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# THE RISE AND FALL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY

BY JENNIFER DEVROYE\*

## I. INTRODUCTION

On June 7th and 8th, 1909, one hundred and fifty delegates from throughout the United States met at the Northwestern University School of Law to attend the First National Conference on Criminal Law and Criminology (National Conference). Mirroring the nascent field of criminology, invitees ran the gamut of professional affiliations. There were alienists, sociologists, prison wardens, prison doctors, the superintendent of a women's reformatory, a statistician, an Episcopal bishop, and lots of lawyers. The conference's organizing committee, led by John H. Wigmore, Dean of the Northwestern University School of Law, included Roscoe Pound, Municipal Court Judge Harry Olson,<sup>1</sup> and Clarence Darrow. The National Conference was held to mark the fiftieth anniversary of the founding of the Northwestern University School of Law. Its purpose was to promote cooperation and the exchange of ideas between disciplines concerned with crime and criminals. Roscoe Pound, looking back on the event in 1941, described the National Conference as its organizer John H. Wigmore's "second great stroke" in modernizing criminal law and procedure, which was in "a most unhappy condition" at the time.<sup>2</sup>

The National Conference voted into existence the American Institute of Criminal Law and Criminology (the Institute). The purpose of the Institute was to foster cooperation between lawyers and scientists to

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<sup>1</sup> Olson was the Chief Justice of the Municipal Court of Chicago and a prominent eugenicist. MICHAEL MATTHEW KAYLOR, *SECRETED DESIRES: THE MAJOR URANIANS: HOPKINS, PATER AND WILDE* 339 n.1 (2006); *see also* EDWARD J. LARSON, *SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 110 (1996).

<sup>2</sup> Manuscript, Roscoe Pound (Sept. 9, 1941) (on file with Northwestern University Archives).

improve criminal laws and the administration of criminal justice.<sup>3</sup> Wigmore was elected its first president. Committees formed at the National Conference included one “to appeal at once to congress for the establishment of a bureau to collect criminal statistics” and another to study British criminal law.<sup>4</sup> Other committees were formed to study topics suggested by the three discussion sections of the National Conference.<sup>5</sup> At the top of a list of study topics suggested by the first section was that of “the complex factors combining to encourage and establish the persistent offender, particularly with reference to hereditary taint and disability.”<sup>6</sup>

One of the Institute’s first projects was the publication of an official organ<sup>7</sup>—the *Journal of Criminal Law and Criminology*<sup>8</sup> (*Journal*). Other publishing projects included the publication of the *Modern Criminal Science Series* (*Modern Series*) of works by European criminologists in translation. The Institute lasted until the Depression.<sup>9</sup> The *Journal*, which was absorbed by Northwestern University in 1931,<sup>10</sup> celebrates its centennial this year. This Essay examines the history of the Institute itself, particularly its relationship to Italian positivism and to debates over the heritable nature of criminality.

This Essay begins in Part II with a review of the Institute’s first year of activities, followed, in Part III, by a consideration of its influential series of translated criminal science monographs in the context of criminological debates of the time. Special attention is paid to Italian positivism and its leading figures, Cesare Lombroso and Enrico Ferri, as well as to degeneracy theory—two highly influential movements during the early years of the Institute. Part IV gives a brief overview of the Institute’s

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<sup>3</sup> AM. INST. OF CRIMINAL LAW AND CRIMINOLOGY, BULLETIN NUMBER EIGHT: GENERAL INFORMATION CONCERNING THE INSTITUTE, ITS PURPOSES, HISTORY, WORK, COMMITTEES, AND MEMBERSHIP, AND THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 4 (1912).

<sup>4</sup> *Penal Reformers Plan Great Work: American Institute of Criminal Law and Criminology Formed in Chicago*, CHI. DAILY TRIB., June 9, 1909, at 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Eugene A. Gilmore, *The Need of a Scientific Study of Crime, Criminal Law, and Procedure—The American Institute of Criminal Law and Criminology*, 11 MICH. L. REV. 50, 54 (1912).

<sup>8</sup> Originally, the *Journal* was known as the *Journal of the American Institute of Criminal Law and Criminology*. When the *Journal* absorbed the *Scientific Crime Detection Laboratory’s Journal of Police Science* in 1932, the publication became known simply as the *Journal of Criminal Law and Criminology*. Robert Wyness Millar, *Pioneers in Criminology: VI. John Henry Wigmore (1863-1943)*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 4, 6-7 (1955).

<sup>9</sup> WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 185 (1977).

<sup>10</sup> This did not result in a severance of the connection between the Institute and the *Journal*. The Institute continued to claim the *Journal* as its official organ. See Robert H. Gault, Editorial, *Announcement*, 22 J. CRIM. L. & CRIMINOLOGY 3, 3 (1931).

influential *Modern Series* of translations of works by European criminologists. Part V describes difficulties the Institute encountered in funding its projects. Part VI considers how the Institute grappled with questions of the role of biology and heredity in crime—paying particular attention to its special committees on criminal statistics and sterilization, as well as members’ attractions to the idea of laboratory study of criminals. Part VII details the fiscal problems that plagued and eventually destroyed the Institute. Part VIII describes the Institute’s eleventh-hour shift away from explorations of innate criminality in favor of examinations of sociological factors. The Essay concludes with a consideration of the Institute’s legacy.

## II. THE FOUNDING OF THE INSTITUTE

The Institute held its first annual meeting in 1910 at the law school of George Washington University in Washington, D.C.<sup>11</sup> The meeting was scheduled to coincide with the International Prison Conference.<sup>12</sup> *The Washington Post* hailed the meetings with the headline “Penologists on Way.”<sup>13</sup>

The first meeting of the Institute was organized in much the same way the First National Conference had been, with topical committees appointed the preceding year making their reports and research projects for the upcoming year being discussed. Committees reported on systems of recording data on criminality, sentencing, court organization, reforms in criminal procedure, and British criminal procedure and practice.<sup>14</sup> Committees on “the insane offender” and the relationship between immigration and crime were appointed for the following year.<sup>15</sup> A new president of the Institute was elected. Though a new president would be elected most years, very little turnover took place within the core leadership of the Institute: John H. Wigmore served until at least 1925 as Chairman of the Executive Committee,<sup>16</sup> and Robert Gault served as editor of the

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<sup>11</sup> *Penologists on Way*, WASH. POST, Sept. 28, 1910, at 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Edwin R. Keedy, *The Meeting of the American Institute of Criminal Law and Criminology*, 5 ILL. L. REV. 237, 237 (1911).

<sup>15</sup> *Id.*

<sup>16</sup> Precisely when Wigmore stepped down as President of the Executive Board of the Institute is difficult to ascertain; the Institute only sporadically published notes on its annual meetings in the *Journal*. The Wigmore papers include minutes for some, but not all, of the meetings of the Executive Board. Together, these sources show that Wigmore served as President of the Executive Board at least until 1925, but not later than 1932. See *Proceedings of the Annual Meeting of the American Institute of Criminal Law and Criminology*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 509, 509 (1925). See also Meeting of

*Journal* from 1911 until 1960. That both Wigmore and Gault were Chicagoans meant that the center of Institute and *Journal* operations would always be Chicago.

In the year between the National Conference and the Institute's first meeting,<sup>17</sup> the *Journal of the American Institute of Criminal Law and Criminology* was begun. Wigmore described the publication of a journal as "an indispensable prerequisite of real fruition for the work of the Institute."<sup>18</sup> In 1910, he informed potential donors that "in criminal science there is hitherto absolutely not a single periodical in the English language devoted to that science [of criminology]."<sup>19</sup> Still, raising enough money to start the *Journal* proved to be a challenge. In a 1910 letter seeking aid from the Carnegie Institution, Wigmore explained that he "had a list made of the fifty richest lawyers of Chicago, and asked them for \$100 each, but only nine gave."<sup>20</sup> "Most of the lawyers," Wigmore noted with dismay, were "impervious."<sup>21</sup> Even members of the Executive Board of the Institute (with two exceptions), whom Wigmore "called upon . . . to be responsible for \$300 each," refused to help fund the *Journal*.<sup>22</sup> Ultimately, the *Journal* received its funding from subscriptions and Northwestern University. Wigmore envisioned a subscriber base of "10,000 persons, including prosecuting attorneys, judges, police officials, prison officials, medical men, alienists, psychologists, sociologists, and philanthropists."<sup>23</sup>

The other major project of the first year of the Institute was the organization of the publication of a series of English language translations (*Modern Series*) of works by Cesare Lombroso, Enrico Ferri, and other European criminologists. The importance of this series, as well as the debates and projects of the early years of the Institute, is best understood in the context of early criminological discourse. The theories of positivism and degeneracy were central. Both of these theories are described briefly in Part III.

