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Eugenics and the Carceral State: Progressive-Era Reform & the Creation of the Modern Criminal Justice System

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Eugenics and the Carceral State: Progressive-Era Reform & the Creation of the Modern Criminal Justice System

Laura I. Appleman*

ABSTRACT

The modern American criminal justice system emerged not simply from Progressive-Era reform, but from the intertwined projects of eugenics, psychiatry, and legal modernism. Drawing upon archival, historical, and doctrinal sources, this Article reveals how early twentieth-century reformers—including judges, criminologists, and social scientists—recast criminal law as a mechanism for identifying and controlling hereditary “defect.” Under the guise of scientific progress, the Progressive movement fused eugenic ideology with judicial administration, creating psychopathic laboratories, municipal courts, and indeterminate sentencing regimes that classified defendants by biological “fitness.” These reforms, presented as rational and humanitarian, in fact legitimized a coercive system of confinement and segregation that targeted the poor, the disabled, racial minorities, and other populations deemed “unfit.”

By tracing this genealogy, the Article exposes how Progressive Era faith in scientific governance entrenched a lasting logic of heredity within the criminal system—one that still informs contemporary practices of risk assessment, punishment, and social control. In recovering the eugenic origins of our carceral state, the Article challenges the myth of Progressive Era benevolence, calling for a critical reexamination of how modern criminal justice continues to reproduce the hierarchies of the past.

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I. INTRODUCTION

The roots of America's modern criminal justice system lie not in the late-twentieth-century "war on crime," but in the Progressive Era's fusion of eugenics, psychiatry, and legal reform. The first quarter of the twenty-first century has laid bare the deep structural inequities of this system: racialized policing, algorithmic risk tools reproducing bias, the mass incarceration of people with disabilities,¹ racial and gender discrimination in the juvenile justice system, and a carceral state that continues to pathologize poverty and deviance. The intellectual and institutional origins of these practices, however, reach back to the early twentieth century, when Progressive reformers,² animated by pseudoscientific theories of heredity and fitness, remade the criminal courts, sentencing structures, and emerging field of criminology. Under the guise of science and social improvement, they constructed a new vision of criminal justice, one that sought to classify, segregate, and eliminate those deemed "unfit" to belong in the civic body. Although these contemporary problems have received extensive scholarly attention, their roots in Progressive-Era criminal justice reform remain largely unexplored in the legal literature.³ Those reforms, heavily influenced by eugenic theory, fundamentally reshaped criminal courts, sentencing practices, and criminology itself.⁴

The Progressive Era, often celebrated as a moment of professionalization and humanitarian reform, in fact introduced a

¹ See Leah Wang, *New Data: Police Use of Force Rising for Black, Female, and Older People; Racial Bias Persists*, PRISON POL'Y INITIATIVE (Dec. 22, 2022), https://www.prisonpolicy.org/blog/2022/12/22/policing_survey/ [<https://perma.cc/JKJ6-YB8Z>]; Vilissa Thompson, *Understanding the Policing of Black, Disabled Bodies*, CTR. FOR AM. PROGRESS (Feb. 10, 2021), <https://www.americanprogress.org/article/understanding-policing-black-disabled-bodies/> [<https://perma.cc/PV5A-WYDQ>].

² "The Progressive movement was a political and social-reform movement that brought major changes to the United States during the late [nineteenth] and early [twentieth] centuries," where some of the goals were "strengthening the national government and addressing people's economic, social, and political demands." *Progressive Era Key Facts*, BRITANNICA, <https://www.britannica.com/summary/The-Progressive-Era-Key-Facts> [<https://perma.cc/VU4F-XRTL>] (last visited Sep. 20, 2025).

³ *But see* Megan Stevenson & Robynn Cox, *Eugenic Criminology and the Birth of Predictive Algorithms in Criminal Justice*, 2026 ILL. L. REV. (forthcoming 2026); 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 (2020); Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. & HIST. REV. 63 (1998).

⁴ Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 443–46 (2018); Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 CRIM. L. & CRIMINOLOGY 471, 474 (1987).

profoundly coercive regime of social governance.⁵ Reformers aimed to rationalize the chaotic criminal system of the Gilded Age through scientific management and administrative expertise. But the “science” that undergirded this project was based on eugenics: the belief that crime, poverty, and immorality were inherited defects of blood and race. Eugenic criminology transformed the understanding of the “criminal type” from moral agent to biological specimen, a being whose degeneracy was measurable, predictable, and heritable. This redefinition authorized a broad expansion of state power: the creation of municipal courts, psychopathic laboratories, and indeterminate sentencing schemes designed to identify and control the deviant. What emerged was a carceral apparatus that conflated deviance with disability, criminality with heredity, and social order with racial hierarchy.

At the center of this transformation was the Progressive-Era conviction that law could operate as a tool of scientific governance. Progressive-Era reformers argued that the criminal system should not punish sin but instead diagnose pathology. Drawing on the new disciplines of psychiatry, psychology, and sociology, they sought to reorder the criminal courts to reflect eugenic hierarchies of intelligence, morality, and worth.⁶ Judges, social workers, and court psychiatrists cooperated to “classify” offenders by type: the feebleminded, the defective delinquent, the habitual criminal.⁷ Municipal courts in cities like Chicago, Cleveland, and New York instituted psychopathic laboratories to test defendants’ heredity and mental condition.⁸ In Chicago, for example, the Municipal Court’s Psychopathic Laboratory, founded in 1914 under Chief Justice Harry Olson, examined thousands of defendants—many of whom were never convicted of a crime—and consigned them to asylums, farms, or colonies in the name of “crime prevention.”⁹ The Progressives invoked science and equated it with human advancement.¹⁰ The eugenic belief that society could eliminate criminality by identifying hereditary defects became the operating logic of reform.

Traditional legal accounts of Progressive criminal reform have largely ignored this eugenic foundation. The familiar story portrays

⁵ The Gilded Age is a term commonly used to denote the years between the end of the Civil War and the turn of the twentieth century, where America saw immense growth in industry and technology but also suffered from political corruption, gross materialism, and extreme inequities in wealth. *Gilded Age*, HISTORY.COM (May 28, 2025), <https://www.history.com/articles/gilded-age> [<https://perma.cc/MNS4-D5ZC>].

⁶ See Hedvica Pohlová, *The Social Impact of the American Eugenics Movement*, 15 AM. & BRIT. STUD. ANN. 148, 156–57 (2022).

⁷ See generally Appleman, *supra* note 4, at 421–44.

⁸ See discussion *infra* Section II.E.

⁹ MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 245 (2003).

¹⁰ See Pohlová, *supra* note 6, at 148.

Progressives as enlightened modernizers, replacing local corruption with rational administration and bringing compassion to juvenile justice and sentencing. But this narrative omits the racialized and ableist ideologies embedded within the Progressive project.¹¹ Eugenics offered Progressives an elegant, “scientific” rationale for social stratification, an explanation for poverty, immorality, and criminality that absolved structural inequality.¹² The poor, the disabled, racial minorities, immigrants, and women accused of vice were cast as biologically inferior, their deviance naturalized and medicalized. In the criminal courts, this ideology justified indefinite confinement, sterilization, and segregation, all under the rhetoric of rehabilitation. The Progressive state promised uplift but delivered control.

This Article seeks to reconstruct this neglected legal history and to reveal how eugenic thought helped shape the very architecture of our carceral state. Part I examines the Progressive-Era transformation of the criminal courts and the system of punishment, exposing how eugenic ideology infiltrated legal reform. Drawing on examples from Chicago, Cleveland, and other urban centers, it traces how municipal courts, psychopathic laboratories, and expert administrators redefined justice as social engineering.

Part II explores the rise of eugenic criminology, showing how early criminologists such as Cesare Lombroso and American disciples like Arthur Hall and Charles Davenport translated hereditary theories of degeneracy into legal policy. These criminologists reimagined crime as an inherited condition and redefined the purpose of punishment as social protection rather than moral responsibility.

In Part III, the Article investigates the eugenic roots of Progressive punishment, particularly in juvenile justice and indeterminate sentencing. These reforms, often cited as hallmarks of rehabilitative justice, were in fact designed to separate the “rehabilitable” from the “hereditarily criminal.” The Progressive Era belief that criminal behavior could be predicted through science fostered a new discretionary regime, one that remains embedded in modern sentencing, parole, and risk assessment.

Part IV turns to the intersection of race, psychiatry, and eugenics, explaining how Progressive psychiatrists pathologized racial difference, using psychiatric terminology to criminalize Black, immigrant, and disabled populations. The eugenic classification of “feeble-mindedness” and “psychopathy” became powerful legal tools for racial and social exclusion.

Finally, Part V traces the endurance of this legacy into the present, connecting the Progressive-Era project of hereditary classification to contemporary carceral practices. Modern risk assessment instruments,

¹¹ KHALIL GIBRAN MUHAMMED, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 4 (2010).

¹² *Id.* at 4–5.

civil commitment laws, and the persistent association between race, disability, and criminality reflect the eugenic logic that the Progressive Era first institutionalized. The Progressive faith in scientific management—so central to early twentieth-century reform—continues to animate today’s technologies of control, from predictive policing to actuarial sentencing.

By recovering this forgotten genealogy, this Article challenges the myth of Progressive-Era benevolence, exposing the genetic determinism underlying the architecture of modern punishment. The role of eugenics in influencing Progressive-Era legislation such as miscegenation and marriage restrictions, sexual segregation, mandatory involuntary sterilization, and immigration limitations is well known territory in our legal history.¹³ But eugenics’ role in the twentieth century criminal reform is a story far less told. The Progressive eugenic criminal justice system promised rationality and rehabilitation but delivered coercion and exclusion. Its institutions, including psychopathic laboratories, juvenile courts, and indeterminate sentencing, became the laboratories of the carceral state. To confront our present crisis of mass incarceration, we must first reckon with its true origins: a history in which the language of science and reform masked the machinery of eugenic control.

II. PROGRESSIVES, EUGENICS, AND THE REMAKING OF THE CRIMINAL COURTS

The Progressive-Era remaking of the criminal system has not been extensively explored in legal scholarship.¹⁴ Post-2020 critiques of our system of crime and punishment have largely ignored the legacy of the early-twentieth century Progressive-Era changes to criminal law and criminal courts, particularly the role of eugenically driven policies in shaping reform.¹⁵ This Part deepens our historical understanding,

¹³ EDWARD J. LARSON, *SEX, RACE AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 21–22 (1996).

¹⁴ There have been some notable exceptions in the past 15 years. *See, e.g.*, Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449 (2019); Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335 (2013); Herbert J. Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947, 961 (2017); Daniel Loehr, *The Eugenic History of Habitual Offender Laws*, 68 HOWARD L.J. 233 (2025); Jamelia Morgan, *Disability’s Fourth Amendment*, 122 COLUM. L. REV. 489 (2020).

¹⁵ Another notable recent discussion of criminal reform in the Progressive Era is Bruce A. Green and Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719 (2020).

scrutinizing the eugenics-influenced, Progressive-Era transformation of the criminal courts and the criminal system.¹⁶

The Progressives implemented major criminal justice reforms at the turn of the twentieth century, framing our modern approaches to probation, parole, and indeterminate sentencing, and establishing juvenile courts.¹⁷ These reforms promoted criminal justice policies that were open ended, informal, and highly flexible, in order to either rehabilitate or incarcerate those seen as deviant.¹⁸ Progressive reformers sought to create logical, scientific-driven administrative regimes, created by experts and—critically—controlled by the state.¹⁹ Elites and administrators exercised highly discretionary decision-making, a Progressive-Era hallmark.²⁰

The standard legal history holds that Progressive reformers, with their new understanding of the criminal persona, their scientific-medical analogies for offenders' treatment, and the bulwark of their newly established social sciences, effected criminal reform under the guise of the "Rehabilitative Ideal," a prominent aspect of the Progressive platform.²¹ But the truth is both more complicated and less salutary. The Progressives did remake criminal courts and sentencing, but eugenics indelibly influenced their beliefs about who could be rehabilitated and who was unsalvageable.²² Eugenics was part of almost every aspect of Progressive-Era criminal reform.

A. *Scientific Regulation, Social Order, and Eugenics*

Eugenics played a role in many of the modernizing forces in the first half of the twentieth century.²³ Both a scientific crusade and a social movement, the ideology of eugenics—particularly, the goal of

¹⁶ "Eugenics stood for the idea that a person's abilities and social position were innate traits determined by their biological and genetic makeup, and the same attributes would be passed on to their children. Everything from intelligence to poverty to criminality to general morality was thought to be inherited." Osagie K. Obasogie, *Legacies of Eugenics: An Introduction*, L.A. REV. BOOKS (Apr. 17, 2024), <https://lareviewofbooks.org/article/legacies-of-eugenics-an-introduction/> [<https://perma.cc/YLJ9-6LNN>].

¹⁷ See Feld, *supra* note 4, at 474.

¹⁸ See DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 2 (1980).

¹⁹ See Feld, *supra* note 4, at 474.

²⁰ See *id.* at 474–75.

²¹ *Id.* at 475.

²² Appleman, *supra* note 4, at 436; Feld, *supra* note 4, at 475.

²³ See Obasogie, *supra* note 16; see Chazeman S. Jackson et al., *Facing Our History—Building an Equitable Future*, 110 AM. J. HUMAN GENETICS 377, 378 (2023) ("Eugenic ideologies were embedded into American science, politics, and society in the first half of the 20th century.").

“improvement” of human heredity—was tied up in social order.²⁴ Viewed as a scientific means of refining human genetics, Progressive-Era eugenical thinking was embraced by social reformers, scientists, jurists, intellectuals, and doctors from diverse political persuasions.²⁵ “Powered by the prestige of science, [eugenics] allowed modernizing elites to represent their prescriptive claims about social order as objective statements irrevocably grounded in the laws of nature.”²⁶ Early twentieth-century Progressives were attracted to eugenics as a means of social advancement,²⁷ in science, medicine, social work, and the law.

By providing firm guidelines for controlling the social order, eugenics provided a salve for growing public anxiety over the economic realities of industrialization and demographic changes stemming from increased immigration.²⁸ Progressives found in eugenics the opportunity to apply many newly discovered scientific methods, in order to solve social problems.²⁹ This philosophy affected state, federal, and local legislation, as well as policymaking.³⁰

Eugenics and the Progressive movement evolved hand-in-hand.³¹ Many eugenics supporters contended that federal, state, and local legislation was the way to stop perceived societal deterioration.³² The ideal of scientific management appealed to both Progressives and eugenicists, since both groups believed that “modern society . . . could no longer afford to function on a laissez-faire basis; public policy had to be based on modern principles of biology, sociology, and economics.”³³ Several leading Progressives were fervent eugenicists, consumers of eugenic literature, and supporters of eugenics-based reform.³⁴

Part of the attraction of eugenics was the perceived elegance of the solution: eugenical theories, such as criminal reform, immigration restriction, and involuntary sterilization, could provide social control

²⁴ See THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* 112 (2016).

²⁵ Frank Dikötter, *Race Culture: Recent Perspectives on the History of Eugenics*, 103 *AM. HIST. REV.* 467, 467 (1998).

²⁶ *Id.* at 468.

²⁷ See Daniel A. Farber, *Back to the Future? Legal Scholarship in the Progressive Era and Today*, 100 *MINN. L. REV.* 1, 29 (2015).

²⁸ See Pohlová, *supra* note 6, at 149.

²⁹ See LEE D. BAKER, *FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF RACE, 1896–1954*, 89–90 (1998).

³⁰ See Pohlová, *supra* note 6, at 150.

³¹ See Hovenkamp, *supra* note 14, at 961.

³² *Id.*

³³ Garland E. Allen, *Biological Basis of Crime: An Historical and Methodological Study*, 31 *HIST. STUD. PHYS. & BIO. SCI.* 183, 217 (2001).

³⁴ *See id.*

while reducing the cost of government.³⁵ The Progressives trusted that the discoveries of the new social sciences—most prominently, criminology, anthropology, psychology, and sociology—offered promising instruments for creating systemic change.³⁶

Eugenical thinking took strong hold among the elites, both in academia and the professions of law and medicine.³⁷ Law in particular found the “science” of eugenics easily adaptable to support inequitable laws.³⁸ Many jurists argued that eugenics proved there could be no equality between the races, bolstering various state anti-miscegenation statutes and the then-lawful racial segregation at schools and universities.³⁹ Although not all Progressives were eugenicists, Progressive-Era eugenic leaders helped mold both social and immigration policies in the first three decades of the twentieth century, through judicious use of “science,” lobbying of federal and local legislatures, and powerful financial support.⁴⁰

The story of how eugenics influenced Progressive legislation such as miscegenation and marriage restrictions, sexual segregation, involuntary sterilization, and immigration limitations is a familiar story to legal historians.⁴¹ Lesser known, however, is the role eugenics played in the Progressive-Era remaking of the criminal state, establishing a framework for criminology, court reform, and sentencing that still exists in some measure today.

B. Court Reform, the Criminal System, and Crime Control

The Progressives believed in an active state, and their approach to changing the criminal system reflected as much.⁴² During the Progressive Era, legal institutions were used not only for law, but also as tools for social governance.⁴³ This phenomenon helped drive reforms in the criminal court system and in criminal punishment and sentencing.

The Progressives’ use of a “scientific” approach to criminal behavior led to efforts to study the underlying social issues that created crime.⁴⁴

³⁵ *Id.* at 218. As Allen trenchantly notes, “Eugenics had something for almost everyone, except the poor, mentally retarded, and other institutionalized individuals who consumed but did not produce, the ‘useless eaters’ in Nazi terminology.” *Id.*

³⁶ Feld, *supra* note 4, at 475.

³⁷ Hovenkamp, *supra* note 14, at 962.

³⁸ *See id.* at 965.

³⁹ *Id.* at 965, 998.

⁴⁰ *See* BAKER, *supra* note 29, at 93.

⁴¹ LARSON, *supra* note 13, at 21–22.

⁴² Hovenkamp, *supra* note 14, at 986, 990.

⁴³ Barbara Young Welke, *City of Courts: Socializing Justice in Progressive Era Chicago* (Review), 36 J. INTERDISC. HIST. 292, 293 (2005).

⁴⁴ Green & Roiphe, *supra* note 15, at 730.

This effort led Progressives to the conclusion that individual mental and emotional disabilities provided much of the true root of crime.⁴⁵ “Eugenic thinking pointed to serious crime as the product of a ‘degenerate’ minority . . . presumed likely to be violent and predatory in their criminality.”⁴⁶ By segregating, sterilizing, and permanently detaining the “unfit,” Progressive reformers believed they could largely eradicate crime, particularly in urban areas.⁴⁷

Progressive-Era policymakers targeted criminal punishment for reform.⁴⁸ In the early twentieth century, crime, particularly urban crime, emerged as socio-politically important for the public.⁴⁹ In many ways, dealing with crime became a simulacrum for addressing all social problems.⁵⁰ As Michael Willrich contends, “Progressives turned crime talk into a graphic language for defining and mapping the social itself as a realm of collective structures, identities, risks, and needs that lay between the market and the state.”⁵¹ Progressive-Era jurists were focused on criminal justice reform, and judges and social activists alike supported changes in the way the criminal system dealt with both criminality and those dependent on government support.⁵²

Progressives viewed the criminal system as especially ripe for transformation, given the growing crime in cities,⁵³ a desire to regulate and professionalize the courts, a renewed focus on criminal rehabilitation, and a genuine concern over the conditions of incarceration.⁵⁴ In particular, “[p]rogressive jurists, social scientists, and activists took a special interest in urban crime precisely because it seemed to implicate a host of broader public concerns.”⁵⁵ All of these concerns led to a renewed emphasis on “deviant” behavior, and how best to solve it.⁵⁶

With a focus on properly analyzing social problems,⁵⁷ the Progressives were particularly interested in understanding crime and

⁴⁵ See *id.* at 731.

⁴⁶ Simon, *supra* note 3, at 794.

⁴⁷ *Id.* at 789.

⁴⁸ See Beth A. Colgan & Jean Galbraith, *The False Promise of Installment Fines*, 172 U. PA. L. REV. 989, 1006 (2024).

⁴⁹ See WILLRICH, *supra* note 9, at xxiii.

⁵⁰ See *id.*

⁵¹ *Id.* at 68.

⁵² See *id.* at 60.

⁵³ See Simon, *supra* note 3, at 794–95 (arguing that growing crime in cities was often blamed on increasing immigration and Northern migration).

⁵⁴ ROTHMAN, *supra* note 18, at 8, 18, 31, 51–52.

⁵⁵ WILLRICH, *supra* note 8, at xxv.

⁵⁶ ROTHMAN, *supra* note 18, at 50.

⁵⁷ Green & Roiphe, *supra* note 15, at 730; see generally THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977).

criminals *scientifically*.⁵⁸ This interest in defining and solving criminal deviance, through purportedly scientific methods, led to an influx of eugenically driven policy changes,⁵⁹ both in legislating new crimes and providing treatment to those criminally convicted.

