

NOMOS AND NULLIFICATION: A COVERIAN VIEW OF NEW YORK'S HABITUAL OFFENDER LAW, 1926 TO 1936

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*"We inhabit a nomos – a normative universe."*¹

INTRODUCTION

In 1926, New York passed a habitual offender law that mandated life sentences for a fourth felony conviction, regardless of severity. Called the Baumes Law,² after its principal author and advocate New York Senator Caleb Baumes, the law remains one of the harshest habitual offender laws ever passed in the United States. Until its amendment in 1936, the law launched an intense policy debate that in many ways reflects the contemporary debate over Three Strikes legislation and high U.S. incarceration rates.³

In 1994, California enacted a habitual offender law, popularly referred to as the "Three Strikes and You're Out" Law, which dovetailed with a period of emphasis on the incapacitation of habitual offenders.⁴ Several states passed similar laws that punish recidivists with longer prison terms.⁵ In Washington, a third conviction for the "most serious offenses" listed in the law requires a life sentence without the

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1. Robert M. Cover, *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

2. Throughout this article the term "Baumes Law" refers to a series of habitual offender laws passed in 1926 upon the recommendation of the New York Crime Commission, also called the Baumes Commission or Committee.

3. Victoria Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 930 (2013) ("[C]ontrary to widespread scholarly assumptions, today's three strikes laws are not unprecedented. Between 1920 and 1945, laws mandating or permitting life imprisonment for repeat felonies (two, three, or four prior offenses) were passed or operative in more than twenty states.").

4. See Frank A. Zeigler & Rolando V. Del Carmen, *Constitutional Issues Arising from "Three Strikes and You're Out" Legislation*, in THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY 3 (David Shichor & Dale K. Sechrest eds., 1996).

5. E.g., Ark. Code Ann. § 5-4-501 (2016) (stating that a defendant convicted of "a serious felony involving violence" who has previously been convicted of one or more "serious felonies involving violence" shall be sentenced to imprisonment without parole for 40 to 80 years or life); Colo. Rev. Stat. Ann. § 18-1.3-801 (West 2016) (providing for a prison term three times the maximum of the presumptive range for a defendant previously convicted of two felonies and four times the maximum of the presumptive range for a defendant previously convicted of three felonies); Fla. Stat. Ann. § 775.084 (West 2016) (prescribing mandatory minimums for defendants previously convicted of three violent felonies).

possibility of parole.⁶ Until its revision in 2012, the California Three Strikes Law was one of the most severe, imposing an indeterminate sentence of twenty-five years to life for defendants previously convicted of two or more felonies.⁷ Even with the Supreme Court decision in *Ewing v. California* upholding the California Three Strikes Law against an Eighth Amendment challenge,⁸ the policy debate continues around current habitual offender laws and high incarceration rates.⁹ During the Progressive Era, a similar debate raged in New York and across the U.S. over how to address the ‘habitual criminal problem.’¹⁰ New York answered with passage of the Baumes Law – one of the harshest habitual offender statutes in U.S. history.

This article discusses, through the lens of Robert Cover’s concept of *nomos*, the nullification of the Baumes Law by juries, judges, and prosecutors in order to mitigate its harshest application. Many of these criminal justice actors repeatedly exhibited concern about imposing life sentences for four felony convictions, especially for non-violent felonies such as minor property crimes. Section I summarizes Robert Cover’s concept of *nomos*, discussing its relevance to the rise and fall of the Baumes Law. Section II then provides a brief historical backdrop to passage of the Baumes Law, highlighting the role of a widely perceived crime wave, and the pseudo-scientific rationales for incapacitation and removal of certain persons from society. Section III discusses the competing normative universes that characterized the fairly turbulent, brief history of the Baumes Law.

I. ROBERT COVER’S NOMOS

Robert Cover’s 1983 article *Nomos and Narrative* sets forth a nuanced conception of legal pluralism centered on the *nomos* or normative universe. Cover’s normative universe is inclusive of not only legal institutions and prescriptions in

6. Wash. Rev. Code Ann. § 9.94A.030(38)(a)(i) – (ii) (West 2018); see also John Clark, James Austin, & D. Alan Henry, *Three Strikes and You’re Out: A Review of Legislation*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN BRIEF (Sept. 1997).

7. Cal. Penal Code § 667 (West 2011). The law was revised in 2012.

8. *Ewing v. California*, 538 U.S. 11 (2003).

9. See JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); Andrea Roth, *To End Mass Incarceration, Look Beyond ‘Non-Violent Drug Offenders’*, L.A. TIMES, July 24, 2015; see also *Brown v. Plata*, 563 U.S. 493 (2011) (holding that court-mandated population limit for California’s state prisons was necessary to remedy the Eighth Amendment violation); Nancy J. King, *Barrock Lecture: Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523 (2014); Eric Helland & Alexander Tabarrok, *Do Three Strikes Deter? A Non-Parametric Estimation*, 42 J. HUM. RESOURCES 309 (2007); Clark et al., *supra* note 6; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM (Apr. 2016) [*hereinafter* “Economic Perspectives”]; Ed. Board, *California’s Continuing Prison Crisis*, N.Y. TIMES, Aug. 10, 2013, at SR10; Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFFALO L. REV. 1 (2010).

10. Nourse, *supra* note 3, at 930 (“The politics of this first twentieth century generation of three strikes laws was similar to that of later incarnations.”).

well-known sources of law, such as statutes, regulations, and judicial decisions, but also the narratives that inform how we interpret (or resist) prescriptions and even inhabit and navigate legal institutions.¹¹ Narrative is the “code [] that relate[s] our normative system to our social constructions of reality and to our visions of what the world might be.”¹² Our narratives, or the stories we tell ourselves about right and wrong, moral and immoral, inform our interpretative commitments to prescriptions and legal institutions.¹³ Narrative is as much about the ‘what might be’ as the ‘ought’ or ‘is.’¹⁴ In other words, how we use language to tell ourselves and others particular stories over time in turn give our prescriptions and legal institutions an ever-changing meaning. Members of society, even jurors, prosecutors, or judges, can each hold different commitments on how to interpret prescriptions and how legal institutions should further those commitments.¹⁵

This is a more nuanced, richer conception of legal pluralism than the distinction between ‘law in the streets’ and ‘law on the books.’¹⁶ For that distinction suggests a binary state, but Cover rightly realizes that narratives and interpretative commitments can vary substantially, creating a plethora of diverse, subtle, nuanced normative universes.¹⁷ The ‘law on the streets’ and the ‘law on the books’ could coincide or diverge, but in either case a simplistic binary relationship masks a diversity of normative universes,¹⁸ even among those who serve official government functions.

The diverse array of normative universes circulating even among government officials often produces tension between vision and reality; between wanting a controversial law, such as the Baumes Law, overturned but acknowledging the court’s ruling as the law of the land. This tension in turn circles back to further develop, refine, or confirm our narratives and interpretative commitments. With multitudinous narratives and interpretative commitments swirling around in society and governmental bodies, each constitutive of different, and potentially competing normative universes, what does this mean for laws and legal institutions? What does this mean for law-making and the strength of legal institutions, even for social fabrics?

For Cover, normative universes are both jurigenetic, law creating, and juripathic, law destroying. Law is created and destroyed continuously as different normative universes compete and coincide through civil society, public discourse, social movements, and the legislative, judicial, and executive functions of

11. Cover, *supra* note 1, at 4–5.

12. *Id.* at 10.

13. *Id.*

14. *Id.* at 9–10.

15. *Id.*

16. *Id.* at 8–9.

17. *Id.*

18. *Id.*

government. In some instances, the normative universes are so incompatible they give rise to efforts within or outside the law and legal institutions through jury nullification, judicial resistance, prosecutorial discretion, even civil disobedience, and, in extreme cases, internal armed conflict. Although in *Nomos and Narrative* Cover does not discuss the role of judges, prosecutors, and juries in criminal law enforcement,¹⁹ each of these actors deploy strategies for obstructing normative universes in conflict with their own. As we shall see, each exploited these strategies to mitigate the potential harshness of the Baumes Law.

Indeed, just as narratives and interpretive commitments constitutive of normative universes are jurisgenerative, normative universes can also be jurispathic. The creation of legal meaning through multiple, often competing narratives and interpretive commitments is inherently violent: “the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence.”²⁰ That is, a normative universe can destroy legal meaning and other competing normative universes. Courts, and the judicial exercise of power, are characteristically jurispathic as their primary function is to impose order, precedent or hierarchy to competing laws—even to competing normative universes.²¹ Courts are the corrective to the problem of too much law, or unclear law.

However, Cover does not appear to consider the role played by discretion embedded in the enforcement of prescriptions or in legal institutions.²² That is, precepts and institutions that permit discretion create openings for some normative universes to destroy others—to create new law and destroy legal meaning, and thereby alter the very trajectory of the law. Although judicial philosophies and doctrines of statutory interpretation are designed to impose strict conceptual clarity on the judicial exercise of discretion, discretion is part and parcel of the judicial function. We may also think of discretion as that very judicial word – judgment. Judgment is the amorphous reliance on intelligence, practicality, experience, or wisdom to ‘make the right call.’ When a judge on the Second Circuit Court of Appeals, Justice Sotomayor said, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life,”²³ implicitly acknowledging the reality of judicial discretion and the inevitable insertion of competing normative universes in judicial decision making – for better or worse.

19. Cf. ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 6 (1975) (discussing the role of anti-slavery judges in enforcing the Fugitive Slave Act in the antebellum United States).

20. Cover, *supra* note 1, at 40.

21. *Id.* at 40–41.

22. Although Cover does not explicitly discuss discretion in his work, many others have addressed the role of discretion in the rule of law. The most well-known is perhaps Friedrich Hayek in *The Constitution of Liberty*, for whom discretion in administrative and judicial institutions poses a significant challenge to the rule of law. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* 212 (2011).

23. Charlie Savage, *A Judge’s View of Judging Is on the Record*, N.Y. TIMES, May 14, 2009, at A21.

Yet the existence of judicial discretion often produces discomfort.²⁴ This discomfort with judicial discretion is captured by Justice Scalia declaiming that consistency and logic are the “only thing[s] that prevent [the Supreme Court] from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.”²⁵ In a sense, the supposed evil of judicial discretion was as much a target of early Twentieth Century habitual offender laws as the habitual offenders themselves.²⁶ As a contemporary jurist opined, “[a]long with our ingenious belief in the efficacy of laws exists a pervasive lack of confidence in Law — a popular distrust of courts, judges and judicial institutions generally.”²⁷

In place of judicial discretion and judgment on a case-by-case basis came habitual offender laws that “virtually made justified leniency impossible.”²⁸ The Baumes Law attempted to foreclose judicial, prosecutorial and even jury discretion and in doing so prevent the perceived obstruction wrought by normative universes in opposition to life sentences for non-violent crimes. But other potential openings remained, such as the plea bargain, jury nullification, and judicial discretion to interpret the law’s application. Indeed, as we shall see, prosecutors, judges, and juries attempted to nullify the harshest application of the Baumes Law.²⁹

II. HABITUAL OFFENDER LAWS IN THE PROGRESSIVE ERA

This section will provide an overview of the Baumes Law. It will then discuss other habitual offender laws passed at the beginning of the Twentieth Century that inspired, or were inspired by, the Baumes Law, as well habitual offender laws passed in the Nineteenth Century, most notably Illinois’ Habitual Criminal Act. Finally, the section will discuss how a perceived crime wave, urbanization, and improvements in identification technology provided the motive and means for

24. See, e.g., HAYEK, *supra* note 22, at 320, 463 (arguing against discretion, as distinct from judicial discretion in interpreting laws, in order to limit the arbitrariness and pernicious coercive powers of the government).

25. *Dickerson v. United States*, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting).

26. Newman Levy, *Judges and the Legislature*, 19 J. CRIM. L. & CRIMINOLOGY 557, 559 (1929).

27. *Id.* at 557.

28. *Id.* at 559.

29. See discussion *infra* Section III.A.2. Nullification is the refusal to enforce a law because of a personal sense of justice, a power vested in juries that is considered a cherished aspect of the Anglo-American legal tradition. See *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) (“We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.”). Nullification may become a prominent feature of criminal law when the law mandates harsh punishments. See, e.g., Michael Tory, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUSTICE 65 (2009).

the explosion of habitual offender laws across the U.S. during the Progressive Era.

