

Annual Review of Criminology Can Conservative Criminal Justice Reform Survive a Rise in Crime?

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Keywords

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Abstract

Over the past 20 years, conservatives have often been at the forefront of criminal justice reform efforts, including to reduce mandatory minimum sentencing, lengthy prison terms, and excessive criminal fines and fees and to improve conditions in prisons and jails. Rejecting the Nixonian "law and order" impulse, criminal justice reform has increasingly become incorporated into the conservative political self-identity. But this has been an elite-driven phenomenon, and it is open to question whether the roots of that political identity are deep enough to withstand the rising salience of crime as a political issue. This review traces how criminal justice reform came to be incorporated into the conservative political identity, raises questions concerning its staying power in the face of rising crime and increasingly strident progressive demands, and proposes some principles that might ground a more lasting conservative commitment to a just, proportionate system of criminal justice.

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INTRODUCTION

In the past 20 years, Republicans and conservatives executed a remarkable about-face on the politics of criminal justice. Somehow, the party of Nixonian law and order, Just Say No, mandatory minimum sentences, and the abolition of parole became institutionally committed to criminal justice reform. An entire generation of federal and state Republican lawmakers, as well as conservative writers, activists, and policy experts, set to work undoing a substantial portion of the punitive legal and policy structures their predecessors had created. And this change occurred over a decade or so—what feels in retrospect like a stunningly short period of time.

To the extent it has had success, conservative criminal justice reform faces something of an identity crisis at this particular moment in our political history. The steady decreases in crime rates that opened up the policy space for reform in the 2000s suddenly appear fragile. Murder rates, and those of other violent crimes, have skyrocketed in many American cities. In others, "progressive" prosecutors have outrun even their own blue constituents in reimagining criminal prosecutions, sparking backlashes in unlikely places. Criminal justice reform advocates on the left, impatient with incremental change, have begun to coalesce around a series of policy proposals that strike many Americans (and especially many conservatives) as far-fetched and even dangerous. In response, authoritarian and punitive impulses among Republicans and conservatives—never far from the surface—seem poised to reassert themselves.

The next few years will, I believe, be critical for the conservative criminal justice reform movement. This is likely to be the first election cycle in decades in which crime is an increasingly salient voter concern and prospective nominees will likely bid for Republican votes with explicit toughon-crime messaging. The outcome of these intracoalition battles may well determine whether criminal justice reform remains an enduring facet of the conservative self-identity or was all along nothing more than an elite phenomenon, with little staying power and little purchase on the conservative psyche.

To continue to advance their stated goals, conservative criminal justice reform advocates likely will have to step back and articulate a distinctive language and framework for approaching policy questions that have the moral and philosophical heft to withstand ups and downs in the crime rate and whatever lurid true-crime headline is roiling passions day-to-day. The review suggests four principles that might be adopted: careful attention to the common good, human dignity, successful reentry, and securing legitimacy through appropriate accountability. These principles, explicated below, draw on deep wellsprings of conservative thought as well as attitudes that are highly congenial to the conservative temperament. They are, moreover, grounded in the history of the conservative criminal justice reform movement that I trace below. The review also explores the challenges to the reform movement today and concludes by offering a framework for the future. In so doing, the goal is not to identify specific policies that conservatives might either support or oppose; rather, the purpose here is to offer an integrated and principled framework that conservatives might use to evaluate criminal justice policies in the context of a political and cultural landscape that seems more challenging than any in decades.

CRIME AND THE CONSERVATIVE IDENTITY

It has only been about 60 years since criminal justice became a particularly salient issue in American politics. Its rise in importance coincided with the rise in crime rates—especially violent and property crime—that began in the 1960s and continued until the mid-1990s. In response to this crime wave, Republicans began to position themselves as the "law and order" party, embracing an authoritarian approach to crime and championing the victims of criminal disorder. In his 1960 convention speech, Richard Nixon did not mention crime at all. But by his 1968 convention speech, Nixon would use the words "law" and "order" 21 times, famously saying that "the nation with the greatest tradition of the rule of law is plagued by unprecedented lawlessness" (Trautman & Rizer 2018).