Such eugenic science intertwined with late Victorian criminology, and criminal reform became a natural and attractive path for budding twentieth-century eugenicists.⁶⁰ “The beginning of the Progressive Era coincided with a broad-based revolution in the social science of race,” relying on hereditary explanations for antisocial behavior.⁶¹ The new Progressive-Era penology broke with classic criminology, however, by focusing on “scientific” differentiation of criminal types and causes.⁶²

Critically, eugenic thinking helped motivate the Progressive-Era scientific plan to find genetic roots for the many problems of personality and society, particularly those that stoked fear in the populace: “feble-mindedness,” “psychopathy,” “delinquency,” and “hypersexuality.”⁶³ “[F]ew areas were more shaped by the appeal of the eugenic ideas than criminal justice law and policy.”⁶⁴ Legal progressivism aided the rise and spread of eugenics, along with other coercive aspects of social governance.⁶⁵

Progressives believed that state police powers provided the primary means for controlling the spread of criminality, deviancy, and dependency.⁶⁶ They relied heavily on state police powers in their modernization of the criminal courts.⁶⁷ The Progressives counted on early twentieth-century police powers to help order and reorder society, providing state governments the ability to support public health and welfare through reasonable regulations.⁶⁸

Progressive-Era reformers prioritized the comprehensive restructuring of courts, prisons, and sites of detention.⁶⁹ They sought to eradicate justice-of-the-peace systems and local municipal courts, which

⁵⁸ See Robert F. Wetzell, *New Directions in the History of Criminology*, 21 *CRIME, HIST. & SOC.* 361, 368–69 (2017).

⁵⁹ See Willrich, *supra* note 3, at 64–65.

⁶⁰ Phillip Jenkins, *Eugenics, Crime and Ideology: The Case of Progressive Pennsylvania*, 51 *PA. HIST.: J. MID-ATL. STUD.* 64, 65 (1984).

⁶¹ Hovenkamp, *supra* note 14, at 956.

⁶² See WILLRICH, *supra* note 9, at 75; see also *infra* Part IIIA.

⁶³ See Willrich, *supra* note 3, at 64.

⁶⁴ See Simon, *supra* note 3, at 791.

⁶⁵ WILLRICH, *supra* note 9, at xxvii.

⁶⁶ Willrich, *supra* note 3, at 64.

⁶⁷ See *id.*

⁶⁸ *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 29 (1904) (upholding the authority of states to enforce compulsory vaccination laws).

⁶⁹ See Willrich, *supra* note 3, at 67.

they castigated as slow, outdated, and ineffectual.⁷⁰ Progressive reformers replaced them with consolidated municipal court systems, fully transforming the focus and structure of various major criminal institutions, including jails, prisons, reformatories, work farms, and mental asylums.⁷¹ At the same time, eugenicists began working to eliminate determinate sentencing in favor of individualized sentencing based on hereditary criminal propensity.⁷²

Progressives also expanded the criminal code, adding new “morals” crimes, and started building more modern court systems. This wholesale expansion of the criminal code, supported by numerous “vice raids,” created an explosion of arrests, as well as a marked increase in state and local power over the individual.⁷³ Criminal justice, particularly in the urban cityscape, meant focusing on both major and minor crimes, including new and weighty misdemeanors such as prostitution, assault, petty theft, fornication, and adultery.⁷⁴

Progressive reformers used the powerful language of socialized law, encompassing both the power of social justice and the power of social control,⁷⁵ to consolidate judicial administrative power and burrow the state’s reach well into local regulation.⁷⁶ In part, this was based on a concept of social responsibility, where jurists and social scientists pinpointed crime as the basis for a panoply of social ills.⁷⁷ Thus social reform, powered by eugenics, seemed an obvious fix for what was beginning to be seen as a societal problem.⁷⁸

Eugenicists played a central part in this overarching criminal reform, whether large or small.⁷⁹ As discussed below, formal eugenic theory contributed significantly to criminal law reform.⁸⁰

⁷⁰ See Green & Roiphe, *supra* note 15, at 724.

⁷¹ See Willrich, *supra* note 3, at 67.

⁷² Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 12 (1997).

⁷³ See Kate Markey, *Unlawful Intimacy: The Criminalization of Interracial Relationships in Progressive-Era Chicago*, 49 L. & SOC. INQUIRY 1169, 1173 n.14, 1180 (2024).

⁷⁴ See WILLRICH, *supra* note 9, at xxxiv.

⁷⁵ *Id.* at 119. Willrich defines socialized law as such: “At the turn of the twentieth century, a rising generation of progressive legal academics, swept up in the transatlantic revolt against formalism in social and political thought, launched a much broader assault upon the individualistic, rights-based framework of American law and jurisprudence.” *Id.* at 97.

⁷⁶ Willrich, *supra* note 3, at 76.

⁷⁷ See WILLRICH, *supra* note 9, at 86.

⁷⁸ Garland E. Allen, *Eugenics and American Social History*, 31 GENOME 885, 886–87 (1989).

⁷⁹ See Willrich, *supra* note 3, at 70.

⁸⁰ Lombardo, *supra* note 72, at 12.

Early twentieth-century eugenics helped reframe crime and criminality from a theory of individual sin to a concentration on hereditary mental defects, the mixing of races, and what was seen as “inferior genetics.”⁸¹ The Progressives believed that crime was both scientifically understandable as well as preventable through social and legal reform.⁸² Progressives assumed that law and order could be imposed nationally, in part through the revamping of the criminal and sentencing system.⁸³ “The emergence of a court-based regime of social governance in American cities during the early twentieth century nurtured the rise of eugenic jurisprudence, the aggressive mobilization of law and legal institutions in the pursuit of eugenic goals.”⁸⁴ By integrating psychological testing into the daily routines of criminal courts, through the classification of offenders to such new categories as “feebleminded,” “psychopathic,” or “mentally defective,” eugenic thinking gained substantial coercive power in the Progressive-Era criminal system.⁸⁵

Progressive reformers found crime and punishment an attractive platform for testing and enacting some of their deepest beliefs. As such, they focused their battle against crime on the “unfit” and “feebleminded[,]” and tried to control those beyond the reach of the criminal law as well.⁸⁶ For many Progressives, criminality itself was an inborn trait, and thus could only be curtailed by segregating and isolating those who harbored the inherited genetic flaws.⁸⁷ The fear of inborn criminals not only committing crime but also passing down negative genetic propensities to their (future criminal) children was enough to support a wholesale revision to the existing criminal structure.⁸⁸ Concern over hereditary criminality, combined with statistics that claimed to show a higher rate of crime and hereditary insanity in recent immigrants, created a panic over rising birthrates of so-called “inferior” classes.⁸⁹

Progressive-Era, eugenically-inspired initiatives included segregating unfit individuals in prisons, asylums, reformatories, and

⁸¹ See WILLRICH, *supra* note 9, at 241.

⁸² *See id.*

⁸³ *See id.* at 242.

⁸⁴ *Id.* at 243.

⁸⁵ *Id.*

⁸⁶ Simon, *supra* note 3, at 798.

⁸⁷ See Daniel Loehr, *The Eugenic Origins of Three Strikes Laws: How “Habitual Offender” Sentencing Laws Were Used as a Means of Sterilization*, THE SENT’G PROJECT (Mar. 5, 2025), <https://www.sentencingproject.org/reports/the-eugenic-origins-of-three-strikes-laws-how-habitual-offender-sentencing-laws-were-used-as-a-means-of-sterilization/> [<https://perma.cc/2MQM-3F65>].

⁸⁸ See Randall Hensen & Desmond King, *Eugenic Ideas, Political Interests, and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.*, 53 WORLD POL. 237, 247–48 (2001).

⁸⁹ *Id.* at 249.

specially created colonies.⁹⁰ Disabled, poor, “immoral,” and foreign-born individuals were deemed “unfit” in Progressive and eugenic belief systems.⁹¹ As I have previously contended, the history of mass incarceration began with the disabled;⁹² early twentieth-century Progressives then expanded this detention to the three other groups under the category of “unfitness.”⁹³ Restructuring the criminal court and sentencing system was one way to eradicate the danger of the unfit;⁹⁴ the hereditary criminals would then be subject to lifetime supervision, for the good of both themselves and the country.

C. City Reforms and the Remaking of the Criminal System

The Progressive reformers were eager to remake state and local courts.⁹⁵ The effort to create new, centralized municipal court systems was a critical part of Progressive-Era procedural reform.⁹⁶ This effort led to “a sweeping reorganization of judicial institutions in the early twentieth century,” achieved rapidly in cities throughout the United States.⁹⁷ Many of these reforms were experiments in “eugenicist jurisprudence and expansive social control.”⁹⁸ And as with many Progressive-Era transformations, the court initiatives focused on the behavior of the poor as the locus of reform.⁹⁹

The city of Chicago provides an illuminating example of Progressive-Era crime reform and eugenics. Prior to Progressive reform, the Chicago city courts were regarded as chaotic, populated by multiple “justice shops” where judges personally profited by charging the litigants fees for specific

⁹⁰ See Pohlová, *supra* note 6, at 151.

⁹¹ See *id.* By 1911, eugenicists believed that there were 10 different classes of individuals posing a threat to the polity: the feeble-minded, the pauper class, alcoholics, criminals, epileptics, the insane, the constitutionally weak, those with a predisposition to certain diseases, the deformed, and those with impaired sense organs (deaf, blind and mute individuals). EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* 58 (2012).

⁹² See Appleman, *supra* note 4, at 421–35.

⁹³ See Pohlová, *supra* note 6, at 157.

⁹⁴ The other main tool to rid the country of the “unfit” was, of course, immigration reform. Eugenics was a strong motivator of Progressive-Era immigration policy, which singled out individuals with physical, mental, or “moral defects.” This philosophy ultimately culminated in the 1924 National Origins Act, an extremely restrictive immigration policy for most seeking to emigrate. See *id.* at 158–60.

⁹⁵ See Willrich, *supra* note 3, at 67.

⁹⁶ Amalia Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 *YALE L.J.* 2940, 2945 (2015).

⁹⁷ See Willrich, *supra* note 3, at 67.

⁹⁸ Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 *HARV. L. REV. F.* 213, 219 (2021).

⁹⁹ *Id.*

services such as criminal trials or performing marriages.¹⁰⁰ Through a 1905 reform effort by politicians and legal reformers, the city established the Chicago Municipal Court, a multi-powered agency that had a significant effect on the wider crime and eugenics movement.¹⁰¹ The Municipal Court had jurisdiction over both civil cases and misdemeanor criminal cases, as well as jurisdiction over felony preliminary hearings.¹⁰²

Progressives intended the Municipal Court to serve as a model of socialized law that “purposefully reshaped society by directly addressing concrete problems of social life.”¹⁰³ This approach was central to the Progressive Era’s rethinking of criminality and punishment, moving away from theories of free will and towards a combined eugenic/environmental basis.¹⁰⁴ The Municipal Court wanted to “socialize” criminal justice through the individual treatment of offenders and the use of professional experts within the court process.¹⁰⁵ In practice, both of these means relied both explicitly and implicitly on eugenics.

The Municipal Court system was divided into numerous sub-courts, including the Court of Domestic Relations (dealing with women, children, and non-support),¹⁰⁶ the Morals Court (focusing on vice),¹⁰⁷ the Boys’ Court (a criminal court for boys aged seventeen to twenty-one, who had aged out of Juvenile Court),¹⁰⁸ and the Psychopathic Laboratory.¹⁰⁹

Founded in 1914, the Chicago Psychopathic Laboratory, operating in tandem with the Municipal Court, served to strengthen the belief in hereditary links between criminality, feeble-mindedness, and mental disorders.¹¹⁰ The city’s Municipal Court and its Psychopathic Laboratory collaborated to send thousands of criminal defendants—along with some individuals not accused of any crime—to the Laboratory, where many individuals, after undergoing a battery of mental tests, were ultimately classified as mentally defective.¹¹¹ A common diagnosis was “dementia

¹⁰⁰ See Lawrence Friedman, *Review of City of Courts 1*, HIST. NET REVIEWS (April 2004), <https://www.h-net.org/reviews/showpdf.php?id=9192> [<https://perma.cc/3G2T-QFNH>]; see also *Chicago City Government Records*, NEIU LIBRS. (May 25, 2023, at 16:41 CT), <https://neiulibraries.libguides.com/ChicagoCityGovernmentRecords/citycourts> [<https://perma.cc/J2J4-CE56>].

¹⁰¹ See WILLRICH, *supra* note 9, at 243–44.

¹⁰² See Friedman, *supra* note 100, at 1.

¹⁰³ See WILLRICH, *supra* note 9, at 98.

¹⁰⁴ See Friedman, *supra* note 100, at 1.

¹⁰⁵ WILLRICH, *supra* note 9, at 245.

¹⁰⁶ *Id.* at 133.

¹⁰⁷ *Id.* at 185–86.

¹⁰⁸ *Id.* at 209–10.

¹⁰⁹ *Id.* at 121.

¹¹⁰ See Markey, *supra* note 73, at 1181.

¹¹¹ WILLRICH, *supra* note 9, at 244–45.

praecox,”¹¹² now known as schizophrenia.¹¹³ As the New York Times reported in 1915,

The establishment of a psychopathic library in Chicago to make an individual study of the mentality of criminals brought before the courts there has proved that more than 15 per cent. of the crimes are committed by persons suffering from dementia praecox. . . . A great part of the children arrested for serious offenses . . . had been found by tests to be suffering from mental diseases, the chief types of which were dementia praecox, and feeble-mindedness with dementia praecox grafted onto it. Between 60 and 80 per cent. of the women arrested . . . were found to be suffering from some mental affliction.¹¹⁴

Approximately 1,000 individuals a year were so classified and sent to mental institutions, whether they were found guilty of their crimes or not.¹¹⁵ The declared purpose of this policy was crime prevention.¹¹⁶ The advent of the Psychopathic Laboratory, combined with the Municipal Court, illustrated Chicago’s deep-seated commitment to “codifying eugenical ideas into the city’s legal system.”¹¹⁷

The Laboratory collected data on the psychological and physical make-up of individuals deemed criminal, using such tools as the Stanford-Binet intelligence scale, questionnaires, and a visual memory test.¹¹⁸ Based on this information, the Laboratory would recommend certain citizens to be committed at various mental institutions or farms outside the city, even for very minor offenses.¹¹⁹ Many of these stays were indefinite.¹²⁰

After the creation of the Municipal Court, the city of Chicago established an Adult Probation Act in 1911.¹²¹ The Act allowed Municipal

¹¹² The Laboratory defined “dementia praecox” as a common “criminal psychosis,” which led those affected to frequently commit “violent criminal assaults.” See MUNICIPAL COURT OF CHICAGO, EIGHTH AND NINTH ANNUAL REPORT 20 (Chicago: Municipal Court of Chicago, 1913–14) (available at <https://babel.hathitrust.org/cgi/pt?id=mdp.35112101534917&view=1up&seq=343>).

¹¹³ See T. Franklin Murphy, *Dementia Praecox: A Historical Perspective on Schizophrenia*, PSYCH. FANATIC (June 25, 2022), <https://psychologyfanatic.com/dementia-praecox/> [<https://perma.cc/X5WJ-U8AE>].

¹¹⁴ *Declares Insanity Can Be Extirpated*, N.Y. TIMES (Nov. 20, 1915), <https://timesmachine.nytimes.com/timesmachine/1915/11/20/104657156.html?pageNumber=7> [<https://perma.cc/7XCQ-FKCN>].

¹¹⁵ See WILLRICH, *supra* note 9, at 245.

¹¹⁶ *Id.*

¹¹⁷ See Markey, *supra* note 73, at 1181.

¹¹⁸ See MUNICIPAL COURT OF CHICAGO, *supra* note 112, at 21–22.

¹¹⁹ See Markey, *supra* note 73, at 1183.

¹²⁰ *Id.* at 1183–84.

¹²¹ *Id.* at 1181.

Court judges to sentence first-time offenders convicted of misdemeanor violations to a maximum of one year on probation.¹²² The law gave probation officers the ability to keep a sharp eye on probationers, where any further transgressions, large or small, would lead to continued scrutiny and punishment.¹²³ Finally, in 1915, the Illinois Legislature, on behest of the Municipal Court, passed a new commitment law for those deemed “mentally defective.”¹²⁴

The two primary supporters of the Chicago Municipal Courts, Justice Harry Olson and Harvard Law School Dean Roscoe Pound,¹²⁵ held eugenic beliefs. Olson, who was the Chief Justice of the Chicago Municipal Courts and President of the Eugenics Research Association, urged a eugenic solution for a variety of American problems and claimed that eugenics could stop crime.¹²⁶ Pound, who was Dean of Harvard Law from 1916–1936, was comfortable with eugenics and had links to National Socialism,¹²⁷ meeting with Nazi officials in 1934 and actively defending Hitler.¹²⁸

By the 1930s, forty cities nationwide had adopted the Chicago court reforms in their own judiciary and criminal system.¹²⁹ Chicago’s reforms were praised by both the ABA and the American Judicature Society as the “paragon of judicial modernity.”¹³⁰

Cleveland, Ohio, similarly revamped their criminal courts during the Progressive Era, moving from a secretive, inefficient, and corrupt system to one based on efficiency and probity.¹³¹ With efficiency came a de-emphasis of due process; as the Report from the Progressive Cleveland Foundation for Criminal Justice noted, “[t]he steps in the administration of justice are too numerous, involve too many agencies, and are too loosely

¹²² WILLRICH, *supra* note 9, at 93.

¹²³ Markey, *supra* note 73, at 1181.

¹²⁴ See MUNICIPAL COURT OF CHICAGO, *supra* note 112, at 21.

¹²⁵ Pound enthusiastically praised Olson’s Municipal Court, noting that the “excellent work done by the Municipal Court of Chicago shows us that we must abandon the hard-and-fast line between the judicial and the administrative involved in our legal tradition.” See Roscoe Pound, *Legislation as a Social Function*, 18 AM. J. SOCIO. 755, 768 (1913).

¹²⁶ See *Asserts Eugenics Can Stop Crime: Justice Olson of Chicago Pleads for Laws to Weed Out Mentally Deficient*, N.Y. TIMES (June 17, 1923), <https://timesmachine.nytimes.com/timesmachine/1923/06/17/105918330.html?zoom=14.82&pageNumber=9> [https://perma.cc/2PFZ-2DLN].

¹²⁷ See LEONARD, *supra* note 24, at 25; see Peter Rees, *Nathan Roscoe Pound and the Nazis*, 60 B.C. L. REV. 1313, 1315 (2019).

¹²⁸ See Rees, *supra* note 127. See also JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 15 (2017).

¹²⁹ See Willrich, *supra* note 3, at 200.

¹³⁰ *Id.*

¹³¹ See Green & Roiphe, *supra* note 15, at 724.

guarded.”¹³² The desire to rush to trial and drop various procedural steps in the administration of criminal justice, including the elimination of the grand jury, was typical of the Progressive Era’s revamping of court procedure,¹³³ since the focus was on either rehabilitating or permanently incapacitating the criminal.

The Progressive-Era influence of eugenics is visible in the Cleveland court structure as well, which followed the example of the Chicago Municipal Courts in designating a Psychopathic Institute as part of its judicial project.¹³⁴ Most notably, one of the recommendations of the Cleveland Foundation of Criminal Justice was to appoint a Chief Psychiatrist, who would “examine and pass upon all cases coming from the Probate Court, the Municipal Court, and the Court of Common Pleas, in which the question of sanity or insanity, epilepsy, or mental deficiency is raised.”¹³⁵ This allowed any person so diagnosed to be committed to an asylum, the psychopathic hospital, or other life-long mental-health-based detention.¹³⁶

Similarly, by 1900, Eastern Penitentiary in Philadelphia, PA, one of the first prisons in the United States, had begun to classify criminals as their own distinct race.¹³⁷ Reform of the court system and sentencing soon followed. In 1909, Pennsylvania implemented an indeterminate sentencing system, where the length of the sentence was ultimately decided by administrators and medical experts, not jurists.¹³⁸ The state also implemented parole and probationary schemes, where individuals deemed criminal would be supervised by administrative experts, sometimes for life.¹³⁹ The focus was on isolating and permanently confining unreformable “biological criminals,” leaving the penitentiaries for those offenders who were capable of rehabilitation.¹⁴⁰ If crime was “inborn,” then sentences had to be flexible to allow science, medicine, and ultimately psychiatry to determine the right solution for the offender.¹⁴¹

By establishing specialized courts, psychological laboratories, and flexible sentencing, the Progressives sought to scientifically classify, control, and segregate individuals deemed “unfit”—including disabled,

¹³² CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 246 (Roscoe Pound & Felix Frankfurter eds., Cleveland Foundation 1922).

¹³³ *Id.* at 248.

¹³⁴ *Id.* at 442.

¹³⁵ *Id.* at 479.

¹³⁶ *See id.*

¹³⁷ Jenkins, *supra* note 60, at 68.

¹³⁸ *Id.* at 71.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 72.

¹⁴¹ *Id.*

poor, immigrant, and “immoral” populations.¹⁴² These reforms, which were strongly influenced by eugenic thinking, expanded state power, reduced due process, and laid groundwork for modern approaches to criminal justice, fundamentally reshaping societal approaches to crime and punishment through a lens of genetic determinism.¹⁴³

III. CREATING THE PROGRESSIVE-ERA CRIMINAL

Progressive-Era criminology and the study of eugenics were tightly intertwined.¹⁴⁴ Both relied on a primary assumption that there was a distinct criminal class, both physically and psychologically different than “normal” citizens.¹⁴⁵ The field of criminology itself was still in a formative period during the Progressive Era, providing the first true scientific discourse on crime, criminals, and criminality.¹⁴⁶

Through the lens of eugenics, both poverty and crime were understood as a combination of racial mixing, inferior hereditary traits, and mental illness.¹⁴⁷ The belief that crime was both knowable and preventable with the help of eugenic criminology heavily influenced criminal reform in both theory and practice, prompting the use of state and local police powers to address the growing population of criminals, deviants, and dependents.¹⁴⁸

A. *The Rise of Progressive Criminology*

Victorian criminologists developed a taxonomy to categorize and describe intellectually disabled individuals,¹⁴⁹ among them, the “idiot,” “imbecile,” or “psychopath,” all categories which were found predominantly in the criminal population.¹⁵⁰ As the Progressive Era advanced, mental disability was further separated into three distinct

¹⁴² *Id.* at 64.

