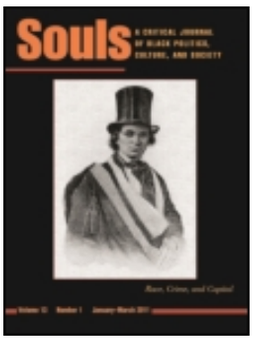

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Souls

Black Critiques of Capital: Radicalism, Resistance, and Visions of Social Justice

Where Did All the White Criminals Go?

Reconfiguring Race and Crime on the Road to Mass Incarceration

Khalil Gibran Muhammad

This article highlights racialized constructions of criminality that surfaced in the wake of mass migrations and immigrations of African American and European workers to the industrial North during the first few decades of the 20th century. This attention to historical patterns is critical to contemporary studies because it shows processes and dynamics that are far less visible in today's criminal justice landscape, overwhelmingly dominated by black and brown faces. Too often, policy researchers deem rehabilitative, nonpunitive approaches to illegality among marginalized and impoverished populations fanciful and too abstract to be implemented. The evidence here suggests that earlier responses to similarly stigmatized white immigrant populations actually led to more humane reforms and shifts away from harsh laws and incapacitation as preeminent responses to social inequality. This earlier reformist moment happened in direct relation to increasingly repressive criminal justice responses to African Americans, which shows how blackness was reconfigured as a more durable criminal identity. Understanding this crucial period also helps to map the long road to mass incarceration. In today's popular postracial discourse about personal responsibility, the guiding logic presumes that the

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relative absence of white criminals is a product of good citizenship and not discriminatory policies prefiguring the New Deal welfare state. Parables of hard work and law-abidingness have erased this crucial period in the history of incarceration.

Keywords: criminality, four-strikes law, prisons, prohibition, race

The "black man" in America may be the most enduring and potent symbol of criminality in modern American history.[1] This was not always the case. Not only did such imagery emerge in a particular historical moment—after slavery and during the rise of segregation—but it also evolved in a variety of ways and in different places and regions of the country. This essay examines one of the least explored aspects of this development: how black male criminalization depended upon the reconstitution of white *and* black "criminal" identities in the mid-20th century.

Racial criminalization has historically depended on the relational construction of ideas of whiteness and blackness. Comparative notions of race, ethnicity, gender, and citizenship shaped cultural attitudes and political practices toward crime and punishment in particular ways and in specific places and moments over the long 20th century. However, scholars have paid insufficient attention to the history of racial criminalization on both sides of the color line in the same temporal and spatial frame. They continue to analyze race in the singular based on the demographics of punishment by region: the terrors of convict leasing against southern blacks and the horrors of eugenic sterilization campaigns against northern white immigrants. Starting with W.E.B. Du Bois' 1935 seminal critique of convict leasing in *Black Reconstruction*, southern historians began to identify the relationship between racial ideology, crime, and punishment. In his 1952 study of South Carolina's postbellum race relations, George B. Tindall wrote, "The assumption by whites that a natural criminality and barbarism existed among the Negro population and the general determination to repress that tendency goes far toward explaining why the prisons were crowded with Negroes." For three-quarters of a century, therefore, southern historians have been dominant in the literature on racial criminalization, turning our attention to the popularity of black crime discourses, the development of white supremacist ideology, and the deployment of vigilante violence and state-sanctioned terror against African Americans. And more recently, within the past decade or so, historians have explored the full dimensions of the political economy of southern punishment.

The consensus is that when it came to black people and punishment, the New South was the meanest place on earth.[2]

But partly out of a long historiographical tradition of southern exceptionalism, the role of racial criminalization in the making of the urban North remains inadequately researched and theorized.[3] Instead, native-born whites and European immigrants have received the overwhelming focus of historiographical attention. Consequently, our understanding of crime and punishment not only tends to separate by region and by place, but also tends to divide falsely the cultural construction of criminality and punishment by the race of the clients or targets of crime-control systems, as if they were not conceived and imagined in relation to one another.

Previous research has shown how crucial racialized discourses were to social scientific and reformist notions of who was worth saving, why, and by what means. In the urban North, racial criminalization proceeded on the basis of interconnected notions of white, immigrant, and black criminality. These ideas set the foundation for modern concepts of race, crime, and punishment. Black criminality, for example, was shaped by innovative statistical discourses that emphasized racial inferiority, while northern white and immigrant criminality was relationally and simultaneously defined by sociological discourses that emphasized class victimization.[4]

I argue here that an early 20th-century moment characterized by disparate cultural constructions of criminality and victimization led to what might be called the "New Dealization" of white criminality. Borrowing Ira Katznelson's recent formulation that the New Deal's social welfare programs "though seemingly race neutral, functioned as a commanding instrument of white privilege"—what he calls "affirmative action for whites"—I argue that a related development took place in the criminal justice system during the 1920s and 1930s.[5] That is, criminal justice reforms during Prohibition and the Great Depression signaled the beginning of the end of white (ethnic) criminality as a culturally and politically rich signifier of crime in the urban North.

