

No. 25-891

IN THE
Supreme Court of the United States

ANDREW BURGESS GREGG,

Petitioner,

v.

COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

**BRIEF OF THE COLORADO OFFICE OF
ALTERNATE DEFENSE COUNSEL AND
PROFESSOR DANIEL LOEHR AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

ERIC A. SAMLER
Counsel of Record
HOLLIS A. WHITSON
SAMPLER AND WHITSON, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
(303) 670-0575
eric@samlerandwhitson.com
Counsel for Amici Curiae

120962



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(800) 274-3321 • (800) 359-6859

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Office of Alternate Defense Counsel (OADC) and Professor Daniel Loehr submit this brief in support of Petitioner Andrew Burgess Gregg.¹ The Office of Alternate Defense Counsel (OADC) was established under section 21-2-101, C.R.S. (1997), et seq. as an independent governmental agency within the Colorado Judicial Branch. OADC provides representation by contracting with licensed attorneys, § 21-2-103(4), and is mandated to provide to indigent persons “legal services that are commensurate with those available to nonindigents.” § 21-2-101(1), C.R.S. (2023).

OADC is funded to provide legal representation for indigent persons in criminal and delinquency cases in which the Office of the State Public Defender (OSPD) has a conflict of interest. § 21-2-103(1)(a), C.R.S. (2023). In the vast majority of cases in which the defendant is charged with habitual offender counts, OSPD was the representing agency on the prior conviction(s) and therefore has a conflict in handling the habitual offender challenges. As a result, OADC handles the vast majority of habitual offender litigation in Colorado state courts for indigent defendants. Directly and indirectly, habitual offender litigation greatly impacts OADC’s fiscal and policy concerns.

1. Pursuant to this Court’s Rule 37.2, notice to all parties is satisfied by the filing of this brief more than 10 days prior to the deadline. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Daniel Loehr is an Associate Professor of Law at the City University of New York School of Law. His extensive research includes a focus on the history of habitual criminal laws, most notably, *The Eugenic History of Habitual Offender Laws*, 68 How. L.J. 233 (2025).

SUMMARY OF ARGUMENT

The question before the Court is whether double jeopardy protections apply to habitual criminal sentencing proceedings. To assist the Court in answering that question, this brief offers historical insight into the nature and meaning of such proceedings. The brief begins by documenting how habitual criminal laws, including Colorado's, were proposed by eugenicists who believed that certain individuals—"habitual criminals"²—inherited their criminality and would spread it to their offspring. See Daniel Loehr, *The Eugenic History of Habitual*

2. We adopt the term "habitual criminal" not to endorse the concept of a "habitual criminal" but because we are telling the history of a law, the original versions of which were described as "habitual criminal laws" by their proponents. And the historical use of the term "habitual criminal" is revealing. The term "habitual" bears a different meaning today than it did when habitual criminal laws were first adopted. Today, "habitual" is defined as something that is "of the nature of a habit." *Habitual*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). But in the first half of the 1900s, the Oxford English Dictionary defined "habitual" as something that is "inherent or latent in the mental constitution." *Habitual*, OXFORD ENGLISH DICTIONARY (1st ed. 1898). Thus, in using this term, proponents of "habitual criminal laws" were asserting that criminality was inherent or latent in the individuals subject to the law. Throughout this brief, we adopt their terminology to communicate, but not endorse, their conception of "habitual criminality."

Offender Laws, 68 How. L.J. 233 (2025). Based on this theory, eugenicists designed habitual criminal laws to increase sentences for “habitual criminals” so severely that the prolonged incarceration would prevent them from reproducing. *Id.* In short, habitual criminal laws were designed by eugenicists to be sterilization by another means, and they were adopted across the country in the early 1900s to serve this purpose. *Id.* While the statutes have been amended over the years, the reproduction-limiting core of the eugenic-era laws remain in place.

Understanding this history casts a different light on the nature and meaning of habitual criminal sentencing proceedings. These proceedings are not merely trivial exercises in tallying past convictions. They are—and always have been—profound inquiries into whether the law is prepared to diagnose somebody as a “habitual criminal” and whether, therefore, the law is prepared to subject this individual to a separate sentencing scheme designed to prevent them from reproducing. The stakes and significance of habitual criminal sentencing proceedings, in other words, could not be higher.