A. The Baumes Law and Early Habitual Offender Laws

The Baumes Law actually refers to four separate laws passed in 1926 that amended the New York Penal Law in relation to habitual offenders.³⁰ Section 1941, originally enacted in 1920, required, upon a second felony conviction, a minimum sentence at the maximum authorized under the prior felony for which the defendant was convicted and a maximum sentence at twice the maximum authorized under the prior felony.³¹ Section 1942 is perhaps the most infamous part of the Baumes Law; it mandated life imprisonment for a defendant's fourth felony conviction, regardless of the type of felony at issue.³² Further, prosecutors were required to seek life sentences if aware of a prior felony conviction. Section 1943 stated that "[i]f at any time, either after sentence or conviction" the district attorney becomes aware of prior convictions mandating an enhanced sentence under sections 1941 or 1942 it "shall be the duty of the district attorney . . . to file an information accusing [the convicted defendant] of such previous convictions."³³ As discussed below, the Baumes Law prohibited plea bargains to non-felony offenses or agreements to not include prior felonies.³⁴ Finally, section 1944 stated that the commission of a felony while armed with a pistol required a minimum five year sentence with a maximum of ten years.³⁵ Upon a second conviction for carrying a pistol during the course of a felony the mandatory minimum increased to ten years and the maximum to fifteen years. Upon a third conviction the minimum increased to fifteen years and the maximum to twenty-five years, and upon a fourth conviction the minimum increased to twenty-five years and the maximum to life imprisonment.³⁶

Prior to the Baumes Law, between 1900 and 1920 four laws were passed in New York to address habitual offenders, each law evidencing a progression towards incapacitation that culminated in the severe 1926 Baumes Law.³⁷ The 1907 law, the law which the Baumes Law amended, required life imprisonment for fourth offenders but permitted parole after serving a sentence equal to the maximum penalty for the fourth felony, without enhancements, minus time for good

30. See *People v. Gowasky*, 155 N.E. 737, 742 (N.Y. 1927).

31. N.Y. Penal Law § 1941, quoted in New York State Crime Commission, *Habitual Offender and Pistol Acts*, in 6 *The Reference Shelf: The Baumes Laws* 65–66 (Julia E. Johnson ed., 1929) [hereinafter *Habitual Offender*].

32. N.Y. Penal Law § 1942, quoted in *Habitual Offender*, supra note 31, at 66.

33. N.Y. Penal Law § 1943, quoted in *Habitual Offender*, supra note 31, at 66.

34. See *Gowasky*, 155 N.E. at 737; see also *Dodd v. Martin*, 162 N.E. 293, 293 (N.Y. 1928).

35. N.Y. Penal Law § 1944, quoted in *Habitual Offender*, supra note 31, at 67.

36. *Id.*

37. Mabel A. Elliot, *CONFLICTING PENAL THEORIES IN STATUTORY CRIMINAL LAW* 193–95 (1931).

conduct.³⁸ A 1914 law authorized immediate warrantless arrest of a person deemed a habitual offender if found carrying a dangerous weapon or in “any place or situation giving reasonable grounds for believing he is intending or waiting opportunity to commit some crime.”³⁹ An additional law passed in 1914 provided that “persons adjudged habitual criminals shall at all times be liable to search and examination by any magistrate, sheriff, constable, or other officer with or without warrant.”⁴⁰ Finally, in 1920 the New York Legislature passed a law stating:

If a subsequent crime is such that upon the first conviction the offender would be punished by any term less than natural life, then such a person must be sentenced to a term not less than the longest term nor more than twice the longest term prescribed upon the first conviction.⁴¹

As with other state laws modeled on the Baumes Law, prior convictions had to be alleged and a jury had to determine that indeed the defendant was the same person identified in the prior conviction records.⁴²

In the Nineteenth Century, some states enacted laws that required mandatory sentences for prior convictions,⁴³ but such laws were rare.⁴⁴ Illinois was an exception, having passed the Habitual Criminal Act in 1883. The Act provided that a defendant twice convicted of certain felonies received a mandatory minimum at the maximum sentence authorized under the prior felony for which the defendant was convicted. Defendants thrice convicted of certain felonies received a fifteen-year mandatory minimum. The Habitual Criminal Act stated:

[W]henever any person having been convicted of either of the crimes of burglary, grand larceny, horse-stealing, robbery, forgery, or counterfeiting, shall thereafter be convicted of any one of such crimes, committed after such first conviction, the punishment shall be imprisonment in the penitentiary for the

38. *See id.*

39. *Id.* at 194.

40. *Id.* at 194–95.

41. *Habitual Offender*, *supra* note 31, at 66.

42. *See Habitual Offender*, *supra* note 31, at 67; *see also* Sam Elson, Note, *Habitual Criminal Acts and the Ex Post Facto Clause*, 14 WASH. U. L. REV. 414, 421 (1929).

43. Mass. Gen. Laws ch. 176, § 5 (1818), *cited in* P.M., *Attempts to Combat the Habitual Criminal*, 80 U. PA. L. REV. 565, 566 (1932) (requiring thirty days solitary confinement and an additional seven years imprisonment for second conviction and life imprisonment for third conviction); *see also* State v. Smith, 42 S.C.L. 460, 460 (2 Rich. 1832) (involving a horse stealing statute that requires whipping upon the first conviction and upon a second conviction the defendant is sentenced to death without benefit of clergy); State v. Freeman, 27 Vt. 523, 523 (1855) (involving the Liquor Act of 1852 that authorized an increased sentence for prior convictions for violating the Act); Graham v. West Virginia, 224 U.S. 616, 621, 631 (1912) (upholding against a Due Process, Equal Protection, Privileges and Immunities, Double Jeopardy, and Eighth Amendment challenge a West Virginia law originally passed in 1849 that mandated life imprisonment for defendants with two or more prior convictions). *See generally* Note, *Constitutionality and Mandatory Nature of the Baumes Laws*, 3 ST. JOHN'S L. REV. 135 (1928).

44. Jerome Hill, *Committee on Survey of Crime, Criminal Law, and Criminal Procedure*, 29 AM. INST. CRIM. L. & CRIMINOLOGY 562, 575 (1938); *see The Baumes Bills: A Beginning in the Reorganization of Criminal Procedure in New York*, 26 COLUM. L. REV. 752, 752 (1926).

full term provided by law . . . and [if] convicted of any of said crimes, committed after said second conviction, the punishment shall be imprisonment in the penitentiary for a period not less than fifteen years.⁴⁵

By committing one of the six enumerated felonies, a defendant triggered the Habitual Criminal Act. The Habitual Criminal Act was not as severe as the later habitual offender laws of other states that imposed a life sentence.⁴⁶ Although the Habitual Criminal Act permitted a life sentence depending upon the convicted crime, it only required a fifteen-year sentence for the third felony conviction.⁴⁷ However, original versions of the law imposed a life sentence for three felony convictions; more severe than the Baumes Law four decades later. The Habitual Criminal Act, then Bill 310, as originally introduced on March 7, 1883 by Senator Kirk read, “after said second conviction, the punishment shall be imprisonment in the penitentiary for *life*”⁴⁸ The Bill was amended after its second reading in the Senate to require only a fifteen-year minimum for three felony convictions.⁴⁹

Members of the Illinois bar around the time of the Habitual Criminal Act’s passage voiced support for a habitual offender law that incorporated the rehabilitative theory of punishment. A speaker addressing the Illinois State Bar Association in 1884 touted Illinois’ commitment to rehabilitation:

It may, indeed, be doubted, whether any other code of criminal law can be found, that is more admirable than our own, in the happy adjustment of all penalties in proportion to the nature of the offense, and in its humane provisions, which tend to the reformation of persons who shall be convicted of crime.⁵⁰

In January 1883, a few months before the introduction of Bill 310, the Illinois State Bar Association at their annual meeting in Springfield adopted a resolution calling for a law that distinguishes between “criminals who are such without deliberate intent to enter or continue upon a criminal career for a livelihood or business, and those who commit crime as a regular business or profession”⁵¹ In other words, the members of the Bar Association supported a habitual offender law, mandating sentences that differentiate between repeat offenders and first offenders. The resolution refers to concerns about “the welfare of the community and the impartial administration of justice.”⁵² This was not the first time the idea of a habitual offender law had been raised by Illinois lawyers. An 1882 article in the

45. Habitual Criminal Act, 1883 Ill. Laws 76.

46. Elliot, *supra* note 37, at 188.

47. Habitual Criminal Act, 1883 Ill. Laws 76; *see* People v. Parker, 190 N.E. 358, 358 (Ill. 1934) (invalidating a life sentence under the Habitual Criminal Act for larceny of a motor vehicle).

48. 33 J. S. 795 (Ill. 1883) (emphasis added).

49. *Id.*

50. E.B. Green, The Arrest, Detention, Trial, Conviction, and Punishment of Criminals, Read Before the Illinois State Bar Association (Jan. 3, 1884), *in* Proceedings of the Illinois State Bar Association 67, 75 (1884).

51. ILLINOIS STATE BAR ASSOCIATION, PROCEEDINGS OF THE ILLINOIS STATE BAR ASSOCIATION 40 (1883).

52. *Id.* at 40.

Chicago Legal News, a publication containing articles written by Illinois attorneys, mentioned a bill in the French Parliament addressing habitual offenders.⁵³ The author proposed a similar measure for Illinois, arguing “such persons [habitual offenders] seldom if ever reform, and when they are released from imprisonment, which is usually short, they return to their ‘profession’ with increased desperation and wickedness.”⁵⁴

Illinois supporters of mandatory sentences for habitual offenders pointed to the lack of effective action by prosecutors, with many offenders going free due to plea bargaining or lack of follow-up by prosecutors. Then as now, prosecutors enjoyed substantial discretion. Cook County State’s Attorney John J. Healey estimated that 70% of the law enforcement conditions in Chicago were attributable to the State’s Attorney.⁵⁵ The District Attorney in New York City had a similarly dominant position.⁵⁶ As Arthur Train, a former New York Assistant District Attorney, put it, “[p]robably there is no public official in Christendom wielding an immediate authority over a greater number of human beings than the public prosecutors of New York[] [and] Chicago”⁵⁷

Yet, evidence suggests that the Cook County State’s Attorney generally failed to enforce the Habitual Criminal Act. Almost from the Act’s inception commentators lamented the lack of enforcement.⁵⁸ Prosecutions under the Habitual Criminal Act were sporadic. Between October 1, 1886 and 1888, Joliet prison received one prisoner convicted under the Act,⁵⁹ and from December 1, 1883 to 1888 Joliet prison received only twenty-six prisoners convicted under the Act.⁶⁰ Of the twenty-six prisoners, three were sentenced for ten years, one for fourteen years, one for seventeen years, one for twenty-one years, and twenty for twenty years.⁶¹ A member of the Illinois State Bar Association at the annual meeting in 1888, after citing the above statistics, exclaimed in exacerbation, “Now doesn’t it look a little as if that law had fallen into . . . ‘innocuous desuetude’? The ‘habituals’ have certainly not all left Illinois, or even Cook County.”⁶² No surprise then that the Chicago Tribune in 1929 thought it newsworthy to note the State’s Attorney’s attempt to enforce the “*seldom used* habitual criminal act”⁶³

53. H.B.H., *Habitual Criminals*, 15 CHI. LEGAL NEWS 133, 133 (Dec. 30, 1882).

54. *Id.*

55. RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 52 (1929)

56. See Arthur Train, *FROM THE DISTRICT ATTORNEY’S OFFICE: A POPULAR ACCOUNT OF CRIMINAL JUSTICE* 119 (1939) (“The power of a prosecutor, particularly in a large city, is so vast that unconsciously he all too often comes to regard himself as a sort of alcalde, who dispenses justice as a favor and not as a right belonging to the citizen who demands it.”).

57. *Id.* at 120.

58. See R.W. McClaghry, *Crimes and Criminals*, Address Before the Illinois State Bar Association (Jan. 10, 1888), in *Proceedings of the Illinois State Bar Association* 70 (1888).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See Elliott, *supra* note 37, at 188 (citing CHI. TRIB., Mar. 11, 1929, at 22) (emphasis added).

Criminal identification was a barrier, even for prosecutors willing to enforce the Act. Criminal identification before the advent of fingerprinting was an impediment to effective prosecutions.⁶⁴ In an attempt to improve enforcement, the 1889 “Act for the identification of habitual criminals” (“Identification Act”) required the warden of every prison to keep a register containing a photograph and “the description of every person committed to such prison under a sentence for a felony, and also the criminal history of every such person so committed.”⁶⁵

Even with passage of the Identification Act, there were few prosecutors to keep up with the significant felony case load. In 1926 13,117 felony cases entered Cook County courts.⁶⁶ The Cook County State’s Attorney’s Office had 70 assistant prosecutors, a ratio of one prosecutor for every 187 felony cases in 1926.⁶⁷ Of the 13,117 felony cases in Cook County in 1926, approximately 58% were for robbery, burglary, forgery, and larceny, all offenses that could potentially trigger the Habitual Criminal Act.⁶⁸ Unlike the Baumes Law, the Habitual Criminal Act did not prohibit prosecutors from negotiating plea bargains for lesser offenses, even if the Act otherwise applied to the felony charged. In general, Illinois prosecutors routinely entered into plea bargains for lesser offenses.⁶⁹ Cook County prosecutors may have foregone the clumsy data retrieval process under the Habitual Criminal Act in order to speedily dispose of cases.⁷⁰ This practice was also common in New York prior to passage of the Baumes Law, which prohibited plea bargains to lesser offenses to avoid enhanced sentences for prior felonies.⁷¹

Although the Illinois Habitual Criminal Act was one of the first habitual offender laws in the Progressive Era, the number of states with habitual offender laws increased between 1880 and 1930.⁷² In a 1931 study of the criminal laws of

64. SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 217 (2001).

65. 1889 Ill. Laws 112.

