**Broken Beyond Repair: Rehabilitative Penology and American Political Development**

**Abstract.** Historical research on the American criminal justice system generally agrees that the “rehabilitative ideal”—the belief that punishment should reform offenders of their criminal ways—was an important factor shaping penal development in the twentieth century. While support for rehabilitation was never unanimous, particularly in Southern states where harsher modes of punishment historically prevailed, existing accounts conclude that the onset of mass incarceration was preceded by a universal repudiation of rehabilitation as a penal philosophy in the 1970s. This article complicates existing understandings of the rehabilitative ideal by examining its intellectual roots and tracing the role it played in political development. This reveals that the ideal’s foundational premises rely on distinctions between curable offenders and incorrigible ones who cannot be reformed and must be contained, thus embedding a justification for punitive politics into rehabilitative penology. Early in the twentieth century, rehabilitative policy innovations like indeterminate sentencing were designed to have both curative and repressive functions, and political coalitions advancing punitive objectives like the eugenics movement drew on rehabilitative ideology in articulating their goals. In the 1970s, a tough-on-crime coalition facilitated the rise of the carceral state not by repudiating the ideal altogether, but by exploiting these premises to help further a punitive agenda. This should alarm contemporary reformers advancing rehabilitation as a possible panacea to mass incarceration, as the historical record indicates that the ideological structure of rehabilitative penology limits its potential as an alternative to punitive politics.

Once primarily a source of academic interest, the phenomenon of mass incarceration in the United States has become a subject of political attention in recent years. Concerns over the cost of incarceration and its negative effects on offenders’ lives have led policymakers to advocate various proposals to reduce the prison population. One commonly voiced proposition, particularly from the political Right, involves reorienting the penal system to focus on inmate rehabilitation to reduce crime and incarceration (Norquist 2016; “What Conservatives are Saying”; Shavin 2015). Inmate rehabilitation is a worthwhile goal in its own right, but an historical analysis of rehabilitative penology
reveals that a state commitment to rehabilitation is unlikely to reduce incarceration. Scholars have offered various explanations for the carceral state’s emergence, but many suggest that mass incarceration began in the 1970s after escalating retributive sentiments pushed policymakers to abandon the “rehabilitative ideal,” an ideology dedicated to reforming offenders, in favor of punitive politics (Allen 1981; Garland 2001; Pratt 2007). Rehabilitative penology was never completely embraced, as punitive and racially biased forms of punishment persisted in many states throughout the twentieth century (Oshinsky 1996; Perkinson 2010; Muhammad 2010; Lynch 2010). Nonetheless, many accounts conclude that the onset of mass incarceration was preceded by a wholesale repudiation of rehabilitation.

This article alternatively argues that a basis for punitive politics undergirded the rehabilitative ideal from its origins. Late nineteenth century penological scholars and practitioners imbued rehabilitation with a dual purpose, as failure to reform was deemed evidence that some offenders were incorrigible and must be incarcerated. An analysis of indeterminate sentencing, the hallmark policy innovation of the rehabilitative ideal, reveals that indeterminate systems have consistently served both reformative and incapacitative purposes. My analysis of the early twentieth century eugenics movement further demonstrates how rehabilitative ideology can become a weapon for coalitions with coercive objectives. Ultimately, the tough-on-crime coalition of the 1970s facilitated a shift away from rehabilitation not by abandoning the ideal, but by exploiting its premises to justify a politics focused on containment. The revitalization of rehabilitative ideology today risks further exacerbating the punitive impulses of contemporary American politics.
This analysis complicates orthodox understandings of penal rehabilitation and its role in American political development. It shows that rehabilitation has routinely resurfaced in debates about crime throughout the century and has limited the equality of those deemed incorrigible despite appearing ostensibly progressive. Several ideas about crime and human behavior that were foundational to the rehabilitative ideal continue to inform penal practice today as policymakers have repeatedly used the ideological structure of rehabilitation to further punitive agendas. By tracing the genealogy of contemporary crime politics to a rehabilitative ideology borne in the late nineteenth century, this article reveals that rehabilitation has consistently contributed to punitive policy developments, including the emergence of mass incarceration. This sheds new light on the punitive turn of the 1970s and indicates that the ideological structure of rehabilitation limits its potential as an alternative to punitive politics.

The Rehabilitative Ideal

In 1870, the American Congress of Corrections published its “Declaration of Principles” following its first annual meeting in Cincinnati. The Declaration encouraged the use of rehabilitative techniques in prisons and is widely understood to mark the moment at which prisons began to focus on inmate reform. Zebulon Brockway, a primary contributor to the Declaration’s text and the first warden of New York’s Elmira Reformatory when it opened in 1876, was one of the first penologists to implement the Congress’s recommendations. Brockway’s efforts at Elmira earned him the title “father of the rehabilitative ideal,” and he was particularly praised for Elmira’s indeterminate sentencing program that permitted early release for offenders based on their rehabilitative progress. By the end of the nineteenth century, Brockway’s “rehabilitative ideal” had
largely supplanted alternative philosophies of punishment such as deterrence-based utilitarianism, while older religious reform techniques and prison labor systems were incorporated into Brockway’s rehabilitative program (Conrad 1983; Pisciotta 1994; Rafter 1997; McLennan 2008).

