"THE CRIMINAL IS TO GO FREE": THE LEGACY OF EUGENIC THOUGHT IN CONTEMPORARY JUDICIAL REALISM ABOUT AMERICAN CRIMINAL JUSTICE

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"The criminal is to go free because the constable has blundered."
—Judge Benjamin Cardozo, *People v. Defore*[1]

ABSTRACT

Historians of the American penal state agree that "eugenics"—the global scientific and social movement for government managing of the "racial stock" of society—was a significant influence on the major wave of penal expansion that took shape in the first decades of the twentieth century, commonly described as the "Progressive Era." As a social and scientific movement that identified both individuals and whole races as more or less "fit," eugenics fell out of cultural favor in the 1940s following international revulsion at the enthusiastic eugenic practice of the Nazi regime. Ever since then, prevailing ideas in American penal policy, both liberal and conservative, have largely (although not completely) avoided classic eugenic arguments. However, decades after policy makers renounced its prevailing ideas, a growing body of scholarship points to the ongoing legacy of eugenic thinking about crime and crime prevention that likely intensified the punitive turn of the late twentieth century and continues to shape the penal state today. It is not that contemporary penal policy makers consciously or perhaps unconsciously continue to hold eugenic beliefs or assumptions (although that is possible) but rather, this Essay argues, that an ensemble of strategic criminal justice principles, anchored in eugenic beliefs and assumptions, has broken off from this source material to become a

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[1] 150 N.E. 585, 587 (N.Y. 1926).

taken-for-granted "realism about American crime" that is now fully color-blind yet remains anchored in the strategic imperatives of the Progressive Era. It is in this context that this Essay suggests we should read Graham v. Connor *today, a quarter century after its formulation at the peak of the punitive turn of the late twentieth century, as part of broader judicial realism about American crime that has led the Supreme Court to curb individual rights in the name of giving law enforcement a necessary margin.*

This Essay examines one particularly influential vehicle through which eugenic ideas changed into a realism about crime control, traveling across time and beyond their original source material: Benjamin Cardozo. Judicial hero for the Legal Realists and their successors, star of the New York Court of Appeals, and Supreme Court appointee at the height of the Progressive/Eugenic Era, Cardozo has remained a fascination to casebook authors and biographers. In one of the most famous sentences in modern criminal procedure, Cardozo wrote, in summing up the reasons New York and other states had for rejecting the exclusionary rule as a remedy for police violations of constitutional privacy: "The criminal is to go free because the constable has blundered." This short sentence, with its deft deployment of a nostalgic characterization of police and its slightly alarming image of the criminal set free to prey upon society, does as well as perhaps any sentence could have to capture the essence of a broad eugenic program for battling America's alarming crime problem in the interwar years and turn it into a piece of judicially sanctioned realism. Indeed, this sentence has been emblematic of crime-control values ever since Cardozo put pen to paper. Intersecting in Cardozo's arresting image is a eugenic program has three key axes: (1) focus on the dangerous minority, (2) consider law enforcement a weak link, and (3) punish the criminal, not the crime.

Each of these axes took on a distinctive eugenic logic in the early twentieth century, but they were translated into a color-blind realism about crime control that played a key role in the late twentieth-century war on crime. As Cardozo's influential trope nears its centenary, the Supreme Court's shifting treatment and recent embrace of Cardozo's words provides a troubling indicator of the legacies of eugenic thinking in contemporary criminal law and procedure.

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INTRODUCTION

In the early decades of the twentieth century, a group of sophisticated social and biological scientists around the globe convinced much of the educated public, including Progressive Era judges and lawyers, that decisive action to prevent the reproduction of the "unfit" through segregation, sterilization, and pervasive controls on the leisure lives of the working classes (e.g., prohibition) could eliminate much of the crime problem in America, as well as "pauperism" and "feeblemindedness."[2] Eugenicists were hardly the only source of racism, imperialism, and white supremacy—or even of "scientific racism"—then in circulation in the United States, but in its linkage to the emerging university-based biological and social sciences, eugenics offered a powerful justification for the growing "nativism" in the United States in response to mass immigration, urbanization, and industrialization. In the scope of its support among educated classes across the political spectrum and ultimately in its success in legislation and judicial acceptance (especially in the United States), eugenics stands alone as a successful program for governing society allegedly to optimize its social and biological traits.

Although forgotten by many today, historians have shown that eugenics made a massive and lasting influence on American law and society and on criminal justice in particular. The nation passed its most exclusionary immigration laws during the 1920s in explicit reliance on eugenic expertise.[3] Prohibition was implemented by the extraordinary measure of constitutional amendment, bringing the federal government into crime control in an enduring way for the first time.[4] States expanded their expensive prison and asylum systems and some eventually pursued the sterilization of thousands of inmates; the latter was upheld by the Supreme Court in a near unanimous decision by a Progressive Era hero, Justice Oliver Wendell Holmes, in the case *Buck v. Bell*.[5]

Common to all of these projects was a belief that America had an unusually significant crime problem due to immigration from "races" deemed undesirable from eastern and southern Europe, the great migration of African Americans from the South to the cities of the North, and the degenerative tendencies that eugenicists and other reformers believed were an almost inevitable result of the conditions created by industrial and urban life (and by substances like alcohol, which went along with these conditions).

Eugenics and the enthusiasm it generated among progressive judges provided critical support for the major expansion of the penal state that took place at this

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[2] *See* DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 72 (1995).

[3] *See id.* at 94-95.

[4] *See generally* LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE (2015).

[5] 274 U.S. 200, 208 (1927).

time. Often identified with the progressive movement[6] these innovations in criminal justice remain a significant part of our penal landscape today; they include probation, the juvenile court, parole and the indeterminate sentence, and forms of proactive "preventive" policing.[7] Although these institutions are largely invisible in legal scholarship on criminal justice,[8] they extend criminal justice coercion far beyond the prison and the police force and concentrate just as heavily on minority communities.[9]

This eugenics ideology reached far beyond criminal justice. There are few areas of the modern regulatory state—that is, the activist form of government intervention in economy and society that emerged in the interwar years and reached its peak in the 1970s—that were not touched or even tainted by the reach of the eugenics ideology. From conservation and environmentalism to immigration, alcohol and drug policy, and criminal justice, Progressive Era reformers who championed government's role in these domains saw eugenic thinking as the common intellectual ground on which they arose.[10] But few areas were more shaped by the appeal of the eugenic ideas than criminal justice law and policy. If most crime was a product of hereditary or racially carried traits, a rigorous program of segregating the unfit through prisons and asylums and excluding the racially unfit through immigration restrictions could greatly reduce the burden of crime and punishment on society in just a generation or two.

Without ever being internally repudiated, support for eugenics collapsed after the 1940s in the United States as a result of the global repulsion at Nazi Germany's eugenics-inspired genocidal policies.[11] Indeed, during the forty years or so after the Second World War, criminal justice thinking swung decisively against the more explicit elements of eugenic thinking in criminal justice, especially the biological or racial theory of criminality, in favor of a greater

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[6] *See generally* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (2017).

[7] *See, e.g.*, ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 27 (2d ed. 1977) (citing correctional professionals' opinions that many criminals are "not born right"); MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 242-43 (2003) (describing eugenics' institutional success). Although often ignored by lawyers and judges, the progressive penal state includes institutions that play an outsized and often invisible role in our contemporary practice of mass incarceration and punitive policing.

[8] Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1788 (2011) (discussing significance of parole and possible uses to further just sentencing).

[9] Jay-Z, Opinion, *The Probation System Stalks Blacks*, N.Y. TIMES, Nov. 17, 2017, at A19 (discussing how probation imposes severe, unjustified demands on lives of Black people).

[10] *See* THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 110 (2016) ("In the first three decades of the twentieth century, eugenic ideas were politically influential, culturally fashionable, and scientifically mainstream.").

[11] *See* KEVLES, *supra* note 2, at 175.

emphasis on social factors and rehabilitative penology. A growing body of scholarship suggests that despite this ideological shift, core elements of the eugenics framework for criminal justice thinking never went away but instead were largely reinterpreted in light of newer and less controversial social scientific frameworks.[12] This Essay contributes to this research on the legacy of eugenic ideas in the contemporary penal state by exploring one plausible line of transmission: the rhetoric of elite judges in our common-law-oriented legal system.