¹⁴³ *Id.* at 75.

¹⁴⁴ NICOLE HAHN RAFTER, *WHITE TRASH: THE EUGENIC FAMILY STUDIES, 1877–1919*, 1 (1988); *see also* James C. Oleson, *The New Eugenics: Black Hyper-Incarceration and Human Abatement*, 5 *SOC. SCI.* 66, 66 (2016).

¹⁴⁵ *See* NICOLE HAHN RAFTER, *CREATING BORN CRIMINALS* 118 (1997).

¹⁴⁶ *Id.*

¹⁴⁷ *See* WILLRICH, *supra* note 9, at 241.

¹⁴⁸ *Id.* at 242.

¹⁴⁹ The field of criminology scientifically studies the non-legal aspects of crime, including causation, corrections, and prevention, viewing it through various disciplines such as anthropology, biology, psychology, psychiatry, economics, sociology, and statistics. *See* Hermann Mannheim & Thomas J. Bernard, *Criminology*, *BRITANNICA* (Sep. 13, 2025), <https://www.britannica.com/science/criminology> [<https://perma.cc/72PQ-QXGV>].

¹⁵⁰ Jenkins, *supra* note 60, at 65–66.

classifications: “idiots,” or those with intelligence of an infant to a two-year-old; “imbeciles,” or those with intelligence of a three- to seven-year-old; and “morons,” or those with intelligence of an eight- to ten-year-old.¹⁵¹ These classifications were utilized to help sort the intellectually disabled into various institutions, colonies, and mental hospitals.¹⁵²

Two extremely influential criminologists, Cesare Lombroso and Arthur C. Hall, shaped much of the Progressive-Era view of human criminality. Lombroso, considered the “father of positive criminology,” was an Italian physician and mental hospitalist who focused on how phrenology was tied to the “criminal character.”¹⁵³ His 1876 book *Criminal Man* promoted the theory of biological criminology, which became very popular in the United States around the turn of the twentieth century.¹⁵⁴ Lombroso concluded that criminal tendencies originated from the person’s “biological constitution.”¹⁵⁵

The data Lombroso garnered from his obsessive study of criminal corpses and skulls led him to conclude that the majority of criminals were atavistic throwbacks who had failed to fully evolve mentally and psychologically, leaving them unable to compete with the rest of society.¹⁵⁶ Accordingly, these individuals had no choice but to turn to crime, as their actions were determined almost solely by heredity, rendering them both unredeemable and not responsible for their deeds.¹⁵⁷ Lombroso also believed in “preventative criminology,” contending that potential criminals should be identified in early childhood and incarcerated before they could negatively affect society.¹⁵⁸

Progressive politicians, jurists, and legislators popularized this theory of genetic determinism, and it was widely embraced by American academics beginning in the early 1890s.¹⁵⁹ A major line of Lombroso’s theory was the notion there was a distinct criminal class, physically

¹⁵¹ See Appleman, *supra* note 4, at 439.

¹⁵² *Id.* at 445.

¹⁵³ See Herbert Hovenkamp, *Insanity and Criminal Responsibility in Progressive America*, 57 N.D. L. REV. 541, 561 (1981).

¹⁵⁴ AnaCristina Bedoya & Jill Portnoy, *Biosocial Criminology: History, Theory, Research Evidence, and Policy*, 18 VICTIMS & OFFENDERS 1599, 1602 (2023).

¹⁵⁵ See Gerald V. O’Brien and Meghan E. Bundy, *Reaching Beyond the “Moron”: Eugenic Control of Secondary Disability Groups*, 36 J. SOCIO. & SOC. WELFARE 153, 165 (2009).

¹⁵⁶ See Hovenkamp, *supra* note 153, at 561.

¹⁵⁷ *Id.* at 561–62. Unsurprisingly, later research failed to support Lombroso’s slightly more nuanced ideas expressed in his later work, *Crime: Its Causes and Remedies* (1899), identifying social and biological causes of crime. See Bedoya & Portnoy, *supra* note 154, at 1602.

¹⁵⁸ O’Brien & Bundy, *supra* note 155, at 165.

¹⁵⁹ ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 20 (2009).

“distinguishable from non-criminals by observable physical anomalies of a degenerative or atavistic nature.”¹⁶⁰ The American legal system digested and accepted this view of criminology by linking criminal tendencies with physical features.¹⁶¹ Lombroso argued the criminal was a “morally inferior human species,” morally “retarded,” “instinctively aggressive,” and needing restraint.¹⁶² These beliefs ultimately justified the “eradication of elements that constituted a permanent and serious danger.”¹⁶³ Following Lombroso’s lead, the bulk of American criminologists believed in the immovable nature of the criminal class.¹⁶⁴ The essential beliefs of late nineteenth-century and early twentieth-century criminologists strongly emphasized the “non-human” qualities of criminals.¹⁶⁵

Hall, a budding sociologist, focused on an environmental theory of criminality.¹⁶⁶ He posited that criminals, and criminal behavior, were created by the changing social environment.¹⁶⁷ The theories of environmentalism and eugenics, however, were often tied together during the Progressive Era.¹⁶⁸ Eugenics and environmentalism harmonized to support Progressive social governance, rejecting the nineteenth-century deterrence theory of criminality, embracing the root causes of crime, committing to a regime which treated offenders individually, and introducing social professionals into the court and criminal system.¹⁶⁹ Both theories worked in tandem to give Progressive reformers the ability to revamp criminal courts, drawing upon judges, psychiatrists, psychologists, and social workers.¹⁷⁰ The combined eugenic and environmental theories of criminality ultimately created a socialized criminal justice system that “circumscribed offenders’ procedural rights and subjected the everyday lives of urban working-class populations to new levels of governmental intervention.”¹⁷¹

Early twentieth-century criminology, hoping to be accepted as a true scientific field, “borrowed both methodology and vocabulary from the medical profession, using metaphors like pathology, infection, diagnosis, and treatment.”¹⁷² These terms provided useful and popular analogies for

¹⁶⁰ *Id.* at 20.

¹⁶¹ See DOUGLAS J. FLOWE, UNCONTROLLABLE BLACKNESS: AFRICAN AMERICAN MEN AND CRIMINALITY IN JIM CROW NEW YORK 4 (2020).

¹⁶² PLATT, *supra* note 159, at 21.

¹⁶³ LEON RADZINOWICZ, IDEOLOGY AND CRIME 55 (1966).

¹⁶⁴ PLATT, *supra* note 159, at 23.

¹⁶⁵ *Id.* at 28.

¹⁶⁶ See Hovenkamp, *supra* note 153, at 564.

¹⁶⁷ *Id.*

¹⁶⁸ See WILLRICH, *supra* note 9, at 277.

¹⁶⁹ *Id.* at 245.

¹⁷⁰ *Id.* at 276.

¹⁷¹ *Id.* at 277.

¹⁷² Feld, *supra* note 4, at 475.

the newly emerging criminal justice professionals.¹⁷³ In this way, psychiatrists and psychologists, participants in emerging professions themselves, became leaders in this new field.¹⁷⁴

Psychiatrists in the first two decades of the twentieth century successfully centered their field around routine American social and cultural life, fashioning a “psychiatry of normalcy.”¹⁷⁵ Psychiatrists at the turn of the twentieth century realized they could no longer simply concentrate their efforts on patients in mental hospitals and accordingly broadened their focus to the public at large, including issues relating to “mental hygiene, care of the feeble-minded, eugenics, control of alcoholism, management of abnormal children, treatment of criminals, and to help in the prevention of crime, prostitution, and dependency.”¹⁷⁶

The enlarged power of psychiatry assisted criminologists in classifying and quantifying the mental “abnormality” of criminal offenders.¹⁷⁷ Beginning in 1910, criminological clinics were set up in state reformatories, prisons, jails, big city police departments, and local courts.¹⁷⁸ These newly baked criminologists were broadly influential, focusing on classifying crimes and its cause.¹⁷⁹ Unsurprisingly, turn-of-the-century psychiatry was “shot through with racial concerns,” linking immigration and the “racially inferior” closely with rising rates of insanity.¹⁸⁰

What characteristics comprised the supposed criminal class? Answers varied, but criminologists of the era agreed members of the class were “bestial, childish, drunken, and drawn to urban squalor,” a “biologically dangerous, criminalistic underclass” composed of dependent, defective, or delinquent individuals.¹⁸¹ The criminally unfit classification was amorphous, sometimes including all the lower class and sometimes not.¹⁸² This vagueness in terminology became a way of “discussing all social problems by speaking of one.”¹⁸³

¹⁷³ *Id.*

¹⁷⁴ WILLRICH, *supra* note 9, at 251.

¹⁷⁵ ELIZABETH LUNBECK, *THE PSYCHIATRIC PERSUASION: KNOWLEDGE, GENDER, AND POWER IN MODERN AMERICA* 11 (1994).

¹⁷⁶ GERALD N. GROB, *MENTAL ILLNESS AND AMERICAN SOCIETY, 1875-1940*, 145 (2019).

¹⁷⁷ *See* WILLRICH, *supra* note 9, at 251. As Willrich notes, one major way the fields of psychiatry and psychology helped criminologists is by their development of the intelligence test. *Id.*

¹⁷⁸ *Id.* at 246.

¹⁷⁹ *Id.*

¹⁸⁰ LUNBECK, *supra* note 175, at 122, 311.

¹⁸¹ *See* RAFTER, *supra* note 145, at 119.

¹⁸² *Id.*

¹⁸³ *Id.*

Early criminologists and criminal anthropologists wished to make both criminology and justice a science,¹⁸⁴ arguing that punishment had to be measured to fit the specific offender.¹⁸⁵ Those criminologists who were also eugenicists contended that permanent confinement of “insane criminals” would also protect society, since they would no longer be able to reproduce.¹⁸⁶ Other ideas included marriage restrictions, sterilization, castration, and even euthanasia—the latter for those convicted of crimes ranging from nighttime burglary to murder, the criminally insane, and those unable to be rehabilitated.¹⁸⁷ It was a purposeful blending of those deemed criminal and those deemed insane.¹⁸⁸

One of psychology’s primary contributions to the new field of criminology was intelligence testing.¹⁸⁹ The intelligence test allowed criminologists to quantify the mental abnormality of criminals, shaping the contours of another new criminal type, “the criminal imbecile.”¹⁹⁰ In 1905, French psychologist Alfred Binet published the first version of an intelligence test to help classify different levels of intellectually disabled children, the Binet-Simon test.¹⁹¹ Although Binet insisted that his test did not provide any fixed certainty of intelligence, his examination, translated into English, was used widely by American eugenicists, who believed in the heritability of low intelligence and wished to weed it out using various societal gatekeepers.¹⁹² This new American version of Binet’s test rapidly proliferated through “eugenic, educational, custodial, psychological, and other scientific circles” in order to weed out the intellectually unfit.¹⁹³

The new Binet intelligence test provided a useful tool for evaluating individuals convicted of crimes, particularly when the testing included the so-called “borderline”—those who tested near but not at the “moron” or “feebleminded” level.¹⁹⁴ Chicago’s central jail, the House of Corrections, carefully studied the Binet test for use with its inmates, as this seemed

¹⁸⁴ It is hard to overstate the level of admiration provoked by anything scientific in this era. As Rafter notes, criminology and criminal anthropology were closely entwined with physical anthropology and evolutionary biology, “sciences that promised to unlock the secrets of human history and human nature.” *Id.* at 126. The classification of the criminal type was seen as a natural step from the classification found in the sciences. *Id.*

¹⁸⁵ *Id.* at 123.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 124.

¹⁸⁸ *Id.* at 123.

¹⁸⁹ WILLRICH, *supra* note 9, at 251.

¹⁹⁰ *Id.*; see RAFTER, *supra* note 145, at 134.

¹⁹¹ See BLACK, *supra* note 91, at 76.

¹⁹² *Id.* at 76–78.

¹⁹³ *Id.* at 79.

¹⁹⁴ *Id.*

another tool that could help uncover “the problems of heredity” in those who were allegedly destined to be criminals.¹⁹⁵ Sterilization was the suggested path toward eliminating criminality in the future.¹⁹⁶

Prisons and jails were used as collection grounds for data to establish the “bottom tenth,” a subset of Americans deemed so mentally unfit they required sequestration from society.¹⁹⁷ Indeed, some eugenicists argued the only way to eliminate feeble-mindedness and criminality was to sterilize this “lowest one-tenth,” which in the early twentieth century comprised approximately 15 million people.¹⁹⁸

The National Committee on Prison and Prison Labor was one such body that sought to identify the criminal imbecile. Originally created in 1910 to investigate the exploitation of prisoner-made goods, the body widened its activities a few years later, creating psychopathic laboratories to document hereditary criminality in major cities.¹⁹⁹ In New York, for example, the New York City Police Department opened its own psychopathic laboratory for eugenic investigations of its prisoners.²⁰⁰ Likewise, in upstate New York, prisoners at Sing-Sing, one of the major New York State prisons, were examined by researchers under a year-long project with the Eugenics Records Office.²⁰¹

Similarly, Indiana established a Committee on Mental Defectives, which scoured the state seeking people who could be classified as “feeble-minded,” relying on doctors, overseers of the poor, corrections records, county judges, and county prosecutors, among others.²⁰² Once likely “defective individuals” were identified, the Committee would visit them at home or in their respective institutions, where they were further sorted into different levels of mental defectiveness.²⁰³ The most dangerous category was that of “moron.”²⁰⁴ Given the concern that “morons” would be able to function in society, albeit poorly, there was a push to classify as many incarcerated individuals as “moronic,” so that this level of “mental

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 63.

¹⁹⁷ See *Eugenics: The Troubling Past of Genetic Research*, HEALTH UNIV. OF UTAH (June 27, 2014), <https://healthcare.utah.edu/the-scope/health-library/all/2014/06/eugenics-troubling-past-of-genetic-research> [<https://perma.cc/7VEX-JAQ3>].

¹⁹⁸ ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 6 (2016).

¹⁹⁹ BLACK, *supra* note 91, at 96.

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² See IND. COMM. ON MENTAL DEFECTIVES, *MENTAL DEFECTIVES IN INDIANA* 6–7 (1919).

²⁰³ *Id.* at 8.

²⁰⁴ *Id.* at 10–11.

defect” would be part of the criminal persona.²⁰⁵ The Committee’s conclusion regarding mental defect and crime argued that “30 to 50 percent of the population of juvenile and adult reformatories were either feeble-minded or insane.”²⁰⁶

Comprised of state doctors, the Indiana Committee sponsored research spearheaded by Arthur Estabrook, a leading eugenicist.²⁰⁷ The Committee defined the “criminal imbecile” as “a feeble-minded person with little to no moral sense,” who largely committed petty larceny, sexual offenses, desertion, and vagrancy.²⁰⁸ As the report concluded, “crime is not peculiar to mental defect, but mental defect is good soil in which to develop crime.”²⁰⁹ Ultimately, the report recommended that the feeble-minded and insane be collected to live in farm colonies, where they could work for the State and do no harm.²¹⁰ Otherwise, if left in the community, they would be “led into disorder and crime and . . . [would] add to the liabilities of this State.”²¹¹

In each city and state, different theories of Progressive-Era criminality emerged, each propagated by slightly different understandings of eugenics, science, and criminology. Criminality was believed to be largely genetic, and Progressive reformers focused on crime in the early part of the twentieth century because it arose as a social issue in the urban areas where their concerns focused.²¹² Crime was not viewed merely as a social and economic problem, but also a moral one.²¹³ This emphasis on crime and its costs led to various eugenic philosophies of criminality from the leading thinkers of the day.

B. Born Criminals and the Mentally Ill

One popular understanding of criminality was tied to intellectual disability and mental illness, popularized partly by Charles Davenport, a Harvard geneticist and arguably the best-known biologist of the early twentieth century.²¹⁴ A major figure in American science and a well-known public intellectual, Davenport was eugenics engineer, statesman,

²⁰⁵ See, e.g., *id.* at 27 (classifying 9 individuals in the Indiana State Prison and 12 individuals in the Indiana State Reformatory as feeble-minded, class of “moron”). Unsurprisingly this county had many mining settlements, and most residents lived in great poverty. *Id.* at 26.

²⁰⁶ *Id.* at 35.

²⁰⁷ *Id.* at 4.

²⁰⁸ *Id.* at 35.

²⁰⁹ *Id.* at 36.

²¹⁰ *Id.* at 53.

²¹¹ *Id.*

²¹² See Allen, *supra* note 33, at 187.

²¹³ *Id.*

²¹⁴ See LEONARD, *supra* note 24, at 113.

and primary torchbearer.²¹⁵ Prominent in both academic and public circles, Davenport “oversaw the expansion of eugenic ideas into both social and scientific spheres that are salient still today.”²¹⁶ A true evangelizer, Davenport and his cohort spread the gospel of eugenics far beyond the laboratory and eugenics institutes, extending into American popular culture.²¹⁷ The focus on American heredity and parallel fear of degeneracy influenced the elites and ultimately, broader public opinion.²¹⁸ Policymakers, lawyers, judges, and politicians fell under the great sway of eugenics.

Davenport focused on the hereditary basis of both crime and lack of fitness, which he pinned to a “feeble self-control” in most criminals,²¹⁹ caused by an inherited defect of the central nervous system.²²⁰ Davenport examined offenses involving a “so-called” criminal lack of inhibition, such as adultery, bigamy, and polygamy.²²¹ Although Davenport allowed for environmental factors to influence an individual’s criminality (noting that poverty could lead to crime and a strict punishment could potentially deter it), he also argued that in many cases, a person’s nature was so biologically flawed that it wasn’t worth cultivating; it would always produce “bitter fruit.”²²²

In 1910, Davenport created a summer training institute for fieldwork in eugenics, partially responding to an increasing desire for research about personal and family histories of both prisoners and patients detained by the criminal legal system.²²³ His institute helped spread eugenical practices and methodologies in the areas of criminality, insanity, and feeble-mindedness,²²⁴ all of which were believed to be related.

Davenport and other fellow eugenical biologists believed a lack of inhibition and criminal nature deeply informed each other, tying many instances of criminal behavior to diseases such as “schizophrenia, epilepsy, severe brain damage, and other forms of insanity.”²²⁵ Ultimately, Davenport and scientists like him claimed criminality had a very strong biological basis, one that could never be fully eradicated by

²¹⁵ See MICHAEL YUDELL, RACE UNMASKED: BIOLOGY AND RACE IN THE TWENTIETH CENTURY 31–32 (2014).

²¹⁶ See *id.* at 31.

²¹⁷ See LEONARD, *supra* note 24, at 113.

²¹⁸ *Id.*

²¹⁹ See Charles Davenport, *Crime, Heredity and Environment*, 19 J. HEREDITY 307, 310 (1928).

²²⁰ See Allen, *supra* note 33, at 188.

²²¹ *Id.*

²²² *Id.*

²²³ See Miroslava Chávez-García, *Youth of Color and California’s Carceral State: The Fred C. Nelles Youth Correctional Facility*, 102 J. AM. HIST. 47, 50 (2015).

²²⁴ See *id.*

²²⁵ Allen, *supra* note 33, at 189.

environment.²²⁶ Much of the data Davenport collected was descriptive and anecdotal,²²⁷ but this did not stop his theories from gaining tremendous popularity.

This intellectual shift in envisioning the American criminal is also supported by the many new and different criminal institutions created by Progressive-Era leaders and legislators. These included mental asylums, psychopathic hospitals, reformatory homes, and hospitals for the insane.²²⁸ Despite the fanfare, the new criminal institutions were often overcrowded, providing little therapeutic treatment.²²⁹ Such criminal institutions quickly transformed into new forms of detention for the mentally ill, the cognitively and physically disabled, and the chronically ill, persisting through the end of the nineteenth century and well into the twentieth.²³⁰

Progressive-Era reformers did not seek to dismantle the existing asylum system, however. They instead “rearrang[ed] the landscape of deviance and dependence in ways which have survived to our own time.”²³¹ In reality, reform under the Progressives meant increased incarceration of individuals deemed either criminal or disabled, whether psychologically, physically, or emotionally.

The Progressives relied on three primary institutions: the prison, the reformatory, and the asylum.²³² It was the asylum population that grew the fastest.²³³ In a forty-year period, from 1880 to 1920, the number of people incarcerated in asylum as inmates skyrocketed: from approximately 40,000 in 1880 to over 263,000 in 1923.²³⁴ By 1923,

²²⁶ *Id.* at 189–90.

²²⁷ *Id.* at 190–91. Similar descriptive, anecdotal evidence was collected in Richard Dugdale’s influential eugenic book, *The Jukes: A Study in Crime, Disease, Pauperism, and Heredity*, which claimed to tell the history of weak family genetics, but in reality was almost all anecdote and myth. See *Myth of ‘The Jukes’ Offers Cautionary Genetics Tale*, ABC NEWS (June 30, 2012, at 12:43 CT), <https://abcnews.go.com/Technology/myth-jukes-offers-cautionary-genetics-tale/story?id=16686108> [<https://perma.cc/HZ67-6T37>].

²²⁸ See Jessie Hodder & Edith Spaulding, *Appendix, A Graphic Method of Illustrating Situations in Penal Institutions for the American Prison Association, 1915*, in PROCEEDINGS OF THE ANNUAL CONGRESS OF THE AMERICAN PRISON ASSOCIATION (1915).

²²⁹ See Appleman, *supra* note 4, at 446.

²³⁰ *Id.* at 433.

²³¹ Michael Zuckerman, *Review of Conscience and Convenience: The Asylum and Its Alternatives in Progressive America*, 73 J. CRIM. L. & CRIMINOLOGY 1803, 1806–07 (1982).

