

REBECCA GOLDSTEIN

The Politics of Decarceration

Prisoners of Politics: Breaking the Cycle of Mass Incarceration

BY RACHEL ELISE BARKOW

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ABSTRACT. In *Prisoners of Politics*, Rachel Barkow convincingly argues that the criminal-justice system is deeply broken: the United States's incarceration rate is the highest in the world, and there is little evidence that this system, with all its devastating human and monetary costs, is contributing to improved public safety. *Prisoners of Politics* argues that at the root of this broken system is electoral politics, and that elected officials (legislators, prosecutors, and judges) will tend toward punitiveness. The book proposes a range of reforms, most notably the use of expert criminal-justice policymakers who would be insulated from the electoral process and devoted to ensuring that the system promotes public safety and avoids arbitrariness. The introduction of expertise can certainly help make the criminal-justice system less punitive, and policymakers should heed the book's detailed policy recommendations.

However, this Review argues that electoral politics are more likely than the book suggests to help bring about criminal-justice reform. There is nothing inherent about electoral participation's punitive influence. To the contrary, we might be at the dawn of a new era of electorally motivated criminal-justice reform. In the past decade, reform has become orthodoxy in the Democratic Party and has been embraced by significant parts of the Republican Party. Recent grassroots mobilization and subnational elections provide hope that criminal-justice reformers can achieve significant gains through the electoral process. Additionally, original public-opinion analysis shows that younger Americans are less punitive than their older counterparts, and evidence suggests that tomorrow's electorate might be less punitive than the electorate of the late twentieth century. For those reasons, this Review argues that electoral politics can offer a path forward for those who seek to end mass incarceration.

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BOOK REVIEW CONTENTS

INTRODUCTION	448
I. MASS INCARCERATION: SYMPTOMS, DIAGNOSIS, AND POSSIBLE CURES	451
A. Symptoms	451
B. Diagnosis	453
C. Proposed Reforms	456
II. CHANGES IN THE NATIONAL PARTIES	460
III. RECENT ELECTORAL DEVELOPMENTS AND THE SUCCESS OF PROREFORM INTEREST GROUPS	466
IV. PUBLIC OPINION AND THE CHANGING ELECTORATE	472
CONCLUSION	480
APPENDIX	481

INTRODUCTION

In *Prisoners of Politics*, Rachel Barkow puts electoral politics front and center in debates over criminal-justice reform. *Prisoners of Politics* is the most recent contribution to an important scholarly conversation about how mass incarceration came to be and how it might be undone.¹ The book's focus on electoral politics distinguishes it from other recent contributions. Elected officials, *Prisoners of Politics* argues, will be structurally biased toward punitive criminal-justice policies because "tough-on-crime" rhetoric is simpler than "smart-on-crime" rhetoric, and it appeals to a public inclined toward fear due to racist attitudes and the media's focus on violent crime.² A main impediment to criminal-justice reform, then, is the class of elected officials—legislators, prosecutors, and judges—who see punitiveness as their only path to electoral success. If mass incarceration is caused by too much direct electoral input, the argument goes, perhaps it can be undone by placing criminal-justice policy outside the domain of electoral politics. The road to a less punitive system, the book contends, lies in expert criminal-justice policymakers who are insulated from electoral politics and can oversee and check the work of prosecutors.

This is a powerful story. It resonates with the demagoguery that has long characterized public debate about criminal justice, from President Nixon's "law-and-order" campaign to President George H.W. Bush's Willie Horton ad to President Trump's fearmongering about urban crime. Given the success of these strategies, how can the American voter be trusted to end mass incarceration?

Tempting as it may be to treat electoral politics as antithetical to decarceration, this Review argues that there is nothing inherent about electoral participation's punitive influence on criminal-justice policy. Drawing on political-science research, including original public-opinion analysis, I argue that *more* electoral politics—not less—may lead the United States toward criminal-justice reform and an end to mass incarceration. I argue that the apparent tension between electoral politics and an end to mass incarceration is highly contingent—and unlikely to last forever. Three political trends signal possible changes in the years ahead.

1. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

2. RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 110–11 (2019). Indeed, political scientist Peter Enns has argued that increasingly punitive public opinion was a key cause of the rising incarceration rate in the second half of the twentieth century. PETER K. ENNS, *INCARCERATION NATION* (2016).

First, the national politics of criminal justice have changed since the late twentieth century: nearly all national Democrats now support criminal-justice reforms, as do significant parts of the Republican coalition. Second, grassroots movements and activism have already been successful in electing reform-minded officials and in spurring reform at the local, county, and state levels. Third, the electorate will likely become less punitive in the years ahead: today's young Americans have come of age under very different conditions than did their older counterparts, and as younger Americans age into greater political participation, we can expect the electorate as a whole to become less punitive. So long as we do not see a return to the crime spike of the late twentieth century, these three trends likely portend a less punitive future.

If these trends hold, it is possible to envision widespread public support for an end to mass incarceration. Indeed, the peak of mass incarceration is likely already behind us. The nationwide incarceration rate is falling.³ Forty-two states have successfully reduced their incarceration rates relative to high-water marks in the late 1990s or 2000s.⁴ Seven of those states have reduced their incarceration populations by more than twenty percent, and an additional fifteen have done so by more than ten percent.⁵ Recent years have witnessed more than a dozen states closing prisons or considering doing so, after decades of expansion.⁶ A recent book by criminologists Todd Clear and Natasha Frost seeks to document and explain “the end of the great penal experiment that took place between 1970 and 2010.”⁷ “The decline in the overall correctional population is but the current realization of a longer trend,” they note, showing how “the steam behind [mass incarceration] has been declining for some time.”⁸

Greater electoral participation might even hasten the end of mass incarceration. General efforts to expand the voting base might be particularly effective in enfranchising voters who are younger or nonwhite, the very voters likely to support an end to mass incarceration. Reformers have several tools at their disposal:

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3. See Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?*, SENT’G PROJECT (Mar. 8, 2018), <https://www.sentencingproject.org/publications/can-wait-75-years-cut-prison-population-half> [<https://perma.cc/C4D7-79QE>].
 4. *See id.*
 5. *See id.*
 6. Nicole D. Porter, *On the Chopping Block: State Prison Closings*, SENT’G PROJECT (Sept. 15, 2011), <https://www.sentencingproject.org/wp-content/uploads/2016/01/On-the-Chopping-Block-2011.pdf> [<https://perma.cc/A2NE-VYMK>].
 7. TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* 6 (2014).
 8. *Id.* at 4.

lifting formal restrictions on voting,⁹ narrowing turnout gaps,¹⁰ and eliminating off-cycle elections for prosecutors¹¹ would all likely result in an electorate friendlier to reform. Thus, these tools – some of which have long been part of a general prodemocracy agenda – would assist in ending mass incarceration. Even without these changes, however, recent years have shown the beginnings of a trend away from punitiveness and toward reform.

A disclaimer is in order before proceeding. This Review is not an intervention in a recent debate over what has been called “democratic criminal-justice reform.” Proponents of that movement have called for “mak[ing] criminal justice more community focused and responsive to lay influences”¹² and have proposed reforms such as an expanded use of citizen juries in service of making the system less punitive.¹³ Critics have responded that greater public participation of this character is unlikely to result in progressive outcomes.¹⁴ The debate between the pro- and antidemocratizers concerns which form of decision-making – highly local citizen participation or technocracy – is structurally more likely to produce a less punitive criminal-justice system. This Review takes no stance on that debate.¹⁵

This Review instead focuses on aspects of democracy largely absent from the current debate: elections, parties, and interest groups. It is concerned with how those forces shape the selection of criminal-justice policymakers, including legislators, prosecutors, and judges. It does not focus on the promise or peril of greater local public participation in criminal-justice decision-making, but rather

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9. See, e.g., Matt A. Barreto et al., *The Racial Implications of Voter Identification Laws in America*, 47 AM. POL. RES. 238 (2019) (finding that people of color are less likely than whites to have a valid ID, even controlling for a host of relevant variables).
 10. See generally BERNARD L. FRAGA, *THE TURNOUT GAP: RACE, ETHNICITY, AND POLITICAL INEQUALITY IN A DIVERSIFYING AMERICA* (2018) (analyzing the enduring racial and ethnic disparities in voter turnout).
 11. See Vladimir Kogan et al., *Election Timing, Electorate Composition, and Policy Outcomes: Evidence from School Districts*, 62 AM. J. POL. SCI. 637, 645 (2018) (finding that older voters are significantly overrepresented, relative to younger voters, in low-turnout special elections).
 12. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017).
 13. See Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017) (arguing, in a wide-ranging white paper jointly signed by nineteen scholars of criminal law, that more democratization will lead to a less punitive criminal-justice system).
 14. See, e.g., John Rappaport, *Some Doubts About ‘Democratizing’ Criminal Justice*, 87 U. CHI. L. REV. (forthcoming 2020) (manuscript at 6), <https://ssrn.com/abstract=3418059> [<https://perma.cc/2SXW-SKQK>].
 15. Indeed, the American criminal-justice system will almost inevitably contain both democratic and bureaucratic elements. See, e.g., Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3391800> [<https://perma.cc/LT5Y-A95X>].

analyzes the electoral forces that determine who becomes a criminal-justice policymaker. It argues that the current national political and public-opinion climate is congenial to a rise in anti-incarceration reforms emerging from electoral politics.

The Review proceeds in four Parts. Part I summarizes *Prisoners of Politics*, including the book's assessment of the causes and consequences of mass incarceration and the book's proposals for reform. The remainder of the Review discusses each of the three reasons why electoral politics are less hostile to decarceration than the book suggests. Part II discusses changes in both the Democratic and Republican parties at the national and state levels; Part III reviews recent electoral outcomes at the state, county, and local levels; and Part IV analyzes public-opinion data suggesting the emergence of a less punitive electorate in the future. A brief conclusion follows.

I. MASS INCARCERATION: SYMPTOMS, DIAGNOSIS, AND POSSIBLE CURES

Prisoners of Politics is organized in three parts: it begins by setting out the symptoms of mass incarceration, it then diagnoses those symptoms, and it proceeds to propose several possible cures.

A. Symptoms

The first and longest part of the book masterfully pulls together several decades of research from criminology, sociology, economics, and law on the causes and consequences of mass incarceration. Anyone not already persuaded that the U.S. criminal-justice system is deeply broken—in that it does not effectively serve the goals of rehabilitation or public safety—is likely to be convinced by the book's deft combination of quantitative, qualitative, and narrative evidence. The book's bill of particulars includes a chapter accomplishing each of the following:

- Showing how individuals can end up convicted of crimes that have sentences and collateral consequences out of proportion to the seriousness of their underlying behavior. In many states, labels like “sex offender” and “drug trafficker” are extraordinarily broad, at times including flashers, streakers, and teenagers having consensual sex with their partners (in the former case) and low-level drug dealers or even users (in the latter case).¹⁶

16. BARKOW, *supra* note 2, at 21, 23.

- Illustrating state legislatures' passage of punitive sentencing laws and mandatory minimums;¹⁷ summarizing the extensive research showing that longer sentences do not deter crime; and explaining the severe negative externalities to lengthy incarceration, including for the families of those incarcerated.¹⁸
- Chronicling the shocking lack of rehabilitative services in prisons and jails, and presenting evidence showing that conditions of confinement and the removal of individuals from family and community influences can make them *more* likely to commit future crimes upon release.¹⁹
- Showing that there are no meaningful mechanisms for reviewing and changing criminal-justice policies that have already been implemented—either for individuals who might be ready to leave prison before the maximum term of their sentence is finished, or for charging, sentencing, and parole policies that seem to threaten rather than improve public safety.²⁰
- Documenting the severe collateral consequences of conviction—particularly felony conviction—for the future housing and employment prospects of individuals with a criminal record.²¹

A notable strength of these chapters is that they tackle the normative failings of the current system along with the positive failings. Nearly all social-scientific research into the criminal-justice system takes a self-consciously positive approach to its research questions, treating normative issues as outside its scope.²² *Prisoners of Politics*, by contrast, undertakes the urgent task of evaluating the justness of many aspects of the criminal-justice system. This task is especially important in studying criminal punishment because coldly positive assessments can only speak to punishment's successes or failures as a matter of deterrence or rehabilitation. Yet many Americans might instead hold a retributivist view of the

17. See *id.* at 30-33.

18. *Id.* at 46-49.