A broad literature in both political science and sociology argues that ideas can, at least under some conditions, shape political events and policy outcomes.[13] For ideas to matter in this sense, it must be the case that outcomes in the world (events, policies, and practices) would—or at the very least could (since our world is probabilistic in any event)—have been different if those ideas were not present in something like their then-present form.[14] Ideas, including eugenic ideas, can do this through a variety of mechanisms, including "culture" (i.e., common beliefs and understandings), "expert knowledge" that permits further action upon the actions of others, "social identities" that permit alliances and opposition lines to be drawn, and "ideologies" or "programmatic beliefs" that help integrate policy-relevant projects and actors into effective alignments.[15] The writings of influential appellate judges in a common law legal system like the United States can operate in all these ways simultaneously, and they often do.[16]

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[12] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 276-77 (2010) (explaining racial bias against blacks in contexts of historical trends); Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 419 (2018) ("Over time, attitudes about eugenics, class and disability combined to create the policies that led to our current nationwide system of punitive detention."); Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, *Constructing the Carceral State*, 102 J. AM. HIST. 18, 22 (2015) ("[T]he history of race science is firmly anchored to the broader history of the carceral state."). *See generally* MCGIRR, *supra* note 4 (discussing growing penal state in early twentieth century alongside attempt to link drunkenness to lawlessness); JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2017).

[13] *See, e.g.*, John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 341 (1977) (examining how social processes become society rules); Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595, 595 (1993) (identifying ideas as inputs to political process).

[14] *See* Randall Hansen & Desmond King, *Eugenic Ideas, Political Interests, and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.*, 53 WORLD POL. 237, 244 (2001) (arguing that "measure of the impact of ideas has to be their effect on public policy").

[15] *Id.* at 238 (examining how eugenic ideas causally influenced politics).

[16] *See generally* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 223-58 (2001) (showing how judicial rhetoric promotes metaphoric connections that can

Here we are interested in a unique subset of this "ideas matter" literature: ideas that transmit the influence of other ideas over time and even after those core ideas themselves have suffered serious reputational damage (as eugenics did after the Nazis). In this context, judicial rhetoric is particularly important, because unlike many other discursive systems, appellate legal citation often favors landmark early opinions, the influential tropes of which then continue to set the terms of debate.

In a 1926 case before the New York Court of Appeals, then-Judge Cardozo wrote an opinion for the majority rejecting the federal exclusionary rule for New York in cases where evidence is gathered in ways that violate the constitutional protection of privacy in the home and related places.[17] Cardozo penned a condemnation of the rule that became its most significant criticism. Cardozo's pithy formula identified the problem with the exclusionary rule, famously stating: "The criminal is to go free because the constable has blundered."[18] The case was *People v. Defore*,[19] and its legacy has cast a long shadow on American jurisprudence.

It is not surprising that Cardozo, who was characterizing what he took to be a widespread repudiation of the federal exclusionary rule by state courts, took a less enthusiastic view of protecting individual rights against police intrusion through suppressing evidence that might be crucial to prosecuting defendants in criminal courts. States, then and now, are responsible for the vast majority of crime control. Federal laws at the time tended to concentrate on financial crimes, and New York was the most populous state and the state most identified with the kinds of social trends eugenicists associated with out-of-control crime: immigration, urbanization, and industrialization. The federal government might be able to afford to offer this exceptional protection to legal rights, but states could hardly be so careless.

Although commentators have noted Cardozo's shrewdness in characterizing a deliberate police invasion of a person's private room without warrant or exception as the innocent "blunder" of a "constable,"[20] the figure at the other

deeply influence how we think about law); Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996) (showing how common law enabled patriarchy to reproduce itself in modern forms despite legal abandonment of gender hierarchy by mid-nineteenth century).

[17] People v. Defore, 150 N.E. 585, 587 (N.Y. 1926). In *Defore*, decided a decade after the Supreme Court had adopted the exclusionary rule for the federal court system in *Weeks v. United States*, 232 U.S. 383, 384 (1914), Cardozo explained why few state courts had followed that precedent in their discretion to interpret their own state constitutions.

[18] *Defore*, 150 N.E. at 587.

[19] 150 N.E. 585 (N.Y. 1926).

[20] *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 56 (1990) ("The entire opinion is lucid and elegant, but the quoted sentence is the only truly notable part of it. More than notable, it is remarkable, because it packs into a simple sentence of eleven words the entire case against the exclusionary rule.").

end of the sentence has been less discussed.[21] In this Essay, I argue that Cardozo's use of the phrase "the criminal" was likely—in the discursive context of the 1920s—a reference to the figure of the eugenic or permanent criminal whose future behavior is determined by inherited traits. Although I cannot prove this claim directly from the text of *Defore*, I will demonstrate that both before and after the opinion, Cardozo expressed his commitment to a eugenic view of law and crime policy. Cardozo shared with most other Progressive Era legal and social scientific elites (and legal realists especially) acceptance of the eugenic understanding of America's serious crime problem. This he shared with other prominent legal elites like Roscoe Pound.[22]

But unlike Pound, Cardozo transformed that conventional elite understanding of the 1920s, with its explicit racial hierarchy, into a kind of "judicial realism" about crime control in American cities that is easily rendered in color-blind terms.[23] Cardozo's dry and economical quip contains a whole understanding of "criminals" in American cities and the limited capabilities of its blundering "constables," anchored in the eugenic thinking of the interwar years and a template for crime control along eugenic principles that was achieving consensus among progressive reformers in this period. Cardozo is important to this story not because he was unusual or particularly innovative in pushing this framework but because his genius as a judicial rhetorician transformed the eugenic thought shared by many progressive lawyers and jurists in the period into a color-blind formula that has become an enduring banner of crime-control realism for modern judges. That formula is comprised of the following three elements: (1) focus on a dangerous minority, (2) consider law enforcement a weak link, and (3) punish the criminal, not the crime.

Focus on a Dangerous Minority. Eugenic thinking pointed to serious crime as the product of a "degenerate" minority ("the criminal") presumed likely to be violent and predatory in their criminality. For such minorities, the normal deterrence constraints of the law were presumably ineffectual, and reform was presumably impossible (or at least unlikely). Early twentieth-century America was perceived as facing an unprecedented crime threat because of racial threats from immigration and migration and from urban conditions that reformers imagined to be criminogenic. Staying on top of this burgeoning threat required studiously identifying these especially dangerous offenders, who became the

[21] *But see* Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 309-10 (2018) (challenging logic behind Cardozo's formulation).

[22] Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 LAW & HIST. REV. 63, 67 (1998) (noting Pound's praise of eugenic jurisprudence).

[23] On color-blind equality thinking, see generally EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2003); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001); and Ian Haney López, *Race and Colorblindness After* Hernandez *and* Brown, 25 CHICANO-LATINO L. REV. 61 (2005).

focus of progressive penal institutions. "The criminal" could be identified by traits that are either highly visible, like race, or detectable only by the expert eye. Later, the idea of degeneracy would become unacceptably stained with the stigma of eugenics, but the closely associated concept of dangerousness has provided an enduring color-blind way to define "the criminal."

Consider Law Enforcement a Weak Link. Law enforcement is generally ineffective at targeting this dangerous minority of true criminals (although enforcement can remain part of a reform effort). Indeed, the same native elites looked at the urban police—made up mostly of the same immigrants and industrial communities from which arrestees came—as equally degenerate. Cardozo's dismissal of the blundering constable holds a contempt that was nativist in its sensibilities and widely shared by educated Americans in the first half of the twentieth century. It would take the war on crime to turn police into warriors and experts in the eyes of the public and the judiciary. Afterwards Cardozo's dismissive tone would be replaced by a sympathetic concern for the difficulty of their job.

Punish the Criminal, Not the Crime. Facing a population with what was perceived by elites as a growing criminal element, crime control in the twentieth century could not afford to become bogged down in the formalism of legal elements so typical of the nineteenth century.[24] A eugenics-informed crime-control model does not mistake the seriousness of crimes as defined by statutes for the seriousness of the criminal. One may catch the great criminal committing a minor crime. In Cardozo's time that meant taking advantage of the new progressive institutions like probation and parole to send the dangerous minority to as much imprisonment as possible. The late twentieth century's war on crime would perfect the art of using extreme sentencing for simple drug-possession-based offenses to incapacitate the great criminal.