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the Executive Board of the American Institute of Criminal Law and Criminology (Nov. 17, 1932) (on file with Northwestern University Archives).

<sup>17</sup> Referred to in Institute publications as the second annual meeting.

<sup>18</sup> Letter from John H. Wigmore to R.S. Woodward, President of Carnegie Institution of Washington (Jan 13, 1910) (on file with Northwestern University Archives).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

## III. INFLUENTIAL THEORIES: POSITIVISM AND DEGENERACY

Early criminologists tended to divide self-consciously into two camps: positivist and determinist. Very generally, positivism asserts that crime is “a product or expression of the individual constitution,” while determinism asserts that crime is “a product or expression of society.”<sup>24</sup> Determinism is associated with Marxism, and positivism with Darwinism.<sup>25</sup> The positivists “claimed to take as their starting point observable facts” and sought to employ “the experimental and inductive methods used in the natural and social sciences, rather than in juristic and deductive reasoning.”<sup>26</sup> Two views often associated with positivism were that (1) criminality is a heritable trait, and (2) the primary purpose of incarceration is the defense of society.

The split between positivism and determinism was somewhat artificial, as few early criminologists denied that both heredity and environment played a role in criminality. Yet it seems to have been important for criminologists to identify either hereditary or environmental factors as precipitating, thereby aligning themselves with either the positivist or determinist perspective.<sup>27</sup> For example, William Hickson, head of the Psychopathic Laboratory of the Municipal Court of Chicago, wrote that the environment of delinquents should be studied because succumbing to environmental influences was “one of the greatest proofs of their inherent mental defectiveness.”<sup>28</sup> Harry Olson wrote that delinquent boys and “fallen women” were “both the victims of a society too complex for their mentality to assimilate.”<sup>29</sup> Michael Willrich has pointed out that, in the debate between hereditarian and environmentalist criminology, “[n]owhere were the lines of this disciplinary debate so clearly drawn as in Chicago.”<sup>30</sup>

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<sup>24</sup> Leon Radzinowicz, *Ideology and Crime: The Deterministic Position*, 65 COLUM. L. REV. 1047, 1047 (1965).

<sup>25</sup> *Id.* at 1048. Determinism should not be confused with *biological* determinism, a belief that inherited physical and mental traits determine criminality.

<sup>26</sup> *Id.* at 1055.

<sup>27</sup> Regardless of which side of this debate criminologists identified themselves with, retributive punishment was widely viewed as inappropriate and unenlightened for all but the most incorrigible recidivists.

<sup>28</sup> Wm. J. Hickson, *Psychopathology and Criminology*, 2 MED. & SURGERY 245, 254 (1918).

<sup>29</sup> Harry Olson, *The Psychopathic Laboratory Idea*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 59, 62 (1915).

<sup>30</sup> Chicago was the geographic center of the Institute. Though Wigmore only served for one year as president, he continued to serve as chairman of the executive board, and the *Journal* offices were located in Chicago. Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 LAW & HIST. REV. 63, 87 (1998).

Positivist ferment inspired national and international congresses in Europe. It was from these that Wigmore drew his inspiration for the National Conference that founded the Institute in 1909.<sup>31</sup> In 1924, Wigmore and other members of the Institute acknowledged the importance of Italian positivism for the founding of their organization in an article titled “The Progress of Penal Law in the United States of America.”<sup>32</sup> They revealed that “the inspiration of Italy’s criminalists was strongly influential in the founding of the ‘Journal of the Institute’ in 1909.”<sup>33</sup> The “criminalists” to which they referred were Cesare Lombroso and Enrico Ferri.

Cesare Lombroso (1835-1909) is considered the founder of the positivist school of criminology and the father of criminal anthropology.<sup>34</sup> Lombroso, a physician, published his influential book, *Criminal Man*, in 1876,<sup>35</sup> in which he promoted his theory of atavism that claims that criminals were “throwbacks” to earlier evolutionary stages of humans. For Lombroso, atavism explained the recurrence of certain crimes, such as infanticide, and even “the recent upsurge of anti-Semitism and the irrepressibility of dueling.”<sup>36</sup> Among atavistic traits, Lombroso included left-handedness, impulsiveness, obscenity, superstition, cannibalism, and the “tendency to reproduce the cries and actions of animals.”<sup>37</sup> Later editions of *Criminal Man* qualified his theory and offered additional explanations for criminality, including family and social environment. In these later editions, atavism was said to account for some criminals—a small minority that were, as Lombroso put it in the first edition of *Criminal Man*, “born with evil inclinations.”<sup>38</sup>

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<sup>31</sup> Radzinowicz, *supra* note 24, at 1059.

<sup>32</sup> Robert H. Gault, James W. Garner, Edwin R. Keedy & John H. Wigmore, *The Progress of Penal Law in the United States of America*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 173, 173 (1924).

<sup>33</sup> *Id.* at 174.

<sup>34</sup> “Criminal anthropology” was the name Lombroso gave his research into the physical anomalies of born criminals. Mary Gibson & Nicole Hahn Rafter, *Introduction to CESARE LOMBROSO, CRIMINAL MAN 1* (Mary Gibson & Nicole Hahn Rafter eds. & trans., Duke Univ. Press 2006) (1876).

<sup>35</sup> LOMBROSO, *supra* note 34.

<sup>36</sup> *Id.* at 222.

<sup>37</sup> CESARE LOMBROSO, *CRIME: ITS CAUSES AND REMEDIES* 370 (Henry Pomeroy Horton trans., 1912).

<sup>38</sup> *Id.* at 48. Lombroso distinguished atavistic criminals from the insane. He regarded insanity as something that developed, not a condition one was born with. Recent studies into the brain structures of psychopaths raise an interesting question of whether criminals who may have been *born* with traits we traditionally classify as evil (a lack of empathy and remorse) should be treated as more culpable than an insane person.

Like Lombroso, Enrico Ferri (1856-1929) believed that some criminals bore physical “stigmata”<sup>39</sup> of their criminality. He believed in the existence of congenital murderers and claimed that he could pick out a murderer by his “retreating forehead, enormous jaw, cold stare, cadaverous paleness, [and] thin lips.”<sup>40</sup> For the most part, however, Ferri believed that criminal degenerates could not be distinguished from non-criminal degenerates on the basis of their appearance.<sup>41</sup>

Ferri’s views on hereditary criminality differed from Lombroso’s only in degree. The first edition of Ferri’s most important work, *Sociologie Criminal* (*Criminal Sociology*), was published in 1913, and then in English translation in 1917 as part of the Institute’s Modern Series. *Criminal Sociology* defended the theory of the born criminal, but did not discount the importance of environment.<sup>42</sup> It defined the criminal type as the individual who “from birth, by hereditary transmission (as has been shown a thousand times in the alternations of alcoholism, insanity, suicide, moral eccentricity, delinquency and sterility in certain families tainted with degeneracy) carries in his organic and psychic constitution this junction of anomalies, is predisposed to crime.”<sup>43</sup>

Though Lombroso and Ferri were popular, atavism and the idea of the born criminal were widely rejected.<sup>44</sup> The more persuasive theory for many American criminologists around the turn of the century was the theory of degeneracy.<sup>45</sup> Degeneracy theory amounted to a belief that some families

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<sup>39</sup> “Stigmata” was a term used by Ferri to refer to physical abnormalities indicating degeneration. Enrico Ferri & Robert Ferrari, *The Present Movement in Criminal Anthropology Apropos of a Biological Investigation in the English Prisons*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 224, 223 (1914).

<sup>40</sup> MAURICE PARMELEE, THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY AND THEIR RELATION TO CRIMINAL PROCEDURE 79 (1912) (quoting ENRICO FERRI, LA SOCIOLOGIE CRIMINELLE 96 (1893)).

<sup>41</sup> *Id.* (citing FERRI, *supra* note 40, at 97).

<sup>42</sup> In fact, Ferri took environmental influences so seriously that he believed soil qualities influenced criminality.

<sup>43</sup> ENRICO FERRI, CRIMINAL SOCIOLOGY 96 (J.I. Kelly & J. Lisle trans., Little, Brown & Co. 1917) (1913). Modern science agrees with Ferri, Lombroso, and the degeneracy theorists that some physical defects can indicate a higher predisposition to criminality. Modern science differs from the criminal anthropologists and degeneracy theorists on the source of these anomalies and finds that physical anomalies that correspond to criminality are not hereditary. Rather, the relevant anomalies are those caused by “prenatal environmental” factors. THOMAS G. MOELLER, YOUTH AGGRESSION AND VIOLENCE 89 (2001).

<sup>44</sup> A 1893 article in the Chicago Daily Tribune noted that “Lombroso and his theory at first had full sway, but lately there has arisen a revolution against his theory.” *To Study Criminal Anthropology: Consignment of Plaster Casts for a New Department at Chicago University*, CHI. DAILY TRIB., Mar. 5, 1893, at 34.