²³² See Appleman, *supra* note 4, at 435.

²³³ *Id.*

²³⁴ John R. Sutton, *The Political Economy of Madness: The Expansion of the Asylum in Progressive America*, 56 AM. SOCIO. REV. 665, 666 (1991).

asylums incarcerated more individuals than did all other types of custodial institutions combined.²³⁵

As crime started to become more of a national concern in the beginning of the twentieth century, however, Progressive sites of imprisonment also began to expand, no matter whether you were found guilty of crime, mental illness, or disability.²³⁶ In particular, the Progressive approach to crime and disability was inextricably linked; “the language of eugenic jurisprudence infused American public discourse on crime during the 1910s and 1920s, the years when law and order, historically a local matter, began to be redefined as a national issue.”²³⁷ The Progressives deemed that the safest way to house eugenic criminals, along with those labeled deviant, dependent, and disabled, was in secure institutions, separated from mainstream society.

C. Immigrants as Hereditary Criminals

“Alien crime” emerged as a defining feature of the criminal persona in the Progressive Era, reflecting deep-seated anxieties about race, citizenship, and social order.²³⁸ By the 1890s, a constellation of organizations advocating immigration restriction had arisen across the Northeast, most prominently the Boston Immigration Restriction League, founded by two lawyers and a geographer from the region’s Progressive elite.²³⁹ Cloaking their efforts in the language of scientific rationality and civic virtue, these reformers argued that immigration control was essential to preserving the nation’s moral and biological integrity.²⁴⁰ The League and its allies warned that “local values and biologies [were] being displaced and replaced; and that a national culture, indelibly marked on the souls of white Americans, [was] being slowly and insidiously erased.”²⁴¹ Such rhetoric fused eugenic science with cultural nationalism, constructing the immigrant not only as an economic or social threat, but also as a contaminant to the racial and moral fabric of the American body politic.

By the 1920’s, these pro-eugenic, anti-immigration movements profoundly reshaped American immigration law, embedding biological

²³⁵ Appleman, *supra* note 4, at 435.

²³⁶ *Id.*

²³⁷ Willrich, *supra* note 3, at 70.

²³⁸ See Allen, *supra* note 33, at 185.

²³⁹ Colm Lavery, *The Power of Racial Mapping: Ellsworth Huntington, Immigration, and Eugenics in the Progressive Era*, 21 J. GILDED AGE AND PROGRESSIVE ERA 262, 266 (2022).

²⁴⁰ *Id.* at 266.

²⁴¹ *Id.*

determinism into the very structure of national policy.²⁴² The first major restriction arose from the 1907–08 “Gentlemen’s Agreement” between the United States and Japan, which, under the guise of diplomacy, effectively curtailed Japanese immigration.²⁴³ The Immigration Act of 1917 soon followed, barring immigrants from most of Asia, increasing the entrance tax for all newcomers, and imposing a literacy test designed to exclude the poor and the uneducated.²⁴⁴ These measures culminated in the Emergency Immigration Act of 1921, which, for the first time, established numerical limits on immigration.²⁴⁵ The accompanying Emergency Quota Act imposed a temporary ceiling of 350,000 new arrivals per year, and restricted entry from any given country to three percent of that nationality’s representation in the United States as of the 1910 census.²⁴⁶ This was a deliberate calculation, favoring Northern and Western Europeans.²⁴⁷

By the mid-1920s, Congress had formalized this racial hierarchy through a permanent system of national-origin quotas designed to exclude “racially undesirable” immigrants from Southern and Eastern Europe.²⁴⁸ The Johnson-Reed Act of 1924 codified this eugenic vision, translating the language of heredity and racial purity into statutory form.²⁴⁹ Supporters in Congress openly invoked eugenic theory to justify these restrictions, warning that unchecked immigration from Asia and the “new” European nations would dilute the supposed Nordic racial stock, to which they attributed America’s strength and civilization.²⁵⁰ In this way, immigration policy became an instrument of social engineering, an attempt to legislate the nation’s genetic future under the banner of scientific rationality.

Harry H. Laughlin, a leading eugenicist and public intellectual at the Eugenics Record Office in Cold Spring Harbor, stood at the center of the early twentieth century’s attempt to fuse hereditarian science with social control. Directing extensive studies on what he termed “defective” and criminal behavior among immigrants, Laughlin sought to locate the origins of crime in biology rather than circumstance.²⁵¹ Over twenty-five years, he constructed an elaborate framework of racialized criminology,

²⁴² Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1061 (2022).

²⁴³ Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1121 (1998).

²⁴⁴ Fish, *supra* note 242, at 1061.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1059.

²⁴⁹ *See id.*

²⁵⁰ *Id.* at 1055.

²⁵¹ *Id.* at 1063.

arguing that criminality and “feeble-mindedness” were inherited traits disproportionately found among non-Anglo immigrants.²⁵² As head of the Eugenics Record Office, a policy engine devoted to transforming eugenic ideology into law, Laughlin became one of the nation’s most forceful advocates for miscegenation prohibitions and the involuntary sterilization of the “unfit.”²⁵³ His role as an “expert eugenic agent” for the House Committee on Immigration and Naturalization allowed him to translate his pseudo-scientific theories into legislative form, linking immigration policy to biological exclusion.²⁵⁴ Working in tandem with Chief Justice Harry Olson of the Chicago Municipal Courts, Laughlin further applied these principles to the criminal justice system, using statistical data from prisoners to rationalize punitive policies grounded in heredity rather than environment: an early and enduring fusion of eugenics, race, and carceral governance.²⁵⁵

Laughlin was an ardent advocate for immigration restriction, convinced that such measures would prevent the entry of the “feeble-minded,” a group he claimed imposed enormous financial burdens on the state.²⁵⁶ His anxieties extended especially to the “criminal insane,” whom he regarded as a grave threat to public welfare. Citing data from 1912, Laughlin asserted that the foreign-born were disproportionately represented among New York State’s criminally insane: “In the institutions for the criminally insane of New York State . . . Italy furnished 23.1 percent; Russia and Poland furnished 12.6 percent; Scandinavia furnished 1.2 percent; Scotland furnished 0.2 percent; England and Wales furnished 5 percent.”²⁵⁷ In his major study *Immigration and Conquest*, Laughlin went further, contending that immigration was the principal reason the United States, by 1938, had the highest prison population in the world relative to its size.²⁵⁸

Uncontrolled immigration, in Laughlin’s understanding, contributed not only to increased crime and more criminals, but also to all sorts of general “inadequacy,” all tightly linked with the criminal persona,

²⁵² See Allen, *supra* note 33, at 191.

²⁵³ See Fish, *supra* note 242, at 1064.

²⁵⁴ *Id.*

²⁵⁵ Allen, *supra* note 33, at 191–92.

²⁵⁶ Fish, *supra* note 242, at 1064.

²⁵⁷ “*Biological Aspects of Immigration*,” Harry H. Laughlin Testimony Before the House Committee on Immigration and Naturalization (9), COLD SPRING HARBOR LAB’Y, <https://dnalc.cshl.edu/view/11099--Biological-aspects-of-immigration-Harry-H-Laughlin-testimony-before-the-House-Committee-on-Immigration-and-Naturalization-9-.html> [<https://perma.cc/B93S-LAYM>] (last visited Oct. 7, 2025); see also *Europe as an Emigrant-Exporting Continent and The United States as an Immigrant-Receiving Nation: Hearings Before the H. Comm. on Immigr. and Naturalization*, 68th Cong. (1924) (statement of Harry H. Laughlin).

²⁵⁸ See HARRY LAUGHLIN, *IMMIGRATION AND CONQUEST* 66 (1939).

including “insanity, feeble-mindedness, blindness, crippled and deformed.”²⁵⁹ In this way, the elite Progressive view of crime and criminals was also shaped by eugenicists who feared the continuing onslaught of the criminally-predetermined immigrant hordes.²⁶⁰

One of Laughlin’s main focal points, and the area where he had tremendous political and legal influence, was his work on “alien crime,” where he created a taxonomy of crime committed by different ethnic and racial groups.²⁶¹ For him, criminality was inextricably linked to “inferior” bloodlines, which had a “genetic, ethnic, and racial propensity for committing criminal acts.”²⁶² Both Laughlin and Olson strove to prove this point by collecting large amounts of data from prison records, sorted by categories such as types of crimes, nationality, occupation, and recidivism rates.²⁶³

Defining crime was no simple task, and Laughlin sought to do so by toggling between the terms “criminal” and “criminalistic,” using criminalistic as more of a biological term which connoted “anti-social instincts.”²⁶⁴ Laughlin’s primary theory about the inheritable nature of crime relied on criminality’s alleged recurrence in family lines or ethnic and racial groups.²⁶⁵ According to Laughlin and Olson, crime rose significantly from 1900–1930, and one of the reasons for this was an increase in the numbers of Americans who had “poor heredity.”²⁶⁶ They pointed to immigration as the underlying reason behind that increase.²⁶⁷

In essence, Laughlin’s understanding of criminality was centered on individuals who possessed criminal records and whose criminal nature could be blamed on heredity.²⁶⁸ According to Laughlin’s research, the greatest propensity for crime arose from those who originated from Southern Europe, the Mediterranean, and the Balkans.²⁶⁹ The policy implications were clear: controlling the “hereditary quality of the immigration stream which for four centuries has been and which is still flowing from Europe into the Western Hemisphere.”²⁷⁰ Laughlin’s

²⁵⁹ *See id.*

²⁶⁰ *See Fish, supra* note 242, at 1065.

²⁶¹ Allen, *supra* note 33, at 191.

²⁶² *Id.* at 192.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 193.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See Analysis of America’s Modern Melting Pot: Hearings Before the H. Comm. on Immigr. And Naturalization*, 67th Cong. (1922) (Statement of Harry H. Laughlin).

²⁷⁰ *Id.*

statistics and figures were later shown to be deeply flawed, but only after they were heavily used by Congress and contemporary criminologists.²⁷¹

Progressive-Era economists also supported these types of immigration restrictions, providing yet more “scientific respectability for immigration restriction on racial grounds.”²⁷² The popular Progressive idea of “race suicide,” the theory that the racially superior natives might be outbred by racially inferior immigrants, was used as yet another reason to push for immigration restriction.²⁷³

Some states set up very clear barriers to ensure the “unfit” would not enter their domain.²⁷⁴ For example, in 1907, Alabama passed legislation forbidding the entrance of individuals who were “suffering from contagious or communicative diseases, of cripples without means and unable to perform mental or physical service, of idiots, lunatics, persons of bad character, or of any persons who are likely to become a charge upon the charity of the State.”²⁷⁵ This fear of the eugenically defective individual stalked both state and federal legislatures. As immigrants arrived in cities, they often created sanitary, educational, criminal, and political problems that lawmakers and politicians were eager to stem.²⁷⁶

The desire to exclude the foreign-born was also behind a number of city ordinances as well, giving another way for Progressive politicians and jurists to further shape the figure of the twentieth-century criminal.²⁷⁷ In 1913 Los Angeles, for example, a city commission originally created to provide charity and eliminate begging also began to focus on regulating two specific groups of “undesirable” immigrants: former Mexican railroad laborers and disabled beggars.²⁷⁸ Los Angeles’ Ugly Law was a specific attempt to criminalize another aspect of the unfit individual and remove them from the streets, whether it was returning them to their native country or incarceration in a poor house, work farm, or asylum.²⁷⁹ Although the law never passed, the belief system supporting it remained.²⁸⁰

It is unsurprising, then, that immigration restrictions and controls gained wide traction at the turn of the twentieth century, both at state and federal level. These were policies grounded less in empirical public health

²⁷¹ See Allen, *supra* note 33, at 197–98.

²⁷² Thomas C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, 19 J. ECON. PERSPS. 207, 209 (2005).

²⁷³ *Id.*

²⁷⁴ See SUSAN MARIE SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 168 (2009).

²⁷⁵ *Id.*

²⁷⁶ See RAFTER, *supra* note 145, at 127.

²⁷⁷ See SCHWEIK, *supra* note 274, at 169.

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *See id.*

concerns than in eugenically inflected notions of purity, contagion, and social hygiene.

D. Black Migration

The Great Migration unsettled the fragile racial balance of Northern cities and ignited new forms of racial anxiety.²⁸¹ As Black southerners sought refuge from the rural poverty, exploitative sharecropping, and brutal racial violence of the Jim Crow South, their movement northward exposed the limits of Northern egalitarianism. At the very moment that eugenical thought was shaping public policy and social reform, nearly six million Black citizens and families undertook a mass exodus toward what they hoped would be opportunity and autonomy.²⁸² Instead, their arrival forced Northern institutions to confront—often defensively—the contradictions between democratic ideals and deeply entrenched racial hierarchies.

The Great Migration's first wave, occurring between 1910 and 1940, saw most Black migrants heading to a small number of major urban areas such as Chicago, Detroit, Los Angeles, New York, and Philadelphia, where there were plentiful jobs available in the food processing and manufacturing industries.²⁸³ “At the outset of the century much of American life was about movement as migrants, immigrants, and city dwellers sought social and economic fulfillment and access to levels of modernity, both of which relocation to novel urban spheres promised.”²⁸⁴ However, most of the Black men who migrated North for better opportunities still lacked full recognition as citizens for much of the twentieth century.²⁸⁵ Additionally, fierce competition for jobs deepened existing conflicts along both class and racial lines.

All of this movement and migration caused great unease among the white middle class, including Progressive-Era reformers. The rising numbers of Black citizens moving to northern and western cities encountered racial violence and attempts to isolate their communities economically, socially, and residentially.²⁸⁶

Combined with the massive turn-of-the-century waves of immigration from eastern and southern Europe, the influx of Black migrants into urban areas provoked more eugenical “solutions.” Because

²⁸¹ Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 890 (1998).

²⁸² See FLOWE, *supra* note 161, at 29.

²⁸³ See Christine Leibbrand et al., *The Great Migration and Residential Segregation in American Cities During the Twentieth Century*, 44 SOC. SCI. HIST. 19, 20 (2020).

²⁸⁴ FLOWE, *supra* note 161, at 7.

²⁸⁵ See *id.* at 12.

²⁸⁶ See Leibbrand, *supra* note 283, at 21.

Black workers worked on the fringes of menial jobs, earning less than other workers (at all skill levels), white workers were concerned about the cheaper competition.²⁸⁷ These working-class laborers also worried about the threat of wage-cuts and job shortages.²⁸⁸

In addition, Black migration to northern and western cities was frequently met with horror and loathing.²⁸⁹ Severe racial discrimination permeated daily life, culminating with the terrible “Red Summer” of 1919, where white mobs laid violent siege to Black communities in both the North and the South.²⁹⁰ Overall, early twentieth-century Black migration from the South to the urban North helped create the myth of Black criminality, shaping the racial discourse on immigration, urbanization, and crime during the Progressive Era.²⁹¹ Unlike Northern European immigrants, the Black southern migrant was marked as an especially dangerous newcomer, incapable of being saved by Progressive-Era rehabilitative efforts.²⁹²

Put differently, the Progressive Era helped crystallize a eugenic conception of the twentieth-century criminal, grounded, in part, in a racialized discourse of Black dysfunction.²⁹³ Crime statistics and migration data were deftly interwoven to construct a narrative of “the exceptional threat [B]lack people posed to modern society,” transforming sociological observation into racial indictment.²⁹⁴ Within the Progressives’ vast project of criminal justice reform, crime and delinquency became reframed as problems of heredity and race, rendering Black citizens presumptively deviant and biologically suspect.²⁹⁵ We must thus scrutinize the particular role that Blackness and its racialized “logic” played in shaping the intellectual and institutional foundations of the Progressive-Era criminal system.

E. Vice, Morality, and Crime

The Progressives were also focused on “vice,” a vague and general concept which encompassed their general anxiety about sexuality,

²⁸⁷ See RAY GINGER, *AGE OF EXCESS: THE UNITED STATES FROM 1877 TO 1914* 70 (1989).

²⁸⁸ See LYNNE DUMENIL, *THE MODERN TEMPER: AMERICAN CULTURE AND SOCIETY IN THE 1920S* 5 (1995).

²⁸⁹ See Barry C. Feld and Perry L. Moriearty, *Race, Rights, and the Representation of Children*, 69 *AM. L. REV.* 743, 756 (2020).

²⁹⁰ *Id.*

²⁹¹ See MUHAMMED, *supra* note 11, at 6.

²⁹² See *id.* at 6–7.

²⁹³ See *id.*

²⁹⁴ See *id.* at 7.

²⁹⁵ *Id.* at 8.

modernity, crime, and deviance, all areas they were desperate to control.²⁹⁶ Progressive moral reformers were quite concerned about the illegal markets in women's bodies, identifying the sale of sex as a "social evil."²⁹⁷ They encouraged state lawmakers, local judges, and health officials to enact new laws and create new institutions to address the so-called scourge of prostitution.²⁹⁸ Progressives believed that the illicit sex market not only spread disease and immorality, but also "threatened the health, virtue, and reproductive capacities of all working women."²⁹⁹

These interrelated concerns over morality, sex, and the working class gave ample room for eugenic philosophy to thrive within the Progressive-Era criminal law and legislative framework. The legal response to prostitution and vice differed from nineteenth-century approaches primarily by the sheer scale of state regulation and intervention brought on behalf of public morals.³⁰⁰ Local, state, and federal legislators enacted a panoply of laws to regulate morality, including the Mann Act, forbidding the transport of women across state lines for immoral purposes; acts prohibiting landlords from allowing their properties to be used for sex work; age of consent laws; and the creation of morals courts, women's courts, and night courts in several northeastern cities.³⁰¹

The city of Chicago again offers an example of how the Progressives weaponized the criminal system to ensure that their most feared sexual morality outcomes would not come to pass. Chicago Progressives used open-ended, low-level criminal charges, focusing on controlling the community's "moral health," in order to punish interracial relationships (despite the legality of these relationships in Illinois).³⁰² Such putative focus on morality and vice belied strong eugenic concerns over the mixing of races and the potentially "unfit" children that would result.

During the 1910s, eugenicists claimed that at least half of American female sex workers had hereditary defects, primarily feeble-mindedness, which made them extremely dangerous to society, given the possibilities of their breeding more degenerate children.³⁰³ Chicago's Moral Court had "an informal practice of examining prostitutes for mental 'subnormality,'" resulting in approximately half of the sex workers being found "subnormal."³⁰⁴ After the opening of Chicago's Psychopathic Court, the

²⁹⁶ See Markey, *supra* note 73, at 1171, 1172; see MUHAMMED, *supra* note 11, at 40–41.

²⁹⁷ *Id.*

²⁹⁸ See WILLRICH, *supra* note 9, at 172.

²⁹⁹ *See id.*

³⁰⁰ *See id.* at 173.

³⁰¹ *See id.* at 176–77.

³⁰² See Markey, *supra* note 73, at 1172.

³⁰³ See WILLRICH, *supra* note 9, at 199.

³⁰⁴ *See id.*

percentage of “subnormal” sex workers rose to 90%.³⁰⁵ After these numbers came out, a new commitment law for prostitutes was passed in 1915.³⁰⁶ This fear of vice combined with the blueprint of eugenics meant that the unfit women were marked for institutions and, ultimately, sterilization.

In 1910, Chicago’s mounting anxieties over urban vice led to the creation of a municipal Vice Commission, composed of thirty civic leaders charged with investigating the city’s moral decay and devising corrective measures.³⁰⁷ Similarly, Columbus, Ohio enacted an 1894 ordinance (revived in 1902) that dramatically expanded the catalog of misdemeanor offenses, criminalizing “lewd or lascivious behavior” and “indecent, immodest, or filthy acts on the street.”³⁰⁸ These broadly framed “decency” laws swept in conduct ranging from prostitution to “improper” dress and public nudity, reflecting a national Progressive-Era impulse to legislate morality through the use of minor criminal offenses.³⁰⁹ Crucially, such “public decency” ordinances were closely intertwined with the contemporaneous Ugly Laws, which sought to regulate and exclude those deemed physically or socially “unfit”—the disabled, the poor, the mentally ill, the developmentally delayed, and immigrants alike.³¹⁰ A woman’s visible “disease, disfigurement, infirmity, or deformity” was treated not only as a personal misfortune, but also as a public menace, a living emblem of degeneracy threatening the moral and biological future of the American populace.³¹¹

Much of the public apprehension over vice folded in the anxiety over the sexual mores and actions of the “new young woman.”³¹² Arising from a newly urban and industrialized society, working-class and immigrant women, now socially free to engage in sexual activities, were a continual subject of Progressive vice concerns.³¹³ This particular anxiety was rooted in the fear that the poor or working-class woman would turn to prostitution to support herself, now that she had freedom to engage with the working world through factory labor.³¹⁴

³⁰⁵ *See id.*

³⁰⁶ *See id.*

³⁰⁷ Markey, *supra* note 73, at 1171–72.

³⁰⁸ SCHWEIK, *supra* note 274, at 144.

³⁰⁹ *See id.*

³¹⁰ *See id.* The enforcement of Ugly Laws continued throughout the Progressive Era, with some lasting until the 1970’s. *Id.* at 156, 158.

³¹¹ *See id.* at 145–46.

³¹² *See* Laura S. Abrams, *Guardians of Virtue: The Social Reformers and the “Girl Problem,” 1890–1920*, 74 SOC. SERV. REV. 436, 438 (2000).