As Cardozo's arresting trope of criminals gone free and blundering constables nears its centenary, the Supreme Court's shifting treatment of it provides a mark of the enduring influence of eugenics in criminology. From a strategy for tackling America's urban crime crisis in the early twentieth century, eugenics transformed itself into a pragmatic judicial realism about crime control that has supported an unprecedented expansion of law enforcement and punishment in the late twentieth century and continues to limit efforts at reform.[25] In its first postwar treatment of the issue, the Supreme Court in *Wolf v. Colorado*[26] rejected

[24] An early formulation of this view is Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913).

[25] A recent example is the law-enforcement-led backlash against New York's significant choice to eliminate cash bail without embracing a risk-assessment approach. Perhaps next to the exclusionary rule, pretrial release has been the number one bane of crime-control realists in the late twentieth century. This has led to reform of federal pretrial release law to allow for explicit preventive detention of people under arrest who courts deem dangerous, a reform upheld by the Supreme Court in *United States v. Salerno*, 481 U.S. 739, 741 (1987).

[26] 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

the exclusionary rule, even while accepting the Fourth Amendment as incorporated in the Fourteenth Amendment, citing Cardozo.[27] Little more than a decade later, the Supreme Court reversed itself in *Mapp v. Ohio*,[28] holding that the exclusionary rule was integral to Fourth Amendment rights and mandatory for state courts.[29] The majority dismissed Cardozo's phrase as superseded by history, citing mid-twentieth-century state court decisions adopting the exclusionary rule.[30] But the Court has since returned to the phrase.[31] In *Herring v. United States*[32] a major precedent limiting application of the exclusionary rule in many cases of less serious police abuse, the Court's majority fully embraced the Cardozo formula.[33]

Today, no member of the Supreme Court openly embraces eugenic thinking; indeed, it remains an anathema across the Court's ideological divide.[34] However, the enthusiastic embrace of the Cardozo formula, with its eugenic signal about born criminals and bumbling police, aligns closely with a "realism" about crime and policing that has shaped a highly deferential application of the Fourth and Eighth Amendments to the aggressive expansion of the penal state in the late twentieth century.

I. EUGENICS

Eugenics was the name[35] coined by British scientist Francis Galton to describe the new, "hard" science of racial improvement that he deduced from Darwin's theory of evolution and Mendelian principles of hereditary selection (which suggested that traits could only be inherited and not changed).[36] This new science resonated well with the new discipline of criminology (or criminal anthropology) that viewed much serious crime as the product of "criminal

[27] *Id.* at 31.

[28] 367 U.S. 643 (1961).

[29] *Id.* at 654-55.

[30] *Id.* at 651-54.

[31] Chief Justice Burger invoked the formula heartily in his concurring opinion in *Stone v. Powell*, 428 U.S. 465, 496 (1976), one of the earliest of many decisions limiting the exclusionary rule.

[32] 555 U.S. 135 (2009).

[33] *Id.* at 147-48 (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

[34] In a concurring opinion to a recent abortion rights case, Justice Thomas castigated the abortion rights movement as anchored in "eugenic goals." Box v. Planned Parenthood of Ind. & Ky., Inc. 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

[35] A neologism for "well-born." *See* FRANCIS GALTON, ESSAYS IN EUGENICS 35 (1909).

[36] For recent histories, see generally ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016); and LEONARD, *supra* note 10.

types."[37] In the United States, eugenics overlapped with existing paradigms of white supremacy and European "manifest destiny" to give rise to a whole new generation of measures intended both to enforce racial segregation and to restrict immigration and the biological influence of immigrants.[38]

Presuming that criminality and seemingly related characteristics like mental illness, "feeblemindedness," or "pauperism" were inheritable, eugenicists promised to improve almost every aspect of the economic and social performance of society through segregation of the "unfit" or "degenerate" from free society.[39] Segregation of these groups would purportedly prevent both their misconduct in the form of criminal behavior and their having children who would carry these traits. Few doubted that criminality persisted in society as an inheritable trait, and therefore most believed it could be stamped out through deft governmental efforts to segregate and sterilize "carriers" of that kind of degeneracy.[40]

Eugenic thinking in the early twentieth century contained multiple internal conflicts but had a core set of beliefs about how to reduce crime and other social problems. Eugenicists agreed that most serious crime could be traced to individuals with criminal traits (and whole populations in which such traits were believed to be prevalent).[41] Influenced by a strand of genetics known as Lamarckianism, some eugenicists within the movement's liberal wing believed that habituated conduct in the life of the individual could produce inheritable good or bad traits in the next generation, leading to reformatory as well as exclusionary logics.[42] Whether produced by the bad behavior of individuals or simply carried by them and reproduced, eugenicists shared the belief that biological degeneration accounted for what many perceived as the rise of crime in American society in the interwar years—a rise unlike any faced by competing industrial societies.[43] The belief that only concerted efforts to manage heredity could combat these issues formed much of the ideology behind what followed: immigration restriction, Prohibition, and the massive extension of the penal state, all part of the bundle of reforms that characterized the Progressive Era.

During the first decades of the twentieth century, eugenics was widely discussed across the globe as a scientific way of improving races through measures to increase the fertility of the fittest and decrease the fertility (or immigration) of the least fit, as well as a technology for nations to improve their

[37] *See* DAVID G. HORN, THE CRIMINAL BODY: LOMBROSO AND THE ANATOMY OF DEVIANCE 6-12 (2015); CESARE LOMBROSO, CRIMINAL MAN 11 (Mary Gibson & Nicole Hahn Rafter trans., 2006) (1911).

[38] *See* KEVLES, *supra* note 2, at 57-70.

[39] *See id.*

[40] *See id.* at 71.

[41] *See id.* at 46-47.

[42] *Id.* at 66.

[43] *Id.* at 46-47.

"racial fitness" in competition with others.[44] In its focus on investing public resources in healthy babies and in discouraging the reproduction of avoidable disabilities, eugenics coalesced with the rising field of public health; the two remain to some extent intertwined today.[45]

Although Great Britain, the country that originated the ideology, shared a similar elite consensus about eugenics, no nominally democratic country was more enthusiastic in its embrace of the eugenic idea in legislation than the United States.[46] Only Nazi Germany, which viewed itself in a deadly competition with the United States to become a racial superpower and which, in turn, copied its rival's system of antimiscegenation and segregation laws, would eventually exceed the United States in policies and practices pursued to eugenic ends.[47]

Domestically, at the time and since, the impact of eugenics generated the most debate in two fields: (1) immigration laws, setting legal immigration caps based on a thinly disguised racial-preference system for northern Europeans explicitly based on eugenic premises, and (2) the expansive program of segregation and sterilization for adults deemed "degenerate" due to mental illness or "feeblemindedness."[48] The central promise of the eugenicists remained consistent: selecting for a better population through racial eugenic interventions could dramatically reduce or eliminate the social problems associated with the poor, especially crime and mental illness (which were increasingly seen as the same problem).[49] The logical leaps here were many (and never had an empirical basis), especially the belief that criminality was a trait that people straightforwardly inherited.[50] But if only the most ardent eugenicists believed their methods could completely eliminate bad traits, many reformers could agree that it was logical to focus the criminal law's battle against crime on those people believed to be unfit (as well as to extend control of the unfit to those beyond the reach of the criminal law). As Galton put it, those who persistently "procreate children inferior in moral, intellectual and physical qualities . . . may come [to] be considered enemies to the State."[51]

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[44] *See id.* at 70-74.

[45] Martin S. Pernick, *Eugenics and Public Health in American History*, 87 AM. J. PUB. HEALTH 1767, 1767 (1997) ("Eugenic methods often were modeled on the infection control techniques of public health. The goals, values, and concepts of disease of these two movements also often overlapped.").

[46] A point not lost on Nazi lawyers. *See* WHITMAN, *supra* note 12, at 134.

[47] *Id.* at 141-42.

[48] LEONARD, *supra* note 10, at 110 (noting sterilization programs that targeted "hopelessly defective and criminal classes").

[49] *See* KEVLES, *supra* note 2, at 70-76.

[50] Galton's American followers, like Madison Grant, invariably cited criminality-as-inheritable-trait as the best-established eugenic fact. *See* MADISON GRANT, THE PASSING OF THE GREAT RACE: OR, THE RACIAL BASIS OF EUROPEAN HISTORY 54 (1916).

[51] Francis Galton, *Hereditary Improvement*, FRASER'S MAG., Jan. 1873, at 116, 129.