In the ensuing decades, "tough on crime" became conservative orthodoxy, and the impulse to ratchet up criminal penalties became self-reinforcing. Social scientists David Dagan and Steven Teles, in their seminal book *Prison Break*: *Why Conservatives Turned Against Mass Incarceration* (which remains the most comprehensive account on the subject), describe the mechanism by which this occurred. Few people, they argue, derive their personal identity from their intellectual and policy commitments. Instead, the relationship is reversed: People advocate for policies they believe to be consistent with their identity. That is, when confronted with a policy proposal, people do not ask, "Is it right?" but rather, "Is this what a person like me believes?" (Dagan & Teles 2016).

The argument draws on an expressive account of how political identity is formed and maintained. This account identifies political identity as primarily an expression of social affiliations drawn from deeper gender, religious, class, and cultural identities (Fowler & Kam 2007, Green et al. 2002). Under this account of political identity formation, partisans take their cues on preferred positions based on their sense of what people who conform to these stereotyped identities believe (Nicholson 2012). "From this perspective, partisanship is the result of a cognitive matching process in which people compare their self-image to the types of people and social groups that are associated with a political party and then sort themselves politically on that basis" (Huddy & Bankert 2017).

As opposed to the competing instrumental account of political identity—in which identity is largely derived from a party's proximity to one's preferred policy outcomes as well as its perceived electoral success (Achen 2002, Downs 1957)—the expressive model has empirical support in the way partisans tend to be anchored in a particular political identity through widely varying circumstances, including changes in their party's policy goals and its electoral successes and failures (Cohen 2003, Dancey & Goren 2010). Recently, political scientists have noted that both the instrumental and expressive accounts tend to be alternatively dominant among different kinds of strong or weak partisans and at different times and under different political circumstances (Arceneaux & Vander Wielen 2013, Bullock 2011). "All or nothing" accounts of political identity are ultimately insufficient.

Nonetheless, the expressive account of political identity has significant explanatory power for how partisans understand their relationship to both parties and policies. It explains, for example, why partisan identity tends to be formed at a relatively young age and persists throughout a person's life despite changes in personal circumstance (Sears 1975). It also explains much about the excessive partisanship and tribalism of our politics, since the flip side of groups of like-minded persons drawing together is antipathy, suspicion, and even outright hostility to persons in different camps—what theorists call affective polarization (Iyengar et al. 2019).

For many conservatives, being tough on crime became the policy default not primarily because of intellectual conviction as to its intrinsic correctness but because it became—through electoral success and repetition by thought leaders—the sort of thing that conservatives believed. And as this became the conservative position, conservatives were impervious to negative feedback from the implementation of these policies, or evidence that they had serious costs, both actual and intellectual (Dagan & Teles 2016). For example, there has always been a tension at the heart of the conservative tough-on-crime position, at least to the extent that a political movement born of suspicion of state power puts expansive powers in the hands of agents of the state. Furthermore, the spiraling cost of the criminal justice system was long a blind spot for a conservative movement that was sparked, in part, from frustration with the kudzu-like growth of state and federal governments and the taxes needed to fund them. And it takes only a little training in libertarian public choice theory to know that, for example, every time a state builds a prison, it also creates a prison guard union that now has a direct interest in continuing and expanding the flow of government money to that institution and its workers. Tough-on-crime policies thus coexist uneasily with conservative orthodoxies on government, taxes, and the growth of the bureaucratic state (Weisberg & Petersilia 2010).

But these tensions at the heart of the conservative tough-on-crime position largely went unexamined during the 1980s and 1990s because the rewards were so substantial. Every institutional player within the conservative movement had incentives to move in the same direction, which created pathway dependency that was hard to shake off (Trautman & Rizer 2018). Republican politicians, especially, discovered that law-and-order politics paid bountiful electoral dividends (Stuntz 2011, Weaver 2007). State legislators begin to outbid each other in ratcheting up criminal penalties, especially for drug crimes, and states begin to roll back previously available release valves to incarceration, such as parole or earned credit for prison time (Travis & Lawrence 2013). One example of this dynamic was 1990s California—the progenitor of "three strikes" laws that helped to pack American prisons in that decade—where a Democratic-controlled legislature and a Republican-controlled executive branch consistently outbid each other to prove who could be more punitive (Campbell 2014).