66. Ill. Ass’n for Criminal Justice, ILLINOIS CRIME SURVEY 55 (1929) [hereinafter ILLINOIS CRIME SURVEY]. The Illinois Crime Survey was composed of several committees consisting of prominent criminal law experts, such as Raymond Moley, and was published by the Illinois Association for Criminal Justice in conjunction with the Chicago Crime Commission.

67. *Id.* at 289.

68. *Id.* at 59.

69. See Tom Pettey, *Blames City Halls for Big Part of Crime: Expert Sees Tribune Clean Up Chicago*, CHI. TRIB., Mar. 11, 1929, at 1, PROQUEST HISTORICAL NEWSPAPERS: CHICAGO TRIBUNE DOC. No. 181010452.

70. Cf. Henry Barrett Chamberlin, *The Proposed Illinois Bureau of Criminal Records and Statistics*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 518, 522 (1921-1922) (suggesting that State’s Attorneys did not forward the criminal records of defendants to the state prisons as required by the Probation Act). If prosecutors did not fully comply with the record keeping requirements of the Probation Act, they likely did not fulfill their duties under the Identification Act to forward the defendant’s criminal record or request the defendant’s prior conviction history.

71. Pettey, *supra* note 69, at 1 (“But New York excels in one of the most pernicious and principal causes of crime. That is the practice of prosecutors of accepting pleas to lesser degrees of crime. In this practice New York is the worst city in America and Brooklyn is worse than Chicago.”) (quoting Raymond Moley).

72. Elliot, *supra* note 37, at 198-99; Ashley Lauren Taylor, *From Dennis-the-Menace to Billy-the-Kid: The Evolving Social Construction of Juvenile Offenders in the United States from 1899-2007* (2010) (unpublished dissertation, Duke University), available at <https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/2420/>

thirteen states Mabel Elliot found that twelve of the states passed habitual offender statutes between 1880 and 1930.⁷³ However, the states were not uniformly committed to severely punishing habitual offenders, for Ohio in 1902 repealed an 1885 law that imposed life imprisonment with the possibility of parole for two felony convictions.⁷⁴

In 1912, the Supreme Court addressed the constitutionality of habitual offender laws in *Graham v. West Virginia*.⁷⁵ In upholding the laws, the Court quoted the historic roots of these laws:

The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England . . . Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796 and in Massachusetts in 1804; and there have been numerous acts of similar import in many states.⁷⁶

The *Graham* decision paved the way for passage of the Baumes Law, which was modeled on the West Virginia law upheld in *Graham*.⁷⁷

Other states in turn were inspired by the Baumes Law. By 1930, 23 states enacted laws inspired or modelled off the Baumes Law, among them were California, Kansas, New Jersey, Oregon, Vermont, Michigan, North Dakota,⁷⁸ South Dakota, and Minnesota.⁷⁹ Kansas' law imposed a life sentence upon a third felony conviction (even harsher than New York's law). In a kind of jurisdictional competition, Kansas lawmakers argued that imposing the harshest habitual offender law would lower incarceration rates because recidivists would leave Kansas for other states with less severe habitual offender laws.⁸⁰ Shortly after passage of the Baumes Law, the New Jersey Governor voiced support, stating he would ask the legislature to pass a similar law and include the request in his annual message to the legislature.⁸¹

D_Taylor_Ashley_a_201005.pdf?sequence=1; Charles L. Chute, *The Progress of Probation and Social Treatment in the Courts*, 24 J. CRIM. L. & CRIMINOLOGY 60, 65 (1933).

73. Elliot, *supra* note 37, at 199. The thirteen states studied by Elliot were Ohio, Nebraska, Texas, North Carolina, Pennsylvania, California, New York, Indiana, Minnesota, Missouri, Illinois, Massachusetts, and Colorado. *Id.*

74. *Id.* at 190.

75. 224 U.S. 616 (1912).

76. *Id.* at 623; see generally Mabel A. Elliott, *Crime and the Frontier Mores*, 9 AM. SOCIOLOGICAL REV. 185, 186 (1944) (discussing history of habitual offender laws in the United States).

77. See *Test Baumes Law in Lifers Appeal*, N.Y. TIMES, Dec. 16, 1926, at 20.

78. Jeffrey Adler, *Less Crime More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 102 J. AM. HIST. 34, 40–42 (2015); see also Note, *Attempts to Combat the Habitual Criminal*, 80 UNIV. PENN. L. REV. 565, 565–66 (1932).

79. COLE, *supra* note 64, at 217; *Many States Adopt Crime Check Bills*, OGDENSBURG REPUBLICAN JOURNAL, June 20, 1927; see Levy, *supra* note 26, at 558. In South Dakota and Minnesota, a life sentence upon a fourth offense was discretionary.

80. *Kansas Expects 'Baumes Law' to Ease Crowding in Prisons*, N.Y. TIMES, July 17, 1927, at E7.

81. *Moore to Demand Rigid Crime Laws*, N.Y. TIMES, Oct. 19, 1926, at 31.

B. Factors Influencing Passage of Habitual Offender Laws: Crime Wave, Urbanization, and Identification Technology

One reasonable question is why habitual offender laws became so widespread during the Progressive Era? Part of the answer lies in the widespread perception of a crime wave, combined with improvements in technology that permitted effective enforcement. In the 1920s, Americans widely perceived themselves to be in the midst of a severe crime wave.⁸² Increases in crime during this period were linked, in part, to Prohibition — the criminalization of the manufacture, sale, or transport of alcoholic beverages under the Eighteenth Amendment to the U.S. Constitution.⁸³ A regression analysis of Chicago homicide data found that total homicide rates increased by 21% during Prohibition, with non-alcohol related homicides increasing by 11%.⁸⁴ Crime statistics from the period also support contemporary perceptions of a crime wave. Between 1900 and 1925, the homicide rate in the U.S. increased by 50%, with particularly large increases in major cities, such as Chicago and New York.⁸⁵ However, a study comparing crime data from the Cleveland Crime Survey with the frequency of news reports on crime found significant over reporting of crime, suggesting that perceptions of a crime wave did not match reality.⁸⁶

Contemporaries did not view the crime wave as driven by organized crime or intra-community violence in ethnic and racial minority communities in urban areas. Rather, the real concern was the surge in robberies and robbery-homicides targeting small businesses and citizens in middle and upper-class neighborhoods, amidst growing urban populations.⁸⁷ Meanwhile, high profile trials in the 1920s contributed to the growing concern that urban crime was out of control. In 1920, anarchists bombed Wall Street, killing thirty-eight people.⁸⁸ A few days prior, anarchists Nicola Sacco and Bartolomeo Vanzetti had been indicated for murder, which would become a trial closely watched by the public.⁸⁹ Then in 1924 Nathan Leopold and Richard Loeb were tried in Chicago for the murder of an upper-class child.⁹⁰ A prominent reformer captured the panicked mood of the public and

82. See, e.g., Robert Post, *Federalism, Positive Law, and the Emergency of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 103 (2006).

83. See J.C. Burnham, *New Perspectives on the Prohibition "Experiment" of the 1920's*, 2 J. SOCIAL HIST. 51, 61–62 (1968).

84. Mark Asbridge & Swarna Weerasinghe, *Homicide in Chicago from 1890 to 1930: Prohibition and Its Impact on Alcohol- and non-Alcohol-Related Homicides*, 104 ADDICTION 355, 355–64 (2009).

85. Adler, *supra* note 78, at 36.

86. Joseph L. Holmes, *Crime and the Press*, 20 J. CRIM. L. & CRIMINOLOGY, no. 2, August 1929, at 245, 265–66 (1929).

87. See Adler, *supra* note 78, at 36.

88. *Havoc Wrought in Morgan Offices*, N.Y. TIMES, Sept. 17, 1920, at 1; see also BEVERLY GAGE, *THE DAY WALL STREET EXPLODED: A STORY OF AMERICA IN ITS FIRST AGE OF TERROR* 220–25 (2009).

89. GAGE, *supra* note 88, at 220.

90. Jeffery Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 104 J. AM. HIST. 34, 36 (2015).

policymakers: “Unless something is done, and done soon, to check the rising tide of crime the very foundation of the country itself is threatened.”⁹¹

As the urban population grew, crime in urban areas, where most crime occurred, was increasingly seen as caused by a small group of ‘habitual criminals.’⁹² These habitual criminals were considered by some as innately predisposed to a life of crime and thus biologically inferior. Pseudo-science, such as phrenology and craniology, was deployed to diagnose and cure the problem of habitual criminality.⁹³ In 1891 “instinctive criminals,” some argued, were clearly identifiable by their “ill-shaped heads,” “assymetrical [sic] faces,” “ill-developed bodies,” among other physical characteristics.⁹⁴ Sixteen states passed laws permitting sterilization of habitual criminals.⁹⁵ These laws were not struck down by the U.S. Supreme Court until 1942 in *Skinner v. Oklahoma*.⁹⁶

Contemporaneous with the policy debate on how the criminal justice system should deal with recidivists was the eugenics movement. Strikingly similar language was used to describe both the habitual criminal and the perceived problem of ‘mental defectives’ and other ‘undesirables.’⁹⁷ Indeed, just as habitual offender laws were intended to separate undesirables from the body politic, even permanently in the case of life sentences, eugenics laws were designed to permanently remove undesirable genetics from future generations of political society.⁹⁸ Chief Justice Harry Olson of the Chicago Municipal Court, in establishing a eugenic criminology clinic, argued that 2% of the American population committed crimes and 2% were mentally defective, implying the two groups were one in the same.⁹⁹ In *Buck v. Bell*, U.S. Supreme Justice Oliver Wendell Holmes, writing for a majority of the Court upholding Virginia’s sterilization laws, argued that the same logic which permits the death penalty in the interest of the public welfare also permits sterilization to “prevent those who are manifestly unfit from continuing their kind.”¹⁰⁰

Although eugenics laws were more extreme than the contemporaneously enacted habitual offender laws, they nonetheless shared an eerily similar logic. Perhaps the clearest articulation of the conceptual similitude between habitual offender laws and eugenics laws is found in a 1934 letter from former New York Senator William Love to the New York Times editor, when both types of laws were waning. The

91. *Id.*

92. King, *supra* note 9, at 530.

93. *Id.*

94. *Id.* at 532.

95. *Id.*

96. *Id.* at 533.

97. Philip Jenkins, *Eugenics, Crime and Ideology: The Case of Progressive Pennsylvania*, 51 PENN. HIST. J. MID-ATLANTIC STUD. 64, 66 (1984).

98. See, e.g., *id.*; see also Thomas C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, J. ECON. PERSP. 207, 214 (2005).

99. Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 LAW & HIST. REV. 63, 69 (1998).

100. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

letter proposed a “Devil’s Island prison” in New York for “chronic criminals” because “[c]rime is as contagious as disease and should be treated accordingly.”¹⁰¹

Throughout the life of the Baumes Law, conferences and policy debates were held around the country. One in Buffalo, New York was titled the Race Betterment Conference.¹⁰² At the Conference, speakers urged the use of scientific knowledge to “enforce eugenic measures for the morons, criminals and the other incompetent” persons.¹⁰³ Similarly, a conference of judges and prosecutors in Pennsylvania endorsed the view that criminals should be “permanently removed as a menace to society.”¹⁰⁴ During vigorous debate after the passage of the Baumes Law, the New York City Police Commissioner went as far as to recommend a Commission for Ostracism, which would review cases of habitual offenders and if appropriate banish them from New York City for a term of years or life.¹⁰⁵

Several major cities also established Crime Commissions and conducted crime surveys with an eye towards reform of the criminal justice system in order to combat the crime wave.¹⁰⁶ Reform efforts tended to focus on low conviction rates,¹⁰⁷ which were blamed on plea bargaining, judicial discretion in sentencing, and juries.¹⁰⁸ The respected criminal justice expert Raymond Moley argued that plea bargaining to lesser offenses was “one of the most pernicious and principal causes of crime.”¹⁰⁹ With respect to the commonality of plea bargains, he considered New York “the worst city in America and Brooklyn [] worse than Chicago.”¹¹⁰ Statistics from the period show that in Chicago only 20% of felony cases were successfully prosecuted.¹¹¹ In New York the figure was 21%.¹¹² Judges and

101. William Lathrop Love, Letter to the Editor, *Ostracism for Criminals*, N.Y. TIMES, Mar. 17, 1934.

102. *Cancer Diagnosing System Discovered: Could Be Bred Out of Human Race, Conference in Detroit Told*, BUFFALO EVENING NEWS, Jan. 5, 1928, at 5.

103. *Id.* Many people disagreed with eugenics. In 1927, Harvard refused a \$150,000 bequest (approximately \$2 million in 2017 money) to teach eugenics on the grounds that eugenics is not a sound doctrine. *See Harvard Declines a Legacy to Found Eugenics Course*, N.Y. TIMES, May 8, 1927.