<sup>45</sup> NICOLE HAHN RAFTER, CREATING BORN CRIMINALS 120 (1998).



were bad and would just keep getting worse with each successive generation. One version of degeneracy theory held that diseases ranging from alcoholism to epilepsy were a heritable “taint” interchangeable with criminality.<sup>46</sup> Another explanation for degeneracy was that the bad habits acquired and indulged during an individual’s lifetime would result in “a general transmission of impaired vitality which may show itself in crime and in various forms of degeneracy.”<sup>47</sup> A popular theory in early American criminology was that a degenerate was more susceptible than a normal person to the environmental influences that led to crime.<sup>48</sup>

Degeneracy theory had a complex relationship to the criminal anthropology of Lombroso and Ferri. Nicole Hahn Rafter, a Lombroso scholar, explains:

In the United States, then, criminal anthropology fell on fertile ground. The people most concerned with crime control were receptive to the idea of the criminal as a biologically distinct and inferior being. But although it is important to identify receptivity factors, this type of analysis can overemphasize criminal anthropology as an import and obscure the fact that Americans had identified the criminalistic degenerate, a first cousin of Lombroso’s born criminal, before they ever heard of Lombroso.<sup>49</sup>

So, though as Rafter points out elsewhere, the Institute was “not founded until enthusiasm for criminal anthropology had begun to fade,”<sup>50</sup> biological determinism was still a persuasive theory to many. Rejection of the theories of Lombroso and Ferri did not mean rejection of the idea of a biological component to criminality. The conflict between the limited lingering appeal of Lombroso and Ferri and the wider appeal of degeneracy theory was one that played out within the ranks of the Institute. To the extent one can generalize about so large and diverse an organization as the Institute, it seems safe to venture that, at the time of its founding, the leaders of the Institute were more interested in positivism than the

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<sup>46</sup> See CHARLES RICHMOND HENDERSON, *AN INTRODUCTION TO THE STUDY OF THE DEPENDENT, DEFECTIVE AND DELINQUENT CLASSES* 114 (1893); see also ROBERT L. DUGDALE, *THE JUKES: A STUDY IN CRIME, PAUPERISM, DISEASE, AND HEREDITY* 51 (4th ed. 1910).

<sup>47</sup> CHARLES A. ELLWOOD, *SOCIOLOGY AND MODERN SOCIAL PROBLEMS* 329 (2d ed. 1913).

<sup>48</sup> See ARTHUR MACDONALD, *JUVENILE CRIME AND REFORMATION: INCLUDING STIGMATA OF DEGENERATION* 294 (1908); see also HENRY HERBERT GODDARD, *THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLE-MINDEDNESS* 54 (1912) (“The best material out of which to make criminals, and perhaps the material from which they are most frequently made, is feeble-mindedness.”).

<sup>49</sup> Nicole Hahn Rafter, *Criminal Anthropology: Its Reception in the United States and the Nature of Its Appeal*, in *CRIMINALS AND THEIR SCIENTISTS: THE HISTORY OF CRIMINOLOGY IN INTERNATIONAL PERSPECTIVE* 159, 166 (Peter Becker & Richard F. Wetzell eds., 2006).

<sup>50</sup> RAFTER, *supra* note 45, at 115.

members, who gravitated toward degeneracy theory. This heterogeneity within the Institute helps explain why, though “hereditary taint”—a degeneracy theory watchword if ever there was one—was so interesting to at least one section of the National Conference,<sup>51</sup> the Executive Committee of the Institute resisted appointing a committee to study it. What drew scholarly men like Wigmore to positivism was the promise of a scientific resolution to the problem of crime, but in the early decades of the twentieth century attracting an audience interested in positivism seemed necessarily to mean that a significant portion of that audience would evince an interest in degeneracy theory and generally be fixated on crime’s possible hereditary aspects. The early years of the Institute reveal that, though they did not hold overtly incompatible positions, at times these two contingencies made uneasy bedfellows.

So, while Leonard Savitz, a criminological historian, was correct in his characterization of the Institute as made up of “very fierce adherents to the Positivist School,”<sup>52</sup> it must *also* be said that it was made up of very fierce adherents to degeneracy theory. For example, the third president of the Institute, Nathan William MacChesney, rejected Lombroso’s theories while embracing degeneracy theory and eugenics. In a speech to the Institute in 1911, MacChesney stated that “[t]he so-called Lombroso theory is vigorously contested and has but little standing outside the country of its birth.”<sup>53</sup> At the 1912 meeting of the Institute, MacChesney announced that “one of the most abominable heresies we have had to face in this country for some years, is the growth of the Lombroso theory, and I thank God it has been broken down and the public has repudiated it.”<sup>54</sup> Displaying an allegiance to degeneracy theory, MacChesney wrote in 1913 that “[w]e ought not to need the history of successive Jukes’ families,<sup>55</sup> who warn us that the way to handle defectives is to prevent them coming into the world

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<sup>51</sup> *Penal Reformers Plan Great Work*, *supra* note 4.

<sup>52</sup> Leonard D. Savitz, *Introduction* to GINA LOMBROSO-FERRERO, *CRIMINAL MAN: ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO* xix (Patterson Smith 1972) (1911).

<sup>53</sup> Nathan William MacChesney, President, Address at the Third Annual Conference of the Institute (Aug. 31, 1911).

<sup>54</sup> AM. INST. CRIM. L. & CRIMINOLOGY, *FOURTH ANNUAL MEETING, AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY AND OF THE WISCONSIN BRANCH 60* (1912) [hereinafter *FOURTH ANNUAL MEETING*].

<sup>55</sup> The Jukes were a New York family that was the subject of Robert Dugdale’s 1877 book *The Jukes: A Study in Crime, Pauperism, Disease, and Heredity*. Dugdale concluded, on the basis of his examination of the criminal records of Jukes dating back to the 1700s, that hereditary criminality did exist but that such tendencies were also subject to environmental influences. PETER CONRAD & JOSEPH W. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 218 (2d ed. 1992).

at all.”<sup>56</sup> As MacChesney’s remarks suggest, degeneracy theory laid a foundation for the widespread acceptance of eugenics<sup>57</sup> among criminologists. Both early criminologists and eugenicists were invested in social defense theory to the point of what Samuel Haig Jameson has termed “custodial psychosis.”<sup>58</sup> Leon Radzinowicz has observed that “biological determinism and the campaign to remove the unfit found their echo not only in the early criminological writings, but also in that powerful current of thought and interpretation which came to be known as Social Darwinism.”<sup>59</sup> Michael Willrich has identified “the proliferation of criminological discourse linking criminality to hereditary ‘mental defect’” as a “critical development in criminal justice” that enabled Progressive Era eugenicists to “use the full range of state police powers to prevent the reproduction of criminality, deviancy and dependency.”<sup>60</sup>

Savitz’s observation about the fierceness of the Institute’s adherence to positivism is, however, an accurate description of Wigmore and Gault, two of the Institute’s most influential members. They personally supported the work of Lombroso and Ferri. In July 1907, Wigmore went to Turin, Italy, and spoke with Lombroso about lecturing at Northwestern University for a year.<sup>61</sup> However, Lombroso told Wigmore he was too old to accept the position and that he was unable to lecture in English.<sup>62</sup> Lombroso suggested to Wigmore that he pursue his protégé Ferri instead. By 1908, Wigmore had shifted his efforts to organizing a Northwestern lectureship and a lecture tour for Ferri.

Wigmore explained his mission to bring an Italian criminal anthropologist to Northwestern in a 1908 letter to W. A. Lacy, Chairman of the Committee on Harris Lectureship.<sup>63</sup> In that letter, Wigmore lamented the legislature’s ignorance of the work of “medical men” like Ferri on the “abnormal classes.”<sup>64</sup> Wigmore believed that Ferri would attract a wide

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<sup>56</sup> Nathan William MacChesney, *Race Development by Legislation*, 4 INSTITUTION Q. 62, 74 (1913).

<sup>57</sup> Eugenics is “the science of the improvement of the human race by better breeding.” CHARLES BENEDICT DAVENPORT, *HEREDITY IN RELATION TO EUGENICS* 1 (1915).

<sup>58</sup> Samuel Haig Jameson, *Quo Vadimus in Criminological Training?*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 358, 358 (1959).

<sup>59</sup> Radzinowicz, *supra* note 24, at 1058.

<sup>60</sup> Willrich, *supra* note 30, at 64.

<sup>61</sup> Letter from John H. Wigmore to W.A. Lacy (Sept. 25, 1908) (on file with Northwestern University Archives).

<sup>62</sup> *Id.* In his travel diary, Wigmore wrote that he visited Lombroso in Turin and that “L. could not consider invitation to be Harris lecturer [because] of age and language—ret. from Turin.” John H. Wigmore, *Travel Diary*, (July 16, 1908) (on file with Northwestern University Archives).