The national attention on white hoodlums and ethnic gangsters during Prohibition gradually receded before the anxiety and panic of the greatest financial collapse in the nation's history. Although in popular media and entertainment, the image of the white public enemy would live on with *The Sopranos* and remain synced with the Prohibition era in Johnny Depp's *Public Enemies*, then even more recently in HBO's *Boardwalk Empire*, its real-life counterpart was increasingly rendered invisible (or disappeared) by the rise of a rehabilitative movement within the northern criminal justice system. Reformers consciously sought to reconfigure white

male criminal subjectivity through what one scholar calls "manly citizenship."[6]

How did important cultural and political shifts related to native-born white and European immigrant criminality transform ideas and practices pertaining to black male criminality, beginning in the Prohibition-era urban North? Urban historians have provided some contextual clues. Well-known demographic changes are part of the answer. Postwar white suburbanization, for example, began to shift the gaze of urban surveillance away from white men. White working-class urbanites took advantage of cheap, often mass-produced, balloon frame homes underwritten by restrictive covenants and leveraged by whites-only mortgages. Residing first in trolley suburbs and later in Levittowns, white men formerly of the "dangerous classes" increasingly escaped the scrutiny of beat cops and the brutality of "gun squads," prototypes of late 20th-century undercover street crimes units.[7]

Given how much mass incarceration has come to dominate the cultural, political, and economic landscape of the nation since the 1970s, and given that racial disparities in incarceration rates are highest outside of the South, it is surprising how slow historians have been to focus on the comparative racial history of crime and punishment in the urban north. According to Heather Ann Thompson, the gaps in the literature are even more substantial and problematic in relation to what scholars have written about some of the major developments in 20th-century U.S. history: the urban crisis, the decline of the labor movement, and the rise of the Right. Historians have not kept pace, she finds, with "how the American criminal justice has evolved since World War II, and specifically on the advent of mass incarceration after the 1960s."[8] Recent scholarship on northern black women's criminal justice experiences by Kali N. Gross and Cheryl Hicks are promising signs that historians are beginning to give more attention, in general, to anti-black racism and northern punishment systems. Still, Douglass Blackmon's 2009 Pulitzer Prize–winning study of convict leasing, *Slavery by Another Name*, attests to the continuing interest and fascination with the history of apartheid-style criminal justice practices in the Jim Crow South.[9]

New Sunbelt studies on the carceral regimes of California and Texas have shifted some of the focus away from the Southeast and Black Belt. And yet when Robert Perkinson calls Texas "slavery's frontier" and describes the story of a "uniquely callous, racialized, and profit-driven style of punishment," southern exceptionalism still shapes the tone and comparative claims of this new body of work. That is to say: Alabama was bad, but Texas or California's "Golden Gulag" is worse.[10] To be sure, California and Texas are exceptional

by many measures of cruelty due to overcrowding, abuse, and exploitation for profit. But the danger is that Sunbelt exceptionalism may eventually replace southern exceptionalism, whereas the North, in terms of black prisoner experiences, has never gotten its due. The North hosts the oldest prison systems in the nation. It is where the logic of penitence and the practice of incarceration was born.[11] And it is where six decades of the Great Migration unfolded and fundamentally altered the nation's culture of punishment.[12] From the 1920s to the 1970s, from stop and frisk practices in the Harlem Renaissance era to the Nelson Rockefeller–inspired War on Drugs, it is nearly impossible to fully comprehend the "color-blind" origins of mass incarceration today without examining the "liberal" urban North.[13] If scholars only focus on punishment based on a slavery model, as Perkinson does for Texas, they miss the disappearance of alternative systems of social control (the penitentiary, rehabilitative penal management, and New Deal liberalism)—all relatively less punitive—that were from the beginning reserved for whites only. All regions of the country deserve full examination before determining which one is exceptional, and on what basis distinctiveness is to be judged. In a 21st-century context, the overt brutality of convict leasing may be less historically revealing than the color-blind criminalization and incarceration of northern blacks since the 1890s—what is called today the "politics of law and order."[14]

What did the situation look like simultaneously in interwar Chicago or New York, where the vast majority of prisoners were white? How was crime and punishment explained and how was it understood in racial and gendered terms? What does the historiography tell us? Much less than we would like in light of the overwhelming majority of black and brown men, women, and children in today's prison leviathan. How did we get here, by what road did we travel from majority white incarceration three-quarters of a century ago to the opposite in 2010? What is the 20th-century history of race and punishment outside of the South?

