**Broken Beyond Repair: Criminal Rehabilitation and 20th Century American Political Development**

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**Abstract.** A commonly accepted premise in criminal justice literature is that the American penal system largely accepted the “rehabilitative ideal”—the belief that the main purpose of punishment is to reform criminals—in the 20th century preceding the rise of mass incarceration in the 1970s. This essay complicates this narrative by assessing the intellectual history that established the rehabilitative ideal as well as examining the ideal’s broader influence on social and political development. Analysis of the criminological theory at its roots reveals that the rehabilitative ideal was built on theoretical premises relying on distinctions between curable offenders and incorrigible ones who must be contained. In this way, the seeds of punitive politics were sewn into the logic of the rehabilitative ideal from its origins. This justified harsh treatments for incorrigible populations during the years of the rehabilitative ideal’s dominance, particularly in the form of extended sentences for recidivists, compulsory sterilizations for the mentally ill, and lynchings for African Americans. This logic was essential in facilitating the emergence of punitive politics in the 1970s and has been key to validating the agenda of the neoliberal state ever since. The paper concludes by arguing that emphasizing rehabilitation will not help reduce mass incarceration without divorcing rehabilitative goals from problematic assumptions at the rehabilitative ideal’s foundation.

**Introduction**

The basic story of mass incarceration is a familiar one—in the latter half of the twentieth century, America’s incarceration rates increased exponentially and the country became the global leader in incarcerating its own citizens. Scholars have pointed to a variety of explanations for this shift, including the conservative politics of the 1960s, “late modernity,” and the history of American institution building.[[1]](#footnote-1) A common feature of many arguments is that the emergence of mass incarceration involved a repudiation of the rehabilitative ideal in the 1970s. According to Francis Allen, the rehabilitative ideal is the belief that the main purpose of punishment is to change an offender’s character, attitudes, and behavior. Allen contends that the rehabilitative ideal had “almost unchallenged sway” in criminological theory from the late nineteenth century through the 1970s and that it was a fundamental force shaping penal policy during these years.[[2]](#footnote-2)

However, examining the intellectual work that shaped penal rehabilitative theory reveals that the potential for punitive politics was built into it from its inception. The rehabilitative ideal and the methods it promoted originated in the works of late nineteenth century criminologists who saw rehabilitation as a double-edged sword, as failure to reform was interpreted as evidence that some offenders were “incorrigible” criminals and could only be controlled through incarceration. This concept of incorrigibility has been applied in ways that legitimated the harsh treatment of large numbers of people throughout the twentieth century. That this justification for punitive politics undergirded the rehabilitative ideal from its origins indicates that, to a large extent, the turn away from rehabilitation in the 1970s was due as much to the rehabilitative ideal’s own ideological and theoretical underpinnings as it was to changes in the political and social context.

The paper begins by assessing the works of late nineteenth century criminologists to demonstrate how the criminological theory that established the rehabilitative ideal laid the foundation for punitive politics. I then assess several developments during the late nineteenth and mid-twentieth centuries—when the rehabilitative ideal was supposedly dominant—that demonstrate how rehabilitative theory justified harsh treatments for certain populations. This is followed by a section demonstrating how the punitive political developments of the 1970s built on tenets of rehabilitative ideology in multiple ways. The final section argues that the current neoliberal political order has capitalized on the punitive rationale of the rehabilitative ideal and created a favorable context for bio-deterministic theories of criminality to return to the academic mainstream. While the paper concludes by endorsing prisoner rehabilitation as intrinsically good, it is argued that rehabilitative philosophy must be divorced from a number of dangerous assumptions if it is to be employed in a way that will reduce rather than exacerbate mass incarceration.

This paper complicates orthodox understandings of penal rehabilitation by demonstrating that punitive seeds are sewn into the rehabilitative ideal. Thus, the turn away from rehabilitation in the 1970s should not have come as a surprise. Various social and political developments facilitated the emergence of punitive politics, butthe rejection of rehabilitation as a goal of the penal system had less to do with the politics of the period than it had to do with the presumptions about criminal behavior on which it rested.

**The Intellectual Roots of the Rehabilitative Ideal**[[3]](#footnote-3)

In 1870, the American Congress of Corrections met in Cincinnati and issued a Declaration of Principles encouraging the use of various rehabilitative techniques in prisons, including educational and vocational training, post-release supervision, and indeterminate sentences that permitted sentence reductions for good conduct. The Declaration is widely understood to mark the moment at which prisons generally began to shift their institutional mission towards corrections and rehabilitation.[[4]](#footnote-4) One of the attendees who helped write the Declaration was Zebulon Brockway, who would later serve as the first warden of New York’s Elmira Reformatory when it opened in 1876. Elmira was hailed as a pioneer in criminal rehabilitation and was praised for its use of indeterminate sentences that allowed experts to determine if offenders should be released based on their rehabilitative progress and its “marks” system that allowed prisoners to gain access to better food and accommodations as rewards for good behavior.

However, while these policies appear enlightened, there was a punitive side to Elmira. Alexander Pisciotta (1994) has demonstrated that Brockway’s promise of “benevolent reform” manifested as “benevolent repression,” as despite Elmira’s nominally progressive philosophy, the institution’s staff physically and psychologically abused inmates as they sought to instill Protestant ethics into offenders while assimilating them into the working class. And while indeterminate sentencing policies allowed experts to release the rehabilitated, those who did not reform were deemed “incorrigible, ”often due to defective heredity, and were incarcerated for extended periods.[[5]](#footnote-5)

Brockway saw degeneracy as a hereditary cause of crime, but also believed that acquired characteristics—particularly impaired mental and moral faculties as a result of poor education or upbringing—were heritable.[[6]](#footnote-6) Thus, his faith in the hereditary nature of criminality rested on his acceptance of Lamarckian evolutionary theory, leading him to conclude that criminality was often hereditary, but not always immutable. His works also built on tenets of Cesare Lombroso’s theory of criminal atavism, which claimed that certain physical stigmata such as greater skull thickness, large jaws, or long ears were suggestive of a primitive biological inheritance that rendered individuals irrational and morally senseless, earning them the label “born criminals.”[[7]](#footnote-7) Brockway discussed the “inferiority” of prisoners who could be identified through Lombrosian stigmata and suggested that many criminals were simply “defective fellow beings” whose “animal instincts” were unchecked by their biology.[[8]](#footnote-8)

This Lamarckian understanding of heredity allowed Brockway to simultaneously espouse a faith in the idea that some criminals could be reformed through rehabilitation while interpreting failure to reform as proof that others were simply incorrigible due to individual defects.[[9]](#footnote-9) Incorrigibles, Brockway explained, were “inevitably” inclined to commit crime and were “irresponsive to common restraints.”[[10]](#footnote-10) He argued that indeterminate sentences permitted incorrigible criminals to be “continuously held under enough of custodial restraint to protect the public” and that between reforming the curable and containing the incurable, indeterminate sentencing would facilitate the creation of “a perfect race.”[[11]](#footnote-11) Thus, he defended indeterminate sentencing as a means to incentivize prisoners to reform and as a means to indefinitely contain incorrigibles.[[12]](#footnote-12)

That the “father of the rehabilitative ideal” supported long-term containment for certain offenders is not worth noticing only as a doctrinal oddity, but as a principle of his thinking that conditioned future developments in criminology. The theorists that elaborated on Brockway’s rehabilitative ideal adopted a similar understanding of heredity and built on his presumption that some offenders were redeemable while others were incorrigible.[[13]](#footnote-13) In *Creating Born Criminals* (1997), Nicole Hahn Rafter identifies several American research publications written in the late nineteenth and early twentieth centuries that built on these premises. Rafter provides a more thorough analysis of these works than can be provided here, but the remainder of this section will review the common themes of these works to demonstrate how ideas about criminal biological defectiveness and incorrigibility built the foundation for the rehabilitative ideal.