<sup>63</sup> The Harris Lectureship was the one-year position Wigmore hoped to secure for Ferri.

<sup>64</sup> Letter from John H. Wigmore to W.A. Lacy, *supra* note 61.

audience of “prison reformers, psychologists, alienists and sociologists, as well as lawyers”<sup>65</sup>—the same cross-section of professionals that would make up the Institute. Wigmore hoped that “the utterances of an eminent foreigner would perhaps do more to command attention than one of our own citizens.”<sup>66</sup> Ferri did not come to Northwestern in 1909, but broached the subject again in 1921, proposing to Wigmore “a scheme” in which he would tour American universities giving lectures for a cumulative fee of \$100,000.<sup>67</sup>

Nonetheless, Wigmore, Gault, and other leading members of the Institute were not blind followers of Lombroso and Ferri. Rafter has pointed out that, from the start, the Institute “evinced a deep and relatively sophisticated interest in biological theories of crime.”<sup>68</sup> As early as 1909, Wigmore acknowledged the qualified nature of his interest in Lombroso, stating at the National Convention that “[y]ou or I may not agree with Lombroso; but I would take the opportunity to read him in two Sunday afternoons if he were put into English.”<sup>69</sup> In his 1932 book, *Criminology* (in which a photo of Lombroso appears on the frontispiece), Gault explained that positivism had advanced beyond its fixation on “hereditary forces” as the sole cause of criminality.<sup>70</sup> Wigmore, in a fundraising pitch for a monument to Lombroso, allowed that many of Lombroso’s “specific conclusions [about the anthropological causes of crime] have since been doubted or disproved; but his beneficent influence as the father of the modern methods and spirit has been universally conceded.”<sup>71</sup>

#### IV. THE MODERN SERIES

The early publishing projects of the Institute showed a positivist bent that later Institute publications would move away from. The chief expression of the Institute’s positivism was the Modern Series—a project Wigmore envisioned from the start. He proposed the formation of a Committee on Translations at the National Conference, suggesting that a

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Letter from Enrico Ferri to John H. Wigmore (May 12, 1921) (on file with Northwestern University Archives). Ferri asked, “[W]ould it not be possible to find some generous American Millionaire, who, either along with the Syndicate of the Universities or for his own account [would pay the \$100,000.]” *Id.*

<sup>68</sup> RAFTER, *supra* note 46, at 115.

<sup>69</sup> AM. INST. CRIM. L. & CRIMINOLOGY, PROCEEDINGS OF THE NATIONAL CONFERENCE ON CRIMINAL LAW AND CRIMINOLOGY 204-05 (1910) [hereinafter FIRST NATIONAL CONFERENCE].

<sup>70</sup> ROBERT H. GAULT, CRIMINOLOGY 28-29 (1932).

<sup>71</sup> John H. Wigmore, *Memorial to Lombroso*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 491, 491 (1911).

translation of the fourth edition of Ferri's *Criminal Sociology* be the starting point for the Modern Series.<sup>72</sup> The Committee on Translations of European Treatises was formed and included Pound, Wigmore, and the criminologist Maurice Parmelee. The Committee's goal was to publish the works that would "best represent the various schools of thought in criminal science."<sup>73</sup> The purpose of the Modern Series was to "inculcate the study of modern criminal science, as a pressing duty for the legal profession and for the thoughtful community at large."<sup>74</sup> Nine works, including Ferri's *Criminal Sociology* and Lombroso's *Crime, Its Causes and Remedies* (*Crime*), were published in the Modern Series from 1911 to 1917.<sup>75</sup> Wigmore "performed the major part of the labor of the committee"<sup>76</sup> and "had the principal voice in the selection of the volumes."<sup>77</sup>

The authors of the Modern Series were more focused on innate causes of criminality than on environmental ones. Hans Gross scoffed at the rejection of the theory of the congenital criminal.<sup>78</sup> Another Series author, Constancio Bernaldo de Quirós, wrote in support of criminal anthropology. He claimed its critics "overwork[ed] the science" and that the problems in that area were "not very serious after all."<sup>79</sup> Another author, Raymond Saleilles, recommended exterminating "born criminals" (just *when* is not entirely clear) writing that "[f]or certain criminals by birth there is no hope on the moral or psychological side; there is nothing to be done but to eliminate them as one would eliminate a dangerous and uncontrollable creature."<sup>80</sup> Rafter has described the Modern Series as opening "a door through which Lombrosian works passed into the United States while

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<sup>72</sup> FIRST NATIONAL CONFERENCE, *supra* note 69, at 204.

<sup>73</sup> AM. INST. CRIM. L. & CRIMINOLOGY, BULLETIN NO. 3: REPORT OF COMMITTEE 2 (ON TRANSLATIONS OF EUROPEAN TREATISES) 5 (1910).

<sup>74</sup> Committee on Translations, *General Introduction* to LOMBROSO, *supra* note 34, at viii.

<sup>75</sup> ROALFE, *supra* note 9, at 85. The works of the Modern Series were: GUSTAV ASCHAFFENBURG, *CRIME AND ITS REPRESSION* (Adalbert Albrecht trans., 1913); CONSTANCIO BERNALDO DE QUIRÓS, *MODERN THEORIES OF CRIMINALITY* (Alfonso de Salavio trans., 3d ed. 1911); WILLIAM ADRIAN BONGER, *CRIMINALITY AND ECONOMIC CONDITIONS* (Henry P. Horton trans., 1916); FERRI, *supra* note 43; HANS GROSS, *CRIMINAL PSYCHOLOGY* (Horace M. Kallen trans., 4th ed. 1911); LOMBROSO, *supra* note 37; BARON RAFFAELE GAROFALO, *CRIMINOLOGY* (Robert Wyness Millar trans., 1914); RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* (Rachel Szold Jastrow trans., 1911); and GABRIEL TARDE, *PENAL PHILOSOPHY* (Rapelje Howell trans., 1912).

<sup>76</sup> ROALFE, *supra* note 9, at 85.

<sup>77</sup> Millar, *supra* note 8, at 8. Having translated one of the works in the Modern Criminal Science Series, Millar would have known first hand of that which he spoke.

<sup>78</sup> HANS GROSS, *CRIMINAL PSYCHOLOGY* 411 (Horace M. Kallen trans., 4th ed. 1911).

<sup>79</sup> CONSTANCIO BERNALDO DE QUIRÓS, *MODERN THEORIES OF CRIMINALITY* 233 (Alfonso de Salavio trans., 3d ed. 1911).

<sup>80</sup> RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* 145 (Rachel Szold Jastrow trans., 1911).

closing that door to studies in alternative theoretical traditions.”<sup>81</sup> Though the works translated by the Institute did consistently favor the positivist tradition of which Ferri and Lombroso were a part, it is probably a mischaracterization of their impact to say they blocked competing theories. At the very least, blotting out competing theories was not the purpose of the Modern Series. In its introduction, the Committee on Translations recommended the study of man’s heredity as just one in a list of potential causes of crime.<sup>82</sup> Wigmore chose Lombroso’s *Crime* out of a desire to distance the Modern Series from the two most Lombrosian theories of all: atavism and the born criminal.<sup>83</sup>

#### V. CRIMINAL STERILIZATION, LABORATORIES, AND STATISTICS

The first decade of the Institute saw a flourishing and then waning of interest in two practices premised on crime’s biological etiology: criminal sterilization and criminal laboratories. Debate on criminal sterilization began at the National Conference with the presentation of a report by a committee “[o]n Causes and Prevention of Crime” which recommended investigation “of the complex factors combining to encourage and establish the persistent offender, particularly with reference to hereditary taint and disability.”<sup>84</sup> William Whittaker, the superintendant of an Indiana reformatory, said he didn’t see much in the recommendation section of the Committee’s report that was “not already being done.”<sup>85</sup> Whittaker pointed to Indiana and California laws (“probably a little ahead of public sentiment”) barring “procreation of their kind by rapists, confirmed criminals and degenerates.”<sup>86</sup> Whittaker said he didn’t expect the National Conference would actually do much with the topic of sterilization, but he thought it was an issue that “should be discussed in meetings of this character.”<sup>87</sup> Henry Favill, a member of the organizing committee and

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<sup>81</sup> RAFTER, *supra* note 50, at 115.

<sup>82</sup> Committee on Translations, *supra* note 74, at vii.

<sup>83</sup> In a letter to Wigmore, Maurice Parmelee wrote of the Committee on Translation’s decision to publish Lombroso’s *Crime* instead of the more well-known *Criminal Man*. Parmelee wrote:

“I advocated ‘*L’Homme Criminal*’ because it seemed to me that represented best Lombroso’s peculiar contribution to criminology. However, it may be just as well ‘*Le Crime*’ has been translated instead, for the reason you suggest, namely, in order to dispel the popular notion that Lombroso recognized only the anthropological causes of crime.”