Democrats were hardly immune to the electoral possibilities of tough-on-crime politics. In fact, there is evidence that Republicans and conservatives only began to be open to criminal justice reform when they so successfully pulled Democrats in the direction of punitiveness that the issue lost its distinctively Republican cast (Holian 2004). It should be remembered that two of the last three Democratic presidents were at the center of the 1994 federal crime bill, which vastly expanded federal mandatory minimum sentencing and federal funding for prison construction. Democrats today likely cringe at the clip, but it is worth recalling one of the most shameful episodes in the history of tough-on-crime politics was when then-Senator Joe Biden joked on the Senate floor about applying the death penalty to jaywalkers (Perticone 2019).

THE RIGHT-WING TURN

So how did it come about that criminal justice reform became a new conservative orthodoxy—one of the markers of how conservatives saw themselves and each other?

Importantly, the left–right convergence on criminal justice reform is manifestly not a case of bipartisanship in the sense of proceeding from a shared set of values or moving causes. Instead, it is a "*trans*-partisan issue," where "agreement on policy goals [is] driven by divergent, deeply held ideological beliefs" (Teles & Dagan 2016). For liberals, mass incarceration reflected systemic racism and ingrained poverty. For conservatives, criminal justice reform came, over time and after strenuous efforts by policy elites, to reflect conservative principles on limited government and the need for government to facilitate personal, spiritual reform within offenders. The two sides thus came to criminal justice reform from very different perspectives, driven by very different ideological motivators (Teles & Dagan 2016). The left–right overlap in policy goals should not obscure this important difference in the two sides' motivations on this issue.

Central to the conservative shift was the way crime simply became less salient as a political issue, for people of all political stripes, as crime rates began their steady decline in the 1990s. That is, the salience of crime as an issue to voters peaked around the mid-1990s, when crime rates also peaked, and has fallen steadily since (Shi et al. 2020). Declines in the rates of crime victimization also helped: There is a significant correlation between tough-on-crime attitudes and having been a victim of violent crime (Bateson 2012, Hersh 2013). The decline in crime salience lowered the potential electoral consequences for lawmakers otherwise inclined to consider

alternative approaches. And the political realignment that transformed the American South into a bastion of Republicanism in the 1990s also had the curious effect of reducing the political salience of crime: The electoral and political "juice had been squeezed" from the crime issue in many of those states (Holian 2004, Teles & Dagan 2016).

More specific to Republican and conservative lawmakers, however, was the transformation of the party and the movement in the 1990s from an authoritarian one into an explicitly anti-statist one. Anti-government rhetoric was key to the Republicans' 1994 electoral victories—the so-called Gingrich Revolution—in which the GOP took 54 seats in the House and eight in the Senate (Balz & Brownstein 1996). Under the leadership of House Speaker Newt Gingrich, the party became more firmly than ever an anti-big-government party, determined to balance the budget, lower taxes, and roll back regulation. President Bill Clinton, sensing the political winds, would declare just months after the 1994 election that the era of big government was over (Antle 2008).

This anti-statist overhaul of the conservative movement had an effect on conservative orthodoxies about the criminal justice system. Prisons were transformed from elements of social order into elements of state power (Gingrich & Nolan 2011). Conservatives developed a more suspicious attitude toward policing, especially federal policing (reflected in the outcry after tragic incidents involving extremists at Waco, Texas and Ruby Ridge, Idaho). And what Dagan & Teles (2016) call "creative entrepreneurs" began to take advantage of these changing positions to detach the association in many Republicans' minds between "conservative ideas" and "tough on crime."

The expressive account of political identity stresses the importance of elite opinion makers in shaping what partisans believe (Bullock 2011). Group norms are communicated by elites who identify certain beliefs and positions as prototypical, encouraging their adoption by messaging that emphasizes that these are the kinds of things "we" believe (Hogg & Reid 2006). This research finding was borne out by the conservative shift on criminal justice, which was driven to a remarkable degree by elite activists with well-established conservative credentials whose fidelity to Republican principles could not be questioned. Grover Norquist, the energetic head of Americans for Tax Reform and veteran of many legislative fights to reduce taxes and expand gun rights, was instrumental in recasting criminal justice reform as the true fulfillment of conservative principles. Writing for *National Review*, a key conservative publication, Norquist said that "There is no reason that conservatives should be tied to the 'lock 'em up and throw away the key' strategy; rather, we must stand for the very principles of limited government, federal accountability, and reduced spending that our forefathers effectively deployed" (Norquist 2011).

