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## RETHINKING CRIME LEGISLATION: HISTORY AND HARSHNESS

V. F. Nourse\*

There is a truth about the criminal law that scholars evade as much as they criticize: the criminal law is produced by legislators (rather than the experts). Personally, I do not know of any way to make law in a democracy other than through the voters' representatives. And, yet, it is the standard pose of the criminal law scholar to denigrate legislatures and politicians as vindictive, hysterical, or stupid.<sup>1</sup> All of these things may be true but name-calling is a poor substitute for analysis. As in constitutional law,<sup>2</sup> so too in criminal law, it is time to put contempt aside and begin the process of understanding the history and the institutional dynamics of our nation's crime legislation.

This is not a claim that the process is wise or rational; in fact, my present hunch is that the legislative process is subject to regular, cycling malfunction. My point is that we need to consider deeper questions—we need to ask whether legislative malfunctions are built into the political system. In other words, we need to turn to history, and specifically the history of crime legislation in the United States, to get a sense of its patterns over time. Here, I offer preliminary support for the claim that wars on crime—at least as political and legislative phenomena—are not new, nor post-World War II, phenomena as they are conventionally viewed.<sup>3</sup> At a minimum, this evidence should prompt us to ask

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1. For an example of such a critique, see e.g. William J. Chambliss, *Power, Politics, and Crime* ch. 1 (Westview Press 1999). For the widespread existence of such a critique, see Lawrence M. Friedman, *Some Remarks on Crime, Violence, History and Culture*, 69 U. Colo. L. Rev. 1121, 1134 (1998) ("Many people think our current policies are rather hysterical reactions."). The standard complaints by legal scholars about politics and the criminal law are hardly new, see, for example, Roscoe Pound, *Criminal Justice in America* 65-69 (Henry Holt & Co. 1930); indeed, they can be found in the ancient stalwart, Blackstone, who openly complained about the harshness of the bloody codification. William Blackstone, *Commentaries on the Laws of England* vol. IV, \*\*2-4 (U. Chi. Press 1979).

2. Richard Parker has provided a devastating portrait of this contempt in constitutional law scholarship; much of the same argument could, and should, apply to criminal law scholarship. See Richard D. Parker, *"Here the People Rule": A Constitutional Populist Manifesto* (Harv. U. Press 1994). Although I make no claim to classify myself as a populist (something emerging as a "swear word" these days in criminological circles), I do believe that contemporary criminal law scholarship too often veers toward elitist self-congratulation. See e.g. Don Herzog, *Poisoning the Minds of the Lower Orders* (Princeton U. Press 1998) (recognizing contempt as a form of hierarchical domination).

3. See e.g. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Crim. L. & Criminology 829, 831 (2001) ("For some thirty years, American criminal law has waged a war on crime.").

whether the crime problem in America is at least in part a reflection of the *structure* of American “crime politics.”<sup>4</sup>

How a nation deals out punishment reveals the character of its political and social life—and this is true whether the laws are efficacious or not, whether they respond to real problems or not. As Douglas Hay, the great historian, once wrote, even when “bloody” codes are evaded or remain unenforced, crime legislation supports the authority of an existing social and political order, the order that continues to control the political process and recapitulate itself through that process.<sup>5</sup> In its recent *Lawrence v. Texas*<sup>6</sup> decision, the Supreme Court came as close to recognizing this as the Supreme Court has ever come. Justice Kennedy noted that when the state backs its sanctions with violence, the powerful legitimatizing force of that opinion is likely to repeat itself within the social order,<sup>7</sup> justifying discrimination in private as well as public life. If this is right, then the criminal law works overtime: its meaning in our life cannot be reduced to a matter of arrests or sentences, it is reinforced even when there are few arrests and little violence, when bloody codes last long after the wars that inspired them.

Analysis of the politics of crime legislation should have a far greater punch in criminal law scholarship if for no other reason than that criminal law’s politics and legislation had such a *real-life* punch in the twentieth century. Wars on crime and their excesses appear to have left their legislative traces throughout the twentieth century. For example, crime legislation of the 1920s and 1930s has a remarkable set of analogues in the 1980s and 1990s,<sup>8</sup> and that includes everything from three-strikes laws, mandatory minimum sentences, attacks on disparities in judicial sentencing, efforts to repeal the insanity defense, habitual sex offender laws, and the expansion of vagrancy laws to cover gangs—to name only some of the historical legislative efforts that have obvious modern legislative analogues.<sup>9</sup>

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4. To be sure, there are a bevy of scholars who see that the problem is related to politics, but very few have engaged in sustained attention to the dynamics and incentives of legislation or political institutions. One admirable, but too lonely, effort to address institutional incentives is Bill Stuntz’s pathological politics piece. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001). The standard critique of politics that often emerges from criminal law and criminological work is really a critical aesthetics (i.e., efforts to describe the state in global terms as penal-welfare, or penal-industrial, or neo-conservative etc.). I confess that I do not share the idea of politics on which such claims rest—that politics is best understood as a description of party platforms or a preferred set of end-state policies or outcomes, rather than a set of institutional structures and relations that intensify or inhibit particular substantive policies or cultural tendencies. See V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 Stan. L. Rev. 835 (2004).

5. Douglas Hay, *Property, Authority and the Criminal Law*, in Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson & Cal Winslow, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* 17 (Pantheon Bks. 1975).

6. 539 U.S. 558, 123 S. Ct. 2472 (2003).

7. 123 S. Ct. at 2482 (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

8. This claim certainly should not be read as one that these periods of history are alike; they are extraordinarily different. Indeed, it is their extraordinary difference that may account for why we have forgotten their legislative similarities. On the difficulties of the Depression in context, see *infra* notes 46-56 and accompanying text.