Letter from Maurice Parmelee to John H. Wigmore (Nov. 14, 1910) (on file with Northwestern University Archives).

<sup>84</sup> FIRST NATIONAL CONFERENCE, *supra* note 69, at 59.

<sup>85</sup> *Id.* at 60.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

Professor of Medicine, replied that though the eugenics laws in California and Indiana did not seem “sufficiently accredited” he did believe they had merit.<sup>88</sup> William Smithers, a future member of the Committee on Translations, argued against sterilization laws. Another attendee, a Mr. Sneve, declared that:

[t]he sterilization of defective individuals might, perhaps, be all right, and on epileptics, but for rapists and for degenerates,- the word ‘degenerate’ has lost all the meaning it had which Lombroso gave it,- it is a difficult proposition to determine who is a degenerate and who is not.<sup>89</sup>

Though it was suggested that a special committee be formed to consider the topic of criminal sterilization, the suggestion was objected to “decidedly” by Joseph Jastrow and overruled.<sup>90</sup> Jastrow succeeded in suppressing committee formation at the National Conference, but the Institute was not without a committee on criminal sterilization for very long. The Institute’s Wisconsin branch formed a special committee on the sterilization of criminals and defectives (Branch Committee D),<sup>91</sup> which presented a report at the 1912 conference asking (1) in what ways can propagation of habitual criminal imbeciles and lunatics be prevented?; and (2) should sterilization of such persons in proper cases be authorized by law?<sup>92</sup>

In 1912, the Wisconsin branch hosted the Institute’s third annual meeting in Milwaukee. In an address to the attendees, Wisconsin Governor Francis McGovern said that “[o]ccasionally in the past, in listening to the proposals of the Wisconsin Branch of this Institute, I have thought that possibly there might be too much zeal.”<sup>93</sup> The zeal noted by McGovern was evidenced in the report of Branch Committee D, which presented readers with “a series of actual family pedigrees showing to a certain extent the effect of hereditary transmission.”<sup>94</sup> The pedigrees were presented in letter-coded charts indicating each family member’s “disease, habit, [or] condition,” including M for migraine and W for “wandered, tramp, or truant.”<sup>95</sup> One chart used data attributed to Charles Davenport<sup>96</sup> and

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<sup>88</sup> *Id.* at 61.

<sup>89</sup> *Id.* at 62.

<sup>90</sup> *Id.* Jastrow was a psychology professor and the author of one of the earliest articles in English to mention Lombroso—*A Theory of Criminality* published in *SCIENCE* in 1886. RAFTER, *supra* note 50, at 116.

<sup>91</sup> State chapters of the American Institute considered local crime and criminology problems. They existed in Massachusetts, Pennsylvania, New York, Illinois, Kansas, Minnesota, and Wisconsin. Gilmore, *supra* note 7, at 55.

<sup>92</sup> FOURTH ANNUAL MEETING, *supra* note 54, at 56.

<sup>93</sup> *Proceedings of the Fourth Annual Meeting of the Institute*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 592, 592 (1912).

<sup>94</sup> FOURTH ANNUAL MEETING, *supra* note 54, at 192.

<sup>95</sup> *Id.*

described a family in which the grandfather “was a western desperado,” his daughter “a lady of good family with much musical talent, but subject to migraine,” and one of her sons “a born criminal.”<sup>97</sup> The report lumped together as allied conditions epilepsy, lewdness, paralysis, stillbirth, defective eyesight, tuberculosis, syphilis, pauperism, sexual immorality, and nervousness.<sup>98</sup> In the eyes of Branch Committee D, these traits were all forms of degeneracy related to criminality.<sup>99</sup>

The Institute assembled its own Committee on the Sterilization of Criminals (Committee F<sup>100</sup>) in 1913.<sup>101</sup> Committee F made its first report in 1914.<sup>102</sup> Its formation may have been an attempt to produce a more measured Institute statement on criminal sterilization than that offered by the Wisconsin Committee. It may also have been formed because, as one contemporary observed, “[e]ugenics, whatever may be the meaning of the word” was “decidedly in the air.”<sup>103</sup> From 1914 to 1916, the *Journal* published a flurry of articles on eugenics and the sterilization of criminals. Titles included “Sterilization and Criminal Heredity,”<sup>104</sup> “Eugenics and the Criminal Law,”<sup>105</sup> and “Eugenics and Feeble-mindedness.”<sup>106</sup> Most of them opposed criminal sterilization and eugenics. Committee F concluded there wasn’t adequate proof that criminality was a heritable trait and that states should therefore not pass laws to sterilize criminals.<sup>107</sup>

Two other areas of significant Institute interest were the operation of “criminal laboratories” in prisons and courts and the development of systems for collecting and compiling criminal statistics. However, in the

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<sup>96</sup> Davenport was director of the eugenics laboratory at Cold Spring Harbor. Charles B. Davenport, *Heredity and Disease*, 34 SCI. MONTHLY 167, 167 (1932).

<sup>97</sup> FOURTH ANNUAL MEETING, *supra* note 54, at 193.

<sup>98</sup> *Id.* at 192-208.

<sup>99</sup> *Id.* at 212.

<sup>100</sup> The Committee was known as Committee H at its inception but by 1916 had become Committee F. For the sake of clarity, I refer to it consistently as Committee F, regardless of the date.

<sup>101</sup> Letter from John H. Wigmore to Quincy A. Meyers (Nov. 29, 1913) (on file with Northwestern University Archives).

<sup>102</sup> Joel D. Hunter, *Sterilization of Criminals. Report of Committee “F” of the Institute*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 373, 373 (1916).

<sup>103</sup> Montague Crackanthorpe, *Eugenics as a Social Force*, in THE NINETEENTH CENTURY & AFTER 962, 962 (1908).

<sup>104</sup> Arthur J. Todd, *Sterilization and Criminal Heredity*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 5, 5 (1914) (challenging claims in the heritable nature of criminality, but supporting sterilization of those whose criminality showed them likely to be unfit parents).

<sup>105</sup> Giulio Q. Battaglini, *Eugenics and the Criminal Law*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 12, 12-14 (Robert W. Millar trans., 1914) (arguing against eugenics).

<sup>106</sup> H.C. Stevens, *Eugenics and Feeble-mindedness*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 190, 190-97 (1915).

<sup>107</sup> Hunter, *supra* note 102, at 374.



early years of the Institute, interest in the former—a movement that drew heavily on theories of hereditary criminality—threatened to eclipse the latter. The 1910 report of the Committee on a System for Recording Data Concerning Criminals (Committee A) illustrates the tendency of biological determinism to dominate members' imaginations. Though Committee A was charged with investigating “an effective system for recording the physical and moral status and the hereditary and environmental conditions of delinquents, and in particular of the persistent offender; the same to contemplate, in complex urban conditions, the use of consulting experts in the contributory sciences,”<sup>108</sup> in practice Committee A focused on the hereditary and the moral more than the environmental.

Committee A was chaired by the sociologist E. A. Ross and included among its nine members Arthur MacDonald and Harry Olson.<sup>109</sup> Olson later took over as Chairman.<sup>110</sup> Olson, Ross, and MacDonald were each advocates of criminal laboratories. MacDonald was, in fact, notorious for his advocacy. He believed criminality came with physical markers and waged a tireless campaign to establish a laboratory to prove it.<sup>111</sup> He began his quest to set up an anthropometric<sup>112</sup> laboratory in the mid-1890s while he was working for the U.S. Bureau of Education.<sup>113</sup> MacDonald's collection of anthropometric instruments and his belief that he had “found a direct link between physical appearance and criminality, insanity, and poverty” worried his superiors at the Bureau and eventually led to his dismissal.<sup>114</sup>

MacDonald pitched his laboratory plan in a pamphlet titled *A Plan for the Study of Man*.<sup>115</sup> He advised that the “best method of study of both children and adults is that of the laboratory, with instruments of precision in connection with sociological data.”<sup>116</sup> Throughout *A Plan for the Study of*

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<sup>108</sup> John H. Wigmore, Chief Justice Harry Olson (Harry Olson Papers, Series 1/14) (on file with Northwestern University Archives) (emphasis omitted).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> James B. Gilbert, *Anthropometrics in the U.S. Bureau of Education: The Case of Arthur MacDonald's "Laboratory"*, 17 HIST. EDUC. Q. 169, 169 (1977).

<sup>112</sup> Anthropometrics is the “measurement of physical characteristics and speculation about their effects upon psychology.” *Id.* A 1901 dictionary explained that “anthropometry has been fostered by the study of the growth and development of the body (and its correlations with mental characteristic).” JAMES MARK BALDWIN, *DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY* 54-55 (1901).