Another key right-wing convert to criminal justice reform was Richard Viguerie, who masterminded the mass-mailing and fundraising techniques that would underwrite key conservative institutions (especially the Heritage Foundation) in the 1970s, laying the groundwork for the Reagan presidency. Few people were (and are) as plugged into the conservative establishment as Viguerie. So, it was notable when, in 2013, he published an op-ed in the *New York Times* criticizing not just "the excessive and unwise spending" of the criminal justice system—a reliably conservative note—but also a prison system that "often turns out prisoners who are more harmful to society than when they went in." Viguerie identified offender rehabilitation and prison reform especially as specifically conservative priorities: "Politically speaking, conservatives will have more credibility than liberals in addressing prison reform" (Viguerie 2013). A central conservative figure such as Viguerie lending his imprimatur to criminal justice and prison reform was an important step in the process Dagan & Teles describe of centering concern about overpunitiveness as the kind of issue that respectable conservatives could incorporate into their political identity.

Responding to signals from conservative elites, conservative state legislators—eager to position themselves as supporters of the conservative position on criminal justice, whatever that was—worked through groups such as the State Policy Network and the American Legislative Exchange

Council, which developed model criminal justice reform legislation (Dagan & Teles 2016). So evident was the elite influence over this shift in values that it sparked bitter complaints from redoubts of the older, law-and-order conservative approach to criminal justice. These included Heather Mac Donald of the Manhattan Institute—an early cheerleader for Mayor Rudy Giuliani's "broken windows" approach to policing—who decried the "high-profile figures on the right [who] are joining the chorus on the left for deincarceration and decriminalization," including Gingrich and the Koch brothers (Mac Donald 2015).

If there was a singular turning point that cemented the new association between conservatism and criminal justice reform, it was Texas's 2007 overhaul of criminal sentencing. In the mid-2000s, Texas faced a financial crisis caused by a rising prison population that likely would require the addition of thousands of new prison beds, at huge cost. In response to this crisis, the group Right on Crime was founded by a "mild-mannered Texas attorney named Marc Levin, who later became one of the nation's leading advocates of conservative criminal-justice reform" (Bauer 2014). Working under the aegis of the Texas Public Policy Foundation, a conservative state think tank, Levin spearheaded a movement to reduce state prison populations by diverting some prison construction funding to rehabilitative programming. Levin recruited conservative heavyweights such as Pat Nolan—a former California Republican legislator who spent two years in prison on racketeering charges and became an advocate for criminal justice reform upon his release—Norquist of Americans for Tax Reform, and even Gingrich himself, who called the criminal justice system "broken" and challenged conservatives to "take the lead in fixing it" (Dagan & Teles 2016, Trautman & Rizer 2018). Right on Crime is now led by former US Attorney Brett Tolman, and it remains a central institution in the conservative firmament.

These efforts by Right on Crime and others culminated in the passage of a bipartisan sentencing reform package in Texas that reduced sentences for nonviolent offenders; expanded probation and drug rehabilitation as alternatives to incarceration; gave judges discretion to divert first-time and nonviolent defendants; reduced the length of probation sentences; and expanded the use of drug courts (Bauer 2014). The success of this reform effort, more than any one event, made it respectable for Republicans and conservatives to entertain new ideas about criminal justice. If reform could become a winning issue in Texas—the heart of the modern Republican party—then criminal justice reform could no longer be characterized as an entirely liberal notion (Dagan & Teles 2016, Trautman & Rizer 2018). Criminal justice reform could become one of the ideas that conservatives could identify with, and among the social cues that defined what it meant to be a conservative. Evidence of its centrality is the 2016 Republican Party platform that endorsed "diversion of first-time, nonviolent offenders to community sentencing, accountability courts, drug courts, veterans treatment courts, [and] restorative justice to make the victim whole and put the offender on the right path" (Repub. Party 2016).