Despite this nominally progressive philosophy, Alexander Pisciotta (1994) has shown that Elmira’s staff physically and psychologically abused inmates as they sought to instill Protestant ethic into prisoners while assimilating them into the working class. Brockway’s understanding of criminality provides insight into how Elmira could abuse inmates while being considered a model rehabilitative institution. Brockway saw degeneracy as a biological cause of crime, but believed that acquired traits—particularly impaired mental and moral faculties as a result of upbringing—were heritable (Brockway 1871, p. 39; 1872, p. 615; 1899, pp. 73-78). This Lamarckian conception of heredity led Brockway to conclude that in many cases, criminality was an inherited acquired trait that could be rehabilitated. However, he also endorsed Italian criminologist Cesare Lombroso’s theory of criminal atavism. Lombrosian theory contended that certain physiological stigmata such as thick skulls or long ears were suggestive of a primitive biological inheritance that rendered individuals “born criminals” whose criminality could be attributed to immutable congenital defects (Lombroso 2006).\(^1\) Brockway discussed the “inferiority” of inmates with specific physiological traits and suggested that many were “defective fellow beings” with uncontrollable “animal instincts” (Brockway 1872, p. 613; 1899, p. 96; 1912, pp. 214-222). Brockway’s acceptance of Lamarckian and Lombrosian theory allowed him to espouse a faith that some criminals could be rehabilitated while

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\(^1\) This is an edited edition of *Criminal Man*, which was originally published in 1876.
interpreting failure to reform as proof of an inclination towards criminality and “irresponsible[ness] to common restraints” (Brockway 1886; 1899, p. 80). He argued that indeterminate sentences incentivized corrigible prisoners to reform while permitting incorrigibles to be “continuously held under enough of custodial restraint to protect the public.” Between reforming the curable and containing the incurable, Brockway concluded that indeterminate sentencing would facilitate the creation of “a perfect race” (Brockway 1871, p. 42; 1874; 1904; 1912, p. 265).

That the “father of the rehabilitative ideal” supported long-term containment is worth noticing not only as a doctrinal oddity, but also because his ideological duality conditioned developments in criminology. Subsequent scholars elaborated on Brockway’s reasoning that redeemable offenders could only be identified in opposition to those who were incorrigible. In Creating Born Criminals (1997), Nicole Hahn Rafter identifies several such academics whose publications at the turn of the century were prominent in criminological circles—Arthur MacDonald, Henry Boies, Charles Henderson, August Drahms, William McKim, G. Frank Lydston, and Philip Parsons.²

The works of these scholars were also influenced eugenic discourse emerging out of Francis Galton’s work at the end of the nineteenth century, which argued that the human race should control its evolution by regulating breeding. These penologists often proposed eugenic solutions like sterilization or extermination for incorrigibles and rehabilitation for curable criminals.

Supporting rehabilitation first and foremost meant endorsing indeterminate sentencing. This was consistent across these authors’ works, as determinate sentencing

² See Rafter 1997 p. 116-8, 129 for her methodology for identifying these authors.
was universally condemned for failing to offer offenders incentives to reform (MacDonald 1893, p. 271; Boies 1893, pp. 189-90; Henderson 1893, pp. 288-293; Drahms 1900, pp. 365-70; McKim 1900, pp. 20-26; Lydston 1906, p. 605; Parsons 1909, pp. 177-81). They also generally adopted a Lamarckian understanding of heredity. For example, Charles Henderson (1893, p. 16) and Henry Boies (1893, p. 179) argued that offenders should be reformed before reproducing so children do not inherit their parents’ criminality. Like Brockway, these scholars mixed their Lamarckian reasoning with deterministic Lombrosian theory. Arthur MacDonald’s *Criminology* (1893) included an introduction written by Lombroso and a first chapter defending his work. Henry Boies wrote in *Prisoners and Paupers* (1893, pp. 171-2) that “a large proportion of [prisoners] were born to be criminals” while Philip Parsons constructed a taxonomy of criminal types including born criminals for whom crime is a “natural function” (1909, pp. 30-35).

Academics linked social ills like crime to biological determinism prior to the rehabilitative ideal’s rise to dominance. Richard Dugdale’s 1877 study of the “Juke” family in New York famously attributed the family’s history of poverty and criminality to features of their gene pool. These connections surfaced in rehabilitative ideology, with scholars claiming that tramps and paupers were “incorrigibly idle” and “criminal,” necessitated incarceration “for life,” and shared the physiological stigmata of born criminals (Boies 1893, pp. 206-10; Lydston 1906, p. 528). Rehabilitative penology’s deterministic disposition was thus significant not because determinism was new, as an intellectual basis for incorrigibility long predated rehabilitation’s rise. Rather, this framework and attendant idea of incorrigibility incorporated a duality into rehabilitative

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3 Dugdale noted that environmental factors could also cause crime, but his work was largely read as purely bio-deterministic.
penology that justified punitive and remedial policy under the guise of progressivism.

Given their acceptance of Lamarckian and Lombrosian theory, the architects of rehabilitative penology endorsed its policy innovations for both their curative and repressive functions. MacDonald contended that “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 (1893, p. 271). August Drahms argued that indefinitely containing incorrigibles was a stronger justification for indeterminate sentencing than was affording offenders a chance to reform (1900, pp. 370-5). In *Prisoners and Paupers* (1893), Henry Boies maintained that any three convictions necessitated life imprisonment (pp. 178-9), and he later wrote in *The Science of Penology* (1901) that, “The reformatory…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” (pp. 188-9). In addresses to the American Prison Association, Charles Henderson repeatedly emphasized that the indeterminate sentence was both a reformatory and incapacitative tool (*Proceedings* 1908, 135-152; *Proceedings* 1911, 43-46), and Arthur MacDonald told Columbia University students in 1901 that criminals “are of two classes, those who are so born and those made by their surroundings” and that born criminals “cannot be helped” and must be contained (“Indeterminate Sentences” 1901, 11).