<sup>113</sup> Gilbert, *supra* note 111, at 169.

<sup>114</sup> *Id.*

<sup>115</sup> Letter from Arthur MacDonald to John H. Wigmore (Jan. 8, 1905) (on file with Northwestern University Archives).

<sup>116</sup> *Id.* MacDonald was fired from the Bureau of Education in 1902 and never did get his laboratory. Gilbert, *supra* note 111, at 170.

*Man*, MacDonald presupposed the existence of an “abnormal class” and, like Lombroso before him, called for efforts to distinguish the habitual from occasional criminal.<sup>117</sup> MacDonald included in his pamphlet the results of an experiment he had conducted on the pain sensitivities of different socio-economic classes of women as an example of the kind of experiments he wanted to conduct in his proposed laboratory.

Another member of Committee A, the sociologist E. A. Ross, shared MacDonald’s interest in anthropometrics. Ross wrote to Wigmore in 1909 to suggest<sup>118</sup> that the National Conference discuss “[w]hat anthropometric measurements of convicted persons are of importance, and what instruments and apparatus are necessary for such purpose[.]”<sup>119</sup> At the National Conference, Ross proposed laboratories “to establish anthropological facts or generalizations regarding the criminal.”<sup>120</sup> The purpose of these laboratories, Ross explained, was to test:

whether Lombroso was right in saying that he [the criminal] is atavistic, reverting to his savage ancestry of ten thousand years ago, or whether others are right in saying that he is what he is because of something that happened when he was in the embryonic condition and is badly built, badly put together; to see whether his ears are like other people’s, whether the formation of his face is like that of other people, whether his senses and association of ideas and all the different things are like normal people, and as to whether he is an abnormal person, a sick man or a normal person, who has made a wrong step.<sup>121</sup>

In its 1910 report, Committee A proposed a system for compiling statistics on criminals which sought “to include practically all the hypothetical foundations for the growth in the individual of criminal traits.”<sup>122</sup> The proposed system collected family and developmental histories and used psychoanalysis and anthropometry. The character questionnaire proposed by Committee A asked, among other things, whether a subject had any “queer ideas about property, family, individual rights, religion, social institutions, etc.”<sup>123</sup> The anthropometry section called for observations of “[t]he well-known stigmata of degeneracy” and “a few careful measurements of the head.”<sup>124</sup>

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<sup>117</sup> ARTHUR MACDONALD, A PLAN FOR THE STUDY OF MAN 3 (1902).

<sup>118</sup> The special topic committees were organized at the first National Conference. Topics had been solicited from all the National Conference invitees and were debated by sections of the Conference. The topics submitted encompassed all manner of issues relating to criminal law and procedure, criminal punishment, and crime prevention.

<sup>119</sup> Letter from E.A. Ross to John H. Wigmore (Nov. 2, 1909) (on file with Northwestern University Archives).

<sup>120</sup> FIRST NATIONAL CONFERENCE, *supra* note 69, at 89.

<sup>121</sup> *Id.* at 89-90.

<sup>122</sup> *Id.* at 85.

<sup>123</sup> *Id.* at 93.

<sup>124</sup> *Id.* at 94.

An editorial note at the end of the 1910 report of Committee A stated that the Municipal Court of Chicago was considering adopting its proposed plan for gathering data.<sup>125</sup> Ultimately, Olson's service on Committee A inspired him to affix a laboratory for studying criminals to the Municipal Court in 1914: the Psychopathic Laboratory. He was inspired by the recommendation of Committee A that courts use "consulting experts in the contributory sciences."<sup>126</sup> In 1914, Olson hired psychologist William Hickson to evaluate criminals. Gault declared that the "fundamental purpose" of the Institute was realized by Hickson's laboratory.<sup>127</sup> Working for Olson, Hickson found high rates of feeble-mindedness<sup>128</sup> in his subjects. In 1914, he reported that of 245 boys between the ages of seventeen and twenty-one sent to him by the Municipal Court for examination, only 7.34% had normal intelligence.<sup>129</sup> Hickson's methods mirrored those proposed by Committee A. In a 1916 article on his work at the Laboratory, Hickson wrote that he was attempting "to make a survey along the psychological, normal and abnormal; physical and medical; anthropometrical and anthropological, stigmata of degeneration, intrinsic and extrinsic."<sup>130</sup> Hickson tested his subjects with devices like the Ergograph, which measured willpower by tracking how steadily a test subject could raise his arms against the machine's resistance, and the Plethysmograph, which measured the subject's "capacity for feeling and withstanding physical pain."<sup>131</sup> In 1915, the Institute published *Pathological Lying, Accusation and Swindling*, a study by the husband and wife team of Dr. William Healy and Mary Tenney Healy based on Hickson's laboratory studies. The book was published "because the editors of [the *Journal of Criminal Law and Criminology*] believe there is urgent need for attorneys and Judges to inform themselves scientifically on the subject."<sup>132</sup>

Ultimately, flamboyant practitioners of anthropometrics like Hickson served to discredit the criminal laboratory movement. By the end of its first decade, interest within the Institute in both criminal sterilization and in using criminal laboratories to find hereditary causes for criminality was on the wane. In 1917, H. H. Laughlin, a member of Committee F, asked that the committee be "excused from writing further opinions not based upon

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<sup>125</sup> *Id.* at 97.

<sup>126</sup> Wigmore, *supra* note 108, at 3.

<sup>127</sup> Robert H. Gault, *The Laboratory in the Criminal Court*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 167, 167 (1914).

<sup>128</sup> "Feeble-mindedness" was a catch-all diagnosis of mental deficiency.

<sup>129</sup> Gault, *supra* note 127, at 168.

<sup>130</sup> Hickson, *supra* note 28, at 246.

<sup>131</sup> *Psycho Courts Work Started*, CHI. DAILY TRIB., May 2, 1914, at 15.

<sup>132</sup> *Menace of the Lying Child*, WASH. POST, Nov. 7, 1915, at MS2.

research.”<sup>133</sup> The Committee Chairman, William A. White, concluded his report by noting the committee members believed it best that they disband until a sufficient scientific and statistical basis existed “upon which some definite action may be erected.”<sup>134</sup> Committee F was not alone in its frustration with the lack of evidence to support theories of heritable criminality and biological causes of crime. It confronted the same obstacle that all inquiries of the day into heritable, biological causes of criminality faced: “there was little credible empirical evidence of hereditary variables that could help us understand social man.”<sup>135</sup>

The exhaustion of Institute interest in heritable causes of crime allowed for greater priority to be given to a subject that had always been foremost in Wigmore’s goals for the Institute: the improved collection of statistics on crime. This shift in Institute focus was indicative of both a progression away from the theories of criminal anthropology and degeneracy theory and an attempt to conduct research that would garner much-needed funding from the likes of the Carnegie and Rockefeller Foundations. Nonetheless, the movement to improve collection of criminal statistics was not inconsistent with the Institute’s founding influence of positivism. It was consistent with the belief that scientific study could be applied to crime and, if the resources were available to collect enough data about criminals and their crimes, the problem of crime could largely be solved.

## VI. FISCAL CRISIS

Whereas positivism, with its relation to theories of heritable criminality, may have sown the seeds of a certain philosophical obsolescence on the part of the Institute, the failure to establish an endowment or secure long-range funding—which made it impossible for the Institute to weather the Depression intact—was the real cause of its demise. Set up to operate exclusively on membership dues,<sup>136</sup> the Institute quickly found itself chasing grant money. As early as 1911, the Institute was facing financial problems, and Wigmore was looking for a financial

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<sup>133</sup> William A. White, *Sterilization of Criminals (Report of Committee “F” of the Institute, and a Minority Report)*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY 499, 500 (1917).

<sup>134</sup> *Id.*

<sup>135</sup> Sarnoff A. Mednick & Jan Volavka, *Biology and Crime*, 2 CRIME & JUST. 85, 92 (1980).

<sup>136</sup> In a 1910 letter to the Carnegie Institution seeking funding for the *Journal*, Wigmore boasted that “[t]he Institute is working scientifically in several fields, and in none of these fields, except the present, is it asking for pecuniary aid.” Letter from John H. Wigmore to R.S. Woodward, *supra* note 18.