The use of long prison sentences as a mechanism of negative eugenics has generally been ignored in the broader histories of eugenics in the United States but has been recognized by historians of the penal state and was central to the policy goals of eugenic governance. As leading American eugenicist (and lawyer) Madison Grant memorably put it in his widely read *Passing of the Great Race*, which promoted eugenics and Nordic supremacy, "Man has the choice of two methods of race improvement. He can breed from the best or he can eliminate the worst by segregation or sterilization."[52] Grant concluded that the former was "impossible" in a democratic society.[53] The Columbia Law School graduate identified "the elimination of the least desirable elements of the nation [achieved] by depriving them of the power to contribute to future generations," including "actual death, life imprisonment, and banishment" as the only "practical and hopeful method of improvement."[54]

Progressive judges and lawyers were at the forefront of promoting eugenics as a master plan for the regulatory state in the early twentieth century.[55] Those squaring off against the Supreme Court's conservative due process jurisprudence and oriented toward the new ideas promoted by legal realism found in eugenics an exemplary form of their overall belief that scientific expertise about social utility could justify government in overruling individual rights.[56] Perhaps no single document epitomized this consensus more than Justice Oliver Wendell Holmes's eight-to-one majority opinion in *Buck v. Bell*, upholding eugenic sterilization for the very purposes we are describing.[57] Its infamous penultimate paragraph is worth quoting in full:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. 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

[52] GRANT, *supra* note 50, at 51.

[53] *Id.*

[54] *Id.*

[55] *See generally* LEONARD, *supra* note 10.

[56] This association has been little discussed by historians of legal realism, perhaps because it is so characteristic of their class and of Progressive Era reformers generally. Still, they have escaped much of the opprobrium that has rightly settled on other academic and reform leaders of the period. Pound's enthusiasm for eugenics is noted in *Illiberal Reformers*. *See id.* at 25 (noting associations of Roscoe Pound and others with eugenic ideas). Above all, legal realists of all stripes and generations venerated the social sciences, and the social sciences, virtually across the board in the 1920s, were convinced by eugenics, with some singular exceptions like W.E.B. Du Bois in sociology and Franz Boas in anthropology.

[57] Buck v. Bell, 274 U.S. 200, 207 (1927) (justifying sterilization by suggesting hereditary nature of mental illness).

> continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[58]

Holmes was joined by seven of his fellow Justices, including liberal Louis Brandeis.[59] Only archconservative Pierce Butler dissented, issuing no opinion.[60]

Today, scholars widely recognize that eugenics had an unusually strong hold on the United States. Widely disparaged policies ranging from prohibition to immigration restriction based on nationality emerged from this apotheosis of enthusiasm for eugenics as a vision for governing advanced industrial societies.[61] In the conventional and largely positive story, the enormous prestige and influence of eugenics crashed with the defeat of the Nazis.[62] Offended by genocidal mass murders and chastened by their own approval of eugenic sterilization, American law and social science both disavowed eugenics and embraced a greater respect for human rights.[63] However, historians have begun to question how fully this postwar shift shook off the epistemological grasp of eugenic thinking.[64] Today, many scholars of American criminal justice suggest that eugenics' influence survived and helped drive the punitive turn of the late twentieth century and the rise of mass incarceration.[65]

II. THE "CRIMINAL" AND THE "CONSTABLE": CARDOZO'S EUGENIC TROPE

When then-New York Court of Appeals Judge Benjamin Cardozo offered his famous rejection of the logic of the exclusionary rule for police violations of constitutional privacy rights—"[t]he criminal is to go free because the constable has blundered"[66]—he (and his audience) would have had in mind for this

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[58] *Id.* (citation omitted) (citing Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905)).

[59] For a discussion of Justice Brandeis's likely views (he published no concurrence), see COHEN, *supra* note 36, at 1-9.

[60] *See Buck*, 274 U.S. at 208 (noting Justice Butler's dissent). However, as the Court's only Catholic, he may have intuited the Vatican's disapproval of eugenics, which would come several years later. *See* KEVLES, *supra* note 2, at 119 ("Catholic authorities linked eugenics with the modern permissiveness that threatened the integrity of the family.").

[61] *See* COHEN, *supra* note 36, at 4-5 (explaining eugenic justifications for these policies).

[62] *Id.* at 118 ("The barbarousness of Nazi policies eventually provoked a powerful anti-eugenic reaction.").

[63] Daniel J. Kevles, *Eugenics and Human Rights*, 319 BRIT. MED. J. 435, 437 (1999) ("[E]ugenics became malodorous precisely because of its connection with Hitler's regime.").

[64] In particular, see MUHAMMAD, *supra* note 12, at 197-98 (pointing to Black/White binary in criminal justice statistics).

[65] *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 44 (2016) (explaining influence on education and antidelinquency programs); Appleman, *supra* note 12, at 462 ("The ties between institutionalization, eugenics, and social engineering have led to the imprisonment of a significant percentage of our population . . . .").

[66] People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

alarming trope not the juridical criminal (who after all would not be a legal criminal if the exclusionary rule applied in his case) but the eugenic criminal—the degenerate criminal—with all his potential for criminal violence and the reproduction of future criminal generations. Whether or not Cardozo specifically intended to invoke Lombroso's criminal man[67] or the generalized eugenic belief that criminality was an inborn trait,[68] he clearly conveyed the message that, as a social policy, allowing a criminal like Defore to go free merely to condemn a "blunder" by the police was a mistake and, if done systematically, would endanger American society. Cardozo's reasoning here comfortably fits his reputation as a pragmatic progressive with a jurisprudential preference for favoring social utility when the law does not require an inapposite result.[69]

Although none of the opinion's arguments turn on the actual facts of the criminal conduct or police misconduct in *Defore*, several of the facts would have had great resonance for his audience at the height of the Eugenic Era. The crime at issue, theft of an overcoat from another resident's room (petit larceny, a misdemeanor in New York at the time) was minor, but there was reason to believe Defore's overall criminal behavior was not.[70] During the search of Defore's bedroom, the police found a "blackjack"—a small club used in fights—the possession of which was illegal in New York at the time.[71] In short, the crime that motivated the police intervention was less serious than the crime ultimately revealed. Police discovery of this indicator of dangerousness was largely accidental (even if the search of the room was hardly a "blunder").

The facts discussed above tick off several indicators of the eugenic template for crime control.

Focus on a Dangerous Minority. Cardozo never describes Defore himself in detail. However, Defore embodied the kind of figure eugenicists blame most serious crime on: a predatory thief with indications of a predilection to violence (the blackjack) embedded among other members of the lower class. His race and criminal background are not described, but in a eugenically reformed criminal system, these are the kinds of considerations that would be considered if the criminal case continued following the retention of the evidence. Although Cardozo does not dwell on it, his formula does pose the implicit social threat of this rooming house thief with his weapon against the blunder of the constable. Although Defore's legal guilt may turn on whether the exclusionary rule should apply, his factual guilt implicates a threat factor that the opinion never names but seems to turn on. In case that threat of violence was not clear enough,

[67] *See supra* note 21 and accompanying text (explaining this classification).

[68] *See supra* notes 18-22 and accompanying text (explaining this theory and its impact).

[69] *See* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 104 (1924) ("Where then shall we look for the revelations of the folk-spirit if not in the prevailing standards of utility and welfare?").

[70] *See Defore*, 150 N.E. at 586 (describing initial crime and other indications of criminality).

[71] *Id.*

Cardozo went on in his conclusion specifically to imagine the application of the exclusionary rule to a suspect in a murder case.[72]

Consider Law Enforcement a Weak Link. Cardozo's reference to the "constable" as a blunderer may have been intended to minimize the officer's misconduct (which was hardly an accident) but also suggests a lack of confidence. Police, certainly in the 1920s, impressed few (let alone New York's top appellate judge) with their honesty or efficiency as crime fighters. In the realm of fiction, it fell to private detectives to solve complicated crimes. Most police officers, especially in the large cities where the crime problem was thought to concentrate, were from the same immigrant groups. Cardozo's trope of the blundering constable ran alongside rather than astride this judgment. When a potentially dangerous criminal like Defore comes into the hands of the law, it is as likely due to luck as due to skill. A system aimed at tackling an outsized crime problem due to a population prone to criminality could not afford to allow criminal convictions to be dismissed because of police errors.