104. *Oppose Baumes Act for Pennsylvania: But Conference of Judges and District Attorneys Approves Principle of the Law*, N.Y. TIMES, Apr. 7, 1928, at 2.

105. *City Commissioner to Ostracize Criminals Proposed by O’Ryan to End Flouting of Law*, N.Y. TIMES, Mar. 13, 1934.

106. *See generally* Esther Conner, *Crime Commissions and Criminal Procedure in the United States Since 1920: A Bibliography*, 21 J. CRIM. L. & CRIMINOLOGY 129 (1930) (providing a survey of various crime commissions established in the 1920s).

107. William Draper Lewis, *The Work of the American Law Institute in Criminal Procedure*, 125 ANNALS AM. ACADEMY POL. SCI. 85, 85 (1926) (noting the need for skepticism with respect to crime statistics but nevertheless arguing that the figures reveal an “appalling amount of crime in the United States” and that the “criminal’s immunity from detection, conviction and punishment is essentially correct.”).

108. *See* *People v. Gowasky*, 219 N.Y.S. 373, 379 (N.Y. App. Div. 1926) (“Judicial discretion has been exercised in favor of criminals to a degree before unheard of, and those charged with the commission of crime and awaiting trial, often hardened criminals, have been admitted to bail and turned loose to continue their careers of crime.”); *see also* Adler, *supra* note 78, at 40–42.

109. Pettey, *supra* note 69, at 1.

110. *Id.*

111. Adler, *supra* note 78, at 37.

112. *Id.*

prosecutors were held primarily responsible, although others blamed delays in every phase of the criminal justice process.¹¹³ In Chicago in the mid-1920s judges dismissed charges in 24% of felony cases and prosecutors dropped 38% of felony cases before trial.¹¹⁴ Similar rates applied to New York, where 58% of felony cases were dismissed or discharged prior to a grand jury.¹¹⁵ Further, in the 1920s juries regularly engaged in jury nullification to obstruct enforcement of prohibition laws.¹¹⁶

This was the environment in which the Baumes Law, and other similar legislation, was born. Senator Baumes, and the New York Crime Commission which he chaired, described the apparent dysfunction:

[W]e found that one of the gravest aspects of the problem was that so many known criminals escaped justice. They were often able to walk out of court free in spite of the fact that everyone knew they were guilty. *That was because there were so many loopholes in the law.* Why, a prisoner who was known absolutely to be guilty had twenty chances of escaping punishment, through one trick or another, to one chance of being convicted.¹¹⁷

The New York Appellate Division in *People v. Gowasky*, involving a challenge to the Baumes Law, concurred, “Present-day laxity in the enforcement of our criminal and penal laws is, in our opinion, largely responsible for the wave of crime which seems to have engulfed the country.”¹¹⁸ The loopholes which the Baumes Law closed were entry points for discretion by judges, juries, and prosecutors built into the criminal justice system.

While the perceived increase in crime and frustration with inefficiencies in the criminal justice system provided the motive to enact habitual offender laws, advances in technology supplied the means to enforce them. Suspect identification was a major technological challenge to enforcement of habitual offender laws.¹¹⁹ In 1927, the National Crime Commission argued for the importance of technology in identifying prior offenses, “Of what significance is a severer penalty for a repeater . . . or a life sentence threatening a man who is convicted of his fourth felony if there is no authoritative means of ascertaining how many previous sentences he has served?”¹²⁰

113. See J. A. Royce McCuaig, *Modern Tendencies in Habitual Criminal Legislation*, 15 CORNELL L. Q. 62, 80 (1929); George E. Simpson, *Chicago Crime Commission*, 26 J. CRIM. L. & CRIMINOLOGY 401, 404 (1935).

114. Adler, *supra* note 78, at 38.

115. *Id.*

116. Burnham, *supra* note 83, at 51.

117. C.G. Poore, *Senator Baumes Aims to Destroy the ‘Fence’*, N.Y. TIMES, Nov. 6, 1927, at 9, PROQUEST HISTORICAL NEWSPAPERS: NEW YORK TIMES Doc. No. 104032533 [hereinafter *Senator Baumes*] (emphasis added).

118. *People v. Gowasky*, 219 N.Y.S. 373, 380 (N.Y. App. Div. 1926).

119. See COLE, *supra* note 64, at 13–31.

120. *Id.* at 217.

Prior to fingerprinting Britain used a national register of “distinctive marks” (e.g. scars and birthmarks) to match defendants to prior convictions.¹²¹ However, this was a slow process, taking between ten and ninety hours to determine a match.¹²² By 1877, the register was only used for a small class of previously identified recidivists because of the prohibitive expense in maintaining the register for all convicted criminals.¹²³ Later, the use of photos improved identification of prior offenses.¹²⁴ Yet the problem of cost-effectiveness and efficiency remained because searching countless photos was time-consuming and the files were expensive to maintain.¹²⁵ Both distinctive marks and photographs were organized by name, but defendants often used aliases.¹²⁶ Thus, these databases, in addition to being difficult to search, could produce matches contestable in court.

In 1888 the French police officer Alfonse Bertillon devised a system that was more accurate and more efficiently searched than previous methods.¹²⁷ The Bertillon system, adopted by New York and Illinois in the 1890s, matched defendants to prior convictions based on eleven bodily measurements.¹²⁸ The system allowed a complete search in minutes.¹²⁹ Bertillon is also credited with inventing the “mug shot” or taking facial photos from the front, left, and right.¹³⁰ In 1904 fingerprinting began to replace the Bertillon system in the U.S. criminal justice system.¹³¹ However, it was not until the 1920s that law enforcement officials began to regularly use fingerprinting in order to quickly and effectively match suspects with prior arrests and convictions.¹³² With the advent of fingerprinting habitual offender laws became possible to regularly enforce.¹³³

III. UNDERSTANDING NEW YORK’S BAUMES LAW THROUGH ROBERT COVER’S NORMATIVE UNIVERSES

This section will discuss the rise and fall of the Baumes Law as a story of competing normative universes. A variety of normative universes competed to create, change, and destroy the Baumes Law. Points of discretion within the criminal justice system enjoyed by judges, juries, and prosecutors facilitated this jurisgenerative and jurispathic competition. Ultimately, those who sought the law’s repeal prevailed.

121. King, *supra* note 9, at n.36.

122. *Id.*

123. *Id.*

124. *Id.* at 531.

125. *Id.* at 531–32.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*; COLE, *supra* note 64, at 53.

130. *Id.*

131. King, *supra* note 9, at 531.

132. COLE, *supra* note 64, at 53.

133. *Id.* at 30, 169.

A. *Conflicting Normative Universes: “The ghost of a prison record”*

In 1926, the New York Legislature created the New York Crime Commission, also referred to as the Baumes Commission or Committee, with a budget of \$50,000 (approximately \$669,000 today).¹³⁴ Pressing issues before the Commission were the apparent flouting of the law by judicial discretion and juries in the face of a perceived increase in habitual criminals.¹³⁵ As a solution, the Commission recommended that the Legislature enact the Baumes Law, which included mandatory life sentences for the fourth conviction of *any* felony offense, even non-violent felonies.¹³⁶

Ironically, the Baumes Law was named after a seemingly mild-mannered person. New York Senator Caleb Baumes was described in a New York Times article in 1927, “[h]e looks rather like a quiet country lawyer, white-haired, kindly, blue eyed, dressed in grays, with a yellow handkerchief giving one spot of color to his clothes.”¹³⁷ He was also celebrated as “the most notable criminal lawmaker of our time” and vilified as “the man who is leading the administration of the law back to the barbarities of the Middle Ages.”¹³⁸ Yet, for Baumes “[t]he theory of the Fourth Offender Act [was] not punishment at all, but [] protection of the public.”¹³⁹ He viewed the fourth offender as “incurable” and “non-reformable.”¹⁴⁰ Baumes argued in various community and interest group meetings that the laws were “carrying into effect what criminologists, social workers, [and others] . . . have been urging for some years, namely, that our laws and our punishments should be made to suit the criminal, not the crime.”¹⁴¹ Adding, “They say that you should treat this man, that he is a sick man Now I say, by the very same token, we should take care of this man though he is sick . . . I would be entirely satisfied if they will take this class of men and put them in an institution and call it a protective detention institution, and keep them there for your protection and mine and the protection of your family and mine.”¹⁴²

134. MARY M. STOLBERG, *FIGHTING ORGANIZED CRIME: POLITICS, JUSTICE, AND THE LEGACY OF THOMAS E. DEWEY* 101 (1995).

135. *Id.*; Julia E. Johnson, *Introduction*, in 6 *THE REFERENCE SHELF: THE BAUMES LAWS* 3 (Julia E. Johnson ed., 1929).

136. STATE OF NEW YORK, *REPORT OF THE CRIME COMM’N: REPORT TO THE COMM’N OF THE SUB-COMMISSION ON STATISTICS* 95–117 (1927) [hereinafter *BAUMES COMM’N*]; STOLBERG, *supra* note 134, at 102; Johnson, *supra* note 135.

137. *Senator Baumes*, *supra* note 117.

138. *Id.*

139. See Caleb H. Baumes, *Baumes Laws and Legislative Program in New York*, in *THE REFERENCE SHELF: THE BAUMES LAWS* 95, 99 (Julia E. Johnson ed., 1929).

140. *Id.*

141. *Affirmative Discussions: Life Sentence for Fourth Offenders*, in 6 *THE REFERENCE SHELF: THE BAUMES LAWS* 89, 89 (Julia E. Johnson ed. 1929).

142. *Id.* at 104.

In the years after passage, generally two distinct groups with conflicting normative universes emerged. As explicated in a report from the New York Crime Commission:

One group dogmatically asserts that the crime problem can only be solved by increasing the severity of sentences and proceeds to have enacted restrictive, mandatory legislation. Any suggestions that the opposing group makes are labeled as . . . not worthy of rational, unemotional, common-sense individuals . . . [T]he other group, equally dogmatic . . . points to the history of crime and punishment and says: ‘read and be convinced that fear will never decrease crime, for history shows that every possible way of punishing criminals has been tried and has proven a failure . . .’¹⁴³

Many officials and academics wholeheartedly supported the laws, with one article praising their “undoubted effectiveness as a deterrent force” and finding “no serious objection, either in law or policy, against their more widespread adoption and application”¹⁴⁴ However, in the same article that praised the Baumes Law and similar statutes, the author lamented cases of “palpably disproportionate punishment for a relatively trivial last offense.”¹⁴⁵ Numerous academic and newspaper articles discussed the policy implications, following court cases and sometimes noteworthy injustices.¹⁴⁶ Such cases were faithfully reported by the New York Times and other media outlets, leading many commentators to recommend some judicial discretion in sentencing.¹⁴⁷ Meetings of professional associations and civic organizations debated the merits.¹⁴⁸ In 1929, the Harvard Law School debate team competed against Marquette on the question of the New York Baumes Law.¹⁴⁹ The Association of the Bar of the City of New York opposed the laws,¹⁵⁰ while the New York County Lawyer’s Association

143. *Crime Board Urges Study of Individual*, N.Y. TIMES, Mar. 25, 1927, at 5, PROQUEST HISTORICAL NEWSPAPERS: NEW YORK TIMES Doc. No. 104209967; see generally Edward Lindsey, *Legislation on Crime in Twenty-Five Years*, 24 J. CRIM. L. & CRIMINOLOGY 109, 115 (1933 (describing the opposing trends referenced here of early twentieth century penal legislation); Vernon F. Murphy, *Limitation of the Baumes Fourth Offender Laws*, 4 ST. JOHN’S L. REV. 325 (1930) (supporting position that the “unreclaimable and habitual criminal” should be “permanently segregated”); Dean Pound, Foreword, *Predictability in the Administration of Criminal Justice*, 42 HARV. L. REV. 297 (1929) (describing the dichotomous viewpoints on harsh habitual criminal laws).

144. Elson, *supra* note 42, at 422.

145. *Id.*

146. See Johnson, *supra* note 135, at 7–8; Levy, *supra* note 26, at 558.

147. See discussion *infra* Section III.B.

148. E.g., *Debate on the Baumes Laws*, N.Y. TIMES, Dec. 12, 1926, at 17, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103688102 (discussing a debate convened by the League of Women Voters on the Baumes Laws between New York Senator James Higgins of Brooklyn and J. A.H. Hopkins).

149. *Debaters Clash with Marquette Tonight*, HARV. CRIMSON, Feb. 20, 1929.