19. *Id.* at 61-67, 69-72.

20. *Id.* at 75-78.

21. *Id.* at 89-96.

22. Economic analyses of labor-market consequences of incarceration, for example, are very common and widely cited. See, e.g., Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759 (2015); Steven Raphael, *Incarceration and Prisoner Reentry in the United States*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 192 (2011). There is also ample research on the relationship between incarceration and crime rate. See, e.g., Magnus Lofstrom & Steven Raphael, *Incarceration and Crime: Evidence from California's Public Safety Realignment Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 196 (2016).

purpose of punishment. With respect to this retributivist view, the book argues the following with respect to sentence length:

While it may not be possible to identify the one correct punishment for a particular crime if the theory is retribution, it is possible to identify disproportionate punishments based on how they stack up against other punishments for crimes where there is a consensus view that they are more or less serious . . . [I]f it turns out the person selling drugs is getting more time than the person who commits murder, there would be broad consensus that this punishment scheme fails as a matter of retributive justice.²³

The book then provides examples of criminal sentences that fail miserably on this metric, including life sentences for nonviolent offenders, sentences for drug crimes and gun possession that exceed sentences for violent crimes, and child-pornography sentences that exceed the length of child-molestation sentences.²⁴ Similarly, the book correctly identifies the shift away from rehabilitative goals and toward retributive and incapacitative goals in the American justice system as “a landmark shift in penal philosophy,”²⁵ and it appeals to the universal principle that “adjusting [decisions] to new information” is “the path to better decision-making in just about every area of life.”²⁶ By taking on normative questions typically excluded by social-scientific research into the American criminal-justice system, the book constitutes an important addition to existing work on the failings of that system.

B. Diagnosis

The book next turns to the task of diagnosis: how did such a broken system come to be? It blames the current system’s ills on an overreliance on policymaking via direct democracy as opposed to a more technocratic approach: “the shift to mass incarceration is directly linked to the shift from leaving judgments to professionals to allowing the masses to set policies directly.”²⁷ The book makes this argument by examining the interests and incentives of four interconnected sets of actors: the public, the media, elected officials, and interest groups.

23. BARKOW, *supra* note 2, at 39.

24. *Id.* at 40.

25. *Id.* at 56.

26. *Id.* at 73.

27. *Id.* at 105.

Public opinion is at the center of the book's skepticism of democratic criminal-justice policymaking. "People fear first and foremost for their safety, and crime threatens their sense of security."²⁸ The public is "receptive to get-tough crime policies" largely because it is uninformed and thus "tends to overestimate the threat of crime."²⁹ This occurs in part because of psychological tendencies—such as the natural bias toward remembering and being fearful of high-profile crimes³⁰—but the media plays a leading role in shaping public opinion about crime. The book rightly describes the media as "obsessed with crime stories," citing statistics about the dominance of news stories about violent crime in both local and national media outlets.³¹ As a result, the book notes, "the public often believes crime rates are up, even when the actual rates are decreasing."³²

Elected officials both respond to and help reinforce this public-opinion environment. Elected officials respond to the public's fear of crime by pursuing tough-on-crime policies. Criminal-justice scholars in the late twentieth century observed that politics "rewards 'toughness more than smartness'"³³ and that "[p]oliticians fear endorsing any position that an opponent can characterize as 'soft on crime.'"³⁴ And elected officials contribute to a vicious circle by

28. *Id.* at 106.

29. *Id.*; see also *id.* at 108-09 ("The crimes featured in the media become salient to voters when they consider what candidates to support, leading them to favor those candidates who talk about being tough The public is left with the misleading impression that there is a constant threat from violent crime without much of an understanding of the full range of what is criminalized. The media also fail to provide them with an understanding of the pros and cons of various approaches to addressing the range of criminal behavior There is no [media] attention to or coverage of what happens to individuals during those long sentences and whether they come out worse than when they went in.").

30. See *id.* at 106.

31. See *id.* at 106-07. Research on this topic includes JEREMY H. LIPSCHULTZ & MICHAEL L. HILT, CRIME AND LOCAL TELEVISION NEWS: DRAMATIC, BREAKING, AND LIVE FROM THE SCENE (2002); and Valerie J. Callanan, *Media Consumption, Perceptions of Crime Risk and Fear of Crime: Examining Race/Ethnic Differences*, 55 SOC. PERSP. 93 (2012). A Pew Research Center report showed that crime is second (after weather) among topics that Americans are interested in their local news covering. *For Local News, Americans Embrace Digital but Still Want Strong Community Connection*, PEW RES. CTR. 40 (Mar. 26, 2019), https://www.journalism.org/wp-content/uploads/sites/8/2019/03/PJ_2019.03.26_Local-News_FINAL.pdf [https://perma.cc/X5HS-DXR2].

32. BARKOW, *supra* note 2, at 107.

33. *Id.* at 111 (quoting LORD WINDLESHAM [DAVID J.G. HENNESSY], POLITICS, PUNISHMENT, AND POPULISM 77 (1998)).

34. *Id.* (quoting Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 932 (1991)).

“echo[ing] the media’s accounts of crime, which in turn exacerbates public misperceptions.”³⁵ This dynamic began in the late 1960s when, in response to rising crime, elected officials from both major parties began to campaign on tough-on-crime platforms that themselves further inflamed fear of crime and criminals.³⁶

These public-opinion dynamics have certainly helped create mass incarceration, but they are not alone in sustaining it. The book rightly highlights a constellation of interest groups that advocate for harsh criminal policies at every level of government.³⁷ Some of these interest groups, such as prosecutors’ associations and victims’ rights groups, are ideologically invested in punitiveness. Others, like law-enforcement officers’ unions, corrections officers’ unions, and private prison corporations, have financial interests in mass incarceration. Together, these interest groups help sustain mass incarceration.

This bleak political landscape – punitive public opinion, fueled by sensationalist crime reporting, politicians who fear being viewed as soft on crime, and antireform interest groups – helps explain the growth of mass incarceration. It helped account for the passage of legislation from the 1970s to 1990s that increased sentence lengths, imposed mandatory minimum sentences, and limited parole.³⁸ But are the political dynamics that created mass incarceration *intrinsic* to American democracy, or are they instead a *contingent* feature of particular circumstances?

Prisoners of Politics argues that these forces are intrinsic: “[T]he underlying political dynamics that produce excessive punishment have been evident from the nation’s early days. The public’s concern for security, and the incentives for elected officials to show responsiveness to it, are nothing new.”³⁹ The book concludes that “[i]f reform is sought directly through the political process, it will achieve only so much before running up against . . . political forces.”⁴⁰ It acknowledges the decline of incarceration rates since 2009 due to state and federal criminal-justice reform efforts, but it argues that these “achievements have been slight” and that “[s]trong political and psychological forces remain decidedly in favor of long sentences and an expansive criminal state.”⁴¹

Parts II to IV of this Review contest these claims, arguing that changing political dynamics – including changes in both major parties and shifts in public

35. *Id.*

36. *See id.* at 106–07.

37. *See id.* at 112–15.

38. *See id.* at 129.

39. *Id.* at 125.

40. *Id.* at 124.

41. *Id.*

opinion—may well portend a less punitive future. The forces that the book describes may ultimately come to be seen not as intrinsic laws of politics, but rather as relics of a high-crime era and particular political responses to that era. Before turning to that argument, however, I turn to the book's proposed reforms.

C. *Proposed Reforms*

The book's third and final part features proposed reforms, which focus in significant part on checking the power of prosecutors. The book's reform proposals stem from its powerful insight that prosecutors have, since the 1970s, come to resemble a regulatory agency for the regulation of criminal behavior. But prosecutors lack crucial checks that are present in other regulatory contexts.

Consider the differences between regulation of criminal behavior by a prosecutor's office and regulation of pollutants by the Environmental Protection Agency (EPA). The EPA is subject to various legal checks to ensure that its decisions' benefits exceed their costs and to ensure that it does not act in an arbitrary or capricious manner. Prosecutors, by contrast, are free to pursue incarceration even when it is likely to be criminogenic, and they are free to charge harshly in some cases and leniently in others without any public justification. "The result," the book persuasively argues,

is that prosecutors escape scrutiny for their enforcement choices. The judiciary does not review their choices, and the political process takes little interest because the vast majority of the electorate, who are unaffected by prosecutions, pays little attention "Without judicial oversight to speak of or any internal constraints, the potential for arbitrary enforcement is high" [While c]ivil regulatory agencies face oversight from other executive actors . . . [n]o such review is in place for prosecutors. And with parole gone and clemency a nonstarter in many jurisdictions, no other executive actor takes a second look at prosecutorial decision-making in individual cases, much less undertakes an analysis of the way in which the broader policies are operating and interacting.⁴²

This insight is both novel and critical. The book's critique that prosecutorial power is largely unchecked and unaccountable to public-safety outcomes leads to three reform proposals, each of which is likely to be successful if attempted.

A first proposal is a massive reduction in prosecutorial power: "There is no reason prosecutors should be in charge of criminal justice policies that do not

42. *Id.* at 135-36 (footnotes omitted) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1027 (2006)).

involve charging and prosecuting criminal conduct.”⁴³ The book highlights sentencing, forensic science, parole, and clemency as areas of policy that have been effectively co-opted by prosecutors’ offices, even though legislatures never formally granted prosecutors a policymaking role over those areas.⁴⁴

A second proposal is for the creation of “another institutional actor or actors with the relevant expertise and access to data and empirical information to coordinate and oversee criminal-justice policies throughout a state or at the federal level.”⁴⁵ This agency would coordinate and review charging and sentencing policy; at present, local police and prosecutors are able to externalize costs to state corrections departments, and criminal-justice policy is largely not subject to expert analysis or review. This proposal takes inspiration from several successful state sentencing commissions; if designed correctly, sentencing commissions can “harness politicians’ concerns with fiscal discipline and pit them against the impulses to lengthen sentences.”⁴⁶

Beyond sentencing commissions, the book recommends that expert agencies that advise or create criminal-justice policy be “insulate[d] . . . from immediate and irrational political pressures.”⁴⁷ It also recommends that they be “require[d] . . . to establish the empirical basis for their rules and policies, to explain how they are consistent with public safety objectives, and to face judicial review of those decisions.”⁴⁸ Outside officials would review decisions to ensure “that the policies are cost-benefit justified and that equally effective but less costly alternatives are considered.”⁴⁹

It is easy to imagine scenarios where a criminal-justice-policy agency of the sort that the book proposes — “insulate[d] . . . from immediate and irrational political pressures”⁵⁰ — would lead to more sensible and just policies. If prosecutors’ offices were overseen by an agency that required them to “explain how the[ir

43. *Id.* at 145.

44. *See id.* at 145-47.

45. *Id.* at 166.

46. *Id.* at 174.

47. *Id.* at 178.

48. *Id.*

49. *Id.* at 180. The book ends by reviewing the extensive legal scholarship showing that “[t]he federal courts in general and the Supreme Court in particular have weakened constitutional protections against government excess in criminal law,” through narrow interpretations of the Sixth and Eighth Amendments. *Id.* at 186. The book recommends that, when it comes to selecting new federal judges, “[i]t is critical to change the composition of a bench dominated by prosecutors.” *Id.* at 200.

50. *Id.* at 178.

decisions] are consistent with public safety objectives,”⁵¹ policy would come to reflect the fact that “there is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs,”⁵² and in fact, “little evidence of a specific deterrent effect arising from the experience of imprisonment [exists] compared with experience of noncustodial sanctions.”⁵³

The early days of sentencing reform in Connecticut are illustrative. A successful 2004 bill to reduce prison overcrowding had resulted in a three percent prison population decrease by the end of 2005, but the prison population increased eight percent from 2006 to 2007, after three high-profile, grisly murders by a pair of parolees led the state briefly toward more punitive parole and sentencing policy.⁵⁴ An agency of the sort that the book proposes could have marshalled evidence to show that increased punitiveness in the aftermath of high-profile murders would almost certainly not move the needle in improving public safety.