9. For a list of habitual offender laws operative during this period, see *infra* app. A. For mandatory minimum sentences, see e.g. 1929 Cal. Stat. ch. 872, § 1; *Baumes Act Upheld by Higher*

Perhaps, as Jim Whitman has recently suggested, there is something rather persistent about the “harshness” of American criminal law,<sup>10</sup> something built into our political institutions or culture that accounts for this phenomenon, something that has very little to do with the conventional explanation that this is all about party politics, a new populism, neo-conservatism, or modernity.<sup>11</sup>

What, you ask, has this to do with George Fletcher? Whether or not he approves (and I have no idea whether he does), Fletcher is an inspiration in two senses. *Rethinking Criminal Law*<sup>12</sup> (“*Rethinking*”) refused to accept the scholarly conventions of the day. Fletcher traded in the narrow and hegemonic focus of the Model Penal Code for a rich comparative and historical project. However much I have disagreed with Professor Fletcher—and I have—it is not debatable that he is a scholar of great breadth, versed not only in the criminal law, but the law of the world and the history of the Constitution. This erudition and breadth has enriched his and our understanding of the criminal law. Indeed, it is precisely because Fletcher rejected the narrow confines of a discipline—that only seems to be getting narrower—that he began *Rethinking* with an injunction that remains

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*Court: Supreme Court Says Life Sentence is Mandatory for a Fourth Offense*, 76 N.Y. Times 3 (Dec. 2, 1926); *Want Crime Laws Made More Drastic: General Sessions Judges Urge Mandatory Life Term for Second Degree Murder*, 76 N.Y. Times 11 (Oct. 15, 1926). For cycling claims about sentencing, see Jay S. Albanese, *Concern About Variation in Criminal Sentences: A Cyclical History of Reform*, 75 J. Crim. L. & Criminology 260 (1984). For a proposal for sentencing commissions to replace judicial sentencing, see C. G. Poore, *Revolutionary Plan for Handling Criminals: Governor Smith's Proposal to Leave the Sentencing of Convicted Felons to a State Board Is Endorsed by Prison Authorities as a Needed Reform*, 77 N.Y. Times 7 (Dec. 18, 1927). For a legislative attack on the insanity defense, see *Sinclair v. State*, 132 S. 581 (Miss. 1931). For the attempted expansion of vagrancy ordinances in the 1930s to cover “gangs” of racketeers, then called “public enemy” laws, see John J. Sullivan, *The Public Enemy Act of New York*, 5 Brook. L. Rev. 62 (1935-36); the recent analogue is the kind of statute debated in *City of Chicago v. Morales*, 527 U.S. 41 (1999). For sexual psychopath laws, both pre-WWII and more modern, see Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 Nw. U. L. Rev. 1317 (1998) (relying in part on Estelle B. Freedman, “*Uncontrolled Desires*”: *The Response to the Sexual Psychopath, 1920-1960*, 74 J. Am. Hist. 83 (1987)).

There are also parallels in social movements, such as the censorship campaigns of the early 1930s, which were based, as were similar campaigns in the 1980s, on claims that “culture” was to blame for crime. As in most things historical, there are also contrary influences. There were movements in state governments, for example, to make parole and probation real rather than illusory (because of lack of funds or personnel); there was also a strong movement to have psychiatric clinics used by judges and a significant elite movement against the death penalty. Perhaps upon further investigation, I shall find greater disparity. At present, however, I find the legislative analogues rather remarkable, even if they tell an incomplete story.

10. James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford U. Press 2003).

11. David Garland's fine book, *The Culture of Control: Crime and Social Order in Contemporary Society* (U. Chi. Press 2001), emphasizes the role of modernity and populism in creating a culture of “control.” Malcolm Feeley, in his review of Garland, focuses on the neo-conservative strain of modern politics. Malcolm M. Feeley, *Crime, Social Order and the Rise of Neo-Conservative Politics*, 7 Theoretical Criminology 111-30 (2003). In part, I think this is explained by the focus of these inquiries, which is typically on the gap between politics and “expert” opinion, rather than legislation or the legislative process itself. It certainly is true that, from a criminal justice “professional's” point of view, the political world appears to have radically changed starting in 1970. The question remains whether this focus—on the experts view—is the right one; and, more importantly, whether 1970 should be considered the proper baseline for historical comparison.

12. George Fletcher, *Rethinking Criminal Law* (Little, Brown & Co. 1978).

unheeded by the academy: the criminal law is not only a matter of statistics or doctrine, but it also raises important questions of political theory.<sup>13</sup>

Political theory should not, however, be a work of the abstract. Theory must explain practice. Elsewhere, I have begun the project of “rethinking” criminal law as it reflects the history of political theory.<sup>14</sup> Here I offer a brief and preliminary take on another facet of this problem—the history of crime legislation. Because of the ongoing nature of my project, all that I say here is truly provisional and awaits a much lengthier defense. But in anticipation of that project, I offer the preliminary results of a study of American crime politics in the twentieth century, focused on one of the more prominent symbols of antipathy toward “wars on crime,” the “three-strikes” law. Three-strikes laws may be bad memories but they are *memories*.<sup>15</sup> I recount this history as description, not prescription. Instead, I suggest that were we to take seriously the possibility of such patterns, we might turn our attention to different kinds of solutions to standard criminal law debates.

#### CRIME POLITICS IN THE TWENTIETH CENTURY

Scholars and popular pundits alike have perpetuated what may be a myth of crime politics in the twentieth century: that it begins with Reagan or Bush or perhaps Nixon and amounts to a fairly recent conspiracy.<sup>16</sup> Many are aware of the Federal government’s involvement in prohibition, but few remember that the great liberal President, Franklin Roosevelt, waged a “war” on crime<sup>17</sup> (borrowing the war metaphor,<sup>18</sup> like much else, from Herbert Hoover).<sup>19</sup> Almost every

13. *Id.* at xix (“Criminal law is a species of political and moral philosophy. Its central question is justifying the use of the state’s coercive power against free and autonomous persons.”). Fletcher’s own work has, of course, focused mostly, but not exclusively, on the moral philosophy part of this equation.

14. See e.g. V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. Pa. L. Rev. 1691 (2003).

15. The conventional wisdom among scholars is that three-strikes laws are a fairly recent political phenomenon. See e.g. Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You’re Out in California* 4 (Oxford U. Press 2001) (stating that three-time loser laws existed prior to the late twentieth century but were not “an important issue in the modern politics of law and order until the 1990s.”). I confess that I, too, subscribed to the conventional wisdom until I was forced to confront this history for purposes of another project. My critique should be understood, then, with a sense of humility and in the spirit of intellectual discovery.

16. See e.g. Chambliss, *supra* n. 1, at 24 (suggesting that “tough on crime” began in the late 1960s and early 1970s), 27 (“Crime has been raised to the level of a national crisis by a coalition of interests . . . including (1) conservative politicians concerned primarily with repressing civil rights activism and political dissent.”).

