCIOLOGY* 11 (D. Appleton & Co. 1900) (1895) (“But apart from these there is a class of occasional criminals, who do not exhibit, or who exhibit in slighter degrees, the anatomical, physiological, and psychological characteristics which constitute the type described by Lombroso as ‘the criminal man.’”).

64. Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 16 (1925) (“[T]he moral cure of criminals . . . is the best means of attaining the end in view—the repression and extirpation of crime; and hence that reformation is the primary object to be aimed at in the administration of penal justice.”).

A central theme in eugenic criminology is that delinquency is one trait amongst a constellation of undesirable characteristics held by a sub-normal class.<sup>65</sup> Delinquency referred to a propensity towards crime or other socially disfavored behavior and was not limited to juveniles.<sup>66</sup> It was believed to be closely associated with feeble-mindedness, pauperism, epilepsy, poor physical health, “moral imbecility,” homosexuality, skin color, and promiscuity (particularly for women).<sup>67</sup> Such traits were seen as markers and even definitions of degeneracy: where one trait was present, the others were likely.<sup>68</sup>

This Section provides a brief overview of eugenic criminology, focusing on three threads within its history. The first thread pertains to institutes for the feeble-minded and is selected as an early example of the connections between eugenic criminology and preventive confinement. The second thread pertains to the writings of Cesare Lombroso and his American followers. Lombroso is by far the most well-known writer of this era, sometimes considered the founder of modern criminology.<sup>69</sup> The final thread discusses the writings of two well-known psychiatrists, Bernard Glueck and William Healy, who believed in inherent defects but situated criminal propensity in the mind rather than the body. They also have close connections with early scholarship on risk assessment.

Although there is voluminous literature on the history of eugenics, eugenic criminology is not well-studied.<sup>70</sup> The primary scholar in this area is Nicole Rafter, who published several books and a number of articles on the topic in the 1990s and 2000s.<sup>71</sup> Our history of eugenic criminology draws on Rafter’s work but cross-references it against primary sources. We have read the original works of all the early criminologists discussed in this Section, as well as many others not mentioned. Some of the ways we synthesize this history are novel and some follow Rafter’s synthesis.

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65. Benjamin Malzberg, *On the Relation of Mental Defect to Delinquency a Study of Cases before the Voluntary Defenders Committee of New York City*, 10 J. AM. INS. CRIM. L. & CRIMINOLOGY 218, 222 (1919) (describing the relationship between delinquency, intelligence, insanity, and emotional stability).

66. See, e.g., *Delinquent*, WEBSTERS1913, <https://www.websters1913.com/words/Delinquent> [<https://perma.cc/HJP4-AAKJ>] (last visited Dec. 14, 2025) (defining a delinquent as “[o]ne who fails or neglects to perform his duty; an offender or transgressor; one who commits a fault or a crime; a culprit”).

67. RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2, at 37 (“This nineteenth-century view of degeneracy as protean and mutable, heritable but nonetheless susceptible to environmental influences, encouraged theorists to conceive of social problems such as insanity, poverty, intemperance, and criminality as interrelated and interchangeable, mere symptoms of the underlying degeneracy.”).

68. *Id.*

69. Hermann Mannheim, *Lombroso and His Place in Modern Criminology*, 28 SOCIO. REV. 31, 32–33 (1936).

70. By far, the primary scholar in this area is Nicole Rafter, who has published several books and numerous articles on the topic. See, e.g., RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2; NICOLE HAHN RAFTER, *THE ORIGINS OF CRIMINOLOGY: A READER* (2009) [hereinafter RAFTER, *ORIGINS*]; Rafter, *Criminal Anthropology*, *supra* note 49; Nicole Rafter, *Cesare Lombroso and the Origins of Criminology: Rethinking Criminological Tradition*, in *THE ESSENTIAL CRIMINOLOGY READER* (Stuart Henry & Mark M. Lanier eds., 2006) [hereinafter Rafter, *Cesare Lombroso*]. As evidence that her work is not well-known, we looked at her citations in Hein Online. Although this does not have her complete works, it has eight articles on topics related to eugenic criminology. These eight articles have only 14 citations total as of February 24, 2025.

71. See *supra* note 70 and accompanying text.

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At the turn of the twentieth century, the academic discipline of criminology did not yet exist. Prototypical criminologists—those who claimed the mantle of expertise in the area—were professionals working for prisons or other institutions: superintendents, psychiatrists, physicians, etc.<sup>72</sup> Today, we think of the scope of such jobs as fairly standardized.<sup>73</sup> While a certain amount of expertise is necessary, the professionals in such institutions generally execute prescribed tasks within an established framework.<sup>74</sup> It is not the domain of wild imagination, groundbreaking research, or rapid revolution.

It was much livelier in the late nineteenth and early twentieth centuries. The professionals who laid the groundwork of early criminology were often visionaries with outlandish claims.<sup>75</sup> They redefined the concept of a criminal and then re-envisioned the role of society in preventing crime.<sup>76</sup>

One of the key sites in which this occurred was in institutions for the feeble-minded. Originally, feeble-mindedness referred to those with severe cognitive disability who could not care for themselves.<sup>77</sup> If their families could not support them, they were often abandoned: taken to the end of the road in town and left to starve in the woods.<sup>78</sup> In the mid-nineteenth century, a few state-funded institutions began to provide the feeble-minded with food, shelter, and education.<sup>79</sup> These institutes were small facilities that focused on training people for return to the community.<sup>80</sup> Their administrators spoke confidently about their ability to

72. RAFTER, ORIGINS, *supra* note 70, at xiii (describing criminology as “a series of cottage industries” where “researchers involved in the production of what we now call criminology may have been in contact with only two or three other specialists conducting similar work”); RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 87 (“In the United States, eugenics doctrine was produced primarily by a loosely affiliated group of psychiatrists, psychologists, prison physicians, social workers, and institutional superintendents.”).

73. *See infra* note 450 and accompanying text.

74. *See* RAFTER, ORIGINS, *supra* note 70.

75. *See, e.g., infra* notes 97–112 and accompanying text.

76. *See, e.g., infra* note 165 and accompanying text.

77. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 28 (explaining that while the superintendent of the first institute for the feeble-minded restricted it to “those whose idiocy was obvious, the next generation of superintendents defined [feeble-mindedness] more generously, including criminals, tramps, and other ‘incapables’”).

78. This practice was known as “warning out.” Paul S. Appelbaum, *A History of Civil Commitment and Related Reforms in the United States: Lessons for Today*, 25 DEV. MENTAL HEALTH L. 13, 13 (2006).

79. Isaac N. Kerlin, *Report of Standing Committee*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION, AT THE TWELFTH ANNUAL SESSION HELD IN WASHINGTON, D.C., JUNE 4–10, 1885, 158 (Isabel C. Barrows ed., 1885) [hereinafter Kerlin, *Standing Committee* 1885] (describing institutions for the feeble-minded across many states).

80. For instance, the first institute for the feeble-minded had only 67 “pupils” as of 1860. MASSACHUSETTS SCHOOL FOR IDIOTIC AND FEEBLE-MINDED YOUTH, THIRTEENTH ANNUAL REPORT OF THE MASSACHUSETTS SCHOOL FOR IDIOTIC AND FEEBLE-MINDED YOUTH TO THE CORPORATION AND THE LEGISLATURE, PUB. DOC. NO. 28, at 3 (1860). “[A]lmost without exception the new comers, though ever so noisy, turbulent, unmannerly, and filthy when they are admitted, soon become quiet, orderly, well-behaved and tidy . . .” *Id.* at 4.

transform their patients into productive members of society.<sup>81</sup> They spoke in caring and nurturing terms.<sup>82</sup>

By the end of the nineteenth century, the narrative flipped.<sup>83</sup> The feeble-minded were no longer portrayed as child-like innocents in need of care and support, but rather as brutish and immoral degenerates in need of confinement.<sup>84</sup> The changing narrative was partly a fearmongering tactic to help justify funding for the institutions.<sup>85</sup> But in the United States, the change was also preceded by westward expansion and the Indian Removal Act of 1830, the fugitive slave act of 1850, as well as the emancipation of enslaved people, which took place in the latter half of the nineteenth century. This was a period of great cultural anxiety in America. An overarching concern during that time was how to deal with “the problem of the Negro,” a newly emancipated group who could no longer be held in captivity, and “the Indian Problem.”<sup>86</sup> It is with this backdrop that theories of biological determinism predating those espoused by the eugenicist developed through race sciences like phrenology and polygeny, the first American (pseudo) science recognized globally.<sup>87</sup> Ultimately, this change reflected a new era of social idealism that sought to perfect society for the fit by isolating undesirables in institutes and colonies.<sup>88</sup>

Early definitions of feeble-mindedness among “native White Americans” (*i.e.*, of Anglo-Saxon descent) were limited to those with severe and unequivocal

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81. *Id.*

82. *Id.* at 3–4 (describing “the tidiness, the docility, the industry, and the general good deportment of the seventy inmates”).

83. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 56 (“In the 1870s most of them [superintendents] still spoke sympathetically about their charges, seldom referring to heredity or crime. Nevertheless, two decades later they were vying with one another to detect moral imbeciles among their inmate populations and cautioning the nation against the ‘crime of procreation among the notoriously unfit.’”).

84. *Id.*

85. *Id.* at 86 (“Negatively eugenics gave them [superintendents] rationales for their failures to cure the feeble-minded, for expanding their institutions, and for the financial burden their institutions imposed on states. Positively it provided them with . . . a larger and higher-status clientele (society in general . . .).”).

86. Paul R.D. Lawrie, “Mortality as the Life Story of a People”: Frederick L. Hoffman and Actuarial Narratives of African American Extinction, 1896–1915, 43 CAN. REV. AM. STUD. 352, 372 (2013); N. A. Miles, *The Indian Problem*, 128 N. AM. REV. 304, 304 (1879). It should be noted that as early as 1787, Thomas Jefferson argued in *Notes on the State of Virginia* that Blacks were likely a different species “inferior to the whites in the endowments both of body and mind.” THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), available online at *Documenting the American South*, UNIV. OF N.C. AT CHAPEL HILL, at 153–54, <https://docsouth.unc.edu> (last visited Dec. 28, 2025) (“To our reproach it must be said, that though for a century and a half we have had under our eyes the races of black and of red men, they have never yet been viewed by us as subjects of natural history. I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind . . . This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people.”).

87. Stephen Jay Gould, *THE MISMEASURE OF MAN* xi (rev. & expanded ed., Kindle ed. 1996) (providing seminal research on the evolution of various race sciences to understand the evolution of a unitary measure of intelligence); R. A. Hogarth, *Toward a New Genealogy of Eugenics: The Aftermath of Slavery and the Measure of Racial Fitness*, 15 J. CIV. WAR ERA 336, 336 (2025) (discussing how eugenics in the United States appears out of race sciences emerging during the Civil War and Reconstruction).

88. *Id.* at 86–87.

intellectual disabilities: “idiots,” using the term of the era.<sup>89</sup> Over time, the concept of feeble-mindedness among native whites came to include other categories that were less extreme: “morons,” who were borderline normal, and “imbeciles,” who were in between idiots and morons.<sup>90</sup> Many of those categorized as feeble-minded under the earlier conceptualization of the term would likely still be understood as disabled today, such as those with severe forms of autism, Down syndrome, fetal alcohol syndrome, etc.<sup>91</sup> But the expanded definition likely swept in a large number of people who were simply poor and uneducated.<sup>92</sup> This is particularly true among groups considered to be racially inferior (*e.g.*, Blacks, Native Americans, Mexicans, South Eastern Europeans, etc.) who were considered feeble-minded regardless of cognitive disability.

The expanded definition of feeble-mindedness also included a newly conceptualized group called “moral imbeciles.”<sup>93</sup> Moral imbeciles were defined as those with a very specific cognitive impairment: the inability to tell right from wrong or to control their impulses.<sup>94</sup> They might have normal cognitive capacity in other domains; their primary defect was a tendency towards immoral behavior. Habitual criminals were said to be moral imbeciles, as were alcoholics, tramps, and prostitutes.<sup>95</sup> The description of moral imbeciles often turned cinematic; they were described as having physical defects such as “the dragging of one limb, a shuffling or heedless gait, [or an] inconstant gaze.”<sup>96</sup>

With the changing concepts of feeble-mindedness, institutes grew. They were no longer small group homes for severely disabled individuals, but rather sprawling colonies with an equally sprawling idea about who belonged in them.<sup>97</sup>

89. *Report of Committee on Classification of Feeble-Minded*, 15 J. PSYCHO-ASTHENICS 61, 61 (1910).

90. *Id.*

91. It is difficult to say for certain what the modern diagnoses would be for an 1850 inmate of an Institute for the Feeble-minded. But, given that these institutes were originally reserved for those whose disability made it difficult for them to function in society, it seems plausible that they would be understood as disabled in today’s terms. See Appelbaum, *supra* note 78, at 13–14.

92. *See id.*

93. Moral imbecility was sometimes also called moral insanity and described as a “mental disorder in which there is a loss or absence of control over the lower propensities, or in which the moral sentiments rather than the intellectual powers are confused, weakened, or perverted.” D. Hack Tuke, *Moral or Emotional Insanity*, 31 J. MENTAL SCI. 174, 175 (1885).

94. This may be “an original deficiency [in the ability to tell right from wrong] analogous to that lack of musical sense, or color-blindness” or “a clear apprehension of right and wrong, but an inability to choose the right because overborne by the seductiveness and sensationalism of the wrong.” Isaac N. Kerlin, *Moral Imbecility*, in PROCEEDINGS OF THE ASSOCIATION OF MEDICAL OFFICERS OF AMERICAN INSTITUTIONS FOR IDIOTIC AND FEEBLE-MINDED PERSONS, SESSION: LAKEVILLE, JUNE 15–18, 1887, 3, 4, 8 (1889) [hereinafter Kerlin, *Moral Imbecility*].

95. *Id.* at 6.

96. *Id.* at 8. This provides a vivid example of how disability is constructed in aesthetic terms. Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895 (2019).

97. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 62–63 (“States are now willing to fund large institutions, [Dr. A. E. Osborne, the superintendent of California’s asylum for the feeble-minded in 1891] says, because ‘society is organizing everywhere for self-protection.’ The large, preventive institution has become thinkable thanks to the cost efficiencies of the ‘colonial system’ championed by Pennsylvania’s superintendent Kerlin.”).

A Stanford University professor estimated that 10% of California's schoolchildren might be better educated in an institution for the feeble-minded; a superintendent scoffed that this was surely an underestimate.<sup>98</sup> Superintendents aspired to build large colonies where undesirables of many sorts could be exiled.<sup>99</sup> Striving for self-sufficiency, superintendents acquired large tracts of farmland and built factories for the production of goods.<sup>100</sup> In this, the expanded definition of feeble-mindedness served practical purposes: the institutes needed skilled people for labor.<sup>101</sup> As one person happily noted, "moral imbeciles . . . make first-class fore[m]en!"<sup>102</sup>

The vision proposed by these superintendents would have entailed a radical reorganization of society: placing a sizable fraction of the American population in isolated colonies that were part charity and part prison.<sup>103</sup> They were charitable in that they provided a home for those believed to be too simple to thrive in a complex, modern society.<sup>104</sup> One superintendent described them as "havens in which all shall live contentedly, because no longer misunderstood nor taxed . . . beyond their mental or moral capacity."<sup>105</sup> But they were not just charities: they were also designed to protect society from crime and disorder.<sup>106</sup> Once all the "warped, twisted, and incorrigible" were contained in these isolated colonies, the remainder of society would supposedly be so upstanding that there would no longer be a need for "[j]ails, criminal courts, and grog-shops."<sup>107</sup>

The vision was at once utopian and dystopic. A world free of crime and vice could be created at the cost of denying personal liberty to a wide cross-section of society.<sup>108</sup> In a refrain that would later be echoed by some of the founders of statistical risk assessment, supporters argued that potential criminals could

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98. *Id.* at 65.

99. Isaac N. Kerlin, *Provision for Idiotic and Feeble-Minded Children*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION, AT THE ELEVENTH ANNUAL SESSION HELD AT ST. LOUIS, MISSOURI, OCT. 13-17, 1884, 246, 262 (Isabel C. Barrows ed., 1884) [hereinafter Kerlin, *Provision* 1884] (describing an ideal institution for the feeble-minded as "large, diffuse, and thoroughly classified institution" which is "to its wards and employe[e]s as cosmopolitan as a city").

100. *See Status of the Work Before the People and Legislatures*, in PROCEEDINGS OF THE ASSOCIATION OF MEDICAL OFFICERS OF AMERICAN INSTITUTIONS FOR IDIOTIC AND FEEBLE-MINDED PERSONS, SESSION: ELWYN, PENNSYLVANIA, 1892, 368-69, 377 (1892) [hereinafter *Status of the Work* 1892] (Dr. J.T. Armstrong of Nebraska: "We have rented a farm of one hundred and sixty acres adjoining the institution grounds, and hope to make such a favorable showing that the next legislature will provide the additional land which we so much need."; Dr. Wm. B. Fish of Illinois: "Our dairy is, as might be expected, most profitable, yielding us on an average one hundred gallons of milk daily."; Dr. A.E. Osborne of California: "Our shoe-shop has turned out some excellent work").

101. *See id.* at 367 (Dr. A. H. Beaton of Ontario: "[T]he amount of useful labor performed by them is marvellous.").

102. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 66 n.72 (quoting Dr. Rogers, superintendent of Minnesota's institution).

103. *Id.* at 66-67.

104. *See* Kerlin, *Standing Committee* 1885, *supra* note 79.

105. *Id.* at 174.

106. *Id.*

107. *Id.*

108. Kerlin, *Provision* 1884, *supra* note 99, at 257.

be identified as early as kindergarten.<sup>109</sup> If they proved unamenable to reform, they would be placed into “permanent sequestration.”<sup>110</sup> Their constitutional rights were considered a necessary sacrifice for the good of others.<sup>111</sup> “[T]he functions of government are not discharged toward its peace-loving, frugal, and law-abiding citizens so long as these disorderly, contaminating, and misery-breeding elements have share and share alike of that personal liberty under the Constitution.”<sup>112</sup>

Institutes for the feebleminded never quite reached the scale proposed by these superintendents, but isolating undesirables within colonies remained a central vision for social control in the Progressive Era and had many similarities with the mass incarceration of today.<sup>113</sup> A similar refrain was used to promote a variety of other types of institutions: reformatories, training schools, institutes for defective delinquents, etc.<sup>114</sup> Determining who belonged in such facilities was, as envisioned by Lewis M. Terman, initially the task of the Stanford-Binet IQ test but would later become a core task of statistical risk assessment.<sup>115</sup>

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A second thread in the history of eugenic criminology began with the writings of Cesare Lombroso. Lombroso was an Italian physician who conducted numerous autopsies within penal institutions and hospitals for the mentally ill.<sup>116</sup> Like many in this era, Lombroso was influenced by the theories of Charles

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109. Isaac N. Kerlin, *Report of the Committee on Provision for Idiotic and Feeble-Minded Persons*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION, AT THE THIRTEENTH ANNUAL SESSION HELD AT ST. PAUL, MINN., JULY 15–22, 1886, 288, 296 (Isabel C. Barrows ed., 1886) [hereinafter Kerlin, *Report*] (“The recognition in the kindergarten and in the primary schools of *congenital moral imbeciles* is believed to be possible. Such children, although often precocious in the power to acquire school learning, should be withdrawn from the community before they reach crime age, and are best cared for under the discipline of institutions for the idiotic and feeble-minded.”).

110. Kerlin, *Provision* 1884, *supra* note 99, at 257.

111. *Id.* at 254.

112. *Id.* at 257 (internal quotation marks omitted).

113. See, e.g., EUGENICS EDUC. SOC’Y, PROBLEMS IN EUGENICS. PAPERS COMMUNICATED TO THE FIRST INTERNATIONAL EUGENICS CONG. HELD AT THE UNIVERSITY OF LONDON, JULY 24–30, 1912, 462 (1912) (“[T]here are in the United States nearly two-thirds of a million persons so defective that the state must exercise a constant custodial care over them.”); Appleman, *supra* note 4, at 435 (describing “explosive growth” of asylums during the Progressive Era).

114. See, e.g., *infra* note 235 and accompanying text.

115. See, e.g., *infra* notes 311–12 and accompanying text; LEWIS M. TERMAN 191 THE MEASUREMENT OF INTELLIGENCE 14–15 (1916). Stanford-Binet IQ test was developed in the United States based on the Binet-Simon Intelligence Test. Alfred Binet did not believe that intelligence was immutable and only sought to develop a test that could distinguish children who were struggling to learn. But Lewis Terman built on the Binet-Simon test to make the test accessible to teachers, physicians, and social workers so that all children could be tested. See *id.* at 14–15; see also *id.* at 6–7 (Terman states, “It is safe to predict that in the near future intelligence tests will bring tens of thousands of these high-grade defectives under the surveillance and protection of society. This will ultimately result in curtailing the reproduction of feeble-mindedness and in the elimination of an enormous amount of crime, pauperism, and industrial inefficiency. It is hardly necessary to emphasize that the high-grade cases, of the type now so frequently overlooked, are precisely the ones whose guardianship it is most important for the State to assume . . .”).