Elite-driven or not, the conservative criminal justice reform movement has resulted in impressive policy wins. Between 2006 and 2012, the GOP-dominated states of Wyoming, Michigan, and Utah reduced their incarceration rates by more than 10 percent. Mississippi, deep in the heart of the carceral South, closed down the isolation unit in one of its supermax prisons, freeing 1,000 prisoners from solitary confinement (Bauer 2014). In Georgia, House Bill 1176, enacted in 2012, reduced penalties for many low-level crimes, created alternatives to incarceration, and mandated better data collection, enabling the state to develop a more evidence-based criminal justice system (Bauer 2014). In South Carolina, the 2010 Omnibus Crime Reduction and Sentencing Reform Act reduced probation and parole revocations by nearly half and helped to cut the incarceration rate for African-American men in the state by 10 percent (Trautman & Rizer 2018). More recently, Louisiana and Oklahoma overhauled criminal justice systems that had resulted in those states having the highest incarceration rates in the world, and redirected millions of dollars to

rehabilitative programming (Finley 2019, La. Dep. Public Saf. Correct. & La. Comm. Law Enforc. 2018). Many red states have gone through multiple rounds of criminal justice reform legislation.

EVALUATING THE NARRATIVE

What is presented above is the generally prevailing view of how the conservative shift on criminal justice happened. My sense—based on both the results of my own academic and policy work and two decades spent as a card-carrying (at times uneasily) member of the American right—is that this description is largely accurate. Certainly, the libertarian and anti-statist roots of conservative criminal justice reform are plain to see, especially in the influence of elite funders such as Charles Koch, whose Charles Koch Initiative has seeded much of the opinion-making apparatus that Dagan & Teles describe (Ball 2015). I have received funding from Koch-affiliated groups, as have organizations with which I have been associated.

I also agree with Dagan & Teles—whose account of this cultural and political shift remains the most comprehensive presented—in mostly discounting the alternative explanation sometimes offered, that fiscal conservatives grew interested in reform primarily out of concern about the increasing costs of the criminal justice system. This explanation largely derives from the 2007 Texas reform, which was given impetus by a looming fiscal emergency in the Lone Star State. But my sense is that although potential budget savings are often presented as a welcome by-product of criminal justice reform by conservatives, the possibility of such savings is rarely a primary motivation for legislative reform proposals. Far more resonant with most conservatives is an argument grounded in libertarian-inflected concerns about state overreach. Certainly, a kind of generalized anti-statism is evident in conservative criminal justice reform, epitomized by Richard Viguerie's (2013) blunt assessment that "Criminal justice should be subject to the same level of skepticism and scrutiny that we apply to any other government program."

But Dagan & Teles understate the religious and ethical roots of the conservative criminal justice reform efforts. They rightly identify Chuck Colson, the Watergate conspirator turned evangelical Christian, as a key figure in the shift they describe, especially in its early days when thought leadership on criminal justice reform carried the greatest potential cost for conservatives (Dagan & Teles 2016). Colson's Prison Fellowship remains one of the most influential organizations in the broad American right coalition, and Colson (who died in 2012) remains a revered figure among many right-leaning evangelical Christians. As Dagan & Teles (2016) acknowledge, Colson and his then-colleague Pat Nolan were instrumental in winning passage of the Prison Rape Elimination Act (PREA), one of the most comprehensive reforms of prison practices in recent history. Signed into law in 2003 with bipartisan support by another evangelical Christian, President George W. Bush, the law substantially tightened reporting and prevention standards in state and federal prisons and other institutions around sexual violence. The implementation of PREA standards caused a huge explosion in the reporting of sexual violence in prisons, largely as a result of new transparency-forcing measures (Rantala 2018). Some observers have noted that correctional staff view PREA requirements as a burden that interferes with their "real" job of custody and control (Rudes et al. 2020). And yet most believe that PREA has, despite institutional skepticism, transformed American prisons and made them much safer places (Smith 2020). In my view, PREA was an undeniably important policy achievement that has ameliorated a great deal of the sexual violence that characterized American prisons, even if it has not eliminated it completely.