American criminology during this era built directly on Lombrosian theory. In *Criminology* (1893), the first purely criminological academic study in America, Arthur MacDonald dedicated the first chapter to reviewing Lombrosian theory.[[14]](#footnote-14) Henry Boies claimed in *Prisoners and Paupers* (1893)that anyone who has visited a prison knows that “a large proportion of them were born to be criminals,” while Philip Parsons’ *Responsibility for Crime* (1909)relied on a taxonomy of criminal types ranging from criminals of occasion to habitual and born criminals. Parsons said that crime is the “natural function” of born criminals who can be identified by recidivism.[[15]](#footnote-15)

A Lamarckian understanding of heredity was shared by these criminologists, which led them to favor rehabilitation as a means of reducing crime in future generations. For example, Charles Henderson argued that improving criminals’ characters could have positive effects on their progeny due to the transmission of acquired traits.[[16]](#footnote-16) Boies similarly reasoned that criminals must be reformed before they reproduce so children do not inherit the immoral character of their parents.[[17]](#footnote-17) But given their general acceptance of Lombrosian theory, they also concluded that some offenders were incorrigible. As Henry Boies made clear in his 1901 work *The Science of Penology*, “The reformatory, then, will operate as an institution for sorting and separating its inmates into the corrigible and incorrigible subdivisions. All those who can be cured will be cured before liberation. The chronic incorrigibles...should be confined under entirely different conditions.”[[18]](#footnote-18)

Upon examining their works with scrutiny, it is evident that these theorists endorsed rehabilitation as a means to fix the curable and a means to identify and separate the incurable. As an example, while MacDonald favored in-prison educational programs, he suggested incorrigible criminals could be identified by their inability to learn, as their criminal instincts would inevitably “overrule or suppress the [offender’s] intellectual nature.” William Duncan McKim and Charles Henderson expressed similar ideas, and Henderson argued that a key purpose of prison education is to identify which inmates were “uneducable” and should be segregated to ensure their “gradual extinction without pain.” Thus, MacDonald, McKim, and Henderson suggested that a minimal response to education could help identify incorrigible offenders with incurable mental deficiencies.[[19]](#footnote-19)

 Most importantly, support for indeterminate sentencing was common, and many works criticized determinate sentences for failing to offer incentives for offenders to reform.[[20]](#footnote-20) As G. Frank Lydston noted in *The Diseases of Society* (1906), “The basic principle of the indeterminate sentence is obviously the treatment of the criminal, rather than the punishment of his crime.”[[21]](#footnote-21) But support for indeterminate sentencing as means of curing offenders was always coupled with support for it as means of indefinitely containing recidivistic incorrigibles.[[22]](#footnote-22) As MacDonald noted, “The indeterminate sentence is the best method of affording the prisoner an opportunity to reform, without exposing society to unnecessary dangers” because incorrigibles would never be released.[[23]](#footnote-23) August Drahms went so far as to argue that indefinitely containing recidivists was a stronger justification for indeterminate sentences than was affording offenders a chance to reform.[[24]](#footnote-24) Henry Boies maintained that three convictions, regardless of severity, necessitated incarceration for life, a proposal bearing striking similar to contemporary three-strikes laws that also interpret recidivism as proof of an individual’s incurability.[[25]](#footnote-25)

Other rehabilitative methods were advocated in these works, such as vocational training and in prison medical treatment.[[26]](#footnote-26) These techniques were situated in a similar doctrinal framework to the strategies already reviewed, as recidivism or resistance to reform was taken as proof of incorrigibility. This worked a punitive logic into the rehabilitative ideal that was used to defend indefinite detention, permanent segregation, compulsory sterilization, marriage restrictions, and extermination for incorrigibles.[[27]](#footnote-27)

These ideas were not constrained to intellectual circles and Elmira. In the forty years following Elmira’s opening in 1876, seventeen reformatories opened across the nation. Almost all of them followed the Elmira rehabilitative model, meaning they embraced its reform-oriented approach to individualized treatment and the punitive reverse logic that came with it—that biologically defective incorrigible criminals could and should be contained indefinitely.[[28]](#footnote-28) By accepting the existence of born criminals, the bio-determinist criminology that shaped the rehabilitative ideal put the onus for reform exclusively on individuals, attributed criminal behavior and recidivism to their individual immutable faults, and disregarded the social, political, and economic structures that often contribute to criminal behavior, such as income inequality and generational poverty.

The conception of criminality undergirding the rehabilitative ideal thus absolved the state of any duty to reform individuals deemed incorrigible and demonstrates how the ideal always had a punitive logic. Studies of the influence of bio-determinist criminology on institutional development focus on reformatories in the late nineteenth and early twentieth centuries, but the harsh flipside of the rehabilitative ideal contributed to other developments within and outside of the penal system further into the twentieth century. The next section will show how several punitive developments that occurred during the rehabilitative ideal’s dominance in the early and mid twentieth century were justified by the idea that certain criminals were resistant to and undeserving of rehabilitation.

**The Punitive Nature of the Rehabilitative Ideal**

In *The Culture of Control*, David Garland suggests that the public harbored retributive sentiments long before the 1970s, but that they were considered unorthodox and were repressed while rehabilitative discourse remained hegemonic among most public officials and penal experts. He argues that these attitudes came to the fore in the 1970s, creating a rift between criminal justice officials and the public that facilitated the decline of the rehabilitative ideal.[[29]](#footnote-29) But even claiming that only penal experts remained steadfastly dedicated to rehabilitation prior to the 1970s is debatable. First, many state laws passed during this period reflected a belief in the incorrigibility of certain groups. Second, a focus on correctional institutions ignores how the punitive aspects of criminological theory flourished outside the criminal justice system. A full understanding of the rehabilitative ideal requires us to acknowledge that its period of supposed hegemony concurred with the rise of markedly punitive practices informed by the idea that some criminals were irredeemable.

As a note, ideas of incorrigibility may seem useful to explain certain crimes. Whether indefinite containment is necessary for recidivistic killers, rapists, and child molesters until the state is confident in their reformation is more debatable than whether perpetual incarceration is necessary for repeat misdemeanants. Determining if some violent criminals are driven by physiological disorders is a question for scholars of biology, psychiatry, and neurology. But a problem with the incorrigible idea is the wide application it has historically received, as it has repeatedly justified punitive treatment for marginalized groups and has disregarded the structural factors contributing to crime. The practices reviewed in this section—severe indeterminate sentencing laws, compulsory sterilizations, and lynching—highlight this concern. Together, they show how four facets of rehabilitative ideology contributed to punitive treatments as much as they contributed rehabilitative ones—(1) that some criminals are incorrigible; (2) that incorrigibility is largely biological; (3) that criminals are individually responsible for their behavior and capacity for reformation; and (4) that coercive state institutions are capable of enacting positive social change, whether by reworking criminal minds or incapacitating them.