17. It was Roosevelt whose men, at least, were to regularly invoke the metaphor. See e.g. *infra* n. 19. The historical literature on this war is sparse. See Kenneth O’Reilly, *A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security*, 69 J. Am. Hist. 638 (1982) (O’Reilly notes that standard treatments of the New Deal generally limit their treatment of the “crime war” to a few paragraphs). Claire Bond Potter’s work tends to focus, as does O’Reilly, on J. Edgar Hoover’s shenanigans, rather than on the history of crime politics and legislation of the period. See Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (Rutgers U. Press 1998).

18. As in many things, Roosevelt inherited the battleground metaphor from his more maligned predecessor, Herbert Hoover. By 1930, Hoover was insisting on a war against “gangsters,” but his “war” was largely rhetorical since he insisted that there was no federal power to intervene. See *President Demands War on Gangsters; Puts Duty on States: Calls for ‘Awakening to Failure of Some Local Governments to Protect Their Citizens,’* 80 N.Y. Times 1 (Nov. 26, 1930). The war metaphor appears to have percolated up into federal politics from the states. See e.g. A “Private War” on Crime: *Chicago’s Battalions at Work*, 80 N.Y. Times XX3 (Sept. 20, 1931); W.A. Warn, *Gov. Roosevelt Asks*

president since has waged war on crime, whether a small one (as Eisenhower's battle against juvenile delinquency) or a fierce one (like Kennedy's battle against organized crime), one primarily focused on predators (as Reagan's), or one disastrously focused on political enemies (as Nixon's). Clinton had a war and so did Bush the elder. Indeed, there seems hardly a period in the twentieth century—other than during an actual war—that the United States was not warring against crime.<sup>20</sup>

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*Firmer Laws to Aid Police War on Crime: Message Calls on Legislatures to Act Promptly on Gangdom's Challenge to Society*, 80 N.Y. Times 1 (Sept. 2, 1931) (the reference is to Franklin Roosevelt as Governor of New York at the time); *Public Aid Asked in War on Crime: National Commission's Committee Meets at Home of Franklin D. Roosevelt*, 75 N.Y. Times 23 (Nov. 20, 1925). At the turn of the century, it was far more common for newspapers to speak of "crime waves" than wars on crime, and this may well reflect intervening events, i.e., the First World War, which created a consciousness of the way in which the public could be motivated during war. Indeed, the war metaphor was widely used by Roosevelt's brain trust as a way to galvanize public opinion.

19. Joseph M. Proskauer, *How Shall We Deal with Crime*, 159 Harper's Mthly. Mag. 419, 419 (Sept. 1929) ("The President of the United States recently voiced the general belief that in our country's 'life and property are relatively more unsafe than in any other civilized country in the world,' and an equally general demand that a cure be found for this condition."); *Roosevelt Asks Narcotic War Aid: States Are Urged to Adopt Uniform Laws, Modeled on Harrison Act*, 84 N.Y. Times 7 (Mar. 22, 1935); *A New Day in America for Justice and for the Law*, Daily Oklahoman 8 (July 30, 1934) ("When the history of the Roosevelt administration has been written, not the least significant, in fact, one of the greatest of its achievements will have been the tremendous headway made against major crime by Attorney General Cummings and his department of justice."); R. S. Thornburgh, *The War on Crime: The Justice Department Has Extended Its Activities*, 83 N.Y. Times XX6 (Mar. 4, 1934); *Senate Body Strengthens Crime Laws, Enforcement: Senator Copeland Tells President of New Proposals*, Wash. Post 1 (Dec. 17, 1933); Joseph B. Keenan, *Uncle Sam Presses His New War on Crime: Joseph B. Keenan, Who Heads the Government's Nation-Wide Drive against Racketeers and Kidnappers Tells of the Federal Aims, the Need for New Laws, and the Forming of a Sound Plan for Widening the Campaign to Relieve Gang-Ridden Communities*, 82 N.Y. Times 1 (Aug. 20, 1933). None of this should be misconstrued as an attempt to paint Roosevelt as unsympathetic to more liberal positions on penal reform. See e.g. Franklin D. Roosevelt, *Address on Prison and Parole Problems* (N.Y.C., Jan. 18, 1930), in *The Public Papers and Addresses of Franklin D. Roosevelt* vol. 1, 376, 377 (Random House 1938) ("We at last understand that not philanthropy but mere common sense, and our own self-protection require that these men [prisoners] should be released, chastened and reformed if possible, but at least not rendered more vicious, more degraded, than when they were sentenced.").

20. To say that the rhetoric is the same is not to say that the policy is; nor am I making that claim. Not all wars on crime are alike: some hit wide sections of the criminal code; others are quite narrowly focused on enforcement. Some Presidents seem to relish war, and others accept it as a necessary evil. And yet the persistence of the rhetoric suggests that any explanation of legislative harshness must reach across party lines. On Clinton's war, see Chambliss, *supra* n. 1; on the George H.W. Bush war, see Andrew Rosenthal, *Taking Message on Road, Bush Pushes Crime Bill*, 139 N.Y. Times A20 (Jan. 24, 1990); on Reagan's war, see Stuart Taylor Jr., *New Attack on Crime: Reagan's Proposals Viewed as More Likely to Appease Citizens Than Reduce Offenses*, 131 N.Y. Times A28 (Sept. 30, 1981); Lee Lescaze, *Reagan Blames Crime on 'Human Predator'*, Wash. Post A2 (Sept. 29, 1981); on Carter's war, see Wayne King, *Bell to Step Up War on Crime in Sunbelt: Attorney General Plans to Reopen Federal Office in New Orleans to Curb Syndicate in South*, 127 N.Y. Times 9 (Oct. 15, 1977); on Ford's war, see James M. Naughton, *President in Miami Pledges a 'Crusade' On Crime in Nation*, 125 N.Y. Times 81 (Sept. 28, 1976); John M. Crewdson, *President Urges Stiff New Laws on Violent Crime*, 124 N.Y. Times 1 (June 20, 1975); on Nixon's war, see R. W. Apple Jr., *Mitchell Says Congress Foils Nixon's Crime War*, 119 N.Y. Times 1 (Dec. 14, 1969); on Johnson's war, see John P. MacKenzie, *President Outlines Proposals to Fight Nationwide Crime*, Wash. Post A6 (Mar. 10, 1966); *Transcript of Johnson's Statement on Signing Crime and Safety Bill*, 117 N.Y. Times 23 (June 20, 1968); on Kennedy's war, see Robert Kennedy Says U.S. Drive on Crime Is Curbing Hoodlums, 111 N.Y. Times 19 (Jan. 2, 1962); Alvin Shuster, *Kennedy Offers Plan to Combat Juvenile Crimes*, 110 N.Y. Times 1 (May 12, 1961); *Kennedy Asks More for Drive on Crime*, 110 N.Y. Times 24 (Mar. 7, 1961); on Eisenhower's war, see *\$3,000,000 Sought in War on Crime: President Acts to Aid States Curb Delinquency—Budget Also Helps the Aged*, 104 N.Y. Times 22 (Jan. 18, 1955).