150. *Bar Favors Ending Public Enemy Law*, N.Y. TIMES, Feb. 26, 1932, at 4, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99711035.

supported them.¹⁵¹ Less than a year after passage, Assemblyman Jerome Ambro introduced a bill that would repeal life sentences for fourth offenders.¹⁵²

Nevertheless, passage of the Baumes Law was advocated for by the Crime Commission as well as the Association of Grand Jurors of New York as a tough on crime measure amidst perceptions that a “gigantic crime wave was engulfing the nation.”¹⁵³ As one commentator at the time described the situation, “We fulminated against judges, juries, lawyers, and the administration of the criminal law . . . and in customary American fashion, it was decided to legislate the crime wave out of existence.”¹⁵⁴ Then Chief Justice of the U.S. Supreme Court, William Howard Taft, endorsed the Baumes Law during a National Crime Commission Conference in 1927, saying “[I]t seems to me that [the Baumes Law] indicate[s] that the forgotten man, the victim of the murderer and the robber and the criminal, as well as society at large, is being remembered in the new legislation in New York.”¹⁵⁵

Statistics from the time show the increase in urban crime peaked around passage of the Baumes Law and generally declined thereafter. Between 1925 and 1929, rates of violent crime dropped 31% in New York City, with similar rate drops in other major cities.¹⁵⁶ For instance, the National Surety Company reported a 25% decrease in theft loss after the Baumes Law went into effect.¹⁵⁷ The decrease continued through the 1930s, even as poverty rates increased due to the Great Depression.

The New York Crime Commission claimed the Baumes Law was responsible for the “marked decrease in crime” and thereby “exceed[ed] the expectations,” while also noting the “period in which these laws have been in operation is much too short to give any conclusive evidence of their value.”¹⁵⁸ The New York City Police Department argued that the laws reduced the need for additional protection in a popular shopping area in Manhattan during the holiday season.¹⁵⁹ The evidence the Commission relied upon to support this conclusion was behavior by defendants, who exhibited a “frantic rush . . . to plead guilty and to break into Sing Sing prison” before the laws went into effect.¹⁶⁰ One commentator frankly admitted, “[A]s the thirty-four felons announced in open court, ‘they’re [the Baumes

151. *County Bar Favors a Divorce Reform*, N.Y. TIMES, Feb. 8, 1932, at 19, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99722004.

152. *Would Amend Baumes Laws*, N.Y. TIMES, Feb. 2, 1927, at 2, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104235038.

153. STOLBERG, *supra* note 134, at 102 (quoting a Century Magazine article).

154. *Id.*

155. E.R. Cass, *National Crime Commission Conference*, 18 J. CRIM. & CRIMINOLOGY 497, 503 (1928).

156. Adler, *supra* note 78, at 39.

157. *Says Baumes Law Cut Theft Loss 25%*, N.Y. TIMES, Feb. 9, 1927, at 23, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104242477.

158. *New York Crime Commission's Report*, 13 A.B.A. J. 337, 337 (1927) [*hereinafter* “NY Crime Commission”].

159. *Holiday Deadline for Shopping Area Ended; Policy Say Baumes Law Scares Away Crooks*, N.Y. TIMES, Dec. 13, 1926, at 1, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103766628.

160. BAUMES COMM’N, *supra* note 136, at 8.

Law] terrible, Your Honor, terrible.’ It was the avowed purpose of Senator Baumes and his committee to make them so.”¹⁶¹ New York Senator Roger Wales echoed the Commission, rejecting any attempt to modify the Baumes Law because it “has driven gunmen and criminals of all types out of New York City and has put fear into all types of criminals in other cities.”¹⁶²

In 1927, the New York Crime Commission referred to the habitual offender laws as a “legislative thunderbolt” that cut robberies in half, causing criminals to flee to states with less severe laws.¹⁶³ The New York City Police Commissioner McLaughlin argued for patience in determining the laws’ impact, as they were passed “in response to a widespread feeling that the administration of the criminal law has been too sentimentally complaisant.”¹⁶⁴ The tool for addressing this problem was the deliberate elimination of judicial discretion.¹⁶⁵ The Commissioner argued that, although some injustices occurred, since passage of the Baumes Law “desirable results have followed in the proportion of 10 to 1.”¹⁶⁶ A Police Officer testified in a court in the Washington Heights neighborhood of New York City that “criminals” told him the Baumes Law was “holding thieves in check.”¹⁶⁷ New York City Police Commissioner McLaughlin summarized the argument:

The Baumes law has teeth in it. There is no doubt that it reaches the habitual criminal with a long known record. He is the type who cannot be changed by reform; who has succeeded in beating the case year after year; who starts with a petty crime for which he is not sufficiently punished, continues his career of crime after that and bolder than ever because he has been dealt with leniently, goes in for more serious crimes, killing policemen when he feels that is necessary.¹⁶⁸

161. Howard McLellan, *The Baumes Laws*, in 6 THE REFERENCE SHELF: THE BAUMES LAWS 48, 54 (Julia E. Johnson ed., 1929).

162. *Stands by Baumes Law*, N.Y. TIMES, Nov. 27, 1926, at 19, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103702691.

163. Nourse, *supra* note 3, at 930.

164. *Impatience with the Baumes Law*, N.Y. TIMES, Nov. 26, 1926, at 18, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No.103682914.

165. *Id.*

166. *Id.*; see also *M’Laughlin Backs the Baumes Laws*, N.Y. TIMES, Nov. 25, 1926, at 27 (“The Baumes Law has been in effect only since July 1 and desirable results have followed in a ration of 10 to 1.”).

167. *Criminals Admit Baumes Act Checks Theft, Court Is Told*, N.Y. TIMES, Dec. 29, 1926, at 23, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 03624331. Today, these arguments are increasingly questioned by criminologists. See, e.g., *When Economists Turn to Crime*, ECONOMIST, Apr. 28, 2016 (relaying study that found an additional year in jail does avoid some property crimes, in particular theft of motor vehicles, but as the prison population grows the marginal benefits of incarceration are outweighed by the marginal cost of maintaining the increased prison population); Economic Perspectives, *supra* note 9. The United States and Canada have nearly identical homicide and robbery patterns even though Canada has had stable imprisonment rates and imprisonment has quintupled in the United States. STOLBERG, *supra* note 134. Recent studies find that the deterrent effect of the criminal law is more a function of the certainty of punishment rather than the severity of punishment. PFAFF, *supra* note 9.

168. BAUMES COMM’N, *supra* note 136, at 10.

Statistics proffered by supporters of the Baumes Law were derided as “statistics of a sort.”¹⁶⁹ Indeed, one commentator argued that understanding the impact of the Baumes Law required taking into consideration “all other factors which may have contributed to the change,” besides adoption of the Baumes Law.¹⁷⁰ That is, confounding variables must be incorporated into evidence-based causal explanations. Further, how criminals respond to deterrents was poorly understood and too often assumed.¹⁷¹

The law had numerous critics. Some New Yorkers thought the law’s severity increased shootings between the police and suspects because suspects were more likely to use violence to avoid arrest and the attendant severer sentences.¹⁷² Meanwhile, other critics retained faith in the rehabilitative model.¹⁷³ A private citizen wrote an open letter as “one of the few voices crying in the wilderness against the barbaric absurdity of an arbitrary life sentence after a fourth felony conviction without regard to the character of the felon, the capacity and condition of the prisoner or the circumstances of the crime.”¹⁷⁴

Opponents argued that many prior offenses were committed as children without a fully developed sense of right and wrong, yet those same offenses, as prior convictions, required life sentences as an adult.¹⁷⁵ Supporters countered that with each successive sentence the probability of recidivism increased while the likelihood of rehabilitation decreased.¹⁷⁶ This fact, they argued, favored permanent incapacitation under the Baumes Law.¹⁷⁷ Overcrowded prisons were also raised as a concern. Initial estimates of 7000 ‘lifers’ (those serving life sentences) in New York prisons proved unfounded,¹⁷⁸ but as we shall see, life sentences due to the Baumes Law contributed to prison riots in New York’s Auburn and Clinton prisons.

As the debate continued, in New York and other states reports of the “most outrageous sentences” emerged because of habitual offender laws. After admitting to three prior felonies, Robert Ayers, an African-American, was sentenced to life in

169. Levy, *supra* note 26, at 559.

170. Gerald W. Johnson, *How Does the Law Work?*, 1 OKLA. ST. B. J. 12, 14 (1930).

171. *Id.*; see George W. Kirchwey, *The Prison’s Place in the Penal System*, 157 ANALS AM. ACADEMY POL. & SOCIAL SCI. 13 (1931); see also Kirchwey *Lauds View of Smith on Crime: Sociologist Commends Governor’s Proposal of Board to Study Basic Cause and Effects*, N.Y. TIMES, Oct. 6, 1928, at 3, PROQUEST HISTORICAL NEWSPAPERS; N.Y. TIMES Doc. No. 104435054.

172. STOLBERG, *supra* note 134, at 103 (referencing New York Daily News article from 1926).

173. Adolph Lewisohn, *The Baumes Laws: Amendment in Method of Sentencing is Suggested*, N.Y. TIMES, Nov. 28, 1927, at 20, PROQUEST HISTORICAL NEWSPAPERS; N.Y. TIMES Doc. No. 104006896.

174. STOLBERG, *supra* note 134, at 102–103.

175. See, e.g., CLARENCE DARROW, *THE STORY OF MY LIFE* 336 (1932). This is consistent with current criminal psychology that argues criminal propensity is not a permanent state but a phase. PFAFF, *supra* note 9.

176. Frank H. Warren, *Crime—A Complex or a Crisis*, 4 NOTRE DAME L. REV. 147, 159 (1928).

177. *Id.*; *Affirmative Discussions*, *supra* note 141, at 89 (“A man who steals \$112 . . . is not under this law sent to state’s prison for life for stealing that \$112, but because, having been convicted before that time of three felonies—all serious crimes—unable to lead an honest life, he relapses to his previous devious ways.”).

178. *Pictures Prisons Filled with Lifers*, N.Y. TIMES, Feb. 17, 1927, at 10, PROQUEST HISTORICAL NEWSPAPERS; N.Y. TIMES Doc. No. 104246799.

Auburn prison for stealing 33 cents in an armed robbery in Lackawanna, New York.¹⁷⁹ In another case, a man who faced life for stealing a purse with \$265, tried to escape from Tombs jail, rather than be sentenced for life.¹⁸⁰ In Michigan a woman received a life sentence for selling a half-pint of whiskey.¹⁸¹ In another Michigan case, a man received life for possessing a pint of gin.¹⁸² The first defendant sentenced to life under the Baumes Law, Joseph Gowasky, was found guilty of stealing a small amount of jewelry and clothing.¹⁸³ As we shall see, Gowasky appealed and the case eventually reached the New York Court of Appeals. Indeed, the *Gowasky* case and others saw judges, juries, and prosecutors compete over whether the Baumes Law would survive, change, or end.

1. Judges

The Baumes Law aimed to eliminate judicial sentencing discretion. Mabel Elliot attributed the rise of habitual offender laws between 1880 and 1930 to “the common distrust which has met the unfortunate administration of probation, parole, and indeterminate sentence.”¹⁸⁴ The motivation for passage of the Baumes Law exemplifies the distrust and impatience with the inability of indeterminate sentencing schemes to deal with habitual offenders. Indeed, the Baumes Law’s express purpose was to abolish the previous system under the 1907 law that sentenced a habitual offender to life only to permit parole after serving a short sentence.¹⁸⁵ An examination of the criminal records of ten defendants convicted as fourth offenders under the Baumes Law in 1927 revealed six defendants with five or more prior felony convictions.¹⁸⁶ Under the 1907 law, the precursor to the Baumes Law, these ten defendants were potentially subject to life sentences upon a fourth felony conviction. Yet, they actually served sentences ranging from one to six years.¹⁸⁷ The 1907 law was incapable of achieving the policy goal of permanent incarceration.¹⁸⁸

179. C.E. Cornell, *Hints to Fishermen*, 4 PREACHER’S MAG. 51, 52 (1929).

180. *Robber Attempts Flight from Court*, N.Y. TIMES, May 15, 1927, at 3, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104207182.

181. DARROW, *supra* note 175, at 336.

182. *Man Is Sentenced to Life for Possessing Pint of Gin*, N.Y. TIMES, Sept. 30, 1927, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104063693.

183. *To Appeal on Baumes Law*, N.Y. TIMES, Jan. 22, 1927, at 4, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104239300.

184. ELLIOT, *supra* note 37, at 200.

185. McLellan, *supra* note 161, at 54.

186. BAUMES COMM’N, *supra* note 136, at 8.

187. *Id.* at 8–9.

188. See Johnson, *supra* note 135, at 91 (“When one reviews the inadequate sentences which the judges in our courts have meted out in the past to notorious criminals with records of this kind, giving them short sentences of two and one half years, or even less, in state’s prison, when they should have sentenced them to thirty or forty years, it is not surprising that the community speaking through the legislature should have decided that the time had come to put an end to such ‘judicial indiscretion.’”).