Indeed, prosecutors are so deeply unaccountable to public-safety outcomes at present that at least some prosecutors openly discount the importance of those outcomes at all. Instead, they favor a self-conception of a victim’s advocate. Brian Radigan, the Assistant District Attorney of Cuyahoga County, Ohio, in 2015 described himself as an advocate for victims and their families, not as having a broader responsibility to making good policy. “You know deterrence, and laws, and how to fix communities, and all that type of stuff—I try not to think of it that way,” Radigan said. He continued:

I think it’s just we’re better off worrying about our victims here. Because when I’m talking to somebody that had their son killed, or their daughter

51. *Id.*

52. Daniel S. Nagin, *Deterrence in the Twenty-First Century: A Review of the Evidence*, 42 CRIME & JUST. 199, 201 (2013).

53. *Id.* at 201; see also Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 83 (2013) (summarizing research showing that studies of the deterrent effect of increases in already-long prison sentences find at most a modest deterrent effect).

54. Dennis Schrantz et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENT’G PROJECT 9-10 (Sept. 5, 2018), <https://www.sentencingproject.org/wp-content/uploads/2018/08/Decarceration-Strategies.pdf> [https://perma.cc/E9AV-YUY4].

killed, or mother raped and murdered, they don't care about the deterrent. They don't give a shit about somebody else's kid, or whatever, they care about what am I doing for them.⁵⁵

For Radigan, as for many other prosecutors,⁵⁶ existing incentives and attitudes – without any checks – only lead to punitiveness.⁵⁷

Prisoners of Politics correctly identifies key problems in the current criminal-justice system and presents valuable recommendations for remedying those problems. The book's recommendations would almost certainly improve a badly broken system, and I am sympathetic to its recommendations about the *content* of reform. In particular, the shocking lack of coordination among the nation's more than 23,000 prosecutor's offices, and the externalization of correctional costs from counties to states, would certainly be solved by the book's proposed "institutional actor or actors with the relevant expertise and access to data and empirical information to coordinate and oversee criminal justice policies throughout a state or at the federal level."⁵⁸ But this Review challenges the book's skepticism of electoral politics as a *means* of pursuing reform. The book argues that electoral politics helped create mass incarceration, that prosecutors have too much power and need to be checked by more technocratic forces, and that moving criminal-justice policymaking away from electoral politics is the best (if not the only) path toward decarceration. The remainder of this Review challenges that final argument – and only that final argument. Recent political trends and public-opinion data provide reason for hope that electoral politics, despite its past failings, can provide a path toward ending mass incarceration.

55. *Episode 5: Pleas Baby Pleas*, SERIAL (Oct. 11, 2018), <https://serialpodcast.org/season-three/5/transcript> [<https://perma.cc/BY8V-KV3S>].

56. In a similar spirit, Theo Stamos, a former Arlington, Virginia prosecutor who lost reelection to a progressive challenger, told *Politico*, "I'm not going to apologize for being a prosecutor. I think it's very misguided to back away from the actual work of prosecution because . . . it's what gives voice to victims of crime." John F. Harris & Shawna Chen, *The Prosecutor's Race Making Arlington Interesting*, POLITICO MAG. (June 10, 2019), <https://www.politico.com/magazine/story/2019/06/10/soros-prosecutor-arlington-county-227101> [<https://perma.cc/W9KM-TFNU>].

57. For more discussion of incentives toward punitiveness among elected prosecutors and judges, see, for example, Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107 (2007); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004); and David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451 (2018).

58. BARKOW, *supra* note 2, at 166.

II. CHANGES IN THE NATIONAL PARTIES

American democracy “is unthinkable save in terms of the [political] parties.”⁵⁹ The Democratic and Republican parties are the defining political actors on the state and federal levels. If the political process ever produces criminal-justice reform, it will be because one or both parties make reform a priority. For decades, neither showed much appetite for criminal-justice reform. Today, however, reform is ascendant in both: it has become orthodoxy in the Democratic Party, and there are substantial reform-oriented elements in the Republican Party. These dynamics—which are relatively recent—provide reason for hope that the political system may be able to enact significant criminal-justice reforms.

Understanding the trajectories of the parties’ approaches to criminal justice begins with the crime wave of the late 1960s to the early 1990s. During that period, the national homicide rate was consistently double what it had previously been, and the rate of juvenile and drug-related homicides skyrocketed.⁶⁰ Rates of assault and property crime reached historic highs as well.⁶¹ Major American cities developed reputations as unsafe places for residents and tourists alike.⁶² Prominent commentators warned that crime and violence would only continue, making many cities all but unlivable.⁶³

Both political parties embraced the view that the crime wave demanded punitive policy measures. Republican politicians led the shift to the “tough-on-crime” rhetoric that became ubiquitous among officeholders in the 1970s and

59. E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 1 (1942).

60. PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* 3-4 (2018).

61. MICHAEL FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S*, at 125 (2007); Ayşe İmrohoroğlu, Antonio Merlo & Peter Rupert, *What Accounts for the Decline in Crime?*, 45 *INT’L ECON. REV.* 707 (2004).

62. To provide but one arresting example: in 1975, a pamphlet prepared by a New York City group that included police officers cautioned visitors that “[u]ntil things change, stay away from New York City if you possibly can,” warning that “[t]he incidence of crime and violence in New York City is shockingly high and getting worse every day.” Kevin Baker, “Welcome to Fear City”—*The Inside Story of New York’s Civil War, 40 Years On*, *GUARDIAN* (May 18, 2015, 6:43 AM EDT), <https://www.theguardian.com/cities/2015/may/18/welcome-to-fear-city-the-inside-story-of-new-yorks-civil-war-40-years-on> [<https://perma.cc/X2DR-STKK>].

63. See SHARKEY, *supra* note 60, at 4.

1980s.⁶⁴ President Nixon launched the War on Drugs,⁶⁵ which President Reagan expanded,⁶⁶ and Republican governors nationwide signed harsh sentencing laws.⁶⁷ Republicans invented the sort of fearmongering about public safety that can impede criminal-justice reform through the political process.⁶⁸ But Democrats were far from blameless, playing a critical role in building the carceral state.⁶⁹ President Johnson's War on Crime was a Democratic project,⁷⁰ many Democrats supported the War on Drugs,⁷¹ and President Clinton's 1994 crime bill contained a historically broad range of punitive provisions.⁷² The carceral state, in short, was long a bipartisan project.

In recent years, however, both parties have begun to change their tune.⁷³ Among Democrats, there has been a strong change in approach to criminal justice since the U.S. prison population peaked in 2008. President Obama was the

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64. DAVID DAGAN & STEVEN M. TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION 15-29 (2016).
65. Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319> [<https://perma.cc/4W7A-TV6F>].
66. Perhaps most notably, the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.), created a framework of mandatory minimum sentences.
67. See, e.g., Brian Mann, *The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013, 3:04 AM ET), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> [<https://perma.cc/7JPP-4NX5>] (describing the Rockefeller drug laws).
68. See BARKOW, *supra* note 2, at 6.
69. See generally MURAKAWA, *supra* note 1 (arguing that in strengthening the federal state to protect civil rights, liberals also helped create mass incarceration).
70. See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2017) (discussing the Law Enforcement Assistance Act of 1965 and the rise of federal anticrime funding).
71. MURAKAWA, *supra* note 1, at 118.
72. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.) (creating a host of new federal crimes, including nonviolent crimes; allocating \$9.7 billion in funding for prisons; and expanding the federal death penalty). President Clinton invoked public safety to justify these reforms: "Gangs and drugs have taken over our streets and undermined our schools. Every day, we read about somebody else who has literally gotten away with murder." William J. Clinton, Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994 (Sept. 13, 1994), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 1540 (1994).
73. See, e.g., Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html> [<https://perma.cc/PK54-NXQ9>] (describing criminal-justice reform proposals laid out by politicians and political activists from both the left and the right in a

first sitting President to visit a federal prison; he vocally supported a less punitive justice system and took a variety of steps (mostly within the executive branch) to reform the federal system.⁷⁴ Contemporary Democrats largely view the Clinton crime bill as a failure.⁷⁵ The overwhelming majority of 2020 Democratic presidential candidates have expressed support for a strong reform agenda: eliminating cash bail, fully legalizing marijuana, and eliminating the state and federal death penalties.⁷⁶ A proreform consensus has emerged in the Democratic Party.

This political consensus has translated into policy changes in states led by Democratic governors. In Connecticut, Governor Dannel Malloy championed criminal-justice reform during his term in office, from 2011 to 2019. He led efforts to “repeal[] the death penalty, close[] prisons, decriminalize[] small amounts of marijuana, raise[] the age from 16 to 18 at which defendants are tried as adults for most crimes, streamline[] the process for parole and pardons, and reduce[] penalties for nonviolent drug crimes.”⁷⁷ During Malloy’s term, Connecticut fully closed four correctional facilities and closed sections of four additional facilities.⁷⁸ His Democratic successor, Ned Lamont, has promised to continue these efforts.⁷⁹ New York State – under a Democratic governor and unified

2019 Brennan Center report, which collectively “show how profoundly the debate has changed,” revealing “a wholesale reversal of [the] bipartisan consensus” on criminal enforcement).

74. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017); see also Grainne Dunne, *Four Ways the Obama Administration Has Advanced Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (May 19, 2016), <https://www.brennancenter.org/blog/four-ways-obama-administration-has-advanced-criminal-justice-reform> [https://perma.cc/5FQ5-SQ7B].
75. Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed as Terrible Mistake*, NPR (Sept. 12, 2014, 3:32 AM ET), <https://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake> [https://perma.cc/LPC9-BBWW].
76. Perry Bacon, Jr., *Democratic Candidates Answer Yes-or-No Questions About Criminal Justice Policy*, FIVETHIRTYEIGHT (June 20, 2019, 6:56 AM), <https://fivethirtyeight.com/features/which-democratic-candidates-are-the-most-progressive-on-criminal-justice-issues> [https://perma.cc/BE55-9FXK].
77. Clarice Silber, *Malloy Leaves Office as National Leader on Criminal Justice Reform*, CONN. MIRROR (Jan. 4, 2019), <https://ctmirror.org/2019/01/04/malloy-leaves-office-national-leader-criminal-justice-reform> [https://perma.cc/G7XC-VYSR].
78. Christine Stuart, *Malloy Closes Another Prison as Inmate Population Declines*, NEW HAVEN REG. (Nov. 8, 2017, 2:28 PM EST), <https://www.nhregister.com/news/article/Malloy-closes-another-prison-as-inmate-population-12339203.php> [https://perma.cc/A3Z3-RZ7Z].
79. Mark Pazniokas, *Lamont Promises to Be a Criminal Justice Reformer*, CONN. MIRROR (Dec. 18, 2018), <https://ctmirror.org/2018/12/18/lamont-promises-criminal-justice-reformer> [https://perma.cc/LAF4-RFGF].

Democratic control of the state legislature—passed significant progressive criminal-justice reforms in 2019, eliminating cash bail for many crimes and adding new requirements for speedy criminal trials.⁸⁰ Washington Governor Jay Inslee led efforts to retroactively reduce criminal sentences for marijuana possession (which became legal in Washington in 2012)⁸¹ and to require de-escalation training for police officers.⁸²

The emergence of a proreform wing of the Republican Party is perhaps less well-known, but no less important. Political scientists David Dagan and Steven Teles have documented in detail what they describe as “a remarkable and unexpected retreat from what was once a conservative article of faith . . . a breakthrough that has opened the door to the most significant sentencing reform movement America has seen in decades.”⁸³

Since the end of the crime wave, a determined combination of libertarians, budget hawks, and evangelical activists have taken advantage of falling crime rates to successfully challenge the Republican Party’s longstanding tough-on-crime positions.⁸⁴ The nonprofit advocacy organization Right on Crime was founded in 2007,⁸⁵ and it quickly gained supporters throughout the Republican coalition. Conservative leaders as varied as Jeb Bush, Mike Huckabee, Newt Gingrich, Jim DeMint, Ed Meese, Russell Moore, and Grover Norquist⁸⁶ have all signed on to Right on Crime’s statement of principles, which declares that “[c]onservatives are known for being tough on crime, but we must also be tough on criminal-justice spending.”⁸⁷ Conservative support for reform, especially with respect to drug crimes, has almost certainly been buttressed by the opioid

80. Dan M. Clark, *Lawmakers Reshape NY Criminal Justice System, with Varied Reactions from DAs, Defenders*, N.Y. L.J. (Apr. 1, 2019, 1:34 PM), <https://www.law.com/newyorklawjournal/2019/04/01/lawmakers-reshape-ny-criminal-justice-system-with-varied-reactions-from-das-defenders> [<https://perma.cc/UT6G-TZ27>].