116. DAVID A. JONES, HISTORY OF CRIMINOLOGY: A PHILOSOPHICAL PERSPECTIVE 82–83 (Greenwood Press ed., 1986).

Darwin and Francis Galton, considered the originator of biostatistics and founder of eugenics. He imported biological sciences into criminology by applying the concept of biological determinism to develop the theory of the criminal man. Lombroso believed that, intermixed with normal human beings, atavistic primitives (less-evolved humans) walked the world, predisposed to crime and delinquency.<sup>117</sup> To a careful observer, these “natural born criminals” could be identified by apelike physical characteristics referred to as stigmata.<sup>118</sup> These included jug ears, sloping foreheads, long arms, and hooked noses.<sup>119</sup> In this “new” theory, children of lower-class individuals were seen as direct descendants of other criminals. Lombroso’s “positive” criminology came to be known as criminal anthropology and is the study of criminal behavior as biological and pathological. He has been credited with many criminal justice innovations such as indeterminate sentencing, the analysis of juvenile delinquency, probation, and parole.<sup>120</sup>

Lombroso’s ideas received, in his own humble words, an “almost fanatical” reception as they arrived in America.<sup>121</sup> His writing launched an era of criminological thought known as the positivist school of criminology due to its focus on causes rooted in the natural, physical world.<sup>122</sup> Lombroso’s claim that criminals could be easily identified by physical markers became rapidly discredited among European criminologists familiar with the work of Quetelet and Guerry, considered to be the initiators of criminology.<sup>123</sup> While many considered his contribution to criminology exaggerated, Lombrosian theories in America, spread by physicians and psychiatrists, went unchallenged. As a result, students who lacked access to early works of European criminologists propagated the myth that Lombroso was the first to bring a scientific approach to the study of crime.<sup>124</sup>

In the 1910s, American criminologists began to see low IQ as the key identifier of criminality rather than the physical markers espoused by Lombroso.<sup>125</sup>

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117. LOMBROSO, *supra* note 59, at 338 (“Up to 35 percent of all criminals are atavistic born criminals who differ physically from normal individuals. Many of their characteristics resemble those of primitive men and the colored races.”).

118. RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2, at 110.

119. LOMBROSO, *supra* note 59, at 306, 310–11 (describing physical characteristics such as jug ears, crooked noses, and so forth).

120. Gould, *supra* note 87, at xi; Alfrad Lindesmith & Yale Levin, *The Lombrosian Myth in Criminology*, 42 AM. J. SOCIOL. 653, 653 (1937).

121. GINA LOMBROSO FERRERO & CESARE LOMBROSO, *CRIMINAL MAN, ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO* xi (1911), <https://wellcomecollection.org/works/xs639uwk/items> [<https://perma.cc/9BB5-YFRU>].

122. FERRI, *supra* note 63, at xvi (“[T]he fundamental purpose [of the positive school] is to study the natural genesis of criminality in the criminal, and in the physical and social conditions of his life . . .”).

123. Courtney Kenny, *The Death of Lombroso*, 10 J. SOC’Y COMPAR. LEGIS. 220, 224 (1910) (“[I]t was shown that the characteristics which [Lombroso] pronounced to be criminal can be found in many honest men; [sic] and that in many of the delinquents in whom they are traceable they are not innate but merely the fruit of penury and hardship.”).

124. See Lindesmith & Levin, *supra* note 120, at 653.

125. TERMAN, *supra* note 115, at 7 (“Although such studies performed an important service in creating a scientific interest in criminology, the theories of Lombroso have been wholly discredited by the results of intelligence tests. Such tests have demonstrated, beyond any possibility of doubt, that the most important trait of at least 25 per cent of our criminals is mental weakness.”).

But Lombroso's broader claim—that the worst criminals constituted a fundamentally different type of person than “normal” human beings—persisted.<sup>126</sup> American positivists infused Lombroso's idea of the atavistic “born criminal” with the more explicitly hereditarian and eugenic ideas that were gaining currency at the time.<sup>127</sup> They also tied criminality more explicitly to feeble-mindedness, pauperism, disease, promiscuity (for women), homosexuality, and race.<sup>128</sup>

Lombroso had a lasting legacy on criminology. His framework held that to understand crime, one should investigate the criminal, not their environment, their current circumstances, institutions, or their upbringing. Recidivism was also an important factor in identifying the natural criminal from the normal man who may commit the occasional crime. Therefore, indeterminate sentencing, probation, and parole were lobbied for by Lombrosian criminologists who believed that inborn criminals should be constantly monitored, and punishment should be based on the individual, not the crime.<sup>129</sup>

The warm reception of Lombroso's ideas was perhaps because they fit well with American ideals of economic and political individualism.<sup>130</sup> Lombrosian theory attributed success or failure to innate capabilities rather than social or environmental factors.<sup>131</sup> Lombroso's success may also be because belief in biological determinism predated the arrival of his theories around 1890–1910<sup>132</sup>: a period of great cultural anxiety in America.<sup>133</sup> Biological determinism provides

126. See, e.g., Mannheim, *supra* note 69 (discussing the ongoing influence of Lombroso in 1936 criminology).

127. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 11 (“American criminal anthropologists reformulated born-criminal theory in hereditarian terms, merging it with the doctrine of eugenics.”).

128. BERNARD GLUECK, STUDIES IN FORENSIC PSYCHIATRY 68 (1916) [hereinafter GLUECK, STUDIES], <https://babel.hathitrust.org/cgi/pt?id=coo1.ark:/13960/t0sq9dz3j&seq=1> [<https://perma.cc/P4SE-AZY9>] (“It is now being universally recognized that the pauper, the prostitute, and the criminal classes are primarily products of mental defect and degeneracy . . .”).

129. Gould, *supra* note 87, at xi; HARCOURT, AGAINST PREDICTION, *supra* note 41, at 2–3.

130. Lindesmith & Levin, *supra* note 120, at 666 n.23.

131. *Id.* at 661.

132. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 110.

133. Paul R.D. Lawrie, “Mortality as the Life Story of a People”: Frederick L. Hoffman and Actuarial Narratives of African American Extinction, 1896–1915, 43 CAN. REV. AM. STUD. 352, 372 (2013); RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 134 (“The intellectual and emotional currents that had encouraged American receptivity to Lombroso's work built in intensity. Fear of social deterioration persisted, with its sense of contamination by swarthy-skinned immigrants and native-born dependents, defectives, and delinquents, but this fear merely strengthened the Progressive determination to improve social control.”); see also James Bryce, *Thoughts on the Negro Problem*, 153 N. AM. REV. 641, 641 (1891) (“Among the problems which the people and government of the United States have to deal with, there are three which observers from the old world are apt to think grave beyond all others. These three are the attitude and demands of the labor party, the power which the suffrage vests in recent immigrants from the least civilized parts of Europe, and the position of the colored population at the South. And of these three, the last, if not the most urgent, is the most serious, the one whose roots lie deepest, and which is most likely to stand a source of anxiety, perhaps of danger, for generations to come. Compared with it, those tariff questions and currency questions and railway questions with which politicians busy themselves sink almost to insignificance.”). In addition to politicians, academics and scholars also debated the “Negro Problem” in the United States during this time. See, e.g., Charlotte Perkins Gilman, *A Suggestion on the Negro Problem*, 14 AM. J. SOC. 78 (1908).

justification for the racialized social order of American society.<sup>134</sup> As Lombroso wrote in 1897:

[T]he greatest obstacle to the negro's progress is the fact that there remain latent within him the primitive instincts of the savage; for notwithstanding that the garb and the habits of the white man may have given him a veneer of modern civilization, he is still too often indifferent to and careless of the lives of others; and he betrays that lack of the sentiment of pity, commonly observed among savage races, which causes them to regard homicide as a mere incident, and as glorious in case it is the outcome of revenge.<sup>135</sup>

African-Americans were widely believed to be genetically inferior and prone to crime.<sup>136</sup> Although the great migration was yet to happen and African-Americans constituted a smaller proportion of the population outside of the South, their growing presence sparked fear of crime and social unrest in the northern cities where early risk assessments were developed.<sup>137</sup> Albeit less pronounced, ethnic bigotry was prevalent alongside racial bigotry.<sup>138</sup> First- or second-generation immigrants from poorer regions in Europe—Italy, Ireland, Greece, Poland, etc.—were viewed with heavy suspicion.<sup>139</sup> They were castigated for failing to properly assimilate, and their bloodlines were suspected to carry unfavorable characteristics.<sup>140</sup>

Eugenics is commonly thought of as a form of scientific racism and, undoubtedly, it was used to justify commonly held racial and ethnic prejudices.<sup>141</sup> Yet, while eugenics was a tool used to promote and bolster racism, the historical record sometimes overlooks the extent to which eugenicists were concerned with drawing distinctions *within* those racialized as White.<sup>142</sup> In many foundational criminal risk assessment studies, Whites comprised the majority of the study

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134. See Cesare Lombroso, *Why Homicide Has Increased in the United States.—I.*, 165 N. AM. REV. 641, 647–48 (1897).

135. *Id.*

136. See, e.g., KEVLES, *supra* note 50, at 8 (“Indeed, though [Galton’s] African travels had confirmed his standard view of ‘inferior races,’ racial differences occupied only a minuscule fraction of his writings on human heredity.”).

137. See Jon Snodgrass, *The American Criminological Tradition: Portraits of the Men and Ideology in a Discipline* 54–55 (1972) (Ph.D. dissertation, University of Pennsylvania) (ProQuest) [hereinafter Snodgrass, *Portraits*].

138. *Id.* at 72 (“The majority of delinquents in [Healy’s] studies were children of impoverished immigrants.”).

139. See CHARLES BENEDICT DAVENPORT, *HEREDITY IN RELATION TO EUGENICS* 219 (1911) (explaining that the influx from Southeastern Europe would make the American population “darker in pigmentation, smaller in stature, . . . more given to crimes of larceny, kidnapping, assault, murder, rape and sex-immorality”).

140. Snodgrass, *Portraits*, *supra* note 137, at 72 (citing BOSTON JUDGE BAKER FOUNDATION, *CASE STUDY NO.1, SERIES I 5a* (1922)) (“We know by our experience that a Southern European immigrant, if left to himself in a poor environment, is apt to become a very costly member of society when once he starts his delinquency.”).

141. See GOULD, *supra* note 87, at xi; B. E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237, 237 (2015); RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2, at 50 (“In the criminological context, what eugenicists spoke of with greatest alarm was the degeneracy of poor whites.”).

142. *Id.*

population.<sup>143</sup> Some of the most well-known research defining and discussing “inferior” bloodlines focused on poor White families and their “degenerate” offspring.<sup>144</sup> In addition, although forced sterilization was disproportionately carried out on women of color, Carrie Buck, the woman who was made famous by the landmark Supreme Court case *Buck v. Bell* which upheld compulsory sterilization, was White.<sup>145</sup>

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By the 1910s, some of the earlier claims of eugenic criminology were being challenged.<sup>146</sup> Criminologists were less certain that criminals could be detected by the shape of their nose or the length of their arms.<sup>147</sup> Even the connections between feeble-mindedness and crime were subject to critique.<sup>148</sup> Using newly-introduced IQ tests to measure “mental age,” some argued that prisoners were no more feeble-minded than Army recruits.<sup>149</sup>

Beliefs that criminals had lower intelligence and a different physical type did not disappear. The core concepts of eugenic criminology would form an explicit part of the criminal legal system until the 1970s,<sup>150</sup> and, we believe, are

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143. See *infra* Part III. Native-born Whites constituted the majority of the populations evaluated in all of the risk assessment studies discussed in Part III.

144. See, e.g., ROBERT L. DUGDALE, *THE JUKES: A STUDY IN CRIME, PAUPERISM, DISEASE, AND HEREDITY* (Forgotten Books ed., 3rd ed. 2018); HENRY HERBERT GODDARD, *THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLE-MINDEDNESS* (1935), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015026709660&seq=7> [<https://perma.cc/XTV9-EAKW>].

145. *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927); Jasmine E. Harris, *Why Buck v. Bell Still Matters*, PETRIEFLOM CTR. (Oct. 14, 2020), <https://petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters/> [<https://perma.cc/TS5E-ACN4>] (describing Carrie Buck as a “young, poor white woman”).

146. See, e.g., CHARLES GORING, *THE ENGLISH CONVICT: A STATISTICAL STUDY* 18 (1913), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015027579351&seq=4> [<https://perma.cc/84TU-AB8G>] (“Lombroso’s system will never, by the scientific critic, be otherwise regarded than as the superstition of criminology.”). Khiara Bridges, *White Privilege and White Disadvantage*, 105 VA L. REV. 449, 465 (2019) purports that the eugenics movement was focused on protecting the white race from undesirable white people. Gould, *supra* note 87, at xi, and other scholars discuss the primary goal of the eugenics movement as protecting the purity of the white race from internal (within group) and external (between group) threats. The main concern of the eugenics movement was racial purity and dominance, which meant drawing distinctions between groups, as well as prohibiting the proliferation of and “inter-breeding” with social groups categorized as inferior, which included Blacks, Native Americans, poor Whites, and immigrants from specific regions. Recall that theories of biological determinism in the United States, as well as classifying certain groups as innately criminal, predated the eugenics movements, as these beliefs were used to justify slavery and Native American genocide. Thus, the claim that some eugenic criminologists focused heavily on poor Whites is not necessarily in conflict with the story told by Khalil Gibran Muhammad in *The Condemnation of Blackness*. As Muhammad argues, people were quicker to attribute crime to biological inferiority when it came to Blacks than they were when it came to native-born Whites or immigrants. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 7 (“Progressive social scientists were innovating environmental theories of crime and delinquency while using crime statistics to demonstrate the assemble ability of the Irish, the Italian, and the Jew by explicit contrast to the Negro.”).

147. See *id.*

148. See, e.g., Burgess, *Part IV: Factors*, *supra* note 5, at 231.

149. *Id.* (describing a study in which Army soldiers were shown to have lower IQ than prisoners).

150. For instance, Maryland’s Institute for Defective Delinquents at Patuxent remained open until 1977. Megan T. Stevenson & Thomas W. Frampton, *Institutes for Defective Delinquents* (2025) (unpublished manuscript) (on file with author).

still implicitly influential today. But the challenges posed to these claims opened a space for a new chapter in eugenic criminology: psychopathy.

In the early twentieth century, psychopathy was not a precisely defined psychiatric diagnosis.<sup>151</sup> It was more of a catchall term that referred to an inherent defect that made someone *mentally* disposed towards crime.<sup>152</sup> Bernard Glueck, a psychiatrist who worked at Sing Sing, was one of the primary proponents of psychopathy theory.<sup>153</sup> He claimed that although psychopathy had biological roots,<sup>154</sup> it did not necessarily have any physical manifestation. Nor were psychopaths necessarily feeble-minded or morally insane.<sup>155</sup> Glueck's book provides a number of case studies that aim to demonstrate psychopathy in action.<sup>156</sup> These tend to be lurid, cinematic accounts of prisoners from "tainted stock" who stumble through a life of crime and impulsivity, inevitably suffering from delusions and perversions.<sup>157</sup> His conclusion about psychopaths seems to be "you know one when you see one."<sup>158</sup> Conveniently, this made classification as a psychopath hard to refute.<sup>159</sup> Their primary identifying characteristic was a propensity towards crime.<sup>160</sup> Not all of those convicted of a crime were believed to be psychopaths, but with such a tautological definition, criminal conviction seems close to sufficient.<sup>161</sup>

While his account emphasizes the psychiatric nature of the problem, Glueck does not appear to see psychiatry as an important part of the solution. He endorses an expansion of the psychiatric hospital within penal institutions, but he thinks the primary way to address the problem of psychopathy is through segregation in colonies, similar to leper colonies.<sup>162</sup> He endorses the idea of converting the island of Guam into one such colony.<sup>163</sup>

It is my opinion that these individuals, forming as they do a distinct species of humanity, should be segregated into colonies especially designed for them, where under proper medical supervision, they should be made to earn their subsistence by means of some useful occupation. It is very obvious that an indeterminate sentence is the only rational way of approach to this

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151. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 168.

152. *Id.* (describing the concept of psychopaths during this era).

153. Phillip Shon & Erik Mansager, *Negligent Criminology: Alfred Adler's Influence on Bernard, Sheldon, and Eleanor Glueck*, 18 EUR. J. CRIMINOLOGY 660, 661 (2019).

154. GLUECK, *STUDIES*, *supra* note 128, at 116 (explaining that "heredity that is responsible for the major portion of this anomalous product [psychopathic criminals]").

155. *Id.* at 115 ("Taking pure intelligence into consideration we find that they show no deficiency in this particular sphere.").

156. *Id.*

157. *Id.* at 89.

158. *Id.* at 118 (asking "whether the incorrigible criminal is sufficiently characterized by such unmistakable features as would enable us to recognize him when we see him," and concluding that "he is").

159. *Id.*

160. *Id.* at 119.

161. *Id.*

162. *Id.* at 118–19 (describing his beliefs about the proper way to treat incorrigibles).

163. *Id.* at 117–18.

problem . . . [with the parole power vested in the hands] of physicians, and particularly those trained in psychopathology.<sup>164</sup>

Psychopathy theories were closely connected with a newly emerging style of research known as the multifactor approach to criminality.<sup>165</sup> The multifactor approach was a precursor to early risk assessments.<sup>166</sup> Proponents of this style claimed that crime arose from multiple causes, which could be learned through careful study of the individual offender.<sup>167</sup> Many of the studies involving this approach consisted of quantitative tabulations of delinquents' traits.<sup>168</sup> The characteristics found to be most common among delinquents were interpreted as *causes* of delinquency.<sup>169</sup> Later, this technique would be used to compare characteristics of those who succeed and fail on parole.<sup>170</sup> From there, it was but a short conceptual leap to building statistical indices of the most predictive characteristics.<sup>171</sup>

The multifactor approach was self-consciously empiricist. Its founder, psychiatrist William Healy, claimed to be learning from the data without bias from preconceived theories.<sup>172</sup> Healy espoused an open-minded approach in which all potential contributing factors to crime were considered.<sup>173</sup> But there was no organizing principle to his research beyond his own interpretation of the facts at hand.<sup>174</sup> While he acknowledged some role of social/environmental causes of crime, he considered the primary causative factors to be mental.<sup>175</sup> His famous book, *The Individual Delinquent*, had two chapters on environmental causes of crime, but seventeen chapters on mental causes, including mental conflicts and repressions, abnormal sexualism, mental abnormality in general, mental defect, mental dullness, psychic constitutional inferiority, mental aberration, and mental peculiarities.<sup>176</sup> His description of psychopathy, which he dubs "psychic constitutional inferiority," is as vague as Bernard Glueck's, and his prescription is similarly subjugating.<sup>177</sup>

Psychic constitutional inferiority may be recognized by chronic abnormal social and mental reactions to the ordinary conditions of life . . . . The

164. *Id.* at 119.

165. Jon Snodgrass, *William Healy (1869-1963): Pioneer Child Psychiatrist and Criminologist*, 20 J. HIST. BEHAV. SCI. 332, 332-33 (1984) [hereinafter Snodgrass, *William Healy*] (describing the multifactor approach as broadening the field of criminology and moving it away from a stress on genetic factors).

166. *See infra* notes 341-486 and accompanying text.

167. *See, e.g.*, HEALY, *supra* note 62, at 130 (tabulating a long list of factors believed to be causative of delinquency along with their frequency).

168. *Id.*

169. *Id.* at 164.

170. *See infra* note 293, at 186.

171. *See infra* note 297.

172. Snodgrass, *William Healy*, *supra* note 165, at 334 (describing Healy's "radical empiricism" and "pragmatism").

173. *See* HEALY, *supra* note 62, at 130.

174. *See* Snodgrass, *William Healy*, *supra* note 165, at 337.

175. *Id.*

176. *See* HEALY, *supra* note 62, at ix-xvi.

177. *See id.* at 444.

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attraction towards misdeeds is too much for their weak inhibitory powers in many a case, or their very feeling of social impotence leads to their taking the easiest path. . . . The females of this class become more of the drudge type than offenders. . . . Almost worse for society is the fact that they live in various relationships with a low class of men in camps or shanties, and frequently produce offspring, who, in turn, become problems to society. The treatment of the constitutional inferior resolves itself down to very careful oversight and patient education, particularly during the years of adolescence. Permanent colonization is needed for many of them.<sup>178</sup>

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178. *See id.* at 575–89.