***Indeterminate Sentencing.*** Following Elmira’s example, most state reformatories in the early twentieth centuries utilized indeterminate sentencing. This allowed parole boards and prison officials to determine if and when offenders had been rehabilitated and were fit for release. But as the creators of the rehabilitative ideal suggested, the indeterminate sentence also permitted long-term incarceration. This is evidenced by the enactment of laws targeting repeat offenders with extended sentences as early as 1885, when Ohio granted judges the discretion to sentence third time felons to life imprisonment. The State Board of Charities, the agency responsible for supervising state welfare institutions, endorsed the law and argued for its application to repeat misdemeanants and paupers.[[30]](#footnote-30) In 1909, Indiana passed a similar law after two decades of advocacy from the State Board of Charities, which defended it by arguing that indeterminate sentencing protected society through “the detention of the incorrigible and the release of the reformed criminal.” The Indiana law made an inclusion for repeat misdemeanants for life sentences.[[31]](#footnote-31)

 Beginning in the 1920s, similar “habitual offender” laws spread rapidly across the states. New York ignited the movement with Baumes’ Law in 1926, which increased sentences for second-time offenders and instituted life sentences for those with three or more convictions. The bill’s sponsor, Caleb Baum, claimed that the bill’s purpose was “protection to the public,” as any offender who commits crime after multiple convictions must be “incurable.”[[32]](#footnote-32) The New York Crime Commission concurred that law’s purpose was to contain incurable offenders.[[33]](#footnote-33) Over the next two decades, habitual offender laws were passed in forty-three states, with twenty-nine authorizing life sentences.[[34]](#footnote-34) It is unclear how frequently these laws were used, but what is relevant here is that state legislatures used indeterminate sentencing systems to authorize long sentences for recidivists, even minor felons, long before rehabilitative goals were abandoned.[[35]](#footnote-35)

 Severe indeterminate sentencing laws were also applied to minor offenders. Due to increased poverty during industrialization, anxiety over “tramps” (homeless men living off temporary work) became widespread in the late 1800s. The political response was a repression of poverty through the enhancement of centuries old vagrancy laws.[[36]](#footnote-36) Richard Dugdale’s analysis of the “Juke” family—which concluded that laziness, idiocy, and other hereditary features of the Juke gene pool contributed simultaneously to the family’s poverty and criminality—abetted these developments after he discussed the links between crime and poverty uncovered in his research before the National Conference of Boards of Public Charities in 1877. [[37]](#footnote-37) Attendee Francis Wayland elaborated on Dugdale’s claims by citing anecdotal data that 94-99% of tramps were criminals and describing the tramp as an “irreclaimable, incorrigible, cowardly, utterly depraved savage” who “knows no gradations in crime.”[[38]](#footnote-38) Many attendees supported incarceration for tramps on the basis that they were prone to criminality.[[39]](#footnote-39) In 1898, Brockway built on this notion, stating that many paupers are “disinclined to satisfy their wants by legitimate earnings” and steal to fulfill their basic needs.[[40]](#footnote-40) Boies argued that many tramps are “incorrigibly idle” and “criminal,” and should be incarcerated “for life.”[[41]](#footnote-41) G. Frank Lydston even claimed to uncover shared physiological stigmata among tramps and criminals. [[42]](#footnote-42)

 By 1897, forty states revamped their vagrancy laws into punitive anti-tramp acts, and thirty-seven incarcerated tramps in penal institutions.[[43]](#footnote-43) The laws targeted wandering without work and often converted misdemeanors into felonies if committed by tramps.[[44]](#footnote-44) Whereas during the mid-nineteenth century, jobless transients would usually be lodged overnight in police stationhouses, anti-tramp laws provided lengthy prison sentences. While New York and New Jersey specified a six-month statutory maximum, tramps in Massachusetts could get two years behind bars and those in Rhode Island could get three.[[45]](#footnote-45) Such anti-tramp acts were widely praised for “checking the extent of crime.”[[46]](#footnote-46) While tramps were not indefinitely incarcerated, notions of incorrigibility and biological inferiority linked to rehabilitative philosophy legitimized extended sentences for them.

***Sterilizations Laws.*** The early twentieth century witnessed the rise of the American eugenics movement. The Eugenics Records Office (ERO), established in 1910 as the national center for the study of human heredity until its closure in 1939, sought to identify the most defective 10% of the population for sterilization and segregation. A number of groups were targeted, including the feeble-minded, paupers, and “criminals of all descriptions.” The ERO’s broad definition of “criminal” spanned from vagrants to felons, serving as a catchall to expand the ERO’s dragnet for the criminally incorrigible. ERO founder Charles Davenport argued that “the fact of incorrigibility” necessitated sterilization of criminals.[[47]](#footnote-47) The ERO defended long sentences for criminals with sterilization being a condition of release, combining ideas favored by multiple early proponents of rehabilitation.[[48]](#footnote-48)

 The sterilization of inmates began long before the founding of the ERO. Doctor Harry Sharp began sterilizing criminals in Indiana as early as 1893 and performed at least 176 vasectomies in the 14 years prior to Indiana’s legalization of compulsory sterilization in 1907. Sharp argued for others to follow suit, claiming that defectives for which sterilization is a suitable treatment could be identified by the physical markings noted by Cesare Lombroso and others.[[49]](#footnote-49) Sharp was not alone in the medical field defending criminal sterilization; Dr. Martin Barr of Pennsylvania wrote in 1904, “Let asexualizaiton be once legalized, not as a penalty for crime but a remedial measure preventing crime.”[[50]](#footnote-50)

By 1911, six more states legalized the sterilization of criminals, and as per the reports of the ERO sixteen states had such laws on the books by 1922.[[51]](#footnote-51) Compulsory sterilization laws were constitutionally upheld in the 1927 Supreme Court decision *Buck v. Bell*, and in the most famous passage from the decision, Justice Holmes explicitly linked the justification for sterilization to criminality:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[[52]](#footnote-52)

From 1907 through 1925, 6,244 compulsory sterilizations were reportedly performed throughout the country, maintaining a rate of about 347 annually. After *Buck v. Bell*, the national rate of sterilizations skyrocketed to nearly 2,000 per year from 1925-1940.[[53]](#footnote-53)

 Several states focused their laws on rapists and child molesters, but other states legalized compulsory sterilization for a broad range of criminals. For example, California’s 1909 law and Oregon’s 1917 law included anyone convicted of any three felonies as eligible for the procedure. Four states targeted the “habitual criminal,” with three states providing no definition of the term and Kansas only vaguely defining it as, “a person who has been convicted of some felony involving moral turpitude.”[[54]](#footnote-54) The extensive reach of these laws indicates how broadly the incorrigible idea was applied.

However, in many states, the defeat of legislation including criminals as eligible for sterilization was followed by the passage of legislation only targeting the mentally impaired.[[55]](#footnote-55) Further, evidence suggests that despite the passage of these laws, criminal sterilizations were rare and decreased after 1910.[[56]](#footnote-56) But as Nicole Hahn Rafter has shown, early twentieth century criminology linking mental health, intelligence, and criminality (particularly the work of H.H. Goddard and Lewis Terman), blurred the lines between mental illness, low intelligence, and criminality by treating the “feeble-minded,” “insane,” and “epileptics” as “criminal types.”[[57]](#footnote-57) The unclear distinction between mental illness and criminality during this period suggests that the occupants of mental institutions where sterilizations were most common may have been of a mix of the mentally ill and individuals that were at the time considered criminal types.

 About 70,000 people were subjected to compulsory sterilizations over the first seven decades of the twentieth century, averaging about 1,000 annually with rates peaking in the 1930s and 1940s. These numbers only include recorded sterilizations, and many procedures were probably performed off the record before, during, and possibly after this period.[[58]](#footnote-58) The prevalence of sterilizations during the era of the rehabilitative ideal’s dominance, sanctioned by laws explicitly and implicitly directed at criminals, indicates that these laws were built on the notion that mentally ill or disabled criminals were incorrigible and necessitated incapacitation.