81. *Marijuana Justice Initiative*, OFF. GOVERNOR WASH., <https://www.governor.wa.gov/marijuanajustice> [<https://perma.cc/4MX4-CP48>].

82. WA Governor’s Office, “*It Was Time for Something to Transpire and Change*” – *Two Divided Sides Come Together for Historic Change to State’s Deadly Force Law*, MEDIUM (Feb. 4, 2019), <https://medium.com/wagovernor/it-was-time-for-something-to-transpire-and-change-two-divided-sides-come-together-for-historic-f830d93aa2c> [<https://perma.cc/CM6F-SVM2>].

83. See DAGAN & TELES, *supra* note 64, at xii-xiii.

84. See *id.*

85. *About Right on Crime*, RIGHT ON CRIME, <https://rightoncrime.com/about> [<https://perma.cc/9E9M-CQ2H>].

86. *Right on Crime Signatories*, RIGHT ON CRIME, <https://rightoncrime.com/right-on-crime-signatories> [<https://perma.cc/497X-CF24>].

87. *Statement of Principles*, RIGHT ON CRIME, <https://rightoncrime.com/statement-of-principles> [<https://perma.cc/HQ9G-GTD5>].

crisis,⁸⁸ which has caused some conservatives to prioritize treatment and rehabilitation over criminal justice in treating opioid users.⁸⁹

The most significant instance of conservative support for criminal-justice reform is Koch Industries' activism on the issue. The Koch brothers were active on criminal-justice issues for decades. In 2011, the National Association of Criminal Defense Lawyers' annual Defender of Justice Award went to the billionaire conservative activist Charles Koch, who had been making seven-figure donations to the group for close to a decade by that time.⁹⁰ Koch Industries increased its public support for prison and sentencing reform in 2015, when it announced a partnership with the American Civil Liberties Union and the NAACP (among other left- and right-wing groups) to form a new bipartisan criminal-justice-reform

88. Rose A. Rudd et al., *Increases in Drug and Opioid Overdose Deaths—United States, 2000–2014*, 64 MORBIDITY & MORTALITY WKLY. REP. 1378 (Jan. 1, 2016), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm> [<https://perma.cc/6WSY-BCN3>] (“Since 2000, the rate of deaths from drug overdoses has increased 137%, including a 200% increase in the rate of overdose deaths involving opioids (opioid pain relievers and heroin).”).

89. There is broad consensus among journalists and academics writing about the ongoing crisis of opiate use that the white American public is broadly taking a more compassionate, medicalized view of the problem than it took during the crack epidemic of the 1980s. See, e.g., German Lopez, *When a Drug Epidemic's Victims Are White*, VOX (Apr. 4, 2017, 8:00 AM EDT), <https://www.vox.com/identities/2017/4/4/15098746/opioid-heroin-epidemic-race> [<https://perma.cc/Q2GU-W8B2>]; Jesse Mechanic, *When a Drug Epidemic Hit White America, Addiction Became a Disease*, HUFFPOST (July 10, 2017, 12:10 PM EDT), https://www.huffpost.com/entry/when-a-drug-epidemic-hit-white-america-addiction-became_b_5963a588e4b08f5c97d06b9a [<https://perma.cc/ZZ3E-LEK8>]. Media content analysis by political scientist Brielle Harbin reveals that newspaper coverage was more “compassionate in tone” and “placed a greater emphasis on non-punitive policy responses” to drug use during the opioid crisis compared to the crack epidemic. Brielle M. Harbin, *The Contingency of Compassion: Media Depictions of Drug Addiction* 21–22 (Nov. 17, 2018) (unpublished manuscript) (on file with author). White families whose children have died from drug overdoses are turning to political advocacy for increased budgets for drug rehabilitation and treatment, “altering the language around addiction [and] prodding government to treat [drug addiction] not as a crime, but as a disease.” Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <https://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> [<https://perma.cc/QZ2L-GMYX>]. The newly compassionate, medicalized media and public understanding around opiate addiction as compared to previous public understandings of drug addiction has important consequences for criminal justice politics more generally, especially among Republicans.

90. Molly Ball, *Do the Koch Brothers Really Care About Criminal Justice Reform?*, ATLANTIC (Mar. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615> [<https://perma.cc/4JLH-EFH5>].

advocacy group called the Coalition for Public Safety.⁹¹ President Obama publicly praised Koch Industries for these efforts.⁹² Koch Industries also lobbied for the First Step Act,⁹³ a federal criminal-justice-reform bill that passed the House and Senate with unanimous Democratic support and majority Republican support and was signed into law by President Trump in 2018.⁹⁴

At the state level, too, Republicans have successfully implemented reforms. Consider Republican Governor Nathan Deal's overhaul of the criminal-justice system in Georgia. During Deal's term in office, from 2011 to 2019, he reduced overall prison entries by nearly nineteen percent and Black prison entries by thirty percent.⁹⁵ Deal's reforms were motivated both by his fiscal conservatism—he prevented construction of what would have been a \$264 million new state prison—and by his personal beliefs in the possibilities for human redemption. In December 2018, he tearfully told the *Atlanta Journal-Constitution*, “Those kinds of stories you hear of transformed lives, of restored family units, of children’s custody that had been lost but is now restored—ooh—those get to me. They are such a clear illustration that reforms can work and there is a possibility to redeem people.”⁹⁶ Georgia is far from alone among conservative states in enacting reforms: “States such as Louisiana and Mississippi that reveled in their own home-grown, ‘get-tough’ politics now lead the nation in prison downsizing.”⁹⁷ While not long ago “even a hint of a policy that might have resulted in prison releases or reductions in sentencing would have spelled certain political death,”⁹⁸ today conservatives champion efforts at decarceration.

91. Zach Carter, *Kochs Embedded in Major Rift on Bipartisan Criminal Justice Reform*, HUFFPOST (Nov. 25, 2015, 5:29 PM ET), https://www.huffpost.com/entry/criminal-justice-reform-koch_n_56560fboe4b079b2818a13fe [<https://perma.cc/C7VM-ZYM2>]; *Partners*, COALITION PUB. SAFETY, <https://www.coalitionforpublicsafety.org/partners> [<https://perma.cc/8MT9-83QT>].

92. See Colleen McCain Nelson & Gary Fields, *Obama, Koch Brothers in Unlikely Alliance to Overhaul Criminal Justice*, WALL ST. J. (July 16, 2015, 8:03 PM ET), <https://www.wsj.com/articles/obama-koch-brothers-in-unlikely-alliance-to-overhaul-criminal-justice-1437090737> [<https://perma.cc/N4EA-VH45>].

93. First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

94. See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://perma.cc/9M3E-BMY9>].

95. See Bill Rankin, *Nathan Deal's Criminal Justice Reforms Leave Lasting Legacy*, ATLANTA J.-CONST. (Dec. 21, 2018), <https://www.ajc.com/news/local/deal-criminal-justice-reforms-leaves-lasting-legacy/ZMwb2vG7C4LurWoFESw46O> [<https://perma.cc/RW4B-RQEW>].

96. *Id.*

97. CLEAR & FROST, *supra* note 7, at 5.

98. *Id.*

Political-science research provides reason to think that the proreform orientations of many Democrats and Republicans are likely to shape the views of partisans from both parties. In his influential 2013 book, *Follow the Leader? How Voters Respond to Politicians' Policies and Performance*, political scientist Gabriel Lenz uses extensive analysis of public-opinion data to argue that

[voters] rarely shift their votes to politicians who agree with them – even when a policy issue has just become highly prominent, even when politicians take clear and distinct stances on the issue, and even when voters know these stances. Instead . . . voters first decide they like a politician for other reasons, and then adopt his or her policy views . . . Moreover, voters seem to follow rather blindly, adopting a particular politician's specific policies even when they know little or nothing of that politician's overall ideology.⁹⁹

If Lenz's assessment of how the American public tends to form its policy views is correct, we should fully expect that public support for reform will grow. As elites in both parties embrace criminal-justice reform, loyal partisans will adopt proreform attitudes as well.

III. RECENT ELECTORAL DEVELOPMENTS AND THE SUCCESS OF PROREFORM INTEREST GROUPS

An emerging proreform movement is influencing local and state elections, showing that electoral participation can be a force for criminal-justice reform at the subnational level. Recent years have witnessed the elections of reform-minded prosecutors and judges, victories for reformers on a host of referenda, and reform packages passed through state legislatures. These developments show that, when the public mobilizes around criminal justice, it is possible for the electoral process to produce change.

There are many forces that push the American criminal-justice system toward punitiveness. White racism no doubt plays a major role, if not the predominant role.¹⁰⁰ Recent scholarship has also shown the role of African American political activism in creating a more punitive justice system in the 1970s and

99. GABRIEL S. LENZ, *FOLLOW THE LEADER? HOW VOTERS RESPOND TO POLITICIANS' POLICIES AND PERFORMANCE* 3 (2013). *But see* Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 857 (2014) (arguing that public attitudes about crime and punishment "have led, not followed, political elites").

100. *See e.g.*, Khalil Gibran Muhammad, *The Condemnation of Blackness* (2011).

1980s.¹⁰¹ And a diverse constellation of interest groups, ranging from district attorneys' associations to telecom companies, have had the means and the motive to preserve the status quo.¹⁰²

Despite these forces, there is evidence of a new—and electoral—movement for criminal-justice reform. Prosecutors who campaigned on progressive criminal-justice reform have recently been elected in Boston,¹⁰³ Houston,¹⁰⁴ Chicago,¹⁰⁵ Brooklyn,¹⁰⁶ Orlando,¹⁰⁷ Philadelphia,¹⁰⁸ and San Francisco.¹⁰⁹ The most progressive rhetoric has come from Philadelphia District Attorney Larry Krasner, who has described himself as “a public defender with *pow-er*.”¹¹⁰ Krasner's election led to immediate policy reforms: the office changed its approach to charging in drug, prostitution, and retail-theft cases; it began encouraging the

101. See FORMAN, *supra* note 1; MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY* (2015).

102. See *supra* note 37 and accompanying text.

103. Ally Jarmanning, *Democrat Rachael Rollins, the Next Suffolk County DA, Is First Woman of Color to Hold the Post*, WBUR (Nov. 6, 2018), <https://www.wbur.org/news/2018/11/06/democrat-rachael-rollins-the-next-suffolk-county-da-is-first-woman-of-color-to-hold-the-post> [<https://perma.cc/Z3M6-CMHM>].

104. Alan Greenblatt, *Law and the New Order: A Fresh Wave of District Attorneys Is Redefining Justice*, GOVERNING (Apr. 2017), <https://www.governing.com/topics/public-justice-safety/gov-district-attorneys-houston-criminal-justice-reform.html> [<https://perma.cc/L88W-76ZC>].

105. Hal Dardick & Matthew Walberg, *Kim Foxx Declares Win in Cook County State's Attorney's Race*, CHI. TRIB. (Nov. 8, 2016), <https://www.chicagotribune.com/politics/ct-cook-county-states-attorney-kim-foxx-election-met-1109-20161108-story.html> [<https://perma.cc/9TWD-LX8K>]; see also Micah Uetricht, *The Criminal Justice Crusade of Kim Foxx*, CHI. READER (Mar. 9, 2016), <https://www.chicagoreader.com/chicago/kim-foxx-bid-unseat-anita-alvarez-cook-county/Content?oid=21359641> [<https://perma.cc/MQL3-524W>].