“Moses.”<sup>137</sup> He asked N.W. Harris, president of the Harris Trust and Savings Bank,<sup>138</sup> for the first \$10,000 contribution towards a \$100,000 endowment for the Institute. When rebuffed, Wigmore offered Harris the presidency for the following year, writing that “it would be the most natural thing in the world for the Institute to elect you its President.” He told Harris that he “could then through the Institute have an opportunity to carry out [his] own personal views and aims in this matter.”<sup>139</sup> Harris gave Wigmore two reasons he would not help endow the Institute: first, he doubted that any “great development in way of reformation of our criminal law and practice will be brought about by the legal fraternity”; and second, he had already contributed \$1,000 and wanted “to see how the work progresses from what I have already contributed.”<sup>140</sup>

The Institute also sought funding from the Rockefeller Foundation and Carnegie Corporation; it did not receive any at first.<sup>141</sup> When Wigmore learned in 1916 that the Rockefeller Foundation was considering publishing its own journal or series of monographs, he scolded it for failing to fund the *Journal*:

[I]f any charitable foundation, like your own, comes to the point of doing anything at all for that cause [of scientific criminology], it will be a serious error to ignore the work and the needs of the Journal. I do not know whether the circumstance that it is published a thousand miles West of New York makes any difference in your attitude towards it. Nevertheless, it is in fact a national journal, and the only one of its kind in the English language. I am disposed to believe that any benevolent enterprise which proceeds to make expenditures in the field of criminology owes a first duty to hold up the hands of the pioneers who have labored soundly and are still laboring in that field.<sup>142</sup>

During World War I the *Journal* lost all of its foreign and many of its domestic subscribers.<sup>143</sup> The *Journal's* managing director used his own money to keep the publication afloat.<sup>144</sup> In 1919, Wigmore appealed once again to the Rockefeller Foundation for funding, explaining that “[t]he hampering thing for the Institute has been its dependence on ordinary

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<sup>137</sup> Letter from John H. Wigmore to N.W. Harris (Aug. 18, 1911) (on file with Northwestern University Archives).

<sup>138</sup> *Stop! Think! Save! Advice to Nation*, CHI. DAILY TRIB., June 17, 1910, at 15.

<sup>139</sup> Letter from John H. Wigmore to N.W. Harris, *supra* note 137.

<sup>140</sup> Letter from N.W. Harris to John H. Wigmore (July 31, 1911) (on file with Northwestern University Archives).

<sup>141</sup> Letter from Edwin Keedy, University of Pennsylvania Law School, to John H. Wigmore (Feb. 1, 1924) (on file with Northwestern University Archives).

<sup>142</sup> Letter from John H. Wigmore to Jerome D. Greene, Rockefeller Foundation (Dec. 21, 1916) (on file with Northwestern University Archives).

<sup>143</sup> Minutes, Meeting of the Executive Board of the American Institute of Criminal Law and Criminology (Nov. 17, 1932) (on file with Northwestern University Archives).

<sup>144</sup> *Id.*

membership dues during the last eight years.” Wigmore wrote to the President of Northwestern University on November 18, 1920, that it was “life or death within the next three weeks.”<sup>145</sup> In 1921, Northwestern University withdrew funding for the *Journal*, citing “existing financial conditions.”<sup>146</sup> In June 1921, the Institute’s coffers held “relatively insignificant” funds of “annual dues of a few hundred dollars.”<sup>147</sup> Compounding the Institute’s difficulties, its treasurer was incommunicado, leaving Wigmore to speculate that the man was “dead or . . . on a long absence in Europe.”<sup>148</sup>

Salvation came in the form of a donation from the Institute’s then-President Hugo Pam’s brother Max Pam, a prominent Chicago attorney<sup>149</sup> who also donated money to Notre Dame to start a journalism school.<sup>150</sup> In 1921, the Institute was promised \$10,000 each year for five years from the Carnegie Corporation “to develop by experiment a comprehensive system of criminal records and statistics”<sup>151</sup> on the condition that the Board raise an equal amount from other sources.<sup>152</sup> In 1922, after largely fruitless attempts to match the Carnegie gift, the Institute received \$10,000 from the Rockefeller Foundation to improve the collection of criminal statistics in the United States.<sup>153</sup> Even so, by 1924 Carnegie funding was in danger of being cut off unless the Institute could “show satisfactory accomplishments from the money already expended.”<sup>154</sup> Funding from the Rockefeller Memorial was also drying up. Letters to the Institute were “quite definite to the effect that the gift [would] not be renewed.”<sup>155</sup>

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<sup>145</sup> Letter from John H. Wigmore to President of Northwestern University (Nov. 18, 1920) (on file with Northwestern University Archives).

<sup>146</sup> Letter from Office of the President, Northwestern University (Feb. 28, 1921) (on file with Northwestern University Archives).

<sup>147</sup> Letter from John H. Wigmore to Granville Clark (June 18, 1921) (on file with Northwestern University Archives).

<sup>148</sup> *Id.* The treasurer, as it turned out, was not dead or in Europe, and the Institute’s funds were all accounted for.

<sup>149</sup> Letter from John H. Wigmore to Max Pam (Mar. 29, 1921) (on file with Northwestern University Archives). Hugo Pam served as President of the Institute from 1919 to 1921.

<sup>150</sup> *Helps Fight on Socialism*, CHI. DAILY TRIB., May 9, 1912, at 1.

<sup>151</sup> *Offer of the Carnegie Corporation to Aid in Supporting the Research Program of the Institute*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 149, 149-50 (1922).

<sup>152</sup> Letter from John H. Wigmore to Granville Clark, *supra* note 147.

<sup>153</sup> Letter from John H. Wigmore to the President of the Carnegie Corporation (Feb. 27, 1922) (on file with Northwestern University Archives).

<sup>154</sup> Letter from Edwin Keedy to John H. Wigmore, *supra* note 141.

<sup>155</sup> *Id.*

## VII. A SHIFT IN DIRECTION

At the same time that the Institute was struggling with its funding, its focus had begun to shift from innate and hereditary to sociological causes of crime, such as joblessness and urban crowding.<sup>156</sup> The shift had begun as early as 1915 when, in conjunction with the Institute,<sup>157</sup> the *Journal* published the first of four supplemental monographs exploring sociological causes of criminality and delinquency. The “Editorial Announcement” of the series (in contrast to the Committee on Translation’s introduction to the *Modern Series*) made no mention of biological causes of crime; instead, it called for an understanding of delinquents’ social environment.<sup>158</sup> The second in the new series, *Studies in Forensic Psychiatry*, described crime as “a type of abnormal conduct which expresses a failure of proper adjustment at the psychological level.”<sup>159</sup> The fourth, *The Unadjusted Girl*, examined the psychological and sociological causes of female delinquency.<sup>160</sup> The term “hereditary taint” was last invoked uncritically in the *Journal* in 1929<sup>161</sup>—after not having appeared in its pages since 1919.<sup>162</sup> In a 1922 *Journal* book review, Gault dismissed the notion that the criminal population contained a higher percentage of the “feeble-minded” than the non-criminal population (a central tenet of degeneracy theory) as an idea “of scarcely more than historical interest.”<sup>163</sup>

The shift away from biological determinism within the Institute was consistent with the post-WWI shift in criminology towards sociological criminology, especially in Chicago.<sup>164</sup> Sociologists at the University of Chicago focused on crime as an outgrowth of urban living conditions, and

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<sup>156</sup> Letter from Andrew A. Bruce to John H. Wigmore (Apr. 25, 1931) (on file with Northwestern University Archives).

<sup>157</sup> Robert H. Gault, Frederic B. Crossley & James W. Garner, *Editorial Announcement* to WILLIAM HEALY AND MARY TENNEY HEALY, CRIMINAL SCIENCE MONOGRAPHS NO. 1, PATHOLOGICAL LYING, ACCUSATION AND SWINDLING: A STUDY IN FORENSIC PSYCHOLOGY vii (1915).

<sup>158</sup> *Id.*

<sup>159</sup> BERNARD GLUECK, *STUDIES IN FORENSIC PSYCHIATRY* vii (1916).

<sup>160</sup> WILLIAM I. THOMAS, *THE UNADJUSTED GIRL: WITH CASES AND STANDPOINT FOR BEHAVIOR ANALYSIS* (1923).

<sup>161</sup> *Amnesia from a Medicolegal Standpoint*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY 563, 572 (1929).

<sup>162</sup> Henry W. Ballantine, *Criminal Responsibility of the Insane and Feeble-minded*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 485, 498 (1919).

<sup>163</sup> Robert H. Gault, 13 J. AM. INST. CRIM. L. & CRIMINOLOGY 157, 158 (1922) (reviewing SAMUEL J. HOLMES, *THE TREND OF THE RACE: A STUDY OF PRESENT TENDENCIES IN THE BIOLOGICAL DEVELOPMENT OF CIVILIZED MANKIND* (1921)).