One might dismiss this as mere symbolism or rhetorical excess if it weren't a reflection of some legislative realities. To see this, let us look closely at the history of legislation often used to symbolize modern "tough-on-crime" politics—three strikes laws.<sup>21</sup> It turns out that long before the Reagan-Bush era, there were political movements advocating three-strikes laws.<sup>22</sup> Indeed, it is fair to say that three-strikes laws—then called habitual offender laws—swept the nation in the period from the mid-1920s until the mid-1930s. These laws were so popular that manuals on them were created for debating societies.<sup>23</sup> One of the reasons that these laws have gone unnoticed is because they went by a particular name, after their "inventor," a New York legislator named Caleb Baumes.<sup>24</sup> To be sure, not all legislatures adopted Baumes's mandatory-life solution, and some laws were harsher than others, but this is a difference in degree, not kind. The conclusion remains the same: contrary to widespread scholarly assumption, 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.<sup>25</sup>

The politics of this first twentieth-century generation of three-strikes laws was similar to that of later incarnations. Consider an account taken from the 1927 report of the New York State Crime Commission, which in standard self-congratulatory tone described these laws as novel and extraordinarily effective. The laws were dubbed a "legislative thunderbolt."<sup>26</sup> They had been so effective, recounted one criminologist, that murders resulting from robberies were down by over half and many criminals had simply "left . . . for other states."<sup>27</sup> Given claims that these laws resulted in the immediate reduction of crime,<sup>28</sup> it was not surprising that other states soon followed suit, either amending existing laws or enacting new ones to provide for life imprisonment upon a third or fourth felony.<sup>29</sup>

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21. My present study is limited to the twentieth century, although life imprisonment for repeaters is much older. See e.g. 1822 Mass. Gen. Laws ch. 176, § 5 (where a person is again convicted of a crime punishable by hard labor, in addition to the penalty for the crime, he shall have 30 days solitary confinement and seven years added to penalty; for the third offense, he shall have the same term of solitary confinement, and shall be imprisoned for life). Moreover, that second felony increases were prevalent at the beginning of the century is testified to by a series of cases in which the constitutionality of such laws was tested before the First World War. See e.g. *Graham v. West Virginia*, 224 U.S. 616 (1912); *State v. Findling*, 144 N.W. 142 (Minn. 1913); *State v. Le Pitre*, 103 P. 27 (Wash. 1909).

22. Note that this is a descriptive claim, not a prescriptive one; I am not advocating these laws.

23. *The Baumes Laws* 89 (Ref. Shelf Vol. 6, Series No. 3, Julia E. Johnsen compiler, H.W. Wilson Co. 1929) (presenting "both sides" of the debates of contemporary controversy).

24. 1926 N.Y. Sess. Laws ch. 457, § 2, 805.

25. *Infra* app. A (a list of sentencing laws for habitual offenders). A federal habitual offender law was also enacted in 1929: the Jones-Stalker Act. 27 U.S.C. § 91 (repealed 1935); see *The Jones-Stalker Act*, 15 Iowa L. Rev. 120 (1930).

26. Clayton Ettinger, *The Problem of Crime* 303 (Ray Long & Richard R. Smith, Inc. 1932).

27. *Id.* Should the reference to leaving for other states seem odd, it is important to remember that, in that day and age, governors still issued "banishment paroles." Such a practice testifies to the ways in which life and crime were once perceived as far more local than they are today.

28. *The Baumes Laws*, *supra* n. 23, at 114; Ettinger, *supra* n. 26, at 303.

29. See *State v. Close*, 287 P. 599 (Kan. 1930):

Our Legislature evidently had the above act [the Baumes law] before it. While it saw fit to change the language and to enact a more severe law by providing life imprisonment for a

These laws created their share of controversy, inciting disagreement not only among lawyers and judges, but in the public as well.<sup>30</sup> Just as we see with mandatory sentencing guidelines today, judges who were forced to apply the Baumes laws were sometimes resistant. Also as we see today, unjust applications of these laws yielded public uproar and demands, in some cases, to limit the law's applications, as in cases where grandmothers could find themselves sentenced to jail for life for fairly trivial offenses.<sup>31</sup> As they do today, commentators rightly asked why legislatures were passing such laws given the existence of already harsh penalties.<sup>32</sup> So, too, the experts doubted whether there was a real increase in crime.<sup>33</sup> And it was only upon crisis—serious overcrowding and riots in New York prisons—that the Baumes laws themselves were softened to a mandatory minimum penalty.<sup>34</sup>

Also not surprising was the way legislative sponsors turned the expertise of the day in their favor, selectively applying criminology to support their political claims. Representative Baumes, for example, explained that his laws were simply “carrying into effect what criminologists, social workers, [and others] . . . have been urging for some years, namely, that our laws and our punishments should be

third conviction of felony, instead of a fourth conviction, as the New York law does, yet it had in mind the same purpose and object as the New York Legislature, namely to provide additional penalties for the commission of felonies subsequent to the first one, and thereby strive to deter the criminally inclined from committing repeated felonies.

*Id.* at 602. See also T.V., Student Author, *Habitual-Criminal Statutes and the Proposed Pennsylvania Act*, 77 Pa. L. Rev. 798, 801 (1928-1929) (noting that the proposed Pennsylvania version was discretionary but was “based on certain sections of the New York Penal Law, popularly known as the ‘Baumes Law,’ which has been the model for a number of habitual-criminal statutes that have been adopted very recently in some of the states.” (emphasis omitted)).

30. See e.g. P.M., Student Author, *Attempts to Combat the Habitual Criminal*, 80 U. Pa. L. Rev. 565, 566 (1931-1932) (“When first put into effect in New York, there was considerable opposition to the law on the part of the lower courts.”); *Minimum Jail Term Opposed by Judges: Plan to Fix One-Year Sentence for First Offenders Called “Absurd and Illogical,”* 81 N.Y. Times 8 (Jan. 16, 1932); *First-Offender Law Declared ‘Inhuman’: Lewisohn Commission Reports That Severity of Indeterminate Terms Defeats Purpose*, 81 N.Y. Times 5 (Feb. 15, 1932). The law review commentary was also generally negative. See e.g. J.A. Royce McCuaig, *Modern Tendencies in Habitual Criminal Legislation*, 15 Cornell L.Q. 62 (1930).