106. Tom Robbins, *Took a Plea? Brooklyn's District Attorney Will Support Your Parole*, MARSHALL PROJECT (Apr. 17, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/17/took-a-plea-brooklyn-s-district-attorney-will-support-your-parole> [<https://perma.cc/Q22V-5SU6>].

107. Tammie Fields, *Aramis Ayala Proud of Challenging Florida Laws' "Status Quo"*, SPECTRUM NEWS (May 29, 2019, 5:43 PM), <https://www.mynews13.com/fl/orlando/news/2019/05/29/aramis-ayala-proud-of-challenging-florida-laws---status-quo-> [<https://perma.cc/D5CM-Q8JE>].

108. Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, PHILA. INQUIRER (Nov. 7, 2017), <https://www.inquirer.com/philly/news/politics/city/larry-krasner-wins-race-for-philly-da-20171107.html> [<https://perma.cc/XNK7-HSEP>].

109. Joe Eskenazi, *George Gascón May Be This City's Most Progressive DA Yet. Voters Might Still Send Him Packing*, MISSION LOCAL (July 10, 2018), <https://missionlocal.org/2018/07/george-gascon-may-be-this-citys-most-progressive-da-yet-voters-might-still-send-him-packing> [<https://perma.cc/D4Q8-B38H>].

110. Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/76CY-YH5W>].

use of diversion programs; and it changed its practices with respect to sentencing and probation recommendations.¹¹¹

The election of a progressive prosecutor does not guarantee policy change as dramatic or as swift as the reform advocates who campaigned for a progressive candidate would have hoped,¹¹² but even when change is slow, the constituencies to which these new prosecutors are accountable and the measures on which they evaluate their own success are progressive. In Boston, the nonprofit advocacy organization CourtWatch MA is observing Suffolk County courtrooms to make sure that charges are in fact not being filed for the fifteen minor offenses new District Attorney Rachael Rollins announced her office would decline to prosecute,¹¹³ and Rollins reported being pleased with their efforts at accountability. “We are fortunate to have CourtWatch [MA], which is showing up every day—and I’m not joking, I mean it,” she said. “I’m excited the community’s involved. And very candidly, I’m sometimes learning from CourtWatch what it is that’s happening in my office.”¹¹⁴ Many of CourtWatch MA’s volunteers also volunteered for Rollins’s campaign,¹¹⁵ making them an important interest group

111. See Memorandum from Larry Krasner, Dist. Att’y of Phila., to Staff, *New Policies Announced February 15, 2018* (Feb. 15, 2018) (on file with author). These changes have given rise to significant criticism. See Chris Palmer, *Larry Krasner’s First Year as Philly DA: Staff Turnover, Fewer Cases, Plenty of Controversy*, PHILA. INQUIRER (Jan. 6, 2019), <https://www.inquirer.com/news/larry-krasner-philadelphia-district-attorney-staff-reform-cases-first-year-20190106.html> [<https://perma.cc/A4N7-6VWQ>].

The Krasner experience demonstrates that entrenched forces in prosecutors’ offices will at times resist the agendas of elected progressive prosecutors from within, and that progressive prosecutors will often have to win internal battles in order to successfully advance a reform agenda. Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/7VUW-5NA9>]. Nonetheless, the election of reform-minded prosecutors, even if not a guarantor of dramatic changes overnight, can be a powerful force for reform.

112. See, e.g., Greg Groogan, *County Judge, District Attorney Clash Over Request for 102 New Prosecutors*, FOX 26 HOUS. (Jan. 29, 2019, 11:31 PM CST), <http://www.fox26houston.com/news/county-judge-district-attorney-clash-over-request-for-102-new-prosecutors> [<https://perma.cc/8DMZ-SXYJ>].

113. CourtWatch MA’s spokeswoman told Boston’s local public radio station that the group was disappointed: “Every week, we see the same racial disparities, the same number of prosecutions for charges on [Rollins’s] ‘do-not-prosecute’ [list].” Walter Wuthmann, *Rachael Rollins, 100 Days In: What Has Changed, and What Hasn’t, Under the Reformer DA*, WBUR (Apr. 12, 2019), <https://www.wbur.org/news/2019/04/12/rachael-rollins-first-100-days> [<https://perma.cc/76XD-QA2B>].

114. *Id.*

115. *Id.*

for her.¹¹⁶ A political incentive to keep promises to *decrease* punitiveness via prosecutorial discretion reverses one of the logics that William Stuntz, in an influential article, argued creates “a one-way ratchet” of increasing punitiveness: that “prosecutorial discretion tends to alter the interest-group forces at work in criminal lawmaking; [and] the biggest effect is probably to disable groups that might push against broader criminalization.”¹¹⁷

Prisoners of Politics rightly acknowledges that the elections of progressive prosecutors represent evidence that “with enough financial support to get out their message, challengers [in prosecutorial elections] have been able to win on progressive agendas.”¹¹⁸ But the book argues that, in general, “[t]he most straightforward way for a politician to demonstrate [their commitment to public safety] is to advocate for longer sentences for criminal conduct.”¹¹⁹ Time will tell whether Krasner and like-minded prosecutors nationwide will be able to successfully ratchet down the levels of incarceration in their jurisdictions – and, if so, whether they will be able to win reelection. It seems highly plausible, though, that this new wave of prosecutors marks a new and powerful electoral means of pursuing criminal-justice reform.

Besides prosecutorial elections, progressive criminal-justice reform can be advanced through elections for a wider range of offices.¹²⁰ Many of the same groups that campaigned for Krasner in Philadelphia subsequently organized around an election to fill seven vacant seats on the Philadelphia Court of Common Pleas and the Philadelphia Municipal Court.¹²¹ One of the organizers for

116. See SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995).

117. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509, 547 (2001).

118. BARKOW, *supra* note 2, at 160.

119. *Id.* at 110.

120. This argument runs contrary to the book’s claim that prosecutorial elections “may allow more room for change [than other types of elections],” *id.* at 154, because district attorneys “are responsible for the single issue of criminal law enforcement [which] means that voters do not have to rank various policy preferences [but rather] can focus solely on the candidates’ approach to criminal law enforcement and criminal justice policies.” *Id.* at 155; see also *id.* (noting that “because the [prosecutorial] election is local, voters may have a better sense of actual crime rates and practices and how they affect their lives and communities” and concluding that “[t]hus if a significant portion of the community is unhappy with how these policies affect them, they could use their votes to get prosecutors who will implement better practices and policies”).

121. Samantha Melamed, *These Reform Groups Helped Elect DA Larry Krasner. Now They Want to Swing Philly’s Judicial Elections*, PHILA. INQUIRER (Apr. 9, 2019), <https://www.inquirer.com/news/philly-judicial-accountability-table-elections-common-pleas-court-criminal-justice-reform-20190409.html> [<https://perma.cc/3BNP-EXFS>].

that campaign gained experience on the successful campaign to elect the self-described democratic socialist and prison abolitionist Franklin Bynum as a judge in Harris County, Texas.¹²² In the same cycle in which Bynum was elected, the 2018 midterms, all fifty-eight other contested judicial elections in Harris County were won by Democrats who replaced Republicans. Nineteen of these candidates were Black women who campaigned together on a platform of criminal-justice reform.¹²³

Similar dynamics have taken hold in some mayoral and city council elections. In Chicago, the Black Lives Matter-led protests of a Chicago police officer's shooting of Laquan McDonald and the city government's handling of the shooting's aftermath led directly to former Mayor Rahm Emanuel's decision not to seek reelection.¹²⁴ Activist groups built on that victory by supporting pro-police-reform candidates in Chicago aldermanic elections in 2019.¹²⁵

The ballot-initiative process, too, has produced major victories for criminal-justice reform. The 2018 elections alone provide several examples. In Florida, voters passed two constitutional amendments: one to restore voting rights to convicted felons, and another to allow future sentencing reforms to apply retroactively.¹²⁶ In Louisiana, voters decided that only unanimous juries may convict defendants of felonies (raising the threshold from ten votes out of twelve).¹²⁷ In Washington, voters overwhelmingly passed an initiative to lower the standard

122. *See id.*

123. *See* Michael Barajas, *The Midterms Trigger a Seismic Shift in Harris County's Courts*, TEX. OBSERVER (Nov. 8, 2018, 11:43 AM CST), <https://www.texasobserver.org/the-midterms-trigger-a-seismic-shift-in-harris-countys-courts> [<https://perma.cc/EE2Z-RXPT>].

124. *See* Sam Charles, *Laquan McDonald Changed Everything for Mayor Rahm Emanuel—and the Police*, CHI. SUN TIMES (May 17, 2019, 1:35 PM CDT), <https://chicago.suntimes.com/city-hall/2019/5/17/18628153/mayor-rahm-emanuel-chicago-police-department-changes-laquan-mcdonald-cpd> [<https://perma.cc/N7UC-XAHC>]; Dahleen Glanton, *Laquan McDonald Was Shot Down by Police, and He Took the Mayor's Career Down with Him*, CHI. TRIB. (Sept. 6, 2018, 5:00 AM), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-rahm-emanuel-dahleen-glanton-laquan-mcdonald-20180905-story.html> [<https://perma.cc/DT8S-M6YH>].

125. *See* John Byrne, *In Wake of Jason Van Dyke Conviction, Young Activists Now Seek to Oust Chicago Aldermen Aligned with Mayor Rahm Emanuel*, CHI. TRIB. (Oct. 10, 2018, 3:45 PM), <https://www.chicagotribune.com/politics/ct-met-activists-aldermen-van-dyke-20181010-story.html> [<https://perma.cc/9GMW-WJYZ>].

126. *See* Udi Ofer, *The 2018 Midterm Elections Were a Big Win for Criminal Justice Reform Ballot Initiatives*, ACLU (Nov. 7, 2018, 5:30 PM), <https://www.aclu.org/blog/smart-justice/2018-midterm-elections-were-big-win-criminal-justice-reform-ballot-initiatives> [<https://perma.cc/7EV4-YHL4>].

127. *See id.*

for conviction in police use-of-force cases from malice to reasonableness.¹²⁸ In Michigan, voters legalized marijuana possession.¹²⁹

Each of these examples illustrates the power of pro-reform interest groups. Krasner's campaign, for example, was supported by an interest group called Coalition for a Just District Attorney, which included supporters "from the city's African-American, Latino and L.G.B.T.Q. communities and represented the Philadelphia populations most affected by the criminal-justice system: immigrant families, incarcerated teenagers, sex workers and victims of violent crimes."¹³⁰ These Philadelphians "joined forces with the young Bernie Sanders ground troops of Reclaim Philadelphia and the local chapter of the ACLU and the racial-justice group Color of Change" to help elect Krasner.¹³¹ Similar interest groups and political coalitions have fueled the other pro-reform elections in cities and states nationwide. These groups will position themselves for future successes as they rack up electoral victories, grow their grassroots bases, share best practices, raise funds, and assemble coalitions of sympathetic elected officials.

Recent electoral victories show that well-organized and well-financed groups can successfully enact criminal-justice reforms through the electoral process. When the public mobilizes on criminal-justice reform, the election of district attorneys, judges, and local political officials who support reform follows. And, as proreform interest groups become stronger and gain further victories, the same politicians who today fear appearing "soft on crime" might come instead to fear appearing overly harsh on crime. A mobilized public can similarly pass ballot initiatives to make the system less punitive. To be sure, civic engagement by a punitive public will lead to punitive outcomes. But recent events show that reform-minded constituencies can be successful in the political arena as well.

128. See Steve Miletich, *Initiative 940, Modifying Law Regulating Police Use of Deadly Force, Passes with Strong Support*, SEATTLE TIMES (Nov. 6, 2018, 8:26 PM), <https://www.seattletimes.com/seattle-news/politics/initiative-940-modifying-law-regulating-police-use-of-deadly-force-holds-strong-lead-in-tuesdays-returns> [https://perma.cc/VCA8-6HNP].