³¹³ *See id.*

³¹⁴ *See id.*

This fear about female working-class promiscuity, among other factors, influenced the rise of the social purity movement.³¹⁵ The social purity movement, extremely influential in both state and federal government, led to various attempts at “legislating social morality,” which were also deeply rooted in eugenic thinking.³¹⁶ Social purity movement leaders engaged in a discourse about “race purity” and “social hygiene” that focused on the “degeneracy” of prostitutes, whom they believed were promiscuous due to “hereditary failures.”³¹⁷

Eugenics provided a helpful tool to those who were concerned with female delinquency and degeneracy, providing a diagnosis of “feeble-mindedness” as an explanation for the most deviant behaviors.³¹⁸ Lombroso, with the help of colleague William Ferrero, posited a tight link between low intelligence—a hereditary condition—and female criminality.³¹⁹ In their view, women’s deviant behavior was closely connected to masculine traits, feeble-mindedness, and sexual deviancy.³²⁰ The need to eliminate these traits helped validate overwhelming state intrusion into these women’s lives, justifying their permanent removal from society.³²¹

Eugenics fueled and promoted the new public-order ordinances as well,³²² most of which carried criminal penalties. The potential female spread of venereal diseases such as syphilis sparked great fear that uncontrolled women would render themselves, their sexual partners, and their unborn children unfit for society.³²³ When envisioning the crime of vice in the twentieth century, Progressive legislators in Columbus, Chicago, and elsewhere, were particularly worried about the deviant and disabled body, where and when and how it should be regulated,³²⁴ and when it should be removed from sight, preferably to the farm or the prison or the asylum. Eugenics helped guide legislative choices and decide who should be deemed criminal.

Eugenics also played a strong role in criminalizing poverty, particularly panhandling and begging. New York City, for example, repeatedly tasked special “anti-vagrancy” plainclothes police forces to

³¹⁵ *See id.*

³¹⁶ *See id.* at 439.

³¹⁷ *See id.*

³¹⁸ *See* Laura S. Abrams & Laura Curran, *Wayward Girls and Virtuous Women: Social Workers and Female Juvenile Delinquency in the Progressive Era*, 15 *AFFILIA* 49, 61 (2000).

³¹⁹ *Id.* at 60 (referencing CESARE LOMBROSO & WILLIAM FERRERO, *THE FEMALE OFFENDER* (1898)).

³²⁰ *Id.*

³²¹ *Id.* at 61.

³²² *See* SCHWEIK, *supra* note 274, at 167.

³²³ *See id.* at 159.

³²⁴ *See id.* at 162.

enforce harsh anti-begging laws and anti-vagrant laws, in the 1890's, 1901, 1914, and 1921.³²⁵ Boston and Philadelphia did the same.³²⁶ These laws solely focused on those considered “ugly” or disabled.³²⁷ Not only did these cities seek to eliminate public begging and vagrants on the street, but they also wished to conceal the physical specter of those who deviated from the norm, whether through disease, mental illness, developmental or intellectual delays, or bodily deformity.³²⁸ The very sight of such individuals was anathema to the Progressives, since they were a reminder of the weaknesses in the American “germ plasm”—weaknesses that could only be eradicated by police power, the courts, and corrections.³²⁹ These fears, formalized through legislation, helped transform the “unsightly beggar” into the twentieth-century Progressive-Era criminal, who needed both legal treatment and punishment.³³⁰

Such reevaluation of the American criminal eliminated such charitable outposts as the poor farm and the almshouse, which were replaced by eugenics-driven institutions such as the asylum and the state hospital.³³¹ These sites of detention were necessary to ensure that there was no mixing or breeding between the different categories of undesirable persons.³³² In the Progressive-Era mindset, the unsightly street-dweller, whether impoverished, diseased, aged, insane, immoral, or drunken, had to be removed and institutionalized to best treat the new criminal.³³³

By 1919, Progressive-Era reformers, as part of their concern over vice and morals, had prosecuted and dislocated innumerable female sex workers, dismantling much of the intimate economy.³³⁴ In Chicago, for example, every woman arrested on criminal morals charges was tested for venereal disease.³³⁵ If positive, the women could be banished to a hospital, sanitarium, or clinic, for an indeterminate amount of time.³³⁶ Even if the woman's criminal case was dismissed, her medical incarceration could continue as long as the Morals Court felt appropriate.³³⁷

³²⁵ *Id.* at 53.

³²⁶ *Id.*

³²⁷ *See id.* at 1–2.

³²⁸ *See id.* at 63.

³²⁹ *See id.* at 69.

³³⁰ *See id.* at 63–64.

³³¹ *See id.* at 67.

³³² *See id.* at 67–68.

³³³ *See id.* at 72.

³³⁴ *See* Rachel A. Boyle, *She Shot Him Dead: The Criminalization of Women and the Struggle over Social Order in Chicago, 1871–1919*, 172 (2017) (Ph.D. dissertation, Loyola University Chicago) (available at https://ecommons.luc.edu/cgi/viewcontent.cgi?article=3581&context=luc_diss [<https://perma.cc/VY7H-KB4G>]).

³³⁵ *See* WILLRICH, *supra* note 9, at 201.

³³⁶ *Id.*

³³⁷ *See id.*

The color line also played a critical role in the work of the Morals Court and punishment of sexual transgression.³³⁸ Judges levied harsh fines and jail terms upon Black men arrested for having sex with white women, and for white women arrested for having sex with Black men.³³⁹ In particular, the Morals Court targeted Black women, who represented 70 percent of the women arrested and taken to court for solicitation.³⁴⁰ To the white elite judiciary on the Chicago Morals Court, Black women were seen as less reformable than their white predecessors.³⁴¹

Race, ethnicity, class, and gender were not peripheral concerns in the Progressive Era's criminal legal reforms. Instead, they were central, deeply embedded in the architecture of the period's two most enduring innovations: indeterminate sentencing and the creation of juvenile courts. As this Article explores in Part III, these reforms were not merely technocratic adjustment but were infused with the eugenic ideologies that shaped early twentieth-century thinking about deviance, heredity, and social control. The eugenical mindset was not incidental but a foundational influence, guiding who was reformable, who was pathologized, and who was quietly cast aside. The logic of eugenics continues to reverberate in the contemporary criminal legal system, where both indeterminate sentencing and juvenile jurisdiction remain.

IV. PROGRESSIVE-ERA CRIMINAL PUNISHMENT

Eugenic philosophy heavily influenced early twentieth-century criminal punishment reform. “[E]ugenicists . . . stressed that crime was inborn, so that sentences had to be flexible to allow for the condition of the individual; and it was the eugenicists who attempted to relieve the prisons of the hopeless cases to permit the triumph of rehabilitation for the rest.”³⁴² The eugenic conviction that criminality was both biologically inherited and, in certain cases, amenable to reform formed the intellectual foundation for two of the Progressive Era's most consequential legal innovations: the rise of indeterminate sentencing and the establishment of a distinct juvenile justice system.³⁴³ Both reforms were lauded as humanitarian, forward-looking solutions, yet they carried with them a deeply racialized and classed vision of who could be rehabilitated and who could not.³⁴⁴

³³⁸ *See id.* at 205.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *See id.* at 206.

³⁴² *See Jenkins, supra* note 60, at 72.

³⁴³ *See generally* Willrich, *supra* note 3, at 75–82.

³⁴⁴ *See generally id.*

Although the explicit rhetoric of eugenics receded after the mid-century,³⁴⁵ its influence persisted. Indeterminate sentencing structures remained widespread in state systems through the late 1980s,³⁴⁶ and there is still a heavy focus on individualized sentencing. The Progressive-Era juvenile reform model continues to inform current policy and practice as well. The sections that follow examine how indeterminate sentencing and juvenile court reform continue to shape our contemporary criminal legal system.

A. Indeterminate Sentencing

Indeterminate sentencing, based on the so-called “rehabilitative model,” was a Progressive-Era penological ideal.³⁴⁷ In the Progressives’ view, criminal justice officials required “wide latitude” and vast discretionary authority to execute their responsibilities, which afforded them the ability to explore and delineate the inner state of the criminal mind.³⁴⁸ Eugenics played a role in this theory of sentencing. Progressive-Era theories of punishment for wrongdoers “developed in a political and intellectual milieu dominated by eugenics, bio-determinism, and a faith in scientific expertise to solve social problems.”³⁴⁹ Indeed, the rehabilitative ideal, upon which the motivation for indeterminate sentencing rested, gained power in the criminal and sentencing context at the beginning of the twentieth century partly due to its relationship with eugenics.³⁵⁰

Eugenic philosophy appealed to rehabilitative penal scholars because it espoused both a permanent solution for incorrigible offenders and a rehabilitative path for those offenders who could be “cured.”³⁵¹ Indeterminate sentencing fit the bill for both extremes.³⁵² The widespread passage of indeterminate sentencing laws in the beginning of the twentieth century found roots in rehabilitative ideology that centered on both containing undesirables as well as reforming and releasing curable

³⁴⁵ See Jenkins, *supra* note 60, at 75.

³⁴⁶ See Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right?*, 100 J. CRIM. L. & CRIMINOLOGY 691, 698–99 (2010).

³⁴⁷ See Anthony Grasso, *Broken Beyond Repair: Rehabilitative Penology and American Political Development*, 70 POL. RSCH. Q. 394, 395 (2017).

³⁴⁸ David J. Rothman, *For the Good of All: Progressive Tradition in Prison Reform* Section IX, in HISTORICAL APPROACHES TO STUDYING CRIME, NATIONAL CRIMINAL JUSTICE RESEARCH UTILIZATION PROGRAM (Oct. 11–12, 1979), <https://www.ojp.gov/pdffiles1/Digitization/91586NCJRS.pdf> [<https://perma.cc/HQ7J-HVK5>].

³⁴⁹ Grasso, *supra* note 347, at 395.

³⁵⁰ See *id.* at 396.

³⁵¹ *Id.*

³⁵² See *id.*

prisoners.³⁵³ Criminal justice reformers in the early twentieth century relied on indeterminate sentencing as an essential tool. Not only did this tool enable courts to classify inmates and diagnose prisoners, but it also afforded them a crucial ability to screen out, segregate, and permanently incarcerate “unreformable defectives,”³⁵⁴ all based on eugenical principles.

The strong link between eugenics and indeterminate sentencing of the era was neatly encapsulated in a 1914 article published in the *Journal of Criminal Law & Criminology*, a leading publication in Progressive-Era criminal justice reform.³⁵⁵ Entitled *Eugenics and the Criminal Law*, the article contended that “eugenics require[d] that punishment, as a harm inflicted for a fixed period, be transformed into a harm which shall vary in duration according to the conduct of the offender. And precisely this sort of harm is found in the indeterminate sentence”³⁵⁶ Why was indeterminate sentencing a natural fit for eugenical criminal theory? Because, according to Judge William Ashman, writing in the *Journal of Prison Discipline and Philanthropy* in 1894–95, “society can guard itself from the criminal only by reclaiming him, if he is within the sphere of reformation, or by suppressing him if he is irreclaimable.”³⁵⁷ Part and parcel with the theory of indeterminate sentencing was the conception that certain individuals, due to their personal characteristics, were beyond any reformatory power to change, and thus must be incarcerated for life.³⁵⁸ Sometimes, only death was the answer.³⁵⁹

If, as many Progressive-Era criminologists and lawyers felt, “[t]he penal code is a eugenics instrument,”³⁶⁰ then one tool to permanently incarcerate the eugenic criminal was a long prison sentence.³⁶¹ Life imprisonment was a popular remedy for incorrigible criminals.³⁶²

Once initiated, indeterminate sentencing spread rapidly among the states. “Between 1880 and 1899, seven states passed indeterminate

³⁵³ See *id.* at 397.

³⁵⁴ See RAFTER, *supra* note 145, at 151–52.

³⁵⁵ See Giulio Q. Battaglini, *Eugenics and the Criminal Law*, 5 J. CRIM. L. & CRIMINOLOGY 12 (1914).

³⁵⁶ *Id.* at 13.

³⁵⁷ William Ashman, *Address*, 33/34 J. PRISON DISCIPLINE & PHILANTHROPY 42, 44 (1894–95) (available at <https://babel.hathitrust.org/cgi/pt?id=chi.74887619&seq=1>).

³⁵⁸ See Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the “Formative Era,”* 6 L. & HUM. BEHAV. 191, 219 (1982).

³⁵⁹ RAFTER, *supra* note 145, at 123.

³⁶⁰ See Battaglini, *supra* note 355, at 15.

³⁶¹ See Daniel Loehr, *The Eugenic History of Habitual Offender Laws*, 68 HOW. L. REV. 233, 246–47 (2025).

³⁶² *Id.*

sentencing laws,” and “[f]rom 1900 to 1911, another twenty-one states” followed suit.³⁶³ By 1910, when Congress officially adopted an indeterminate system for federal sentencing, approximately half of the states were already using indeterminate sentencing.³⁶⁴ The eugenics-driven rehabilitative model helped drive this switch to indeterminate sentencing, particularly in the Northeast and Midwest.³⁶⁵ “Rehabilitative ideology permitted [states] to reap the political benefits of being tough on criminals while appearing progressive by rationalizing punitive policy within a rehabilitative framework.”³⁶⁶

Ultimately, the rehabilitative penology underlying the change to indeterminate sentencing was a key part of the eugenics movement. Progressive-Era rehabilitation had a dark side, embracing the permanent imprisonment, control, or sterilization of those deemed “incorrigible.”³⁶⁷ Once indeterminate sentencing became a standard feature of the criminal legal system, Progressive-Era prison scientists began arguing some individuals should be permanently incarcerated, even before any criminal arrests, due to their “inferior” personal characteristics.³⁶⁸ Sterilization statutes and lifetime imprisonment were natural outgrowths of this approach to rehabilitation.

By 1922, sixteen states permitted inmate sterilizations, with states like California and Oregon sterilizing any prisoner who had been convicted of three felonies.³⁶⁹ Other states sent prisoners to mental health institutions after designating them as unfit, equating criminality with feeble-mindedness.³⁷⁰ Criminal anthropologists of this era advocated that criminals who demonstrated continuing incorrigibility should be permanently incarcerated in a penal institution or, at last resort, executed.³⁷¹

B. Juvenile Court Reform

Progressive-Era reformers also overhauled the court system in service to a particular understanding of juvenile justice and punishment. Prior to the late nineteenth century, most families had almost complete

³⁶³ Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 894 (1990).

³⁶⁴ *See id.*

³⁶⁵ Grasso, *supra* note 347, at 397.

³⁶⁶ *Id.*

³⁶⁷ *See id.* at 398.

³⁶⁸ Haney, *supra* note 358, at 217.

³⁶⁹ *See* Grasso, *supra* note 347, at 399. New York had a “fourth felony” law that sentenced offenders to lifetime imprisonment, no matter how minor the fourth felony. *See* RAFTER, *supra* note 145, at 217.

³⁷⁰ *See id.* at 65–66.

³⁷¹ *Id.* at 123.

control over their children outside the scope of law, and public institutions—including schools—had near absolute authority to shape their daily lives and future.³⁷² Progressive-Era reformers wanted to alter this dynamic, both for the welfare of children and for society at large.³⁷³ These early-twentieth century reformers ultimately did so, drastically transforming the government’s relationship to children and families, particularly children of the poor.³⁷⁴

The Progressive-Era juvenile court was yet another aspect of their standard criminal justice reform: “a specialized bureaucratic agency staffed by experts and designed to serve the needs of a specific category of client, namely the child offender.”³⁷⁵ This was a change from past practices.

For much of American carceral history, children and adults, once arrested and convicted, were held in the same institution.³⁷⁶ In 1899, however, many states began to create juvenile courts, to provide a separate legal regime for children who were believed to be “delinquent.”³⁷⁷ Progressive juvenile courts were partially predicated on the idea that children had less culpability than adults and were more responsive to the processes of rehabilitation.³⁷⁸ But that did not mean that all children benefited from the new Progressive juvenile court system.

The new juvenile courts were given jurisdiction over child abuse, non-criminal status offenses, and juvenile delinquency cases.³⁷⁹ With little formal procedure, judges assumed the role of a child’s “helpful friend,” no longer simply doling out punishment but focusing on the whole child.³⁸⁰ The juvenile court’s decisions on treatment and sentencing were indeterminate and personalized, lasting until the child reached adulthood.³⁸¹ Juvenile proceedings were envisioned as civil, not

³⁷² See Clare Huntington & Elizabeth Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1380–81 (2020).

³⁷³ See *id.* at 1381.

³⁷⁴ See *id.* at 1381–82.

³⁷⁵ See Feld, *supra* note 4, at 476.

³⁷⁶ Priscilla Ocen, *(E)Racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1611 (2015).

³⁷⁷ *Id.*

³⁷⁸ Kirstin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORN. L. REV. 383, 389 (2013).

³⁷⁹ Huntington & Scott, *supra* note 372, at 1381.

³⁸⁰ Jessica L. Anders, *Bad Children or a Bad System: Problems in Federal Interpretation of a Delinquent’s Prior Record in Determining the Appropriateness of a Discretionary Judicial Waiver*, 50 VILL. L. REV. 227, 232 (2005).

³⁸¹ Feld, *supra* note 4, at 477.

criminal.³⁸² Finally, the juvenile court was to be guided by the new fields of psychology and social work, rather than any law or legal rules.³⁸³ In other words, juvenile justice results were now largely subjective, with few rules or norms.³⁸⁴ The vast discretion given to the juvenile justice edifice, along with the “experimental protocols” for trial and sentencing, frequently led to discrimination and arbitrary results.³⁸⁵

This unprecedented, rapid change in the juvenile justice field unfolded over a period of only 20–30 years.³⁸⁶ By 1928, all but two states had created separate juvenile systems. The most dynamic courts, however, were concentrated in the Northeast, among highly industrialized cities such as New York, Boston, and Chicago.³⁸⁷

The creation of juvenile courts was not the only change instituted for children. Progressive court reformers utilized the state’s authority as *parens patriae* to help create a new government role, protecting children from not only parental malfeasance but also from what reformers viewed as immoral or “deviant” behavior.³⁸⁸ Progressives argued that courts needed to divert poor child offenders from the normal criminal courts because they required rescuing from their insalubrious home environments, hopefully transforming them into worthy societal contributors.³⁸⁹ Underlying this change was the Progressive belief that certain juvenile offenders could be diagnosed and even cured of the underlying conditions that created delinquency.³⁹⁰

The Progressives created juvenile courts and overlying administrative agencies to help retrain criminally minded children into dutiful workers, with the hope of transforming them into moral, law-abiding citizens.³⁹¹ Only certain children could be retrained, however; other juveniles, less eugenically fit, would have to be dealt with through other, more restrictive means.³⁹²

The children either arrested or indicted for crimes were placed in the new juvenile courts, where the goal was rehabilitation rather than

³⁸² Anders, *supra* note 380, at 232.

³⁸³ See Feld, *supra* note 4, at 477.

³⁸⁴ *Id.*

³⁸⁵ See Abrams & Curran, *supra* note 318, at 52.

³⁸⁶ See Huntington & Scott, *supra* note 372, at 1381.

³⁸⁷ See *id.*

³⁸⁸ See *id.* *Parens patriae* is a doctrine where the state acts as guardian. See *id.* at 1383.

³⁸⁹ See Henning, *supra* note 378, at 389.

³⁹⁰ See Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1233 (1970).

³⁹¹ Henning, *supra* note 378, at 390.

³⁹² See John R. Sutton, *Bureaucrats and Entrepreneurs: Institutional Responses to Deviant Children in the United States, 1890-1920s*, 95 AM. J. SOCIO. 1367, 1369 (1990).

punishment.³⁹³ As a result of this juvenile reform transformation, many juvenile institutions were either constructed or strengthened, including the reformatories, the work farm, and the asylum.³⁹⁴

The gender of the child often played a major role in how they were treated by the juvenile system. While boys were frequently in the courts for larceny or other misdemeanors, girls most often landed in court due to morals complaints.³⁹⁵ I explore the differential treatment of the two below.

1. Boys

Although Progressive reformers ushered in sweeping changes to the treatment of juveniles within the legal system, their commitment to genuinely safeguarding children was, at best, secondary.³⁹⁶ Their primary concern lay not in protecting youth, but in regulating them—specifically, in identifying, disciplining, and often removing children from families deemed poor, disorderly, or otherwise “unfit.”³⁹⁷ These interventions were more social control than compassionate, designed to either remake wayward children into productive citizens or to segregate the incorrigible from the moral and economic fabric of the community. Although certain reformers expressed humanitarian concern for abused or neglected youth, such sentiment functioned largely as a rhetorical gloss on deeper ambitions of order, discipline, and moral purification.³⁹⁸

Progressive-Era juvenile justice was typified by highly disparate treatment based on race, ethnicity, and class.³⁹⁹ Progressive reformers largely concentrated on addressing the problems of poor, immigrant, and non-white children, since their behavior, as well as their parents, were seen as substandard for proper American citizens.⁴⁰⁰ Because of this underlying paternalistic philosophy, the new juvenile court focused on criminal and non-criminal conduct such as “smoking, sexual activity, truancy,

³⁹³ Huntington & Scott, *supra* note 372, at 1381.

³⁹⁴ See Ocen, *supra* note 376, at 1612.

³⁹⁵ *Criminal Boys and Immoral Girls: The Secret History of the Juvenile Justice System*, VERA INST. OF JUST. (July 2018) [hereinafter *Criminal Boys*], <https://www.vera.org/girls-matter/criminal-boys-and-immoral-girls> [<https://perma.cc/BPK7-S22B>].

³⁹⁶ See Huntington & Scott, *supra* note 372, at 1382.

³⁹⁷ See ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 73–74 (2004).

³⁹⁸ See Huntington & Scott, *supra* note 372, at 1382; PLECK, *supra* note 397, at 74–75.

³⁹⁹ Abrams & Curran, *supra* note 318, at 53.