Judges were understandably reluctant to sentence habitual offenders to prison for life. Arthur Train poetically described the gravity of imposing a life sentence:

But the 'lifer'! Who can picture the horror of a lifetime of repentance or of mocking remorselessness? 'Civilly dead,' he is doomed to drag out his weary years in an earthly tomb, a silent, forgotten creature . . . enduring all the tortures of purgatory until the end seems a far distant haven of oblivion. The court-room echoes, like the empty future of the white-faced prisoner, to the dull fall of the words upon his barren soul—'*for the rest of your natural life.*'¹⁸⁹

Some judges engaged in high profile attempts at nullification, resisting the Baumes Law as an attack on judicial discretion.¹⁹⁰ Judge Julien Mack during a luncheon of the National Probation Association called the imposition of life for a fourth offense “silly,” arguing that environmental factors, such as the “slum system” brought on by the “industrial system”, were the cause of crime, rather than inherent criminality.¹⁹¹ One of the most articulate opponents was Judge Taylor:

There is much in the law that is foolish. What could be more so than the condemning of a man to life imprisonment for the meager offense of misappropriating a paltry sum of his employer's money? The true test should be, has the defendant committed a serious crime, is he a continual menace to the community or is he simply a wayfarer with the ghost of a prison record stalking from the distant background to damn him.¹⁹²

Similarly, Judge Cornelius Collins sentenced an African-American laborer to life imprisonment but his conscience compelled comment, telling the prisoner, “I have no doubt that the Baumes Committee [New York Crime Commission] was actuated by the best of intentions, but it made a law that is arbitrary and inflexible. It leaves the courts no discretion . . . [W]hat I am uttering in criticism of this mandatory legislation is, in my opinion, the consensus of opinion of the judges of the criminal courts throughout the State.”¹⁹³

Initially some judges sought to soften the law by sentencing defendants retroactively as if sentenced days prior to the Baumes Law entering into force. Upon receiving these early prisoners with the special notation for reduced sentences, the Warden of Sing Sing Prison, Lewis Lawes, sought a legal opinion from the New

189. ARTHUR TRAIN, *THE PRISONER AT THE BAR* 264 (1915).

190. *E.g. Baumes Laws Add to Legal Aid's Task: Defender Committee Says More Defendants Take their Chances on Trials*, N.Y. TIMES, Apr. 9, 1928, at 8, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104329769.

191. *Judge Mack calls Baumes Law "Silly"*, N.Y. TIMES, Feb. 17, 1927, at 25, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104268803.

192. *Who Makes the Laws?*, WALL ST. J., Nov. 8, 1926, at 1, PROQUEST HISTORICAL NEWSPAPERS: WSJ Doc. No. 130379581.

193. *Give Life Term, Calls it Unjust*, N.Y. TIMES, Nov. 11, 1926, at 16, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103750153.

York Attorney General.¹⁹⁴ Judges also routinely reduced the crime charged from a felony to a misdemeanor, particularly in cases of a potential fourth felony conviction. This prompted a formal complaint from officials at Sing Sing Prison.¹⁹⁵ Advocates of judicial discretion bemoaned the requirement that judges render judgment if a particular case happened to “coincide with a predetermined formula” necessitating a sentence “in accordance with the apocalyptic pre-vision of Senator Baumes and his associates in the year nineteen twenty-six.”¹⁹⁶ Opponents stressed the uniqueness of each case as a particular blend of social, economic, and biological factors,¹⁹⁷ and the need to reform not judicial discretion, but the public distrust of the judicial profession.¹⁹⁸

Yet the judiciary was not uniformly opposed. Some judges routinely enforced the law. A defendant who used a firearm to commit seven robberies in ten days to raise money for his wedding was given an indeterminate sentence of twenty-five to forty years with no clemency shown by the judge.¹⁹⁹ Judge Francis X. Mancuso pushed for severe habitual offender laws when testifying before the New York Crime Commission.²⁰⁰ Judge Charles C. Nott Jr., addressing members of the Bar Association of the City of New York, admitted that many cases do not “appeal to my sense of justice, but criminals have brought it upon themselves.”²⁰¹ He continued, “If they had only been decent, if they had only been moderate, this wouldn’t have happened.”²⁰²

The first constitutional challenge to the law was *People v. Gowasky*. In that case, rather than face stiffer penalties under the Baumes Law, the defendant plea bargained to a lesser offense, and admitted his identity and prior convictions. The trial judge failed to inform him of his right to a jury trial on these issues but sentenced him to a lesser prison term in keeping with the plea bargain. The case first went to the New York Appellate Division, which upheld the constitutionality of the law and overturned the plea bargain to a lesser offense, arguing, “[j]udicial discretion has been exercised in favor of criminals to a degree before unheard of, and those charged with the commission of crime and awaiting trial, often hardened criminals, have been admitted to bail and turned loose to continue their careers of

194. *Lawes Asks Ruling on Laws*, N.Y. TIMES, Aug. 18, 1926, at 5, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103852457.

195. *Say Courts Dodge Law*, N.Y. TIMES, Dec. 30, 1926, at 21, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103706315.

196. Levy, *supra* note 26, at 559.

197. *Id.*

198. *Id.* at 561 (relaying comments made by Judge Joseph M. Proskauer, New York Supreme Court, during an address of the Association of the Bar of the City of New York).

199. *Long Term for Youth Who Robbed to Wed*, N.Y. TIMES, Sept. 22, 1926, at 29, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103755798.

200. *Want Crime Laws Made More Drastic*, N.Y. TIMES, Oct. 15, 1926, at 11, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103861799.

201. *City Jurists Tell Ways to Cut Crime*, N.Y. TIMES, Oct. 22, 1926, at 23, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103772093.

202. *Id.*

crime.”²⁰³ The abuse of judicial discretion, the court continued, has brought about a “time when discretion should end.” The Baumes Law was designed to end judicial discretion by putting a “fourth conviction of a felony [] beyond the pale of judicial discretion.”²⁰⁴

When the *Gowasky* case reached the New York Court of Appeals, the court agreed with the Appellate Division and held that the defendant’s admission of his identity and prior convictions required mandatory sentencing under the Baumes Law, removing prosecutorial and judicial discretion to enforce a plea bargain.²⁰⁵ Further, the court held that although the judge failed to inform the defendant of his right to a jury trial as to his identity and prior convictions, this right was waved when the defendant admitted that he in fact committed the prior felonies.²⁰⁶

Judges and prosecutors sometimes engaged in a kind of gamesmanship over enforcement of the Baumes Law. Judge George Martin of Kings County Court remained one of the staunchest opponents of the Baumes Law, arguing that the “inexpert and inexperienced tinkering in the devising of the Baumes Law had brought about conflicting sections of the statutes in dealing with crime.”²⁰⁷ From the beginning Judge Martin opposed enforcement of the Baumes Law. In one of the first cases before Judge Martin, four defendants were accused of property crimes as second offenders. When requested by the District Attorney to resentence one of the defendants as a fourth offender, Judge Martin refused:

I am unwilling to believe that the Baumes laws should be interpreted to defeat their own purpose by substituting injustice for justice . . . The Baumes Laws are giving valuable service in striking terror into the breast of the hardened criminal, and there is force enough in them to accomplish that purpose without trying to make them shackle Judges, District Attorney and jurors in the proper administration of justice.²⁰⁸

In the case of Robert Smith, Smith first appeared before Judge Martin where he was allowed to plead as a first offender, escaping the remit of the Baumes Law, and sentenced to eighteen months in Sing Sing Prison.²⁰⁹ However, prison officials returned Smith to the court for resentencing because of his prior felony

203. *People v. Gowasky*, 219 N.Y.S. 373, 379 (N.Y. App. Div. 1926).

204. *Id.*

205. *People v. Gowasky*, 155 N.E. 737 (N.Y. 1927).

206. *Id.*; see Robert E. Cushman, *Public Law in the State Courts in 1927-1928*, 22 AM. POL. SCI. REV. 617, 623 (1928).

207. *Judge Drops Fight in Baumes Law Case: McLaughlin Withdraws Opposition to Plea for Longer Sentence – Martin Puts in a Defense*, N.Y. TIMES, Mar. 3, 1928, at 36, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104330197.

208. *Another Judge Balks on the Baumes Law*, N.Y. TIMES, Nov. 19, 1926, at 9, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103730954.

209. *Jury Decides Novel Baumes Law Snarl: Finds Prisoner Is Second Offender but Frees Him on Plea of Double Jeopardy*, N.Y. TIMES, Apr. 12, 1928, at 29, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104601289.

conviction.²¹⁰ In the second attempt, Judge Martin allowed Smith to plead to petty larceny (a misdemeanor and thus again not triggering the Baumes Law). Later, Smith was arrested for a parole violation and the District Attorney again sought a mandatory sentence due to the prior felony convictions.²¹¹

In another case, Judge Martin ordered the jury to find an 88-year-old defendant, facing life under the Baumes Law, not guilty, instructing the jury that the prosecution did not prove the government's case.²¹² In yet another case, Judge Martin ordered the release of George Crofield, who was initially sentenced to one year in Sing Sing Prison for stealing \$100 from his employer. The District Attorney returned Crofield for trial as a second offender. Judge Martin refused to impose a longer prison sentence:

I have no power to do anything but free Crofield . . . I therefore order his release. This case shows the injustice of the criminal law in that it does not allow the Judge discretionary power in such matters. No one wanted this man punished for the \$100 he stole, of which \$50 was recovered. He was preparing to refund the remainder. But I permitted him to plead guilty as a first offender and sentenced him to serve one year with the idea of straightening him out. There is no law requiring me to resentence this man now and he is discharged.²¹³

Finally, in *Dodd v. Martin*, in a case stemming from Judge Martin's continued opposition to the Baumes Law, the Court held that trial courts and district attorneys had no discretion in sentencing under the Baumes Law, "The Legislature has provided a mechanistic rule to take place of the discretionary powers of the judge The Executive may relieve from the hardship of a particular case. [The judge] cannot" ²¹⁴

2. *Juries*

By removing plea bargains in the case of prior felony convictions under the Baumes Law, defendants increasingly took their chances with a jury trial. The Voluntary Defenders Committee of the Legal Aid Society reported a doubling of trials from 1926 to 1927.²¹⁵ This opened up another avenue for the use of discretion to nullify the application of the Baumes Law – jury nullification.

The Baumes Law preserved one procedural protection for defendants because section 1943 required a jury to "inquire whether the offender is the same person

210. *Id.*

211. *Id.*

212. *Faces Life, Freed by Court*, N.Y. TIMES, May 11, 1927, at 14, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 1041649.

213. *Refuses to Send Man Back to Prison*, N.Y. TIMES, Dec. 7, 1927, at 34, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103978830.

214. *Dodd v. Martin*, 162 N.E. 293, 295 (N.Y. 1928).

215. *Baumes Laws Add to Legal Aid's Task*, *supra* note 190.

mentioned in the several records as set forth in such information.”²¹⁶ The same jury that decided the existence of the defendant’s prior convictions also determined their guilt of the offense charged. A jury, aware of the mandatory life sentence that would follow a guilty verdict, could acquit the defendant of the offense charged, thereby preventing the Baumes Law from being triggered. Alternatively, the jury could find that the defendant was not the same person who committed the prior felonies. Between 1926 and 1927 the Legal Aid Society reported four cases where the defendant should have received a life sentence but the “Judge, jury, or District Attorney” were “sympathetic.”²¹⁷ The first case in New York County that required the prosecutor to prove the defendant was a fourth offender ended in a jury deadlock.²¹⁸ In that case the defendant would have received life for stealing \$30 worth of clothes.²¹⁹ In another case, a jury refused to find the defendant was the same person who committed three prior felonies. A prospective juror reportedly objected to the Baumes Law during voir dire, replying, “kind of stiff for some offenses.”²²⁰

From January 1, 1927 to January 12, 1928, twenty-three of sixty-five defendants (35%) charged as fourth offenders were found not guilty, discharged, or dismissed.²²¹ At least some of these not guilty verdicts were the result of jury nullification, as in the case of Henry Simmons.²²² The New York Times reported the following description of the Henry Simmons case:

Simmons was indicted for grand larceny, second degree, as a second offender for stealing \$116 from the Rubel Ice Company, which employed him as a driver. When the case was called in the Kings County Court an Assistant District Attorney accepted Simmons’ plea of guilty as a first offender. The Court agreed and the three-year sentence was imposed. At Sing it was discovered Simmons had three previous felony convictions against him. Warden Lewis E. Lewes notified District Attorney Dodd, who asked Judge Taylor to resentence Simmons. Judge Taylor refused.²²³

The stakes were high for Simmons; Judge Taylor sentenced him to three years, but he should have received life under the Baumes Law. District Attorney Dodd then appealed for a writ of mandamus to Supreme Court Justice Harry E. Lewis in Brooklyn, who granted the writ ordering Judge Taylor to resentence Simmons as a

216. N.Y. Penal Law § 1943 (emphasis added), *quoted in Habitual Offender, supra* note 31, at 67.

217. *Baumes Laws Add to Legal Aid’s Task, supra* note 190.

218. *Baumes Law Case Deadlocks Jury*, N.Y. TIMES, Feb. 12, 1927, at 2, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104266053.

219. *Id.*

220. *Another Test in Rochester*, N.Y. TIMES, Jan. 18, 1927, at 14, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104248579.