129. *New Marijuana Laws: Michigan, Missouri, and Utah*, DISA GLOBAL SOLUTIONS (Nov. 9, 2018), <https://disa.com/blog/new-marijuana-laws-michigan-missouri-and-utah> [https://perma.cc/6SE9-NK3A].

130. Austen, *supra* note 110.

131. *Id.*

IV. PUBLIC OPINION AND THE CHANGING ELECTORATE

Despite the book's pessimism about public opinion, the public's attitudes have become less punitive as crime has declined. Moreover, original public-opinion analysis shows that young Americans are considerably less punitive than their older counterparts, a fact that portends an even less punitive electorate in the years to come.

Public-opinion data shows a clear trend toward a less punitive public since 1994, the second year of a historic crime decline that has continued to this day.¹³² The number of Americans who reported that they believed crime had gotten worse in the past year dropped from 73% in 1994 to 45% in 2012.¹³³ The number of Americans who reported that they worried about crime and violence "a great deal" dropped from 62% in 2001 to 47% in 2013.¹³⁴ These changes have been accompanied by changes in political attitudes: the number of respondents who reported that the courts deal with criminals "not harshly enough" dropped from 85% in 1994 to 62% in 2012.¹³⁵ These attitudes are still more fearful and punitive than an environment of historically low crime might have created, but the shifts in public opinion since the early 1990s are enormous—far greater than changes in public opinion on most other hot-button political issues.¹³⁶

My own original public-opinion analysis shows not just that opinions have changed, but that younger Americans are less punitive than older Americans. This is true within each racial group: younger whites are less punitive than older whites, younger Blacks are less punitive than older Blacks, younger Hispanics are less punitive than older Hispanics, and younger Asians are less punitive than older Asians. But it's also true that—even holding age constant—Blacks and Hispanics are somewhat less punitive than whites, and they are also much younger

132. See, e.g., *THE CRIME DROP IN AMERICA 2* (Alfred Blumstein & Joel Wallman eds., 2d. ed. 2005) (documenting and explaining "the remarkable decline in violence that began in the early 1990s").

133. See Mark D. Ramirez, *Americans' Changing Views on Crime and Punishment*, 77 *PUB. OPINION* 1006, 1006, 1008 tbl.2.

134. *Id.* at 1009 tbl.3.

135. *Id.* at 1011 tbl.7.

136. By way of contrast, on the question of abortion, there has been virtually no change in aggregate opinion over the same period. In 1994, forty-five percent of General Social Survey (GSS) respondents agreed that "it should be possible for a pregnant woman to obtain a legal abortion if the woman wants it for any reason"; that number remained virtually unchanged (at forty-two percent) in 2012. Tom W. Smith & Jaesok Son, *General Social Survey 2012 Final Report: Trends in Public Attitudes Towards Abortion*, NORC U. CHI. 3 (May 2013), http://www.norc.org/PDFs/GSS%20Reports/Trends%20in%20Attitudes%20About%20Abortion_Final.pdf [<https://perma.cc/GW4N-XSWE>].

than whites on average. All this means that (1) the future electorate will consist of a greater share of Blacks and Hispanics than does the present one and (2) the younger whites, Blacks, Hispanics and Asians who will slowly replace their older coethnics in the electorate are all significantly less punitive than their respective older coethnics. For these reasons, the future electorate is very likely to be less punitive than the electorate of the past.

To explore the relationship between age and criminal-justice policy, I look to three original survey items in a large, nationally representative survey.¹³⁷ I wrote these survey items, each of which asks respondents to indicate whether they support or oppose a series of policy proposals.

A first survey item asks whether respondents support or oppose “[e]liminat[ing] mandatory minimum sentences for non-violent drug offenders.” African Americans of all ages strongly support the proposal, but significant age gaps emerge among other racial groups. The youngest respondents (ages 18-29) are far more supportive than the oldest (ages 65 and over) of eliminating mandatory minimums. Among whites, the largest single racial group, 71% of the youngest respondents support eliminating mandatory minimums, as opposed to only 58% of the oldest respondents. Similar gaps exist for Hispanic Americans (67% as compared to 53%) and Asian Americans (67% as compared to 51%).

A second survey item asks whether respondents support “[i]ncreas[ing] prison sentences for felons who have already committed two or more serious or violent crimes.” Given that this question concerns violent felons, the public as a whole is more punitive than in response to the question about nonviolent offenders. But age gaps remain: in all four racial groups, the oldest respondents are significantly more supportive of increasing sentences than the youngest respondents; that gap is 14 percentage points for whites, 20 percentage points for Blacks, 13 percentage points for Hispanic Americans, and 8 percentage points for Asian Americans. Again, younger Americans are less punitive than their older counterparts, even within racial groups.

Age gaps are largest for a third survey item, which asks if respondents would support “[i]ncreas[ing] the number of police on the street by 10%, even if it means fewer funds for other public services.” Here, age differences in opinion are much larger than race differences in opinion, despite extensive scholarship

137. The Cooperative Congressional Election Survey (CCES) is a longstanding survey program that operates as a partnership between a consortium of academic researchers and the private survey firm YouGov/Polimetrix. The questions discussed here were fielded in the 2016 version of the survey and were answered by over 64,000 respondents. For details about the CCES sampling methodology, see *CCES Guide*, HARV. DATAVERSE (Aug. 16, 2017), <https://dataverse.harvard.edu/file.xhtml?persistentId=doi:10.7910/DVN/GDF6Zo/RK0ONG&version=4.0> [<https://perma.cc/9PB2-LMCV>].

on the relationship between racial attitudes and policing¹³⁸ and no previous analysis of the role of age. Among all four race groups, only 32% to 41% of the youngest respondents supported more police on the street, while 66% to 77% of the oldest respondents supported the same proposal.

The magnitudes of these attitude differences across age groups are drastic. But age is correlated with many other demographic variables potentially relevant to views about criminal justice—such as income, parental status, or home-ownership status—so I conducted analyses to consider whether age differences in public opinion could be accounted for by other, age-correlated demographic variables. Multiple-regression analysis shows that, even accounting for a host of demographic and other variables,¹³⁹ age is still a critical cleavage in public opinion on criminal justice. Even accounting for other variables, the oldest Americans

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138. See, e.g., DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996); Susan E. Howell et al., *Black Cities/White Cities: Evaluating the Police*, 26 *POL. BEHAV.* 45 (2004); Jon Hurwitz & Mark Peffley, *Playing the Race Card in the Post-Willie Horton Era: The Impact of Racialized Code Words on Support for Punitive Crime Policy*, 69 *PUB. OPINION Q.* 99 (2005); Amie M. Schuck & Dennis P. Rosenbaum, *Global and Neighborhood Attitudes Toward the Police: Differentiation by Race, Ethnicity and Type of Contact*, 21 *J. QUANTITATIVE CRIMINOLOGY* 391 (2005); Ronald Weitzer & Steven A. Tuch, *Determinants of Public Satisfaction with the Police*, 8 *POLICE Q.*, 279 (2005); Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 *SOC. PROBS.* 305 (2004); Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 *SOC. FORCES* 1009 (2005).
139. The regression included variables for race, partisan identification, home-ownership status, respondent-county urbaneness, education level, income, gender, presence of a minor child in the respondent's home, and the respondent's county's 2014 violent-crime rate. All of this data is contained in *CCES Guide 2016*, *supra* note 137, with two exceptions. First, data on urbanization came from 2013 calculation by the National Center for Health Statistics (NCHS), which creates six categories for counties, from the most urban to the most rural. Deborah D. Ingram & Sheila J. Franco, *2013 NCHS Urban-Rural Classification Scheme for Counties*, U.S. DEP'T HEALTH & HUM. SERV. (Apr. 2014), https://www.cdc.gov/nchs/data/series/sr_02/sr02_166.pdf [<https://perma.cc/FGZ8-TS67>]. For the purpose of this study, I consolidate these categories down to three: (1) micropolitan and noncore counties, indicating small towns and rural areas; (2) medium and small metropolitan counties, indicating ex-urban areas and medium-sized cities (metropolitan statistical areas (MSAs) with under 1 million residents); and (3) large central and large fringe metropolitan counties (MSAs with over 1 million residents), indicating urban areas. Second, data on violent-crime rates came from the FBI's Uniform Crime Reporting (UCR) program, a voluntary reporting program by local law enforcement agencies. *Uniform Crime Reporting (UCR) Program*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/services/cjis/ucr> [<https://perma.cc/C98R-WVSA>]. The UCR has four violent crime categories: homicide and nonnegligent manslaughter, robbery, aggravated assault, and forcible rape. *Violent Crime, 2018 Crime in the United States*, FED. BUREAU INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/violent-crime> [<https://perma.cc/6KHV-PCGW>].

are 9% less likely than the youngest Americans to support eliminating mandatory minimums, 14% more likely than the youngest Americans to support harsher sentences, and 32% more likely than the youngest Americans to support additional policing. (Full regression results are reported in Appendix Table 1.)

These results raise the question of whether the age-group differences observed in the survey data arise from *age* differences or *cohort* differences. Social scientists often ask whether observed differences between older and younger individuals are due to age (that is, numeric age), or birth cohort (that is, the generation of which an individual is a member).¹⁴⁰ If a young person's attitude is a product of age, we can expect it to change as they get older. If it is a product of cohort, we can expect it to remain more stable over the life course.

Age and cohort effects cannot be disentangled from cross-sectional data—that is, data from just one moment in time—because for a single year of data, age and cohort are exactly confounded.¹⁴¹ To determine whether the less punitive attitudes of young Americans were a product of age or cohort effects, I turned to the General Social Survey (GSS). I analyzed responses to two questions that have been asked in every survey year since 1984: one about whether government spends “too much, too little, or about the right amount” on law enforcement,¹⁴² and one about whether courts “deal too harshly or not harshly enough with criminals.”¹⁴³ In the multiple-regression analysis I present in Appendix Table 2, I include numeric age, birth cohort, and fixed effects for survey year to tease out the separate influences of age, cohort, and survey year on survey responses,¹⁴⁴ along with a variety of demographic controls.¹⁴⁵

This analysis reveals that birth cohort—not numeric age—shapes attitudes toward criminal justice. Numeric age has a near-zero association with the likelihood of a respondent reporting that the government spends “too little” on law enforcement or the likelihood of a respondent reporting that the courts in their

140. See, e.g., Yang Yang & Kenneth C. Land, *A Mixed Models Approach to the Age-Period-Cohort Analysis of Repeated Cross-Section Surveys, with an Application to Data on Trends in Verbal Test Scores*, 36 SOC. METHODOLOGY 75 (2006).

141. Among CCES 2016 respondents, for example, all of the 65-year-old respondents were born in 1950-1951. *CCES Guide 2016*, *supra* note 137.

142. GSS Data Explorer, *Law Enforcement – Version Y*, NORC U. CHI., <https://gssdataexplorer.norc.org/variables/203/vshow> [<https://perma.cc/978F-VSTL>].

143. *Courts: Courts Dealing with Criminals*, ICPSR, <https://www.icpsr.umich.edu/icpsrweb/NADAC/studies/35478/datasets/0001/variables/COURTS?archive=NADAC> [<https://perma.cc/X7VB-AQ5W>].

144. In so doing, I use the methodology developed in Yang & Land, *supra* note 140.

145. Controls include region, race, gender, home-ownership status, parenting status, income, and education level. The GSS did not start collecting non-white, non-Black race information until 2000. In the regression, the variable “Black” takes the value 1 if the respondent is Black and 0 for all other races.

area deal “not harshly enough” with criminals (labeled “punitive attitude” in the Table). But birth cohort is highly significant: respondents born between 1934 and 1946 were 6% more likely than respondents born between 1982 and 1994 to report that government spends “too little” on law enforcement, respondents born between 1946 and 1958 were 7% more likely, respondents born between 1958 and 1970 were 8% more likely, and respondents born between 1970 and 1982 were also 8% more likely. Similarly, for punitive criminal-justice attitudes, respondents born between 1934 and 1946 were 5% more likely than respondents born between 1982 and 1994 to report that the courts deal “not harshly enough” with criminals, respondents born between 1946 and 1958 were 4% more likely, respondents born between 1958 and 1970 were 7% more likely, and respondents born between 1970 and 1982 were 5% more likely.