ARGUMENT

The Nazi party rose to power in Germany in January 1933. Within a year, the party had passed the “Law against Dangerous Habitual Criminals,” which permitted life sentences for individuals who committed three criminal acts. Nikolaus Wachsmann, *From Indefinite Confinement to Extermination: “Habitual Criminals” in the Third Reich*, in *SOCIAL OUTSIDERS IN NAZI GERMANY* 166 (Robert Gellately & Nathan Stoltzfus, eds., 2018). Four years earlier, in 1929, Colorado passed its first “habitual

criminal law,” which, just like the Nazi law, permitted life sentences for individuals who committed three criminal acts. Act of Apr. 18, 1929, ch. 85, sec. 2 1929 Colo. Sess. Laws 310.

The synchronicity of these two laws is no fluke. Both emerged from the same movement—the eugenics movement—which was flourishing around the world in the early to mid-1900s. As we document throughout this brief, eugenicists understood “criminality” to be a heritable trait. To stop the spread of “criminality” from one generation to the next, eugenicists sought to identify those who were innately criminal and then incapacitate them for their reproductive years—by sterilization, by marriage restrictions, and, as is often overlooked but is the focus of this brief, by the passage of habitual criminal laws. And while Coloradans and Nazis adopted strikingly similar habitual criminal laws around the same time, the key difference is that while Germany has now abolished its eugenic-era habitual criminal law, Colorado’s lives on. *Wachsmann*, at 182-83 (describing the repeal in Germany of the habitual criminal law sentencing system).

I. “HABITUAL CRIMINALS” WERE BELIEVED TO INHERIT AND PASS DOWN CRIMINALITY.

In 1914, Charles Carlesi was charged, convicted, and sentenced under New York’s habitual criminal statute. *Carlesi v. New York*, 233 U.S. 51, 56 (1914). He appealed his sentence on the theory that he could not be given additional punishment for an earlier conviction because he had already served that sentence and indeed been pardoned. *Id.* But this Court faulted him for assuming that the habitual criminal punishment amounted to

“additional punishment on crimes for which he had already been convicted.” *Id.* at 57 (quoting *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901)). According to this Court, a habitual criminal statute “does no such thing.” *Id.* Instead, as this Court framed it, under a habitual criminal law, “the punishment is for the new crime only, but is heavier if he is an habitual offender.” *Id.* This is a puzzling sentence at first blush. If the punishment is for the new crime only, how could it be heavier on the basis of being a habitual offender?

The only way to understand the Court’s language is by looking at it through a eugenic lens. What the Court is saying is that Mr. Carlesi is not being punished more on account of his past acts, but is instead being punished more for *who he is*—for his essence as a “habitual criminal,” which, according to the Court, means something other than just somebody with previous convictions. The Court, at this point, was clearly steeped in the prevailing eugenic beliefs of the time, which held that habitual criminals were a distinct category of human. Charles Carlesi was, in the eyes of the Court, a habitual criminal at his core. While the prior convictions helped identify him as such, they did not make him so.

To understand this eugenic logic, and its prevalence in the early 1900s, it is helpful to start in 1876 with a professor from Turin, Italy—Cesare Lombroso. That year, he published “Criminal Man,” which argued that “criminals” are a genetically inferior subspecies of the human race. CESARE LOMBROSO, *CRIMINAL MAN* (Mary Gibson & Nicole Hahn Rafter trans., Duke Univ. Press 2006) (1876). By studying human skulls, Lombroso theorized that “criminals” tended to be individuals who

are less evolved and that their urge to commit crime is a vestige of more primitive human forms. *Id.* at 45-48, 91-93.

Criminality, on his account, was heritable and incurable. “How can one expect to reform that which has been created over several generations!” Lombroso wrote. *Id.* at 108. To put it more vividly, Lombroso quoted English prison wardens who claimed that “it is easier to transform a dog into a wolf than a thief into a gentleman.” *Id.* at 109. And according to Lombroso’s theory, 40 percent of all “criminals” were *born* “criminals” in this way; in other words, 40 percent were “criminal” at the species level. *Id.* at 108-09, 244.