Support for additional rehabilitative techniques like education, spiritual reform, and prison labor was common, but consistently situated in a doctrinal framework that entailed a belief in incorrigibility. For example, Charles Henderson argued that
educational programs helped identify which inmates are “uneducable” and “incorrigible” and should be segregated to ensure their “gradual extinction” (1893, p. 153), while Arthur MacDonald—who later served on the US Bureau of Education—suggested that prison educational programs could identify incorrigibles whose criminal instincts would “overrule or suppress the intellectual nature” (MacDonald 1893, 50-55). Their works concluded by defending indefinite detention, compulsory sterilization, and extermination for incorrigibles (Parsons 1909, pp. 65, 148-9; Lydston 1906, pp. 606-11; Boies 1893, pp. 189-200; Boies 1901, pp. 311-31; McKim 1900, p. 146, 188-93; Henderson 1893, pp. 286-8; MacDonald 1893, pp. 269-70).

In the forty years following Elmira’s opening, seventeen reformatories were built across the country emulating, to greater or lesser degrees, Brockway’s model (Pisciotta 1994, pp. 81-126). By accepting the existence of born criminals, rehabilitative penology put the onus for reform exclusively on individuals and disregarded the social and economic structures that contribute to criminal behavior, absolving the state of any duty to reform incorrigibles. Many instruments of penology that are often taken for granted as progressive, like early release incentives, were tools created by Brockway and his protégés to further this project of sorting offenders into naturalized categories of corrigibility.

Borrowing from the field of American Political Development, this article conceptualizes political actors as operating within an inherited context of established ideational constructs that serve as constitutive elements for coalitional development and institutional change (Smith 2014). Twentieth century policymakers have repeatedly justified punitive politics by appropriating from a constellation of ideas about criminality
shaped by rehabilitative ideology. Pisciotta (1994) and Rafter (1997) have demonstrated how some of these ideas directed the development of reformatory institutions at the turn of the century, and this article extends this analysis by evaluating rehabilitative penology’s role in shaping Progressive Era sentencing and eugenical laws as well as its role in the punitive politics of the latter twentieth century.

**Rehabilitative Penology in the Progressive Era**

Despite their reformist impulses, Progressives of the early twentieth century often coupled enlightened policy with a politics founded on Social Darwinism and pseudo-science that isolated mental defectives, racial minorities, and undesirables from “worthy” elements of the population. The dual logic of rehabilitation provided ammunition for policymakers to target criminals as unworthy inferiors through sentencing and eugenical reforms. Despite being the cornerstone rehabilitative penology, indeterminate sentencing systems were designed with an eye towards containment, while eugenicists utilized rehabilitative penology to justify their politics. Together, these examples highlight four facets of rehabilitative ideology that justified punitive politics—(1) many criminals were incorrigible; (2) incorrigibility was largely biological; (3) offenders were personally responsible for their behavior and capacity for reformation; and (4) coercive state institutions were capable of enacting positive social change.

A few qualifications should be noted. First, the relevance of biology cannot be rejected in whole, as physiological disorders can produce behavior manifesting as crime. However, this account notes that bio-determinist criminology has historically targeted minor offenders and marginalized members of society in abusive ways. Second, eugenicists couched their discourse in deterministic frameworks that would have likely
secured the same reforms without the rehabilitative ideal. But they employed the rehabilitative ideal in justifying their objectives, demonstrating how rehabilitative ideology is ripe for weaponization by punitive coalitions championing exclusionary politics. Last, this analysis recognizes the breadth of early twentieth century race science as an academic discipline identifying scores of races, which downplays the black-white racial dynamic. While this article periodically considers how rehabilitative ideology interacted with ideas about black criminality, differentiating between the influences of racial and rehabilitative ideologies on punishment merits independent analysis.

**Sentencing.** Following Elmira’s lead, most states passed indeterminate sentencing laws at the turn of the century. While records of state legislatures during these years are largely unavailable, documents from State Boards of Charities (SBCs) are accessible. SBCs emerged during this period to supervise state welfare institutions and regularly published advisory reports to state legislatures. An analysis of these shows how rehabilitative penology influenced the structure of indeterminate sentencing laws. The idea of incorrigible criminality was politically valuable, and rehabilitative ideology offered policymakers the opportunity to present themselves as progressive while reaping the political benefits of being punitive.

After New York’s success, Ohio passed an indeterminate sentencing law in 1885. The law granted judges the discretion to sentence third time felons or petty thieves who had “failed to reform” to life imprisonment. Their 1890 report provided the legislature with correspondence from Brockway providing advice on how to structure the system. Later reports praised the state for operating on “substantially the same plan as that of New York” by sorting inmates into divisions based on corrigibility and for limiting early
release to “a limited class of prisoners” (Ohio SBC 1890, pp. 36-37, 43-44; 1891, p. 424; Ohio SBC 1899, p. 9). Indiana established an indeterminate system in 1897 after years of advocacy from the state SBC, which cited Elmira as proof that indeterminate sentencing protected society through “reforming the corrigible criminals and permanently containing the incorrigible” (Indiana SBC 1890, p. 43; 1893, pp. 33-34). Illinois’s SBC similarly referenced Elmira in arguing that indeterminate sentencing protected the public by detaining “the most dangerous” and “born criminals” (Illinois SBC 1884, p. 168-9; 1888, p. 177). In 1891, Illinois enacted its indeterminate sentencing law, which the board claimed embodied “the nobler purpose…to reclaim as well as punish” (Illinois SBC 1898, p. 10; 1900, p. 363). The board frequently cited Arthur MacDonald and Charles Henderson in discussing penal reform (Illinois SBC 1902, p. 253; 1909, pp. 619-20).