31. See e.g. *Woman, 85, Escapes Life Term as Thief: State Permits Mrs. La Touche to Plead Guilty to Minor Charge Because of Her Age*, 80 N.Y. Times 17 (Sept. 1, 1931).

32. As one commentator asked, if increased punishment for second crimes has been “in constant application” since the early nineteenth century, “[i]t would seem strange . . . if the application of so old a principle were going to solve the present problem when it had not already done so.” See P.M., *supra* n. 30, at 566.

33. See e.g. *Experts Discover No ‘Wave’ of Crime: Hoover Research Group Finds No Gain Since 1925 in Minor and Many Major Categories*, 82 N.Y. Times 17 (Feb. 27, 1933). Such expert skepticism had been raised for some time. See e.g. *The ‘Crime Wave’ and Public Hysteria*, L. Notes 205 (Feb. 1922). It is worth noting at this point that the political science literature would predict that social science expertise would be used opportunistically—that politicians pick and choose their experts to fit their positions and that, in any event, those opinions will be molded to the felt political demands of the times. In such a world “real” crime rates different from those used by crime “warriors” will only have meaning if there is a real and meaningful political opposition to take them up.

34. Governor Roosevelt can be credited with this movement, although the result was that life imprisonment was made discretionary and a minimum mandatory penalty appears to have been added. See *Two Views of Parole*, 82 N.Y. Times 22 (Apr. 7, 1932); W.A. Warn, *Gov. Roosevelt Asks Firmer Laws to Aid Police War on Crime*, 81 N.Y. Times 1 (Sept. 2, 1931).

made to suit the criminal, not the crime.”<sup>35</sup> Baumes insisted that the law was compassionate:<sup>36</sup>

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.<sup>37</sup>

Contrast this political and legislative story with the story that is typically told by academics about the criminal law of the 1920s and 1930s. Most academics remember it as the era when Sheldon Glueck won out over Joseph Beale, an era of realism and the injection of social science into the legal curriculum, when criminal law professors were happily recruited from the ranks of criminologists and psychiatrists.<sup>38</sup> This was the era in which Dean Pound excoriated the academy for failing to study and reform the criminal law and in particular criminal procedure.<sup>39</sup> This was the era of the great “studies” and “crime commissions.” Most criminal law scholars have heard of the Wickersham Commission and its fourteen volumes.<sup>40</sup> Few will recall that even before Wickersham there were volumes issued in the states and President Coolidge’s National Crime Commission.<sup>41</sup> The recommendations of these commissions were all quite forward-looking, often focusing on streamlining criminal procedure, opposing the

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35. *The Baumes Laws*, *supra* n. 23, at 89.

36. *Id.* at 99 (“The theory of the Fourth Offender Act is not punishment at all, but it is protection to the public.”).

37. *Id.* at 104 (quoting Caleb B. Baumes, Chairman of the New York State Crime Commission in the 1920s). Baumes was correct in stating that during this period some criminologists, following insistently the theory that the focus should be on the criminal rather than the crime, advocated preventive detention.

38. Professor Beale, author of one of the leading criminal law casebooks of the day, was the butt of many of the realists’ charges. They called it Bealism. In 1930, Sheldon Glueck was one of the most famous criminal law professors in the country; his social scientific studies of large samples of offenders seemed, at the time, to open the way for finding the key to rehabilitation. See Sheldon Glueck & Eleanor T. Glueck, *One Thousand Juvenile Delinquents: Their Treatment by Court and Clinic* (Harv. U. Press 1939).

39. Pound, *supra* n. 1, at 210-11 (1930) (“Unfortunately the backwardness of juristic science with respect to criminal justice is of long standing. . . . Nowhere is the need of the highest type of juristic writing so acute as in the criminal law. Nowhere does there seem so little prospect of it.”).

40. Natl. Commn. L. Observance & Enforcement, *Report on Criminal Procedure* (Series No. 8, U.S. Govt. Printing Off. 1931); Natl. Commn. L. Observance & Enforcement, *Report on Crime and the Foreign Born* (Series No. 10, U.S. Govt. Printing Off. 1931); Natl. Commn. L. Observance & Enforcement, *Report on Lawlessness in Law Enforcement* (Series No. 11, U.S. Govt. Printing Off. 1931).

41. The crime commission movement in the states predated Wickersham by some years. See Esther Conner, *Crime Commission and Criminal Procedure in the United States since 1920: A Bibliography*, 21 *Am. Inst. Crim. L. & Criminology* 129 (1930-31). The New York Commission yielding the Baumes law was seen as a model by some. See e.g. *Wants All States to Seek Crime Data: Richard W. Child Cites New York Commission’s Work to Show Its Aid to Legislation*, 76 *N.Y. Times* 40 (Mar. 14, 1927). The various state and local studies are listed in Conner; the prior Cleveland study is probably the best known to legal scholars because it was edited by Roscoe Pound and Felix Frankfurter. Cleveland Foundation, *Criminal Justice in Cleveland: Reports of the Administration of Criminal Justice in Cleveland, Ohio* (Roscoe Pound & Felix Frankfurter eds., Patterson Smith 1922).