Americans embraced Lombroso’s theory. In Lombroso’s words, Americans were “almost fanatical” about it. Cesare Lombroso, *Introduction to GINA LOMBROSO-FERRERO, CRIMINAL MAN ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO* xi (G.P. Putnam’s Sons 1911). And the evidence supports this—his central thesis was widely endorsed in American scholarship. A decade after Lombroso published *Criminal Man*, a Yale University professor, Simeon Baldwin, who later became Connecticut’s governor and Chief Justice of Connecticut’s Supreme Court, published a paper called “How to Deal with Habitual Criminals,” in which he agreed with Lombroso that children are “bred” into crime. Simeon Baldwin, *How to Deal with Habitual Criminals*, 22 J. SOC. SCI. 162, 163 (1886). That same year, the first ever Dean of Yale Law School, Francis Wayland, compared criminality to smallpox to argue that “criminals” must be imprisoned “for the life of the criminal” lest their condition spread. Francis Wayland, *The Incurable, —Who He Is, And What Shall Be Done with Him* (1886), *in* PROC. NAT’L PRISON CONG., 1886, at 189-97.

Another Yale professor, William Trumbull, quoted approvingly the views of Dr. John Morris, who wrote that there is “a crime diathesis, just as there is a disease diathesis.” WILLIAM TRUMBULL, *THE PROBLEM OF CAIN: A STUDY IN THE TREATMENT OF CRIMINALS* 5 (Tuttle, Morehouse & Taylor, 1890). “[T]hat is,” he elaborated, “there are men born with crime predispositions, just as there are men born with an inheritance of struma, syphilis, or insanity.” *Id.* He went on to agree with Lombroso that criminality was incurable: “Cure, in such cases, is almost hopeless; arrest of disease is all that we can hope to secure.” *Id.*

The belief in criminality as a heritable trait was not limited to these scholars at Yale. It swept the nation. Consider, for example, Oliver Wendell Holmes’ famous 1897 speech “*The Path of the Law*,” which aligned with Lombroso in arguing that criminality was inherited and incurable. As the would-be Justice Holmes put it: “If the typical criminal is a degenerate, bound to swindle or murder by as deep seated an *organic necessity* as that which makes the rattlesnake bite...he cannot be improved.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 470 (1897) (emphasis added).

Justice Benjamin Cardozo advanced a similar conception of criminality, just three years before he joined the Court. In a 1929 lecture, he described the “class” of criminals as “defectives” and held that their “redemption is hopeless.” Benjamin Cardozo, *Anniversary Discourse: What Medicine Can Do for Law*, 5 BULL. N.Y. ACAD. MED. 581, 591 (1929). Quoting a doctor, he elaborated that, “for a large proportion of criminals . . . the percentage has yet to be determined . . . punishment for a period of time and then letting him free is like imprisoning a diphtheria-

carrier for awhile and then permitting him to commingle with his fellows and spread the diphtheria germ.” *Id.* Both would-be Justice Holmes and would-be Justice Cardozo thus endorsed the belief that criminality is spread like a disease.

These beliefs about criminality were also embraced by the medical community. In the July 1881 issue of the *Journal of Medical Science*, Dr. George Savage advanced a theory of hereditary criminality, claiming that moral insanity is inherited, and that “it is almost impossible to draw a definite line between the criminal and the person who is more truly morally insane.” George Savage, *Moral Insanity*, 27 *J. MENTAL SCI.* 147, 152 (1881). In an 1887 edition of the *American Journal of Social Science*, Dr. William Noyes described “the criminal as a distinct type of the human species.” William Noyes, *The Criminal Type*, 24 *J. SOC. SCI.* 31, 31 (1887). Dr. Noyes, notably, had read a translation of Lombroso’s *Criminal Man*. NICOLE RAFTER, *THE CRIMINAL BRAIN: UNDERSTANDING BIOLOGICAL STUDIES OF CRIME* 97 (2010). Another physician, Samuel Strahan, wrote in 1892 that “the instinctive criminal is an abnormal and degenerate type of humanity.” SAMUEL STRAHAN, *MARRIAGE AND DISEASE: A STUDY OF HEREDITY AND THE MORE IMPORTANT FAMILY DEGENERATIONS*, 283 (Kegan Paul, Trench, Trubner & Co. 1892).