Given this substantial accomplishment, it seems a bit stingy that Dagan & Teles largely locate conservative support for PREA—its sponsors included then-Senator Jeff Sessions of Alabama, no one's idea of a soft-on-crime lawmaker—in conservative evangelical discomfort with homosexual sex (Dagan & Teles 2016). This seems like a thin account of what appears to be an exceptional

bipartisan moment in recent American social policy legislation. Although no one can know the innermost thoughts of any of the people who pushed PREA to passage, a more apparent and frequently expressed motive is captured in Hebrews 13:3 (NIV), the biblical passage that serves as the slogan of Colson's Prison Fellowship: "Remember those in prison as if you were together with them in prison, and those who are mistreated as if you yourselves were suffering." The campaign to pass PREA was marked by appeals to religious precepts regarding the sin of degrading human beings through sexual violence, and evangelical Christians and their allies provided much of the public advocacy muscle that pushed PREA across the finish line (see, e.g., Olson 2002).

Dagan & Teles's skeptical treatment of the religious motivation of many conservative criminal justice reform efforts may be a blind spot grounded in their own positions as members of the secular left. But although their account gives short shrift to this important element in the developing conservative consensus in the 1990s and early 2000s, the orthodox view that their account summarizes is a convincing account of the roots of this astonishing shift in conservative values.

CRIMINAL JUSTICE IN THE PARTY OF TRUMP

Teles & Dagan (2016) have consistently stated they believe that the conservative shift on criminal justice may mark a permanent change. But they may have been writing not at the dawning but rather at the end of an era.

In 2016, Donald Trump seized control of the Republican party and began to refashion its policy apparatus in his own image. Over the next few years, the elite-driven conservative criminal justice reform movement would rest uneasily, and sometimes come into conflict, with the older, Nixonian impulse for law and order (Zeitz 2016). The somewhat contradictory policy response of the Trump administration—to say nothing of Trump's own rhetoric about crime, criminals, and policing—reflected this conflict.

Although Donald Trump often seemed like that rare thing in politics, something completely new, on criminal justice issues he was more a return to the past. Recall that one of Trump's first forays into politics was a series of ads he took out in newspapers in 1989, in the wake of the Central Park Five case, calling for the state to "Bring Back the Death Penalty" and "Bring Back Our Police!" Despite the 2002 exoneration of the five black teenagers accused of raping a jogger in Central Park in that case, Trump has never apologized for calling for their execution (Ransom 2019). His rhetoric about crime often seemed stuck in the New York City of the 1980s, where anger over urban disorder found expression in the furor over the prosecution of subway shooter Bernie Goetz, the rantings of Morton Downey Jr., and the Guardian Angels' red-bereted patrols.

As a presidential candidate, Trump frequently connected his signature issue of immigration to fears of crime, most famously in his assertion that undocumented immigrants "are bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people" (quoted in Hughey 2017, p. 127). After his election was confirmed it seemed possible that the era of conservative criminal justice reform was over (George 2017).

The reality turned out to be far more mixed, with lamentable rhetoric and some real policy reversals coexisting alongside one landmark achievement, the First Step Act. Certainly, the appointment of Jeff Sessions—likely the Republican Senator least amenable to criminal justice reform (Carter 2017, Grawert 2017)—as Attorney General was not promising. Among Sessions's first actions was to issue a memorandum to federal prosecutors identifying as a "core principle" the duty to "charge and pursue the most serious, readily provable offense" in every criminal case (Sessions 2017)—as if the only permissible goal of the federal criminal system is maximum punishment. He also rescinded Obama-era guidance that directed federal prosecutors not to focus marijuana law enforcement efforts in states that had legalized the drug (Sessions 2018). And, of course, Trump was criticized even by evangelicals and other faith leaders for his policy of family separation and detention of undocumented persons at the borders (Ingber 2018)—although critics sometimes overlooked the extent to which these actions simply continued existing Obama administration policy.