These results clarify that the observed relationship between older age and support for punitive criminal-justice policies is not a function of numeric age, but having been born before 1982. This finding is consistent with Jonathan Simon’s hypothesis that millennials, who came of age in “a period of urban resurgence and a reduction in the aggressive war on drugs against black communities . . . [exhibit] very different penal behaviors and sensibilities, both at the personal and political level.”¹⁴⁶ Although this Review’s data analysis cannot illuminate the reasons why this birth cohort is so much more supportive of punitive criminal-justice policy than the cohort born after 1982, there are at least three possible explanations consistent with the available data.

First, older Americans lived through and remember the most recent crime wave in the United States, from the 1960s through the early 1990s, while younger Americans were born either at the tail end of the crime wave or once the crime drop had already begun.¹⁴⁷ The long period of increasing crime featured extensive media reporting on its causes and consequences.¹⁴⁸ A large number of

146. Jonathan Simon, *Millennials and the New Penology: Will Generational Change in the U.S. Facilitate the Triumph of Risk Rationality in Criminal Justice?*, in *CRIMINAL JUSTICE, RISK AND THE REVOLT AGAINST UNCERTAINTY* (John Pratt ed., forthcoming 2020) (manuscript at 6) (on file with author).

147. The FBI’s UCR data indicate that violent-crime rates rose from 161 per 100,000 persons in 1960 to 758 per 100,000 persons in 1991, and property crime rose from 1,726 per 100,000 persons to 5,140 per 100,000 persons over the same period. Crime rates then began a rapid downward trend, which has slowed but not stopped or reversed. See *Uniform Crime Reporting Statistics*, FED. BUREAU OF INVESTIGATION, <https://www.ucrdatatool.gov/index.cfm> [<https://perma.cc/76WE-VP6Q>].

148. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); Dennis T. Lowry et al., *Setting the Public Fear Agenda: A Longitudinal Analysis of Network TV Crime Reporting, Public Perceptions of Crime, and FBI Crime Statistics*, 53 J. COMM. 61 (2003).

Americans were victimized by crime during the crime wave.¹⁴⁹ It is no surprise that Americans who remember the crime wave would be more supportive of longer sentences and additional policing as compared to Americans who were either born after it concluded or who are too young to remember it. Social scientists have previously discovered the long-lasting effects of early political experiences. Andrew Gelman and Yair Ghitza, for example, use polling data from 1952 to 2012 to argue that “[t]he political events of a voter’s teenage and early adult years, centered around the age of 18, are enormously important in the formation of these long-term partisan preferences.”¹⁵⁰ Other work by political scientists has shown the importance of voters’ formative elections in shaping long-term voting behavior,¹⁵¹ and economists have shown that particular events during one’s youth (such as a recession) can have long-term effects on attitudes and behaviors.¹⁵² Similar effects may be at work in the criminal-justice domain, given the very different environments in which older and younger Americans came of age.

Second, for the current generation of younger Americans, the advent and spread of more aggressive policing and higher incarceration rates have coincided with the age at which they were (and are) most likely to become targets of police attention. The 1990s and early 2000s witnessed the spread of more aggressive policing¹⁵³ and increases in the U.S. prison population.¹⁵⁴ Younger Americans

149. According to data from the Bureau of Justice Statistics National Criminal Victimization Survey, there were 33.7 violent crimes per 1,000 Americans over age 12 in 1978, and 18.6 violent crimes per 1,000 Americans over age 12 in 2015. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NATIONAL CRIMINAL VICTIMIZATION SURVEY (1978); OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NATIONAL CRIMINAL VICTIMIZATION SURVEY (2015).

150. Yair Ghitza & Andrew Gelman, *The Great Society, Reagan’s Revolution, and Generations of Presidential Voting* (July 7, 2014) (unpublished manuscript), https://graphics8.nytimes.com/newsgraphics/2014/07/06/generations2/assets/cohort_voting_20140707.pdf [https://perma.cc/YM7W-J2DJ].

151. See, e.g., David O. Sears & Nicholas A. Valentino, *Politics Matters: Political Events as Catalysts for Preadult Socialization*, 91 AM. POL. SCI. REV. 45 (1997).

152. See Ulrike Malmendier & Stefan Nagel, *Depression Babies: Do Macroeconomic Experiences Affect Risk Taking?*, 126 Q.J. ECON. 373 (2011) (using consumer finance data from 1960 to 2007 to show differences in investment attitudes and risk-taking depending on whether the stock market was strong or weak in one’s formative years).

153. This more aggressive policing takes different forms and goes by different names, including proactive policing, broken-windows policing, and zero-tolerance policing. See, e.g., NAT’L ACADS. SCI. ENG’G & MED., *PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 1* (2018) (contrasting “proactive policing,” which developed in the late twentieth century, with traditional reactive policing).

154. NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1* (Jeremy Travis et al. eds., 2014).

are most likely to have borne the brunt of these changes: the modal arrest age during that period was 19 for murder, 21 for aggravated assault, 16 for simple assault, and 18 for robbery, burglary, larceny/theft, motor-vehicle theft, weapons-law violations, and drug possession or use.¹⁵⁵ It is reasonable to hypothesize that these individuals might oppose more aggressive criminal-justice policy partly as a result of their experience with the criminal-justice system. A corollary consequence of the timing of the introduction and spread of more aggressive policing and more punitive sentencing is that older individuals observed a major crime decline in the years that followed. Although most criminologists do not believe that these changes caused the crime decline,¹⁵⁶ it is easy to understand how individuals who lived through this major policy change and the subsequent crime decline would attribute the latter to the former.¹⁵⁷

Third, local television news features extensive coverage of crime, and local television news viewing is highly concentrated among older Americans.¹⁵⁸ The relationship between age and television news consumption is by definition a cohort effect because television news did not become widespread in the United States until the mid-1950s.¹⁵⁹ Television news consumption has declined precipitously in the last ten years and is lowest among Americans aged 18 to 29.¹⁶⁰ Although there is no direct evidence of a relationship between television news consumption and concern about crime in the United States, several studies do suggest that news coverage of local crime (of the sort common on local television news) might increase demand for a more punitive system.¹⁶¹ The decline of local

155. Howard N. Synder, *Arrest in the United States, 1990–2010*, BUREAU JUST. STAT. 3, 5-13 (Oct. 2012), <https://www.bjs.gov/content/pub/pdf/aus9010.pdf> [<https://perma.cc/745M-VMN9>].

156. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (showing that there is not sufficient evidence to show that broken-windows policing is associated with lower crime rates).

157. See, e.g., FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2006).

158. See Katerina Eva Matsa, *Fewer Americans Rely on TV News; What Type They Watch Varies by Who They Are*, PEW RES. CTR. (Jan. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are> [<https://perma.cc/369F-VCPG>].

159. CHARLES L. PONCE DE LEON, *THAT'S THE WAY IT IS: A HISTORY OF TELEVISION NEWS IN AMERICA 18* (2015).

160. See Matsa, *supra* note 158.

161. Research has found a strong relationship of this sort by exploiting the random rollout of digital television in Italy. See Nicola Mastroiocco & Luigi Minale, *News Media and Crime Perceptions: Evidence from a Natural Experiment*, 165 J. PUB. ECON. 230 (2018). In the United States,

television news, especially among young Americans, might contribute to the public becoming less punitive.

All this suggests that today's older Americans hold much more punitive attitudes than do younger Americans, and that this pattern is primarily due to differences between birth cohorts, rather than inherent or persistent differences between older and younger individuals. This means that, barring unexpected changes – such as a new crime wave – the voting public is likely to grow increasingly reform-oriented in the coming years. And the fact that today's younger Americans are much more reform-oriented than their older counterparts provides reason to believe that electoral input into criminal-justice policy is likely to produce reforms in the future, as the current cohort of young voters slowly replaces the current cohort of older voters.

Age differences provide particular reason for hope of future reform given gaps in political participation by age. Higher levels of political participation and civic engagement among older Americans as compared to younger Americans are a basic fact of American politics.¹⁶² The political scientist Andrea Campbell has called senior citizens “the super-participators of American democracy.”¹⁶³ Many studies have shown that age itself, rather than birth cohort, influences the likelihood of electoral participation.¹⁶⁴ So, as less-punitive young people age, we can expect them to participate in politics at ever-increasing rates – with implications for criminal-justice policy.

experimental evidence shows that exposing television viewers to a racialized crime story increases support for punitive approaches to crime among white viewers. See Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000).

162. Age differences in participation have been an object of study for decades. See, e.g., KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012); Norval D. Glenn & Michael Grimes, *Aging, Voting, and Political Interest*, 33 AM. SOC. REV. 563 (1968); John M. Strate et al., *Life Span Civic Development and Voting Participation*, 83 AM. POL. SCI. REV. 443 (1989); Richard J. Timpono, *Structure, Behavior, and Voter Turnout in the United States*, 92 AM. POL. SCI. REV. 145 (1998).
163. ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* 14 (2005). Even in the 2008 presidential election, when turnout among young voters was historically high, voters over 65 were 54% more likely to turn out than those aged 18 to 24. See Priscilla Southwell, *Young Voters After the 2008 Election: A Disappearing Act?*, 9 J. POL. & L. 80, 80 (2016).
164. See, e.g., William Lyons & Robert Alexander, *A Tale of Two Electorates: Generational Replacement and the Decline of Voting in Presidential Elections*, 62 J. POL. 1014 (2000) (finding that the generation born before 1932 participated at high rates overall, but that age is a very significant predictor of likelihood of participation for those born after 1932).

This optimistic story about changes in public opinion does, however, contain within it a note of caution. The area about which the public (even the younger public) remains most hesitant about reform concerns violent crime. But violent crime must enter any discussion of how to end mass incarceration. As the Prison Policy Initiative notes, “at the state and local levels, far more people are locked up for violent and property offenses than for drug offenses alone.”¹⁶⁵ Ending mass incarceration thus requires that we “go further than the ‘low hanging fruit’ of nonviolent drug offenses.”¹⁶⁶ Elected officials might well be wary of policies that lead to the release of persons who have been convicted of violent crimes. As a result, to the extent that reform will happen with respect to violent crime, that reform may have to be implemented by bureaucrats of the sort the book describes.¹⁶⁷ Even if democracy can deliver reform for nonviolent offenders, the book’s suggestions may well be the more prudent path for violent offenders, who are the least sympathetic in the public eye.

CONCLUSION

Prisoners of Politics deftly describes the ills that America’s system of mass incarceration has produced: many crimes are defined too broadly and pull in a wide net of low-level offenders; incarceration is criminogenic, and there is no evidence to suggest that longer sentences improve individuals’ likelihood of successful reintegration into society; there are shockingly few opportunities for education or treatment in prison and jail; there are too few opportunities to review the efficacy of a continued prison sentence during an individual’s prison term; and criminal conviction seriously jeopardizes future prospects for economic success. The book characterizes the disease causing all these symptoms as a flourishing of “penal populism” through a political system that elects many criminal-justice policy-makers—district attorneys, judges, and state legislators—by popular vote. The cure, the book argues, is to transfer many of these decision-making powers to

165. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/Y6VC-ZB7V>].

166. *Id.*

167. At least one recent reform that addresses even violent offenders blends democratic and technocratic approaches. In 2016, California voters approved Proposition 57 by a landslide. While enacted democratically, the reform itself returns broad “second-look” discretionary power to the state’s parole board with the goal of shortening the sentences of even violent offenders when they can show that they have been rehabilitated in prison. See Jazmine Ulloa, *More California Inmates Are Getting a Second Chance as Parole Board Enters New Era of Discretion*, L.A. TIMES (July 27, 2017, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-parole-board-proposition-57-20170727-htmlstory.html> [<https://perma.cc/X6U7-PQHS>].

expert agencies, with decisions reviewable by courts, and to thereby insulate criminal-justice policymaking from “penal populism.”