⁴⁰⁰ See Huntington & Scott, *supra* note 372, at 1382.

immorality, or living a wayward, idle, and dissolute life.”⁴⁰¹ These lifestyle and moral offenses were a key focus of the Progressive juvenile reform platform, as they were part of the overarching concerns about vice and necessary moral reform.⁴⁰²

From the very beginning, juvenile justice reform bore the hallmarks of eugenical thinking. The Progressives “deliberately designed the juvenile court to discriminate—to ‘Americanize’ immigrants . . . and to provide a coercive mechanism to distinguish between ‘our children’ and ‘other people’s children.’”⁴⁰³ The creation of the juvenile courts helped reify social stratification and discrimination based on race, ethnicity, gender, and class.⁴⁰⁴

First, many eugenicists, including leading eugenicist Henry Goddard, believed that sixty to eighty percent of the children brought before the Progressive-Era juvenile courts were “defective.”⁴⁰⁵ Justice Olson of the Chicago Municipal Courts contended that “one of the principal factors at work in bringing [juvenile] offenders into these courts is the abnormal mental and physical status of the accused.”⁴⁰⁶ As Olson argued, the “inability to adjust one’s self properly to one’s environment[] is due not so much to criminal tendencies, but in many cases to feeble-mindedness, insanity, light and severe grades, or a combination of both, to say nothing of the large percentage of physical defects and neurological deficiencies.”⁴⁰⁷ Olson’s Psychopathic Laboratory similarly concluded that eighty-five percent of the juveniles brought before the Boy’s Court were feebleminded, with some dementia praecox thrown in.⁴⁰⁸

Noting that these hereditarily “deficient” children had limited abilities due to their innate mental and intellectual disabilities, Guy G. Fernald, the resident physician at the Massachusetts Reformatory in the early twentieth century, argued that such juvenile delinquents should “be committed to a suitable institution or colony, instead of being sentenced for punishment with fully equipped misdemeanants.”⁴⁰⁹ As Fernald counseled, the “adolescent defectives” needed to be contained and controlled in a special, custodial institution or colony that combined the

⁴⁰¹ Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 337–38 (1999).

⁴⁰² See PLECK, *supra* note 397, at 89–90.

⁴⁰³ See Feld, *supra* note 401, at 339–40.

⁴⁰⁴ See Butler, *supra* note 14, at 1341.

⁴⁰⁵ See Henry H. Goddard, *Responsibility of Children in the Juvenile Court*, 3 J. CRIM. L. & CRIMINOLOGY 365, 367, 371 (1912).

⁴⁰⁶ Harry Olson, *Psychopathic Laboratory Idea*, 6 J. CRIM. L. & CRIMINOLOGY 59, 61 (1915).

⁴⁰⁷ *Id.* at 61.

⁴⁰⁸ *Id.* at 62.

⁴⁰⁹ See Guy G. Fernald, *The Recidivist*, 3 J. CRIM. L. & CRIMINOLOGY 866, 873 (1913).

features of both a working farm and psychopathic hospital.⁴¹⁰ The juveniles sent to this special asylum would presumably stay there permanently.⁴¹¹ All that was needed to trigger a life sentence for these minors was a diagnosis of “feeblemindedness” and either committing a single crime or simply possessing “criminal tendencies.”⁴¹²

Second, many Progressive administrators and justices working in juvenile courts did not truly consider that all delinquent youth were equal, or should be treated as such.⁴¹³ Indeed, a leading monograph describing the Juvenile Courts at the turn of the century was quite clear with the distinctions between juveniles who could remain in their homes on probation and those who needed to be placed in a separate institution:

[B]y taking them away from . . . so-called homes which were worse than unfit—homes where drunkenness and poverty, and evil and crime, rendered the atmosphere positively mephitic . . . [by] placing them in homes and institutions where they will receive the exact care each case demands, . . . the Juvenile Court has . . . saved them from shame and crime.⁴¹⁴

In other words, a child’s origins, social class, and parentage all served to determine whether they were truly delinquent or had the ability to be reformed.⁴¹⁵

2. Girls

Unsurprisingly, the Progressive creation of juvenile justice institutions also had a harsh effect on young women, particularly low-income young women and women of color. “[T]he practice of female juvenile justice reflected the quasi-utopian, ultimately repressive, pursuit of Progressive-[E]ra reformers for a more ‘pure’ society, as revealed in the eugenics, antiprostitution, and sex-education campaigns.”⁴¹⁶ The advent of juvenile justice was used as a tool to control the sexuality of wayward girls, particularly those who were poor, immigrant, non-white, or all of the above.⁴¹⁷

⁴¹⁰ See Goddard, *supra* note 405, at 372–73.

⁴¹¹ See *id.* at 375.

⁴¹² See Fernald, *supra* note 409, at 874.

⁴¹³ See RICHARD LAWRENCE & CRAIG HEMONS, *JUVENILE JUSTICE* 21 (Sage 2008).

⁴¹⁴ See TIMOTHY DAVID HURLEY, *ORIGIN OF THE ILLINOIS JUVENILE COURT LAW* 73–74 (3d ed. 1907).

⁴¹⁵ See Butler, *supra* note 14, at 1358.

⁴¹⁶ Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 68 (1978).

⁴¹⁷ See Ocen, *supra* note 376, at 1612.

The girls that came into the orbit of the Progressive juvenile reform courts were primarily charged with immorality or incorrigibility crimes, both delinquency charges that included “associations with vicious or immoral persons, vagrancy, frequent attendance at saloons or pool halls, the use of indecent language, nonviolent altercations with parents, sexual behavior,” and any physical indications of having had sexual intercourse.⁴¹⁸ These immorality offenses were used to enforce strict gender norms and ensure that girls and young women would follow the “proper” path of marriage and motherhood.⁴¹⁹

The reach of the reformed juvenile justice system, however, did not always extend to Black children in the South. In late nineteenth-century Atlanta, Georgia, for example, a spike in arrests and imprisonment meant that many Black children were sentenced to the chain gang if they were unable to pay the fines for their wrongdoing.⁴²⁰ The racial divide in juvenile justice was stark. In Atlanta between 1893 and 1900, there were more Black girls between the ages of fifteen and twenty arrested per year than there were white boys and girls arrested in total.⁴²¹ Similarly, in 1893 Atlanta, Black male juveniles were three times more likely to be arrested than their white counterparts, and Black female juveniles were nineteen times more likely to get arrested than white female youth.⁴²² And although the fines imposed on white and Black youth were relatively similar, the outcomes between Black and white arrestees were very different.⁴²³

The experience of being a Black girl or woman who encountered the juvenile reform system was very different than the liberal ideas of rehabilitative justice that were touted by most Progressive reformers. Young women of color dealt with a juvenile reform system shaped by scientific racism and eugenics, and paid the price.⁴²⁴ Indeed, most Southern Progressives, whether agrarian or urban elite reformers, were deeply steeped in racist, eugenic ideology.⁴²⁵

Accordingly, despite the major reforms to the criminal system and the creation of the juvenile courts, Black girls and young women consistently suffered serious punishment for both major and minor transgressions during the Progressive Era.⁴²⁶ The divide between Black and white young women was substantial. Particularly in areas of sexuality,

⁴¹⁸ See *Criminal Boys*, *supra* note 395.

⁴¹⁹ See *id.*

⁴²⁰ See SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 30 (2016).

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ See *id.* at 31.

⁴²⁴ See *id.*

⁴²⁵ See *id.* at 32.

⁴²⁶ See Ocen, *supra* note 376, at 1610–11.

morals, and vice, white girls were often seen as innocent victims, while Black girls were seen as deviants.⁴²⁷ It follows that Black girls were incarcerated in female reformatories in much higher rates than white girls, who often received non-custodial sentences like probation.⁴²⁸

During the Progressive Era, the state used incorrigibility and wayward minor laws to regulate the “improper parenting” of working-class families, black and white, which was believed to lead to widespread female juvenile delinquency.⁴²⁹ Between 1900 and 1930, there was an explosion of new laws and legal procedures that “deliberately cast a wide net around female adolescent rebellion.”⁴³⁰ Large urban centers like New York City criminalized disobedience and sexual rebellion, focusing on “wayward” and “incorrigible” daughters who were slightly too old to qualify for the juvenile courts, while also expanding the legal definition of prostitution to better capture any sexual transgressions.⁴³¹

Elite Progressive reformers viewed those poor and working-class young women engaging in illicit sexual encounters as delinquents who needed guidance and control.⁴³² The state provided such control through police powers, juvenile courts, detention centers, and reformatories.⁴³³ One motivating factor was the deep-seated eugenical fear of the “immoral woman,” who posed a major threat to the purification of American breeding stock through her faulty heredity, indiscriminate breeding, and spread of sexual disease.⁴³⁴ The eugenic concept of “innate female depravity” became popular within elite reform circles and quickly spread throughout the nation.⁴³⁵

The concern over girls and young women meant that Progressive-Era juvenile courts created special rules and institutions for female delinquents that differed from those designated for male delinquents.⁴³⁶ Progressive

⁴²⁷ *Id.* at 1613.

⁴²⁸ *Id.*

⁴²⁹ See Cheryl Hicks, “*In Danger of Becoming Morally Depraved*”: *Single Black Women, Working-Class Black Families, and New York State’s Wayward Minor Laws, 1917–1928*, 151 U. PA. L. REV. 2077, 2082 (2003). The wayward minor and incorrigibility laws of New York City criminalized young female prostitution, incorrigible female behavior, and delinquency, all of which were broadly defined. The girls who were convicted were sent to either reformatories or training schools. *See id.* at 2084.

⁴³⁰ See RUTH M. ALEXANDER, *THE GIRL PROBLEM: FEMALE SEXUAL DELINQUENCY IN NEW YORK, 1900–1930*, 34 (1995).

⁴³¹ *See id.*

⁴³² MARY ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920*, 95 (1995).

⁴³³ *See id.* at 96.

⁴³⁴ *See id.* at 95–96.

⁴³⁵ *See id.* at 98.

⁴³⁶ *See Abrams, supra* note 312, at 437.

juvenile courts were specifically focused on young women's *moral* crime, frequently separating girls from their families and sending them to either reformatories or training schools for lengthy periods.⁴³⁷ Compared with boys, girls were far more likely to receive harsher results: out-of-home placements, stricter sentences, and longer periods of probation.⁴³⁸ Reformatories for young women proliferated between 1900–1930.⁴³⁹

The focus on young women's morality, or lack thereof, was also linked to "feeble-minded" promiscuity, thus tying the propensity for sexual transgression to eugenic beliefs about heredity.⁴⁴⁰ Such beliefs became particularly pointed with the advent of intelligence testing in the 1910's, as the test results provided high rates of "inferior intellectual capability" among residents of prisons, asylums, and hospitals, particularly in female sex workers.⁴⁴¹ If mental defects caused female delinquency, then there was a link between a eugenic understanding of hereditary feeble-mindedness and promiscuity.⁴⁴² As the Pittsburgh Vice Commission concluded, "[b]orn with defective intelligence and shiftless tendencies, [sex workers] are predestined to become criminaloids."⁴⁴³

The eugenics movement had a strong influence on Progressive-Era understanding of women, particularly female moral offenders.⁴⁴⁴ Believing that female moral offenders were "inherently depraved and dangerous to men," Progressive eugenicists held that sexual immorality was a result of an inherited mental defect.⁴⁴⁵ As a result, the feeble-minded girl posed a vast threat to the rest of hereditarily pure Americans, as she would "disseminate . . . the most loathsome and deadly diseases" to wholesome young men.⁴⁴⁶ Sterilization was the preferred Progressive solution to the problems presented by these wayward girls.⁴⁴⁷ State legislators found this line of argument so compelling that by 1923, forty-two states established institutions or asylums for the feeble-minded.⁴⁴⁸ By

⁴³⁷ See *id.* at 437.

⁴³⁸ See *id.* at 440.

⁴³⁹ See *id.*

⁴⁴⁰ See ALEXANDER, *supra* note 430, at 41.

⁴⁴¹ See *id.*

⁴⁴² See *id.*

⁴⁴³ *Id.*

⁴⁴⁴ See ODEM, *supra* note 432, at 98.

⁴⁴⁵ *Id.*

⁴⁴⁶ See MARK H. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 45 (1963) (quoting Walter E. Fernald, another leading eugenicist, at the Meeting of National Conference of Charities and Corrections in 1904).

⁴⁴⁷ ODEM, *supra* note 432, at 98.

⁴⁴⁸ See HALLER, *supra* note 446, at 129.

1937, thirty-two states passed eugenic laws permitting the sterilization of the unfit or feebleminded.⁴⁴⁹

Unsurprisingly, incorrigibility and wayward minor laws were primarily enforced against the less powerful, often administered by white, middle-class female reformers.⁴⁵⁰ Poor and non-white girls suffered unequal punishment under laws like New York's early twentieth-century wayward minor laws, also called the "incorrigible girl statutes."⁴⁵¹ In part this was because Progressive reformers assumed the Black working class was immoral; accordingly, young female transgressors needed isolation in order to receive "guidance and uplift from their social and racial superiors."⁴⁵²

Additionally, many white reformers believed that Black working-class families had little sense of moral propriety.⁴⁵³ Jane Addams of Chicago's Hull House, for example, believed that Black families lacked "inherited control" and "social restraint," largely due to a lack of European breeding and background.⁴⁵⁴ For Addams, and other Progressive reformers like her, this meant that Black girls did not have the capacity to be "assimilated into civilization."⁴⁵⁵ These racist and eugenicist beliefs led to reformers using the wayward minor statutes to punish supposedly "inadequate" Black working-class parents by removing their children.⁴⁵⁶

Granted, some Progressive reformers believed that transgressing young women only required probation, not confined institutionalization, which allowed them to be treated as "wayward" without actually bearing the disgrace of the crime.⁴⁵⁷ But the mushrooming concern over feminine adolescent rebellion, beginning in the 1900s, ultimately saw a vast number of administrative services and social reformers working together to solve the "criminal girl" problem. Settlement workers, vice commissions, club leaders, probation officers, social workers, and even sex educators came together to devise practical ways to get delinquent young women under control.⁴⁵⁸

In 1913 Pittsburgh, for example, the most desired outcome for a woman engaging in prostitution was a reformatory: "Committal to an industrial reformatory is the only ray of hope for the confirmed

⁴⁴⁹ See Paul A. Lombardo, *Republicans, Democrats, & Doctors: The Lawmakers Who Wrote Sterilization Laws*, 51 J. LAW, MED. ETHICS 123, 124 (2023).

⁴⁵⁰ See Abrams, *supra* note 312, at 437.

⁴⁵¹ See Hicks, *supra* note 429, at 2084–85.

⁴⁵² *Id.* at 2085.

⁴⁵³ See *id.* at 2087.

⁴⁵⁴ See Jane Addams, *Social Control*, 1 CRISIS 22–23 (1911).

⁴⁵⁵ See *id.* at 22.

⁴⁵⁶ See Hicks, *supra* note 429, at 2088.

⁴⁵⁷ See WILLOUGHBY CYRUS WATERMAN, PROSTITUTION AND ITS REPRESSION IN NEW YORK CITY, 1900–1931, 40 (1932).

⁴⁵⁸ See ALEXANDER, *supra* note 430, at 41.

prostitute.”⁴⁵⁹ Similarly, in New York City, many Progressive-Era reformers—including various social service organizations and New York’s Probation and Protective Commissions—endorsed intervention from an array of professionals to attempt to sway the delinquent young woman from her inevitable fall, using homes for delinquent girls as a starting point.⁴⁶⁰ This flotilla of social workers, psychologists, and psychiatrists all conducted mental examinations studying the “emotional factors,” “mental defects,” and “feeble-mindedness” that they believed underlay the sexual transgressions and delinquency of young women.⁴⁶¹

For poor and non-white young females, the final punishment for sexual transgressions was quite serious. The Progressive reformers’ deep concern about delinquent or morally suspect adolescent females was a version of the underlying eugenicist philosophy that supported the moral panic and wayward minor laws. For these young women, probation or admission into private reformatories was usually not the result.⁴⁶² Black girls in particular did not often receive the lighter court sentences, like court reprimands, probation, or being sent to a local reformatory.⁴⁶³

The Progressive-Era establishment of the juvenile courts and the formation of the special status of the adolescent delinquent in part emerged from a desire to fix the existing institutions to better serve troubled youth and prevent their long-term incarceration. But the long-term realities of this reform translated into a vast expansion of the criminal system.⁴⁶⁴ These new legal reforms included the creation of juvenile courts, reformatories, detention centers, and special police bureaus,⁴⁶⁵ all to control and classify adolescents. Within this system, even more care was taken to surveil and constrain young women, particularly those who committed, or might commit, sexual acts.⁴⁶⁶ The extensive authority exercised over the lives of poor, non-white, and female youth during the Progressive Era was extreme, and was based on a “scientific” understanding of both crime and criminality rooted in eugenics.

⁴⁵⁹ See MORALS EFFICIENCY COMM’N, *Report and Recommendations of Morals Efficiency Commission, Pittsburgh, PA*, 35 (Pittsburgh Printing Company, 1913) (available at <https://www.facebook.com/media/set/?vanity=FromTheFurnaceWithLove&set=a.122129190158106727> [<https://perma.cc/KB2P-TQMW>]).

⁴⁶⁰ See ALEXANDER, *supra* note 430, at 46–47.

⁴⁶¹ See *id.*

⁴⁶² See Hicks, *supra* note 429, at 2088.

⁴⁶³ See *id.*

⁴⁶⁴ See ODEM, *supra* note 432, at 108.

⁴⁶⁵ See *id.*

⁴⁶⁶ See *id.* at 108–09.

V. PSYCHIATRY, RACE, AND EUGENICS

Progressive-Era ideas about race and eugenics were foundational in shaping both the understanding of the modern criminal and the new, growing field of American psychiatry.⁴⁶⁷ The two fields of criminology and psychiatry were closely intertwined during the Progressive Era, as “criminologic psychiatry” played a significant role in shaping the revamping of the criminal courts and the treatment of those deemed criminal.⁴⁶⁸ Indeed, by the end of the Progressive Era, psychiatrists were teaching eugenically based criminology courses at various law schools, focusing on psychiatric study of the criminal in order to teach future lawyers and judges about crime and punishment.⁴⁶⁹ In the late 1920’s, the ABA and American Psychiatric Association (APA) created eight medico-legal proposals to improve the criminal law, particularly in issues of criminality and mental illness,⁴⁷⁰ and put them into play.⁴⁷¹ And by 1933, psychiatrists were working in criminal courts, prisons, reform schools, correctional schools, and juvenile justice, influencing all aspects of criminal conviction and sentencing, including probation and parole.⁴⁷²

Psychiatry had an important role to play within the Progressive reform of the criminal system. As such, it is important to explore the changes in American psychiatry at the turn of the century, particularly in the field’s interactions and influence on the criminal system, and the use of eugenics to support its reforms.

A. *Crime, Eugenics, and Psychiatry*

Eugenics offered a strong lure for psychiatrists in the late nineteenth century.⁴⁷³ At that time, psychiatrists had great difficulties in treating and assisting institutionalized patients. Eugenic thinking, with its heavy reliance on genetics, race, and heredity, gave doctors a simple and

⁴⁶⁷ See Kylie Smith, *Psychiatry in the Wake: Racism and the Asylumed South*, S. SPACES (Apr. 9, 2021), <https://southernspaces.org/2021/psychiatry-wake-racism-and-asylumed-south/> [<https://perma.cc/5RPD-269N>].

⁴⁶⁸ See Herman Adler, *Psychiatry Applied to Criminology in the United States*, 24 J. CRIM. L. & CRIMINOLOGY 50, 51 (1933).

⁴⁶⁹ See *id.* at 52.

⁴⁷⁰ See *id.* at 53.

⁴⁷¹ See Winifred Overholser, *Ten Years of Cooperative Effort*, 29 J. CRIM. L. & CRIMINOLOGY 23, 25 (1938) (noting that the American Psychiatric Association had strongly influenced “changes in the laws relating to criminal responsibility, and to expert testimony; the unification of commitment laws; the compilation of statistics and information on the psychiatric aspects of crime and on penological technique; and education of the public regarding the medico-legal situation of the psychiatrist”).

⁴⁷² See Adler, *supra* note 468, at 52; Overholser, *supra* note 471, at 28.

⁴⁷³ See Dikötter, *supra* note 25, at 470.

comprehensible framework for both psychiatric treatment and lifestyle.⁴⁷⁴ Moreover, eugenics helped provide a place for psychiatrists outside of hospitals, at a time when there was tremendous professional discontent with medical treatment in asylums.⁴⁷⁵

Psychiatry at the turn of the twentieth century was extremely labile. On the one hand, psychiatrists believed in the reality of the various mental illnesses they diagnosed, such as dementia praecox and manic-depressive insanity, and attempted to treat the symptoms of these diseases as well as they could.⁴⁷⁶ On the other, there were a spectrum of challenges in these diagnoses, ranging from empirical to ontological, some of which were acknowledged, some of which were not.⁴⁷⁷ Although psychiatrists could admit to each other that they knew little about these newly created mental illnesses, they publicly presented a strong, unified front.⁴⁷⁸ In reality, early twentieth-century psychiatry could do little to address chronic mental illness.⁴⁷⁹

In addition, early twentieth-century psychiatry was corrupted with severe racism.⁴⁸⁰ Race and the history of slavery played a critical role in the development of American psychiatry.⁴⁸¹ Racial difference was imbedded in the ways that psychiatrists thought about mental health and mental illness, as well as how patients were treated and managed.⁴⁸² In part, this was due to the fact that the “psychiatric profession’s routine manufacturing of racial difference constructed the black psyche as alien and fundamentally abnormal.”⁴⁸³ Psychiatrists, psychologists, and other related experts produced and reified various theories of racial difference, which they located in their essential understanding of mental illness.⁴⁸⁴ By placing the source of Black mental illness in Black biology, as so many eugenicists did, turn-of-the-century psychiatrists encouraged not only an “ethnological paradigm of race,” but also promoted the preeminence of hereditarianism.⁴⁸⁵

⁴⁷⁴ *See id.*

⁴⁷⁵ *See id.*

⁴⁷⁶ *See* LUNBECK, *supra* note 175, at 116.