***Lynching.*** While many penal officials accepted rehabilitation as a worthy goal of prisons, it was never fully embraced in the South, where harsh and racially biased forms of punishment persisted for decades. The use of convict leasing, penal farms, and lynching as mechanisms of social control in the nineteenth and twentieth centuries has been thoroughly documented. These practices and alternative theories of punishment that emerged in states like Mississippi and Texas during these periods have largely been linked to racist ideologies and described as detached from rehabilitative goals.[[59]](#footnote-59)

 This section proposes a slight adjustment to this narrative by arguing that while rehabilitation was never embraced as a goal of punishment in the South, the punitive treatment of blacks reflected some foundational premises of the rehabilitative ideal. Particularly, this section will analyze the practice of lynching. At the turn of the century, lynching was a common means of punishing blacks accused of crime in the South, and the unwillingness of local, state, and federal officials to intervene is indicative of how established it was as a form of social control.[[60]](#footnote-60) In *Peculiar Institution*, David Garland argues that lynching was so accepted that it is appropriate to think of it as a form of capital punishment during this era.[[61]](#footnote-61) Justified by a white supremacist discourse asserting the moral and biological superiority of whites to blacks, the practice was validated by the ideas of criminal incorrigibility and biological inferiority key to rehabilitative theory.[[62]](#footnote-62)

Many concluded that blacks were irredeemable, such as George Clarke, who wrote in 1906 that, “To reform [the black criminal’s] character is an almost hopeless task.”[[63]](#footnote-63) The idea that blacks were born criminals led many to conclude that lynching was a rational response to black crime. Frederick L. Hoffman, a crucial figure in linking criminology to white supremacist discourse, concluded in 1896 that the proportion of black crime was higher than the proportion of blacks in the population due to blacks’ criminal tendencies. He claimed that given freedom, blacks chose to “congregate under conditions of vice and crime” because of their “decided tendency towards crime” and biological inferiority. He alleged that the basic flaws of the race were immutable and blamed the prevalence of lynching on their criminal behavior.[[64]](#footnote-64) Robert Shufeldt suggested that lynching would not even be enough to reduce black crime since crime is in “their nature, and they cannot possibly rid themselves of that.”[[65]](#footnote-65)

Lynching was largely justified by stoking fears about rape.[[66]](#footnote-66) In *Race Traits* (1896), Hoffman described rape by blacks as “indescribably beastly and loathsome,” and claimed that it “is marked…by a diabolical persistence and malignant atrocity of detail that have no reflection in the whole extent of the natural history of the most bestial and ferocious animals.”[[67]](#footnote-67) This description of black rape packaged a Lombrosian conception of criminality with a white supremacist narrative to make rape symbolic of blacks’ biological inferiority and immutable criminal tendencies.[[68]](#footnote-68) Black men were often depicted as savages incapable of controlling their sexual urges, and lynching was frequently reserved for black men charged with sexual offenses against white women.[[69]](#footnote-69)

Between 1890 and 1940, roughly three thousand blacks were lynched, averaging about sixty annually.[[70]](#footnote-70) This rate persisted for fifty years, is more than 50% larger than the average annual rate of executions in the U.S. since *Gregg v. Georgia,* and does not include unrecorded lynchings.[[71]](#footnote-71) Some Southern officials explicitly condoned it as a way to punish black criminals, and Presidents Roosevelt and Taft even condemned it in ways that presumed the guilt of blacks.[[72]](#footnote-72) Roosevelt wrote in 1903 that lynching is a response to rape and that to stop lynching, “every effort should be made under the law to expedite the proceedings of justice” for rapists.[[73]](#footnote-73) Two years later, he repeated that, “Long delays of justice, abuses of the pardoning power, [and] the sluggishness with which either the court or attorney moves…[create]…the condition of affairs which produces lynch law.”[[74]](#footnote-74) Taft made similar claims to Congress in 1909, when he argued that lynchings are “due to the uncertainties and injustice growing out of delays in trials, judgments, and the executions thereof by our courts.”[[75]](#footnote-75) Even these critics saw lynching as a response to actual crimes, and their criticisms were rooted in concerns about the challenge it posed to the state’s authority to punish crime more than in concerns about racial injustice.

Lynching was informed by multiple social and political dynamics and was far more than a reflection of the era’s criminological thought, but it was at least partially justified by the idea that black criminals were incorrigible and biologically defective. Given the importance of lynching as a mechanism of punishment, ignoring it because it was extra-legal would downplay how the era’s dominant conceptions of criminality affected the treatment of blacks accused of crime. While lynching may have defied the rehabilitative ideal’s faith in state coercive institutions, it built on other key facets of rehabilitative ideology—that some offenders were incorrigible and biologically defective. The practice of lynching in the South should not be seen as entirely hostile to the era’s rehabilitative theory because it actually reflected fundamental tenets of it.

**The Decline of the Rehabilitative Ideal and Rise of Mass Incarceration**

The conventional narrative of mass incarceration accepts that political shifts in the 1970s drove policymakers to abandon the rehabilitative ideal in favor of a harsh ethic of punishment. But this downplays how the ideas undergirding the rehabilitative ideal contributed to the era’s punitive developments. This section will assess changes in indeterminate sentencing, mental health institutions, and the death penalty and racialization of crime in the 1960s and 1970s. It aims to highlight commonalities between the punitive politics of the late 20th century, the practices reviewed in the previous section, and the ideology of early rehabilitative theorists to demonstrate how several seeds of mass incarceration can be found in the philosophy of rehabilitation.

***Determinate Sentencing.*** By the 1970s, indeterminate sentencing structures existed in the federal system and all states.[[76]](#footnote-76) But in the 1960s and 1970s, conservatives launched attacks on indeterminate sentencing by condemning liberal judges as being “soft” on crime, which defeated the arguments of progressives like Marvin Frankel who criticized the arbitrary disparities generated by indeterminate sentencing schemes. The conservative victory is often seen as a establishing a political context in which being “tough on crime” became the only viable electoral position.[[77]](#footnote-77) The Right’s strategy involved an assault on the rehabilitative ideal that exploited the perceived failures of the Civil Rights Movement (which was linked to urban riots) and the War on Poverty (which was sold as a crime control measure but failed to produce a short-term crime reduction) to claim that crime was a choice for which individuals were personally responsible.[[78]](#footnote-78) Robert Martinson’s 1974 study of penal rehabilitation, which concluded concluded that “nothing works” to reduce recidivism, resonated with the public, penal officials, and politicians who had come to accept the notion that blacks and the poor were prone to crime.[[79]](#footnote-79)

Exemplifying the conservative logic was James Q. Wilson, whose attack on judicial leniency rang of bio-deterministic claims of incorrigibility. In *Thinking About Crime* (1975), Wilson claimed that, “Wicked people exist. Nothing avails them except to set them apart from innocent people.” [[80]](#footnote-80) The revised 1983 edition included a chapter on rehabilitation noting the abundance of studies that validated Martinson’s conclusions and arguing that the rehabilitative ideal rested on “heroic assumptions” about criminals’ reformability. He concluded that few offenders are truly amenable to reform and criticized indeterminate sentencing as naively preoccupied with rehabilitation.[[81]](#footnote-81)