By the 1920s, when criminological risk assessments were first developed, the most hardline views of eugenic criminology had fallen out of favor.<sup>179</sup> Few believed that crime came solely from “born criminals.”<sup>180</sup> The pendulum was swinging the other direction and sociological theories of crime were on the rise.<sup>181</sup> But that does not mean that biological theories had been abandoned.<sup>182</sup> We return in Part III to discuss how the ideas of eugenic criminology remain alive and well within the research of risk assessment’s founders.

### B. Indeterminate Sentencing and Parole

Predictive algorithms in criminal justice were developed to help determine who should be released on parole in an indeterminate sentencing regime.<sup>183</sup> This was the sole application of predictive algorithms as used in the first few decades.<sup>184</sup> It was close to the sole application of academic writing on risk assessment for many decades.<sup>185</sup> Understanding how this technology developed thus requires understanding the task it was expected to accomplish. This Section traces the history of indeterminate sentencing and parole, setting the stage for the introduction of risk assessment in the late 1920s.

Indeterminate sentencing dates back to the early nineteenth century, when English convicts to the Australian colony were forced to labor for the settlers as punishment.<sup>186</sup> Instead of sentencing prisoners to a fixed sentence length, prison administrators found it more effective if sentences were of an indeterminate length.<sup>187</sup> Those who worked hard and behaved well could secure earlier release; those who didn’t had longer periods of indentured servitude.<sup>188</sup>

Originally, this was a practical tool developed by prison administrators to incentivize good behavior.<sup>189</sup> It was not so much about ideals of reform as it was about managing inmates while incarcerated.<sup>190</sup> Over time, however, this practical

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179. See, e.g., Burgess, *The Study of the Delinquent*, *supra* note 61, at 659–60 (1923) (rejecting the overly simplistic views of Lombroso in favor of a more pluralistic and sociological view on crime).

180. *Id.*

181. *Id.*

182. In the same report that Burgess published his risk assessment, another author described the “School of Modern Penology” as being “in accord with the Positivists in the belief . . . that there is at least a modicum of truth in the theory of the existence of mental diseases and uncontrollable hereditary impulses which make the commission of crime almost inevitable.” ANDREW A. BRUCE, ERNEST W. BURGESS & ALBERT J. HARNO, *THE WORKINGS OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS: A REPORT TO THE HONORABLE HINTON G. CLABAUGH* 18 (1928).

183. See *infra* Part III.

184. See *infra* notes 494–495 and accompanying text.

185. See *infra* Part III.

186. See Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 11 (1925).

187. See *id.*

188. See *id.*

189. See *id.* at 13 (“Thus the ticket-of-leave or conditional liberation, which was the forerunner of our modern parole systems, arose out of experience in the care and handling of convicts and was developed by men in charge of prisoners as a practical method of dealing with them.”).

190. See *id.*

approach of incentivizing behavior soon came to be paired with the increasingly popular idea that prisons should serve to reform their inmates: to transform them into law-abiding citizens upon their release.<sup>191</sup>

Along with ideas of reform came a new model for prisons: the reformatory. Those assigned to a reformatory would receive an indeterminate sentence, often as long as ten or twenty years.<sup>192</sup> They would be released when deemed sufficiently reformed by a parole board.<sup>193</sup> While incarcerated, they would receive education and job training.<sup>194</sup>

At first glance, the language of reformation sounds modern and liberal. Instead of incarceration as punishment or warehousing, incarceration was supposed to provide the type of training that would create productive, law-abiding citizens.<sup>195</sup> A Declaration of Principles on the topic stated, “the prisoner’s self-respect should be cultivated to the utmost and every effort made to give him back his manhood.”<sup>196</sup> But a closer look at how reform was conceptualized in that era reveals a different picture. The Progressive Era concept of reform was in many ways closer to the Pavlovian training of animals than a process that respects the dignity of men.<sup>197</sup> Zebulon Brockway, the founder of indeterminate sentencing in the United States, believed that “prisoners are characterless, they lack positiveness, are without an inward dominant purpose.”<sup>198</sup> Reformation was to occur “independent of the immediate conscious choice and will of the prisoner.”<sup>199</sup> Rather, diligent work and a modest lifestyle was supposed to form “new nervous paths” and habits.<sup>200</sup> The job of the reformatory was to institute these habits through a system of intense monitoring and control.<sup>201</sup>

In order to accomplish the new and better habitude it was necessary that wrong and heedless habits should replace with scrupulousness. To effect this, the entire life of each inmate—his bodily and his mental activities, must, to the utmost, be noted, reported, and appropriately channeled. . . . For instance, every day from the early morning reveillé to taps at nine o’clock at night—every waking moment—each prisoner felt the pressure of some care or duty the observance of which gained a credit, or neglect of which involved a loss . . . .<sup>202</sup>

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191. *See id.* at 13–14 (describing the theoretical foundations of indeterminate sentencing).

192. *See id.* at 14.

193. *See id.* at 15.

194. *See id.* at 17.

195. *See id.*

196. *Principles of Penitentiary and Reformatory Discipline Suggested for Consideration by the National Congress*, in *TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE HELD AT CINCINNATI, OHIO, OCTOBER 12–18, 1870*, 541–42, 554 (E.C. Wines ed., Albany, Argus Co. 1871).

197. *Id.* at 541.

198. Z.R. Brockway, *The American Reformatory Prison System*, 15 *AM. J. SOCIO.* 454, 464 (1910).

199. *Id.*

200. *Id.* at 474.

201. *Id.*

202. ZEBULON REED BROCKWAY, 50 YEARS OF PRISON SERVICE 317 (1912).

Brockway did not shy away from using harsh methods. In his view, “the spirit and procedure of the training” could be captured by the following motto: “Fear not: I mean not vengeance but your reformation. Severe is my hand but benevolent is my intention.”<sup>203</sup> Brockway boasted that his harsh methods of reformation would reform 80% of inmates.<sup>204</sup> But, as with the superintendents of institutes for the feebleminded, his braggadocio was not always matched by results. A number of inmates could not or would not abide by the strict regimentation and sunk through the ranking system.<sup>205</sup> Needing justification for this failure, Brockway turned to the ideas of the Italian positivists, which were just starting to gain popularity in the United States.<sup>206</sup> Those who could not be reformed must be the atavistic creatures described in Lombroso’s lurid tales.<sup>207</sup> In Brockway’s words:

Like wind-falls of the fruit orchard, some defectiveness at the core or elsewhere has weakened the hold, so that under stress one kind will stand, the others give way. . . . They have certain organic peculiarities, and perverted inclinations . . . . The femininity of male and the masculinity of female prisoners is quite commonly observed. . . . Evidences of interrupted organic development are plentiful: the cranium, long, broad, conical, sparrow shaped, knotted, variously irregular, crowned with coarse hair grown far down at the nape of the neck . . . . [T]he whole corpus suggestive of degeneracy and susceptibility to disease.<sup>208</sup>

Legal historian Michele Pifferi describes indeterminate sentencing as having a “double soul”: benevolent ideals of reform on the one hand and frighteningly unconstrained state power on the other.<sup>209</sup> This latter aspect—preventive confinement of those deemed irredeemable—was the main point of indeterminate sentencing for some. Cesare Lombroso’s followers envisioned an entirely

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203. *Id.* at 315. Two separate investigations were conducted into Brockway’s harsh methods of discipline. It was revealed that Brockway beat prisoners in an isolated bathroom known as the “slaughterhouse.” An inmate who had barricaded himself in his cell was forced out with hot iron hooks. The report found that Elmira’s food supply was adulterated, and its water supply was “a menace to health.” Brockway was fired but his career was not over; he continued engaging in prestigious speaking events and publishing for many years further. *See RAFTER, CREATING BORN CRIMINALS, supra* note 2, at 103–05.

204. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 99–100 (explaining that Elmira became increasingly overcrowded, prompted in part by Brockway’s vaulted claims of “‘probable reformation’ rates of over 80%”).

205. *Id.* at 100.

206. *See, e.g.,* Lindesmith & Levin, *supra* note 120, at 653, 670 (“It may be that the theory of the born criminal offered a convenient rationalization of the failure of the preventive effort and an escape from the implications of the dangerous doctrine that crime is an essential product of our social organization. It may well be that a public, which had been nagged for centuries by reformers, welcome the opportunity to slough off its responsibilities for this vexing problem.”).

207. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 11 (“[D]espite [Brockway’s] efforts some inmates simply would not behave within the institution or remain law-abiding after release. In despair the superintendent concluded that such prisoners must be ‘incurribles,’ mental and physical degenerates incapable of obedience.”).

208. BROCKWAY, *supra* note 202, at 216–17.

209. *See* MICHELE PIFFERI, REINVENTING PUNISHMENT: A COMPARATIVE HISTORY OF CRIMINOLOGY AND PENOLOGY IN THE NINETEENTH AND TWENTIETH CENTURIES 65 (Jill Peay et al. eds., 2016).

new system of criminal justice: one that centered on preventive confinement.<sup>210</sup> They rejected the classical theories of punishment predominant in that era, such as those associated with Bentham and Beccaria.<sup>211</sup> Classical theories assumed men were rational agents capable of free will and focused on either retributive or deterrent rationales for criminal punishment.<sup>212</sup> These theories tied punishment tightly to the offense: either as just punishment for a wrongful act or as efficient deterrent for future wrongful acts.<sup>213</sup>

In contrast, positivist criminology saw people who committed crime as largely devoid of free will. Crime was deterministic; natural born criminals could hardly help themselves from committing it.<sup>214</sup> This has important implications for criminal law and punishment.<sup>215</sup> If criminals lack the rational capacity to make decisions in the face of consequences, it makes no sense to try and use criminal punishment as a deterrent. Those compelled to commit crime by instinct would not respond to such threat. Nor does it make sense to punish for purposes of retribution, since retributive theories are usually based on the concept of a rational agent who freely chooses to commit crime.<sup>216</sup> Punishing someone who lacks the ability to choose otherwise would be like exacting vengeance on a cat for eating a mouse.

Instead, this school held that punishment should be tailored to the individual for the purpose of social defense.<sup>217</sup> Indeterminate sentencing allowed those capable of reform to return to the community after short incarceration spells.<sup>218</sup> But it also allowed for potentially permanent confinement of those “habitual” criminals who were incapable of change.<sup>219</sup>

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210. FERRI, *supra* note 63, at 207 (“[T]he problem of punishment ought no longer to consist in administering a particular dose, as being proportionate to the moral culpability of the criminal; but it should be limited to the question whether . . . it is necessary to separate the offender from his social environment for ever, or for a longer or shorter period . . .”).

211. Clarence R. Jeffery, *Pioneers in Criminology: The Historical Development of Criminology*, 50 J. CRIM. L. & CRIMINOLOGY 3, 18 (1959).

212. See, e.g., *Chapter Summary and Key Concepts*, in JOHN RANDOLPH FULLER, *JUVENILE DELINQUENCY: MAINSTREAM AND CROSSCURRENTS* (3d ed. 2015), OXFORD UNIVERSITY PRESS: HIGHER EDUCATION GROUP, <https://global.oup.com/us/companion.websites/9780190275570/stud/ch3/summary/> [<https://perma.cc/4P72-NZNB>].

213. *Id.*

214. Adalbert Albrecht, *Cesare Lombroso*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 71, 72 (1910).

215. Foucault’s discussion of delinquency builds directly on these ideas. MICHEL FOUCAULT, *DISCIPLINE & PUNISH* 251–52 (1977) (“The delinquent is to be distinguished from the offender by the fact that it is not so much his act as his life that is relevant in characterizing him. The penitentiary operation, if it is to be a genuine re-education, must become the sum total existence of the delinquent, making of the prison a sort of artificial and coercive theatre in which his life will be examined top to bottom.”).

216. FERRI, *supra* note 63, at 224.

217. *Id.* at 207 (laying out the principles of social defense).

218. See *id.* at 208 (explaining the concept of indeterminate sentencing).

219. “Habitual criminals” was a term used to describe those with inherent tendencies towards crime. Habitual criminal laws grew out of this concept. *E.g., id.* at 11; Brief for David L. Ward as Amici Curiae Supporting Petitioner, *Ward v. Colorado*, 560 P.3d 410 (Colo. 2024) (No. 2023SC328), <https://www.scribd.com/document/717393657/2023-03-05-Daniel-Loehr-Amicus-Brief> [<https://perma.cc/X2E5-93MM>].

In the first few decades of the twentieth century, individualized punishment went from a radical proposal to a core tenet of the criminal legal system.<sup>220</sup> It also underwent a shift in emphasis, from an idealistic focus on reformation to a public-safety orientation towards locking away incorrigibles.<sup>221</sup> The repressive aspect of indeterminate sentencing's double soul took center stage. Indeterminate sentencing was seen as so closely tied to the ideas of the Italian positivists that Cesare Lombroso is sometimes credited as the forefather of indeterminate sentencing.<sup>222</sup> This is obviously false; indeterminate sentencing and parole predated Cesare Lombroso by many decades.<sup>223</sup> But the fact that Lombroso was *remembered* as the originator of indeterminate sentencing is notable. To observers, his ideas resonated strongly with the spirit of indeterminate sentencing.<sup>224</sup> In fact, tailoring punishment to the person rather than the crime is remembered as Lombroso's greatest legacy:

And if we decline to follow those nineteenth-century thinkers whom Lombroso trained or inspired, in their efforts to discover in every cracksman or pickpocket a physiological anomaly, . . . we shall hold them in enduring honor for having taught us the necessity of "individualizing" our penal discipline to the circumstances of each particular offender, so that the shoe shall always fit the foot.<sup>225</sup>

Lombroso developed a system of classification for different "criminal types," as did many other Progressive Era criminologists.<sup>226</sup> These systems varied in their details, but, as Rafter describes, they "located incorrigibles at the bottom of the criminal class and ranked other offenders by the degree to which they approached normality."<sup>227</sup> Each class was believed to need different types of punishment, ranging from fines and restitution at the low-end to permanent confinement or even execution at the higher end.<sup>228</sup> Note that these punishments were proposed not as punishment for the crime committed but as appropriate state intervention for the type of criminal they were.<sup>229</sup>

Classification simplified the process of identifying the appropriate sentence for each criminal type.<sup>230</sup> But, it also formed a central part of how "criminals"

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220. See PIFFERI, *supra* note 209, at 22 ("[B]y the 1930s, the claim for 'individualization', which was *ab origine* so revolutionary and in such conflict with classical retributive tenets of the criminal law, had already been absorbed into the system, strengthening instead of subverting it.").

221. See *infra* notes 491–93 and accompanying text.

222. Lindesmith & Levin, *supra* note 120, at 653; see Gould, *supra* note 87, at 171.

223. Lindesmith & Levin, *supra* note 120, at 653–54.

224. See *id.* at 668–69.

225. Kenny, *supra* note 123, at 220–21.

226. FERRI, *supra* note 63, at 47 ("[A]ll who have been devoting themselves to the subject of crime as regarded from a biological and social standpoint have recogni[z]ed the need for a classification less simple than that of habitual and occasional criminals . . .").

227. RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2, at 121.

228. See *id.* at 123.

229. *Id.* at 196.

230. *Id.* at 123 ("Criminals of passion and political offenders should 'never' be imprisoned. For the upper-level criminaloids [those led to crime by environmental factors], probation and indeterminate sentencing are appropriate. Even habitual and born criminals may be improved under the indeterminate sentence, but those who

came to be understood.<sup>231</sup> “Ultimately these distinctions were statements about the biological causes of crime.<sup>232</sup> The typologies showed that whereas incorrigibles are irrevocably doomed to criminality by their bad heredity, offenders further up the evolutionary ladder are increasingly impelled by environmental forces.”<sup>233</sup>

Classification also served direct eugenic purposes. Consider the following, written by a Russell Sage Foundation official named Hastings Hornell Hart:<sup>234</sup>

Thus we have in every penal and reformatory institution in the United States two classes of inmates: on the one hand, people of normal mentality, presumably able to take care of themselves if a proper basis of character could be established; on the other hand, people so deficient in mentality as to be unable, under the most favorable circumstances, to succeed in the battle of life. . . . These two classes of inmates need radically different treatment. The normal inmate needs [physical, educational, moral, and vocational training] . . . . The inmate of the second class needs . . . permanent institutional life.

In order to restrict and ultimately put an end to the production of defective delinquents, it is necessary to restrict the propagation of the feeble-minded variety of the human race. . . . Sterilization is at best a partial remedy. Its use is restricted by public sentiment. It is operative in only one of the eight States which have passed sterilization laws, and there is little reason to anticipate that public sentiment can be educated to the point of sterilizing all defectives, including high grade imbeciles, within the next fifty years. . . . Segregation is the most practical and effective method. . . . The following suggestions are offered . . . . *Provide by law for the establishment of separate departments or colonies in connection with prisons and with adult juvenile reformatories*, and transfer into these departments forthwith, all inmates of such institutions who are found to be feeble-minded, for permanent custodial care.<sup>235</sup>

Hart’s proposal reflects a commonly held view of the era: that incarceration was an important instrument of reproductive policy.<sup>236</sup> This fact remains somewhat underappreciated in the literature. Several modern books on the history of eugenics omit incarceration almost entirely from the discussion—aside from it being a site where sterilization occurs.<sup>237</sup> But sterilization was controversial,

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continue to demonstrate incorrigibility should be kept in ‘perpetual isolation in a penal colony’ or, in extreme cases, executed.”).

231. RAFFAELE GARAFALO, *CRIMINOLOGY* 132–34 (1914) (arguing that a classification system which fails to distinguish between causes of crime would be of no practical interest).

232. RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2, at 121.

233. *Id.*

234. HART, *DEFECTIVE DELINQUENT*, *supra* note 47.

235. *Id.* at 6, 9–10.

236. *Id.* at 11.

237. *See, e.g.*, KEVLES, *supra* note 50.

even at the time.<sup>238</sup> Beyond the danger of the procedure and the threat to personal autonomy, it was seen as promoting promiscuity without consequence.<sup>239</sup> Incarceration, meanwhile, was already something widely accepted within society.<sup>240</sup> Using prison to prevent procreation as well as crime was seen as killing two birds with one stone.<sup>241</sup>

### C. *Statistics and Eugenics*

Many of the most prominent statisticians of the late nineteenth and early twentieth centuries were eugenicists—a fact which is conveniently left out of many history of statistics books.<sup>242</sup> But to state it that way—that many statisticians were eugenicists—does not sufficiently convey the extent to which the two endeavors intermingled. When we compared the evolution of statistical knowledge presented in Stephen Stigler’s classic *The History of Statistics: The Measurement of Uncertainty Before 1900* to the history of eugenics provided in Daniel Kevles’s classic *In the Name of Eugenics*, we were struck by how many foundational ideas of modern statistics were developed in pursuit of eugenic goals.<sup>243</sup> In the Progressive Era, it was hard to tell where statistics stopped and eugenics began.

Francis Galton, wealthy dilettante, first began considering the project of eugenics in the mid-nineteenth century, well before the science of genetics had been developed.<sup>244</sup> Galton’s thoughts were greatly influenced by Charles Darwin, his first cousin.<sup>245</sup> He “appropriated Darwin to argue that man, instead of falling from a high estate, was ‘rapidly rising from a low one.’ Eugenics would accelerate the process, would breed out the vestigial barbarism of the human race and manipulate evolution to bring the biological reality of man into consonance with his advanced moral ideals.”<sup>246</sup> Yet an important problem remained: the laws of heredity were still too poorly understood to do this reliably.<sup>247</sup> Inexperienced but undaunted, Galton set forth on this task. Galton’s work on classification and heredity laid the groundwork for many key statistical concepts.<sup>248</sup> Galton was the

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238. For instance, the American Institute of Criminal Law and Criminology strongly supported biological theories of crime yet ultimately rejected sterilization of criminals. Jennifer Devroye, *The Rise and Fall of the American Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7, 19–21 (2010).

239. See *id.* at 31.

240. *Mass Incarceration Trends*, SENTENCING PROJECT (May 21, 2024), <https://www.sentencingproject.org/reports/mass-incarceration-trends/> [https://perma.cc/28UH-A4AT].

241. KLINE, *supra* note 50, at 32–33.

242. See, e.g., STEPHEN M. STIGLER, *THE HISTORY OF STATISTICS: THE MEASUREMENT OF UNCERTAINTY BEFORE 1900* 1 (1986) (which does not mention eugenics); DAVID SALSBERG, *THE LADY TASTING TEA: HOW STATISTICS REVOLUTIONIZED SCIENCE IN THE TWENTIETH CENTURY* 9–10 (2002) (failing again to mention eugenics).

243. See KEVLES, *supra* note 50, at 8.

244. *Id.* at 3.