Against these developments, it seems—as law professor and formerly incarcerated person Shon Hopwood (2019) puts it—"almost miraculous" that the First Step Act was enacted and signed into law with substantial bipartisan support. The Act retroactively applies the sentencing reductions of the Fair Sentencing Act to eligible persons convicted of crack offenses, reduces the statutory maximums for certain drug offenses committed by those with prior drug convictions, and precludes the stacking of criminal charges in many "drugs and guns" cases. It also permits federal judges to sentence below the statutory mandatory minimum punishment for eligible offenders. The act also addressed post-sentencing issues, expanding rehabilitation programs for federal prisoners and permitting some to serve out part of their sentence in halfway houses or home confinement, increased available federal "good time" credit, and expanded the availability (and imposed new accountability measures on) the federal compassionate release program. And it implemented reforms designed to improve the quality of life of the incarcerated, including placing prisoners near their families and expanding access to feminine hygiene products (Hopwood 2019).

It has become de rigueur among some criminal justice reform advocates to denigrate the impact of this law or ascribe mixed motives to its proponents. This seems churlish, given the extraordinary opposition of Jeff Sessions's Department of Justice, which worked energetically to defeat the bill or constrain its scope (Hopwood 2020). A more justified substantive complaint is that the Department of Justice has been slow and grudging in its implementation, preventing the fullest expression of Congressional intent in passing the act (Davie & Medina 2020). Nonetheless, the most substantial reform of federal criminal sentencing since the beginning of the war on drugs was an achievement of significant import, and one for which President Trump and his advisors can duly be credited.

Important to the question of where the conservative criminal justice reform movement goes after Trump, however, was the right-wing opposition to the bill. Their rhetoric was a startling throwback to the tough-on-crime era, a reminder that the authoritarian approach to criminal justice still has many adherents in the conservative universe. Senator Tom Cotton of Arkansas, the most vociferous opponent of the bill (and likely a 2024 presidential candidate), predicted in *National Review* that if it passed "thousands of federal offenders, including violent felons and sex offenders, will be released earlier than they would be under current law. Whatever word games the bill's proponents use will make no difference to the future victims of these felons" (Cotton 2018). This and other examples strongly suggest that the Nixonian law-and-order impulse still holds sway over a significant corner of the conservative universe.

THE CURRENT MOMENT

In reviewing *Prison Break*, Rutgers professor Lisa Miller offered a prescient critique when she suggested that Dagan & Teles—and the orthodox account of conservative criminal justice reform generally—underplay the importance of the decline in crime rates in spurring conservative openness to policy changes. Dagan & Teles, she wrote (Miller 2017, p. 71),

are keen to distinguish genuine reform ideals from mere economic expediency for the key players in their story and I think they are reasonably successful.... But I wish they had paid a bit more attention to the role of the crime decline in freeing up previously tough on crime conservatives to be open to reforms. If the crime decline was a necessary condition for reform, no amount of smart, resourceful, entrepreneurial identity vouchers are going to win people over. The current data concerning crime rates and especially rates of violence offer a test of Miller's hypothetical. For the first time in 25 years, the salience of crime as a public concern seems to be increasing rather than decreasing, with polling finding public concern about crime rates higher than at any point in recent decades (Herndon 2022, Quinnipiac 2022, Rasmussen Rep. 2022). This is driven largely by eye-popping increases in the rates of homicides and other violent crimes in many American cities—likely the largest one-year rise in the homicide rate in history (Corley 2021). Conservative opponents of criminal justice reform have been reinvigorated by the rise in crime rates and have begun to sound the alarm, claiming that reforms have gone too far in releasing criminals to the streets and constraining police crime-fighting efforts (Mangual 2021).

It remains to be seen whether these crime rate increases are an anomaly of the COVID-19 pandemic and the economic and social dislocation of the lockdowns, or whether we are seeing the beginning of the reversal of a quarter-century trend of declining crime rates. Certainly, these complaints about decarceration sound strange in a country that continues to be the most incarcerated in the world by far. But reformers should not underestimate the danger of the rising salience of crime to reform efforts. When lawmakers perceive that there are risks—or even just a lack of rewards—involved in championing criminal justice reform efforts, those efforts will likely begin to fail.

Moreover, the public's concern over rising crime rates cannot help but be strengthened by the arguments of segments of the Democratic party that many Americans find extreme, even dangerously so. Consider, for example, far-left support for abolition of policing. Proponents give two different definitions for abolition, sometimes simultaneously. The first is self-evident: Uprooting the institution of law enforcement such that there is no government entity responsible for using force to apprehend lawbreakers, violent or otherwise. Abolitionists claim they can prevent crime by addressing root causes like poverty, mental health, addiction, and trauma and that community order can be maintained without the intervention of an armed representative of the government and justice accomplished without punishment, which is not just "an ineffective way to reduce violence; it is illegitimate" (Gimbel & Muhammad 2019, p. 1542).