<sup>164</sup> See Piers Beirne, *Introduction* to WILLIAM I. THOMAS, *THE UNADJUSTED GIRL: WITH CASES AND STANDPOINT FOR BEHAVIOR ANALYSIS* (1923), *reprinted in* 1 *THE CHICAGO SCHOOL OF CRIMINOLOGY* xiv (Piers Beirne ed., 2006) (1923).

their approach “began to dominate criminology.”<sup>165</sup> Biological theories of criminality fell by the wayside, and criminologists focused on psychological and sociological causes of crime. In the 1930s, Nazism “drove an almost final nail in the coffin of biological and social interactionism; among social scientists, biological factors became expressly excluded from consideration in the same context as social variation.”<sup>166</sup> Institute-sponsored studies from 1931 included “The Vice Areas and Vice Problems of the City of Chicago,” “Organized Crime in the City of Chicago,” and the “Chicago Police Problems.”<sup>167</sup>

No longer directed at the study of the innate characteristics of individual criminals, the Institute channeled its penchant for science into the *detection* of criminals. A long campaign by the *Journal* and Wigmore for the formation of a forensics laboratory led, after the importance of ballistics evidence was illustrated in the prosecution of the St. Valentine’s Day Massacre, to the establishment of the Scientific Crime Detection Laboratory at Northwestern University in 1929.<sup>168</sup> It has been called the first crime detection lab of national significance.<sup>169</sup> By the time it was established, the quest for “anthropological” causes of crime had been dropped from the list of reasons for a criminological laboratory.<sup>170</sup> The lab was established primarily to examine ballistics evidence<sup>171</sup> but also performed lie detector tests<sup>172</sup> and handwriting identification.<sup>173</sup> Updates on its activities were published in the *Journal of Police Science*—another Institute publication.<sup>174</sup> The Laboratory was a highly publicized project and even presented an exhibit at the Century of Progress Exposition demonstrating the operation

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<sup>165</sup> Frank Williams, *Criminology*, in 1 THE ENCYCLOPEDIA OF POLICE SCIENCE 359, 362 (Jack R. Greene ed., 3d ed. 2007).

<sup>166</sup> Sarnoff & Volavka, *supra* note 135, at 91-92.

<sup>167</sup> Letter from Andrew A. Bruce to John H. Wigmore (Apr. 25, 1931) (on file with Northwestern University Archives).

<sup>168</sup> FRED E. HAYNES, CRIMINOLOGY 120 (2d ed. 1935).

<sup>169</sup> JOE NICKELL & JOHN F. FISCHER, CRIME SCIENCE: METHODS OF FORENSIC DETECTION 13 (1998).

<sup>170</sup> Robert H. Gault, announcing the formation of the Scientific Crime Detection Laboratory, wrote that the criminological laboratory the *Journal* had been advocating for over almost twenty years would perform “psychological, medical, neurological, and sociological analyses of individual criminals.” Robert H. Gault, *The Criminologic Laboratory*, 20 J. AM. INST. CRIM. L. & CRIMINOLOGY 166, 166 (1929).

<sup>171</sup> JOE NICKELL & JOHN F. FISHER, CRIME SCIENCE: METHODS OF FORENSIC DETECTION 108 (1999).

<sup>172</sup> *Society Finds New Thrill in “Lab” of Crime*, CHI. DAILY TRIB., Dec. 11, 1931, at 27.

<sup>173</sup> *A Woman Scientific Detective*, CHI. DAILY TRIB., May 5, 1935, at D10.

<sup>174</sup> ROALFE, *supra* note 9, at 185.



of a polygraph.<sup>175</sup> Its inventor, Leonard Keeler, was a member of the Laboratory staff.<sup>176</sup>

In 1929, Wigmore informed the Detroit Convention and Tourist Bureau that there was “no prospect of the American Institute of Criminal Law and Criminology having a general meeting of all members this year.”<sup>177</sup> “Its business,” Wigmore concluded, “is now done entirely by meeting of the Executive Board.”<sup>178</sup> However, just when the Institute finally expired is hard to establish. The *Chicago Daily Tribune*, which covered the Institute’s national and local meetings, last mentioned the organization as a going concern in 1932.<sup>179</sup> All that even Wigmore’s fastidious biographer William Roalfe can tell us is that it expired at some point during the Depression. Whatever the exact date, the fact that theories of heritable and biological criminality fell apart around the same time the Institute’s finances became most precarious raises a tantalizing question of whether its early association with positivism and degeneracy theory contributed to its decline. This may have been a precipitating factor, but it seems incontrovertible that the Depression was the proximate cause of the Institute’s demise.

#### VIII. CONCLUSION

Though the Institute was never revived, the theories of heritable and biological criminality that so defined its early years eventually were. By the 1970s, criminology was ready to reconsider, en masse, biological causes for criminality.<sup>180</sup> Today, criminologists tend to view biology, though not determinate, as relevant in assessing criminality.<sup>181</sup> Studies of criminality in adopted twins uniformly support the conclusion that there is “a heritable or genetic component to the behavior that results in crime”<sup>182</sup>—fundamentally the same position taken by the Institute positivists at the turn of the twentieth century. Some studies have even lent credence to the Lombrosian theory that physical anomalies correspond to criminality.

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<sup>175</sup> KEN ALDER, *THE LIE DETECTORS: THE HISTORY OF AN AMERICAN OBSESSION* 136-37 (2007).

<sup>176</sup> *Inventor Tells how His Device Picks out Liars*, CHI. DAILY TRIB., Aug. 30, 1930, at 4.

<sup>177</sup> Letter from John H. Wigmore to J. Lee Barrett, Detroit Convention and Tourist Bureau (Jan. 30, 1929) (on file with Northwestern University Archives).

<sup>178</sup> *Id.*

<sup>179</sup> *Downtown Clubs*, CHI. DAILY TRIB., Jan 24, 1932, at D3.

<sup>180</sup> Henry F. Fradella, *From the Legal Literature: What Role, If Any, Should Biology Play in Criminal Cases?*, 45 CRIM. L. BULL. 175 (2009).

<sup>181</sup> Erica Beecher-Monas, *Circumventing Daubert in the Gene Pool*, 43 TULSA L. REV. 241, 254 (2007).

<sup>182</sup> GAIL S. ANDERSON, *BIOLOGICAL INFLUENCES ON CRIMINAL BEHAVIOR* 96 (2007).

Lombroso claimed that “[l]arge jug ears” corresponded to atavism.<sup>183</sup> Contemporary scientists have found that “[s]omething that can change the development of the ears [*in utero*] could certainly also damage such vital things as the central nervous system,” leading to hyperactivity and aggressive behavior—both of which have a “strong correlation” with violent offending.<sup>184</sup>

In light of recent science, the early fascination of the Institute with the possibility that criminality had a biological source demands reconsideration. Though this fascination often ran parallel to racism, xenophobia, and elitism, it also fueled innovative applications of scientific methods to the problem of crime. For example, the criminal laboratory movement within the Institute led (via Olson’s Psychopathic Laboratory) to the inclusion of psychiatrists in court proceedings to determine criminal accountability.<sup>185</sup> In collaboration with the American Prison Association, the Institute convinced the Census Bureau to publish statistics on prisoners each year instead of every ten years starting in 1925.<sup>186</sup>

Carol Smart has noted, “[P]ositivism is misconstrued if its main problem is seen as its connection to a conservative politics or a biological determinism.”<sup>187</sup> The same can be said in assessing the legacy of the American Institute of Criminal Law and Criminology. Indeed, the Institute’s most hubristic position was not its gravitation to Italian positivism and biological determinism, but its excessive faith in the ability of scientific research to find an “effective and permanent solution” to “the criminal problem.”<sup>188</sup> The positivism of the Institute showed overconfidence in both the ability of science to isolate hereditary and biological causes of crime, as well as overconfidence in the ability of the criminal justice system to administer a system of individualized punishment based on those results. However, criminology was advanced by virtue of

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<sup>183</sup> LOMBROSO, *supra* note 34, at 339.

<sup>184</sup> ANDERSON, *supra* note 182, at 167.

<sup>185</sup> John H. Wigmore, Editorial, *Chief Justice Harry Olson*, 26 J. CRIM. L. & CRIMINOLOGY 327, 328 (1935).

<sup>186</sup> Sanford Bates, *Criminal Records and Statistics*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY 8, 10-11 (1928).

<sup>187</sup> Carol Smart, *Feminist Approaches to Criminology or Postmodern Woman Meets Atavistic Man*, in CRIMINOLOGICAL PERSPECTIVES 489, 490 (Eugene McLaughlin et al. eds., 2003).

<sup>188</sup> Letter from John H. Wigmore to Dr. George E. Vincent, Rockefeller Foundation (Feb. 14, 1919) (on file with Northwestern University Archives). In the introduction to the Modern Series, the Committee on Translations predicted a future in which crime, like disease, could be either diagnosed, prevented, or controlled. John H. Wigmore, Ernst Freund, Maurice Parmelee, Roscoe Pound, Edward Lindsay & Wm. W. Smithers, *General Introduction to ENRICO FERRI, CRIMINAL SOCIOLOGY* vi (1917).

the fact that Wigmore and the founders of the Institute, as Burnham's aphorism advises, made no little plans.