The Pennsylvania Board, on which Henry Boies served from 1887 to 1901, praised the state’s indeterminate sentencing law for increasing the average confinement period of inmates (Pennsylvania SBC 1889, p. 7; 1892, p. 13; 1900, p. 5). New York’s SBC also favorably claimed that, “in every state where the indeterminate sentence has been given trial, the average term of imprisonment has increased” (New York SBC 1905, p. 805). This indicates that the punitive elements of rehabilitative ideology were just as, if not more, influential to the design and implementation of indeterminate sentencing statutes than were remedial goals. In 1907, New York went to the logical extreme of indeterminacy by passing a law authorizing life sentences for fourth time offenders, implementing requests of the SBC that the indeterminate sentence “be relieved of its maximum limit” so as to contain incorrigibles permanently (New York SBC 1907, p. 647; 1905, pp. 795, 798, 804).
Beginning in the 1920s and 1930s, penal institutions abandoned correctional goals to pursue efficient prison management, and traditional rehabilitative techniques were repurposed to turn convicts into complacent inmates rather than productive citizens (McLennan 2008, pp. 419-448). But despite this shift away from rehabilitation, presumptions about incorrigibility remained attached to sentencing. In 1926, New York passed a series of statutes called the Baumes’ Laws abolishing early release incentives, increasing sentences for recidivists, and instituting life sentences for fourth felony convictions. These laws have been interpreted as consistent with managerial penology (McLennan 2008, pp. 448-62). But the law’s sponsor Caleb Baumes claimed that their purpose was “protection to the public” against “incurable” offenders (Baumes quoted in “Court Treatment” 1948, p. 238). The state Crime Commission concurred that law aimed to contain offenders who “cannot be changed by reform,” and noted that, “there is nothing new about this statute” because it simply replicated the 1907 statute that went unenforced due to poor record-keeping by police and courts (1927, pp. 10, 13).

While the Baumes Laws were symptomatic of a shift towards managerialism, they replicated statutes based on rehabilitative theory and concerns about incorrigibility remained a central political justification for them. This indicates that the policy innovations and ideological assumptions of rehabilitation had some staying power even as alternative penologies gained influence. Over the next two decades, forty-three states passed legislation based on the Baumes Laws (Tappan 1949; “Court Treatment” 1948). By 1970, all state and federal jurisdictions had indeterminate sentencing systems (Reitz 2011, p. 473). It was not until the 1960s that rehabilitation explicitly returned to political discourse, but the indeterminate sentence and the ideas attached to it shaped development
during mid-century even as other penologies emerged.

**Eugenics and Race Science.** Race science and eugenics were distinct, but interdependent, schools of thought in the early twentieth century. Scientific racism was an intellectual endeavor seeking to hierarchically organize human racial categories with roots at least to the eighteenth century, while the eugenics movement emerged late in the nineteenth century with the aim of improving humanity through selective breeding. Deterministic eugenic concepts emerged independently of rehabilitative penology, as did the ascriptive racial taxonomies of race scientists. But the symbiotic relationship between eugenics and race science facilitated the repression of the “unfit,” and both schools drew on ideas about criminal incorrigibility. Particularly, eugenicists targeted criminals for compulsory sterilizations, a procedure defended by several penologists (MacDonald 1893, pp. 269-70; Boies 1893, pp. 269-71; Lydston 1906, pp. 562-8).

Before the turn of the century, compulsory inmate sterilizations occurred off the record. Doctor Harry Sharp performed at least 176 vasectomies in Indiana prisons in the fourteen years prior to the state’s legalization of the procedure in 1907 (Black 2003). Sharp claimed that candidates for sterilization could be identified by the physical markings noted by Lombroso (Sharp 1909a; 1909b). In the twentieth century, additional medical professionals became vocal advocates for sterilization laws (Cohen 2016, pp. 37-76). Doctors and scholars often cited rehabilitative penologists to defend the procedure. In 1900, President of the Academy of Political Science George Makuen endorsed sterilization, citing Brockway’s belief that penology should be about caring for criminals and preventing their propagation. He claimed that William McKim’s suggestion to exterminate incorrigibles was excessive, but revealed “the drift of thought” in penology.
and used it to depict sterilization as humanitarian. Makuen also cited Boies’ *Prisoners and Paupers* in claiming that “Pauperism, criminality, [and] insanity” are “all one interdependent family” that were grounds for sterilization (Makuen 1900, pp. 2-7). In the Academy’s Bulletin, S.D. Risley similarly used McKim as a counterpoint to portray sterilization as progressive (Risley 1901, pp. 584-6). In 1904, Dr. Martin Barr defended sterilization as “a remedial measure” (191), and in 1909 penologist Charles Henderson appeared before the American Prison Association to defend the procedure (*Proceedings 1909*, pp. 223-253).

By 1910, the eugenics movement gained enough momentum to establish the Eugenics Records Office (ERO). As the national center for the study of heredity, the ERO targeted the most defective 10% of the population for sterilization and segregation, including the feeble-minded, paupers, and criminals. The ERO’s broad definition of “criminal” spanned from vagrants to felons and served as an expansive dragnet for the criminally incorrigible. The organization’s founder Charles Davenport argued in the eugenical text *Heredity in Relation to Genetics* that “the fact of incorrigibility” necessitated inmate sterilization (1913, pp. 83-92, 261, 266). Harry Laughlin, another a high-ranking ERO official, frequently cited rehabilitative penologists. His treatise *Eugenical Sterilization in the United States* (1922) included extensive quotations from articles and books about criminality that defended sterilization with references to Lombrosian theory (pp. 122-4). Laughlin cited several multipage-length quotes from Boies’ *Prisoners and Paupers* (1893), including Boies’ statements that imprisonment permits the reproduction of “those who would perish without its aid” and that, “in no sense could the deprivation of [sexual] organs inflict injury or damage to criminal or
pauper” (Laughlin 1922, p. 158; Boies 1893, pp. 269, 271). Laughlin also referenced a brief submitted by Washington State during a legal challenge to the state’s sterilization law using Boies’ work to defend the statute (Laughlin 1922, pp. 158-159).