Rebecca McClennan's 2008 book *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State*, an award-winning, revisionist study of the inextricable link between labor, penal servitude, and American prisons, attests to the enduring scholarly silence. The book is a thoroughly northern history, but only of the white working classes. Black workers, black prisoners, and anti-black criminal justice practices get slim mention in her otherwise fine study.[15]

The gaping hole in the scholarly literature has left many contemporary observers—including politicians, criminal justice reformers, and legal scholars—to speculate on the racial dimensions of the

current mass imprisonment crisis. In an October 1995 presidential address at the University of Texas, in the context of the O. J. Simpson Trial, Million Man March, and the release of a Sentencing Project report that one in four black men were under the supervision of the criminal justice system, Bill Clinton stated, "Every white person here and in America needs to take a moment to think how he or she would feel if one in three white men were in similar circumstances."[16] In his 1997 study *Race, Crime and the Law*, Harvard Law School professor Randall Kennedy wrote, "It is entirely plausible that the white-dominated political institutions of America would not tolerate present conditions in jails and prison if as a large a percentage of the white population were incarcerated as is the reality facing the black population. It is surely possible, to many likely, that if the racial shoe were on the other foot, white dominated political structures would be more responsive than they are now to the terrors of incarceration."[17] Two years later, Marc Mauer, director of the Sentencing Project, a Washington, D.C.–based reform organization committed to ending mass incarceration policies, expressed the same concern. "An attitude of complacency has pervaded public policy discussion in this arena, whereby a record rate of imprisonment is either actively encouraged or passively accepted," he wrote in *Race to Incarcerate*. "One is led to wonder, however, to what extent the zeal with which efforts are made to demonstrate the value of imprisonment is a reflection of the 'otherness' of those being imprisoned."[18] More recently, Georgetown law professor David Cole wrote in a November 2009 *New York Review of Books* article that "if white male babies faced anything like the current rate of incarceration among blacks, the politics of crime would look very different. We would almost certainly see this as an urgent national calamity, and demand a collective investment of public resources to forestall so many going to prison." What Cole, Mauer, and others intuit but do not name is the invisible hand of racial nepotism that sets the limits of cruel and unusual punishment for white Americans.[19]

In the absence of historical scholarship or historical memory of the time when white prisoners ruled the Big House, Cole's speculations about a deep-seated racial double standard in the current system no doubt sound fanciful and abstract. The current "politics" of postracialism in the wake of Barack Obama's election to the presidency also minimize the willingness of casual observers and everyday bloggers to be swayed by the possibility that harsh punishment (especially in the "liberal" North) is a function of much more than bad behavior. Blacks and Latinos in some states represent 90 percent of those admitted to prison for drug offenses, for example.[20] Yet drug prosecutions are a product of the targeting by law enforcement of black and brown

inner-city communities in a context of post–civil rights law and order. "These stark racial disparities cannot be explained by rates of drug crime," writes Michelle Alexander in her recent study of the War on Drugs. "Studies show that people of all colors *use and sell* illegal drugs at remarkably similar rates." Scholarship on the War on Drugs has, for instance, demonstrated that *crime policy*, not *crime*, is the single most significant factor in the unprecedented growth and size of the nation's prison population. And mass incarceration, argues Alexander, "is the most damaging manifestation of the backlash against the civil rights movement." Still, despite mountains of social scientific research that our crime-control policies are deeply racially discriminatory, have reached the point of diminishing returns, and may be doing far more harm than good to the law-abiding, people too often fall back on prevalent misconceptions that crime is low, that prisons work. Case closed.[21]

Debates about the effectiveness of punishment policies have always been politicized. Likewise they are inevitably constrained by their context. Yet recent historical inquiries have made it ever easier to discern the gap between the scholarly evidence and public discourse. Unlike the latest racial disparity data and hyperbolic public-safety risk analysis, historical research reveals patterns in crime sentencing and policing that flesh out a complicated geography of race and gender. If we can learn something from the past that sheds light on analogous circumstances and that breaks through the Maginot Line of tough-on-crime politics, then we would be wise to pay attention. Thus, I agree with Katznelson when he writes, "History matters for present-day efforts to create a less racially unjust country."[22]

* * *

The history of our current situation is a legacy of extending racial privileges in the 1930s "for whites only." The privileges of *victimization, rehabilitation, and decriminalization*—like social security benefits—were extended to white men and women while simultaneously excluding African Americans. Using a wide range of sources, including prisoner records, state crime commission reports, mayoral and gubernatorial papers, the correspondence of white prisoner rights' advocates and civil rights activists, and press accounts of four-strikes defendants and judicial protestations against the law's excesses, I examine northern criminal justice systems as crucial sites for the reshaping of racial identities among whites *and* blacks in the mid-20th century. I seek to explain how racial privilege has been as important as racial discrimination to understanding how, who, and why we punish.

