

E2: The Frontlines: Professor Daniel Loehr's Report on Eugenic Roots of Sentencing Laws

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[00:00:00] Introduction to Sustained Podcast

[00:00:00] Milik Robinson: You are listening to Sustained inside the conversations, classrooms and collective efforts happening at CUNY Law. Join our public interest lawyers, advocates, and communities as we carry social justice forward.

[00:00:21] Exploring the Eugenic Origins of Three Strikes Laws

[00:00:21] Elise Hanks Billing: This episode of Sustained the Front Lines feature, professor Daniel Loehr discussing his report, the Eugenic origins of Three Strikes Laws, how Habitual Offender Sentencing Laws were used as a means of sterilization published by the sentencing project. The report examines the historical origins of habitual offender laws, their connection to eugenics and racial control, and how these legal structures continue to shape the US criminal legal system today.

[00:00:48] Daniel Loehr: I am Daniel Loehr. I'm an associate professor of law at CUNY School of Law. I teach criminal procedure and constitutional law, and I started this past August.

[00:00:59] Elise Hanks Billing: And [00:01:00] Daniel, can you tell us about the central argument or main idea of your now published report?

[00:01:07] Daniel Loehr: The report that The Sentencing Project just published is about "three strikes" laws, which are also called habitual offender laws.

[00:01:15] Daniel Loehr: Habitual offender laws, and three strikes laws were passed at a rapid pace in the early 1900s as part of the eugenics movement, and they were designed to stop certain people from reproducing.

[00:01:30] Historical Context and Implementation

[00:01:30] Daniel Loehr: So an important historical piece to understand how that happened, is that in the late 1800s, there were

new theories that people who committed crime, some subset of those people, were genetically criminal.

[00:01:45] Daniel Loehr: And they "inherited" their criminality and they would spread it to their offspring. And these theories spread rapidly across the United States— in institutions of higher education, among doctors, in [00:02:00] the judicial branch—and once people started believing that for some people crime was inherited, it was a genetic trait, they started to think: how can we stop this from spreading?

[00:02:11] Daniel Loehr: And what they looked to were a number of solutions to stop people from reproducing. And they considered sterilization. They considered marriage restriction, but what ended up being the most popular solution was really long prison sentences. And they wanted to start identifying , "who are these people who have genetic criminality?"

[00:02:31] Daniel Loehr: And one very simple tool that they used was, if you commit three crimes, you're likely one of these people. It was a diagnostic tool. If you do it three times, you probably are one of these people with genetic criminality, and therefore we want to stop you from reproducing. So, upon a third conviction, we're gonna put you in prison for life, or for 40 years, 50 years.

[00:02:52] Daniel Loehr: A sentence that's long enough to stop you from reproducing. And advocates argued for these three strikes laws [00:03:00] on this explicitly eugenic basis across the country. By 1950, 42 states had adopted them.

[00:03:06] Modern Implications and Racial Disparities

[00:03:06] Elise Hanks Billing: And these laws persist in 49 states today—we read in your report—what does this tell us about the ongoing racial disparities in sentencing and mass incarceration now?

[00:03:18] Daniel Loehr: One of the responses that I often get to the report is, these laws might have passed back then for eugenic reasons, but today we have them for totally different reasons. We have them to just punish people who commit multiple crimes and they're reasonable, and we shouldn't think about that history.

[00:03:36] Daniel Loehr: Other people are horrified about the history and think that history on its own suggest that we should get rid of the laws today but a third subset of people wanna know more questions, which is what's the relationship between the laws that passed in the early 1900s and the current laws we have today?

[00:03:55] Daniel Loehr: Are they completely separate? Were they all repealed and then repassed for different reasons, have [00:04:00] they lingered? And the answers to these questions, I think, inform how we should think about the 49 laws that we still have today. Most of these laws, based on my research, have not changed significantly from the early eugenics movement.

[00:04:13] Daniel Loehr: So Vermont, for example, passed their first three Strike Three Strikes Law in 1927, and they've only changed a few words in the statute to the one that they currently have on the books. California's has been amended a number of times, but the substantive core is unchanged, and I don't think we would have the type of habitual offender law in 49 states that we have today but for the eugenics movement. I don't think that habitual offender laws can be explained or rationalized on any reasonable ground today based on theories of sentencing and punishment that we currently believe in. I think the only way to understand them is through this eugenics history.

[00:04:55] Daniel Loehr: And so that's all to say I think the eugenic [00:05:00] origin of habitual offender laws has left a serious imprint on the type of habitual offender laws we have today. It's possible that without the eugenics movement, we would still have less severe versions, but I think the severity of them is a concrete legacy of the eugenics movement.