⁴⁷⁷ *See id.*

⁴⁷⁸ *See id.*

⁴⁷⁹ *See* Preethy George et al., *Cycles of Reform in the History of Psychosis Treatment in the United States*, 3 SSM MENTAL HEALTH 1, 5 (2023).

⁴⁸⁰ *See* LUNBECK, *supra* note 175, at 122.

⁴⁸¹ *See* Smith, *supra* note 467.

⁴⁸² MARTIN SUMMERS, *MADNESS IN THE CITY OF MAGNIFICENT INTENTIONS: A HISTORY OF RACE AND MENTAL ILLNESS IN THE NATION’S CAPITAL* 4 (2019).

⁴⁸³ Given how much the psyche, through the work of eugenics, helped frame who was and was not a potential criminal, this framing had huge implications for the construction of the Progressive criminal profile. *Id.*

⁴⁸⁴ *See id.*

⁴⁸⁵ *See id.* at 6. Hereditarianism is

American psychiatry also believed that the rising public insanity rates were attributable to the huge uptick in immigration, especially darker migrants from “inferior” European countries.⁴⁸⁶ One way to safeguard white citizens was to save them from “hopeless racial others”—such as Black populations and other ethnicities deemed undesirable—via segregation.⁴⁸⁷ The prominent eugenicist and criminologist Lombroso argued that physical racial differences made specific segments of society “born criminal.”⁴⁸⁸

By 1910, social and demographic change had created many distressing alterations to the fabric of local communities, especially in the cities.⁴⁸⁹ Vagrancy, homelessness, panhandling, and general disorder in the streets had increased substantially in urban centers.⁴⁹⁰ In particular, the number of people sent to mental asylums skyrocketed from 74,000 in 1890 to 150,000 in 1904 to 267,000 in 1922.⁴⁹¹ The ever-rising cost estimates of those individuals diagnosed as “insane”—a number expanding at double the overall rate of population growth—was projected to be more than the cost of all farming and agriculture in 1920.⁴⁹²

The increasing numbers of individuals sent to asylums coincided with the birth of psychiatry at the turn of the twentieth century. By 1921, the APA was formed and eagerly sought to frame psychiatry as a crucial tool in fixing a wide collection of social issues.⁴⁹³ Psychiatrists were particularly active in the field of eugenics, and many leading psychiatrists were strong eugenics supporters.⁴⁹⁴

the view that genetic inheritance is the major influence on behavior. Opposed to this view is the belief that environment and learning account for the major differences between people. The question of heredity versus environment or “nature versus nurture” continues to be controversial, especially as it applies to human intelligence.

Hereditarianism, AM. PSYCH. ASS’N: APA DICTIONARY OF PSYCH. (April 19, 2018), <https://dictionary.apa.org/hereditarianism> [<https://perma.cc/S8BS-LZMQ>].

⁴⁸⁶ See LUNBECK, *supra* note 175, at 122.

⁴⁸⁷ See FLOWE, *supra* note 161, at 6.

⁴⁸⁸ *Id.* at 4.

⁴⁸⁹ See Danielle Carr, *Medicalizing Society*, JACOBIN (Aug. 18, 2018), <https://jacobin.com/2018/08/mental-health-psychiatry-class-struggle> [<https://perma.cc/3AUR-MQMB>].

⁴⁹⁰ See *id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ See Aaron Levin, *APA’s Origins Reflected Enlightened Thinking About Care for People with Mental Illness*, PSYCHIATRIC NEWS (Dec. 28, 2018), <https://doi.org/10.1176/appi.pn.2019.1a26>.

⁴⁹⁴ See Jason Luty, *Psychiatry and the Dark Side: Eugenics, Nazi and Soviet Psychiatry*, 20 ADVANCES IN PSYCHIATRIC TREATMENT 52, 52–53 (2014).

All these developments helped shape the idea of the Progressive criminal. Turn-of-the-century criminological science believed very strongly in heredity as the key to solving crime, and Black citizens “were the lowest on the eugenic scale.”⁴⁹⁵ The eugenic racial science of the era, holding that Black individuals were diseased, degenerate, intellectually inferior, and devoid of self-control, was integrated into Progressive-Era law and public policy.⁴⁹⁶

In this way, psychiatry’s new eugenic-based diagnostics gave a “modern, scientific patina” to any destructive or abnormal human behavior troubling communities and local and state government.⁴⁹⁷ This set of racialized diagnoses has led to over a century of incarceration for those so diagnosed, either in asylums, jails, or prisons. It also ultimately became the basis of the APA’s Diagnostic and Statistical Manual, originally published in 1952 and now in its fifth edition.⁴⁹⁸ The link between mental illness, race, and crime, then, is one built on a foundation of Progressive-Era eugenics. The “carceral ideologies of mental health care and treatment” that were established during the Progressive Era continue to trouble the criminal system today.⁴⁹⁹

B. Race, Crime, and Mental Illness

Race, crime, and mental illness have long been tied together in the American psychiatric imagination.⁵⁰⁰ During the lengthy period of enslavement, the general assumption was that enslaved people lived a simple life due to their bondage, while whites were exposed to the stress and strain of daily decision making, thus struggling far more with insanity.⁵⁰¹ As John P. Galt, the nineteenth-century Director of the Eastern Lunatic Asylum, infamously argued, the enslaved “have not the anxious cares and anxieties relative to property, which tend to depress some of our free citizens.”⁵⁰² In similar fashion, mid-nineteenth century enslaved Blacks who ran away from their enslavers were diagnosed with a mental

⁴⁹⁵ See FLOWE, *supra* note 161, at 5.

⁴⁹⁶ See LADELLE McWHORTER, *RACISM AND SEXUAL OPPRESSION IN ANGLO-AMERICA: A GENEALOGY* 142 (2009).

⁴⁹⁷ MAG SEGREST, *ADMINISTRATIONS OF LUNACY: RACISM AND THE HAUNTING OF AMERICAN PSYCHIATRY AT THE MILLEDGEVILLE ASYLUM* xvii (2020).

⁴⁹⁸ See *id.* at xviii.

⁴⁹⁹ *Id.* at 3.

⁵⁰⁰ See JONATHAN M. METZL, *THE PROTEST PSYCHOSIS: HOW SCHIZOPHRENIA BECAME A BLACK DISEASE* ix (2009).

⁵⁰¹ See Jeffrey Geller, *Structural Racism in American Psychiatry and APA: Part I*, 55 *PSYCH. NEWS* (June 23, 2020), <https://doi.org/10.1176/appi.pn.2020.7a18>.

⁵⁰² See JOHN M. GALT, *ANNUAL REPORT OF THE COURT OF DIRECTORS OF THE EASTERN LUNATIC ASYLUM* 25 (1848).

condition called “drapetomania,” and those who resisted their enslavement were frequently ascribed as having a condition entitled “dysaesthesia aethiopsis,” a form of insanity which arose in acts of “rascality” and “disrespect for the master’s property.”⁵⁰³ The “cure”? Extensive whipping.⁵⁰⁴

During the latter parts of the nineteenth century, the concept of race “shifted from a marker of primarily morphological difference to one of biological difference by linking notions of phenotype to rapidly changing theories of disability and criminality.”⁵⁰⁵ This understanding of race, and in particular Blackness, was strengthened and reified during the Progressive Era, tightly tying Blackness to both disability and criminality, not only “racialized criminality but also grafted ableist notions of disability into understandings of criminality.”⁵⁰⁶

In the years following the Civil War and leading up to the twentieth century, the number of Black individuals committed to Southern institutions, both asylums and work farms, rose by a factor of ten.⁵⁰⁷ Matters had not much improved by the turn of the twentieth century, which were still heavily influenced by mid-nineteenth-century medical “scholarship.”⁵⁰⁸ Many Progressive-Era psychiatrists still argued that Black citizens were “psychologically unfit” for freedom, claiming that the rates of insanity for Black individuals rose precipitously after emancipation.⁵⁰⁹ These spurious diagnoses of rising mental illness were tightly linked to the Black population’s supposed inability to handle freedom and lingering “need” for servitude, served up fresh for the twentieth century by a coating of pseudo-scientific terminology.⁵¹⁰ One result was that mentally ill Black patients were diagnosed with mania and characterized as dangerous far more frequently than white patients.⁵¹¹

⁵⁰³ METZL, *supra* note 500, at ix.

⁵⁰⁴ *Id.*

⁵⁰⁵ Andrew Dilts, *Incurable Blackness: Criminal Disenfranchisement, Mental Disability, and the White Citizen*, 32 *DISABILITY STUD. Q.* (July 2012).

⁵⁰⁶ Jamelia Morgan, *Disability, Policing, and Punishment: An Intersectional Approach*, 75 *OKLA. L. REV.* 169, 171 (2022).

⁵⁰⁷ See Catherine Zandonella, *Judith Weisenfeld Explores Psychiatry, Race and Religion in the Post-Civil War Era*, *DISCOVERY: RSCH. AT PRINCETON* (Jan. 5, 2021, at 09:00 CT), <https://www.princeton.edu/news/2021/01/05/judith-weisenfeld-explores-psychiatry-race-and-religion-post-civil-war-era> [<https://perma.cc/DQX8-A663>].

⁵⁰⁸ See METZL, *supra* note 500, at 30.

⁵⁰⁹ See Arrah B. Evarts, *Dementia Praecox in the Colored Race*, 1 *PSYCHOANALYTIC REVIEW* 388, 394 (1913–1914).

⁵¹⁰ See METZL, *supra* note 500, at 31.

⁵¹¹ See SUMMERS, *supra* note 482, at 7.

In this way, the mental asylum was closely linked to the expanding penal system.⁵¹² Georgia's Milledgeville Sanatorium was a prime early-twentieth century example. There, "eugenic framing of patients . . . stigmatized mental illness as the result of 'morbid, depraved, and selfish natures' . . . to which others easily added 'criminal' to the mix."⁵¹³ The reality was that pellagra, tuberculosis, syphilis, and parasites such as malaria were some of the reasons Black people were sent to the asylum; these diseases could result in symptoms such as memory loss, hallucinations, and delusions, all of which would result in involuntary commitment.⁵¹⁴ Despite these glaring public health problems, however, staff doctors concluded that "heredity is the greatest pre-disposing etiological factor in insanity," adopting the eugenic credos in full.⁵¹⁵

Progressive-Era public health associations and eugenic societies frequently shared common goals and even personnel.⁵¹⁶ This all came together in the beginning of the twentieth century, when many southern states believed they had a new and disturbing problem: rising insanity among free Black citizens.⁵¹⁷ Insane asylums did indeed see a striking rise in Black populations, and several state prisons saw a higher mortality rate in their Black inmates.⁵¹⁸ The eugenicists concluded Black individuals were inferior to whites, psychologically and physically, and thus needed to be controlled and segregated in asylums, in prisons, and in everyday society.⁵¹⁹ As prominent mid-nineteenth-century social reformer Samuel Gridley Howe argued, Blacks were destined to be criminals because their arrested development precluded any ability to follow any law or prohibition.⁵²⁰ In this way, the Progressive understanding of race, lunacy, and criminality "supported and reinforced each other as related impairments."⁵²¹

With the newer discovery and diagnoses of such mental illnesses as manic-depressive psychosis and dementia praecox,⁵²² the psychiatric world married race and genetic unfitness.

⁵¹² See SEGREST, *supra* note 497, at 204.

⁵¹³ See *id.* at 219.

⁵¹⁴ See *id.*

⁵¹⁵ See *id.*

⁵¹⁶ See Martin S. Pernick, *Eugenics and Public Health in American History*, 87 AM. J. PUB. HEALTH 1767, 1768 (1997).

⁵¹⁷ See ANTONIA HYLTON, MADNESS: RACE AND INSANITY IN A JIM CROW ASYLUM 13 (2024).

⁵¹⁸ See McWHORTER, *supra* note 496, at 149.

⁵¹⁹ See *id.* at 149–50, 154.

⁵²⁰ See Dilts, *supra* note 505.

⁵²¹ *Id.*

⁵²² See SUMMERS, *supra* note 482, at 130.

Through eugenics, genetics gave race and racism an unalterable permanence; neither education, nor change in environment or climate, nor the eradication of racism itself could alter the fate of African-Americans or those labeled belonging to the non-white races.⁵²³

In other words, when applied along a racial axis, eugenics sought to categorize the supposed social, mental, and biological differences by relying heavily on racial and ethnic heredity.⁵²⁴

The interconnection between law, race, and eugenics was particularly strong in the South.⁵²⁵ The South was preoccupied with situating Black individuals as a “dysgenic source of criminality, disease, and feeble-mindedness.”⁵²⁶ Southern doctors and psychiatrists there eagerly adopted the new Progressive ideas of “born criminality” and “feeble-mindedness.”⁵²⁷ Such new classifications made it all the easier for the medical profession to combine race, class, and gender into “a new concept of disability.”⁵²⁸ By collapsing the categories of race, poverty, and mental disability into “lack of fitness,” Progressive eugenics helped the medical profession present “feeble-mindedness” into a specifically racial threat.⁵²⁹

North or South, however, the medical conclusion that white abnormality was parallel to Black normality shows us how theories of racial difference structured medical thought.⁵³⁰ Specifically, the medical and psychological community believed that Black people, believed to be physiologically inferior to white people, would suffer enormous setbacks in all areas of their physical and mental health without close supervision.⁵³¹ The impact of racial thinking on psychiatric practice was enormous, and still has not been fully explored.⁵³²

Race and eugenics continued to play a major role in the diagnosis and treatment of mental illness throughout the first few decades of the twentieth century. Arrah B. Evarts, a prominent D.C. psychiatrist and

⁵²³ See YUDELL, *supra* note 215, at 15.

⁵²⁴ *See id.*

⁵²⁵ Gregory Orr, *Defective or Disabled?: Race, Medicine, and Eugenics in Progressive Era Virginia and Alabama*, 4 J. GILDED AGE & PROGRESSIVE ERA 359, 360 (Oct. 2006).

⁵²⁶ *Id.* at 374

⁵²⁷ *See id.*

⁵²⁸ *Id.*

⁵²⁹ *See id.* at 390.

⁵³⁰ *See* SUMMERS, *supra* note 482, at 108.

⁵³¹ *See* McWHORTER, *supra* note 496, at 149.

⁵³² *See* Smith, *supra* note 467.

eugenicist, argued in 1910 that Black patients' "inferiority" manifested "a distinctive presentation of the disease":⁵³³

During its years of savagery, the race had learned no lessons in emotional control, and what they attained during their few generations of slavery left them unstable. For this reason we find deterioration in the emotional sphere most often an early and a persistent manifestation.⁵³⁴

In large part, psychiatrists viewed Black patients as "primitive, alien, and inferior."⁵³⁵ These racist "diagnoses" were not confined to the asylum. Instead, the "new psychiatry" spread in popularity within the schools, the courts, and the military.⁵³⁶

Progressive-Era psychiatrists conceived of Black mental illness very differently than white mental illness, with Black insanity often understood as a manifestation of a so-called natural Black psychological makeup.⁵³⁷ Despite little empirical evidence to back it up, Progressive-Era psychiatrists believed in a "distinctive Black psyche," operating far differently than the white mind, particularly in the area of mental illness.⁵³⁸ In this way, a "statistical link" between Blackness and criminality was forged.⁵³⁹

Early twentieth-century psychiatry also believed that Black individuals had brains structurally incapable of higher-order thinking, tying this theory to the rising Black insanity rate and the growing presence of Black patients in mental asylums.⁵⁴⁰ In 1906, for example, the Maryland State Lunacy Commission's annual report noted the rates of mental illness in Black patients were sure to rise: "There can be no doubt of the fact that the progress of the negro from slavery has been attended with a very marked increase of insanity in this race."⁵⁴¹ In Maryland and throughout the nation, these "concerns" about Black lunacy persisted in public discourse.⁵⁴²

⁵³³ See Matthew Gambino, "The Savage Heart Beneath the Civilized Exterior": *Race, Citizenship, and Mental Illness in Washington, D.C., 1900–1940*, 28 *DISABILITY STUD. Q.* 1 (2008).

⁵³⁴ Evarts, *supra* note 509, at 396.

⁵³⁵ See Gambino, *supra* note 533.

⁵³⁶ Barbara Sicherman, *The New Psychiatry: Medical and Behavioral Science, 1895–1921*, in *AMERICAN PSYCHOANALYSIS: ORIGINS AND DEVELOPMENT* 31 (Jacques M. Quen & Eric T. Carlson eds., 1978); see also Gambino, *supra* note 533.

⁵³⁷ See SUMMERS, *supra* note 482, at 7.

⁵³⁸ See *id.* at 128.

⁵³⁹ See MUHAMMED, *supra* note 11, at 1–2.

⁵⁴⁰ See Geller, *supra* note 501.

⁵⁴¹ See HYLTON, *supra* note 517, at 24.

⁵⁴² See *id.*

All of this racist pseudo-psychiatry encouraged not only mental health professionals but also a wide array of Progressive-Era elites to view Black Americans as “alien, inferior, and incapable of self-government.”⁵⁴³ Within Progressive discourse, little distinction was made between the ordinary Black citizen and the supposedly deviant or criminal mind; those experiencing mental illness were rendered even more indistinguishable.⁵⁴⁴ From the 1890s through the 1940s, emerging social-scientific theories of race, fortified by the new analytic tools of racial statistics, social surveys, and criminological classification, consolidated a distinct ideology of Black criminality and inherent inferiority.⁵⁴⁵ This constructed vision of racial deviance did more than reflect existing prejudice: it became foundational to the architecture of modern urban America itself.⁵⁴⁶

Popular Progressive-Era criminological and eugenical theories held that supposed race-based bodily difference meant some individuals, from the “primitive races,” were “born criminals.”⁵⁴⁷ The work of criminal anthropologists defined non-European features as predictors of crime, with Black features often described as “unevolved.”⁵⁴⁸ Since Progressive-Era criminological science was based on the problems of heredity, and Black individuals were ranked on the bottom of the eugenical heredity scale, their criminality was often simply assumed.⁵⁴⁹

Although serious crime was committed by every ethnicity in early twentieth century American cities, Progressives and criminologists filtered their understanding of crime through a lens of race and class.⁵⁵⁰ In particular, “[t]he solidification of whiteness as a racial category in this period hinged on delineating [B]lackness as separate, indelible, and criminal.”⁵⁵¹ Combined with eugenicist ideas of Black genetic inferiority and statistics on Black mortality, crime, and imprisonment, Progressive reformers, lawyers, and policy-makers used this concept of criminality as one of the keys to their systemic criminal reforms.⁵⁵²

C. *The Rise of Eugenic Psychiatric Terminology*

Adding to these beliefs was the popularization of psychiatric terms and ideas at the turn of the century. “Scientific” diagnoses such as

⁵⁴³ See Gambino, *supra* note 533.

⁵⁴⁴ *See id.*

⁵⁴⁵ MUHAMMED, *supra* note 11, at 20–21.

⁵⁴⁶ *Id.* at 272.

⁵⁴⁷ FLOWE, *supra* note 161, at 4.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 5.

⁵⁵⁰ *Id.* at 9.

⁵⁵¹ *Id.*

⁵⁵² *Id.*

dementia praecox quickly left the realm of early twentieth century psychiatry and entered popular American culture.⁵⁵³ The use of the term in most popular press also invariably mentioned familiar boogeymen such as immigrants, the intellectually unfit, criminals, or Black citizens.⁵⁵⁴ During the 1910's, dementia praecox became a routine diagnosis in American psychiatric institutions.⁵⁵⁵

As a diagnosis, dementia praecox was most often linked with crime,⁵⁵⁶ although that definition did not lack controversy.⁵⁵⁷ Those psychiatrists who believed the diagnosis was more tightly linked with crime favored far tougher treatment for the disorder, including indeterminate institutional commitment—both to deter future crime and to prevent future criminals.⁵⁵⁸

American newspapers in the 1910's and 1920's breathlessly chronicled a supposed spike in crime by “demented criminals,” a term possibly taken from dementia praecox itself.⁵⁵⁹ By the 1920's, the belief in urban crime waves had taken hold, a theory eagerly reported on by the papers.⁵⁶⁰ The popular press took for granted the link between “emotional insanity” and crime.⁵⁶¹

These ideas were bolstered by leading eugenic jurists of the era. Chief Judge Henry Olson of Chicago's Municipal Court argued for national testing of all adolescents convicted of minor crimes and the sterilization of those found suffering from dementia praecox and other “mental diseases.”⁵⁶² Eugenic Progressives sought to regulate the racial composition of America by controlling human breeding, which they believed would also eliminate much of the crime being committed.⁵⁶³

During the Progressive Era, criminality was widely imagined as an intrinsic characteristic of Black and other nonwhite populations.⁵⁶⁴ Social problems such as crime and mental illness were framed not as products of environment or deprivation but biologically predetermined—fixed attributes of racial identity rather than conditions requiring structural

⁵⁵³ See METZL, *supra* note 500, at 31.

⁵⁵⁴ *Id.* at 31–32.

⁵⁵⁵ WILLRICH, *supra* note 9, at 260.