245. STIGLER, *supra* note 242, at 267 (describing Darwin’s influence over Galton’s work).

246. See KEVLES, *supra* note 50, at 12.

247. *Id.* at 3.

248. See *id.* at 13.

founder of eugenics and, through his work to advance this goal, became the founder of modern statistics.<sup>249</sup>

One of his first forays into statistics was to adapt the use of the bell-shaped normal curve as a way to distinguish between different “types.” If data did not follow a normal curve, Galton argued this was evidence that the data must be a conglomeration of different classes, each with their own bell-shaped distribution.<sup>250</sup> He argued that traits like intelligence or ability also followed a normal distribution, with averages according to race.<sup>251</sup> This line of reasoning would later be used to justify race and class stratification in Richard Herrnstein and Charles Murray’s *The Bell Curve*.<sup>252</sup>

Galton’s first major statistical contribution was the discovery of regression, which he stumbled upon through a study of inheritance. Given the lack of available data on human intelligence and ability, Galton focused much of his research on plants and animals, expecting that the insights would carry over to humans.<sup>253</sup> He divided sweet pea seeds into seven groups classified by weight and sent them to friends to grow.<sup>254</sup> When the friends sent back seeds from the resulting plants, the distribution of weights each followed a similar normal distribution, albeit centered on different means.<sup>255</sup> On average, larger parent seeds yielded larger progeny seeds.<sup>256</sup> But an interesting phenomenon occurred: the progeny seeds centered around a distribution that was *closer* to the overall mean than that of the parent.<sup>257</sup> This phenomenon of regression, at first, seemed to Galton like a major problem for eugenics. If the progeny of exceptional parents drifted back towards average, how could one use breeding to improve the stock?<sup>258</sup>

It would be left to Galton’s protégé, Karl Pearson, to resolve this problem. Pearson was a brilliant mathematician and a low-grade social radical.<sup>259</sup> He changed his name from Carl to Karl in honor of the great Karl Marx.<sup>260</sup> He was forward enough to include women in his political discussion circles, but not

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249. *See id.*

250. STIGLER, *supra* note 242, at 268, 271 (describing Galton’s use of the normal curve as a way of distinguishing among groups).

251. *See* Aubrey Clayton, *How Eugenics Shaped Statistics: Exposing the Damned Lies of Three Science Pioneers*, NAUTILUS (Oct. 27, 2020), <https://nautil.us/how-eugenics-shaped-statistics-238014/> [<https://perma.cc/HA5H-625N>] (“Galton imagined one bell curve for white Europeans, one for Africans, one for Asians, and so on.”).

252. *See generally* RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (discussing distribution of human qualities on a bell curve).

253. Francis Galton, *Anthropological Miscellanea: Regression Towards Mediocrity in Hereditary Stature*, 15 J. ANTHROPOL. INST. GR. BRIT. & IR. 246, 247 (1886) (“It was anthropological evidence that I desired, caring only for the seeds as means of throwing light on heredity in man.”).

254. STIGLER, *supra* note 242, at 282 (describing the sweet pea experiment).

255. *Id.*

256. *Id.*

257. *Id.*

258. *See* KEVLES, *supra* note 50, at 18 (describing Galton’s concern that this experiment was a death knoll for eugenics).

259. *See id.* at 21, 35.

260. *See id.* at 22.

forward enough to give them equal pay in his lab.<sup>261</sup> Like Galton, Pearson was a devoted eugenicist. Pearson claimed that the primary endeavor of his career was “to prove in the first place that Eugenics can be developed as an academic study.”<sup>262</sup> Thanks to a generous donation from Galton, Pearson held the post of Galton Eugenics Professor in the applied statistics department at University College London, which was the center of eugenics research in the UK for many decades.<sup>263</sup>

Pearson argued that the regression to the mean observed in Galton’s sweet pea experiment was simply a single-generation phenomenon, not the unescapable influence of ancient ancestors.<sup>264</sup> If one continued to select the heaviest seeds for breeding, he thought there could be a meaningful shift within just a few generations.<sup>265</sup> He supported this theory with elaborate statistical analysis.<sup>266</sup> Unfortunately, his theory did not evince a deep understanding of genetics.<sup>267</sup> His genetic research did, however, yield many important contributions to statistics. As geneticist J.B.S. Haldane later said: “[H]is theory of heredity was incorrect in some fundamental respects. So was Columbus’[s] theory of geography. He set out for China, and discovered America.”<sup>268</sup>

Pearson had an extended partnership with a biologist, Raphael Weldon.<sup>269</sup> Weldon was dissatisfied with the classification procedures common to the late nineteenth century, which seemed ad hoc and speculative.<sup>270</sup> He hoped to sidestep the subjectivity of current methods by using statistical techniques.<sup>271</sup> Many of Pearson’s contributions to statistics, such as the development of various skew (asymmetric) curves and goodness of fit tests, were developed as methods of determining how best to classify the animals or people under study.<sup>272</sup> Science historian Daniel Kevles writes:

Instead of speculative definitions of alleged archetypes, species or races might be defined in terms of the quantitatively certain distribution of a given character around a mean and by the statistical correlation of character pairs. . . . [Pearson] found Weldon’s program appealing because of its positivist determination to deal only with directly observable quantities . . . .

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261. *See id.* at 24–25, 39.

262. Karl Pearson, *VALE!*, 5 *ANNALS OF EUGENICS* 416, 416 (1933).

263. KEVLES, *supra* note 50, at 38, 40, 201.

264. *Id.* at 30.

265. *Id.* at 30–31.

266. *Id.* at 38–39.

267. J.B.S. Haldane, *Karl Pearson, 1857-1957*, 44 *BIOMETRIKA* 303, 303 (1957).

268. *Id.*

269. KEVLES, *supra* note 50, at 29–30 (“For the next fourteen years . . . [Pearson and Weldon] collaborated closely on the statistical study of heredity and evolution.”).

270. *Id.* at 27 (describing classification procedures of the late nineteenth century and Weldon’s dissatisfaction with them).

271. *Id.*

272. *Id.* at 28–30.

Pearson developed the necessary statistical theory and pursued its implications for evolution and heredity.<sup>273</sup>

The method of classifying “criminal types” discussed in the previous Section would almost certainly suffer from a similar critique. Instead of “speculative definitions of alleged archetypes,” statistics brought the promise of scientific rigor and positivist orientation.<sup>274</sup>

The subsequent Galton Eugenics Professor, Ronald Fisher, continued to carry the torch for both eugenics and statistics. Like Galton, his path to statistics originated in eugenics.<sup>275</sup> He made many of his pioneering advances in statistical methods through developing tools for classification of types and understanding the laws of evolution.<sup>276</sup> His devotion to eugenics may even have exceeded that of his predecessors.<sup>277</sup> Even when the atrocities of the Holocaust were well-known, he offered the following endorsement:

In spite of their prejudices I have no doubt also that the [Nazi] Party sincerely wished to benefit the German racial stock, especially by the elimination of manifest defectives, such as those deficient mentally, and I do not doubt that von Verschuier gave, as I should have done, his support to such a movement.<sup>278</sup>

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In building the argument that the ideas of eugenic criminology were influential in the origins of risk assessment, we are reminded of a seminal book by complexity scientist Brian Arthur called *The Nature of Technology*.<sup>279</sup> According to Arthur, technologies rarely emerge fully formed from isolated inventors.<sup>280</sup> Instead, they develop gradually through adaptation, trial and error, and serendipity.<sup>281</sup> New technologies arise out of a fortuitous combination of old technologies, recombined to fit the purpose.<sup>282</sup> Inventions grow haltingly, and sometimes almost accidentally.<sup>283</sup> Arthur’s characterization of technology growth is reminiscent of evolution.<sup>284</sup> With a wide number of people tinkering and experimenting, technology evolves to greater complexity and usefulness.<sup>285</sup>

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273. *Id.*

274. *Id.* at 28.

275. *See* Clayton, *supra* note 251.

276. *See id.*

277. *See id.*

278. *See, e.g.,* Sheila Faith Weiss, *After the Fall: Political Whitewashing, Professional Posturing, and Personal Refashioning in the Postwar Career of Otmar Freiherr von Verschuier*, 101 *ISIS* 722, 745 (2010) (quoting Ronald Fisher).

279. W. BRIAN ARTHUR, *THE NATURE OF TECHNOLOGY: WHAT IT IS AND HOW IT EVOLVES* 15–25 (2011).

280. *Id.* at 15–25 (describing how technology evolves via the combination of previously existing technologies which are, at their roots, various ways of harnessing natural phenomenon).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *See id.*

We see the development of risk assessment as following a similar process. But there is one important aspect of this growth process that did not get emphasized in Arthur's telling. We refer to it as the influence of ideas, but this framing is probably too narrow. Every society has a shared space of meaning: common cultural understandings and beliefs.<sup>286</sup> What we have been laying out in this first part of the Article is the shared space of meaning from that era: its scientism, its biological essentialism, its ambitious social engineering, its racism and bigotry, its outlandish ideation.<sup>287</sup> As much as technology develops through a sporadic process of growth upon previous technology, it also develops through the ideas, beliefs, and cultural practices of its environment.<sup>288</sup>

The ideas of eugenic criminology helped to define the task that risk assessment sought to accomplish: distinguishing between the "occasional criminals" who merit parole and the habitual criminals who require permanent preventive confinement.<sup>289</sup> It built upon a moment of cultural interest in classification and followed in the footsteps of the broader statistical project by seeking to classify "types" in a more objective manner.<sup>290</sup> It was part of the dream of building a better society through scientific expertise and expert management.<sup>291</sup> And, relatedly, it was a tool that was used to justify beliefs of White, Anglo-Saxon racial supremacy as well as to bolster the mores of that era's socially conservative middle and upper class.<sup>292</sup>

The next Part describes the development and use of criminal justice risk assessment from the 1920s through the 1950s.

### III. THE BIRTH OF STATISTICAL RISK ASSESSMENT

In 1923, a professor at the University of Oregon published a paper that compared the characteristics of people who succeed on parole against those who do not.<sup>293</sup> The goal was to determine whether data on these characteristics would be helpful to the Board of Parole when making release decisions.<sup>294</sup> The author concludes that, as "poor as the criteria now used by the Board are, the Board would not improve matters by considering any of the 60-odd pieces of information at its disposal."<sup>295</sup> The author argues that a "glance" at the data is sufficient to show its irrelevance and that "the Board of Parole is correct in paying to it no more attention than it does."<sup>296</sup>

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286. *See id.*

287. *See supra* Section II.A.

288. *See* ARTHUR, *supra* note 279, at 159–60.

289. *See, e.g.,* Burgess, *Part IV: Factors*, *supra* note 5, at 205.

290. HARCOURT, *AGAINST PREDICTION*, *supra* note 41, at 47.

291. *See supra* notes 246–47 and accompanying text.

292. MUHAMMAD, *supra* note 146, at 15–16.

293. Sam B. Warner, *Factors Determining Parole from the Massachusetts Reformatory*, 14 J. CRIM. L. & CRIMINOLOGY 172, 195–96 (1923).

294. *Id.* at 172–73.

295. *Id.* at 196.

296. *Id.* at 190–91.

Almost immediately, another researcher responds. In an article published later that same year, Hornell Hart writes: “That the percentage of violations of paroles among men paroled from the Massachusetts Reformatory could be reduced one-half through scientific utilization of data already being collected by the authorities of that institution, is the conclusion which *should have been reached*.”<sup>297</sup> Hart critiqued the previous paper for failing to use any formal statistical analysis,<sup>298</sup> demonstrating that many of the patterns identified were indeed statistically significant.<sup>299</sup> The characteristics highlighted by Hart hew closely to the eugenic criminology playbook: delinquency of parents, personality/character, and physical condition.<sup>300</sup> Hart then goes on to advocate for creating “prognostic scores” which could inform the parole board about likely parole success.<sup>301</sup> He provides the following as an example:

Will Smith has a prognostic score of 21 points. In the past experience of the Board among men with prognostic scores close to 21 points, 80 percent have violated their paroles.<sup>302</sup>

This Article marks the birth of statistical risk assessment in criminal justice.<sup>303</sup> Although Hart does not create a risk assessment himself, he presents the idea and advocates for its use in parole.

To a certain extent, Hornell Hart came out of the blue. At the time of publication, Hart was a “relatively unknown researcher” working on child welfare issues in Iowa.<sup>304</sup> This is one of the only articles Hart ever wrote about crime or the prison system.<sup>305</sup> Following a hunch, however, we discovered that Hornell

297. Hornell Hart, *Predicting Parole Success*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 405, 405 (1923) (emphasis added). Note the similarities between this language and a more recent prominent paper, which claimed adopting pretrial risk assessments could lead to “jailing rate reductions up to 41.9% with no increase in crime rates.” Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & Sendhil Mullainathan, *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 238 (2018). The literature thus far on risk assessment use has not shown dramatic gains to adoption, although this may be partly because judges do not always follow the risk recommendations. See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 369 (2018); Carly Will Sloan, George Naufal & Heather Caspers, *The Effect of Risk Assessment Scores on Judicial Behavior and Defendant Outcomes*, 60 J. HUM. RES. 1778, 1783 (2025); Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans*, 16 AM. ECON. J.: ECON. POL’Y 382, 383 (2024); Kosuke Imai, Zhichao Jiang, D. James Greiner, Ryan Halen & Sooahn Shin, *Experimental Evaluation of Algorithm-Assisted Human Decision-Making: Application to Pretrial Public Safety Assessment\**, 186 J. ROYAL STAT. SOC’Y SERIES A: STAT. SOC’Y 167, 168 (2023).

298. Hart, *supra* note 297, at 405.

299. *Id.* (“[Warner’s] failure to apply accurate statistical tests to determine which of the factors involved showed significant contrasts, and which did not, resulted in his overlooking certain highly important differences between the men who violated their paroles and men who succeeded.”).

300. *Id.* at 406–08.

301. *Id.* at 411.

302. *Id.*

303. Crediting him as the first with the idea: HARCOURT, AGAINST PREDICTION, *supra* note 41, at 39; SHELDON GLUECK & ELEANOR T. GLUECK, 500 CRIMINAL CAREERS 280 n.2 (1930) [hereinafter GLUECK & GLUECK, CRIMINAL CAREERS].

304. HARCOURT, AGAINST PREDICTION, *supra* note 41, at 39 (describing Hart as “a relatively unknown researcher laboring at the Iowa Child Welfare Research Station”).

305. See Lux Ferre, *Hornell Norris Hart*, OCCULT WORLD (July 5, 2017), <https://web.archive.org/web/20250215004955/https://occult-world.com/hornell-norris-hart/> [https://perma.cc/Z3BG-VRD7].

Hart was the second-born son of Hastings Hornell Hart, the Russell Sage official who advocated for the extinction of the defective delinquent via confinement in prison colonies.<sup>306</sup> Given his father's line of work, he may easily have grown up in an environment in which discussions of crime and prison were common.<sup>307</sup> Undoubtedly, he shared his father's eugenic beliefs, arguing that children of "the weak-minded, the diseased and the criminal . . . dilute and poison the race."<sup>308</sup> Hart went on to have a prominent career as a scholar of the occult, working to "try to make scientific sense out of the evidence in favor of ghosts, poltergeists, and other manifestations."<sup>309</sup>

While Hornell Hart was the first to propose the idea of statistical risk assessment, in many ways it was ripe and ready to happen.<sup>310</sup> Both the requisite need and the requisite pieces were all there. Thanks to eugenic criminology, people understood crime as mostly arising from a sub-species of crime-prone humans.<sup>311</sup> Indeterminate sentencing was now widespread and required a method of distinguishing between the different criminal types to determine appropriate sentence length.<sup>312</sup> Mathematical statistics was going through significant advances motivated primarily by the eugenic goals of understanding heredity and classifying people according to their fitness.<sup>313</sup> Similar tools were being developed to classify people for commercial purposes such as life insurance.<sup>314</sup> It was only a matter of time before statistical methods of prediction and classification were applied to criminal justice.

After Hart's proposal, there was a flurry of new work on risk assessment algorithms, arising primarily from two camps.<sup>315</sup> One camp consisted of Eleanor and Sheldon Glueck, a husband-and-wife team based out of Harvard.<sup>316</sup> The Gluecks made crime prediction their life's work and were, in their era, some of the most famous criminologists in the world.<sup>317</sup> The early part of their careers

306. See *id.*; HART, DEFECTIVE DELINQUENT, *supra* note 47, at 3.

307. See HART, DEFECTIVE DELINQUENT, *supra* note 47, at 3.

308. HORNELL HART, 78, *TAUGHT SOCIOLOGY; Professor Dies—Worked on Parapsychology at Duke*, N.Y. TIMES (Mar. 1, 1967), <https://www.nytimes.com/1967/03/01/archives/hornell-hart-78-taught-sociology-professor-diesworked-on.html> [<https://perma.cc/Y9VF-3DTV>].

309. *Id.*; see, e.g., Ferre, *supra* note 305.

310. See *supra* Sections II.A–B.

311. See *supra* Section II.A.

312. See *supra* Section II.B.

313. MUHAMMAD, *supra* note 146, at 33.

314. See, e.g., *id.* at 42.

315. Howard Borden published a risk assessment study in 1928 and is thus another early researcher in this area. Howard G. Borden, *Factors for Predicting Parole Success*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY 328, 328 (1928). Borden was the Director of Statistics for the New Jersey agency that oversaw prisons and, as far as we were able to discern, this was his only academic publication. There is no evidence that his tool was ever used. We expect that ideas of eugenic criminology influenced Borden's writing: he was a member of the American Eugenics Society and his instrument included concepts such as defectiveness, mental age, feeble-mindedness and intelligence. AM. EUGENICS SOC'Y, LIST OF MEMBERS OF THE AMERICAN EUGENICS SOCIETY (Aug. 1930) (Subscribing Member, New York). But he mostly appears as a bit player on our stage.

316. Elizabeth Waterman Gilboy, *Projections—Eleanor Touroff Glueck*, BARNARD COLL. ALUMNAE MONTHLY (Barnard College, New York, N.Y.), Oct. 1936, at 1.

317. Snodgrass, *Portraits*, *supra* note 137, at 320.

focused on risk assessment among adults; they were known for bringing in-depth data collection and analysis to argue that most criminals are incapable of reform.<sup>318</sup> The second part of their careers focused on crime prediction among children as young as two years old, advocating for state intervention to steer proto-delinquents away from crime.<sup>319</sup>

The other camp consisted of Ernest Burgess and his students at the University of Chicago.<sup>320</sup> Burgess's risk assessment, adopted for use in Illinois's parole system, was the first and only statistical crime prediction tool in use for several decades.<sup>321</sup> Burgess was a member of the Chicago School of Sociology, a school known for developing social and contextual theories of crime.<sup>322</sup> Today, such an approach would be considered anathema to the individual-level theories associated with eugenic criminology.<sup>323</sup> In the 1920s, however, social theories of crime were interlayered with those of eugenic criminology.<sup>324</sup>

Unlike the Gluecks, who made crime prediction their life's work, Burgess only published one study about risk assessment.<sup>325</sup> Yet he spawned an academic cottage industry of Ph.D. students who developed their own risk assessments and frequently worked as actuaries within the prison system, implementing Burgess's risk assessment.<sup>326</sup> The large majority of early risk assessment research was written either by Burgess's students or by the Gluecks.<sup>327</sup>

This Part describes how the ideas of eugenic criminology influenced the development of statistical risk assessment from the 1920s–1950s. We structure our narrative around the main characters of the era: the Gluecks, Burgess, and his students. For some of these characters, the influence of eugenic criminology is fairly obvious. The Gluecks, for instance, explicitly endorsed many of the central ideas from eugenic criminology.<sup>328</sup> For others, the influence is more indirect. Burgess's writing, for instance, generally did not explicitly endorse biological or hereditarian theories of crime.<sup>329</sup> Nonetheless, we show that he did not reject such views; rather, he considered them outside of his purview as a sociologist. With some knowledge of history, it is plain to see how the ideas of eugenic

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318. *See id.* at 324–25.

319. *See id.* at 325–26.

320. *See* Shahan, *supra* note 45, at 114.

321. *See infra* notes 490–91.

322. MUHAMMAD, *supra* note 146, at 236 (“As representatives of the Chicago School of Sociology, they established the field of urban ecology, sharing to varying degrees a scientific commitment to advancing environmental theories of poverty, crime, and delinquency . . .”).

323. Shahan, *supra* note 45, at 214.

324. MUHAMMAD, *supra* note 146, at xvii.

325. *See infra* Section III.B; *see, e.g.*, GLUECK & GLUECK, CRIMINAL CAREERS, *supra* note 303; GLUECK & ELEANOR T. GLUECK, UNRAVELING JUVENILE DELINQUENCY 257 (1950) [hereinafter GLUECK & GLUECK, UNRAVELING].