Popular publications soon adopted these medical and legal theories. One widely distributed book, *Prisoners and Paupers*, characterized “criminals” as a subspecies and described them as “the imperfect, knotty, knurly, worm-eaten, half-rotten fruit of the race.” HENRY BOIES, *PRISONERS AND PAUPERS: A STUDY OF THE ABNORMAL INCREASE OF CRIMINALS, AND THE PUBLIC BURDEN OF*

PAUPERISM IN THE UNITED STATES, THE CAUSES AND REMEDIES 266 (1893). The book embraced Lombroso's specific rhetoric, noting that "a large proportion" of prison inmates "were born to be criminals." *Id.* at 171-72. Despite this alarming language, the author, Henry Boies, was not a marginal man. He was a high-profile Pennsylvania figure, serving on the Board of Public Charities, the Lunacy Committee, and the Prison Discipline Society. Philip Jenkins, *Eugenics, Crime and Ideology: The Case of Progressive Pennsylvania*, 51 J. MID-ATLANTIC STUD. 64, 69 (1984).

These ideas also made their way into textbooks. *A Civic Biology*, the textbook popularized by the Scopes trial, warned that genetically defective families spread "disease, immorality, and crime to all parts of this country." GEORGE W. HUNTER, *A CIVIC BIOLOGY* 263 (1914). The textbook also foreshadowed the emerging demand to isolate "degenerates," suggesting that society could only protect itself by confining them to celibate asylums. *Id.*

The idea of the "genetic criminal" did not die out in the 19th century but, rather, persisted to the mid-1900s. In 1914, a year before the *Carlesi* opinion, one author captured the ubiquity of the belief that crime was heritable. "That a criminal father should beget a child pre-destined to criminality," he wrote, "is a foregone conclusion." W.S. Hall, *The Relation of Crime to Adolescence*. 15 BULL. AM. ACAD. MED. 86, 87 (1914). In a law review article published a decade later, another author quoted the prevailing views of the era as follows: "the criminal is a special type of individual capable of an accurate description as a species." J.A. Royce McCuaig, *Modern Tendencies in Habitual Criminal Legislation*, 15 CORNELL L. REV. 62, 82 (1929).

What this litany of sources makes clear is that there was a widely held belief in the early 1900s that habitual criminals inherited their criminality and could not be cured of it.

II. EUGENICISTS PROPOSED “HABITUAL CRIMINAL” LAWS AS A TOOL TO STOP REPRODUCTION.

Once the idea of the “habitual criminal” as a genetically defective subspecies was conjured in the American mind, the question became what to do about it. Because the “habitual criminal” would pass its genetic inferiority to its offspring, there was widespread agreement that the “habitual criminal” must be barred from reproducing. As Charlton Lewis, the President of the Prison Association of New York wrote in 1899, “The extinction of the criminal class, [is an] ideal[] to be kept in view, just as the elimination of disease must be the perpetual aim of medical sciences.” Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 29 (1899).

The question, then, was *how* to extinguish the “criminal class.” One method involved marriage restrictions. Note, for example, that the anti-miscegenation law struck down in *Loving v. Virginia*, 388 U.S. 1 (1967) also required grooms to swear that “neither is she nor am I a habitual criminal.” APPLICATION FOR MARRIAGE LICENSE, ROCKBRIDGE COUNTY (Va.) CLERK’S CORRESPONDENCE, 1912-1943 (Local Government Records Collection, Rockbridge County Court Records, Library of Virginia).

But the principal method to extinguish the “criminal class” involved criminal law. As one author wrote in a eugenics periodical of the time: “*the penal code is a*

eugenic instrument.” Giulio Q. Battaglini, *Eugenics and the Criminal Law*, 5 J. CRIM. LAW & CRIMINOLOGY 12, 15 (1914) (emphasis in original). But, even within the criminal law, there remained a debate about whether sterilization or long prison sentences would be the better method for barring the reproduction of “habitual criminals.”