221. BAUMES COMM’N, *supra* note 136, at 7.

222. Editorial, *Baumes Laws Anties*, WALL ST. J., Jan 21, 1927, at 1, PROQUEST HISTORICAL NEWSPAPERS: WSJ Doc. No. 130483735.

223. *Baumes Act Upheld by Higher Court*, N.Y. TIMES, Dec. 2, 1926, at 3, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103672604.

fourth offender.²²⁴ On remand the jury found that Simmons had no prior convictions and was therefore a first offender.²²⁵ In a clear case of jury nullification, one of the jurors reported that the jury “‘reached its verdict according to common sense, not law,’ having been of the opinion that the three previous convictions were for negligible offenses.”²²⁶ The District Attorney criticized the jury’s decision, “No jury should be placed in a position where it is able to nullify the law.”²²⁷ Among the twenty-three failed prosecutions under the Baumes Law there were at least two other instances of jury nullification, where the defendant was charged with a felony, but the jury returned a guilty verdict for a misdemeanor.²²⁸ For example, in 1928 the first woman to be convicted under the Baumes Law, May English, faced a life sentence for stealing \$43.²²⁹ Although she was a “nationally known pickpocket,”²³⁰ she received only a five-year sentence because the jury “refused to vote the woman a habitual criminal.”²³¹

In a 1932 letter to the editor of *Spectator* magazine, the author argued against the severe penalties under the Baumes Law as ineffective in part because juries often refused to convict.²³² Knowing this, prosecutors would sometimes accept guilty pleas for misdemeanors rather than risk no punishment upon jury nullification,²³³ although the courts found this strategy contrary to the law.²³⁴ It was argued that studies on the effectiveness of the Baumes Law should take into consideration the extent to which juries were more likely to acquit defendants who would otherwise be found guilty if the law permitted more lenient punishment.²³⁵ As one commentator put it, “The average man dislikes to declare a man to be guilty of a relatively minor offense when he knows that the verdict will mean a sentence to life imprisonment. But, just how much is he affected by this dislike?”²³⁶

Concerns about jury nullification were such that the New York Crime Commission considered allowing jury verdicts by majority vote, rather than

224. *Id.*; *Taylor Reopens Baumes Law Fight*, N.Y. TIMES, Dec. 30, 1926, at 21, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103829539.

225. *Baumes Law Anties*, *supra* note 222.

226. *Id.*

227. *Dodd Plans Fight for Baumes Law: Seeks Way to Convict Simmons, Found a First Offender by a Jury*, N.Y. TIMES, Jan. 19, 1927, at 9, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104253683.

228. BAUMES COMM’N, *supra* note 136, at 7.

229. *Woman Faces Life Term: Pickpocket Suspect Is Being Tried as Fifth Offender*, N.Y. TIMES, Mar. 24, 1928, at 19, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104615118.

230. *Id.*

231. *May English Receives Five Year Sentence*, N.Y. TIMES, Apr. 11, 1928, at 35, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104353364.

232. *Letter to the Editor*, THE SPECTATOR, Feb. 20, 1932, at 16.

233. *Id.* (writing in response to an article by a proponent of severe habitual offender laws who argued the death sentence should be imposed on habitual offenders).

234. *See People v. Gowasky*, 155 N.E. 737, 742 (N.Y. 1927).

235. *See Johnson*, *supra* note 170.

236. *Id.* at 14

unanimity. The rationale according to Senator Baumes, “This is on the theory that in every twelve men there is at least one ‘d’ fool.”²³⁷ Later, when the provision requiring a life sentence for a fourth felony conviction was softened to a minimum of fifteen years, one of the reasons for the amendment was an increasing recognition that the law “has proved in practice a deterrent not so much to criminals as to juries. [For] [w]here the fourth offense was of a comparatively trivial character they simply would not convict.”²³⁸

3. Prosecutors

Unlike juries, prosecutors were more constrained in their ability to use discretion to obstruct enforcement of the Baumes Law. The Baumes Law eliminated some of the barriers to consistent, effective enforcement that plagued the Illinois Habitual Criminal Act, discussed in Section II above. The Baumes Law created a State Central Bureau of Identification, charged with maintaining a central registry of identifying documents that could be used by prosecutors to ensure conviction of defendants as habitual offenders.²³⁹ The New York system was touted as “probably . . . the most modern in America . . .”²⁴⁰ Before the Baumes Law, defendants routinely pled guilty as first offenders in order to avoid a harsher mandatory sentence under section 1941 and the previous 1907 law.²⁴¹ The Baumes Law prevented the erroneous guilty plea as a first offender by facilitating access to accurate identification records and permitting resentencing as a habitual offender any time after the prosecution discovered the defendant’s prior convictions.²⁴²

Whereas the Illinois Habitual Criminal Act was susceptible to a reading that would permit prosecutors to omit a defendant’s prior convictions from the indictment, the Baumes Law unambiguously denied such discretion.²⁴³ Section 1943 explicitly placed an affirmative duty upon the district attorney to prosecute the defendant under the Baumes Law upon discovery of prior convictions, stating “it shall be the *duty* of the district attorney . . . to file an information accusing the said person of such previous convictions.”²⁴⁴ Section 1943 also placed an affirmative

237. *Hold-Up Gunman Gets 70-Year Term*, N.Y. TIMES, Oct. 29, 1926, at 25, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103708436.

238. *Two Views of Parole*, N.Y. TIMES, Apr. 7, 1932, at 22, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No., 99727312.

239. McLellan, *supra* note 161, at 48–49.

240. *Id.* at 49.

241. *Id.* at 53.

242. *Id.* at 54 (“Six convicts, as a result, have been brought back into court from state prison to receive life sentences because, upon arrival at the prison, past records showing three previous felony convictions had come to light.”).

243. See Habitual Criminal Act, 1883 Ill. Laws 76 (“the punishment *shall be* imprisonment in the penitentiary for the full term provided by law . . . and [if] convicted of any of said crimes, committed after said second conviction, the punishment *shall be* imprisonment in the penitentiary for a period not less than fifteen years . . .”) (emphasis added); see also *People v. Gowasky*, 155 N.E. 737, 744 (N.Y. 1927).

244. N.Y. Penal Law § 1943 (emphasis added), quoted in *Habitual Offender*, *supra* note 31, at 66.

enforcement duty upon other law enforcement officials, providing that, “[w]henver it shall become known to *any* warden or prison, probation, parole, or police officer or other peace officer” that the convicted defendant has a prior conviction “it shall become his *duty* forthwith to report the facts to the district attorney”²⁴⁵

Yet, initially prosecutors were slow to use the Baumes Law. A month after the laws went into effect, a review of Sing Sing prison records showed that several defendants could have been tried for prior convictions and sentenced as habitual offenders, but none of the twelve counties in the southern part of New York enforced the Baumes Law.²⁴⁶ The warden of Sing Sing Prison, Lewis Lawes, notified two district attorneys about the prior convictions of five defendants, but no action was taken.²⁴⁷ As mentioned, from January 1, 1927 to January 12, 1928 sixty-five defendants in New York City were charged as fourth offenders under the Baumes Law.²⁴⁸ The district attorneys permitted fourteen, or 21%, of these defendants to plead guilty to misdemeanors, thereby avoiding application of the Baumes Law.²⁴⁹ In the case of Marion LaTouche, the district attorney permitted a misdemeanor plea to prevent application of the Baumes Law.²⁵⁰ LaTouche had four prior felony convictions for fraud, but the assistant district attorney in the case concluded that life imprisonment was “too severe a sentence for a woman of Mrs. LaTouche’e [sic] age”²⁵¹

New York County District Attorney Joab Banton argued that a habitual offender is in reality too difficult to define to merit the severe penalties of the law, “We may recognize him in the street and in the theater or as he is depicted in fiction, but before the bar of justice he becomes a most elusive character.”²⁵² Some prosecutors also argued that the severity increased desperation by criminals, “causing them to use the pistol more freely when in danger of arrest.”²⁵³ Yet some district attorneys enforced the Baumes Law even against sympathetic defendants. In *People v. Rogan*, the defendant was sentenced to twenty years for his second felony conviction, with the first felony conviction considered by the court “a crime merely in the technical sense.”²⁵⁴ When the defendant was sixteen years old he was convicted for assaulting a minor, the minor later became his wife with whom he had two children.²⁵⁵

245. *Id.* at 67.

246. *Baumes Crime Acts Unused, Says Lawes*, N.Y. TIMES, August 17, 1926, at 23, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103827672.

247. *Id.*

248. BAUMES COMM’N, *supra* note 136, at 7.

249. *Id.*

250. *Woman, 85, Escapes Life Term as Thief*, N.Y. TIMES, Sept. 1, 1931, at 17, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99300184.

251. *Id.*

252. STOLBERG, *supra* note 134.

253. *To Weigh Protests on Baumes Laws*, N.Y. TIMES, Nov. 23, 1926, at 31, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 103840371.

254. *People v. Rogan*, 224 N.Y.S. 5, 6 (N.Y. Spec. Term 1927).

255. *Id.*

B. Jurispathy: The End of the Baumes Law

Unsurprisingly, exuberant support for the severe punishment of habitual offenders proved transient, for the New York Legislature had, by 1930, “rejected practically the entire program of the Crime Commission.”²⁵⁶ Even Senator Baumes argued for replacing the law in favor of a parole system, which was recommended by then Governor Franklin Roosevelt (the future US President).²⁵⁷

Obvious cases of injustice mounted. For example, twenty-one year-old William Fisher was sentenced to life for stealing \$40 worth of shirts.²⁵⁸ In 1931, attention was drawn to the case of an eighty-five year-old woman who faced a life sentence due to numerous felony convictions spanning five decades.²⁵⁹ The felonies tended to be for grand larceny.²⁶⁰ On September 10, 1931, she took \$400 from her landlady to invest in General Electric stock.²⁶¹ She never purchased the stock, but kept the money. Similar offenses occurred in 1917, 1921, and again in 1926.²⁶² In an act of judicial and prosecutorial nullification, she was permitted to plead to a misdemeanor and thus avoid a life sentence.²⁶³ In another case, Danbridge Bibb faced life for a fraudulent \$15,000 bank note when he forged the signature of newspaper magnate William Randolph Hearst.²⁶⁴ It was a sensational crime and significant sum of money, but questionable whether he deserved a life sentence. In October 1927, William Fanta was sentenced to life for stealing three rugs valued at \$30.²⁶⁵ When imposing the sentence, the judge opined on its disproportionality and told the defendant he would recommend clemency through the prison system.²⁶⁶

In 1926, Clifford Hanson, a “tall, slender youth and of a quiet demeanor” was sentenced to life for using a firearm in a robbery of a delicatessen that netted him \$51.²⁶⁷ The New York Times recounted the court scene in detail, in which the judge evinced little sympathy for Hanson. Before imposing the sentence, the judge

256. RAYMOND MOLEY, *OUR CRIMINAL COURTS* 72 (1930).

257. STOLBERG, *supra* note 134.

258. *Youth, 21, Gets Life in Prison for Theft of \$40 of Shirts*, N.Y. TIMES, Apr. 14, 1928, at 21, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104598149.

259. *Woman, 85, Escapes Life Term as Thief*, *supra* note 250.

260. *Id.*

261. *Id.*

262. *Woman, 85, Faces Life Prison Term*, N.Y. TIMES, Aug. 4, 1931, at 23, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99103931.

263. *Woman, 85, Escapes Life Term as Thief*, *supra* note 250.

264. *Faces Life in \$15,000 Forgery: D.H. Bibb Gets Penitentiary Term for Swindling Hearst and Will be Tried as Fourth Offender*, N.Y. TIMES, Oct. 23, 1928, at 27, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104439646.

265. *Gets Life for \$30 Theft*, N.Y. TIMES, Oct. 26, 1927, at 21, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 104073799.

266. *Id.*

267. *Gets Life Sentence Under Baumes Law for a \$51 Hold-Up*, N.Y. TIMES, Aug. 21, 1926, at 1, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No.103677220.

declared Hanson “no good to yourself or society” and concluded, “I am going to put you where you can do no harm to yourself or society.”²⁶⁸ He then imposed a life sentence. Hanson’s face went white.²⁶⁹ He dropped his face and muttered, “My God!”²⁷⁰ Afterwards, the judge expressed satisfaction with the sentence as a signal to the “underworld” to “Stay out of Brooklyn.”²⁷¹

Senator Baumes protested the harsh characterization of the law by pointing out some of the misleading reports. In one case where a man was sentenced to life for stealing twenty cents Senator Baumes explained:

That man had broken into a house in the middle of the night. His crime was first degree burglary. He stole only 20 cents because he could not find anything else to steal. As he had been convicted of three serious crimes before trial, he had proved himself a hardened criminal and so was sent up for life.²⁷²

However, that defense somewhat missed the point. The real issue debated around the Baumes Law was whether discretion should be permitted in such cases precisely because reasonable people disagree on the appropriate sentence.