[00:05:18] Call for Policy Change and Legal Reforms

[00:05:18] Elise Hanks Billing: Now, your report explicitly calls for policy change. What do you see as the most urgent legal reforms needed to address these laws?

[00:05:26] Daniel Loehr: One of my goals for the report is for people, citizens, legislators, people serving sentences, people with family serving sentences, I want them to understand what the history is behind the laws that exist today.

[00:05:40] Daniel Loehr: And I want them to be able to decide for themselves how that history is relevant to the laws. And as I suggested earlier, some people might not think it's relevant. Some people think it's extremely relevant but I want people to know what they're buying and know what the historical grounding and justification is for these habitual offender laws. [00:06:00]

[00:06:00] Daniel Loehr: Personally, I think we wouldn't have these laws, but for the history of eugenics, and therefore, I think we need to take the eugenics out of our habitual offender laws. That might mean amending them to minimize their severity so that we can actually

justify them under contemporary theories of punishment and there are active legislative proposals across the country to amend three strikes laws in these ways to either eliminate them, or diminish their severity.

[00:06:31] Engaging in Advocacy and Legal Education

[00:06:31] Elise Hanks Billing: What can people do if they want to engage further or take action?

[00:06:35] Daniel Loehr: Public interest lawyers, law students, advocates can use this history of habitual offender laws in their advocacy in a number of different areas. Public defenders, people doing appellate litigation, are using this history to bring to the court's attention, and to prosecutors' attention, that the laws that are currently being enforced [00:07:00] have their roots in eugenics and , have an imprint of eugenics on them.

[00:07:04] Daniel Loehr: And so advocates can bring these, this history to the courtroom and use it as arguments against habitual offender laws and their enforcement. Today also advocates in the legislative environment are using this history to talk to legislators that are considering ending three strikes laws, to inform them about how these laws came into existence and why they're still tainted by that history.

[00:07:29] Elise Hanks Billing: So how does the research in your report inform your teaching at CUNY Law?

[00:07:34] Daniel Loehr: One of the things that we talk about in class often is how to come up with creative arguments that you can use for your clients. And this report is a new argument that can be used to challenge a law that has been challenged many times without success.

[00:07:49] Daniel Loehr: And it doesn't have to be used that way but what it is a historical basis to make a new type of argument. And that's something that we work on in the classroom is how do you do deeper [00:08:00] research and make new arguments that other people are not making that you believe are compelling and that can actually influence the outcome of a case.

[00:08:09] Why Choose CUNY Law?

[00:08:09] Elise Hanks Billing: And Daniel, you've taught at other law schools before coming to CUNY.

[00:08:14] Elise Hanks Billing: What do you love about teaching at CUNY Law?

[00:08:18] Daniel Loehr: I love teaching at CUNY Law because I love working with the students that are at CUNY Law. I find the students here to be passionate, kind, thoughtful, and careful in their argument, and to have a lot of nuance and precision and a real interest in making arguments and doing advocacy that's responsive to people, that doesn't cut corners, and that pursues a better world for all people.

[00:08:51] Elise Hanks Billing: And what would you say to anybody listening who's thinking about coming to CUNY Law?

[00:08:55] Daniel Loehr: I went to NYU Law and I taught for two years at Yale Law [00:09:00] School. And if I was advising a student deciding between these three schools, I would definitely say to come to CUNY Law.

[00:09:08] Daniel Loehr: And the reason for that is that CUNY Law is a place that supports its students. There's a strong student community where they support each other. There's not the competitiveness that I've seen elsewhere, and it's an environment where we're all pursuing a similar goal, which is to use law in the service of human needs.

[00:09:28] Daniel Loehr: And that's real and meaningful. And you can feel that throughout the design of the institution and the experience of being here. And for those reasons, I think CUNY Law is the best law school in the country. I'm really proud to teach here. And I think all students should seriously consider coming to CUNY Law.

[00:09:47] Elise Hanks Billing: Where could people find the full report or learn more about the work?

[00:09:52] Daniel Loehr: The Sentencing Project published the full report, so you can Google my name, Daniel Loehr, and The Sentencing Project, and the report will [00:10:00] come up. I've also published a longer version of the report on SSRN, so you can find the full Law Review article there.

[00:10:09] Daniel Loehr: It'll be published formally by the _Howard Law Journal_ this spring. Also, if you're interested in legislative efforts there's currently a movement to end three strikes laws in New York, and there's the Marvin Mayfield Act, which has been introduced to do that. So you can follow along that work and advocate in support of that bill if you're interested.

[00:10:31] Elise Hanks Billing: You've been listening to Sustained Conversations and Advocacy at CUNY Law. To hear more from the front lines of public interest, lawyering, and social justice advocacy,

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[00:10:53] Elise Hanks Billing: Thanks for listening and for carrying it forward. [00:11:00]