These various approaches were summarized by one author in 1914: “the following methods have been suggested for removing individuals with innately defective strains. 1. Life segregation (or segregation during the reproduction period.) 2. Sterilization. 3. Restrictive marriage laws and customs.” Joel D. Hunter, *Sterilization of Criminals*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 514, 526 (1914).

Of these options, Lombroso was in favor of long prison sentences. In his words, “born criminals must be interned in special institutions” to “gradually reduce that not inconsiderable proportion of criminality that stems from heredity factors.” *Lombroso*, at 348. Many in the United States shared his view. For example, in 1907, Pennsylvania prison administrators wrote of “the desirability of restricting the liberty and power of degenerates to transmit their criminal propensities to unfortunate progeny.” INSPECTORS OF THE STATE PENITENTIARY FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 78TH ANN. REP. 5 (1908).

One author (Charles Darwin’s son) made the case for long sentences in even stronger terms, claiming that short sentences actually made it more likely that criminals would reproduce when released: “The eugenicist condemns our existing system whereby the habitual criminal is subjected to numerous short imprisonments, because not

only does it not tend to lessen the number of his progeny, but is, indeed, likely to increase his racial productivity by, from time to time giving him renewed vigour.” Leonard Darwin, *The Habitual Criminal*, 6 *EUGENICS REV.* 204, 212-13 (1914).

The proposals for long sentences for “habitual criminals” were prominent in universities. Bernard Glueck, head of the psychiatric clinic at Sing Sing and a professor at Harvard, declared that, “the incorrigibles have to be dealt with in only one way, and that is permanent segregation and isolation from society.” See DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 71-72 (1980). In a similar vein, a 1923 textbook, which included a chapter on “The Defective Criminal,” suggested that “permanent segregation. . . may be the kindest and most efficient form of treatment.” ERNEST BRYANT HOAG & EDWARD HUNTINGTON WILLIAMS, *CRIME, ABNORMAL MINDS, AND THE LAW* 5-6 (1923).

But the calls for life in prison were only half the story. At the same time, calls for sterilization proliferated as well. In 1899, Dr. A.J. Oschner published a study called *Surgical Treatment of Habitual Criminals*. He took as a starting point for his study that “[i]t has been demonstrated beyond a doubt that a very large proportion of all criminals, degenerates and perverts have come from parents similarly afflicted.” A.J. Oschner, *Surgical Treatment of Habitual Criminals*, 32 *J. AM. MED. ASS’N.* 867, 867 (1899). He specifically cited Lombroso: “It has also been shown, especially by Lombroso, that there are certain inherited anatomic defects which characterize criminals, so that there are undoubtedly born criminals.” *Id.*

Thus, Dr. Oschner fantasized, “if it were possible to eliminate all habitual criminals from the possibility of having children, there would soon be a very marked decrease in this class, and naturally, also a consequent decrease in the number of criminals from contact.” *Id.* Being a doctor and not a lawyer, his proposed solution was a vasectomy rather than a life sentence, and he recommended it not just for criminals but also for “chronic inebriates, imbeciles, perverts and paupers.” *Id.* at 868.

President Theodore Roosevelt embraced this idea as well. In 1913, in a letter to the prominent eugenicist Charles Davenport, Roosevelt wrote: “we have no business to permit the perpetuation of citizens of the wrong type.” Letter from Theodore Roosevelt, President of the United States of America, to Charles B. Davenport, Director, Cold Spring Harbor Laboratory (Jan. 3, 1913) (on file with Am. Phil. Soc’y). His preferred method for halting that perpetuation was sterilization. “I wish very much,” he wrote, “that the wrong people could be prevented entirely from breeding; and when the evil nature of these people is sufficiently flagrant, this should be done. Criminals should be sterilized and feeble-minded persons forbidden to leave offspring behind them.” Theodore Roosevelt, *Twisted Eugenics*, 106 *THE OUTLOOK* 30, 32 (1914).