Punish the Criminal, Not the Crime. Defore's crime was minor. The blackjack hinted at more. The full social file presented by a probation officer would show even more. In his conclusion, Cardozo went on to hypothesize the application of the exclusionary rule to a case of murder:

> A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. . . . We may not subject society to these dangers until the Legislature has spoken with a clearer voice.[73]

The *Defore* opinion itself never addresses what should be done with criminals once they are subject to the state's control, as it solely addresses whether the conviction should stand. However, the tension of the "blundering constable and criminal" trope turns on the lost benefit to society of the opportunity to impose that control. The whole thrust of Cardozo's ruling in *Defore* is to narrow the individual right—here, Defore's privacy interest in his room—by rejecting the exclusionary remedy.

I do not wish to overstate what we can discern in the words of this famous piece of judicial rhetoric. Within the four corners of the opinion, Cardozo's use of the phrase "the criminal" is at best ambiguous. It is consistent with both a notion of factual guilt grounded in the classical criminal law concerns of retributive and deterrent considerations (Defore was factually guilty of stealing his neighbor's coat) and a notion of positive criminality grounded in eugenic concerns with immanent criminality and the incapacitative and perhaps reform aims of Progressive Era penal policy. Indeed, that ambiguity is important to the formula's eventual success as a banner for realism about crime control in the late

[72] *Id.* at 588.

[73] *Id.* at 586.

twentieth century.[74] Because the phrase is consistent with a focus on punishing the factually guilty (and thus the goals of retribution and deterrence), late twentieth-century champions of crime control in those terms did not reckon with the eugenic meaning of the term for Cardozo's time. Although it may be right that, whatever its origins, the noneugenic meaning of the Cardozo formula has now become dominant in understanding the modern Court's use of the formula, the danger is that the eugenic meanings shaped strategic logics that have been transmitted down as a pragmatic realism about crime control in American cities.

The case for reading "the criminal" in positivist-eugenic terms is strengthened by considering Cardozo's own acceptance of the eugenic view of crime as evidenced in his writings and speeches.[75]

III. A WISE SCIENCE: CARDOZO AND EUGENICS

Cardozo's writings and speeches before and after *Defore* display a clear intellectual awareness of and positive alignment with eugenic thinking about crime control. Two years before *Defore*, in his 1924 book, *The Growth of the Law*, which helped burnish his reputation as one of the leading jurists of his day, Cardozo used the trope of a "wise science of eugenics" to describe judging itself.[76] Discussing the then-current Restatement projects of the elite American Law Institute ("ALI"), Cardozo celebrated the critical editorial task of its academic leaders in weeding out weak precedents and choosing the right path forward for legal evolution as an example of "what can be done for law by a wise science of eugenics."[77] The reference made clear and positive use of eugenics as a project of managed evolution. Rather than allowing law to grow naturally and haphazardly through positive citation by lawyers and courts, Restatements aimed to favor some precedents over others through their expertise. The Restatement project itself may be seen as a kind of eugenic project, since it was motivated by concern about the role that immigrant lawyers were playing in reshaping litigation.[78]

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[74] I mean "crime control" in the sense that Herbert Packer suggested in the 1960s, as the countervailing legal-system value to the due process revolution in which the Supreme Court was then engaged. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 6 (1964).

[75] I see Cardozo less as a major promoter of the eugenic idea in his time (that fell to others like Roscoe Pound) but more as a rather typical legal consumer of it: someone who fully accepted it and helped to transmit it to the future.

[76] CARDOZO, *supra* note 69, at 11.

[77] *Id.*

[78] On eugenics and the ALI, see generally JEROLD S. AUERBACH, UNEQUAL JUSTICE (1976). Like his friend and fellow progressive jurist, Louis Brandeis, Cardozo was Jewish from a family long in the United States. These Jews, mostly immigrants from Germany in the mid-nineteenth century (Cardozo's parents were Sephardic Jews of Portuguese origins), were distinct in many ways culturally and ethnically from the mostly eastern European Jews that immigrated in the 1880s and later. Jews like Brandeis and Cardozo understood the low view eugenicists had of these recent Jewish immigrants. Although they both joined other elite Jews

Cardozo presented a more complete discussion of his eugenic view of crime control in a lecture he gave before a medical association in New York, titled "What Medicine Can Do for Law."[79] Written three years after *Defore*, Cardozo favorably cited the work of eugenics-influenced criminologists like S. Sheldon Glueck, who argued that physicians rather than judges should decide on punishments.[80]

Cardozo is self-deprecating and clear that the cutting-edge ideas belong to others, but his affinity for this thinking is just as clear. After some throat clearing aimed at pleasing an audience of elite doctors (one imagines this was an evening of amicable feasting and perhaps a fat honorarium not yet shadowed by the soon-to-come market crash), Cardozo begins with a standard progressive apologia for judicial errors in the period when social and economic reforms were regularly being struck down by the Supreme Court and many state high courts on the grounds of liberty of contract: "We make our blunders from time to time as rumor has it that you make your own. The worst of them would have been escaped if the facts had been disclosed to us before the ruling was declared."[81] Striking themes that were well identified with legal realism, Cardozo quoted his earlier work, *The Nature of the Judicial Process*: "[S]tatutes are to be viewed, not in isolation . . . but in the setting and the framework of present-day conditions as revealed by the labors of economists and students of the social sciences in our own country and abroad."[82] The last bit almost certainly references eugenics.

This eugenics-infused realism includes a limited view of individual rights. Citing the many cases that struck down legislation,[83] Cardozo offered a view of rights that would have been acceptable by the most ardent legal eugenicist and that was likely written in light of *Buck v. Bell*, decided only two years earlier:

> Liberty in the literal sense is impossible for anyone except the anarchist, and anarchy is not law, but its negation and destruction. What is undue in

in supporting the new immigrants on immigration issues, the fact that both seem to have embraced eugenics in penal and social policy making (Brandeis in *Buck v. Bell* and Cardozo in his writings) may have represented their way of balancing out the competing dangers to the status of elite native Jews with racialized revulsion at new immigrants. By embracing a scientific and precise application of eugenics, like sterilization of the feebleminded or penal segregation of the criminal, these liberal Jewish jurists could counterbalance their opposition to wholesale eugenic exclusion of eastern Jews through immigration law.

[79] *See generally* Benjamin Cardozo, *What Medicine Can Do for Law*, 5 BULL. N.Y. ACAD. MED. 581 (1929) (discussing importance of medical research to development of law, especially criminal law).

[80] *Id.* at 587 ("[Glueck] puts forward the view that . . . the maximum [sentence] in every instance should be left indefinite, to be determined for the individual prisoner by psychiatrists and physicians . . . .").

[81] *Id.* at 583.

[82] *Id.* at 584 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 81 (1921)).

[83] *Id.* at 584-85.

> mandate or restraint cannot be known in advance of the event by a process of deduction from metaphysical principles of unvarying validity [rights talk]. It can be known only when there is knowledge of the mischief to be remedied, and knowledge of the mischief . . . is knowledge of the facts.[84]

It is hard to believe that Cardozo was not thinking about Holmes's opinion in *Buck*, which had specifically written of preventing unnecessary executions of the likely offspring of defective sterilization candidates, when he offered his audience the image of the blundering constable—a spectacle that was obviously familiar to him as the chief judge of the court of last resort in then-heavy-executing New York state.[85] Invoking a common "duty to our defective fellow beings" shared by doctors and judges, Cardozo asked his audience to consider "the life history of a man sentenced to the chair."[86] Consistent with the criminologists and eugenicists of his day, Cardozo asserts that this life history would show that

> [t]he heavy hand of doom was on his head from the beginning. The sin, in truth, is ours—the sin of a penal system that leaves the victim to his fate when the course that he is going is written down so plainly in the files of the courts and the stigmata of mind and body.[87]

Cardozo embraced the eugenic solution of preventive incapacitation of the defective as part of the coming reform of criminal law. He held out the possibility of a chemical solution (much as sterilization was a solution to the need for long-term segregation of the unfit) but maintained that the law must have more for those who have shown their propensity to violence:

> The criminal of old was given copious draughts of exhortation and homily administered with solemn mien by reformers lay and cleric. The criminal of tomorrow will have fewer homilies and exhortations, but will have his doses of thyroxin or adrenalin till his being is transfigured. Good people sitting peacefully in their homes and reading fearsome tales of robbery and rapine, may take comfort in the thought that while the generation of character is in this process of "becoming," the body of the offender will be in the keeping of the law.[88]

As if to address the possible objection from civil libertarians among his audience, worried about the fates of their own wayward children, Cardozo invoked the pitiable situation of the "casual offender" who "expiates his offense in the company of defectives and recidivists," the latter of "whose redemption is hopeless," and who, if freed by a rigid punitive system, "goes back after a like

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[84] Cardozo, *supra* note 79, at 584.