“third-degree,” and impaling crass public assumptions such as the idea, then quite prevalent, that the “foreign-born” were responsible for crime.<sup>42</sup>

To remember this story is to focus on intellectual history (indeed, the intellectual history that tends to include academics). For the people of the 1920s and 1930s, crime was a part of real life,<sup>43</sup> as real as machine gun shootings, motorcars, and children being gunned down in the streets. This fear was in part a panic—fear of crime always is. But in this, there is less that is different about crime and crime legislation than is conventionally thought. Laws are frequently passed because of panic or even sheer anecdote—because of a flood or a hurricane, because of the impending close of government, or because of a terrorist bombing. This exaggerates, but only a bit, particularly if one remembers how extraordinarily difficult it is to pass any piece of legislation, how easy it is to block legislation (a single vote may be enough), and how fear is a powerful galvanizing factor in many political matters—including matters of civil rights, global warming, cold wars, and even the United Nations.<sup>44</sup>

In the early 1930s, there were some reasons to panic, and they were more than the public celebrities we remember or the film noir they inspired. At the height of the Depression scare, two-and-a-half-year-old Dorette Zeitlow was “snatched” by a thirteen year old and left to die in an icehouse outside Chicago. Ten thousand mobbed her funeral.<sup>45</sup> In April 1934, five thousand men searched the Arizona desert for the body of six-year-old June Robles, who had been kidnapped and buried alive in a box (she survived).<sup>46</sup> In May, in Toledo, the National Guard battled six thousand striking workers, and in Oklahoma City, twelve hundred men and women stormed the relief offices.<sup>47</sup> Six months earlier, in San Jose, California, a mob lynched two white kidnapers, and the Governor pardoned them on the spot, thanking them for their vengeance.<sup>48</sup> Is it a surprise in this world that federalism objections to national intervention (which were made)

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42. See e.g. *Report on Criminal Procedure*, supra n. 40; *Report on Crime and the Foreign Born*, supra n. 40; *Report on Lawlessness in Law Enforcement*, supra n. 40.

43. Editorial, *A Change Toward Criminals*, Muskogee Daily Phoenix 18 (May 4, 1934) (“Time was when a murder in another locality did not strike home.”).

44. These facts are a staple not only of legislative studies but also of the law of legislation. See Jenna Bednar & William N. Eskridge Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1476 (1995).

45. *Throngs Riot, Fight to See Bier of Baby: Morbid Mob Tears Up Wreaths at Funeral of Chicago Child*, Daily Oklahoman 1 (Apr. 14, 1934).

46. *1,000 Armed Men in Vengeful Hunt for Kidnapped Girl: Canyons, Desert Scanned as Second Note Proves to Be Spurious*, Tulsa Daily World 1 (Apr. 27, 1934).

47. *Nine Arrested as 1,200 Rush Relief Bureau: Tear Gas Bombs Break Up Crowd Converging upon Commissary*, Daily Oklahoman 1 (May 22, 1934); *Savage Strike Riot Flares Anew*, Muskogee Daily Phoenix 1 (May 5, 1934).

48. *Gov. Rolph Backs San Jose Lynching As Kidnap Warning: He Will Pardon Any Arrested—Favors Turning Over to Mob Convicted Abductors*, 83 N.Y. Times 1 (Nov. 28, 1933); *“A Fine Lesson,”* 83 N.Y. Times 20 (Nov. 28, 1933); *Rolph Statement Stirs Storm Here: Civil Liberties Union Wires Stand Makes Him a Party to Lynching*, 83 N.Y. Times 3 (Nov. 28, 1933).

were given short shrift, and that Congress in May of 1934 put its final stamp of approval on expansive new federal criminal laws in two hours on a Saturday?<sup>49</sup>

My point in recounting this is not to embrace the stories of victims—nor to glorify “tough on crime”—but to suggest that there is more to the meaning of the criminal law than some imagine. In politics, the criminal law is always about order on a larger scale; it is about the *nature of government itself*. Although I think this generally true, it is quite evident in the period in which many of these laws arose. Remember, this was the Depression, a world where many were literally eating out of garbage cans and a quarter of the nation was out of work.<sup>50</sup> Many citizens during the early 1930s believed democracy was dead. By 1935, radical popular movements, led by Huey Long and Father Coughlin, seemingly bent on “revolution,” had rounded up millions of supporters.<sup>51</sup> In such a world, crime symbolized grave disorder and even political collapse.

If crime legislation is about order, it is because crime carries the risk of rebellion. As Eric Hobsbawm showed us, the public may well understand the bandit as a rebel,<sup>52</sup> and if there was an American age of the criminal as a bandit, the thirties was it, with its Bonnies and Clydes, Machine Gun Kellys and Dillingers. Perhaps then it really should be no surprise to learn that when Franklin Roosevelt heard that movie audiences were cheering public enemies, he reminded the country that they were in fact at war on crime.<sup>53</sup> He and other Presidents of this century have understood that crime legislation is a powerful symbol of public and political order and stability. Roosevelt may not have had any enthusiasm for his crime war (it appears to have been marshaled by his attorney general, Homer Cummings,<sup>54</sup> who also helped to push the terrible idea to pack the Supreme Court<sup>55</sup>), but Roosevelt had enough enthusiasm to campaign on the idea of “security,” linking social security to the war on crime.<sup>56</sup>

49. *Dillinger Causes House to Pass 10 Anti-Crime Bills: Sweeping Power Voted to Federal Agents, with Roosevelt Applying the Goad*, Muskogee Daily Phoenix 1 (May 6, 1934). The “two hours on a Saturday” is journalistic (indeed, it is taken from newspaper accounts at the time). Although reporters like to make much of speed in these matters, this was a two-hour debate on a conference committee report; crime measures along these lines had been debated for some time by the spring of 1934.

50. See e.g. 78 Cong. Rec. 449 (1934) (comment by Sen. Royal S. Ferguson) (“There are places in America where orderly government has disappeared, where the underworld is in control. I do not wish to indulge in any extravagant statement, but I am here to say that unless America shall be aroused the underworld gangster will come more and more into control in the United States.”).

51. Alan Brinkley, *Voices of Protest: Huey Long, Father Coughlin and the Great Depression* 6-7 (Vintage Bks. 1983) (quoting General Hugh S. Johnson).

52. Eric Hobsbawm, *Bandits* (New Press 2000).

53. See e.g. *New Dillinger Killings Stir the President and He Asks Quick Action on Crime Bills*, 83 N.Y. Times 1 (Apr. 24, 1934); *Roosevelt Opens Attack on Crime, Signing Six Bills as ‘Challenge’: Extending Federal Jurisdiction to Interstate Gang Offenses, with Death for Some Kidnappers, He Calls on People to Join in War on Underworld*, 83 N.Y. Times 1 (May 19, 1934).

54. See *Crime War ‘Real’ Asserts Cummings*, 83 N.Y. Times 3 (Sept. 12, 1933); *Wide Power Asked in Drive on Crime*, 84 N.Y. Times 11 (Feb. 20, 1934); *Federal ‘Teeth’ Asked in Gang War*, 84 N.Y. Times 46 (Mar. 20, 1934).

55. See Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (Fordham U. Press 2002) (recounting Homer S. Cumming’s involvement in the court-packing plan based on newly discovered evidence).