⁵⁵⁶ METZL, *supra* note 500, at 32.

⁵⁵⁷ WILLRICH, *supra* note 9, at 260.

⁵⁵⁸ *See id.*

⁵⁵⁹ METZL, *supra* note 500, at 32.

⁵⁶⁰ *See* WILLRICH, *supra* note 9, at 289.

⁵⁶¹ *See* Charles D. Files, *Emotional Insanity and Crime*, N.Y. TIMES (Sep. 7, 1924), <https://www.nytimes.com/1924/09/07/archives/emotional-insanity-and-crime.html> [<https://perma.cc/67JZ-8GT6>]; *see also* METZL, *supra* note 500, at 32.

⁵⁶² *Declares Insanity Can Be Extirpated*, *supra* note 114.

⁵⁶³ *See* BAKER, *supra* note 29, at 89–90.

⁵⁶⁴ *See* Alexis Hoag, *The Color of Justice*, 120 MICH. L. REV. 977, 984 (2022) (book review).

remedy.⁵⁶⁵ Within this framework, Black, immigrant, and ethnic communities were collectively marked as inherently unfit for full citizenship, their supposed biological inferiority serving as justification for social exclusion and legal presumption of guilt long before conviction.⁵⁶⁶ The absence of meaningful access to defense counsel only deepened these inequities, rendering racialized defendants vulnerable to a system that had already declared them criminal by nature.⁵⁶⁷ For Progressive reformers and physicians alike, confinement was not punishment but social hygiene: a method of protecting the public from those deemed constitutionally deviant.⁵⁶⁸ White psychiatrists, in particular, portrayed mentally ill Black individuals as an acute menace to public safety; individuals who, by virtue of both race and illness, demanded containment, control, and, ultimately, removal from civic life.⁵⁶⁹

The perpetrators of urban crime waves were of all races and ethnicities.⁵⁷⁰ But many Progressive-Era reformers discussed Black crime in terms solely of race, while delineating white crime in terms of class.⁵⁷¹ This tied in nicely with eugenic theories of Black hereditary inferiority, where Progressive-Era reformers, lawmakers, psychiatrists, and criminologists used specious evidence and statistics to “prove” that Black citizens were natural criminals.⁵⁷²

These concerns about Black urban crime spanned both North and South. Take early twentieth-century Florida, for example. Although Florida’s white middle class was generally suspicious of all rural working-class behavior, it was especially hostile to the Black urban populace.⁵⁷³ As the Florida commissioner of agriculture noted in 1903, there were great concerns over Black individuals migrating to the city and instantly falling in with “immoral dens of vice” and “the idle class,” since hereditary factors encouraged the Black “criminal side” to emerge.⁵⁷⁴

The linking of crime, scientific methods, and mental illness with race reached its height during the Progressive Era. During this time, racial crime statistics, couched in the language of mental disease, became a

⁵⁶⁵ See COHEN, *supra* note 198, at 5–7.

⁵⁶⁶ See Hoag, *supra* note 564, at 983, 985.

⁵⁶⁷ See *id.*

⁵⁶⁸ See Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to Brown v. Plata*, 48 HARV. C.R.-C.L. L. REV. 217, 229 (2013).

⁵⁶⁹ See WENDY GONAVAR, *THE PECULIAR INSTITUTION AND THE MAKING OF MODERN PSYCHIATRY, 1840–1880*, 18 (2019).

⁵⁷⁰ FLOWE, *supra* note 161, at 9.

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ VIVIEN M.L. MILLER, *CRIME, SEXUAL VIOLENCE, AND CLEMENCY: FLORIDA PARDON BOARD AND PENAL SYSTEM IN THE PROGRESSIVE ERA* 117 (2000).

⁵⁷⁴ *Id.*

“subject of dialogue and debate” about Black citizens’ fitness for modern life.⁵⁷⁵ The debate on crime and mental unfitness was inalterably shaped by race: “[T]he statistical discourse on [B]lack criminality from the 1890’s forward was a modern invention that encapsulated northern and southern ideas about race and crime.”⁵⁷⁶

Although immigrants, the poor, and the disabled all were frequently over-categorized as criminal or criminally insane, the most “immutable” cases were routinely found to be those who had Black ancestry. As Charles R. Henderson, a leading Progressive-Era social scientist from the University of Chicago, contended, “racial inheritance, physical and mental inferiority, barbarian and slave ancestry and culture” were the greatest markers in incorrigible criminality.⁵⁷⁷ Ironically, many Progressives argued that racism had nothing to do with Black criminality.⁵⁷⁸

As such, the Progressive Era was in many ways “the founding moment for the emergence of an enduring . . . discourse of [B]lack dysfunctionality.”⁵⁷⁹ The racial biological frame constructed by Progressive-Era social scientists fit neatly into their more modern understanding of the criminal.⁵⁸⁰ And it was this understanding of racialized criminality that was codified into Progressive criminal justice reform.⁵⁸¹

VI. GRAPPLING WITH EUGENICS AND CRIME IN THE 21ST CENTURY

The same Progressive-Era faith in science, classification, and social hygiene that first redefined crime and punishment continues to animate the modern carceral state, whose risk-driven and technocratic logics represent the eugenic project’s enduring afterlife. The legacy of the Progressive Era endures, not as a distant curiosity of legal history but as the deep architecture of our modern criminal system. The assumptions that animated the eugenic reformers of the early twentieth century, including belief in the measurability of deviance, the biological roots of crime, and the capacity of expert governance to perfect social order, continue to inform our contemporary penal practices. The language may have shifted from heredity to risk, from degeneracy to dangerousness, but the underlying logic remains strikingly familiar. To understand the carceral state as it operates today is to recognize it as the lineal descendant of the

⁵⁷⁵ MUHAMMED, *supra* note 11, at 2.

⁵⁷⁶ *Id.* at 5.

⁵⁷⁷ *Id.* at 7 (quoting CHARLES R. HENDERSON, AN INTRODUCTION TO THE DEPENDENT, DEFECTIVE, AND DELINQUENT CLASSES (1893)).

⁵⁷⁸ *Id.* at 8.

⁵⁷⁹ *Id.* at 7.

⁵⁸⁰ *See id.* at 8.

⁵⁸¹ *See* BAKER, *supra* note 29, at 37.

Progressive-Era project described in Parts I through IV: a project that cloaked coercion in the rhetoric of science, that substituted classification for compassion, and that redefined justice as the management of the “unfit.”

The twenty-first-century American criminal system continues to operate within the conceptual and institutional framework laid down by Progressive-Era reformers. The intellectual scaffolding of modern punishment, discretionary sentencing, reliance on psychiatric and psychological expertise, and growing faith in algorithmic prediction, all retains the same foundational logic of hereditarian control.⁵⁸² These lingering influences are often subtle but can be seen in a number of areas, including the excessive use of police force against people of color and those with disabilities.⁵⁸³

The Progressives’ conviction that deviance could be scientifically classified and eliminated through technocratic management persists, even if the vocabulary has changed. As Parts I through IV have shown, the Progressive project fused eugenics, psychiatry, and legal modernism into a single administrative vision of social order. That vision has not vanished; it has evolved into the present-day carceral state, where technology and data analytics have replaced the Psychopathic Laboratory but the underlying faith in measurable defect remains unchanged.⁵⁸⁴

Modern criminal law still bears the genetic imprint of that moment.⁵⁸⁵ Where Progressive reformers relied on laboratories, intelligence tests, and anthropometric measurements to detect the “born criminal,” their twenty-first-century successors deploy algorithmic risk assessments, biometric surveillance, and predictive policing software. As Jonathan Simon has argued, our criminal system continues to focus on regulating the “abnormal,” through the surveillance and control of the carceral state.⁵⁸⁶ The purpose is the same—to sort, rank, and control those deemed most likely to transgress.⁵⁸⁷ The “scientific” instruments of risk governance, like their eugenic predecessors, promise neutrality while replicating the very hierarchies they claim to transcend. The actuarial tools now used in sentencing, parole, and pretrial detention reproduce old categories of biological suspicion: race, disability, poverty, and mental illness. The

⁵⁸² See Nora Leonard, *Racial and Ethnic Disparities in the Juvenile Justice System*, COAL. OF JUV. JUST. (Mar. 2, 2023), <https://juvjustice.org/blog/racial-and-ethnic-disparities-in-the-youth-justice-system/> [<https://perma.cc/JNA5-UGP8>].

⁵⁸³ See Wang, *supra* note 1; Thompson, *supra* note 1.

⁵⁸⁴ See *supra* Parts I–IV; see also Vincent Southerland, *With AI and Criminal Justice, the Devil Is in the Data*, ACLU (Apr. 9, 2018), <https://www.aclu.org/news/privacy-technology/with-ai-and-criminal-justice-the-devil-is-in-the-data> [<https://perma.cc/T3N7-VJ2R>].

⁵⁸⁵ Simon, *supra* note 568 at 1629.

⁵⁸⁶ *Id.* at 1633.

⁵⁸⁷ See *id.* at 1634.

Progressive conviction that crime could be prevented through identification of hereditary defect has evolved into an abiding belief that data can predict dangerousness.⁵⁸⁸

The parallels run deeper than rhetoric. Just as the Progressive faith in indeterminate sentencing gave immense discretion to judges and parole boards to separate the “rehabilitable” from the “incorrigible,” today’s discretionary regimes allow actuarial scores and psychiatric evaluations to dictate liberty and confinement.⁵⁸⁹ Modern risk instruments, such as COMPAS, LS/CMI, and a host of state-level equivalents, classify defendants according to variables that correlate strongly with race and poverty.⁵⁹⁰ These models transform structural inequities into individualized predictions,⁵⁹¹ much as Progressive eugenicists translated poverty, migration, and disability into hereditary defect. Both frameworks produce what might be called a *scientific presumption of guilt*: a belief that future criminality can be discerned through measurement, whether by skull calipers or machine-learning code.⁵⁹²

The same Progressive drive to merge law with psychiatry also persists. In the early twentieth century, psychiatrists and judges collaborated to diagnose “psychopathic” offenders who required confinement for the protection of society. Today, civil commitment statutes for so-called “sexually violent predators” echo that eugenic logic, authorizing indefinite detention based on purportedly clinical judgments

⁵⁸⁸ See, e.g., Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again*, 48 CRIME AND JUSTICE 439, 440 (2019)

⁵⁸⁹ See MELISSA HAMILTON, RISK ASSESSMENT TOOLS IN THE CRIMINAL LEGAL SYSTEM—THEORY AND PRACTICE: A RESOURCE GUIDE 53–59 (Nov. 2020), <https://www.nacdl.org/getattachment/a92d7c30-32d4-4b49-9c57-6c14ed0b9894/risk-assessment-report-november-18-2020.pdf> [<https://perma.cc/D9HK-BS3F>].

⁵⁹⁰ See SARAH PICARD ET AL., BEYOND THE ALGORITHM: PRETRIAL REFORM, RISK ASSESSMENT, AND RACIAL FAIRNESS 4 (2019), https://www.innovatingjustice.org/wp-content/uploads/2019/07/Beyond_The_Algorithm.pdf [<https://perma.cc/5F3J-FKWP>]; see also HAMILTON, *supra* note 589, at 60–62.

⁵⁹¹ See Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 257 (2015).

⁵⁹² See, e.g., Sidney Fussell, *An Algorithm That ‘Predicts’ Criminality Based on a Face Sparks a Furor*, WIRED (June 24, 2020, at 07:00 CT), <https://www.wired.com/story/algorithm-predicts-criminality-based-face-sparks-furor/> [<https://perma.cc/XH7B-4DG3>]; Catherine Stinson, *The Dark Past of Algorithms That Associate Appearance and Criminality*, AM. SCIENTIST, <https://www.americanscientist.org/article/the-dark-past-of-algorithms-that-associate-appearance-and-criminality> [<https://perma.cc/VB5Y-EBYH>] (last visited Dec. 17, 2025).

of dangerousness.⁵⁹³ These modern statutes revive the Progressive belief that certain individuals (i.e., those whose pathology is deemed “incurable”) must be permanently removed from civic life, even after their legal sentences have expired. The institutional through-line from the psychopathic laboratory to the forensic psychiatric unit is unbroken.

The continuity extends beyond sentencing and commitment to the very conception of rehabilitation itself. Progressive reformers recast punishment as therapy, framing incarceration as a mechanism of treatment rather than retribution. Yet their therapeutic rhetoric masked a harsh dichotomy: those classified as “salvageable” were disciplined into conformity, while those labeled “degenerate” were segregated and sterilized. The modern rehabilitative ideal, though stripped of its explicit genetic language, preserves this same hierarchy of worth. Prison and probation programs promising reform through “behavioral modification” or “cognitive restructuring” reward compliance with institutional norms and pathologize resistance.⁵⁹⁴ The rehabilitative model continues to divide the deserving from the undeserving, echoing the Progressive conviction that some offenders can be remade while others must be contained indefinitely.

Nowhere is this continuity more visible than in the treatment of race and disability within the criminal system.⁵⁹⁵ Progressive eugenics constructed Blackness, immigration, and mental illness as overlapping markers of deviance, using the tools of psychiatry and statistics to naturalize racial hierarchy.⁵⁹⁶ The result was a juridical order that conflated criminality with racialized embodiment—a presumption of hereditary inferiority that justified the expansion of surveillance and incarceration. The twenty-first century system has refined, not repudiated, that premise. Black and brown individuals remain disproportionately targeted by police, arrested for minor offenses, and sentenced to longer terms under ostensibly neutral regimes of risk assessment and prosecutorial discretion.⁵⁹⁷ The overrepresentation of people with psychiatric and developmental disabilities in jails and prisons (often exceeding thirty percent of the incarcerated population) mirrors the

⁵⁹³ See Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 *TEMPLE L. REV.* 697, 707–12 (2011).

⁵⁹⁴ See Jordynn Hyatt, *The Impact of Cognitive-Behavioral Therapy on the Recidivism of High Risk Probationers: Results from a Randomized Trial* 34–35 (Jan. 1, 2013) (Ph.D. dissertation, University of Pennsylvania) (available at <https://files01.core.ac.uk/download/pdf/76383755.pdf> [<https://perma.cc/28Q6-PX8G>]).

⁵⁹⁵ See Morgan, *supra* note 506, at 175.

⁵⁹⁶ See Morgan, *supra* note 14, at 506.

⁵⁹⁷ See David A. Harris, *Racial Profiling: Past, Present and Future?*, 34 *CRIM. JUST.* 10, 11 (2020).

Progressive practice of institutionalizing those deemed mentally or morally “unfit.”⁵⁹⁸ The Progressive belief that social disorder emanated from “defective” bodies has become the unspoken axiom of modern public safety policy.

The same carceral logic governs the policing of gender and reproduction. Progressive reformers once justified the sterilization of women labeled “feeble-minded” or “promiscuous” in the name of social hygiene. Today, incarcerated women face coerced medical procedures, denial of reproductive care, and punitive responses to pregnancy, all under the guise of protecting public health or institutional order.⁵⁹⁹ The state’s regulation of female bodies remains grounded in the same eugenic impulse: the conviction that certain populations must be monitored, disciplined, and prevented from reproducing social disorder. The contemporary criminalization of pregnancy outcomes, especially among poor and minority women, reveals the persistence of this logic of control, one that conflates biological difference with moral defect.

The Progressive faith in scientific governance also survives in the modern turn to data analytics and algorithmic policing. Predictive-policing programs such as PredPol or Patternize claim to forecast where crime will occur, drawing on historical arrest data steeped in the racial and socioeconomic biases of earlier policing.⁶⁰⁰ The result is a feedback loop that concentrates surveillance on the same communities long deemed “dangerous.”⁶⁰¹ These tools are, in effect, the digital descendants of Progressive-Era crime maps and social surveys—technologies of classification masquerading as instruments of objectivity. Ultimately, such instruments perpetuate what the Progressives first institutionalized: a eugenic epistemology that treats skin color and poverty as evidence of inherent criminal propensity.

Equally telling is the persistence of indeterminate, long-term confinement. From the Progressive creation of the “habitual offender” to today’s life-without-parole statutes and “three strikes” laws, the notion that some individuals are beyond rehabilitation endures.⁶⁰² The parole boards that once weighed eugenic criteria of character and heredity now

⁵⁹⁸ See Appleman, *supra* note 4, at 470–73.

⁵⁹⁹ See Note, *Impediments to Reproductive Justice: The Criminal Legal System and American Carceral State*, 137 HARV. L. REV. 2320, 2328–36 (2024).

⁶⁰⁰ See Beth Schwartzapfel, *Can Racist Algorithms Be Fixed?*, THE MARSHALL PROJECT (July 1, 2019, at 06:00 ET), <https://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed> [<https://perma.cc/CV8M-JU7A>].

⁶⁰¹ See Stephen Lurie, *There’s No Such Thing As a Dangerous Neighborhood*, BLOOMBERG (Feb. 25, 2019, at 09:18 CT), <https://www.bloomberg.com/news/articles/2019-02-25/beyond-broken-windows-what-really-drives-urban-crime> [<https://perma.cc/FT92-ZGE5>].

⁶⁰² See Loehr, *supra* note 361, at 239.

rely on psychological evaluations and statistical risk scores,⁶⁰³ but the outcome is the same: often indefinite exclusion from the civic body. The rhetoric of “public protection” that justifies mass incarceration today can trace its descent from the Progressive belief that segregating the “unfit” would cleanse society of disorder.

If the Progressive Era linked eugenics, psychiatry, and legal modernism to create a system of scientific segregation, the twenty-first century has perfected that fusion through digital precision. The carceral state’s commitment to data-driven governance,⁶⁰⁴ its appetite for classification, and its management of difference are inheritances from a stained past. In this way, our contemporary criminal system remains, at its core, a eugenic institution, one that continues to equate deviance with defect and danger.

Recognizing this lineage forces a reorientation of reform. The crises of mass incarceration, racialized policing, and algorithmic bias cannot be understood merely as contemporary malfunctions. Instead, they are the logical outcomes of a system designed, from its inception, to identify and contain the “unfit.” The Progressive myth of benevolent modernization must be replaced with an honest reckoning with its coercive foundations. The scientific “rationality” that once justified sterilization and indeterminate confinement in asylums and work farms now animates our risk matrices and predictive models. Until we confront that continuity, the bias of Progressive-Era classification will persist—ever more efficient, ever more opaque, but still animated by the same eugenic imagination.

To dismantle the eugenics of the carceral state, then, requires more than technical reform. It demands a rejection of the epistemology that created it: the belief that social order can be engineered through measurement; that difference can be managed through surveillance; and that justice consists in the identification and elimination of dangerousness. What the Progressive reformers bequeathed to us was not simply a set of institutions but a worldview, where law functions as a diagnostic instrument and punishment as a form of treatment. The true challenge of the twenty-first century is to unlearn this inheritance and to replace the calculus of risk with the language of rights. Our twenty-first century mission should be to build a system that acknowledges the structural roots of harm rather than pathologizing the people who bear its burdens.

Only by building such a criminal system can we move beyond the eugenic foundations of American criminal justice. The task is not to perfect the Progressive dream of scientific management but to abandon it

⁶⁰³ See Pari McGarraugh, Note, *Up or Out: Why “Sufficiently Reliable” Statistical Risk Assessment Is Appropriate at Sentencing and Inappropriate at Parole*, 352 MINN. L. REV. 1079, 1090–94 (2013).

⁶⁰⁴ See Dorothy Robert, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1696 (2019) (book review).

altogether. Can we even imagine a legal order that values context over classification and justice over control? The carceral state, born of Progressive faith in science and sustained by its modern technologies, will persist until we confront the uncomfortable truth that the logic of eugenics still animates its core. Reckoning with that past is the first step toward dismantling its future.

VII. CONCLUSION

The legacy of eugenics continues to shape the American criminal system in systemic and subterranean ways. The Progressive-Era reforms that transformed the criminal courts and redefined the very concept of the criminal mind were grounded in eugenic philosophy, which explained criminality, mental illness, and social deviance as hereditary flaws, all requiring scientific management. This vision of biological defect as the root of disorder informed not only early twentieth-century penal policy but also the enduring structure of mass incarceration that followed. Its imprint remains visible in the persistent racial and economic disparities that define the modern carceral state.

The eugenic logic of classification and control also endures in the criminalization of poverty, addiction, and mental illness, which continue to be punished through incarceration rather than treated. The inadequate provision of community-based care ensures that the jail or prison remains the primary institution for managing those deemed “abnormal.” In this sense, contemporary carceral practices replicate the Progressive conviction that social problems can be solved through confinement and control, rather than through structural reform.

Modern criminal adjudication and punishment still reflect the Progressive fusion of science and coercion. Using ostensibly neutral tools of prediction, such as risk assessments, actuarial models, and data analytics, the criminal system continues to forecast, classify, and contain those judged likely to offend. A century ago, Progressive reformers embraced the cutting-edge science of eugenics as the cure for social ills. Today’s reformers likewise rely on algorithmic objectivity to achieve the same end. Both regimes rest on the same epistemological foundation: faith in scientific rationality as a means of both identifying and eliminating deviance. The only difference lies in the instruments: the eugenic chart has given way to the digital code.

The continuing influence of eugenic thought can be seen in the disproportionate incarceration of marginalized communities, the criminalization of mental illness and poverty, the persistent reliance on biased predictive technologies, and the policies that regulate rehabilitation and release. These patterns are inheritances of our Progressive past. Confronting mass incarceration therefore requires more than procedural reform; it demands a reckoning with the historical and ideological roots of

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the system itself. Only by acknowledging how Progressive-Era eugenic philosophy still animates the logics of risk, control, and exclusion can we begin to imagine a more equitable and humane vision of criminal justice.