My research is organized around the creation and dissolution of a four-strikes law in New York state during the height of Prohibition-era anxiety about organized crime and violence. In 1926, the Baumes Law was enacted to deter repeat offenders with the threat of life imprisonment upon the conviction of a fourth felony. State legislatures argued the criminal justice system was overrun by modern gangsters and their high-priced lawyers. Not unlike the spirit of the 1994 creation of mandatory three-strikes sentencing provisions in California and elsewhere, the Baumes Law sought to satisfy public desire for tougher crime policies by sending a clear message that recidivism would not be tolerated.

On the eve of New York's first war on crime, sensational press accounts and fear-mongering politicians deployed the cultural imagery of "Beau Brummel," a white man whose violent and immoral behavior was cloaked behind a sophisticated and nattily dressed appearance. He was so troublesome in part because his whiteness and his "class" submerged his criminality. New York State Senator Caleb H. Baumes, who sponsored the new law, described the modern criminal:

> Ranging from 18 to 24 years of age, the best dressed man in the community, the Beau Brummel of his time, wearing the latest fashion of coat, the latest pattern necktie, the latest trim of hair, always cleanly shaven, patent leather shoes, and usually swings a cane, hard to identify. If he were to go into a bank or jewelry shop or place where some of you men and women might be working, he is not the man—in fact, he is the last man you would suspect of holding up a man.[23]

The "modern gunman and bandit," wore an ethnic mask at times, but the sheer volume of second-generation immigrant diversity among well-known bootleggers tended, as scholars have noted, to unite them by their whiteness.[24]

But soon after the law's passage, it missed its mark and instead sent mostly nonviolent property offenders to prison for the rest of their lives with no possibility of parole. An eighteen-month sentence for larceny was quickly revised to mandatory life in prison with no parole for one of the first men to be convicted.[25] Other four-strike convictions quickly followed, and judges began to complain bitterly. They argued that the mandatory sentences under the Baumes Law stripped them of their discretionary powers to weigh the merits of a case against the past and present behavior of a defendant. It was not uncommon for judges to apologize to defendants whose initial sentences were changed in light of new evidence of their past felony convictions. In the case of William Green, for example, a black laborer convicted for second-degree assault as a fourth offense, Judge Cornelius F. Collins told Green, "I am sorry for you," as he resentenced him from five years to life. Judge Collins then launched into

a critique of the Baumes Law, saying, "It leaves the courts no discretion and substitutes the authority of that bill for the arbiter of justice and its administration throughout the State."[26] Similar complaints by judges led to attempts by the court to circumvent the law by accepting lesser pleas in lieu of felony convictions.

A groundswell of outrage spread quickly across New York's criminal justice landscape, from judges to prosecutors to prison wardens. Months after passage, Louis N. Robinson, an influential white social scientist and member of the National Crime Commission, completed a survey of European criminal justice practices, and called the Baumes Law barbaric by comparison. He argued that American convicts were being victimized by medieval practices. "The long sentences recently imposed by certain American judges are regarded by European students as a return to the cruelty of the Middle Ages, and a further increase in the barbarities of our prisons is difficult to explain to those Europeans who have in the past looked to America as the birthplace of new ideas with respect to the worth and dignity of all members of mankind."[27]

George Kirchwey, a former Sing Sing warden and onetime dean of Columbia University Law School, added to the criticisms that the law was counterproductive to the Progressive-era goal of rehabilitating prisoners. "We don't do anything very useful about a criminal if we know nothing more than that he had three previous convictions," he stated at a meeting of social workers on the one-year anniversary of the law. "In the long run, society is best served not by supporting a prisoner for life at public expense but by turning him back into the community as a self-supporting member of the community."[28] The war on alcohol, Kirchwey stated at the next stop on his anti-Baumes campaign, was causing crime, not ending it. He complained that the punitive turn represented by Baumes put more people in prison for longer sentences with little hope of rehabilitation. The prisoner "becomes in fact the crook and bandit that we have by that process forced him to become."[29]

As an historical case study, the racial dimensions of the Baumes story are not readily discernable. In Kirchwey's speeches and in most civil society backlash, working-class white men and women represented the face of *victimization* under the Baumes Law. Even though three of the earliest Baumes lifers were African American men convicted of nonviolent property offenses, the four-strike opponents and defenders were not in the end debating the victimization or rehabilitation of black people.[30] The irony is worth noting: those who were disproportionately arrested for property crimes in New York City, and most likely to face a Baumes conviction, were least likely to elicit sympathy or inspire reform. Analogous to the

19th-century antipoverty reformers' distinction between the "deserving" and "undeserving" poor, race increasingly trumped class, nationality, and ethnicity in assigning moral value to convicts in the Baumes era.[31]