56. See e.g. *President Offers Kansans Security as New Deal Fact: School Expenditures the Last Place to Economize, He Tells 20,000 in Kansas City*, 86 N.Y. Times 1, 16 (Oct. 14, 1936) (stating that

My point is not to make Roosevelt a crime-warrior; rather, it is to insist upon considering the idea that the crime legislation of the twentieth century—the real politics—has been remarkably predictable. And that it has been predictable because of an obvious structural problem: no one is “for” crime and thus the political debate remains invariably one-sided.<sup>57</sup> Criminal law scholars must consider the possibility that there is nothing recent about the harshness of American crime politics or legislation, that the politics of crime that academics abhor is not a temporary phenomenon, nor one limited to a particular political party, nor one that follows fashions against the “welfare” state.<sup>58</sup> Perhaps it is built into American political culture, as Whitman’s cross-cultural comparison suggests.<sup>59</sup> Or, as I have a hunch, our political culture of crime—no doubt imagined in the form of rugged individualism and manliness—is exacerbated and amplified by the very political structure we otherwise cherish.

There is every reason to believe that American crime politics is likely to be different from crime politics in other countries, and that is because our system of government has no precise analogue anywhere in the world. Its system of federalized control coupled with the separation of powers (its presidential, non-parliamentary system) makes politics a highly redundant, but also highly competitive, affair. It means that, typically, our government is perpetually ineffectual—that it is very hard to get agreement on any particular policy, much harder than in parliamentary systems where political parties hold more sway, and can effectively control, rather than compete, with the administration. It also means that crisis legislation, in all matters, is likely to have greater importance as a way to push toward agreement. (What, after all, is the war metaphor but a means to galvanize public opinion, to suggest the need for action and sacrifice?)

All of this is made even harder by the fact that there are two competing governments, each with its separate powers, and here I refer to the existence of the states. States must compete with the nation for voters’ attention and allegiance. In the nineteenth century, crime was largely a local and state affair. With the institution of mass communication—which allowed fear of crime to spread across the nation almost instantaneously—the stage was set for federal intervention on a substantial scale, something that began at the turn of the century and became politically irresistible in the wake of the kidnapping scare of the early 1930s. This structural shift—which is unique to the twentieth century—increased political competition. And increased competition in a world of one-sided—or

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“security” was the theme of the campaign in Kansas and “[u]nder the heading of ‘security’ he grouped not only old-age pensions and unemployment insurance but the Federal war on crime.”).

57. This suggests that the real question to ask may be not “why harshness?,” but “why mildness?” My suspicion is that religion played an important role in restraining American crime policy in the nineteenth century. In the twentieth century, as I indicated, when fears of government itself were stronger than fears of one’s citizens (as exemplified in the Watergate/Vietnam era), then there may have been more political will to restrain government actors.

58. If this is right, and admittedly my research remains provisional, then one must consider all sorts of seemingly contrarian propositions. For example, wars on crime may turn out to be as consistent with welfare-state-building as welfare-state-opposition.

59. Whitman, *supra* n. 10.

perhaps more accurately, no—debate (criminals, remember, cannot vote) is likely to yield increasingly extreme legislation. Only when the fear turns inward, when people are more afraid of the police than they are of their fellow citizens' use of violence, is the harshness countered. Then the politics changes abruptly, in punctuated fashion, and only temporarily (as in the 1960s and 1970s).<sup>60</sup> My hunch, then, is that criminal law harshness is the norm, not the exception, of twentieth-century American crime politics.<sup>61</sup>

To recognize this is not, in my view, to embrace despair, and certainly not to justify a return to "original" solutions. Simply because a few states in 1930s still whipped their prisoners, and one even tried to use them as mules, does not mean that we should return to such a tradition. It is to say that, if one is looking for real solutions, rather than self-congratulation, one will have to look in the very places that criminal law scholars fear to tread—inside politics and political institutions. There are obvious candidates for consideration. For example, scholars might consider the problem of specific legislative malfunctions and informational failures. They might turn their attention to the predictable information failures that occur when legislative bodies attempt to ensnare the big fish and instead catch the small fry. For it seems clear, both from the debates and the results, that legislators pay little attention to what every first year law student knows about the ancillary liabilities of aiding and abetting and conspiracy. Such information failures are quite common in legislatures, in large part because of what I call the "generality gap" between politics and law. Turn on C-SPAN and you will *not* see legislators reading statutes into the camera; they are reading speeches, speeches whose audience is the electorate, not the experts. During debate, the complexities of legislation are often lost, leaving details crucial to lawyers ignored. Such gaps are ameliorated, in the standard case, by the incentives of citizens and interest groups who oppose laws to offer conflicting views and information and make them felt in pre-debate committee venues. But in a world where there is really no opposition, there is little incentive for anyone to raise the problem that the kingpin who is legislated against will turn out to be the courier.

Perhaps more importantly, scholars may want to consider even deeper institutional reforms: one way to fight institutional malfunction in government is to harness the incentives of a competing institution. Ever since John Ely wrote decades ago, it has become conventional constitutional wisdom that political malfunction is a reason to consider stronger judicial intervention in the legislative arena.<sup>62</sup> Why not in the *substantive* criminal law? After all, the state is depriving citizens of their liberty. If harms to minorities deserve heightened judicial scrutiny, why not the claims of people who, if they are convicted, cannot vote and

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60. I offer this hypothesis in deliberately conclusory fashion with the hope that it will in fact be taken as it is offered, as a hypothesis, while I complete the much larger study which is underway.

61. I do not mean to slight here various cultural explanations; it also seems true to me that the decline of religion, and an institutionalized ideal of mercy, are factors of at least equal importance to structural changes. Those structural changes, it seems to me, are likely to exacerbate such a cultural shift.

62. John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 135 (Harv. U. Press 1980).

are termed “civilly dead”? One need not transform every criminal case into a constitutional case; one might simply, as William Stuntz argues, use statutory interpretation as a lever in this battle.<sup>63</sup> In constitutional law, courts and commentators have become quite accustomed to super-clear statement rules<sup>64</sup> and have felt themselves quite free to assert their power in the case of repeated political malfunction and structural concern. Why not consider such intervention to refuse to apply irrational penalty structures (ones that could only be passed into law in a world where there was no one to point up the obvious problems)? Even if such a rule would not prevent excess, it might aid in political transparency, increased saliency, and might even reduce the political costs of opposing such legislation.