While many intellectuals argued about the relative merits of sterilization versus segregation through long prison sentences, the most common view was that both practices should be invoked. Davenport argued that “incurable and dangerous criminals . . . may under appropriate restrictions be prevented from procreation—either by segregation during the reproductive period or even by sterilization.” C.B. DAVENPORT, *EUGENICS: THE*

SCIENCE OF HUMAN IMPROVEMENT BY BETTER BREEDING
33-34 (1910).

A 1913 report specifically weighed the merits of sterilization and segregation and concluded that “it is not a question of segregation *or* sterilization, but segregation *and* sterilization.” HENRY H. GODDARD, *STERILIZATION AND SEGREGATION* 11 (1913) (emphasis in original). Similarly, Earnest Hooton, an anthropology professor at Harvard, argued that because criminals are “organically inferior,” they can only be eliminated “by the extirpation of the physically, mentally and morally unfit, or by their complete segregation in a socially aseptic environment.” ERNEST A. HOOTON, *THE AMERICAN CRIMINAL: AN ANTHROPOLOGICAL STUDY* 309 (1939).

And in 1922, Chief Justice Harry Olson of the Chicago Municipal Court wrote that “the two theories of segregation and sterilization are not antagonistic, but both may be invoked.” Harry Olson, *Introduction to HARRY HAMILTON LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES* vi (1922). And indeed, both theories were invoked—rapidly and aggressively across the United States, including in Colorado. As horrific as these theories seem now, they were decidedly not fringe views. And there is no better evidence of that than in the legislation that ensued.

III. STATES, INCLUDING COLORADO, ADOPTED HABITUAL CRIMINAL LAWS AS A EUGENIC TOOL.

In the first half of the 1900s, habitual criminal laws and sterilization laws were passed rapidly across the country. Indiana passed the first sterilization law in 1907,

Hunter, at 515, and California passed the second in 1909, Act of April 26, 1909, ch. 720, 1909 Calif. Sess. Laws 1093. In 1911, Governor Woodrow Wilson signed New Jersey's sterilization bill, which reportedly acknowledged the "power of heredity in criminals" and was targeted at "the hopelessly defective and criminal classes." *Gov. Wilson Signs the Sterilization Bill*, N.Y. TRIB., May 4, 1911, at 1. By 1933, 27 states had passed sterilization laws. E.S. Gosney, *Eugenics in California*, N.Y. TIMES, Jan. 14, 1934, at E5. Many of these laws targeted "habitual criminals" or "confirmed criminals," such as Iowa's law, which required sterilization upon a second felony conviction. *Hunter*, at 514-515. Colorado would have been among the states to pass a sterilization bill but for a gubernatorial veto. *Gov. Adams Vetoes Sterilization Bill*, THE DAILY TIMES, Apr. 12, 1927, at 1.

The passage of habitual criminal laws followed a similar trajectory. In 1907, New York passed one of the earliest and harshest habitual criminal sentencing laws, requiring a life sentence upon a fourth conviction. Act of July 19, 1907, ch. 645, 1907 N.Y. Sess. Laws 1494-95. The New York State Board of Charities, which championed the bill, argued for the bill on the grounds that it would provide "permanent detention" to "those who by defect of character or constitution" required containment. NEW YORK STATE BOARD OF PUBLIC CHARITIES, 1905 ANN. REP. Specifically, they argued that "incurable offenders should be permanently segregated by the state." *Id.* They even cited Lombroso in their publications for the proposition that habitual criminals are a "distinct class" in need of permanent segregation. *Id.*

States across the country followed suit. Twenty-three states adopted habitual criminal laws between 1920 and

1930 and by mid-century, 42 states had them. George K. Brown, *The Treatment of Recidivists in the United States*, 23 CAN. B. REV. 640, 642 (1945). Among these states was Colorado.

Colorado's habitual criminal law first passed in 1929, amidst the wave of eugenically-motivated habitual criminal laws sweeping the United States. Act of Apr. 18, 1929, ch. 85, 1929 Colo. Sess. Laws 310. While the timing of Colorado's habitual criminal law allows for an inference of its eugenic intent, the state-specific history of the law provides more direct evidence of such intent.