Support for eugenics was not limited to medical circles. Michael Willrich (1998) has traced the advent of “eugenics jurisprudence” in the early twentieth century, defined as “the aggressive mobilization of law and legal institutions in pursuit of eugenic goals” (p. 66). Willrich outlines the history of the Chicago Municipal Court, which opened a Psychopathic Laboratory in 1914 to identify genetically predisposed criminals. Tens of thousands of defendants were tested in the lab during Harry Olson’s tenure as Chief Justice until 1930. The lab assisted judges in sentencing, sent defendants to institutions for the feeble-minded or mentally ill, and served as a model for labs in several cities. Olson stated that crime control should be “the first step in the eugenics programme” (Willrich 1998, pp. 85, 89).

Eugenic practitioners thus drew on rehabilitative penology in different ways, as some defended sterilization as punishment while others saw it as curative. As Laughlin noted in his typology of sterilization laws, some state laws reflected “therapeutic” logic (California called it “beneficial and conducive” to the inmate) while others were punitive (Washington called the procedure “an addition to punishment”) (Laughlin 1922, pp. 100-1). Sixteen states authorized criminal sterilizations by 1922, and though most focused on violent and sexual offenders, others cast a wide net. California and Oregon targeted anyone convicted of three felonies while four states targeted “habitual criminals,” with
only one defining the term.⁴

The Supreme Court upheld compulsory sterilizations in the 1927 decision *Buck v. Bell* (274 U.S. 200) in which Justice Holmes wrote, “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.” It is significant that Holmes linked degeneracy to crime, as this reflected his personal beliefs in eugenics (Cohen 2016, pp. 239-242). In his speech “The Path of the Law” thirty years before *Buck*, Holmes stated that, “If the typical criminal is a degenerate, bound to swindle or murder by as deep seated an organic necessity as that which makes the rattlesnake bite...he cannot be improved” (1897, p. 1002). After *Buck*, the national rate of sterilizations skyrocketed to nearly 2,000 annually (Black 2003).

There is reason to believe that sterilizations were less common in prisons than in mental facilities, especially since some states only targeted the mentally ill and disabled (Hunter 1916). But as Rafter (1997) has shown, early twentieth century research published by scholars like H.H. Goddard (1914) blurred distinctions between mental illness, low intelligence, and criminality by treating the mentally ill as “criminal types” and by suggesting that “born criminals” were a variety of “feeble-mindedness.” Further, courts with laboratories like Chicago’s routinely sent defendants to institutes for the mentally ill and feeble-minded. This all suggests that the occupants of mental institutions where sterilizations were most common probably included many “criminal types.” While not all were convicted criminals, at least 70,000 people were subjected to compulsory sterilizations between 1900 and 1970, although this is probably an underestimate given

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⁴ Text of laws in Laughlin (1914), (1922). Kansas’s definition was “a person who has been convicted of some felony involving moral turpitude.”
the likelihood that procedures occurred off the record.

Southern states were slower to endorse eugenics than Northern states. This is partially because eugenicists initially focused on purifying white genetics and segregating blacks out of the gene pool until eugenics was connected to blackness in the 1910s (Cohen 2016, pp. 58, 71-76). Further, justified by the fusion of race science and criminological research, unique forms of punishment reserved for blacks like convict leasing and lynching tended to characterize Southern criminal justice (Oshinsky 1996; Muhammad 2010; Garland 2010). These practices were built on notions of black incorrigibility inherent to long-standing ascriptive racial ideologies. However, the resemblance these ideas shared with the idea of incorrigibility embedded in rehabilitative logic indicates that the rehabilitative ideal was never a true alternative to Southern racialized justice. The “incorrigible” category has historically been populated with different groups, including recidivists, paupers, and “mental defectives,” and would have likely included blacks in the South. This complicates the commonly held conclusion that Southern states rejected rehabilitation to exercise abusive racialized justice, as this claim mistakenly assumes that the rehabilitative ideal would have actually offered black offenders meaningful rehabilitative opportunities.

Support for eugenics faded as the century progressed. Buck briefly rejuvenated the movement so that 28 states had sterilization statutes by 1931, but by 1942 liberals began to repudiate the eugenics tradition as the Court struck down an Oklahoma statute in Oklahoma v. Skinner (316 U.S. 535) authorizing sterilizations of habitual offenders. Adam Cohen and Edwin Black complicate this history, as Skinner’s narrow ruling did not overturn or limit Buck but only struck down the statute for not differentiating between
crimes of “moral turpitude” and other crimes, while sterilization rates actually rose immediately following *Skinner* and only noticeably fell two decades later (Cohen 2016, pp. 317-9; Black 2003, p. 398). The last state-sanctioned sterilization was ordered in 1981, indicating that relics of the eugenics movement and the conceptual overlap between mental illness, disability, and criminality had surprising durability before subsiding (Cohen 2016, p. 319). But this article does not argue that eugenical ideology has been a constant fixture of twentieth century American political development. Rather, this case highlights how deterministic conceptions of criminality attached to rehabilitative ideology can reinforce the objectives of punitive coalitions. As the final section of the paper argues, this offers insight into the dangers posed by the revival of bio-criminology and rehabilitative ideology today.

**Rehabilitation, Sentencing Reform, and Mass Incarceration**

Rehabilitation was reinvigorated by liberal discourse in the 1960s. In its 1967 report, the President’s Crime Commission endorsed funding for early release, parole, probation, and prison rehabilitation programs as recidivism reduction interventions. This situated their logic in a doctrinal framework comparable to original framings of rehabilitation. Published in 1972, the National Council on Crime and Delinquency’s “Model Sentencing Act” similarly articulated the original logic of rehabilitation, stating “Persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation, considering their individual characteristics, circumstances, and needs…[D]angerous offenders shall be identified, segregated, and correctively treated in custody for as long terms as needed” (Von Hirsch 1976, p. 9).