The emergence of mandatory sentencing schemes followed in the 1970s and 1980s given that, in the words of one US congressman, indeterminate sentencing was “widely discredited.”[[82]](#footnote-82) The Sentencing Reform Act of 1984 promulgated mandatory sentencing guidelines for federal judges that were, as one observer stated, oriented “more toward toughness rather than toward fairness” given how dramatically they increased sentences.[[83]](#footnote-83) Congressional supporters of the bill declared that imposing the minimum sentence would be “ludicrous” and “a mockery of the guidelines.”[[84]](#footnote-84) Numerous states implemented similarly harsh guidelines directing judges to mete out severe sentences.[[85]](#footnote-85)

The shift from indeterminate to determinate sentencing was a radical change, but there is a logical continuity between the two systems. The logic of indeterminate sentencing was that it allowed penal officials and parole boards to release redeemed offenders and contain incorrigible ones. In a sense, it was fueled by skepticism in the ability of judges to determine who was reformable and gave discretion for such questions to penal experts. The rise of determinate sentencing was similarly fueled by distrust in judicial discretion, but was driven more by anxieties over judges underestimating the incorrigibility of criminals. Nowhere is the continuity between the rehabilitative theory favoring indeterminate sentencing and strict determinate sentencing schemes clearer than in the fact that determinate three-strikes laws, which spread across the states in the 1990s, were first suggested by Henry Boies in 1893.[[86]](#footnote-86) This foreshadowed the distrust of judicial-decision making that would facilitate the rise of determinate sentencing in the 1970s.

That the conservative attack on indeterminate sentencing as too lenient prevailed over the liberal criticism about arbitrary disparities was not just a result of the Right being louder. The Republicans’ argument built on the claim that many criminals were immune to rehabilitation and necessitated indefinite incarceration, which was a formative assumption of the rehabilitative ideal. The Right’s argument for severe determinate sentencing did not change how we understood criminal behavior as much as it capitalized on beliefs fundamental to the rehabilitative ideology that had already been shaping American penality for decades—that some offenders are incorrigible and that judges were not equipped to determine who is redeemable and who is incorrigible.

***Mental Health Deinstitutionalization.*** While compulsory sterilization laws for criminals reveal the punitive potential of rehabilitative thought, most procedures occurred in mental health institutions and many state sterilization laws only applied to mental health patients. But in the 1950s and 1960s, mental health facilities “deinstitutionalized.” Driven by ethical concerns about quality of care, condition of institutions, and public support for community-based care, deinstitutionalization aimed to shift the mentally ill and developmentally disabled from psychiatric hospitals to smaller community institutions.[[87]](#footnote-87) For a variety of reasons this did not happen as planned, and incarcerating the mentally ill behind bars has become commonplace as a cost-saving measure.[[88]](#footnote-88)

While cost saving concerns help to explain the increased incarceration of the mentally ill, additional factors matter to this story. Locking up the mentally ill mirrors several features of the logic of rehabilitation—that some offenders are incorrigible, that criminal behavior is biological, and that the hard power of the state could and should be employed to control them. Bernard Harcourt’s assessment of the nation’s overall institutionalization rate during the twentieth century illuminates this connection. He shows that from 1938 to 1960 the rate of citizens institutionalized in mental hospitals and prisons combined remained over 600 people per 100,000. As hospitals emptied in the 1960s and 1970s, the prison population increased and kept the total institutionalization rate relatively constant. Harcourt argues that the shared emphasis on social control of undesirables in mental facilities and prisons helps to explain the consistency of the aggregate institutionalization rate.[[89]](#footnote-89) As mental health facilities emptied, their population at least partially shifted to prisons; research on federal inmates indicates that 26% have been diagnosed with a mental illness (though less than 50% are treated), a tremendous increase from 5% in the 1960s.[[90]](#footnote-90) Further, deinstitutionalization occurred as blacks entered the mental health system in larger numbers, prompting Harcourt to ask if incarceration was deemed a better option for an increasingly black mentally ill population.[[91]](#footnote-91)

However, it would be an oversimplification to claim that in the wake of deinstitutionalization, everyone released from mental hospitals landed in prison. There were major demographic differences between the residents of mid-century mental health facilities and the prisons of the 1970s—for example, mental health institutions had larger female populations. But there is reason to believe that the blurry distinction between criminality and mental illness forged earlier in the century mattered when sterilization rates fell and asylums shut down. Mentally ill criminals had long been deemed incorrigible and subjected to sterilization. While the shift to prisons occurred at least partially due to political and economic complications that arose during deinstitutionalization, it was abetted by the fact that mental illness had long been deemed an incorrigible form of criminality subjected to forms of punishment geared more towards incapacitation rather than rehabilitation. The premise that some offenders were redeemable while others were not justified sterilizations in the earlier part of the century and incapacitation in the latter, exemplifying how the rehabilitative ideal’s progenitors and the punitive policymakers of the latter twentieth century shared a remarkable faith in the power of coercive state institutions to enact positive social change.

The incarceration of the mentally ill and disabled was foreshadowed by several of the rehabilitative ideal’s creators who suggested that segregation of the mentally unfit was a humane means of isolating incorrigibles from the population.[[92]](#footnote-92) That penal institutions abandoned their commitment to rehabilitation as more mentally ill individuals found themselves with nowhere to go makes sense in light of the links between mental illness and innate criminality forged during the formative years of the rehabilitative ideal.

***Race.*** Although lynching has long declined, the notions of innate black criminality that justified it have persisted and influenced development well into the twentieth century. As Garland argues, the “specter” of lynching has shaped the contemporary death penalty, as modern capital punishment and lynching have disturbing similarities like a concentration in the South, emphasis on victims’ rights, and racially biased outcomes.[[93]](#footnote-93) Garland and others have concluded that these common dynamics suggest that the death penalty, especially given its explicit emphasis on social control and its racially disparate outcomes, is a socially tolerable version of lynching.[[94]](#footnote-94) That it is admittedly purely used as a social control mechanism suggests that the offenders it targets are seen as lost causes.

Claims by tough-on-crime conservatives made in relation to the urban disorder following the Civil Rights Movement also built on similar ideas about black criminality. Michael Flamm has outlined the arguments advanced by the Right in the 1960s that conflated poverty, race, and criminality. The public disorder offenses of blacks and rioters were painted as behaviors common among the urban poor that were related to more serious criminal conduct, a logic that had been established by the likes of Dugdale, Brockway, and others. As Lawrence Bobo has written, this encouraged “laissez-faire racism,” a logic by which conservatives blamed the black community itself for racial disparities in poverty and crime.[[95]](#footnote-95) Structural contributors to poverty and crime were discounted in favor of a narrative emphasizing the individual faults of blacks and black culture. Daniel Moynihan’s 1965 report “The Negro Family” studying the roots of black inequality exemplified this logic by attributing the high rates of poverty, unemployment, and crime among blacks to the nature and pathologies of the black community.[[96]](#footnote-96)

The image of the “black male rapist” has also carried over into contemporary crime politics. Public officials since the 1970s have been attuned to rape as a criminal justice issue, often with racialized implications. This is best illustrated by the 1988 presidential campaign in which, building on the conflation of race and crime key to the Southern Strategy, the Bush campaign ran ads about rapist Willie Horton to discredit Democrat Michael Dukakis as soft on crime. These sorts of racialized anxieties over rape helped direct the goals of the anti-rape movement of the 1970s in a punitive direction.[[97]](#footnote-97)

Despite shifts in how we punish, there are remarkable continuities between punitive forms of punishment inflicted on blacks in the early twentieth century and mass incarceration. Particularly, there is a constant emphasis on criminal incorrigibility and the biological defectiveness of blacks. The historical ties between criminology and race have repeatedly caused blacks to be considered irredeemable, rendering it predictable that as blacks entered prisons higher rates, a shift away from rehabilitation behind bars followed.