326. Schuessler, *supra* note 42, at 426–27.

327. *Id.*

328. *See infra* notes 390–96 and accompanying text.

329. *See infra* notes 476–83 and accompanying text.

criminology influenced Burgess's risk assessment tool as well as tools developed by his students.

A. *Eleanor and Sheldon Glueck*

Remember Bernard Glueck, the psychiatrist from Part II who advocated for turning Guam into a penal colony for psychopaths? He was the link that connected two of risk assessment's early pioneers: Eleanor and Sheldon Glueck. Bernard was Sheldon's older brother as well as Eleanor's professor; he introduced the couple in New York.<sup>330</sup>

Eleanor was described as a quiet and diffident woman who, in an interview, remarked that she was "so unaccustomed to talking about herself that she hardly knew what to say."<sup>331</sup> But while she may have been diffident in speech, she was bold in action. Eleanor was one of the first women to receive a Ph.D. from Harvard.<sup>332</sup> By all accounts, she was the organizational force behind the research partnership with her husband.<sup>333</sup> She managed the large data collection teams and took charge of the methodological parts of the analyses.<sup>334</sup> Sheldon, meanwhile, provided the public face and rhetorical flourish to their writing.<sup>335</sup> He built up his oratorical skills as a young man, working to translate silent movies to immigrant audiences and dreaming of being an actor.<sup>336</sup> The couple published virtually all their work together, yet their institutional status diverged sharply: Sheldon became a law professor at Harvard while Eleanor's position was little more than a research assistant.<sup>337</sup>

The Gluecks were committed empiricists. They styled themselves as almost anti-theoretical, claiming to learn from the data rather than promote preconceived notions of crime.<sup>338</sup> They denigrated overly simplistic accounts that attributed crime to single factors, such as Lombroso's atavistic man.<sup>339</sup> Instead, they saw

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330. See Meriam H. Berlin, *Eleanor Glueck*, JEWISH WOMEN'S ARCHIVE: THE SHALVI/HYMAN ENCYCLOPEDIA OF JEWISH WOMEN (Feb. 27, 2009), <https://jwa.org/encyclopedia/article/glueck-eleanor> [<https://perma.cc/CK9Q-U6LN>] (describing how Eleanor and Sheldon met).

331. Elizabeth Waterman Gilboy, *Projections—Eleanor Touroff Glueck*, XXVI BARNARD COLL. ALUMNAE MONTHLY, 11, 11–12 (1936).

332. See *id.* at 12 ("Mrs. Glueck is one of [the] few women to hold a doctor's degree from Harvard University.").

333. Snodgrass, *Portraits*, *supra* note 137, at 318.

334. *Id.*

335. *Id.*

336. *Id.* at 317–18.

337. See Berlin, *supra* note 330 (explaining that Eleanor worked as a "research assistant (1929–1953) and later research associate (1953–1972)" and that "Eleanor Glueck, though a full partner in the joint work and the sole author of other books, occupied a position offered to Ph.D. candidates").

338. John H. Laub & Robert J. Sampson, *The Sutherland-Glueck Debate: On the Sociology of Criminological Knowledge*, 96 AM. J. SOCIO. 1402, 1415 (1991) ("We have no criminologic axes to grind. We search for facts as accurately as possible and on the basis of the findings we arrive inductively, and not *a priori*, at certain conclusions.").

339. See Sheldon Glueck, *Crime Causation*, 1941 Y.B. 86, 89–90 (1941) (explaining that the desire to "attribute exclusive or even major causal significance to any [singlefactor] . . . has led to putting one's scientific

crime as stemming from the interaction of multiple causes: social, environmental, familial, and constitutional.<sup>340</sup> Following William Healy, they adopted a multifactor approach to crime.<sup>341</sup>

Despite their avowal of empirics over theory, the Gluecks worked within a fairly explicit theory of crime causation.<sup>342</sup> They believed that, due to “inadequate biologic equipment” some people “simply cannot ‘make the grade’ in conforming their behavior to the demands of socially-tamed living.”<sup>343</sup> Their intelligence may be too faulty to enable them to grasp the necessary distinctions made by the criminal laws; their instinctual equipment may be too strong for control in the light of existing taboos; their emotional life may be topsy turvy because of varying degrees of mental abnormality or temporary or permanent derangement.<sup>344</sup> The Gluecks saw social and environmental factors as mitigating or aggravating an individual’s inherent crime risk.<sup>345</sup> “The more ‘inflammable’s’ (such as poverty, broken and distorted home life, badly occupied leisure time, culture conflict, and the like) that can be removed from the environment of childhood and youth, the less possibility there is of criminalistic conflagration.”<sup>346</sup>

According to the Gluecks, these various crime-causing factors were organized in a hierarchy. Factors such as economic conditions, unemployment, and social disorganization are “very remote from the individual human being’s theater of thought and action.”<sup>347</sup> Accordingly, the Gluecks believed that this was not an effective place to intervene to prevent crime.<sup>348</sup> When it comes to crime causation, the Gluecks believed the proper unit of analysis was the individual:

[A]ll of us are subjected to certain social pressures and to social disorganization. The great issue in crime causation is, why do some of us succumb to them and continue to do so, while others do not?<sup>349</sup>

They would focus their career around this question. Inspired by the in-depth data collection efforts of William Healy, their lab went to the field to find out what characteristics distinguish those who enter a life of crime from those who do not.<sup>350</sup> Their first major research project was to track the post-parole outcomes of 500 people released from the Massachusetts Reformatory in order to

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faith in a theory so remote from the dynamic realities of the individual offender’s intellectual and emotional life as to be almost meaningless”).

340. Laub & Sampson, *supra* note 338, at 1404 (“The Gluecks advocated a multiple-factor theory of crime . . .”).

341. “I had been particularly inspired with [Dr. Healy’s] book *The Individual Delinquent*.” Snodgrass, Portraits, *supra* note 137, at 310 (quoting Sheldon Glueck, *Remarks in Honor of William Healy, MD*, 48 MENTAL HYGIENE 318 (1964)).

342. See Glueck, *supra* note 339, at 89–90.

343. *Id.* at 95–96.

344. *Id.*

345. *Id.* at 107.

346. *Id.*

347. *Id.* at 88.

348. *Id.* at 96.

349. *Id.*

350. Snodgrass, Portraits, *supra* note 137, at 310–11.

determine what factors predicted parole success.<sup>351</sup> A journalist described this endeavor as follows:

How to find the prisoner who had left reformatory five years before and learn what had happened to him during that interim? They knew that he had possibly roamed the country, and probably changed his name many times. Also, they must conduct the investigation in such a way that no one would know he was an ex-convict. Now a crack private investigator at \$100 a day and expenses might secure such information on *one* man. But the Gluecks were multiplying the one by 500, and they had no crack investigators. Nevertheless, with careful maneuvering and persuasiveness, they assembled a small corps of investigators who worked for part-time payment. The Gluecks and their workers located 95 per cent of the “lost” 500 men, even though some were at sea and some were as far away as China and Australia.<sup>352</sup>

Successfully tracking down 95% of parolees is an impressive feat, let alone convincing them to engage in an in-depth interview about their lives, personalities, and delinquent acts.<sup>353</sup> (One might argue that it is so impressive as to strain belief, but we will leave that aside for now.) The data from this study was unprecedented and helped establish the Gluecks’ reputation as serious scholars.<sup>354</sup> Following the standard multifactor approach, they extensively cataloged parolee characteristics, categorizing them as successes or failures based on whether they returned to crime or antisocial behavior.<sup>355</sup>

The Gluecks built a prediction instrument as a result of this in-depth research.<sup>356</sup> But it was not their prediction instrument that gained attention in the headlines.<sup>357</sup> It was the claim that 80% of parolees failed at parole.<sup>358</sup> The reformatory, in other words, had failed to reform.<sup>359</sup> This brought “a howl of disbelief from wardens and penal authorities who thought their big gray-stone buildings had solved the problems of reform.”<sup>360</sup> It was the first major challenge to the indeterminate sentencing system that had been so dominant up to this date.<sup>361</sup>

If “a deplorable proportion of criminals never reform,” then what is to be done?<sup>362</sup> The Gluecks’ answer to that question hewed closely to the proposals of

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351. GLUECK & GLUECK, *CRIMINAL CAREERS*, *supra* note 303, at 7–8.

352. Carol Hughes, *The Harvard Couple Who Predict Crime*, 32 *CORONET* 94, 95 (1952).

353. *Id.*

354. *Id.* at 95–97.

355. GLUECK & GLUECK, *CRIMINAL CAREERS*, *supra* note 303, at 7–8.

356. *Id.* at 12.

357. Richard C. Cabot, *Foreword* to GLUECK & GLUECK, *CRIMINAL CAREERS*, *supra* note 303, at vii.

358. *Id.* Note that the Glueck’s version of failing at parole included a continuation of behaviors they considered delinquent, even if they did not result in parole revocation and even, in some cases, if such behaviors would not count as crime. GLUECK & GLUECK, *CRIMINAL CAREERS*, *supra* note 303, at 281–85.

359. Cabot, *supra* note 357, at vii.

360. *Id.*

361. GLUECK & GLUECK, *CRIMINAL CAREERS*, *supra* note 303, at vii.

362. *Id.* at 316 (“It might be argued that every case, no matter how ‘hardened,’ should be regarded as promising of reformation. So far as experience goes, however, this contention will not hold water. A deplorable proportion of criminals never reform.”).

the Italian positivists from the generation prior: lengthy or permanent incarceration as a way to protect society.<sup>363</sup> Like the Italian positivists, they believed incarceration should be based on the traits of the individual rather than the details of the offense.<sup>364</sup> The Gluecks had little patience for “the slow-moving cumbersome machinery of prosecution and trial,” believing that the due process rights of the criminal proceeding would hinder the ability to protect society from crime.<sup>365</sup> Accordingly, sentencing should be decided by a “treatment tribunal” composed of psychiatrists and other medical experts, rather than a judge.<sup>366</sup> This tribunal would have the authority to impose a “a *wholly indeterminate* sentence, so that manifestly dangerous individuals might be kept under control within institutions and on parole for long periods—if necessary throughout life.”<sup>367</sup>

Risk assessment played a central role in this vision. The tool the Gluecks built would help guide the treatment tribunal in determining who could be released and who required lengthy periods of incarceration.<sup>368</sup>

The Glueck’s instrument was composed of six characteristics: three focusing on the offense and criminal record, two on work habits, and one on mental abnormality.<sup>369</sup> This instrument is not too dissimilar from those used today, nor many others of the era.<sup>370</sup> Criminal record, work history, and psychological dispositions are frequently inputs to risk assessments.<sup>371</sup> The score itself was a weighted sum of the six inputs where the weights correspond to each factor’s predictive value.<sup>372</sup> This weighting approach is effectively quite similar to today’s regression based tools.<sup>373</sup>

But their instrument differed from others of the era in a notable manner: it did not include race or ethnicity variables.<sup>374</sup> The exclusion of race may perhaps be explained by the fact that Massachusetts at the time was overwhelmingly White.<sup>375</sup> Yet the same could be said for Illinois during that era, and that did not

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363. *Id.*

364. *Id.* at 317.

365. Sheldon Glueck, *Sex Crimes and the Law*, 11 SOC. SERV. REV. 717, 718 (1937). This quote is from an article about sex crimes, but the recommendations are not limited to those who have committed sex offenses. In fact, the article implies that the large majority of delinquents are sexual deviants as well.

366. *Id.*

367. *Id.* (emphasis added).

368. *Id.*

369. GLUECK & GLUECK, CRIMINAL CAREERS, *supra* note 303, at 281–83.

370. Schuessler, *supra* note 42, at 426 (“Except for minor differences [the Gluecks’] first tables . . . [were] very similar in form and significance to the table prepared by Burgess.”).

371. Mayson, *supra* note 39, at 2286.

372. William F. Lanne, *Parole Prediction as Science*, 26 J. CRIM. L. & CRIMINOLOGY 377 (1935).

373. *Id.*

374. GLUECK & GLUECK, CRIMINAL CAREERS, *supra* note 303, at 281–83.

375. SHELDON GLUECK & ELEANOR T. GLUECK, FIVE HUNDRED DELINQUENT WOMEN 74 (1934) [hereinafter GLUECK & GLUECK, FIVE HUNDRED] (“In colour 93.6% of our girls are white, 5.2% are Negroes, and 1.2% are Indian or other . . . This is a slightly lower proportion of whites and a higher proportion of Negroes than is found in the general population of Massachusetts, in which the white population in 1920 was 98.7%, the Negro 1.2%.”).

prevent Chicago's sociologists from incorporating race into their tools.<sup>376</sup> Furthermore, both states had a considerable number of Southern and Eastern European immigrants.<sup>377</sup> Crime in the early twentieth century was frequently attributed to immigration from these areas.<sup>378</sup>

Unlike most of their contemporaries in early risk assessment, the Gluecks were part of a demographic frequently condemned as inferior within eugenic frameworks. Both Eleanor and Sheldon were Jewish and were raised by Eastern European immigrants.<sup>379</sup> Eleanor's mother had chosen to emigrate from Russia to the United States with a bag of jewels rather than take her social debut.<sup>380</sup> Sheldon's father was a prosperous contractor in Warsaw who lost his fortune after building a bridge that was too short to span a river.<sup>381</sup> After emigrating to the United States, he supported his family by peddling religious statuary, relics, and pictures.<sup>382</sup> The Gluecks' life experiences may therefore have made them more sensitive to racial or ethnic bigotry.<sup>383</sup>

But their personal experiences with prejudice did not prevent them from applying moralistic judgment on the character of those they studied. One of their next major research endeavors focused on 500 delinquent women released from the Massachusetts Reformatory for Women.<sup>384</sup> The conclusions of this research were dripping with condemnation. They find that:

*The women are themselves on the whole a sorry lot. Burdened with feeble-mindedness, psychopathic personality, and marked emotional instability . . . Illicit sexual indulgence was the chief form of their adolescent and early-adult misbehaviour. . . . The poor calibre [sic] of our delinquent women is further reflected in other aspects of their careers. Thus, the women who married prior to commitment (half the group) had done so with the casualness and irresponsibility which could only end in tragedy. Most of them married "pickups"—often vicious and criminal wasters and irregular, inefficient workers—with whom they had scraped acquaintance. . . . This swarm of defective, diseased, antisocial misfits, then, comprises the human material which a reformatory and the parole system are required by society to transform into wholesome, decent, law-abiding citizens! Is it not a miracle that a proportion of them were actually rehabilitated?"*<sup>385</sup>

376. See *infra* text accompanying notes 483, 517, 530.

377. Only 30% of the sample from 500 criminal careers were native-born and had native-born parents. GLUECK & GLUECK, CRIMINAL CAREERS, *supra* note 303, at 118–19.

378. William F. Ogburn & Clark Tibbitts, A Memorandum on the Nativity of Certain Criminal Classes Engaged in Organized Crime, and of Certain Related Criminal and Non-Criminal Groups in Chicago 4 (July 30, 1930) (unpublished manuscript) (on file with University of Chicago Library) ("It is sometimes stated that immigrants and not native Americans constitute our criminal classes, that Italians are the gunmen, the Jews financed crime, that the Irish fix the government in favor of the criminal.").

379. See Snodgrass, Portraits, *supra* note 137, at 314–16.

380. *Id.* at 314–15.

381. *Id.* at 316.

382. *Id.*

383. *Id.* at 314–317.

384. GLUECK & GLUECK, FIVE HUNDRED, *supra* note 375, at 28.

385. *Id.* at 299–303.

The Gluecks adopt explicitly eugenic attitudes towards female delinquents, advocating for both sterilization and incarceration to prevent “irresponsible breeding.”<sup>386</sup> How to determine whom among the “defective, diseased, antisocial misfits” most need to be prevented from having children?<sup>387</sup> Again, prediction comes to the rescue. The Gluecks built a prediction instrument designed specifically for women, including such factors as economic responsibility, mental abnormality, retardation in school, steadiness of employment, and neighborhood influences.<sup>388</sup> They advocate for the elimination of sentence maximums so that those scoring in the highest categories can be incarcerated for life.<sup>389</sup>

In 1952, the Gluecks took out a full-page newspaper advertisement with the announcement that “Right Now the Thieves, Murderers and Rapists of the Future can be Spotted in our Kindergartens!”<sup>390</sup> This marked a shift in their career towards identifying proto-delinquents at a young age for early intervention.<sup>391</sup> The Gluecks held a quasi-Freudian perspective, in which children were born with varying degrees of criminal tendencies that had to be suppressed to conform to society’s rules.<sup>392</sup> With proper supervision, discipline, and affection, the Gluecks believed that most potential delinquents could develop necessary self-control, but this guidance must come when the child is still young and malleable.<sup>393</sup> The Gluecks believed that by the time a teenager or young adult faces their first arrest, they are no longer capable of reform.<sup>394</sup>

The Gluecks saw schools as a central clearinghouse for reform. They developed a risk assessment specifically for children and wanted elementary schools to use it to identify proto-delinquents for additional monitoring, discipline and guidance.<sup>395</sup> According to the Gluecks, “The school has the function not only of teaching the ‘three Rs’ but of discovering and remedying those

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386. *Id.* at 309–10.

387. *Id.* at 303.

388. *Id.* at 289.

389. *Id.* at 292.

390. See Snodgrass, Portraits, *supra* note 137, at 320. Later, the Gluecks argued that future criminals could be identified as early as 2-3 years old, based on the child’s body type, disposition, pathology of parents and relationship to parents. Eleanor T. Glueck & Sheldon Glueck, *Identification of Potential Delinquents at 2-3 Years of Age*, 12 INT’L J. SOC. PSYCHIATRY 5, 8 (1966).

391. The Gluecks had released an in-depth study of juvenile delinquents in 1934, as well as a follow-up study that tracked these youths 10 years into the future. Therefore the focus on youth in the 1950s and 1960s could be thought of as a shift in emphasis rather than a new research endeavor. SHELDON GLUECK & ELEANOR GLUECK, ONE THOUSAND JUVENILE DELINQUENTS: THEIR TREATMENT BY COURT AND CLINIC 3 (1934) [hereinafter GLUECK & GLUECK, ONE THOUSAND]; SHELDON GLUECK & ELEANOR GLUECK, JUVENILE DELINQUENTS GROWN UP I (1940) [hereinafter GLUECK & GLUECK, GROWN UP].

392. SHELDON GLUECK & ELEANOR GLUECK, VENTURES IN CRIMINOLOGY: SELECTED RECENT PAPERS 245–46 (1964) [hereinafter GLUECK & GLUECK, VENTURES] (“[O]ne must conclude that it is not delinquent behavior that is learned; that comes naturally. It is rather *non*-delinquent behavior that is learned. . . . Law-abiding character formation is a hard-won process.”).

393. GLUECK & GLUECK, UNRAVELING, *supra* note 325, at 257 (identifying proto-delinquents at an early age “would make possible the application of treatment measures that would be truly crime preventive”).

394. *Id.*

395. See Snodgrass, Portraits, *supra* note 137, at 393 (“Fundamentally, the Glueck Prediction Table wants to determine whether the state should substitute itself for the family as the major agent of social control.”).

distortions of personality that are brought to the surface by the child's first attempts to adjust to the codes and authority imposed by adults outside the home."<sup>396</sup>

Their youth risk assessment predicted delinquency on the basis of family life, personality (as evidenced by a Rorschach test), and psychiatric traits.<sup>397</sup> Interestingly, many of the "criminalistic" traits were also favorable ones.<sup>398</sup> Delinquents were characterized as adventurous, extroverted, assertive, stubborn, suggestible, defiant, and emotionally labile.<sup>399</sup> In contrast, the non-delinquents evaluated in the study were often characterized as neurotic, fearful, and timid.<sup>400</sup> As Justice Polier put it, "One might even question whether the basic human material in the delinquent group, if properly handled, is not more promising."<sup>401</sup>

The Gluecks' risk assessment for children was adopted in at least a handful of schools in the United States, and possibly many more.<sup>402</sup> But the assessment was generally not paired with very robust programs to substitute for the parental guidance that was supposedly lacking at home.<sup>403</sup> Later evaluations found that, while the tool was predictive, the interventions to reduce delinquency largely were not.<sup>404</sup> Risk assessments for children have continued today, although now they exist in juvenile justice systems as a way of determining whether and for how long youth should be incarcerated, rather than in schools.<sup>405</sup>

By the 1950s and 1960s, the Gluecks were internationally famous.<sup>406</sup> Their research was translated into a variety of foreign languages.<sup>407</sup> Follow-on studies were funded by the governments of Puerto Rico, France, and Germany, as well

396. GLUECK & GLUECK, UNRAVELING, *supra* note 325, at 257–58.

397. *Id.* at 259–65 (describing the construction of three prediction tables).

398. *Id.* at 276.