Two years later, Robert Martinson (1974) published a paper concluding that
prisons used few rehabilitative techniques successfully. His work was famously interpreted as saying nothing works, permitting conservatives to seize the empirical high ground in dismissing rehabilitation (Ruth and Reitz 2003, pp. 83-4). Two years later, the report Doing Justice published by the Committee for the Study of Incarceration stated that, “To our surprise, we found ourselves returning to the ideas of such Enlightenment thinkers as Kant and Beccaria—ideas that antedated notions of rehabilitation that emerged in the nineteenth century” (Von Hirsch 1976, p. 6). Some committee members like Andrew Von Hirsch defended a just-deserts philosophy couched in Kantian retributivism, rationalizing punishment as a moral condemnation of an offender’s actions that should be proportionate to the offense in order to rectify the moral imbalance it created. Alternatively, Cesare Beccaria’s eighteenth century deterrence theory positing that swift and certain punishments proportionate to the crime could deter individual offenders and the broader population was revitalized by James Q. Wilson in his defense of determinate sentencing. Just-deserts and deterrence frames focused on providing sentences commensurate to an offense’s gravity, a distinction from rehabilitative theory in which sentences reflected judgments of an individual’s reformative capacity.

Conventional narratives conclude that political shifts in the 1970s drove policymakers to abandon rehabilitation in favor of a harsh ethic of punishment steeped in alternative ideologies. A coalition of tough-on-crime intellectuals and policymakers drastically reframed understandings of criminality in constructing their politics, but doing so involved reworking ideas key to rehabilitative penology. The push for punitive sentencing reforms, particularly at the federal level, often drew on reasoning only found

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5 Other just-deserts scholars had alternative understandings of Kant; see Morris (1974).
in rehabilitative penology. My aim is not to suggest that rehabilitative ideology was the foremost cause of the carceral state’s rise, but that it is an overlooked contributor to the politics of mass incarceration.

Indeterminacy was a central target of the Right’s assault on rehabilitation. James Q. Wilson’s *Thinking About Crime* (1975) captured this discursive shift and rationalized the conservative coalition’s agenda (Ruth and Reitz 2003, pp. 81-91). Wilson wrote that, “Wicked people exist. Nothing avails them except to set them apart from innocent people” (p. 239). His second edition (1983) added a chapter compiling studies validating Martinson’s work and claimed that indeterminate sentencing rested on “heroic assumptions” about criminals’ corrigibility (pp. 162-77).

In the 1970s, the Right used the perceived failure of the Civil Rights Movement and War on Poverty to reduce crime to depict crime as a personal choice (Flamm 2005). In this context, Wilson’s work resonated with politicians and the public by attributing inequality to personal failures and permitting people to distance themselves from the social and economic problems plaguing disadvantaged communities (Ruth and Reitz 2003, p. 88). Leftist intellectuals also began to reject rehabilitation, with Francis Allen (1981) and Andrew von Hirsch (1976) concluding that it invaded inmates’ rights and Marvin Frankel (1973) and Charles Silberman (1978) conceding to social science evidence damning rehabilitation. Ted Kennedy also pushed for determinate sentencing out of concern that indeterminacy generated arbitrary sentencing disparities. This broad alliance made being anti-rehabilitation the only viable political position.

The emergence of mandatory sentencing followed after indeterminate schemes were discredited. The Federal Sentencing Act of 1984 authorized the newly created
United States Sentencing Commission (USSC) to produce more determinate sentencing guidelines that ultimately were, as Michael Tonry (1996, p. 89) noted, “oriented more toward toughness than toward fairness” given how dramatically they increased sentences. Numerous states constructed similar systems cutting parole, implementing determinate guidelines, and increasing prison terms. A theoretically pure determinate system does not exist, as all variations permit some early release opportunities, but these mechanisms were radically constrained (Reitz 2011, pp. 474-5). This represented a denunciation of the core policy of rehabilitation.

In a 1983 report about the Sentencing Reform Act, the Senate Judiciary Committee wrote, “imprisonment is not an appropriate means of promoting correction and rehabilitation” (Senate Report 98-223, p. 73). Shortly before the law’s passage, the House Judiciary Committee similarly specified that, “The bill prohibits the use of rehabilitation as a rationale for imprisonment” (House Report 98-1017, pp. 28, 40). However, the Senate Committee also clarified that it “does not suggest that efforts to rehabilitate prisoners should be abandoned” (Senate Report 98-223, p. 73) while the House Report stated that rehabilitation remained “a permissible reason for imposing a sentence” (House Report 98-1017, p. 40). This logic recognized value in pursuing rehabilitation in sentencing, but opposed incarceration as a rehabilitative tool. Thus, when the Act charged the USSC with promulgating sentencing guidelines, Congress left some room for the Commission to consider rehabilitative ideology.

First published in 1987, the guidelines constructed a matrix primarily considering offense seriousness and an offender’s criminal history in specifying a narrow range in which federal judges could sentence offenders. The first page of the 1987 guidelines
manual explicitly stated four purposes of punishment: “deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender” (USSC 1987, p. 1.1). Confinement in substance abuse centers, mental health institutions, and similar facilities as conditions of probation or supervised release were authorized as sentencing options serving rehabilitative goals (1987, pp. 5.8-9, 5.23). Rehabilitation thus remained a permissible consideration for judges in constructing non-carceral sentences, although these options were limited to few cases.

However, the logical reciprocal to rehabilitation—the predictive incapacitation of incorrigibles—also influenced the new sentencing regime. Defending the use of criminal history as a factor that could increase a defendant’s sentence, the Commission claimed that, “To protect the public…the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation” (1987, p. 4.1). An offender’s criminal history score was calculated not only by number and type of past convictions, but also included “diversionary dispositions” defendants received in state courts. Through diversionary dispositions, states authorized judges to grant non-carceral punishments for rehabilitative purposes in lieu of a finding of guilt (Shapiro 2008). By incorporating diversionary dispositions into an offender’s criminal history score, the Commission stated that it ensured “that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes [would] not be treated with further leniency” (1987, p. 4.8).