The rise in incarceration starting in the 1970s was not driven by changes in the crime rate, but rather by changes in how the state chose to treat criminals. This was not only driven by the agency of tough-on-crime policymakers; the theoretical underpinnings of the rehabilitative ideal were essential in helping to facilitate this shift. It is misleading to claim that the rehabilitative ideal “declined” as Francis Allen said, since the guiding principles of rehabilitative philosophy share more in common with their successor—the severe ethic of punishment contributing to mass incarceration—than has been recognized. It is unsurprising that as punitive forms of treatment for incorrigibles fell out of use and the demographic composition of the prison population changed, Martinson’s conclusion that “nothing works” in criminal rehabilitation resonated with the public, politicians, and correctional officials.[[98]](#footnote-98) His argument validated longstanding assumptions about criminal behavior that had been at the foundation of the rehabilitative ideal since the 1890s.

**Neoliberalism and the Revival of Bio-determinist Criminology**

 Most rehabilitative interventions employed in prisons—like incentives for early release or educational training—presume that the causes of criminal behavior are located within an individual. As Marie Gottschalk has argued, rehabilitative interventions should be embraced on their own merit but not as a means to reduce recidivism. Because individualized forms of rehabilitation ignore the social conditions that contribute to crime, it is foreseeable that research often fails to causally link rehabilitation to reductions in recidivism. Given how the individualistic orientation of rehabilitative philosophy obscures the complex structural causes of crime, it comports well with the neoliberal consensus in American politics and could once again lead to the conclusion that “nothing works” in corrections.[[99]](#footnote-99) This section will show how neoliberal crime politics rely on the punitive ideological facets of the rehabilitative ideal and will argue that neoliberalism has created a fertile context for bio-determinist criminology to thrive.

As defined by Loïc Wacquant, neoliberalism is a philosophy of governance that favors free markets, celebrates individual responsibility, and stigmatizes poverty and crime as individual faults.[[100]](#footnote-100) This justifies the state’s abandonment of poor communities by claiming that socioeconomic disadvantage is a function of the faults of a neighborhood’s residents. The state’s withdrawal produces rampant unemployment, creating a labor void that is often filled by the drug trade. These conditions are causes of crime that are often ignored by rehabilitative methods. Traditional correctional strategies thus direct responsibility for crime onto individuals by emphasizing incorrigibility and personal responsibility, two pillars of rehabilitative ideology, while deflecting attention away from the state’s role in creating the conditions that help cause crime.[[101]](#footnote-101)A third feature of rehabilitative theory—faith in the hard power of state—is also reflected in neoliberalism’s expansion of the penal apparatus, which highlights the fact that neoliberalism entails less a retrenchment of the state and more a repurposing of it.

The intellectual history reviewed in this paper demonstrates how traditional rehabilitative strategies validate the neoliberal agenda of upsizing of the penal apparatus and downsizing the welfare state. The distinction between curable and incurable offenders absolves the state of responsibility for helping incurable criminals and justifies their long-term detention. Meanwhile, welfare retrenchment creates the social conditions that produce crime. This generates a self-fulfilling cycle in which the state labels poverty and crime as outcomes of individual pathologies, which legitimates further welfare retrenchment and carceral expansion. By producing the social conditions that create disadvantaged populations and then blaming any resultant behavior on their own faults and pathologies, neoliberalism manages to perpetuate and regulate socially and economically marginalized populations in American society.[[102]](#footnote-102) The theoretical premises of the rehabilitative ideal support this element of the neoliberal project by emphasizing individual responsibility and hiding how the justice system is designed in ways that promote and protect the interests of the state. While some understand the crime politics of the 1960s and 1970s as the result of penal conservatives seeking to reframe crime from being a rehabilitative issue to one centered on individual choice and punishment, this paper reveals that there was no “reframing” of the rehabilitative ideal at all.[[103]](#footnote-103) Penal conservatives were able to facilitate a punitive shift because long-established notions of incorrigibility, individual responsibility, and state capacity that were key to the rehabilitative ideal also justified incarceration in a neoliberal political context.

Joachim Savelsberg has shown that academic work in criminology is influenced by state allocation of research funding, and he argues that since the 1960s and 1970s criminological research has been cajoled into validating the state’s interests.[[104]](#footnote-104) The political context engineered by neoliberalism has favored the proliferation of criminology that emphasizes the individual pathologies of criminals. A great example is the “career criminal” criminology popular during the Reagan era, as Reagan himself had stated in 1968 that, “We must reject the idea that every time a law is broken society is guilty rather than the lawbreaker,” and “It is time to restore the American precept that each individual is accountable for his actions.”[[105]](#footnote-105) Particularly, neoliberalism has provided an opportunity for the fourth pillar of rehabilitative ideology, bio-determinist criminology, to regain academic legitimacy. Biological criminology is especially effective at affirming the part of the rehabilitative ideal that has been essential to justifying neoliberal carceral policy–the notion that certain criminals are incorrigible.

For example, as the incarceration rate began to accelerate in the 1960s, the theory that XYY “Super-Males” with an extra Y-chromosome are likely to commit violent crimes (presuming that the Y chromosome is a seed of aggression) sparked decades’ of global research, even though less than 1% of XYY males ever spend time behind bars.[[106]](#footnote-106) XYY theory facilitated a resurgence of biological studies on crime, as researchers in the 1980s sought to link criminality and genetics in adoption studies and cross-cultural analyses.[[107]](#footnote-107) The clearest bio-deterministic validation of neoliberalism came in Herrnstein and Murray’s *The Bell Curve* (1994)*,* which concluded that IQ is genetically determined, racial differences in IQ are hereditary, behaviors associated with intelligence have a genetic basis, and identified IQ as the most important predictor of criminal behavior. According to their reasoning, criminality is indirectly heritable through IQ and racial differences in IQ are genetic, which implies that certain races are genetically prone to crime. Their work offered a full-fledged justification of neoliberal ideology by placing responsibility for behaviors associated with IQ, like criminality, squarely on individuals and suggesting that state efforts at reform are largely futile and limited by individuals’ IQs.[[108]](#footnote-108)

Contemporary bio-criminology generally emphasizes the brain, with Adrian Raine leading the charge. While Raine claims to narrow his focus to violent crime, his work broadly reexamines XYY theory, claims to connect low heart rates to crime, and compares the heritability of criminality to the heritability of cancer. Like Herrnstein and Murray, Raine has thrived because he is operating in a social context in which stigmatizing crime as a result of genetic pathologies is acceptable and justifies state policy. His arguments reinforce the idea that criminals cannot be meaningfully reformed, thus legitimating the state’s abdication of responsibility for rehabilitating criminals in favor of a more punitive brand of politics. Given the similarities Raine shares with late nineteenth century bio-determinists (he claims that Lombroso “was on the path toward a sublime truth”) it is predictable that his policy proposals sound similar to theirs—he defends indefinite detention for high-risk offenders and restrictions on sexual reproduction for criminals.[[109]](#footnote-109)

Conceptions of innate criminality have spread easily into neoliberal political discourse. This is epitomized by the research of John DiIulio and James Fox examining the growing population of “super-predators” in America’s inner city black communities in the 1990s. DiIluio’s 1995 *Weekly Standard* article painted these young men as “hardened, remorseless juveniles” who would, unless closely regulated, “do what comes ‘naturally’: murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.” This language drew on the imagery of the born criminal, and the work of Fox and DiIulio helped facilitate the spread of punitive criminal justice policies for juveniles in the 1990s.[[110]](#footnote-110) The language carried readily into politics as Hillary Clinton, stumping for her husband’s reelection bid in January 1996, told a New Hampshire crowd that the government has to engage in “an organized effort against gangs,” but that the gangs the state has to fight “are not just gangs of kids anymore. They are often the kinds of kids that are called ‘superpredators.’ No conscience, no empathy.”[[111]](#footnote-111) This clarifies how the popularity of the theory was largely contingent on a neoliberal crime politics seeking to take a hard line against criminals as incorrigible and individually flawed.