[85] *See Buck*, 274 U.S. at 207 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime . . . society can prevent those who are manifestly unfit from continuing their kind.").

[86] Cardozo, *supra* note 79, at 592.

[87] *Id.*

[88] *Id.* at 588.

term, or one not greatly different, to renew his life of crime, unable to escape it without escaping from himself."[89] The solution for eugenicists, one that has been repackaged for our time, is the preventive incapacitation of those deemed permanent or habitual offenders. Cardozo specifically endorsed a British statute that supplemented punishment with preventive detention: "Here or in some system not dissimilar may be found the needed adjustment between the penal and the remedial elements in our scheme of criminology."[90] Cardozo reassured his readers that he "would not shut the door of hope on anyone, though classified in some statistical table as defective or recidivist, so long as scientific analysis and study of his mental and physical reactions after the state had taken him in hand held out the promise of redemption."[91]

The point is not that Cardozo's eugenic thinking about crime was especially innovative or even influential in its time; the eugenic thought of others was far more important, including that of those cited by Cardozo in his lecture to the doctors. Virtually all of the leading social scientists of the era supported eugenics, and even the critics thought it was probably mostly accurate.[92] It is precisely because eugenics was such a consensus reform position on criminal justice and aligned so perfectly with Cardozo's realist preference for functional laws that served social utility that he saw rejection of the exclusionary rule as an easy case, a seemingly pragmatic realism about crime and criminals that he packed into his influential trope, pitting blundering constables against supposed habitual criminals.

IV. THE RISE AND FALL AND RISE AGAIN OF CARDOZO'S "THE CRIMINAL" TROPE ON THE EXCLUSIONARY RULE

From just before World War I, when the federal exclusionary rule was announced in *Weeks v. United States*,[93] to after World War II, Cardozo's case against the rule on eugenic grounds had little relevance to the federal system, which dealt with a relatively tiny and select group of people. However, once the Supreme Court's incorporation doctrine raised the possibility that the exclusionary rule would be imposed on all the states, Cardozo's pithy critique of the exclusionary rule began its own career in the Supreme Court. In *Wolf v. Colorado*, decided in 1949, a six-to-three majority voted to reject extending the rule to all of the states as part of the Due Process Clause of the Fourteenth Amendment, citing *Defore* and praising the "[w]eighty testimony against such an insistence . . . [in] the opinion of Mr. Justice (then-Judge) Cardozo."[94]

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[89] *Id.* at 591.

[90] *Id.* at 592.

[91] *Id.* at 592-93.

[92] *See, e.g.*, LEONARD, *supra* note 10, at 121-22 (discussing one scholar's acceptance of some psychological roots of difference, despite disputing eugenics overall).

[93] 232 U.S. 383, 384 (1914).

[94] Wolf v. Colorado, 338 U.S. 25, 31 (1949) (deciding not to require exclusionary rule under Due Process Clause), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

A little more than a decade later, in the landmark *Mapp v. Ohio* decision, the Court reversed *Wolf* and explicitly rejected the presumption of "blunder" that Cardozo artfully worked into his narration of the hardly accidental incident. The facts in *Mapp*, with its home-invading, warrant-faking, woman-groping, and almost certainly racially demeaning police-officer conduct, were perhaps distinguishable, but the majority opinion did not rely on such a distinction, instead rejecting the *Defore* formulation as doctrinally superseded by subsequent decisions and opining that "the force of that reasoning has been largely vitiated by later decisions of this Court."[95] Crucially, neither *Mapp* nor any subsequent decision challenged the eugenic assumptions underlying Cardozo's view that releasing Defore from the consequences of his misdemeanor conviction would be a price incommensurate with improving police compliance with the law. Soon it would return. In one of *Mapp*'s most famous passages, the Court deemed this price acceptable rather than overstated: "The criminal goes free, if he must, but it is the law that sets him free."[96] Over the next decades, dissenting Justices seeking to limit the exclusionary rule would invoke the Cardozo formulation.[97] In the 1980s, the tide turned as a new majority began limiting the rule.[98]

Cardozo wrote his formula about "the criminal" going free as a result of the exclusionary rule when eugenics was reaching its cultural peak (just a few years ahead of the Supreme Court's eight-to-one embrace of it in *Buck v. Bell*). By the time it was lauded as "[w]eighty testimony" by Justice Frankfurter in *Wolf*,[99] eugenics was out of fashion. When Justice Clark in *Mapp* described Cardozo's view on the exclusionary rule as one that "time has set its face against," the rather emphatic characterization may have hinted at acknowledgment of the eugenic thinking behind it, but the citation was to more recent Supreme Court decisions reaffirming the value of the exclusionary rule.[100] Now enshrined by a majority of the Supreme Court as limited to those circumstances where the heavy costs Cardozo emphasized are warranted by the seriousness of the police misconduct, the Cardozo formula has lost any direct association with eugenics. Yet this history has an afterlife in the expanded and aggressive penal state that was normalized in eugenic fears about the outsized crime problem facing American cities in the early twentieth century. Cardozo's formulation managed to

[95] *Mapp*, 367 U.S. at 653 (explaining various reasons to abandon *Defore*'s reasoning).

[96] *Id.* at 659.

[97] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) ("[There are] bizarre miscarriages of justice that have been experienced because of the exclusion of reliable evidence when the 'constable blunders' . . . .").

[98] In *United States v. Leon*, where the majority embraced a "good faith exception" to the exclusionary rule for searches that reasonably rely on warrants, it was Justice Brennan who invoked the by-then-fading negative view of *Defore* to insist that its metaphor about blundering is wrong. 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) ("[S]ome criminals will go free . . . because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals.").

[99] *Wolf*, 338 U.S. at 31.

[100] *Mapp*, 367 U.S. at 653.

condense that eugenic logic into a canon of realism about crime control that has flourished in our time including in a wider body of Supreme Court decisions, not only on the exclusionary rule but also more broadly in the Court's Fourth and Eighth Amendment jurisprudence.

Focus on a Dangerous Minority. This is bedrock eugenics and anchored in a hereditary view of criminal behavior. Yet the primary source of alternative thinking in the early and mid-twentieth century—the sociological school of criminal justice analysis associated with the University of Chicago—was led by scholars who accepted key parts of the eugenics framework but believed environment also played a role worthy of crime-prevention attention.[101] Once eugenics was abandoned in the 1950s as a biological theory that underpinned the salience of a minority of people involved in crimes, both criminology and criminal justice thinking reframed this as a sociological finding with undetermined but presumably social and cultural sources.[102]

Professor Khalil Gibran Muhammad's work in particular highlights the way eugenic thought allowed Black people, migrating to large northern cities during the First World War and after, to become the main focus of criminological efforts to differentiate criminal threats.[103] Equipped with eugenic thinking that cast races in a kind of continuum of racial fitness, progressive criminal justice thinkers cast Black people as far more dangerous than immigrants from less clearly white parts of Europe (Italians, Jews, Slavs, etc.).[104]

As historian Elizabeth Hinton argues, when crime policy became a front-burner national political issue during the Johnson Administration, the view that the major threat of crime was anchored in Black communities was presumptive and unquestioned.[105] An early effort to head off danger with a war on poverty soon gave way to the war on crime.

Consider Law Enforcement a Weak Link. Despite a revolution in law enforcement educational requirements, professionalism, and training that has been recognized by the Supreme Court,[106] contemporary Fourth Amendment

[101] *See generally* ALDON D. MORRIS, THE SCHOLAR DENIED: W.E.B. DU BOIS AND THE BIRTH OF MODERN SOCIOLOGY (2017).

[102] An important example is Marvin Wolfgang, whose influential book, *Delinquency in a Birth Cohort* (coauthored with Thorsten Sellin and Robert Figlio), provided empirical evidence that 5% of Philadelphia's young men born in 1945 were responsible for nearly half the arrests. There was no link drawn to eugenics. In fact, Wolfgang served as an expert on the racial bias of the death penalty for the petitioners in the landmark case *Furman v. Georgia*, 408 U.S. 238 (1972), suggesting he was a strong antiracist.

[103] *See* MUHAMMAD, *supra* note 12, at 5-6.

[104] *See id.* at 7.

[105] *See* HINTON, *supra* note 65, at 13.