The USSC suggested that considering criminal history was consonant with just deserts and utilitarian goals in addition to rehabilitative ones (1987, p. 4.1), but this rests on dubious reasoning. Just-deserts scholars often acknowledged that a penology focused
on rectifying moral imbalances generated by specific acts left little logical room for lengthening an offender’s sentence based on past behavior (Von Hirsch 1976, pp. 85-88; Morris 1974, pp. 79-80). From a utilitarian perspective, Wilson found enhancing sentences for recidivists irrational given that recidivists are generally not deterrable, and also cautioned that sentences could be unjustly extended for previous minor offenses (1983, pp. 140-158). Echoing Beccaria, Wilson stated that, “severity is the enemy of certainty and speed” (1983, p. 135). Predictive containment based on past behavior is difficult to fit within retributivist and deterrence frames, but was designed as a corollary to rehabilitation by using recidivism to identify incorrigibles.

Rehabilitation and indeterminate sentencing was discredited by a set of political and intellectual strategies. The shift to determinate sentencing was significant, but embodies some ideological continuity with indeterminacy. Constraints on judicial discretion and early release opportunities reflect a recalculation in estimates of incorrigibility, as determinate reforms were fueled by anxieties that judges routinely underestimated criminal incorrigibility. This was a crucial achievement of the punitive coalition—not dismissing rehabilitation, but reframing ideas central to rehabilitative ideology to stoke fears that criminals were unreformable. This coalition exploited the repressive facets of the rehabilitative ideal to legitimate their punitive politics.

Neoliberalism and Bio-Criminality

After incarceration, many offenders return to structurally disadvantaged communities with limited opportunities for social and economic mobility. Given that

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6 In *On Crimes and Punishments*, Beccaria wrote, “it is essential that [punishment] be public, speedy, necessary, the minimum possible in the given circumstances, [and] proportionate to the crime” (113).
rehabilitative ideology disregards such structural factors that contribute to crime, it is unsurprising that rehabilitation has not been shown to reduce recidivism. This has led some scholars to defend rehabilitation on its own merits, not as a recidivism reduction tool (Gottschalk 2015). But it is unlikely that rehabilitative penology will be embraced as an inherent good today, as its emphasis on offenders’ personal flaws comport with contemporary punitive neoliberal politics.

Neoliberalism is a political ideology and normative order of reason in which market analytic frames become the dominant schema for evaluating all aspects of human life. The application of market rationality to non-economic phenomena has specific implications, as people are encouraged to view themselves as firms and cultivate their human capital in order to compete in all domains of life. Inequality is then naturalized because it is attributed to the failure of some to develop competitive human capital (Brown 2016, pp. 1-74). Since the success of capital is premised on defeating competitors, failure populations must always exist as a matter of principle in a neoliberal context. The state is then not simply retrenched; progressive assistance is seen as a distortion of market dynamics and is replaced by intrusive state interventions punishing the failures produced by the marketplace (Brown 2016, p. 72; Spence 2016, pp. 21-22). Loïc Wacquant has shown how since its ascendance in the 1970s, neoliberalism has paternalistically regulated urban marginality and criminality by interpreting the behavior of poor and criminal populations as functions of their personal shortcomings warranting punishment and a denial of social and economic security. Punitive politics operates symbolically to convey the message to marginalized populations that they will be punished unless they transform into successful market-compliant worker-citizens.
Neoliberal rationality, and its tendency to blame criminality on underdeveloped human capital, creates an amenable context for rehabilitative penology to be employed punitively. The idea that offenders alone are responsible for their behavior and that incorrigibility can only be attributed to causes within the individual complements the application human capital theory to criminality. Further, the history of American eugenics clarifies the potential dangers posed by the contemporary revival of bio-criminology in a neoliberal political context. While the state has consistently blurred the distinction between mentally ill, disabled, and criminal populations—and, as Bernard Harcourt (2006) has suggested, emphasized their containment and “reformation” in different institutional settings overtime—the eugenic links between mental illness, disability, and criminality forged early in the century have largely been rejected. But eugenicists’ use of rehabilitative ideology illustrates the potential for contemporary bio-criminology and a revived rehabilitative ideology to be weaponized by punitive neoliberal coalitions, as bio-criminology implies that individuals’ capacity to cultivate human capital is biologically limited.

It is unclear whether the renaissance of bio-criminology has been driven by neoliberalism, if the causal arrow points the other or both ways, or if their concurrent emergence was coincidental, but it is not the goal of this article to make this

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7 Harcourt (2006) demonstrates consistency in America’s aggregate institutionalization rate from 1938 to 2000, which included those institutionalized in mental facilities and prisons. After asylums deinstitutionalized in the 1960s, the prison population increased and kept the total rate relatively consistent. Harcourt’s account is more descriptive than causal and downplays the larger female and white populations in asylums. Also see Ruth O’Brien (2001) on the history of disability, discrimination, and rehabilitation, for a critical analysis of rehabilitative logic compelling individuals to adjust to society rather than changing society to meet the needs of individuals.
determination. Rather, this analysis demonstrates that intellectuals and criminal justice officials have started to draw on bio-deterministic concepts in justifying punitive practices. This creates space for rehabilitative theory to be deployed punitively against the biologically incorrigible. This account is broadly consistent with Foucault’s account of bio-politics, in which neoliberalism’s rise is seen as intertwined with the extension of political control to all human social and biological processes. Bio-politics views the population as a scientific and political problem and as the central object of governance. By measuring and regulating population-wide phenomena, such as criminal behavior, bio-politics acts preventatively to compensate for unpredictable phenomena and maintain social and biological facets of human life on equilibria (Foucault 2008, pp. 239-266; Foucault 2003, pp. 241-60). Theoretical explanations of criminality as a biological behavioral anomaly situate “incorrigible” offenders within power discourses in which they are aberrations from this equilibrium and necessitate incarceration.