399. *Id.* at 215–44 (describing character and personality structure of delinquents and nondelinquents).

400. *Id.*

401. Justine Wise Polier, *Review: A Symposium on "Unraveling Juvenile Delinquency,"* 64 HARV. L. REV. 1022, 1036, 1037 (1951) (book review).

402. See, e.g., Maude M. Craig & Philip W. Furst, *What Happens After Treatment? A Study of Potentially Delinquent Boys*, 39 SOC. SERV. REV. 165, 165 (1965); Emory F. Hodges, Jr. & C. Downing Tait, Jr., *A Follow-up Study of Potential Delinquents*, 120 AM. J. PSYCHIATRY 449, 450 (1963); Richard E. Thompson, *A Validation of the Glueck Social Prediction Scale for Proneness to Delinquency*, 3 BRIT. J. DELINQ. 289, 291 (1953).

403. Hodges & Tait, *supra* note 402, at 205–07.

404. *Id.* at 208–09.

405. GINA M. VINCENT, LAURA S. GUY & THOMAS GRISSO, RISK ASSESSMENT IN JUVENILE JUSTICE: A GUIDEBOOK FOR IMPLEMENTATION 31 (2012).

406. See, e.g., Gilbert Geis, *Ventures in Criminology*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 187, 187 (1966) (book review).

407. See Snodgrass, *Portraits*, *supra* note 137, at 330 (noting that their work has been translated into Italian, Japanese, French, German, and Urdu). We were also able to find translations into Spanish and Hebrew. *Unraveling Juvenile Delinquency*, WORLD CAT, <https://uva.on.worldcat.org/search/detail/84298563?queryString=au%3A%28sheldon%20glueck%29%20AND%20au%3A%28eleanor%20glueck%29&databaseList=239%2C638&origPageViewName=pages%2Fadvanced-search-page&clusterResults=false&groupVariantRecords=false&expandSearch=true&translateSearch=false&queryTranslationLanguage=&lang=en&scope=&changedFacet=language&author=Glueck%20Sheldon&language=Heb> [https://perma.cc/S8SH-G2ZC] (last visited Dec. 14, 2025).

as by industrialists in the Philippines.<sup>408</sup> There were proposals to adopt the Gluecks' prediction instruments into military enlistment screening and for use during juvenile sentencing; the record is unclear as to whether these were actually implemented.<sup>409</sup>

As popular as they were among institutions looking for a way to control crime, the Gluecks' theories were waning in influence among other academics.<sup>410</sup> Criminology was going through a rupture.<sup>411</sup> On the one hand were the Gluecks: interdisciplinary scholars who focused on individuals and their families.<sup>412</sup> On the other hand were the sociologists who emphasized societal explanations for crime.<sup>413</sup> One approach does not automatically preclude the other and, in the 1920s, scholars moved freely between these different methodological approaches.<sup>414</sup> But by the 1950s, the divide had escalated into an "intellectual shoot-out" between the Gluecks and the leader of the sociological approach, Edwin Sutherland.<sup>415</sup> Sociology closed ranks and began to ignore or criticize the Gluecks' research.<sup>416</sup> Criminology, always somewhat of an orphan child, became tucked under the wing of sociology.<sup>417</sup> Since the Gluecks did not train Ph.D. students, they had no one to carry the torch of their methods after they were finished.<sup>418</sup> Within a couple decades after their deaths, the Gluecks had been largely forgotten.<sup>419</sup>

The methods and approach used by the Gluecks, however, have had a Renaissance. Starting in the 1980s and 1990s, an increasing number of criminologists adopted what could be called a modern version of the multifactor approach to crime: using the individual as the unit of analysis and using regression analysis to see which characteristics predict criminal activity.<sup>420</sup> Around the same time,

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408. See Snodgrass, Portraits, *supra* note 137, at 386 n.95.

409. See Richard L. Levine, *Gluecks Pioneer in Delinquency Study*, HARV. CRIMSON (May 20, 1963), <https://www.thecrimson.com/article/1963/5/20/gluecks-pioneer-in-delinquency-study-pin/> [<https://perma.cc/HZ92-Z2TA>].

410. Geis, *supra* note 406, at 187–88 (describing how the Gluecks' influence is likely to wane due to the lack of disciplinary home, students to carry their torch, and warm relationships with other scholars).

411. Laub & Sampson, *supra* note 338, at 1404 (describing the rancorous debate between the sociological criminologists, led by Edwin Sutherland, and the Gluecks).

412. *Id.* at 1408–10.

413. *Id.* at 1418 n.16.

414. *Id.* at 1408.

415. *Id.*

416. *Id.* at 1408.

417. *Id.* at 1421.

418. See, e.g., *id.* at 1408.

419. See Philip Shon & Erik Mansager, *Negligent Criminology: Alfred Adler's Influence on Bernard, Sheldon, and Eleanor Glueck*, 18 EUR. J. CRIMINOLOGY 660, 661, 673 (2021) ("The Gluecks' challenge of the dominant sociological position ultimately led to their exclusion from major academic standing in the discipline . . .").

420. Andrew Abbott refers to this derogatorily as the "variables paradigm." Notably, his historical narrative of the variables paradigm omits any mention of the Gluecks, despite their position as some of twentieth century's most prominent and prolific researchers within this paradigm. Andrew Abbott, *Of Time and Space: The Contemporary Relevance of the Chicago School*, 75 SOC. FORCES 1149, 1152, 1165 (1997).

biological theories of crime began receiving mainstream attention once again.<sup>421</sup> Statistical crime prediction tools began surging as a way to prevent crime by locking up the most dangerous.<sup>422</sup>

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Prediction algorithms were a central part of the Gluecks' four-decade career.<sup>423</sup> None of the other forefathers of risk assessment were so devoted to the cause.<sup>424</sup> Most generated but one risk assessment algorithm and, at most, a handful of papers on related criminal justice topics.<sup>425</sup> Ernest Burgess is perhaps the most prominent among them, both because he was one of the first to generate a risk assessment algorithm and because—unlike most—his algorithm was actually adopted for use in parole.<sup>426</sup> Yet, as we will describe in the next Section, Burgess almost stumbled into parole prediction. It was a topic he wrote on for a short period of time after being asked to contribute to a report on parole. Other early risk assessment authors, many of whom were Burgess's students, were similarly fly-by-nights to the topic.<sup>427</sup>

While the Gluecks constituted a relatively straightforward continuation of eugenic criminology beliefs, Burgess and his students generally were less explicit in endorsing eugenic criminology.<sup>428</sup> For many of them, biological/hereditarian theories did not play a big role in their research, even though they may have played a bigger role in their belief system.<sup>429</sup> Nonetheless, the marks of eugenic criminology are indisputably visible in the risk assessments' inputs, language, style, and function within indeterminate sentencing systems.

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421. See Laub & Sampson, *supra* note 338, at 1423 (arguing that Gluecks' embrace of biological theories of crime is supported by contemporary knowledge).

422. See, e.g., John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10, 10–15 (1984) (reviewing violence-prediction algorithms); Mairead Dolan & Michael Doyle, *Violence Risk Prediction: Clinical and Actuarial Measures on the Role of the Psychopathy Checklist*, 177 BRIT. J. PSYCHIATRY 303, 303–05 (2000) (describing developments in violence prediction in the 80s and 90s).

423. Laub & Sampson, *supra* note 338, at 1409 (“The Gluecks' methodological approach to the study of crime can be characterized by three distinct features. The first is an emphasis on longitudinal and follow-up prediction studies, including, when possible, control groups for comparative purposes.”).

424. See Richard Berk, *A Primer on Criminal Justice Risk Assessment 2* (U. Pa. Dep't of Criminology, Working Paper No. 2016-3.0, 2016), [https://crim.sas.upenn.edu/sites/default/files/WP2016-03\\_Berk\\_Risk\\_Primer\\_07.10.2016%281%29.pdf](https://crim.sas.upenn.edu/sites/default/files/WP2016-03_Berk_Risk_Primer_07.10.2016%281%29.pdf) [<https://perma.cc/2UNF-9UJZ>] (providing an overview of risk assessment construction).

425. See, e.g., Robert M. Allen, *A Review of Parole Prediction Literature*, 32 J. CRIM. L. & CRIMINOLOGY 548 (1942); William F. Lanne, *Parole Prediction as Science*, 26 J. CRIM. L. & CRIMINOLOGY 377, 377 (1935).

426. See *infra* notes 488–92 and accompanying texts; see also William F. Lanne, *Parole Prediction as Science*, 26 J. CRIM. L. & CRIMINOLOGY 377, 378 (1935) (“To Prof. Ernest W. Burgess belongs the honor of being the first actually to prepare an experience table which could be used for prognostic purposes.”).

427. See *infra* Section III.C.

428. See *infra* Sections III.B–C.

429. See *infra* Sections III.B–C.

*B. Ernest Burgess and Risk Assessment in Illinois*

Risk assessment in Illinois emerged during a period of growing disillusionment with indeterminate sentencing. Crime rates had been rising and many saw the parole system as corrupt, with freedom available to the highest bidder.<sup>430</sup> In 1926, this exploded in a dramatic fashion. During a prison escape, inmates armed with scissors murdered a deputy warden, leaving him sprawled over his desk.<sup>431</sup> Upon searching the office, police found letters revealing an extensive scheme: the deputy warden and other prominent officials had been selling parole for cash and political favors.<sup>432</sup> Calls to reform or abolish the parole system grew louder.<sup>433</sup> Seeking damage control, the governor appointed a commission of independent experts to evaluate Illinois's parole system and propose reforms.<sup>434</sup> Ernest Burgess was part of this commission and developed his risk assessment as part of the commission's report.<sup>435</sup>

Ernest Burgess was described as a quiet and self-effacing man.<sup>436</sup> He was born in Canada but immigrated to a small town in Michigan where he grew up.<sup>437</sup> He completed his Ph.D. in sociology at the University of Chicago, and then joined the department in 1919.<sup>438</sup> Despite being one of the first to develop an actuarial risk assessment, he was not primarily a statistician.<sup>439</sup> In fact, he had to sit in on a statistics class taught by a colleague to brush up his skills.<sup>440</sup> The only other foray he would make into prediction would be about predicting marriage success.<sup>441</sup> Nonetheless, his work in this area left an indelible mark. The tool that he built was used to help make parole decisions for many decades,<sup>442</sup> and his statistical approach, referred to as the "Burgess method" is still in use today.<sup>443</sup>

430. Shahan, *supra* note 45, at 66; *see, e.g.*, Karl Gruschow, *Parole and Mandatory Supervised Release in Illinois 1895-2021*, ILL. CRIM. JUST. INFO. AUTH. (June 2, 2022), <https://icjia.illinois.gov/researchhub/articles/parole-and-mandatory-supervised-release-in-illinois> [<https://perma.cc/U5EJ-WKCE>].

431. Shahan, *supra* note 45, at 64.

432. *Id.* at 65.

433. *Id.* at 65–66.

434. *See* BRUCE ET AL., *supra* note 182, at iii (describing the committee selection process).

435. *See* Schuessler, *supra* note 42, at 425 (describing how Burgess developed a parole prediction instrument not long after Hornell Hart first proposed the idea).

436. Shahan, *supra* note 45, at 114 ("Burgess [was] a congenitally quiet and unobtrusive observer.").

437. *Id.* at 131.

438. Ruth Shonle Cavan, *The Chicago School of Sociology, 1918-1933*, 11 URB. LIFE 407, 410 (1983).

439. *See id.* at 414 (describing how William F. Ogburn, not Burgess, brought statistics to the sociology department and stating that Burgess's 1928 risk assessment study was his first foray into prediction).

440. *See* Shahan, *supra* note 45, at 139 ("Burgess sat in on at least one of his colleague William F. Ogburn's courses in statistics in 1927.").

441. *See* ERNEST W. BURGESS & LEONARD S. COTTRELL, JR., *PREDICTING SUCCESS OR FAILURE IN MARRIAGE* viii–ix (Prentice-Hall, Inc. 1939).

442. *See* Shahan, *supra* note 45, at 273 (describing how Burgess's prediction method "remained static from 1934 to at least 1940 for Joliet-Statesville and Menard, and into the 1950s at Pontiac").

443. DON M. GOTTFREDSON & HOWARD N. SNYDER, *THE MATHEMATICS OF RISK CLASSIFICATION: CHANGING DATA INTO VALID INSTRUMENTS FOR JUVENILE COURTS* 9, NAT'L CTR. JUVENILE JUST. (2005), <https://www.ojp.gov/pdffiles1/ojdp/209158.pdf> [<https://perma.cc/8CWW-MEY5>] (describing the Burgess method as popular due to its simplicity).

At first glance, Burgess does not seem heavily connected with eugenic criminology. He was a member of the Chicago School of Sociology, a group of influential scholars who built their reputation in the 1920s and 1930s by focusing on “ecological” theories of crime.<sup>444</sup> This school is known for using a case study approach to understand the role of context and environment in social dynamics, particularly in urban industrial areas.<sup>445</sup> Burgess is most well-known for developing a model of urban crime in which cities consist of concentric zones.<sup>446</sup> In this model, most crime occurs due to social disorganization in the “transitional zone,” characterized by high residential turnover, poverty, and friction between different ethnic groups.<sup>447</sup>

To the modern eye, a focus on context and environment within a narrative approach to research reads like the diametric opposite of biological theories of crime. Of course, to say that one is important does not automatically preclude a role for the other. But today, those who champion environmental theories of crime tend to discredit biological theories, and vice versa.<sup>448</sup> The former is associated with the left, the latter is associated with the right, and there is often rancor between the two perspectives.<sup>449</sup>

In the Progressive Era, this was not the case. As Michael Willrich demonstrates, there was much more fluidity and overlap between those who focused on biological causes for society’s problems and those who focused on economic or environmental.<sup>450</sup> Both perspectives supported a strong role for the state in improving social welfare.<sup>451</sup> Both championed an increasing role for experts and

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444. See Abbott, *supra* note 420, at 1152 (“In a single sentence, the Chicago school thought—and thinks—that one cannot understand social life without understanding the arrangements of particular social actors in particular social times and places. Another way of stating this is to say that Chicago felt that no social fact makes any sense abstracted from its context in social (and often geographic) space and social time.”).

445. See Roger Salerno, *Chicago School: City as a Social Laboratory*, in THE CAMBRIDGE HANDBOOK OF SOCIAL PROBLEMS 203, 203 (A. Javier Treviño ed., 2018) (explaining that the Chicago School “was a more eclectic collection of descriptive statistics and a set of interpretive studies that yielded narratives of urban social life that captured the imaginations of those interested in the form, structure and processes of urbanization”).

446. Ernest W. Burgess, *The Growth of the City: An Introduction to a Research Project*, in ROBERT E. PARK, ERNEST W. BURGESS & RODERICK D. MCKENZIE, THE CITY 35, 38 (Univ. Chi. Press 1925).

447. *Id.*

448. See Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63, 72 (1998) (describing the broad trend, post-1920s, “in psychiatry and social science toward an explicit repudiation of eugenics and hereditarianism generally”).

449. The division between the sociologists, who focused on environmental causes, and the “multifactorists,” who focused more on individual-level causes and tended to emphasize biology, really began in the 1950s with the schism between Edwin Sutherland and the Gluecks. See Laub & Sampson, *supra* note 338, at 1420. Today many progressives passionately reject anyone who believes there are biological roots to crime. Gideon Lewis-Kraus, *Can Progressives Be Convinced That Genetics Matters?*, NEW YORKER (Sep. 6, 2021), <https://www.newyorker.com/magazine/2021/09/13/can-progressives-be-convinced-that-genetics-matters> [https://perma.cc/D8TF-V4RS].

450. Willrich, *supra* note 448, at 71 (“[B]y framing the story as a contest between distinct *types of reformers*, . . . the current synthesis obscures the extent to which criminal justice reformers of all stripes appropriated each other’s rhetoric and were engaged in a common enterprise: to broaden the reach of governmental institutions into the everyday lives of urban working-class populations.”).

451. *Id.* at 72 (“[E]ugenic jurisprudence and environmentalism, though contradictory in their first principles, were remarkably interdependent.”).

technocrats within governance.<sup>452</sup> And they were frequent allies in advocating for reform.<sup>453</sup> Even Cesare Lombroso—the Italian criminologist who favored food rationing and even execution for born criminals<sup>454</sup>—believed socialism would help reduce crime, arguing that “[w]e need social legislation that mandates greater equity in wages, makes jobs more accessible, and reduces the hours of work for women and children. We need to legalize strikes in more than theory, so as not to suppress the power of workers and their organizations.”<sup>455</sup>

The modern tendency to draw division between the individual-focused and the societal-focused lenses may be why previous scholars have underappreciated the extent to which Burgess’s risk assessment was influenced by eugenic theories of crime.<sup>456</sup> While most of Burgess’s research focused on social and contextual factors, he clearly saw biology as important.<sup>457</sup> He was a registered member of the American Eugenics Society, an organization that sought to promote eugenic goals,<sup>458</sup> and served on the board of *Eugenics Quarterly*, the society’s flagship journal.<sup>459</sup> His 1924 textbook, *Introduction to the Science of Sociology*, endorses renowned eugenicist Charles Davenport as “a foremost American student of heredity.”<sup>460</sup> It includes the following excerpt from Davenport’s writing, which the book states “indicates the precision and accuracy with which the prediction of inheritance of individual innate traits is made.”<sup>461</sup>

The clear eugenical rule is then this: Let abnormals marry normals without trace of the defect, and let their normal offspring marry in turn into strong

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452. See *id.* (describing how both eugenicists and environmentalists champion the use of professional experts such as psychologists, psychiatrists, and social workers in the juridical process).

453. See *id.* at 79–81 (describing how reformers more closely associated with environmentalist theories of crime supported the heavily eugenic Municipal Court under Justice Harry Olson).

454. LOMBROSO, *supra* note 59, at 141, 145–46 n.5.

455. *Id.* at 334.

456. See Shahan, *supra* note 45, at 273 (“Like Burgess, Laune believed that criminality was not a psychiatric problem—that there was no such thing as a ‘born criminal’—but rather that society itself forged the criminal.”); More generally, historians often position the Chicago School as being against eugenic thought. See, e.g., MUHAMMAD, *supra* note 146, at 7 (“[T]he Chicago School of Sociology systematically destroyed the immigrant house of pathology built by social Darwinists and eugenicists . . .”).

457. Burgess endorsed the approach of Italian positivist Enrico Ferri, which took a pluralistic approach, embracing both hereditary and environmental factors. Burgess, *The Study of the Delinquent*, *supra* note 61, at 659–60; see also Reza Barmaki, *On the Origins of “Labeling” Theory in Criminology: Frank Tannenbaum and the Chicago School of Sociology*, 40 *DEVIAN'T BEHAV.* 256, 263 (2019) (describing how Burgess attributed recidivism to the formation of a “delinquent or criminal-social type” that emerged “in infancy and early childhood through a conjunction of constitutional and experiential factors”) (first quoting Ernest W. Burgess, *Discussion*, in CLIFFORD R. SHAW, *THE NATURAL HISTORY OF A DELINQUENT CAREER* 235, 251 (1931); and then quoting Ernest W. Burgess, *Discussion*, in CLIFFORD R. SHAW, *THE JACK-ROLLER: A DELINQUENT BOY’S OWN STORY* 184, 193 (1966) [hereinafter Burgess, *THE JACK-ROLLER*]).

458. E.g., *Controlling Heredity: American Eugenics Society*, UNIV. MO. LIBRS., <https://library.missouri.edu/specialcollections/exhibits/show/controlling-heredity/america/aes> [<https://perma.cc/A5WG-YCLB>] (last visited Dec. 14, 2025) (implying that American Eugenics Society consisted of roughly 400 scientists when Burgess was a member).