Prohibition-era press accounts linking blackness and criminality offer the first clue as to how whiteness was the precondition for being defined as a "deserving criminal"—a victim of society's harsh laws, not one's own biology or cultural defects. When African Americans were the focus of anticrime crusades or sensational crime reporting, the markers "negro" or "colored" were emphasized to naturalize and racialize criminality by contrast to whites. One of the most explicit Prohibition examples comes from a March 3, 1921, *New York World* article, "Gin-Crazed Negro Killed Organist for Drink Money." Not only did the alleged assailant George Washington Knight go nameless for several lines in the coverage, but he was also described initially by his physicality, repeatedly compared to a primate. "He is a gorilla-like black, if there ever was one. He stands 5 feet 4, but he has the shoulder-breadth of a man eight inches taller. He weighs 160 pounds. His nose is flat, his lips thick and heavy, his arms hang down to his knees like the African forest creature. His eyes bulge and are yellowed from drink." His young white female victim died, according to the press, not from physical violence but because she was literally scared to death by Knight's appearance.[32]

As in the South, white fear of black male criminality in relation to white female Christian virtue played vividly in the northern Prohibition and Baumes-era press. Such fears also extended to white men, casting them as potential victims of black male criminality, even when they partnered with black men to commit crimes. An interracial robbery team, for example, was arrested in Brooklyn on September 26, 1927, after allegedly committing hundreds of holdups together. They both faced four-strikes convictions under Baumes.

Starting with the headline "Giant Negro and White Youth, Staged 100 to 200 Hold-Ups," the *New York Times* racialized the twenty-six-year-old South Carolina migrant David Mitchell as the total opposite of his partner in crime, twenty-four-year-old, New Jersey–born Frank B. Moore. Despite their negligible age difference, over and over again, the reporter juxtaposed the "negro man" with the "white youth," describing Mitchell as a "desperate criminal" who delighted in violence. His "gold-toothed smile" was the natural expression of a depraved black man. "Tall, stocky, and powerfully built, and with huge arms, he impressed everyone who saw him as thoroughly 'hard-boiled' yet primitive." By contrast, Moore was an "undersized fellow," and "an obvious weakling," the reporter wrote. "He said he came from a good family and begged the police not to let his mother know about

his arrest." A measure of sympathy was clearly in store for Moore, a corrupted "white youth" victim of a primitive "negro" bandit.[33] With increasing black migration, white middle-class and suburban fears of interracial vice, leisure, and intimacy in Harlem were widespread. This was just the kind of trouble Moore's mother may have warned him about when he crossed the Hudson River.[34]

Although press reports of interracial robberies required the use of "white," in opposition to "black," the absence of racial markers in crime news or in Baumes reportage almost always signaled white criminality.[35] Tellingly, the same *Times* article mentioned a third holdup man, captured on the same day as Mitchell and Moore. The nineteen-year-old "chain store robber" with a "wife and child" was caught when he returned to the same store he had robbed a week before. Described only by his name and offense, his whiteness remained invisible in print. But the absence of racial markers signified it nonetheless.[36] And his family ties positioned him as a "deserving criminal" who had fallen on hard times and was attempting to take care of his dependents.

If the press advanced the notion of "deserving criminals" as white, not black, then the four-strikes controversy cemented the idea by widening the scope of white criminality to include second-generation immigrants. Proponents of the four-strikes statute defended the law by claiming that racially profiling the foreign-born and their children was no longer an effective crime-control measure. In a few instances, members of the New York State Crime Commission (NYSCC), headed by Baumes, highlighted the foreign-parentage of habitual criminals sentenced to life. But references to a "Russian Polish father" or an "Austrian mother," as in the case of "Joseph G.," whose case history was profiled in the NYSCC 1928 annual report, were incidental to the very ordinariness of this dangerous recidivist.[37] Two decades earlier, Joseph G's parentage would have been a key marker of his criminal tendencies among criminologists and criminal justice officials. Now what mattered was he looked like any other American, which marked him as "white" rather than foreign-born or ethnic. The fact that he could blend in so well demanded that once caught he should be incapacitated. "The modern young criminal is a hardened young man who dresses better than you or I," Baumes explained at a winter 1927 luncheon of the National Republican Club, "who studies criminal opportunities and lays his plans as carefully as you and I study our professions, and it requires harsh and severe methods to cope with him."[38] The tone and substance of Senator Baumes' portrait of the calculating criminal chameleon, hidden behind fine clothing and a vanilla facade, was meant to counter the opposition's view that four-strike convicts were underprivileged young men of humble

origins. The outcry of white victimization fueled the debate, and in the process white criminality continued to be reconfigured.