Notably, for example, Colorado's habitual criminal law was passed only after three failed attempts to pass sterilization laws. The first such attempt, in 1921, was with a bill entitled "An Act to Prevent the Procreation of Confirmed Criminals, Idiots, Imbeciles, and Rapists." Michala Tate Whitmore, "Immediate Preservation of the Public Peace, Health and Safety": Colorado's History of Eugenic Sterilization 29 (Apr. 2020) (unpublished manuscript) (on file with author). The bill was drafted by Dr. Minnie Love, a state representative who would go on to become the "excellent commander" of the women of the Ku Klux Klan in 1924. *Id.* at 27.

Though the sterilization bill did not pass in 1921, and though a similar effort failed in 1924, the General Assembly had more success in 1927. The 1927 sterilization bill passed both chambers, but was then vetoed by Governor William Herbert Adams, who argued that segregation was preferable to sterilization. In his veto message, he wrote that because the state had "facilities for segregation" readily available, "the end sought to be reached by the

[sterilization] legislation can be obtained by the exercise of careful supervision of the inmates, without invoking the drastic and perhaps unconstitutional provisions of the act.” *Gov. Adams Vetoes Sterilization Bill*, THE DAILY TIMES, Apr. 12, 1927, at 1. In other words, Governor Adams was comfortable with the goal of stopping reproduction, but preferred accomplishing that goal through incarceration, not sterilization.

Two years later, the legislature gave him just that opportunity. Having failed to make the sterilization bill become law in 1927, the legislature succeeded with the passage of a habitual criminal sentencing bill in 1929. Act of Apr. 18, 1929, ch. 85, 1929 Colo. Sess. Laws 310. One of the bill’s advocates, Representative Annah G. Pettee, spoke of her disappointment with the Governor’s veto of the 1927 sterilization bill, describing the veto as “the tragedy of the session.” *Legislative Council Plans Annual Luncheon*, ROCKY MOUNTAIN NEWS, Apr. 29, 1928, at 21. Simultaneously, she warned of the “rapid increase of the insane, feeble-minded and habitual criminal classes.” *Id.*

The drafted habitual criminal bill looked similar to many of the eugenic habitual criminal laws being passed across the country, and it was specifically modeled off of New York’s habitual criminal law. *House Favors Crime Measure, ‘Habitual Criminal’ Proposal Modeled on Baumes Law in New York*, ROCKY MOUNTAIN NEWS, Mar. 3, 1927. In addition to creating an exponentially longer sentence for individuals convicted of a third felony, the bill imposed a mandatory life sentence upon conviction of a fourth felony. Act of Apr. 18, 1929, ch. 85, 1929 Colo. Sess. Laws 310. The bill thus accomplished the eugenic aim of stopping people deemed to be “habitual criminals”

from reproducing, but did so through means other than sterilization. Governor Adams, who already signaled that he preferred segregation to sterilization, signed the bill.

Colorado's habitual criminal law has been amended over the years, but the operative core has remained in place. For example, Mr. Gregg faces a virtual life sentence of 48 years if he is deemed a habitual criminal under the 2024 version of the statute. § 18-1.3-801(2)(a), C.R.S. (2024) (requiring a sentence of four times the maximum presumptive range). If he had been convicted instead under the 1929 statute, he would have instead faced a sentence for "the term of his natural life." Act of Apr. 18, 1929, ch. 85, sec. 3 1929 Colo. Sess. Laws 310. Though the statute has been tinkered with, the eugenic effect remains in place: then and now, Mr. Gregg would receive a sentence long enough to prevent him from procreating.

IV. HABITUAL CRIMINAL LAWS CONTINUE TO LIMIT REPRODUCTION, AND DO SO IN A RACIALLY DISPROPORTIONATE MANNER.

State legislatures have tinkered with habitual criminal laws over the last century, but no legislature has ever acknowledged or repudiated the eugenic origins of habitual criminal laws. And, as a practical matter, habitual criminal laws continue to operate as eugenicists would have hoped. They identify individuals based on prior behavior, mark them as habitual criminals, and then prevent them from reproducing through exponentially longer sentences than they would have received but for the "habitual criminal" determination.