459. See, e.g., *Membership List, 1956, American Eugenics Society, Inc.*, 3 *EUGENICS Q.* 243, 243 (1956).

460. ROBERT E. PARK & ERNEST W. BURGESS, *INTRODUCTION TO THE SCIENCE OF SOCIOLOGY* 71 (2d ed. 1924).

461. *Id.*

strains; thus the defect may never appear again. Normals from the defective strain may marry normals of normal ancestry, but must particularly avoid consanguineous marriages. The sociological conclusion is: Prevent the feeble-minded, drunkards, paupers, sex-offenders, and criminalistic from marrying their like or cousins or any person belonging to a neuropathic strain. Practically it might be well to segregate such persons during the reproductive period for one generation. Then the crop of defectives will be reduced to practically nothing.<sup>462</sup>

In the 1920s, the beliefs underpinning eugenics were widespread. While people debated the details, most educated people thought it was important to improve society by increasing childbirth among “higher” types and reducing it among the others.<sup>463</sup> Membership in the American Eugenics Society and endorsement of Davenport makes Burgess simply a man of his time.<sup>464</sup> Although Burgess wrote little about biological causes of crime, that doesn’t mean he believed biology to be unimportant. Rather, he did not consider this type of inquiry to be within his domain as a sociologist.<sup>465</sup> He frequently made a distinction between the terrain of sociology (the product of an individual and their interactions with others) and the study of psychiatry or psychology (the study of the individual).<sup>466</sup> While he respected the latter, he saw his work to be centered predominantly in the former.<sup>467</sup>

To the extent that hereditary traits play a role in sociology, he saw them as one input in a more complicated process by which inherent tendencies interact with the social and economic world:

The fact seems to be that the problem of crime is essentially like that of the other major problems of our social order, and its solution involves three elements, namely: (a) the analysis of the aptitudes of the individual and the wishes of the person; (b) the analysis of the activities of our society with its specialization and division of labor; and (c) the accommodation or adjustment of the individual to the social and economic environment. The older notions that dependency, deficiency, and delinquency were to be treated as due either to biological defects or to the inequalities in economic conditions arising out of competition are now being sharply challenged. Poverty, physical and mental defects, and crime are coming to be

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462. *Id.* at 136 (alteration in original) (quoting Charles Benedict Davenport, *The Inheritance of Physical and Mental Traits of Man and Their Application to Eugenics*, in WILLIAM ERNEST CASTLE, JOHN MERLE COULTER, CHARLES BENEDICT DAVENPORT, EDWARD MURRAY EAST & WILLIAM LAWRENCE TOWER, *HEREDITY AND EUGENICS* 269 (1912)).

463. Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 *L. & HIST. REV.* 63, 70 (1998).

464. *Membership List*, *supra* note 459; PARK & BURGESS, *supra* note 460, at 71.

465. Burgess, *The Study of the Delinquent*, *supra* note 61, at 657.

466. *Id.* (“The study of individual behavior falls in the fields of psychiatry and psychology. The study of the person, as the product of social interaction, lies, primarily, in sociology.”).

467. *Id.* at 662–63 (“In sociology the distinction is now clear between the individual and the person. The study of the individual, of the reaction of the organism to its environment, falls in the fields of psychiatry and psychology. The study of the person, the product of social interaction with his fellows, lies in the domain of sociology.”).

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conceived in the larger setting of human nature, social interaction, and social forces.<sup>468</sup>

His views were thus more complex than the simple biological essentialists of previous eras.<sup>469</sup> Innate differences matter, but their impact depends on context and dynamic processes of the social environment in addition to biological heredity.<sup>470</sup> This perspective was, in fact, very similar to how the Gluecks viewed crime.<sup>471</sup>

Burgess did not write extensively about race, but he may have had similar views to his longtime collaborator, Robert Park. Consider the following excerpt from the textbook they co-authored together:

The Negro is, by natural disposition, neither an intellectual nor an idealist, like the Jew; nor a brooding introspective, like the East Indian; nor a pioneer and frontiersman, like the Anglo-Saxon. He is primarily an artist, loving life for its own sake. His *metier* is expression rather than action. He is, so to speak, the lady among the races. . . .

The individual man is the bearer of a double inheritance. As a member of a race, he transmits by interbreeding a biological inheritance. As a member of society or a social group, on the other hand, he transmits by communication a social inheritance. . . .

[T]emperament determines what things the individual and the group will be interested in; what elements of the general culture, to which they have access, they will assimilate; what, to state it pedagogically, they will learn.<sup>472</sup>

This writing is consistent with Burgess's theories about the dynamic interactions between temperament and environment.<sup>473</sup> It is also consistent with anecdotes relayed by some of his students. When providing feedback on the dissertation research of an African-American student about crime in Black communities, Burgess nudges the student to consider the extent to which biological difference contributed to Black delinquency.<sup>474</sup>

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468. PARK & BURGESS, *supra* note 460, at 563–64.

469. *Id.*

470. In *The Study of the Delinquent as a Person*, Burgess presents several case studies as a way of describing the sociological approach to delinquency. These case studies illustrate how temperament and inherited defect interacts with social context to create delinquency. Burgess, *The Study of the Delinquent*, *supra* note 61, at 663–79; see also PARK & BURGESS, *supra* note 460, at 25 (discussing “social inheritance” in addition to biological inheritance).

471. See *supra* notes 343–49 and accompanying text.

472. PARK & BURGESS, *supra* note 460, at 139–41 (quoting Robert E. Park, *Education in Its Relation to the Conflict and Fusion of Cultures*, in XIII PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY 38, 59–61 (1918)).

473. See, e.g., Burgess, *The Study of the Delinquent*, *supra* note 61, at 672 (“The following case indicates how a Negro lad through the mechanism of compensation for physical and mental inferiority organized a personal behavior pattern that secured for him leadership and a superior status in his social world of the gang.”).

474. See SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER 44 (Heather Ann Thompson & Rhonda Y. Williams eds., 2019) (discussing “Ernest Burgess, who advised Moses on his master’s thesis and who explicitly (and tellingly) asked if ‘biological difference’ contributed to black delinquency”).

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While much of Burgess's research followed the standard Chicago school approach, his work on parole prediction did not fall so comfortably under that umbrella.<sup>475</sup> Rather, it followed the stylistic blueprint of William Healy's multi-factor approach: using the individual as the unit of analysis and tabulating characteristics predictive of parole failure.<sup>476</sup> It is but one short step to move from such tabulations to an index that summarizes the available information in a single score.

Burgess's risk assessment report begins by invoking the classic dichotomy between the incorrigible criminal and the normal person amenable to reform:

Two widely divergent pictures of the paroled man are, at present, in the minds of the people of Illinois. One picture is that of a hardened, vicious, and desperate criminal who returns from prison, unrepentant, intent only upon wreaking revenge upon society for the punishment he has sullenly endured. The other picture is that of a youth, perhaps the only son of a widowed mother, who on impulse, in a moment of weakness, yielded to the evil suggestion of wayward companions, and who now returns to society from the reformatory, determined to make good if only given a chance.<sup>477</sup>

Note how one type is described by the nature of his character—hardened, vicious, unrepentant—and the other is described by the nature of his circumstances—widowed mother, wayward companions, moment of weakness.<sup>478</sup> As Burgess continues, he adds nuance, claiming that although prisoners of each type can be found, the great majority of prisoners fall somewhere between these extremes.<sup>479</sup> Like many eugenic criminologists of the early twentieth century, Burgess evokes a ranking of people from incorrigible defectives on the one hand to normal people in bad circumstances on the other.<sup>480</sup>

The main body of Burgess's study consists of a quantitative tabulation of a wide variety of individual-level factors—both constitutional and environmental—that may contribute to crime.<sup>481</sup> His study followed the stylistic blueprint of the multifactor approach of William Healy and the Gluecks.<sup>482</sup> Like others

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475. See Howard S. Becker, *The Chicago School, So-Called*, 22 *QUALITATIVE SOCIO.* 3, 5 (1999) ("Burgess . . . was not so clearly a proponent of what we now think of as 'Chicago-style' research, though he did not oppose it. He devoted much of his research to such topics as predicting criminal behavior and marital 'success,' using conventional quantitative research techniques to analyze questionnaire data.").

476. See Burgess, *The Study of the Delinquent*, *supra* note 61, at 657.

477. Burgess, *Part IV: Factors*, *supra* note 5, at 205.

478. See *id.*

479. See *id.*

480. See RAFTER, *CREATING BORN CRIMINALS*, *supra* note 2, at 121 ("[Lombroso's] American followers create[d] typologies that located incorrigibles at the bottom of the criminal class and ranked other offenders by the degree to which they approached normality. . . . [W]hereas incorrigibles are irrevocably doomed to criminality by their bad heredity, offenders further up the evolutionary ladder are increasingly impelled by environmental forces.").

481. See, e.g., Barmaki, *supra* note 457, at 263.

482. See Salerno, *supra* note 445, at 207.

employing the multifactor approach, Burgess considered many factors associated with eugenic criminology, including “mental age” (a eugenic concept associated with feeble-mindedness), race/nationality, his “social type” (e.g., ne’er-do-well, gangster, hobo), his “criminal type” (e.g., occasional or habitual offender) and his personality type according to psychiatric examination.<sup>483</sup> He also included neighborhood characteristics, which his private notes indicate were a racialized concept.<sup>484</sup> Many of the factors included in the risk assessment could also be interpreted as representing environmental causes of crime.<sup>485</sup> Burgess’s risk assessment ultimately consisted of twenty-one factors and, unlike the Gluecks, employed equal weighting for each item.<sup>486</sup>

Burgess’s risk assessment relied almost entirely on data that was collected around the time of sentencing.<sup>487</sup> Like most that followed, it contained almost no measures of behavior while incarcerated.<sup>488</sup> Given how few post-sentencing factors were included, it cannot reasonably be considered a measure of reform.<sup>489</sup> A more natural interpretation, based both on Burgess’s framing and the manner in which crime was understood in that era, is as a classification of inmates on a spectrum of criminal propensity: innate or at least fixed as of the date of sentencing.<sup>490</sup>

By 1928, parole was being heavily criticized for letting criminals out of jail.<sup>491</sup> Defenders of the parole system, like Ernest Burgess, emphasized the incapacitative aspect of indeterminate sentencing.<sup>492</sup> They sought to remind the public that parole was not just for letting occasional criminals out early, but also for the extended confinement of “vicious or habitual” criminals.<sup>493</sup>

Within a few years, Burgess’s risk assessment was adopted for use in predicting parole in several of Illinois’s prisons.<sup>494</sup> Versions of this risk assessment

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483. Burgess, *Part IV: Factors*, *supra* note 5, at 210, 221, 225.

484. *See id.* at 221; WIGGINS, *CALCULATING RACE*, *supra* note 45, at 48 (“In Burgess’s notes, however, we find that the factor ‘Neighborhood in Relation to Record on Parole’ included nine categories with two that were baldly racialized: ‘negro neighborhoods’ and ‘negro rooming house neighborhoods.’”).

485. *See* Burgess, *Part IV: Factors*, *supra* note 5, at 221.

486. FERRIS F. LAUNE, *PREDICTING CRIMINALITY: FORECASTING BEHAVIOR ON PAROLE* (John Webster Spargo ed., 1936) [hereinafter LAUNE, *PREDICTING CRIMINALITY*].

487. Such data includes: type of offense, parental and marital status, criminal “type,” social “type,” neighborhood prior to incarceration, whether the trial judge/prosecuting attorney recommended leniency, months served before paroled, criminal record, work record, age, and intelligence rating. *See* BRUCE ET AL., *supra* note 182, at 265–66.

488. The sole measure that could be thought of as measuring reform was the person’s punishment record while incarcerated. *See id.*

489. *See id.*

490. *See id.* at 12.

491. Ernest W. Burgess, *Protecting the Public by Parole and by Parole Prediction*, 27 J. CRIM. L. & CRIMINOLOGY 491, 496 (1936).

492. *Id.* at 494 (describing the main objective of parole as “first, and foremost, the protection of society from the criminal”).

493. Hinton G. Clabaugh, *Foreword* to BRUCE ET AL., *supra* note 182, at v.

494. ERNST WENK, *RESPONSIBLE ACTION, INC., THE DIAGNOSTIC PAROLE PREDICTION INDEX 7* (1979) (describing how Burgess’s risk assessment was introduced into the Illinois system in 1933).

would be the only predictive algorithms used in criminal justice for several decades.<sup>495</sup>

### C. Other Early Risk Assessments

The risk assessment literature continued to build through the 1930s and 1940s. Aside from the Gluecks, the main people contributing to it were Burgess's students at the University of Chicago.<sup>496</sup> They developed risk assessments either as part of their dissertation or post-graduation, while working in the Illinois prison system.<sup>497</sup> Many of Burgess's students went on to work in the parole prediction office, implementing his risk assessment and developing new ones.<sup>498</sup>

As this literature developed, so did an internal narrative. Risk assessment studies often began with a recounting of the studies that came before, as if they were collectively generating risk assessment's origin story.<sup>499</sup> Each study would recount the history of who did what when, sometimes quibbling over the details of others' approaches.<sup>500</sup> The next one would repeat this history, adding a summary of what had been accomplished in the meantime.<sup>501</sup> In this way, the narrative built over time.

This auto-history was mostly concerned with methods of tool construction.<sup>502</sup> There were debates over the number of variables to include, the weighting each should receive, how to address cross-correlations within the data, and so forth.<sup>503</sup> Noticeably absent from this narrative was any conscious reflection about what risk assessment was trying to measure, conceptually speaking,

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495. HARCOURT, AGAINST PREDICTION, *supra* note 41, at 40 (describing how Illinois was the only state using a parole prediction instrument until the 1960s).

496. We focus on the following risk assessment scholars, each of whom worked directly with Burgess: Ferris F. Laune, George B. Vold, Clark Tibbitts, Charlotte Ruth Klein, and Courtlandt Churchill van Vechten. LAUNE, PREDICTING CRIMINALITY, *supra* note 486 (dedicating his book to Ernest Burgess and two other professors); George B. Vold, *Preface to* GEORGE B. VOLD, PREDICTION METHODS AND PAROLE (1931) (Vold completed a Masters in Sociology at the University of Chicago in 1924 and thanks Burgess in his dissertation, later reprinted as a book); Charlotte Ruth Klein, Success and Failure on Parole: A Study of 160 Girls Paroled from the State Training School at Geneva, Illinois (Mar., 1935) (M.A. dissertation, University of Chicago) (implying Klein completed a Masters in Sociology at Chicago in 1935); Burgess, *Part IV: Factors*, *supra* note 5, at 205 n.1 (thanking Clark Tibbitts for his help on Burgess's report); Courtlandt Churchill van Vechten, Jr., A Study of Success and Failure of One Thousand Delinquents Committed to a Boys' Republic ii–iii (1935) (Ph.D. dissertation, University of Chicago) (evidencing van Vechten's completion of a doctorate in sociology in 1935 and explicitly thanking Burgess in the acknowledgments).

497. See, e.g., LAUNE, PREDICTING CRIMINALITY, *supra* note 486, at 80.

498. See Shahan, *supra* note 45, at 273 ("Many of the Illinois sociologist-actuaries who worked at the three major branches of the [Illinois State Penitentiary] were current or former Burgess students . . .").

499. See, e.g., LAUNE, PREDICTING CRIMINALITY, *supra* note 486, at 3; van Vechten, *supra* note 496, at 19–24; VOLD, *supra* note 496, at 12–19.

500. See VOLD, *supra* note 496.

501. *Id.*

502. See Schuessler, *supra* note 42, at 428 ("It seems fair to say that recent research has concentrated almost exclusively on methodological matters, rather than on conditions, personal or situational, which affect behavior on parole.").

503. *Id.* at 430.

or the proper way to address crime risk.<sup>504</sup> Such issues appeared to be taken for granted or considered uninteresting.

This Section includes our own narrative of risk assessment's development post-Burgess and through the late 1940s. Our focus is on the conceptual foundations underlying risk assessment; we discuss methods of tool construction only insofar as they are relevant. We adopt a vignette-style approach, providing brief descriptions of each scholar, their contribution to crime prediction, and the influence of eugenic criminology. As will be shown, each scholar worked within grand and sometimes fantastical visions of criminal justice. But their visions were influenced by essentialist assumptions about human nature and criminal types. Racism, misogyny, and homophobia was rampant. The mix of idealism and bigotry led to proposals that were often frighteningly draconian.

**Ferris Laune**, reportedly named after the Ferris wheel,<sup>505</sup> was Illinois's first prison actuary.<sup>506</sup> He worked in the parole office and implemented Burgess's risk assessment.<sup>507</sup> While there, he conducted a handful of studies related to crime prediction.<sup>508</sup> He was the originator of what is now known as dynamic risk assessment: a tool that incorporates dynamic factors such as attitudes to evaluate the extent of rehabilitation over time.<sup>509</sup>

While working at Joliet prison, Laune befriended the notorious Nathan Leopold and Richard Loeb.<sup>510</sup> These wealthy and supposedly brilliant young men were serving life sentences for having murdered a fourteen-year-old boy just to prove that they, as self-styled Nietzschean supermen, could get away with it.<sup>511</sup> Indeed, they may have, if they had not left a distinctive pair of eyeglasses at the scene of the crime.<sup>512</sup> As evidence mounted, "they ceased to be masterminds and became, instead, frightened children who babbled their confessions, each blaming the other for the actual murder."<sup>513</sup>

Working closely together, Laune and Leopold came up with the idea of predicting parole success using "hunch scores," or crowd-sourced predictions

504. See generally *id.* at 428–30.

505. *Ferris Finley Laune PhD (1893–1978)*, WIKITREE, <https://www.wikitree.com/wiki/Laune-7> [<https://perma.cc/99F4-BPD8>] (last visited Dec. 14, 2025).

506. HARCOURT, *AGAINST PREDICTION*, *supra* note 41, at 39.

507. *Id.*

508. See Ferris F. Laune, *The Application of Attitude Tests in the Field of Parole Prediction*, 1 AM. SOCIO. REV. 781, 788 (1936).

509. See *id.* at 792 ("If we are to succeed in determining the optimum point of parolability we must, in some way, measure the attitudes involved in the situation rather than the fixed, external physical facts relating to the subject.").

510. See Shahan, *supra* note 45, at 263–72 (describing the relationship between the three men).

511. 1924: Leopold and Loeb, Nw. Univ.: Homicide in Chi., 1870–1930, <https://homicide.northwestern.edu/crimes/leopold/> [<https://perma.cc/JPE9-PU6A>] (last visited Dec. 14, 2025).

512. See Shahan, *supra* note 45, at 236 ("[Leopold's] mottled, dark brown plastic frames lay on a railroad embankment, just a few feet from the poorly concealed and lifeless body of thirteen-year-old Bobby Franks.").

513. NATHAN LEOPOLD, *LIFE PLUS 99 YEARS* 13 (1958). Leopold went on to write several well-published academic articles about risk assessments under various pen names. See GILBERT GEIS & LEIGH B. BIENEN, *CRIMES OF THE CENTURY* 21 (1998).

made by fellow inmates.<sup>514</sup> They also came up with a list of “hunch factors” that Leopold and Loeb believed important.<sup>515</sup> This included traits such as excessive interest in clothes and stupidity, which they proposed should be normalized to the average intelligence of different races.<sup>516</sup> “Thus, a Negro would not be penalized unless he were stupid to the extent of being feeble-minded, whereas a white man from a city district would be expected to have a somewhat higher intelligence quotient.”<sup>517</sup> Although he often emphasized the social aspects of crime, Laune was a registered member of the American Eugenics Society.<sup>518</sup>

**George B. Vold** wrote his dissertation on risk assessment and went on to become a professor of sociology at the University of Minnesota.<sup>519</sup> He believed that “individuals became criminals due to innate character flaws rather than association with other criminals.”<sup>520</sup> He was chair of a committee of experts who advocated expanding Minnesota’s defective delinquent statute to allow for the indefinite confinement of sexual psychopaths.<sup>521</sup> This law allowed Minnesota “to permanently institutionalize *potential* sex offenders before they committed a crime. It did this by extending a 1917 law permitting the compulsory eugenic commitment of persons ‘alleged to be feeble minded, inebriate or insane’ to persons having a ‘psychopathic personality.’”<sup>522</sup> The statutory language defining psychopathic personality was extraordinarily broad, and included

any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.<sup>523</sup>

The concept of sexual psychopathy had roots both in eugenics and in homo- and trans-phobia.<sup>524</sup> In a letter attached to the report, a professor of neuropsychiatry wrote “most observers believe that sexually perverted individuals [such as transvestites, homosexuals, adult masturbators and fetishists] are constitutionally

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514. See Shahan, *supra* note 45, at 265 (“Leopold claims to have come up with their hypothesis first. He wondered if his personal ‘hunches’ about which men would succeed on parole and which would fail could be a predictive tool.”); LAUNE, PREDICTING CRIMINALITY, *supra* note 486, at 9 (“If these estimates of inmates or ‘hunches’ are valid, it follows that an analysis of the prisoners by an official, proceeding on the same basis as that which prompts the inmate’s prediction, would place the authorities in possession of an excellent instrument for prediction.”).

515. LAUNE, PREDICTING CRIMINALITY, *supra* note 486, at 20–26.

516. *Id.* at 20–21.

517. *Id.*

518. AM. EUGENICS SOC’Y, MEMBERS, OFFICERS & DIRECTORS ACTIVITIES DATABASE (1930 Subscribing Member, Illinois) [<https://perma.cc/B9UV-2UPN>].

519. See VOLD, *supra* note 496.

520. *Id.*

521. See Molly Ladd-Taylor, “Ravished by Some Moron”: *The Eugenic Origins of the Minnesota Psychopathic Personality Act of 1939*, 31 J. POL’Y HIST. 192, 204 (2019) (explaining that the Governor “appointed a new sex crimes committee of nine men . . . including the committee’s chair, University of Minnesota criminologist George B. Vold” and that the governor’s committee “was charged with developing a legal solution to the sex crimes problem”).