One adverse impact of mandatory sentences under the Baumes Law was an increase in the prison population. The Baumes Law, it was argued, was responsible for overcrowded prisons and thus, indirectly, the riots that erupted in the early 1930s across New York.²⁷³ Even before passage of the Baumes Law, New York prisons were overcrowded, with some prisons putting two or three prisoners in a cell designed for one.²⁷⁴ The situation worsened between 1926 and 1929. The prison population in New York nearly doubled, increasing by 44% between 1923 and 1930.²⁷⁵ By 1931, 200 convicted defendants had been sentenced to life as fourth offenders under the Baumes Law.²⁷⁶ In 1930, Auburn Prison had eighty-three prisoners serving life sentences and 114 serving an indeterminate sentence with a maximum of life.²⁷⁷ Sing Sing Prison had 18 prisoners serving life sentences and twenty others with an indeterminate sentence where the maximum was life.²⁷⁸ In Clinton Prison, 106 out of the 115 prisoners serving life sentences were sentenced to life under the Baumes Law – 92%.²⁷⁹

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Senator Baumes, supra* note 117.

273. Nourse, *supra* note 3, at 931.

274. Kirchwey, *supra* note 171, at 13.

275. *Id.*

276. COLE, *supra* note 64, at 217.

277. *Convicts Passing Lives in Prison*, N.Y. TIMES, Oct. 9, 1932, at 12, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 100480792.

278. *Id.*

279. *Id.*

At the time the Baumes Law was passed, penal managerialism was ascendant, and its most well-known advocate was Lewis E. Lawes, warden of New York's Sing Sing Prison from 1920 until 1941.²⁸⁰ According to penal managerialism, prisoners are neither sinners deserving of harsh punishment nor the objects of reform.²⁸¹ Rather, prisoners are bundles of potentially dangerous passions that need careful management.²⁸² Penal managerialism, as a penal theory, focused on prisoner happiness as a means to the very practical end of ensuring the prison system ran smoothly.²⁸³

The Baumes Law was a potential threat to penal managerialism, which presupposed that: (1) only a small minority of prisoners would serve life sentences, (2) embittered 'lifers' resistant to incentives for good behavior would not accumulate, and (3) nearly every prisoner enjoyed at least the theoretical possibility of early release.²⁸⁴ The Baumes Law meant that these three assumptions were no longer sound, threatening penal managerialism as an effective tool. Worse, the Baumes Law injected a sense of arbitrariness in punishment. For penal managerialists like Warden Lawes, equality of sentencing was critical for a well-ordered prison because otherwise, prisoners were more inclined to act out against the perceived injustice.²⁸⁵ Because of the wide variety of felonies subject to mandatory minimums and the role of prior convictions, some prisoners were serving much longer sentences than other prisoners convicted of the same crime.²⁸⁶ Lawes complained publicly in an interview with the *New York Times* about the perverse incentives created by the Baumes Law.²⁸⁷

Indeed, Lawes appeared to embrace a rehabilitative approach to criminal justice. Towards the end of his career, Lawes wrote an autobiography entitled, *Twenty Thousand Years in Sing Sing*. In the book Lawes views the causes and correctives for crime as particular to each person:

[E]ach prisoner behind the prison walls was a distinct problem. No two men were led to crime by exactly the same urge. So, also, no two criminals could be swayed from crime by exactly the same procedure. At the basis of all corrective influences was the sense of individual responsibility. The prisoner was a continuing social unit and must be impressed by society's continued interest.²⁸⁸

280. Rebecca McLennan, *Punishment's Square Deal: Prisoners and their Keepers in 1920s New York*, 29 J. URBAN HIST. 597, 605 (2003).

281. *See id.* at 608–09.

282. *See id.* at 609.

283. *See id.*

284. *Id.* at 609–10.

285. *Id.* at 610.

286. *Id.*

287. *Id.*

288. Raymond Moley, *Behind the Walls of Sing Sing: What Warden Lawes has Learned of Crime and Criminals*, N.Y. TIMES, May 1, 1932, at BR1, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99655174 (reviewing the autobiography: LEWIS E. LAWES, *TWENTY THOUSAND YEARS IN SING SING* (1932)).

Prisoners at Auburn and Clinton Prisons became increasingly agitated with the criminal justice system. In July 1929, prisoners at Auburn rioted for several days, destroying the prison furniture shop, foundry, dye house, storehouse, and commissary.²⁸⁹ Order was only restored with the help of the National Guard.²⁹⁰ Shortly thereafter, riots also erupted in Clinton Prison and in prisons across the country, particularly in states with habitual offender laws similar to the Baumes Law.²⁹¹ Then five months after the July riot, a small group of prisoners at Auburn serving life sentences (lifers under the Baumes Law) attempted to escape.²⁹² They took the warden hostage and forced him to release the prisoners in punishment cells.²⁹³ Using the radio, the ‘lifers’ exhorted the prisoners to riot.²⁹⁴ Prisoners responded and the riot once again required intervention by the National Guard.²⁹⁵ By the time order was restored, one guard and eight prisoners were dead, and four guards and two prisoners were seriously wounded.²⁹⁶ The Baumes Law was widely seen as bearing the blame for the prison riots.²⁹⁷ Joseph M. Proskauer, Associate Justice of the Supreme Court of New York, explicitly blamed the riots on the “return of medievalism” under the Baumes Law, calling on then Governor Franklin Roosevelt to undertake “fundamental and drastic reform.”²⁹⁸

Interestingly, no riots occurred in Sing Sing Prison, where Lawes served as warden.²⁹⁹ Not only was this the prison where penal managerialism was most fully practiced, but there prisoners were serving mostly short terms.³⁰⁰ Indeed, when the riot in Auburn broke out Lawes took mitigation measures, calling a meeting with prisoners to hear their grievances.³⁰¹ He also made it clear that any similar unrest would result in swift and harsh punishment.³⁰² A small U.S. naval vessel appeared off the island in the Hudson River that housed Sing Sing, and three additional Gatling machine guns were installed on the prison walls.³⁰³

Clemency petitions began to circulate for sympathetic defendants sentenced to life under the Baumes Law. Long Island residents, including a District Attorney,

289. McLennan, *supra* note 280, at 611.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. DARROW, *supra* note 175, at 336 (“Judges meted out the most outrageous sentences. New statutes created new crimes, increased the penalties, and destroyed age-long safeguards for freedom. Boards of parole and pardon ceased to function. The unfortunates in prisons felt that there was no chance for regaining liberty once the prison doors closed upon them. This hopelessness kindled prison revolts . . .”).

298. McLennan, *supra* note 280, at 613.

299. *Id.* at 611.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

petitioned Governor Roosevelt to reduce the life sentence of a forty-six-year-old mother of three.³⁰⁴ She was sentenced in 1930 for stealing jewelry from the guests at the hotel where she worked as a chambermaid.³⁰⁵ Other sympathetic cases emerged, in a country that was perhaps more inclined towards sympathy with the coming of the Great Depression. In April 1932, Frank Kavanagh hung himself in Auburn Prison.³⁰⁶ He was serving a life sentence, having been one of the first sentenced under the Baumes Law in 1927.³⁰⁷

The Baumes Law was gradually rolled back. In April 1931, a law was passed reinstating compensatory time for good behavior retroactive to July 1, 1926 when the first defendants were sentenced under the Baumes Law.³⁰⁸ This law was designed to make many eligible for parole before they served their mandatory sentences. That same year, acting upon a recommendation of the Sam A. Lewisohn Commission, New York Senator Slater introduced a bill that would have retroactively reduced life sentences under the Baumes Law to fifteen years.³⁰⁹ This softening of the Baumes Law was resisted by some in part because at the time the country was shocked by the kidnapping of Charles Lindbergh's baby only a month before. Senator Love opposed the bill; "[w]ith the front pages of the newspapers covered with the accounts of the kidnapping of the Lindbergh baby, the most atrocious crime in recent history, this is no time to show leniency to criminals."³¹⁰

In 1932, the Commission to Investigate Prison Administration and Construction recommended that the New York Legislature soften the Baumes Law, by reintroducing indeterminate sentencing for fourth felony convictions except for first and second-degree murder or treason.³¹¹ By then the debate over the Baumes Law shifted in favor of opponents seeking to soften its severity.³¹² A law to amend the Baumes Law went before the Legislature in early 1931, but the two chambers could not agree. In early 1932, in one of his last acts as Governor, Roosevelt signed into law a bill that made fourth offenders serving life sentences eligible for parole

304. *Seek to Cut Life Term for Mother of Three*, N.Y. TIMES, Nov. 14, 1931, at 2, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99248954.

305. *Id.*

306. *Hangs Himself in Auburn*, N.Y. TIMES, Apr. 21, 1932, at 10, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99739644.

307. *Id.*

308. *Prison Term Bill Signed*, N.Y. TIMES, Apr. 11, 1931, at 10, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99132559.

309. *Assembly Buries City School Bill*, N.Y. TIMES, Mar. 31, 1931, at 21, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99362322.

310. *Votes for Easing 4th Offender Law*, N.Y. TIMES, Mar. 5, 1932, at 2, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99757168.

311. COMMISSION TO INVESTIGATE PRISON ADMINISTRATION AND CONSTRUCTION, PROGRESS REPORT AND PROPOSALS FOR CHANGES IN THE PENAL AND CORRECTIONS LAWS, PRESENTED TO THE LEGISLATURE OF THE STATE OF NEW YORK 38 (Feb. 15, 1932).

312. *Changing the Baumes Law*, N.Y. TIMES, Mar. 2, 1932, at 18, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99713709.

after fifteen years in prison, provided they were sentenced after April 4, 1932.³¹³ After the signing Governor Roosevelt explained his reasoning:

[O]nly 213 individuals have been convicted [and received life sentences under the Baumes Law] and that there are numerous instances in which juries have failed to convict and the courts have accepted pleas of misdemeanors in lieu of felonies because it was felt that the mandatory life sentence was too severe for the immediate criminal act in question.³¹⁴

Roosevelt argued that by aligning the law more in keeping with others' normative universes, to use the Coverian concept, more convictions would result.³¹⁵ Shortly thereafter, Governor Roosevelt commuted the sentence of thirteen men and one woman sentenced under the Baumes Law, stating the reason for the commutation was "misapplication" of the law.³¹⁶ Then in 1936, Section 1943 was amended to require indeterminate sentences of fifteen years to life for fourth felony convictions.³¹⁷ A few years later in 1941, Governor Herbert Lehman signed the Peterson bill into law, which made eligible for parole all those still serving mandatory life sentences under the Baumes Law.³¹⁸ He was responding to a memorandum submitted by the Corrections Commissioner.³¹⁹ That memorandum summarized the thinking of a new era in criminal justice:

This department believes that holding of prisoners in cases other than first-degree murder for natural life sentences with no prospect of commutation or parole does not conform to recent trends to impose indeterminate sentences in all case other than first degree murder.³²⁰

The era of the Baumes Law was over.

CONCLUSION: OF HAEMONS AND KREONS

In Sophocles' play *Antigone*, Kreon, the King of Thebes, insists upon absolute obedience to state law despite popular attitudes that the law is unjust, while his son Haemon attempts to convince Kreon that state law should respond to popular sentiment.³²¹ In a reversal of the paternal role, the sagacious Haemon admonishes

313. See *id.*; see also *Baumes Law Terms Upheld by Lehman*, N.Y. TIMES, May 4, 1933, at 8, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 100709542.

314. *Signs Bill Easing Baumes Life Law*, N.Y. TIMES, Apr. 6, 1932, at 4, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99728993.

315. *Id.*

316. *14 State Prisoners Freed by Governor*, N.Y. TIMES, May 1, 1932, at 26, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 99694618.

317. William M. McKinney, *McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED*, Book 39, Penal Law, at 223-24 (West. Pub. Co. 1939).

318. *Governor Accepts Parole Law Easing*, N.Y. TIMES, Apr. 22, 1941, at 22, PROQUEST HISTORICAL NEWSPAPERS: N.Y. TIMES Doc. No. 105498167.

319. *Id.*

320. *Id.*

321. SOPHOCLES, *ANTIGONE* 50 (Richard Emil Braun trans., Oxford Univ. Press, 1973).

Kreon, “You could rule a desert right, if you were alone there.”³²² Haemon’s point is deceptively simple. If no one obeys a law then the law is divorced from its purpose and exists in a moral and existential vacuum. Without the essential connection to the polity that responsiveness fosters, the law may have the potential to govern but will govern no one.

As seen in the story of New York’s Baumes Law, the powers of juries, judges, and prosecutors to nullify the law were critical points of discretion. This discretion interspersed into the various functions of juries, judges, and prosecutors ensures that competing normative universes and their formal and informal sources of law have a place in our criminal justice system. In this way, law is responsive to “citizens’ own lives and [] conform[s] with the citizens’ expectations and understanding of the law.”³²³ Reasonable people may disagree as to the merits of such a system, but it ensures that Haemons have a role and that criminal justice is not dominated by Kreons. Contemporary lawmakers should perhaps peruse the history of the Baumes Law, lest they find themselves with sand for citizens.

322. *Id.*

323. Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 583 (2014).