On the defensive, State Senator Baumes and his crime commission colleagues needed to drive home the "Americanness" of second-generation immigrants to substantiate the necessity of their punitive, discretion-less law. No excuse, they argued, justified long criminal histories, including being part of a community victimized by anti-immigrant racism. Judges, in other words, could no longer be soft on poor, second-generation immigrants when they became bootleggers, burglars, or drug addicts. "To say the least, this life timer has not come from very desirable surroundings," the commissioners said of Joseph G. "Reared in impoverished conditions by parents noted for their loose methods of life, undisciplined, he practically grew up on the streets; a member of at least two gangs, 'The Cherry Boys' and 'Coyboy Tessler's'; associating with criminals, never taking any religion seriously, acquiring the drug habit before he was twenty, arrested frequently, appearing before courts, and in and out of correctional institutions for nearly twenty years . . . . No one is apt to question the wisdom of Joseph being committed to prison for natural life."[39] The bad parenting of the foreign-born clearly registered in the NYSCC's opinion of Joseph G.'s ruined life, but in the several case studies they highlighted in defense of the law's necessity, these white young men were really "America's Most Wanted." These men were perceived as the most dangerous criminals because they moved easily beyond the slums of their birth and the ethnicity of their parents, eluding surveillance and capture.

In a NYSCC study of five thousand prisoners to prove how dangerous and beyond rehabilitation were such young men like Joseph G., the commissioners identified 82 percent (4,097) as "White" and 18 percent (895) as "Black."[40] The ethnicity or nationality of the white prisoners was noteworthy only in that their whiteness and physical appearance masked their actual criminality—"he is the last man you would suspect of holding up a man"—and hence justified the commission's "drastic action." Once caught, "it is safer and cheaper to confine and care for him than to permit him to run at large," according to August Vollmer, the most influential police chief in the nation in his day.[41]

The only explicit consideration of race in the 1928 commission study singled out African Americans for being overrepresented in the sample: "Note that blacks are responsible for 18 per cent of all crime as compared with a population expectation of only 3 per cent." Otherwise, according to their analysis, the average age of the five thousand men was thirty-one years, half were recidivists, and 70 percent were property criminals, most of them convicted repeatedly for

burglary. These men were, in Baumes's preferred phrasing, "a menace to society."[42]

In this Prohibition-fueled law and order moment, the old associations of Southern and Eastern European immigrants with poverty, vice, and crime were giving way to the new imperatives of crime fighting. The success of Progressive-era Americanization campaigns had not only opened pathways of European immigrants to become middle-class and shed their ethnic identities, assimilation had also whitened the criminal classes. "The second generation [immigrant] appears to approach the native born of native parentage in regard to the kinds of crime committed," noted Edwin H. Sutherland, the leading criminologist of the period.[43] Much to the dismay of the nation's criminal justice officials, bootlegging created both the reality of a massive white crime problem, and the possibility of an unstoppable political backlash against the new harsh laws. This moment is the closest historical equivalent to that which President Clinton and so many others have speculated about if the "racial shoe were on the other foot."[44] How would society's stakeholders behave now if in fact the vast majority of the *victims* of harsh drug prohibition polices were white, as they were under alcohol prohibition?

At the intersection of the Baumes Law's tough-on-crime defenders and the law's white victims as portrayed by opponents, stood the reality that the vast majority of the two hundred people convicted as Baumes lifers were, at best, small-fry thieves. They were hardly the "big criminals" or "modern gangsters" whose Al Capone– and John Dillinger–style deeds have inspired Hollywood movies. They were like today's mass incarcerated: nonviolent drug users, small-time dealers, or property offenders. (The U.S. Sentencing Commission estimated in 2002 that "only 11 percent of them could possibly be classified as high-level dealers.")[45] Ultimately, the four-strikes convicts were not as Senator Baumes had described them, fancy criminals with high-priced lawyers.

This inconvenient fact proved to be a major factor in the law's undoing, shown by the NYSCC own 1928 sample of prisoners, and a follow-up 1929 report that sampled the case histories of fifty lifers. The 1929 report provided undeniable proof that the four-strikes opposition was winning the public relations war. The Baumes Law was blamed for a series of prison riots, occurring at the Auburn and Clinton prisons. A new class of prisoners bore the blame for destroying prison morale. They had no hope of ever seeing the light of day. In the year-end 1929 NYSCC study, the vast majority of the "fair sample of men . . . charged as 4th offenders," revealed four or more-time burglars not bootleggers (Figure 1). The commissioners' own data was so contradictory in their latest report that they extended the