522. *Id.* at 193.

523. 1939 Minn. Laws 712–13 (ch. 369 § 1).

524. Ladd-Taylor, *supra* note 521, at 194.

psychopathic. . . . Short periods of confinement for punishment accomplishes nothing as some of these individuals are convicted over and over again.”<sup>525</sup>

Vold’s report recommended sterilization as a possible remedy if preventive confinement proved insufficient.<sup>526</sup>

**Clark Tibbitts** was a research assistant on Burgess’s parole report and went on to succeed Laune as an actuary working for Illinois prisons.<sup>527</sup> Following closely on Burgess’s method, he built his own risk assessment tool, focusing specifically on the population of inmates at Pontiac.<sup>528</sup> This tool used “white marks” to describe mitigating factors and “black marks” to describe aggravating factors.<sup>529</sup> Being Black was a black mark (an irony noted previously by Harcourt<sup>530</sup>) as was being feeble-minded, sexual, of “very inferior” mental age, or coming from/returning to a “Negro” community.<sup>531</sup> Tibbitts also wrote a long report based on the following query:

It is sometimes stated that immigrants and not native Americans constitute our criminal classes, that Italians are the gunmen, the Jews financed crime, that the Irish fix the government in favor of the criminal. The report is concerned with topics of this nature . . . .<sup>532</sup>

For context, this statistical exercise came in the midst of a national dialogue in which Black social scientists argued that crime statistics were unreliable and should not be used to infer anything about the criminal propensity of Blacks or immigrants.<sup>533</sup> Tibbitt’s report concludes otherwise,<sup>534</sup> arguing that even when

525. Letter from J.C. McKinley, Prof. of Neuropsychiatry, U. Minn. Med. Sch., to George Vold, Chairman, The Governor’s Comm. on Sexual Criminality (Mar. 20, 1939) (on file with author).

526. See ALEX BLUMENSTEIN ET AL., REP. OF THE GOVERNOR’S COMM. ON THE CARE OF INSANE CRIM. AND SEX CRIM., Minn. Legis. 5 (51st Sess. 1939) (on file with author) (“Consideration of the desirability of modification of present laws relating to sterilization to permit greater experimentation with this operation as a form of treatment in the case of certain types of defective, abnormal or psychopathic persons.”).

527. See van Vechten, *supra* note 496, at 21 (“In 1931 Clark Tibbitts, who had done much of the field work in Burgess’s study, published a report of a prediction study based on 3000 parolees from the Illinois State Reformatory at Pontiac.”).

528. See Clark Tibbitts, *Success or Failure on Parole Can Be Predicted: A Study of the Records of 3,000 Youths Paroled from the Illinois State Reformatory*, 22 J. CRIM. L. & CRIMINOLOGY 11 (1931).

529. See *id.* at 40.

530. HARCOURT, AGAINST PREDICTION, *supra* note 41, at 63 (“Not surprisingly . . . being ‘American (Colored)’ was a ‘black mark’ and being ‘American (White)’ was a ‘white mark.’”).

531. See Tibbitts, *supra* note 528, at 46.

532. William F. Ogburn & Clark Tibbitts, unpublished manuscript, A Memorandum on the Nativity of Certain Criminal Classes Engaged in Organized Crime, and of Certain Related Criminal and Non-Criminal Groups in Chicago 4 (July 30, 1930) (Hanna Holborn Gray Special Collections Rsch. Ctr., U. Chi. Libr., Charles E. Merriam Papers, Box 89, Folder 15).

533. MUHAMMAD, *supra* note 146, at 243–44 (describing how Black scholars drew attention to problems with the data).

534. See Ogburn & Tibbitts, *supra* note 532, at 11. This report is described as a memorandum and is marked “strictly confidential.” There is no evidence that it was ever published. We were unable to ascertain how it was funded, but it uses data from a previous study by John Landesco, who was Burgess’s research assistant in the parole prediction report. Landesco’s study was funded by the Rockefeller foundation, a heavily eugenic organization that Burgess had a number of connections to. See U. CHI. LIBR., Guide to the John Landesco. Papers 1923-1946, <https://www.lib.uchicago.edu/e/scrc/findingaids/view.php?eadid=ICU.SPCL.LANDESCO> [https://perma.cc/L4PF-345V].

careful attention is paid to data quality, stereotypes about race and ethnicity were true: Italians, Jews, and Irish constitute 80% of the organized crime leaders, and murderers are disproportionately Black.<sup>535</sup> Without providing any supportive evidence, Tibbett says that “most negro murderers are crimes of passion.”<sup>536</sup> Tibbitts is careful to note that it is unclear whether these racial patterns are caused by heredity.<sup>537</sup>

**Charlotte Ruth Klein** wrote a study about parole of young women from the State Training School at Geneva, an institution of involuntary confinement for teenage girls.<sup>538</sup> Women often received special attention in eugenic criminology, with strong associations between female delinquency and sexual promiscuity.<sup>539</sup> Women who were sexually active outside of marriage were often labeled feeble-minded.<sup>540</sup> Those who advocated for preventive confinement as a mode of reproductive control often prioritized doing this for women over men, at least during childbearing age.<sup>541</sup>

Sexuality is a consistent theme in Klein’s report.<sup>542</sup> Klein reports that nine-tenths of the female inmates are there for having committed sexual misconduct.<sup>543</sup> This is by far the most frequent offense listed, followed by “incurability” and truancy.<sup>544</sup> It appears that pretty much any sexual encounter is labeled a sex offense, including much of what we might now consider being the victim of rape or sexual trafficking.<sup>545</sup> In Klein’s reporting, the girls she studied were

535. Ogburn & Tibbetts, *supra* note 532, at 11, 28 (“The Italians, the Jews, and the Irish together constitute 80 per cent of the owners and managers [of crime syndicates]. Not a single leader was recorded as native white American of native born stock. . . . [T]he negroes constitute 44 per cent of the total number [of murders]. This is an amazingly high figure but it is not representative of organized crime, for most negro murders are crimes of passion.”).

536. *Id.* at 28.

537. *See id.* at 1–2 (“For instance, it is a fact the largest percentage of the gunmen engaged in organized crime which could be found were of Italian stock. But this may not mean that a tendency to crime is an inherited trait of the Italians . . . . The investigation was not concerned with a study of such causes, but only with establishing the facts of the national origins of the criminal groups.”).

538. *See* Klein, *supra* note 496; HARCOURT, AGAINST PREDICTION, *supra* note 41, at 40 (Klein listed as among the individuals who wrote her dissertation on the topic of predicting parole). Klein’s report provides a number of statistics about the characteristics of the incarcerated girls. Although she compares two groups, a paroled group and a group of girls who had been paroled and then sent back to the institution, she does not develop an instrument. Klein, *supra* note 496. We include her since she is one of the few to write about women.

539. RAFTER, CREATING BORN CRIMINALS, *supra* note 2, at 159 (explaining that authors “almost totally defined female defective delinquents as sex offenders, the lascivious, hyper fecund mothers of criminals and other degenerates”).

540. *Id.*

541. HART, DEFECTIVE DELINQUENT, *supra* note 47, at 11 (quoting Dr. Henry H. Goddard: “[t]he feeble-minded woman is more dangerous to society than the feeble-minded man”).

542. *See e.g.*, Klein, *supra* note 496, at 23 (“Since most of the girls had illicit sexual relations before commitment, it is not surprising that gynecological pathologies were present in one-third of the cases and venereal disease in another third.”).

543. *Id.* at 39.

544. *Id.*

545. *Id.* at 38–40. The sex offenses listed include having intercourse with a man, promiscuity, prostitution, and sex with a male family member. Many of the girls in this study are young teenagers.

constantly seeking sex.<sup>546</sup> For instance, she says that girls who attempt to escape the compound are easily caught because “many girls stopped to have sexual intercourse with the first man who is willing.”<sup>547</sup> In another example, she describes a twelve-year-old girl who is forced to marry a twenty-nine-year-old man with whom she “had sex relations” (*i.e.*, by whom she was raped).<sup>548</sup> She characterizes this child as a congenital luetic who later turned to prostitution in order to seek “good times” and speaks as if she is sympathetic with the husband when he finally “secured a divorce.”<sup>549</sup>

The report is heavily racialized, with frequent discussion about how the White girls compared to the “colored girls.”<sup>550</sup> The “colored girls” are often characterized as more sexualized and with greater physical and mental defect.<sup>551</sup> Klein describes them as having reached puberty earlier and having higher rates of “glandular imbalance, gynecological pathology, and venereal disease.”<sup>552</sup> Although she believes all the girls to be of less than average intelligence, she says this is particularly true of the Black girls.<sup>553</sup>

Klein sees delinquency as arising from the strain that “defectives” experience when forced to live amongst society:

With a predominantly defective group of girls, it is only natural that a large proportion should prove unequal to the strain of complicated social life. When girls of inferior intelligence are forced to attempt tasks beyond their powers they are apt to develop feelings of inferiority and guilt, these feelings being exhibited in attitudes of boastfulness, aggression and defiance of authority.<sup>554</sup>

Klein thinks that parole is unsuited for the “very defective girls,” implying that such people should be institutionalized for life.<sup>555</sup> But she supports parole for those whose degree of defect is more slight.<sup>556</sup> Those eligible for parole were

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546. *See id.* at 78.

547. *Id.*

548. *Id.* at 37.

549. *Id.* (“The twelve year old girl, a congenital luetic, was forced by an unsympathetic step-mother to marry a man with whom the girl had had sex relations and by whom she was erroneously thought to be pregnant. After the birth of her second child, this girl commenced to ‘run around’ because she wanted good times while her husband was interested in his farm. After four months of soliciting on the streets, the girl was committed to the State Training School and the husband secured a divorce.”).

550. *See id.* at iv (“[T]he important differences between . . . the colored and white girls in the two major groups are pointed out whenever noted.”).

551. *Id.* at 26–27. As Jamelia Morgan explains, the label “mentally defective” links sexual deviance to inherent physiological abnormalities. Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 HARV. C.R.-C.L. L. REV. 663, 708 (2023). Such traits were thought to be constitutive of non-White races and a corruption of the otherwise-pure White race. *Id.* at 707.

552. *See Klein, supra* note 496, at 23, 25–26.

553. *Id.* at 26–27.

554. *Id.* at 28.

555. *Id.* at 89 (“Omitting from the discussion the very defective girls for whom parole is utterly unsuited . . .”).

556. *See id.*

frequently placed in wage homes or indentured into domestic service.<sup>557</sup> Klein highlights the importance of physical attractiveness for domestic labor, leaving the reader to speculate what type of “domestic labor” requires physical attractiveness.<sup>558</sup>

Klein’s report was perhaps the most emotionally challenging to read of all the documents examined through the course of the study.

**Courtlandt Churchill van Vechten** studied the parole outcomes of 1000 boys in the Ford Republic.<sup>559</sup> The Ford Republic was a private institution that received “problem boys from ten to seventeen years of age” and aimed to operate as a miniature democratic social state.<sup>560</sup> “Inmate citizens” worked for a special currency that covered room, board, and—if they worked hard enough and were frugal—occasionally candy.<sup>561</sup> The “inmate citizens” also had voting power and elected boy judges and boy sheriffs empowered to administer corporal punishment via a leather strap.<sup>562</sup> The prediction instrument van Vechten built includes many predictive factors associated with eugenic criminology: feeble-mindedness, psychiatric classifications such as “defective psychopaths” and “constitutional inferiority,” as well as “defects” such as “inferiority habits.”<sup>563</sup> “Serious homosexuality” was found to predict failure on parole, although “mild” homosexuality predicted success.<sup>564</sup>

#### IV. CONCLUSION

It is said that those who do not know history are condemned to repeat it. This cliché implies that knowing history will somehow prevent you from making mistakes. But, if history teaches us about current practices, it does not do so in a straightforward way. It would be way too simplistic to assume that practices with unsavory roots should be automatically avoided.<sup>565</sup> Such a condemnation, known as the “genetic fallacy,” is rightfully rejected.<sup>566</sup> But it would also be naïve to continue using these corrupted practices without deeper examination of whether and how they impact contemporary outcomes.

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557. *See id.* at 96–97 (describing between one-third and two-thirds of the girls studied going to wage homes).

558. *See id.* at 99 (“[T]here are many girls who do not fit into the plan [of being indentured into domestic service] because of physical unattractiveness or defects . . .”).

559. *See* van Vechten, *supra* note 496, at ii.

560. *Id.* at 5 (“[A] considerable effort is made to duplicate in so far as possible the conditions of a normal democratic social state on a miniature basis.”).

561. *Id.* at 5–6 (“Each inmate goes to school and also works . . . . Charges are made for board, clothes and other essentials; and the inmate citizens may purchase with their spare cash, if they have any, limited amounts of candy . . . . All accounts and transactions are in the form of a special ‘currency’ good only in the institution.”).

562. *Id.* (“The inmate citizens have voting power equal to that of officers . . . .”); *see id.* at 10 n.2 (describing “cracks” as “[b]lows with a leather strap ordered by the boy judge and inflicted by the boy sheriff”).

563. *Id.* at 116–19 tbl. LXI.

564. *See id.* at 98–99 tbl. XLIX, 118 tbl. LXI.

565. For discussion about when a policy with tainted origins should condemn its current use, see W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1192, 1192 (2022).

566. *See id.* at 1194, n.15.

There are often echoes of history in current practice.<sup>567</sup> We tell the story of risk assessment's origins not just because we find it interesting, but because we see it as relevant. Risk assessment is still used in parole, but has spread to many other criminal justice decision points as well.<sup>568</sup> It is used in over 1,000 counties to help determine bail and pretrial detention.<sup>569</sup> It is used in at least twenty-seven states to help make sentencing decisions.<sup>570</sup> It is also used to determine prisoner placement, levels of probation supervision, and response to domestic violence calls.<sup>571</sup> While the tools have modernized, the principles remain the same: predicting the likelihood that someone will commit new harm on the basis of demographics, criminal record, personality, and socioeconomic factors.<sup>572</sup> Race is no longer explicitly included, but many of the input factors correlate strongly with race.<sup>573</sup> Unsurprisingly, individuals from historically marginalized groups are disproportionately incarcerated.

In all these settings, risk assessment is used to determine whose liberty should be constrained in order to prevent some future crime or misconduct.<sup>574</sup> Incarcerating someone to prevent future crime is called preventive confinement or selective incapacitation.<sup>575</sup> This was the centerpiece of the agenda for eugenic criminology: preventing crime by locking up those with supposedly innate criminal tendencies.<sup>576</sup> In a direct way, risk assessment's current use is very similar to its origins in the 1920s and 1930s.<sup>577</sup>

Preventive confinement has always been controversial.<sup>578</sup> On the one hand, it seems natural to want to protect society from crime by segregating those who would commit it. On the other hand, it seems deeply illiberal to take away someone's freedom on the basis of something they have not even done yet. A mere forty years ago, there was a widespread belief that incarcerating an able-minded individual on the basis of dangerousness was unconstitutional.<sup>579</sup> That shifted in 1987 when the Supreme Court in *Salerno* declared that preventive confinement

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567. See Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 167 (2014) (drawing ties between historical and modern risk assessment use).

568. *Id.*

569. See Movement Alliance Project & MediaJustice, *National Landscape*, MOVEMENT ALL. PROJECT, <https://pretrialrisk.com/national-landscape/> [<https://perma.cc/9GK9-75E4>] (last visited Dec. 14, 2025).

570. See Stevenson & Doleac, *supra* note 297, at 386.

571. *Id.* at 382.

572. See, e.g., Berk, *supra* note 424 (providing an overview of risk assessment construction and use).

573. See Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237–40 (2015).

574. See Berk, *supra* note 424, at 2 (“[I]f at sentencing an offender is projected as high risk, a more restrictive intervention (e.g., incarceration) might be imposed. If at sentencing an offender is projected as low risk, a less restrictive intervention (e.g., probation) might be imposed.”).

575. See Dershowitz, *supra* note 38, at 1278–81 (discussing preventive confinement).

576. See Morgan, *supra* note 551, at 705–06.

577. See Harcourt, *supra* note 573, at 238.

578. See Dershowitz, *supra* note 38, at 1277–81 (discussing a long history of polarized views on the topic).

579. See, e.g., *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting) (writing that detaining an innocent person to prevent some future crime has “long been thought incompatible with the fundamental human rights protected by our Constitution”).

could be “a carefully limited exception” to the general rule that incarceration is only authorized for those convicted in criminal proceedings.<sup>580</sup> Now, some 20% of the total incarcerated population is detained pretrial under a preventive confinement rationale.<sup>581</sup> Many others are incarcerated based on a mixture of rationales, but preventing crime via incapacitation is one of the most commonly-cited justifications.<sup>582</sup> Preventive confinement is a cornerstone of the carceral system.

We think there is reason to be concerned that modern-day practices of preventive confinement are undergirded by ideas central to eugenic criminology: that crime is caused primarily by individuals with quasi-innate criminal tendencies, with lower social worth, and from groups historically marginalized as “racially inferior.”<sup>583</sup> This is hard to demonstrate directly, since such ideas have become fairly taboo, at least in educated and left-leaning circles.<sup>584</sup> But, as Jonathan Simon argues, that does not mean these ideas have disappeared.<sup>585</sup> Anodyne terms such as “dangerousness” or “high risk” may simply be the modern equivalents of “degeneracy” and “defectiveness.”<sup>586</sup> And there are plenty of instances in which the language is more direct, blaming crime on “thugs,” “violent predators,” or plain old “bad people.”<sup>587</sup>

In theory, risk assessments could be used for purposes other than preventive confinement—distributing supportive services, for instance.<sup>588</sup> Even preventive confinement could theoretically be detached from its eugenic roots. Those who reject bad apple theories of crime may still support preventive confinement as an occasional way of mitigating an acute and serious risk.<sup>589</sup> Our concern is about

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580. *Id.* at 755.

581. *See supra* note 36 and accompanying text.

582. *See* Dershowitz, *supra* note 38, at 1277–78 (“[T]he majority of persons currently confined in American institutions are there, at least in part, because of a prediction of their potential for harm.”).

583. *See* van Vechten, *supra* note 496, at 116–19; Morgan, *supra* note 551, at 705–06.

584. *See supra* text accompanying notes 448–49.

585. *See* Simon, *supra* note 40, at 2138–40.

586. *Id.* at 2145–46, 2163.

587. *See, e.g.,* Post Editorial Board, *Blame NY’s Thug-Loving Progs for the Death of Innocent Bystanders like ‘Momma Zee,’* N.Y. POST (Apr. 24, 2025, at 19:30 ET), <https://nypost.com/2025/04/24/opinion/blame-nys-thug-loving-progs-for-the-death-of-innocent-bystanders-like-momma-zee/> [<https://perma.cc/3KYP-33ZB>]; *Portland and Other ‘Defund’ Cities Are Destroying Their Own Livability*, WASH. EXAM’R (Oct. 15, 2021, at 04:04 CT), <https://www.washingtonexaminer.com/news/crime/2636068/portland-and-other-defund-cities-are-destroying-their-own-livability/> [<https://perma.cc/ACU9-Y788>]; *Stop and Frisk: Good Police Work or Racial Profiling?*, FOX NEWS (Jan. 27, 2017, at 18:44 ET), <https://www.foxnews.com/transcript/stop-and-frisk-good-police-work-or-racial-profiling> [<https://perma.cc/PW4P-6NVA>].

588. *See* Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2286–87 (2019) (arguing that concerns about bias with risk assessment would be minimized if the tools were used for supportive services).

589. One could argue that, if carefully followed, Chris Slobogin’s “principles of risk assessment” could allow preventive confinement in a manner detached from its eugenic roots. Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583, 587–88 (2018) (arguing that the “fit principle” requires that a person pose a greater than 50% risk of serious violent crime in the immediate future: a designated group that is “likely to be very small in number”). Limiting preventive confinement to the very small number of people who are more likely than not to commit a serious violent crime in the near future could reasonably be interpreted as more about the risk of crime itself rather than as a condemnation of the person perceived to be a criminal. Nevertheless, to the extent that violent behavior is also environmental and connected to structural inequality, then even focusing on those individuals who are likely to commit a serious violent crime could still

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how risk assessment is used in practice, however, not about how it could be used in theory. Given the scale of preventive confinement and the conditions of American carceral institutions, we think there is ample reason to be concerned about the ongoing influence of “born criminal” type beliefs.

For now, we tell history’s story in hopes that it helps us see present practices more clearly. The relationship between past and present is rarely straightforward, but that does not mean it is uninformative. Knowing what came before can help bring the present into sharper focus, guiding analysis and helping to identify persistent patterns.