[106] Hudson v. Michigan, 547 U.S. 586, 598 (2006) ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline."); United States v. Leon, 468 U.S. 897, 919 n.20 (1984) (espousing efficacy of police Fourth Amendment training programs).

jurisprudence is full of examples where Fourth Amendment privacy is limited based on the concern that full enforcement would render some aspect of modern policing less convenient or effective, leading to an unacceptable increase in crime.[107] It is as if police remain in the eyes of legal elites what they were for Cardozo: blunderers. Only now, police can only be addressed as warrior heroes, but heroes ever capable of being improved by the newest reforms, most recently algorithms to pick hot spots for stop and frisk.

Punish the Criminal, Not the Crime. For Progressive Era legal reformers, especially those who identified with legal realism, eugenics was considered an easy case for overriding concerns about individual rights in the name of reducing crime and the cost of punishment.[108] After all, a habitual offender arrested for a minor crime might be worthier of an incapacitative sentence, from this perspective, than a normal individual provoked into a homicidal rage (Cardozo's "casual" offender who may have to be locked up with the feebleminded and recidivists). In Europe, this was often taken as a total attack on the role of law in the penal field.[109] In America, always more flexible in criminal justice as a tool of settler-colonial race control, it meant an expansion of criminal justice discretion to allow prosecutors and new criminal justice actors, like probation officers and juvenile court judges, to distinguish the dangerous from the reformable.[110]

Today we are used to the idea that prosecutors have tremendous discretion to use their charging and sentencing powers to incapacitate those they deem dangerous, and we even assign much of the blame for mass incarceration to these powers.[111] But it was in the Eugenic Era that this capacity began to be constructed through the formation of new penal measures, like probation, parole, and habitual offender laws, and associated with enhancing public safety.[112]

V. THE POST-*MAPP* RETURN OF "THE CRIMINAL"

Sixty years after it was endorsed by a Supreme Court majority in *Wolf* and forty-eight years after being prematurely buried in *Mapp*, the Supreme Court

[107] *See generally* Kentucky v. King, 563 U.S. 452 (2011) (upholding warrantless entry in pursuit of marked drug money as exigent circumstances despite the fact that police created the exigency); Terry v. Ohio, 392 U.S. 1 (1968) (holding that brief investigatory stops by police are constitutional because the textual "probable cause" standard is too demanding to allow desirable policing).

[108] This is perhaps the best explanation for the astonishingly short opinion—only nine paragraphs—in favor of eugenic sterilization in *Buck v. Bell*. *See generally* COHEN, *supra* note 36.

[109] As James Whitman points out, Germany's embrace of eugenics was in contrast to the formalistic tradition of continental legal thought. *See* WHITMAN, *supra* note 12, at 149.

[110] *See generally* Willrich, *supra* note 22.

[111] *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

[112] *See* Willrich, *supra* note 22, at 104.

majority in *Herring v. United States* restored Cardozo's emphasis on "the criminal" to the status of accepted wisdom about why the exclusionary rule should not be used to redress routine violations of the Fourth Amendment. Quoting Cardozo, Chief Justice Roberts explained: "In such a case, *the criminal* should not 'go free because the constable has blundered.'"[113] Although eugenics remains anathema today, the eugenic template of crime-control assumptions and beliefs outlined above remains as potent as ever, now largely distanced from its unsightly origins as a hardnosed judicial realism about crime and crime control.

We can see Cardozo's eugenic assumptions and beliefs not only in the Court's increasingly restricted exclusionary rule jurisprudence but also in the Fourth Amendment more generally (to which *Mapp* joined the exclusionary rule for better and worse). His pessimistic assumptions about America's urban population and crime problem, baked into progressive legal thinking of the early twentieth century, has passed to us as a largely unstated weight to be put on the scale in favor of allowing arrests and searches to stand. Like the "dark matter" of physics, whose mass is mathematically necessary to account for observations at the galactic level and above[114] but which cannot be detected with conventional instruments, the dark legacy of eugenic thought exerts a pull on contemporary Fourth Amendment law that is invisible to color-blind definitions of equality and that has made the courts complicit in permitting the expansion of policing and punishment we know today as mass incarceration.

A. *The Exclusionary Rule*

Nothing could flout the imperatives of eugenic thinking more than permitting habitual criminals to escape segregation by the penal system through a rule designed to honor their formalistic individual rights. The dangerousness of American criminals, the weakness of the police as a crime-control institution, and the centrality of acting on the factual rather than the legal status of the penal subject are all factored into Cardozo's assessment of the "costs" of the exclusionary rule. In its most decisive statement on the exclusionary rule since *Mapp*, the contemporary Court's ruling in *Herring* reaffirmed Cardozo's appraisal of the excessive social costs of the rule (despite little empirical evidence about cases actually lost or crimes not prevented).[115]

Chief Justice Roberts, writing for the majority, offered his own version of the Cardozo formula (without citation to *Defore*), making its eugenic agenda even more explicit: "The principal cost of applying the rule is, of course, letting guilty

[113] Herring v. United States, 555 U.S. 135, 148 (2009) (emphasis added) (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

[114] *See* NEIL DEGRASSE TYSON, ASTROPHYSICS FOR PEOPLE IN A HURRY 77-81 (2017).

[115] *Herring*, 555 U.S. at 141 ("[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." (alterations in original) (quoting Illinois v. Krull, 480 U.S. 340, 352-53 (1987))).

and *possibly dangerous* defendants go free . . . ."[116] As a result, Roberts noted, the exclusionary rule offended "basic concepts of the criminal justice system."[117] Which basic concepts? Where are they in the Constitution? And if they reside in an unstated knowledge about American crime and crime control, we have every reason to be concerned that such knowledge includes the very eugenics-based template of modern crime control we have been discussing.[118]

B. *Stop and Frisk and Deadly Force*

In one of its final contributions to criminal procedure, the Warren Court endorsed an expansive vision of police powers that would allow police to stop and frisk those who they reasonably suspected of being involved in unfolding or recently completed crimes.[119] In explaining what has become one of the most helpful effects of the decision for police powers—that is, the enabling of a relatively automatic jump from suspicion of crime to belief in the possibility of violence—Chief Justice Warren, who had been the District Attorney for progressive Alameda County (Oakland, Berkeley)[120] at the very moment Cardozo was writing *Defore*, wrote:

> Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. *American criminals have a long tradition of armed violence*, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.[121]

This same image of the armed and violent "American criminal" was unnamed but present in the Supreme Court's landmark *Graham v. Connor*[122] decision that is the focus of this symposium, qualifying Fourth Amendment limits on police use of force by the requirement of prioritizing police knowledge and belief.[123] Noting that "police officers are often forced to make split-second judgments—

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[116] *Id.* (emphasis added).

[117] *Id.* (quoting United States v. Leon, 468 U.S. 897, 908 (1984)).

[118] It was left to Justice Ginsburg in dissent to argue, via Judge Henry Friendly (who knew Cardozo), for a more limited reading that Cardozo only meant that the exclusionary rule was not worth it in cases of "technical error in an on-the-spot judgment"—not where a deliberate stop was made by an officer, as in *Herring*. *Id.* at 151 (Ginsburg, J., dissenting).

[119] Terry v. Ohio, 392 U.S. 1, 24 (1968).

[120] Prosecutors were a primary audience for eugenicists' appeals on how to control American crime. It is not unfair to assume that the young Earl Warren, educated at Berkeley when the university was a major hub of eugenic research and promotion, was exposed to it. His racial thinking of the Japanese "threat" during the wartime crisis is also not inconsistent with eugenics. Until further research, however, I suggest that Chief Justice Warren was voicing a growing "realism" about crime control in the face of the violence of the 1960s.

[121] *Terry*, 392 U.S. at 23 (emphasis added). The Chief Justice supplied no authority for this long tradition. It was already understood.

[122] 490 U.S. 386 (1989).

[123] *Id.* at 397.

in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation,"[124] the Court tied the evaluation of reasonableness to "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[125]

What exactly is this "perspective" that is more reasonable than the "20/20 vision of hindsight"? I would suggest it is Cardozo's eugenic understanding of the dangerousness posed by American criminals repackaged as a pragmatic realism about crime control. More specifically, the specter of the armed criminal (who is almost by definition the habitual criminal) haunts all three cases. Like *Defore*'s blackjack but worse, the gun has become a ubiquitous assumption of American policing, one anchored in the eugenic idea of American criminals as particularly violent and dangerous. In *Terry*, it is the concession to this reality that requires a novel form of Fourth Amendment search unfound in the history of the Amendment. In *Defore*, it is the obvious lunacy of letting "the criminal" go free to honor a formalistic legal right. In *Graham*, it is the necessary reconstruction of reality to make sure it conforms to the weaker police side of the crime-control project.