Case	Year	Convictions for	Term	Place
A.....	1900	Sneak thief.....	2½ years.....	Trenton.
	1906	Unlawful entry.....	60 days.....	City Prison.
	1909	Burglary.....	5 years.....	Sing Sing.
	1914	Burglar tools.....	1 year.....	N. Y. C. Penitentiary.
	1915	Burglary.....	Discharged.	
	1916	Burglary.....	4½ years.....	Sing Sing.
	1922	Burglary.....	4 years.....	Sing Sing.
B.....	1908	Unlawful entry.....	3 months.....	Workhouse.
	1909	Burglary.....	2½ years.....	Sing Sing.
	1910	Burglary.....	3½ years.....	Sing Sing.
	1914	Burglary.....	2½ years.....	Sing Sing.
	1917	Burglary.....	6 years.....	Sing Sing.
	1922	Burglary.....	5 years.....	Sing Sing.
C.....	1916	Grand larceny.....	2–4½ years.....	Sing Sing.
	1927	Petit larceny.....	Suspended.	
	1919	Burglary.....	3 yrs., 5 mo....	Sing Sing.
	1924	Burglary.....	2 years.....	Sing Sing.
D.....	1914	Burglary.....	1 yr., 5 mo....	Sing Sing.
	1916	Unlawful entry.....	.....	N. Y. C. Penitentiary.
	1917	Burglary.....	2 yrs., 5 mo....	Sing Sing.
	1921	Burglary.....	.....	N. Y. C. Penitentiary.
	1925	Burglary.....	2½ years.....	Sing Sing.
E.....	1910	Assault.....	2½ years.....	Sing Sing.
	....	Robbery.....	4½ years.....	Sing Sing.
	1915	.....	4 years.....	Sing Sing.
	1920	Forgery.....	3 years.....	Sing Sing.
	1922	Violated parole.....	.....	Sing Sing.
	1925	Petit larceny, unlawful entry.....	.....	N. Y. C. Penitentiary.
F.....	1908	Burglary.....	1 year.....	N. Y. C. Penitentiary.
	1909	Burglary.....	8½ years.....	Sing Sing.
	1915	Burglary.....	2 yrs., 3 mo....	Sing Sing.
	1923	Burglary.....	5 years.....	Sing Sing.

Figure 1. Fair Sample of Men Charged as Fourth Offenders, NYSCC, Annual Report 1929.

definition of violent crimes to include *burglary*: "The serious crimes of violence, which especially characterize the operations of organized criminal are murder, manslaughter, assault and battery, and burglary." In the six cases shown in Figure 1, "burglary" makes up 60 percent of the strikes listed (20 out of 33). The 1929 report was the last time the NYSCC vigorously defended the Baumes Law.[46]

The seams of the law finally began to unravel in the wake of a series of riots in two New York State prisons, Clinton and Auburn, at the beginning of the year, and an unprecedented stock market crash at the end. Lewis Lawes, Sing Sing's popular and influential warden, a key player in expanding rehabilitative prison management through sports, recreation, movies, radio, and other privileges, led the fight against the Baumes Law. He had a personal stake in the matter, since he had forty-nine Baumes lifers imprisoned at Sing Sing. Impressed by the fact that Lawes's facility did not have a riot and the warden's ability to run an orderly prison with high inmate morale, Governor Roosevelt ordered a review of the Baumes Law and signaled that he would support repeal. In 1930, Roosevelt announced a $30 million investment in improving New York prisons, including money for athletics, education, and job training.[47]

This was good news indeed. The bad news was that blacks were not among the beneficiaries of the new state monies. Prison administrators excluded African Americans from much of the rehabilitative programming. Calling Dannemora Prison in upstate New York a "hell hole," black prisoners made a rare breakthrough in the press

by drawing attention to the darkening color line. John Thomas, a former black prisoner, stated: "The colored there only get jobs in . . . the weave shops and cotton shops and those shops are death traps . . . . A colored man is not allowed to work in any of the shops where he can learn a trade, it makes no difference what he knows about the trade . . . . They are not allowed on the baseball team nor in the band."[48]

Tales of rampant racism and discrimination in New York's prisons were well known to prison officials years before Governor Roosevelt's reforms. In 1927, black prisoners drew statewide attention to discrimination in workshops, leading some observes to conclude that black men did not have an equal chance to "take their place side by side with their white fellow prisoners once both are freed. Thus the colored men in prison . . . are made even more desperate by their worse lot to improve themselves during prison life." In spite of calls for Roosevelt's predecessor, Governor Al Smith, to launch an investigation, he made little progress.[49]

Officials at the national headquarters of the National Association for the Advancement of Colored People (NAACP) began to monitor the situation more closely after white prisoners killed forty-year-old Henry Williams at Auburn prison in October 1929. Prison officials claimed that Williams died from a preexisting heart condition, not from the beating. Black inmates vehemently disagreed, calling the official story "all wrong." In a jointly written statement, they maintained that Williams "died from the effect of the beating we gets in here from the white inmates of Auburn prison and the prison official know all about it as the warden Mr. E. S. Jennings of this prison approve of all the wrong in here that is done to the colored inmates." Black prisoners also revealed that members of the Mutual Welfare League—an organization of inmate self-governance that epitomized Progressive reform efforts to empower white male prisoners—were directly responsible for Williams's death: "[T]hey have . . . the league room that is the place where all the dirty work is done at . . . . [Williams] is not the only one that has been beat up in the league room by the league or officials. It is on average about 2 or 3 a month that is taken in and beat up." They ended their letter with another call for a gubernatorial investigation.[50]