This all suggests that support for prisoner rehabilitation from Grover Norquist, the conservative “Right on Crime” initiative, and publics in red states like Texas should be viewed skeptically.[[112]](#footnote-112) These are good signs, since rehabilitative interventions can provide chances for offenders to reform. But it should not be presumed that a reform agenda emphasizing rehabilitation faces no risk of a public backlash, especially in a neoliberal political environment and when state support for rehabilitation is tied to recidivism reductions as Norquist suggests.[[113]](#footnote-113) Given the conceptualization of criminality on which rehabilitative theory rests and the assumptions it makes about incorrigibility and individual responsibility, a failure to reduce recidivism rates could be politically disastrous by again leading to the conclusion that “nothing works” and only exacerbating the problems of mass incarceration. We cannot expect to reduce mass incarceration by returning to the rehabilitative-oriented penology predating the 1970s without changing the way we conceptualize rehabilitation, criminality, and recidivism.

**Conclusion**

Public opinion research has long shown that public support for rehabilitation coexists with support for punitive policies in the American populace.[[114]](#footnote-114) This paper reveals that Americans are able to hold these seemingly mutually exclusive opinions at the same time because prisoner rehabilitation and punitive politics are not substantiated by distinct logics. Rather, support for both has developed simultaneously due to the theoretical premises undergirding the American approach to rehabilitation.

It should not be surprising that many offenders recidivate even after receiving rehabilitative treatment. Providing an offender with a GED and a reduced sentence for good behavior is unlikely to translate into improved behavior given that offenders generally come from environments with limited potential for upward social and economic mobility. Even disregarding the scarcity of jobs in the communities that most offenders live in, a criminal record makes it harder for felons to find work and earns them a sub-average wage when they do.[[115]](#footnote-115) The logic of rehabilitation not only obscures the structural factors that cause crime; it also ignores how incarceration itself creates additional obstacles to self-improvement. An increased emphasis on rehabilitation is thus an unlikely way to reduce mass incarceration, especially in a neoliberal political environment that stigmatizes the individual faults of offenders.

To reiterate, prisoner rehabilitation should be favored as intrinsically good. Educational and vocational training, sentence reductions for good behavior, and psychotherapy, among other interventions, can offer criminals meaningful opportunities for self-betterment. But a shift towards rehabilitative philosophy will likely fail to shrink the carceral state unless rehabilitative theory is divorced from its problematic assumptions—particularly, that many criminals are incorrigible and necessitate containment, that crime is invariably a function of personal responsibility and individual (often biological) defects, and that rehabilitation should produce short-term reductions in recidivism. Rehabilitative philosophy will continue to be a dangerous ideology that will likely aggravate rather than reduce mass incarceration unless it ceases to emphasize the individual faults of criminals and ignore the structural factors that contribute to crime.

The decline of rehabilitation as a goal of the penal system in the 1970s was not just due to political and social developments. The basis for punitive politics was laid in the foundations of the rehabilitative ideal itself. Without fundamentally reshaping how we understand and employ prisoner rehabilitation in America so that we embrace rehabilitation on its own merit, reject recidivism as a measure of corrigibility, and acknowledge the structural factors that cause crime, rehabilitation will continue to facilitate carceral expansion by espousing the idea that some offenders are incorrigible and require containment.

1. Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (New York: Oxford University Press, 2014; Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006). [↑](#footnote-ref-1)
2. Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven: Yale University Press, 1981), 6-7; Francis Allen, "The Decline of the Rehabilitative Ideal in American Criminal Justice," *Cleveland State Law Review*, 27.2 (1978): 147-156; Francis Cullen and Paul Gendreau, “Assessing Correctional Rehabilitation: Policy, Practice, and Prospects,” in *Criminal Justice 2000: Volume 3, Policies, Processes, and Decisions of the Criminal Justice System*, ed. Julie Horney (Washington: US Dept. of Justice, National Institute of Justice, 2000), 109-175; Garland, *Culture of Control*, 3, 34-37. [↑](#footnote-ref-2)
3. This section assesses the work of Zebulon Brockway and other 19th century criminologists. For more thorough analyses, see Alexander W. Pisciotta, *Benevolent Repression: Social Control and the American Reformatory-Prison Movement* (New York: New York University Press, 1994) and Nicole Hahn Rafter, *Creating Born Criminals* (Chicago: University of Illinois Press, 1997). This section builds on these works. [↑](#footnote-ref-3)
4. Nicole Hahn Rafter, *Creating Born Criminals* (Chicago: University of Illinois Press, 1997), 96-98; John Phillips Conrad, “Correctional Treatment,” in *Encyclopedia of Crime and Justice,* vol. 1, ed. Sanford H. Kadish (New York: Free Press, 1983), 269-270. [↑](#footnote-ref-4)
5. Pisciotta, *Benevolent Repression*; Rafter, *Creating Born Criminals,* 96-103. [↑](#footnote-ref-5)
6. Zebulon Brockway, “Crime,” annual address before the National Prison Congress in 1898, in *Papers on Penology,* 4th Series, 1899 (New York State Reformatory at Elmira: Elmira, 1899), 73, 78; Zebulon Brockway, “The Ideal of a True Prison System for a State,” in *Transactions of the National Congress on Penitentiary and Reformatory Discipline, Held at Cincinnati, OH October 12-18, 1870.* E.C. Wines, ed. (Albany: Weed, Parsons and Co., 1871), 38-66, esp. 39; Zebulon Brockway, “Prisoners and their Reformation,” in Edwin Pears ed. *Prisoners and Reformatories At Home and Abroad, Being the Transactions of the International Penitentiary Congress, Held in London July 3-13 1872* (London: Longman, Green, and CO., 1872), 615. [↑](#footnote-ref-6)
7. Cesare Lombroso, *Criminal Man*, trans. Mary Gibson and Nicole Hahn Rafter (Durham: Duke University Press, 2006). Lombroso is widely recognized as being the founder of the positivist school of criminology. [↑](#footnote-ref-7)
8. Zebulon Brockway, *Fifty Years of Prison Service: An Autobiography* (New York: Charities Publication Committee, 1912)*,* 214-222; Brockway, “Crime,” 96; Brockway, “Prisoners and their Reformation,” 613. [↑](#footnote-ref-8)
9. Zebulon Brockway, “The Incorrigible Criminal: What Is He, and How Should He Be Treated?” in, *The National Prison Association of the United States of America, 5th and 6th Report of Proceedings* (Boston: Geo. E. Crosby and Co, Printers, 1886), 105-107. [↑](#footnote-ref-9)
10. Brockway, “Crime,” 80. [↑](#footnote-ref-10)
11. Brockway, *Fifty Years of Prison Service,* 265; Brockway, “The Ideal of a True Prison System,” 42. [↑](#footnote-ref-11)
12. Brockway, “Crime,” 79-80, 89-91, 96; Brockway, “An Absolute Indeterminate Sentence,” in *Fifty-Ninth Annual Report of the Prison Association of New York For the Year 1903* (Albany: Oliver A. Quayle State Legislative Printer, 1904); Brockway, “The Ideal of a True Prison System,” 42, 52-56; Brockway, “Reformatory Prison Discipline,” 206-207. [↑](#footnote-ref-12)
13. Rafter, *Creating Born Criminals,* 94-95, 101-102. [↑](#footnote-ref-13)
14. Arthur MacDonald, *Criminology* (New York: Funk & Wagnalis, 1893),36-39. [↑](#footnote-ref-14)
15. Henry M. Boies, *Prisoners and Paupers: A Study of the Abnormal Increase of Criminals, and the Public Burden of Pauperism in the United States; the Causes and Remedies* (New York: Putnam, 1893), 171-172; Philip A. Parsons, *Responsibility for Crime: An Investigation of the Nature and Causes of Crime and a Means of its Prevention* (New York: Columbia University Press, 1909),18, 30-35; see August Drahms, *The Criminal: His Personnel and Environment* (New York: Macmillan, 1900), 52 for a similar taxonomy. [↑](#footnote-ref-15)
16. Charles R. Henderson, *An Introduction to the Study of the Dependent, Defective, and Delinquent Classes* (Boston: Heath and Company, 1893), 16*.*  [↑](#footnote-ref-16)
17. Boies, *Prisoners and Paupers*, 179. [↑](#footnote-ref-17)
18. Henry M. Boies, *The Science of Penology: The Defence of Society Against Crime* (New York: GP Putnam’s Sons, 1901), 188-189. [↑](#footnote-ref-18)
19. William Duncan McKim, *Heredity and Human Progress* (New York: GP Putnam’s Sons, 1900), 268; MacDonald, *Criminology*, 50-55; Henderson, *An Introduction*, 153. [↑](#footnote-ref-19)
20. Boies, *Prisoners and Paupers*, 189-190; Henderson, *An Introduction*, 288-293; MacDonald, *Criminology*, 271; Drahms, *The Criminal*, 365-370; Parsons, *Responsibility for Crime*, 177-181. [↑](#footnote-ref-20)
21. G. Frank Lydston, *The Diseases of Society: The Vice and Crime Problem* (Philadelphia: JB Lippincott, 1906), 605. [↑](#footnote-ref-21)
22. MacDonald, *Criminology*, 271; Boies, *Prisoners and Paupers*, 189-190; Henderson, *An Introduction,* 288-293; McKim, Heredity and Human Progress*,* 23-26; Parsons, Responsibility for Crime, 177-181; Lydston, *The Diseases of Society,* 605; McKim, *Heredity and Human Progress,* 20; Lydston, *The Diseases of Society,* 610-611; Henderson, *An Introduction*, 293. [↑](#footnote-ref-22)
23. MacDonald, *Criminology*, 271. [↑](#footnote-ref-23)
24. Drahms, *The Criminal,* 365-370. [↑](#footnote-ref-24)
25. Boies, *Prisoners and Paupers*, 179. [↑](#footnote-ref-25)
26. Parsons, *Responsibility for Crime,* 65; Lydston, *The Diseases of Society,* 606-611; Boies, *Prisoners and Paupers*, 145, 187, 189-200; McKim, *Heredity and Human Progress*, 146; Lombroso, *Criminal Man*, 81-84, 188-197, 212-220, 247-252, 247-276; Henderson, *An Introduction*, 250, 286-288. [↑](#footnote-ref-26)
27. Henderson, *An Introduction,* 153; MacDonald, *Criminology*, 269-270; Lydston, *The Diseases of Society*, 562-568; Boies, *The Science of Penology*, 311-331; Parsons, *Responsibility for Crime*, 137, 148-149; McKim, *Heredity and Human Progress*, 188-193. [↑](#footnote-ref-27)
28. For a review of the reformatories, see Pisciotta, *Benevolent Repression,* 81-126. Also see Rafter, *Creating Born Criminals*, 95-98; Conrad, “Correctional Treatment,” 269-273. [↑](#footnote-ref-28)
29. Garland, *The Culture of Control*, 41. [↑](#footnote-ref-29)
30. *The Revised Statutes of the State of Ohio*, Vol. 2 (Cincinnati: Robert Clarke, 1896), Title III Ch. 2, Sec 7436-10-2, 1815-1816; “Sixteenth Annual Report of the Board of State Charities to the 69th General Assembly of the State of Ohio,” *Annual Report* (1891), 404-424. [↑](#footnote-ref-30)
31. *Indiana Statutes of 1909*, Ch. 239, Sec. 34, p. 899; quote from “Third Annual Report of the Board of State Charities Made to the Legislature of Indiana,” (Indianapolis: WM.B. Burford, 1890), 43; as early as 1890 the Board pushed for a habitual offenders’ law: “First Report of the Board of State Charities Made to the Legislature of Indiana,” (Indianapolis: WM. B. Burford, 1890), 32-34. [↑](#footnote-ref-31)
32. Note, “Court Treatment of General Recidivist Statutes,” *Columbia Law Review* 48.238 (1948). [↑](#footnote-ref-32)
33. “New York State Crime Commission Report” (Albany: JB Lyon, 1927), 13-17. [↑](#footnote-ref-33)
34. The states were aggregated from: Paul W. Tappan, “Habitual Offender Laws in the United States,” *Federal Probation* 13 (March, 1949): 28-31; and “Court Treatment” (1948). The 29 authorizing life sentences: NY, MI, NV, ID, IN, VT, WA, CO, TX, MO, SD, NJ, OH, CA, FL, NM, VA, LA, UT, WV, KY, KS, MN, ND, PA, WY, IL, OR, and TN (varied in whether they authorized it on the 2nd, 3rd, or 4th felony). AL, CT, DC, GA, IA, MA, NE, NH, RI, and WI did not authorize life sentences but increased sentences with the number of convictions. There were some discrepancies between the articles on the details of each law, and my own analysis of what laws I have been able to find indicate both authors made a few mistakes (for which I have made corrections), but I have not yet confirmed the details of every law. [↑](#footnote-ref-34)
35. Tappan suggests they were used more frequently than “Court Treatment.” [↑](#footnote-ref-35)
36. Todd DePastino, *Citizen Hobo: How A Century of Homelessness Shaped America* (Chicago: University of Chicago, 2003); Paul T. Ringenbach, *Tramps and Reformers, 1873-1916: The Discovery of Unemployment in New York* (Westport: Greenwood Press, 1973). [↑](#footnote-ref-36)
37. Richard L. Dugdale, *The Jukes: A Study in Crime, Pauperism, Disease, and Heredity* (New York: G.P. Putnam’s Sons, 1877), 110, 114-115; Richard Dugdale, “Hereditary Pauperism,” Conference of Boards of Public Charities, *Proceedings* (1877), 81. [↑](#footnote-ref-37)
38. Francis Wayland, “A Paper on Tramps Read at the Saratoga Meeting of the American Social Science Association Before the Conference of State Charities” September 6, 1877 in *Proceedings of the Fourth Annual Conference of Charities* (New Haven 1877), 10, 13, 16. [↑](#footnote-ref-38)
39. Conference of Boards of Public Charities, *Proceedings* (1877), xxiii, 106; Ringenbach, *Tramps and Reformers,* 16-17. [↑](#footnote-ref-39)
40. Brockway, “Crime,” 78; Brockway, “The Reformatory System,” 26 regarding property crimes. [↑](#footnote-ref-40)
41. Boies, *Prisoners and Paupers,* 206-210. [↑](#footnote-ref-41)
42. Lydston, *The Diseases of Society,* 528 on similar frontal and temporal defects in tramps and petty thieves. [↑](#footnote-ref-42)
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