Data suggest that states have sentenced hundreds of thousands of individuals under habitual criminal statutes,

and have thus impeded upon these individuals' ability to reproduce on the basis of prior criminal acts. Petition for Writ of Certiorari, *Gregg v. Colorado*, No. 25-891, at *26 (U.S. filed Jan. 27, 2026). The data also suggest that individuals of color, and particularly Black individuals, are disproportionately targeted with habitual criminal laws relative to white individuals, even when their criminal histories are similar. See Justin D. Levinson, et al., *Racializing Three Strikes*, 67 ARIZ. L. REV. 919, 940 (2025).

In California, for example, half of the state's three strikes prison population is Black, even though the state's Black population is only 6 percent. *Id.* at 943. In Florida, it is 75 percent of the state's habitual criminal prison population that is Black, even though the state's Black population is only 14.5 percent. *Id.* at 944. The disparity is similar in Louisiana, where Black people make up 75 percent of the habitual criminal prison population but only a third of the state population. *Id.* In Oregon, a recent study showed that while Black people make up only 3.2 percent of the population, they make up 16.58% of those with "dangerous offender sentencing enhancements." *Jones v. Fhuere*, Case No. 24cv61156 (Or. Cir. Ct. Dec. 27, 2024), Declaration of Claire Powers, at *2. And in Washington, a 2024 report shows that "Black people are represented in the three-strikes population at a rate more than 8 times greater than their population in the state." MELISSA LEE & JESSICA LEVIN, JUSTICE IS NOT A GAME: THE DEVASTATING RACIAL INEQUITY OF WASHINGTON'S THREE STRIKES LAW (2024).

Recently analyzed data puts Colorado in this category too. According to a report released last month, 22.67 percent of all habitual cases in Colorado had a defendant identified as Black while Black people have historically

made up approximately just 4 percent of the Colorado population since 2000. *See* Letter from 2d-Chair to Office of Alternate Defense Counsel, re: A Quarter Century of Colorado Habitual Charging Data: Against Who, Where, and in What Cases is the Habitual Statute Charged (Feb. 13, 2026).

The upshot of these studies is the grim reality that people of color and in particular Black people are disproportionately prevented from procreating because of the eugenic tool of habitual criminal laws. From the perspective of the eugenicists, this might be the crowning achievement of their movement, and the strongest living, operational legacy of their work.

CONCLUSION

Habitual criminal sentencing proceedings were designed to determine whether an individual was a “habitual criminal.” This determination, even though it may be informed by past convictions, contains meaning much deeper than a criminal record. In essence, the proceeding is the venue where the law decides if the person in front of them is, in the law’s eyes, irreparable. It is the proceeding that eugenicists designed to determine whether the person accused of a crime was not just a person who committed a crime, or a few, but a person who was innately criminal and at risk of passing on that criminality should they reproduce.

From this vantage point, it would be difficult to find a proceeding in criminal law that is more profound (excepting perhaps the penalty phase of a capital case). And the consequences of the proceeding are similarly profound.

If the proceeding results in a finding that someone is a habitual criminal, they become subject to a wholly different sentencing scheme with a logic of its own. The sentencing schemes for people deemed habitual criminals were designed not for deterrence or rehabilitation or retribution but rather to stop reproduction. The sentences are thus extremely lengthy, even for smaller offenses, because according to eugenicists they had to be that long to stop reproduction and thus to stop the spread of crime.

At bottom, habitual criminal sentencing proceedings both make a profound factual determination about a person's essence and impose a profound sentencing consequence based on that finding. These are the features of the habitual criminal sentencing proceeding that this Court ought to consider when deciding whether double jeopardy protections apply.

Respectfully submitted,

ERIC A. SAMLER

Counsel of Record

HOLLIS A. WHITSON

SAMPLER AND WHITSON, P.C.

1600 Stout Street, Suite 1400

Denver, CO 80202

(303) 670-0575

eric@samlerandwhitson.com

Counsel for Amici Curiae