In this Review, I have argued that there is greater hope for criminal-justice reform through electoral politics than *Prisoners of Politics* suggests. Decarceration has already begun, with declining prison populations nationwide. Reform may be slow: it took four decades to create our present system of mass incarceration, and it may take decades to undo it. But, as this Review has shown, the trend lines are positive. Both the Democratic Party and significant parts of the Republican Party have embraced reform. Popular campaigns for reform have already achieved remarkable success passing pro-reform state ballot initiatives and electing reform-minded prosecutors and judges. The American public is far from uniformly punitive, and there are signs that it will likely become less punitive in the future, so long as crime rates do not unexpectedly spike. To be sure, electoral politics bears considerable blame for our system of mass incarceration. But it is possible that electoral politics could help undo that system in the years to come.

APPENDIX

FIGURE A1.
AGE, RACE, AND SUPPORT FOR ELIMINATING MANDATORY MINIMUM SENTENCES

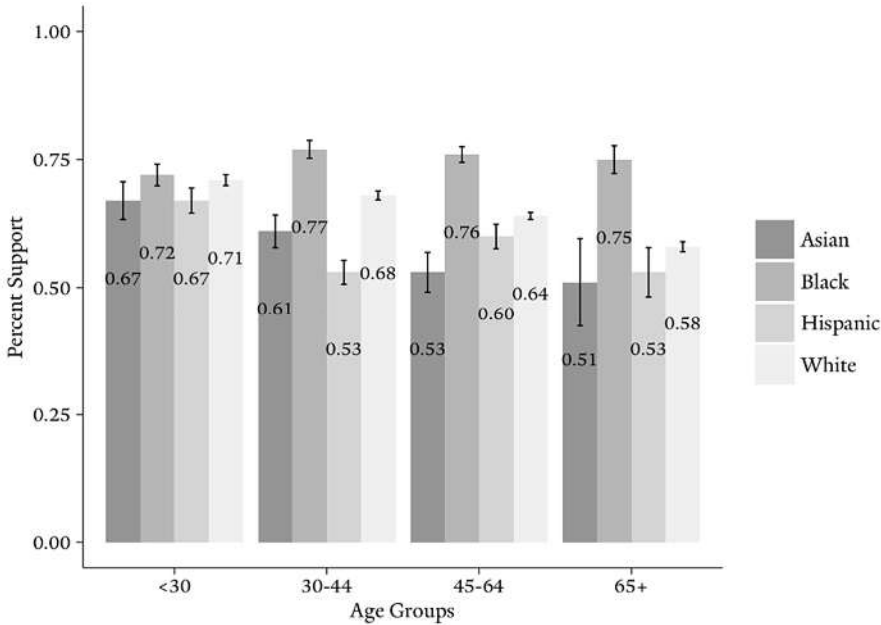


FIGURE A2.
AGE, RACE, AND SUPPORT FOR INCREASING SENTENCES FOR VIOLENT FELONS

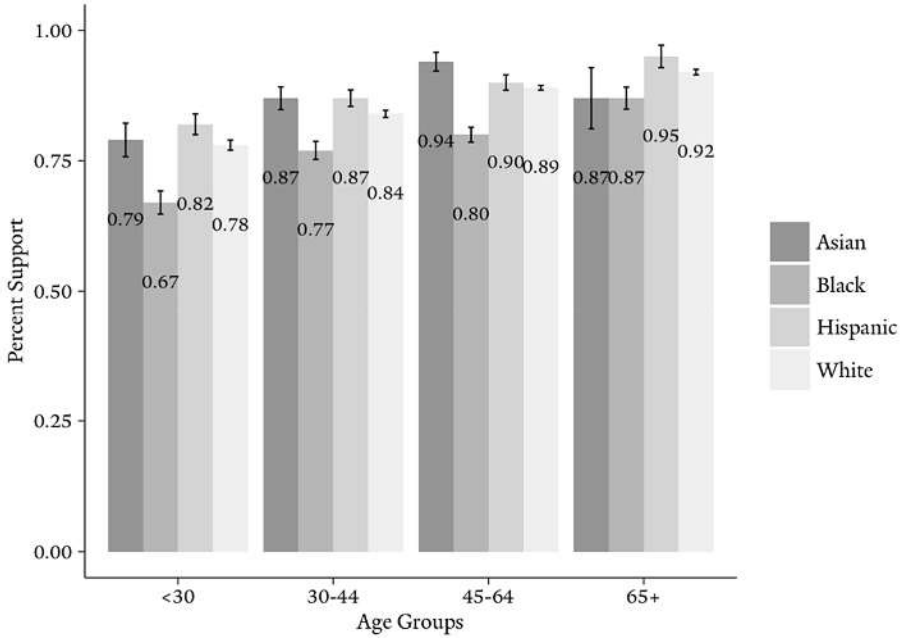


FIGURE A3.
AGE, RACE, AND SUPPORT FOR ADDITIONAL POLICING

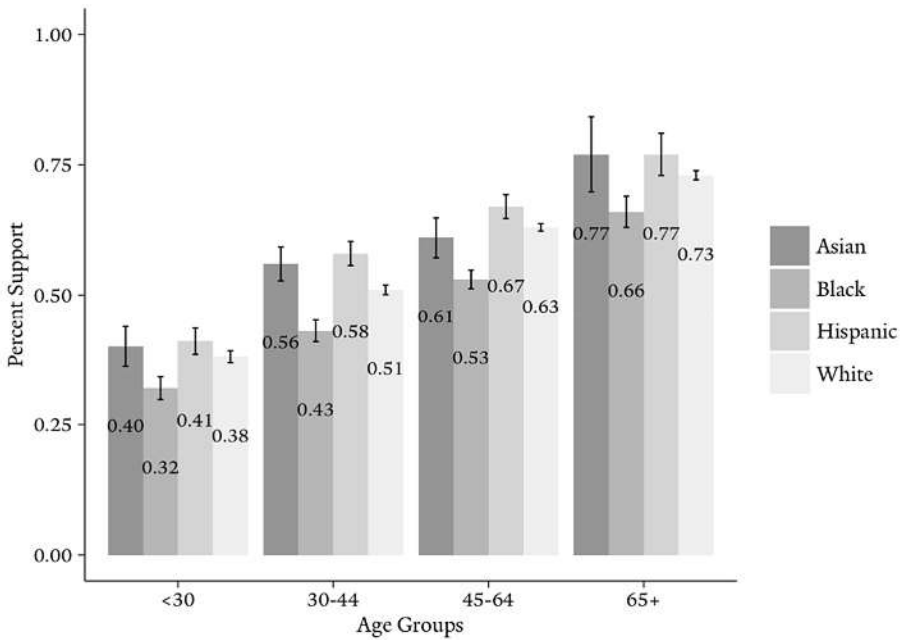


TABLE A1.

	Dependent Variable ¹⁶⁸		
	Support for additional policing (1)	Eliminate mandatory min. sentences (2)	Increase sentence length for felons (3)
Age 30-44	0.121*** (0.006)	-0.027*** (0.006)	0.058*** (0.004)
Age 45-64	0.234*** (0.006)	-0.045*** (0.006)	0.109*** (0.004)
Age 65 and over	0.325*** (0.007)	-0.092*** (0.007)	0.140*** (0.005)
Black	-0.057*** (0.007)	0.006 (0.007)	-0.052*** (0.005)
Hispanic	0.033*** (0.008)	-0.092*** (0.008)	0.045*** (0.006)
Asian	0.059*** (0.011)	-0.114*** (0.011)	0.074*** (0.008)
Democrat	-0.123*** (0.004)	0.205*** (0.004)	-0.098*** (0.003)
Male	-0.033*** (0.004)	0.065*** (0.004)	-0.041*** (0.003)
Medium Metro County	0.008 (0.006)	0.010 (0.006)	-0.008* (0.005)
Urban County	0.035*** (0.006)	0.028*** (0.006)	-0.001 (0.005)
Income \$30k-\$60k	0.008 (0.005)	-0.004 (0.005)	0.026*** (0.004)
Income \$60k-\$100k	0.002 (0.006)	-0.011* (0.006)	0.030*** (0.005)
Income over \$100k	-0.011 (0.007)	0.008 (0.007)	0.015*** (0.005)

168. * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$. The reference category for age groups is age 18-29. The reference category for race groups is white. The reference category for income groups is income under \$30,000 per year. The reference category for education groups is no high school degree. The reference category for urbanness is rural county. The urbanness index comes from the 2013 calculations by the National Center for Health Statistics, which creates a 6-point category for county urbanness, which I have consolidated to three categories here for interpretability.

High-School Grad	0.043*** (0.008)	-0.006 (0.007)	0.026*** (0.006)
Some College	-0.014* (0.008)	0.042*** (0.008)	-0.004 (0.006)
College Grad	-0.062*** (0.009)	0.050*** (0.009)	-0.046*** (0.006)
Postgrad	-0.124*** (0.010)	0.084*** (0.010)	-0.105*** (0.007)
Child under 18	0.046*** (0.005)	-0.019*** (0.005)	0.034*** (0.004)
Homeowner	0.051*** (0.005)	-0.033*** (0.005)	0.022*** (0.003)
Violent Crime Rate (log)	0.041*** (0.005)	0.017*** (0.005)	-0.013*** (0.004)
Constant	0.353*** (0.022)	0.606*** (0.021)	0.866*** (0.016)
Observations	55,240	55,276	55,276
State Fixed Effects?	Yes	Yes	Yes
R²	0.095	0.072	0.071

TABLE A2.

	Dependent Variable ¹⁶⁹	
	Law enforcement spending (R believes too little) (1)	Positive attitude (courts not harsh enough) (2)
Age (years)	0.001* (0.001)	0.001*** (0.0004)
Born 1910 to 1922	0.035 (0.041)	0.031 (0.025)
Born 1922 to 1934	0.047 (0.034)	0.023 (0.021)

169. * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$. The variable Black denotes Black respondents, and all other respondents are coded as non-Black. The reference year is 1985. The sample size is greater for the punitive attitude question because there are many fewer missing cases for that question than for the law enforcement spending question.

THE POLITICS OF DECARCERATION

Born 1934 to 1946	0.053* (0.028)	0.042** (0.017)
Born 1946 to 1958	0.060** (0.024)	0.033** (0.015)
Born 1958 to 1970	0.074*** (0.021)	0.062*** (0.013)
Born 1970 to 1982	0.073*** (0.022)	0.042*** (0.013)
B.A. or more	-0.017 (0.013)	-0.049*** (0.008)
Democrat	-0.002 (0.009)	-0.044*** (0.006)
Income (log)	0.026*** (0.005)	0.015*** (0.003)
Black	0.052*** (0.014)	-0.045*** (0.009)
Male	-0.068*** (0.009)	-0.046*** (0.006)
Child under 18	0.030*** (0.011)	0.033*** (0.007)
Homeowner	0.00005 (0.011)	0.039*** (0.007)
1986	-0.038 (0.027)	0.008 (0.016)
1987	-0.029 (0.024)	-0.042*** (0.015)
1988	0.010 (0.029)	-0.007 (0.018)
1989	0.003 (0.030)	0.005 (0.018)
1990	-0.003 (0.031)	-0.009 (0.019)
1991	-0.032 (0.030)	-0.041** (0.018)
1993	0.033 (0.029)	-0.018 (0.018)
1994	0.084*** (0.025)	0.015 (0.015)
1996	0.026 (0.026)	-0.053*** (0.015)

1998	0.005 (0.026)	-0.080*** (0.016)
2000	-0.081*** (0.026)	-0.141*** (0.016)
2002	-0.102*** (0.031)	-0.161*** (0.019)
2004	-0.048 (0.032)	-0.195*** (0.019)
2006	-0.029 (0.027)	-0.170*** (0.016)
2008	-0.009 (0.030)	-0.193*** (0.018)
2010	-0.083*** (0.029)	-0.207*** (0.018)
2012	-0.067** (0.030)	-0.246*** (0.018)
2014	-0.084*** (0.029)	-0.234*** (0.018)
Constant	0.185*** (0.057)	0.642*** (0.034)
Observations	12,076	23,556
Region Fixed Effects?	Yes	Yes
R²	0.030	0.068