At precisely the same moment when Roosevelt was about to double down on earlier Progressive investments in the "manly citizenship" of white prisoners, black prisoners were trapped in a "vicious circle" of neglect, discrimination, and abuse.[51] As African Americans protested, complained, and physically defended themselves against racism in the New York criminal justice, the system turned a deaf ear. From the governor's office to the warden's mansion to the Mutual Welfare

League's "room," the stigma of "undeserving criminal" became more synonymous with, and a more durable sign of, blackness.

The change in tone within New York's criminal justice system after the riots, and the renewed shift away from simply warehousing the white working-class in "medieval" prisons, throws into sharp relief that decriminalization was for whites only. George Kirchwey, the former warden turned reformer and prisoner advocate, continued to highlight the dehumanizing effects of mandatory sentencing, the horrors of this early moment of mass incarceration (at least as some contemporary critics understood it), and the folly of incapacitation. "Far too many people are committed to prison," Kirchwey stated at a Wesleyan University conference on crime, where he shared the stage with a former white convict, Jack Black. Both criticized the Baumes Law in Black's words as one of "the worst laws ever passed."[52] The dynamic duo of Kirchwey and Black, the ex-warden and ex-convict, powerfully demonstrates the currency of white privilege among "deserving criminals" of the Prohibition era. They and many others attempted to shut down the prison pipeline as a conscious act of racial nepotism, of looking out for their own.

As the recession took hold and the Great Depression lurked around the corner, white juries nullified verdicts by refusing to convict white defendants. Law-abiding citizens joined forces with law and order types, advocating for reform. In one celebrated case, Mary Walsh, a white "mother of three," as emphasized in the headlines, was sentenced to life for stealing. But immediately upon conviction, an ad hoc organization of suburban white women pleaded for clemency, along with the prosecutor in her case. Indeed, Governor Franklin D. Roosevelt with Eleanor Roosevelt's support granted many similar pleas.[53] In 1932, on the eve of his departure to the White House, Roosevelt put an end to the Baumes Law by amending its harshest provision from mandatory life to a minimum fifteen years to life. It was a remarkable reversal in just six years during the nation's first war on crime. By historical comparison, almost two decades have passed since the 1994 three-strikes laws were passed, with no end in sight. As David Cole argues, "there aren't such calls today" for reversing mass incarceration policies "because its disparate effects leave the majority off the hook."[54] When they were "on the hook," politicians amended the four-strikes law and repealed Prohibition a year later.

Through the 1920s and 1930s, a steady stream of reports and NAACP press releases of police brutality in Harlem, and black prisoner abuse across New York State filled newspapers without any of the same political or cultural currency attending the successful campaign against the "vindictive" Baumes Law.[55] Fewer people seemed to care what happened to black men or women accused of crime,

convicted under the Baumes Law, or abused in prison. However, this was not just about the fate of a minority population. Rather, it was also about the reconfiguration of race and crime in the Prohibition era. More expansive racial privileges within the northern criminal justice arena—victimization, rehabilitation, and decriminalization—redrew the boundaries of "deserving" and "undeserving" criminals, and thereby reshaped racial identities. The children of the foreign born became more "white," and whites became less "criminal." Under Franklin D. Roosevelt's gubernatorial watch, the New Dealization of white criminality came early to New York's urban white working class. Yet for African Americans, the mark of criminality moved closer to indelibility. Racism in New York's criminal justice system, including false arrests of black suspects, made it more likely that African Americans would be convicted as Baumes lifers, but less likely that they would benefit from clemency or from early release, as was true for several whites who successfully fought their convictions as improper from the 1940s to the 1960s.[56]

The Baumes legacy of racial privilege in claiming the right to be, and being seen as, a victim of punitive and destructive crime-control policies would continue for decades. Late in the 1960s, New York's four-strikes law, long since repealed, was being remembered for its harshness. A 1967 *New York Times* editorial remarked: "The whole history of law enforcement proves that vindictive penalties are self-defeating. New York's State experience with the severe Baumes laws of a generation ago demonstrated that juries will not convict, even when the guilt of the accused is plain, if they feel the prospective punishment is disproportionate to the crime."[57] And yet, the Rockefeller drug laws, aimed squarely at black and brown drug dealers, not white bootleggers, were just a few short years from arriving.

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