C. *Racial Profiling*

One might think that the one aspect of the eugenic template that would have to be rejected to comport with modern color-blind equality values is that era's obsession with nonwhite (enough) races and, in particular, with blackness as the degenerate source of serious urban crime, as well as the parallel project of controlling and containing their bodies (especially the young and fertile). And yet that kind of racially selective policing and punishment (especially directed at African Americans) is exactly what the era of mass incarceration has turned into an assembly line.[126] At every opportunity to demand an end to racial profiling, whether at the apex of the punitive state in the death penalty[127] or in its entry level of "stop and frisk,"[128] the contemporary Supreme Court has resolutely declined to do so—acknowledging, if only implicitly, the value of

[124] *Id.*

[125] *Id.* at 396.

[126] *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2017); NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016).

[127] McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (holding that racially disproportionate impact in Georgia death penalty indicated by study was not enough to overturn guilty verdict without showing "racially discriminatory purpose").

[128] Whren v. United States, 517 U.S. 806, 811 (1996) (holding that searches conducted during routine traffic stops do not violate Fourth Amendment when police officers have reasonable suspicion that traffic violation has occurred).

racial knowledge to the modern regime, a supposedly post-eugenic world of crime control.

Most importantly, in *Whren v. United States*,[129] the majority rejected clear evidence of racial profiling in a traffic stop, holding the use of such tactics constitutional under the Fourth Amendment because the stop was "objectively" reasonable; the subjective intentions of the officer were irrelevant.[130] With a callousness just short of Justice Holmes's in *Buck v. Bell*, Justice Scalia dismissed attempt after attempt by the petitioners to identify ways courts could in fact hold police accountable for using race as a proxy for crime, including obeying their own departmental regulations.[131] There is no final line about three generations of imbeciles being enough. But we can see Cardozo's pragmatic realism about American crime in Scalia's reduction of the facts of *Whren* to a "run-of-the-mine case," concluding, "[W]e think there is no *realistic* alternative to the traditional common-law rule that probable cause justifies a search and seizure."[132] Why is there no realistic alternative, even though multiple ones were offered no less awkward than many others accepted by the Court including in *Terry*? I would contend that it is because race is so central to how police do their work. In short, eugenics, now transformed into a color-blind approach to crime control, is what puts the realism in the "realistic" rejection of the alternatives.

CONCLUSION

The perception of American cities as plagued by violent, racially degenerate criminals became commonplace among America's university-educated elite in the early decades of the twentieth century. Legal reformers, like Dean Roscoe Pound of Harvard, believed major innovations were needed to maintain crime control in the face of these realities, even if such innovations would require rejecting traditional understandings of individual rights, privacy, and family life.[133] The global social and scientific movement known as eugenics aligned with and helped set the agenda for this reform movement, which called itself "progressive," and institutions like probation, the juvenile court, and parole were part of the response.

After the Second World War, eugenics—stained by the widespread Nazi human rights abuses carried out in its name—fell into an embarrassed silence.[134] New approaches, whether in mental health or corrections, pointedly sought to distinguish themselves from the biological determinism and utilitarian calculus promoted by eugenics. In fields like criminal law and criminology, a shift toward

[129] 517 U.S. 806 (1996).

[130] *Id.* at 813.

[131] *Id.* at 815.

[132] *Id.* at 819 (emphasis added).

[133] *See generally* Pound, *supra* note 24.

[134] Eugenic policies persisted for a surprisingly long time in some countries, including the Nordic welfare states, where coercive segregation of those deemed mentally deficient carried on into the 1960s.

psychological and social theories of criminalization flourished in part in response to embarrassment about the earlier overembrace of biological theory. But the underlying template of criminal justice thinking that eugenics had promoted remained deeply inscribed in the principles and practices of the penal state and in thinking about criminal justice policy.

Prior to 1961 and the Supreme Court's imposition of the exclusionary rule on the states in *Mapp v. Ohio*, there was little reason for this template and these principles to be tested directly by the Supreme Court. Although *Mapp* and other criminal procedure decisions of the 1960s can be read today as a partial repudiation of eugenic thinking in criminal justice,[135] the Court failed to make this critique explicit. Accordingly, when the tide of politics in America turned toward governing through crime in the 1970s, the eugenic template—now hardened into a pragmatic realism about crime—proved influential all over again.[136] Once the Supreme Court found itself regularly facing police-misconduct cases under the exclusionary rule, it was inevitably faced with the dilemma of American crime control as Cardozo had already known it: How much can state criminal justice systems, with their burden of urban criminal populations, afford to indulge federal rights shaped for a far more rarified crime problem?

As the Supreme Court began a major intervention in policing through review of search-and-seizure cases, it might have seized the occasion to uproot this eugenic template. The bloodbath of crime that eugenicists had seen coming from the overcrowded Jewish and Italian neighborhoods had become a Hollywood memory by World War II. And as the demand for tough-on-crime policies grew, so did the stock of Cardozo's judicial realism. In the years after, the Supreme Court has both reaffirmed the centrality of criminal dangerousness to its skepticisms about the exclusionary rule and affirmed the other core principles of eugenic thought on crime prevention.

The influence of something like the eugenics movement in the early part of the twentieth century on mass policing and mass incarceration in the late twentieth and early twenty-first centuries is both blunt and difficult to trace. It is widely known that the expansion of the penal state in the early part of the century was largely justified on eugenic grounds and included those Progressive Era penal innovations like probation, parole, and preventive policing.[137] It has also

[135] *See, e.g.*, *In re* Gault, 387 U.S. 1, 41 (1967) (holding juvenile court proceedings subject to many aspects of due process—including right to counsel—and partially repudiating Progressive Era model of juvenile court), *abrogated by* Allen v. Illinois, 478 U.S. 364, 372 (1986).

[136] *See generally* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (detailing tripling of U.S. prison population from late 1970s to late 1990s); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (arguing that variety of state actors have governed through crime and criminal procedure over past four decades).

[137] *See* Willrich, *supra* note 22, at 104.

become clear that a weaponized form of all of these played a crucial role in creating mass incarceration.[138] Yet it seems sharply anachronistic to read early twentieth-century eugenic thinking onto late twentieth-century American crime-control policies, given how much those polices protest their fealty to color blindness.

My aim in this Essay has been to identify one line of influence: the influential realism of then-Judge Cardozo's famous rejection of the exclusionary rule in *People v. Defore*. The storyline is clear enough: The reforming jurists of the early twentieth century—Cardozo chief among them—and most Progressive Era social scientists were enthusiastic about eugenics as a model for how to reform law and society with science. Even those who opposed its strongest claims believed it got a lot right.[139] Judges and academic criminologists were particularly important in building eugenics into a framework for thinking about crime prevention as reflected in Holmes's *Buck v. Bell* opinion. When the core of beliefs and assumptions of racial eugenics became anathema after the Second World War, this layer of understanding about crime control remained entrenched in American criminal justice thinking.

These jurists and scientists were heroes to the legal realists, and their influence on the postwar generations of lawyers and judges remained great as translated into the Legal Process school of the midcentury (quotes from Holmes and Cardozo festoon the outer wall of Berkeley Law's main classroom building and have greeted students on their daily arrival since the mid-1950s). This Essay suggests that when these jurists, many of them great liberals like Chief Justice Earl Warren, began to reform criminal procedure in the 1960s, they did so carrying an outsized portrait of the dangerousness of American criminals and the weakness of American crime control that carried over from the 1920s, transformed into a color-blind realism attractive to judges in the late twentieth century. As demand for a war on crime emerged in the late twentieth century even more fervently than that mounted by the eugenicists in the early twentieth century, Cardozo's realism and its pessimistic eugenic assumptions about urban crime in America provided a safe color-blind line of retreat after the disruption of *Mapp*. As another generation of reformers and even abolitionists consider whether the Fourth Amendment can play a role in rebalancing police in contemporary society, they must reckon with this often cynical realism and its spectral eugenic thinking.

[138] *See generally* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 (1993) (tracing parole from Progressive Era to 1980s as it became increasingly focused on returning parolees to prison).

[139] *See* LEONARD, *supra* note 10, at 21-24 (documenting widespread acceptance of eugenic framework among university social scientists during this period).