The roots of bio-criminology’s revival can be traced to the 1960s and 1970s when research on XYY “Super-Males” was advanced as evidence of crime’s biological basis (Gould 1981, pp. 173-5). Scholars have recognized that deterministic intellectual constructions of criminality have since surfaced in political discourse, including “career criminal” scholarship during the Reagan years and “super-predator” research in the 1990s, which permitted policymakers to rationalize punitive policies by depicting criminality as an incurable threat to public safety (Howell 2009; Hagan 2010). A more explicitly bio-deterministic explanation of social inequalities and ills came in 1994, when Herrnstein and Murray concluded in *The Bell Curve* that IQ is a genetic trait, is a stronger predictor of criminality and other social problems than environmental or socioeconomic
factors, and limits an individual’s personal potential.

Contemporary bio-criminology draws on a range of themes, including genetics (Beaver et al. 2009), psychophysiology (Patrick 2008), and neurology (Raine 2013). Bio-criminologists such as Adrian Raine endorse policy solutions that sound similar to the proposals of late nineteenth-century criminologists, including indefinite containment for high-risk offenders and mandatory therapy for those biologically prone to crime (2013, pp. 341-51). While biological factors can cause behavior manifesting as crime, the nascent developmental stage of disciplines like genetics and neurology should give us pause before accepting sweeping policy recommendations from these fields. For example, despite favorably reviewing literature about crime’s genetic basis, Raine admits that these conclusions are only based on the 2% of DNA that performs protein-coding functions and that it is unclear what purpose the remaining 98% serve (2013, 339). But esoteric language can make it difficult to see such disputable reasoning.

Current trends reveal some growing support for compulsory sterilization. Between 2006 and 2010, almost 150 inmates were pressured into sterilization by the California Department of Corrections and Rehabilitation, prompting a rebuke from the state legislature (Schwartz 2014). In 2015, several prosecutors were fired in Tennessee for regularly negotiating sterilizations into plea deals (Associated Press 2015). Despite the disciplinary responses to these illegal practices, sterilizations occurred extra-legally for decades prior to legalization in the early twentieth century. These occurrences indicate that an ideological basis for such eugenical practices is reemerging.

Racial ideologies have also intermixed with bio-deterministic crime discourse, with scholars linking biological criminality to race (Herrnstein and Murray 1994, pp.
This complements the Right’s increased emphasis on cultural and biological pathologies as the primary explanations for disparate black criminality since the 1960s (Flamm 2005; Bobo 2004). Of course, the roots of racial disparities in criminal justice are more than a carryover of Progressive Era beliefs about innate black criminality. Naomi Murakawa (2014) has demonstrated that liberal efforts to professionalize the justice system and protect blacks from racial violence in mid century laid the institutional and rhetorical groundwork for the racially biased crime politics of the latter century. But the durability of ideas of black criminality and the revival of bio-criminology indicates that a renewed emphasis on rehabilitation is unlikely to provide black offenders meaningful reform opportunities, since neoliberal political and intellectual discourse already embraces the idea of black incorrigibility.

Rehabilitative ideology places accountability for crime with individuals by emphasizing incorrigibility and personal responsibility. This aligns with neoliberalism’s individualistic orientation as well as the conclusions of bio-criminology that some offenders are innately criminal. The incorrigibility idea has historically absolved the state of responsibility for helping incorrigible offenders rehabilitate and instead facilitated their long-term containment. As a result, traditional rehabilitative strategies can validate the neoliberal agenda of retrenching social and economic programs while expanding coercive institutions to detain the disposable “incorrigible” populations produced by market dynamics. In a context in which bio-criminology is garnering increased attention, rehabilitative penology has the potential to direct the punitive politics of the contemporary neoliberal order against groups deemed biologically incorrigible.

Neoliberal cuts in progressive social and economic assistance create conditions
producing poverty and crime, which the state defines as outcomes of individual pathologies, thus generating a self-fulfilling cycle of welfare retrenchment and carceral expansion. By establishing the social conditions that create disadvantaged populations and then blaming any resultant behavior on their own pathologies, neoliberalism produces marginalized populations that are subsequently penalized. Tough-on-crime policymakers in the 1970s reworked the theoretical premises of the rehabilitative ideal to help construct a politics that disguises how the justice system promotes this cycle. A robust revival of rehabilitative penology today will likely only exacerbate the punitive instincts that built these institutions.

Conclusion

Opinion research has long shown that public support for rehabilitation coexists with support for punitive policies (Cullen et al. 2000). This article reveals that these seemingly mutually exclusive opinions are actually not substantiated by distinct logics. Rather, the theoretical structure of rehabilitative ideology supports both positions.

It should not be surprising that many offenders recidivate after receiving rehabilitative treatment. Providing offenders with reduced sentences for good conduct may not alter their behavior in the long-term given that they often come from neighborhoods with limited potential for 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 (Western 2006). The logic of rehabilitation not only dismisses the structural factors that cause crime; it also ignores how incarceration creates obstacles to reform that can offset the benefits of rehabilitation.
To reiterate, inmate rehabilitation can offer individuals meaningful opportunities for self-improvement. But it should not be assumed that a reform agenda emphasizing rehabilitation faces no risk of a backlash. For a shift towards rehabilitative penology to shrink the carceral state, it must be divorced from its problematic premises and should not be politically framed as a recidivism reduction measure, but as an intrinsic good. Attached to its current assumptions, rehabilitative ideology will continue to obscure the structural contributors to crime and carry ideological elements that can be exploited to justify punitive politics.
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