Whatever the merit of these proposals, it does seem to me to be time to begin anew in the criminal law. History demands as much from those of us who have the privilege to write and teach these matters. We have spent almost an entire century looking for the “causes” for crime that have never been uncovered to everyone’s satisfaction;<sup>65</sup> we have spent almost an entire century believing that the “science” of real numbers and facts will constrain legislatures when it has not; we have spent almost an entire century theorizing about retribution and deterrence and punishment only to discover what we should have known—that these ideas partake of the dangers of “semantic ascent” (they are full of normative contradiction because they are described at such a high level of abstraction).<sup>66</sup> Perhaps we might want to consider criminal laws from a different angle. But this can only occur if we, like Fletcher, look beyond the standard boundaries of the discipline, take risks, and “rethink” our assumptions about the criminal law.

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63. Stuntz, *supra* n. 4.

64. One might call this “super-lenity,” on the theory that the rule of lenity requires courts to construe statutes in favor of defendants. Clear statement rules, however, do not typically focus on all statutory matters (as does the rule of lenity) but rather on particular questions that reflect constitutional anxieties, particularly structural anxieties. In this case, the argument would be that the kind of penalty structures created shift powers from the judiciary to prosecutors, increasing the relative risk to individuals or what I have called minoritarian risk.

65. It may well be that we will only find the causes of crime when we find the “causes” of emotion. See James Gilligan, *Violence* 45-55 (Vintage Bks. 1997).

66. See Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 *Nw. U. L. Rev.* 843 (2001) (arguing that “retributivism fails to satisfy its own criteria of just punishment”); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *Harv. L. Rev.* 413 (1999) (suggesting that deterrence is a political idiom reflecting radically-conflicting social and cultural meanings); Nourse, *supra* n. 14 (suggesting that retributivism and deterrence have conflicting meanings as both limits and permissions and thus are unhelpful in rejecting or accepting any particular doctrine).

## APPENDIX A

1. 1927 Cal. Sess. Laws ch. 634, 1066, (amending 1923 Cal. Sess. Laws ch. 111, 237); Cal. Penal Code § 644 (1931) (mandatory life sentence after third specified felony conviction).
2. 1929 Colo. Sess. Laws ch. 85, § 3, 310; Colo. Stat. Ann. § 553, 1164-65 (1935) (mandatory life sentence after third specified felony conviction).
3. 1927 Fla. Comp. Gen. Laws § 7107 (1929); Fla. Stat. Ann. § 775.10 (West 1944) (mandatory life sentence after third felony or attempted felony conviction).
4. 1923 Idaho Sess. Laws ch. 109, § 1, 139; Idaho Code Ann. § 19-2414 (1932) (discretionary life sentence upon third felony conviction).
5. 1927 Kan. Sess. Laws ch. 191, § 1, 247; Kan. Gen. Stat. Ann. § 21-107a (1935) (mandatory life sentence after second felony conviction).
6. 1929 Mich. Pub. Acts 24, § 12, 53, amending 1927 Mich. Pub. Acts 175, § 12, 325; Mich. Comp. Laws § 769.12 (1948) (mandatory life sentence after third specified felony conviction).
7. 1927 Minn. Sess. Laws ch. 236, § 2, 338; Minn Stat. § 610.29(1) (1941) (mandatory life sentence if the fourth felony may be punishable by life sentence).
8. 1927 N.J. Sess. Laws ch. 263, 483; N.J. Rev. Stat. § 2:103-10 (1937) (discretionary life sentence after third conviction).
9. 1929 N.M. Sess. Laws ch. 58, § 3, 83; N.M. Stat. Ann. § 42-1603 (1941) (mandatory life sentence after third felony conviction).
10. 1926 N.Y. Sess. Laws ch. 457, § 2, 805 (mandatory life sentence after third felony conviction).
11. 1927 N.D. Sess. Laws ch. 126, § 2, 158; N.D. Rev. Code § 12-0621 (1943) (discretionary life sentence after third felony conviction).
12. 1929 Ohio Sess. Laws H.R. 8, § 2, 40; Ohio Gen. Code Ann. § 13744-2 (Anderson 1939) (mandatory life sentence after third specified felony).
13. 1927 Or. Sess. Laws ch. 334, § 3, 432; Or. Code Ann. § 13-2803 (1930) (mandatory life sentence after third felony conviction).
14. 1929 Pa. Sess. Laws 373, § 2, 854; Pa. Stat. Ann. tit. 19, § 922 (West 1936) (discretionary life sentence after third specified felony).
15. 1927 S.D. Sess. Laws ch. 119, § 2, 143; S.D. Comp. Laws § 3613 (1929) (discretionary life sentence after third felony conviction).
16. 1939 Tenn. Pub. Acts ch. 22, § 2, 106-107; 7 Williams Tenn. Code Ann. § 11863.2 (Supp. 1952) (mandatory life sentence after third specified felony).

17. 1927 Vt. Sess. Laws 128, Vt. Stat. Ann. tit. 41, § 8616 (1947) (mandatory life sentence after third conviction).
18. 1939 W. Va. Acts ch. 26, art. 11, § 19; W. Va. Code § 6130 (1943) (mandatory life sentence after second conviction).
19. 1937 Wyo. Laws ch. 68, § 2, 103; Wyo. Comp. Stat. § 9-110 (1945) (mandatory life sentence after third conviction).

The following 6 states had laws mandating life after 4 or fewer convictions in force from 1920 until 1940 but these laws were likely to have been enacted at an earlier date:

20. Tex. Penal Code Ann. art. 63 (1925) (mandatory life sentence upon third felony conviction).
21. Ind. Stat. Ann. § 2339 (1926); 1907 Ind. Sess. Laws, ch. 82, § 1, 109 (mandatory life sentence after second felony conviction).
22. Carroll's Ky. Stat. Ann. § 1130 (1930) (mandatory life sentence upon third felony conviction); Ky. Rev. Stat. § 431.190 (1942).
23. Mont. Rev. Code Ann. § 11594 (1921) (mandatory life sentence upon second conviction if the subsequent offense is punishable by a life sentence).
24. OK. Stat. art. 6, § 1818 (1931) (mandatory life sentence upon second felony conviction if the subsequent offense is punishable by a life sentence).
25. Wash. Rev. Stat. § 2286 (1932) (mandatory life after second felony or fourth specified lesser crime).

This is not a complete list of all relevant state statutes as this research remains in progress; it should be noted that other states during this period, and earlier, had habitual offender statutes, with penalties less than life sentences.