Polling suggests this idea is unlikely to be successful: Although approval ratings for the police have declined, majorities of Americans of all classes and ethnicities have favorable views of the police and want to increase police presence in high-crime areas (Yglesias 2019). And Americans rightly appear to reject a proposal that has no modern analog and no evidence for its effectiveness. No functioning modern polity has gone without a class of guardians tasked with policing public order.

Accommodating this reality, when pressed, many of those who identify as abolitionists acknowledge the need for some police-like function to combat and deter acts of violence. The "defund" movement instead calls for "significant, permanent reductions to existing policing and carceral infrastructures" and an increase in funding for various social services (Highsmith 2020). Presented as an alternative to full-scale abolishment of the policing function, reallocation of taxpayer dollars away from police departments toward other programs nonetheless faces similar challenges in terms of public opinion and practicality. There is good evidence that hiring more police and concentrating them in high-crime areas can reduce crime (Natl. Acad. Sci. Eng. Med. 2018). In fact, another hypothesis asserts that much of the backlash against policing in communities of color comes not from a sense that there are too many police, but from policing that is at once both overpowering (when it comes to minor crimes such as public drunkenness or turnstile jumping) and ineffective (when it comes to preventing and solving major crimes such as murder and rape) (Leovy 2015, Prowse et al. 2019).

The debates over defunding and abolition played out against the backdrop of the destructive clashes in American cities in the summer of 2020 after the killing of George Floyd. And progressive

ideas about decarceration and criminal justice got a road test in California, where San Francisco district attorney Chesa Boudin was recalled by voters amid a general sense that, as one essayist wrote, in implementing liberal policies relating to cash bail, diversion, homelessness, and substance abuse, "he didn't seem to care that he was making the citizens of our city miserable in service of an ideology that made sense everywhere but in reality" (Bowles 2022). A similar recall effort is aimed at Los Angeles district attorney George Gascón based on accusations that his office (like Boudin's) has released violent criminals and will not prosecute quality of life crimes such as theft and public urination that citizens tend to experience as immediate signs of public disorder (Herndon 2022, Lacey 2021).

There appears to be no strong evidence that the post-Floyd riots, progressive prosecutors, or the abolition/defund movements are causing the increases in murder rates and violent crime or that these increases have been sustained year-to-year (Grabar 2022). But just like many conservatives in the 1980s, liberal criminal justice reform advocates appear deaf to negative feedback in the form of the rising salience of crime as a political issue, of which Boudin's recall is a startling example—from their espousal of policies that appear to give short shrift to public order. It remains to be seen whether Boudin's recall will temper the more extravagant liberal criminal justice initiatives or if the rising salience of crime will continue to threaten reform efforts even in blue states. But the Boudin effort strongly suggests that there are limits to the public willingness to fundamentally reimagine policing and prosecution, and that reformers (justifiably or not) will be held responsible for public disorder that appears to result from reformist policies.

This dynamic also poses a challenge for conservative advocates of criminal justice reform because of the tribal nature of our politics and the way political identity is formed (Fowler & Kam 2007, Green et al. 2002, Huddy & Bankert 2017, Nicholson 2012). If liberal ideas about crime and criminal justice continue to coalesce around principles that are viewed as radical, the likelihood is that rank-and-file conservatives will be unwilling to support any measures that smack of abolition, decarceration, and defunding. Again, there is evidence that conservatives became open to criminal justice reform only when law-and-order politics lost their distinctiveness as a Republican issue (Holian 2004). Just as strong as the pull toward "the kind of ideas a conservative like me accepts" is the impulse to reject ideas that seem like those of "someone not like me."

THE FUTURE OF CONSERVATIVE CRIMINAL JUSTICE REFORM

It is unlikely that the fiscal savings and anti-statist rationales that fueled early efforts for conservative criminal justice reform will be sufficient to sustain the effort. Especially in an age when Donald Trump has reordered conservative orthodoxy on issues such as Social Security and spending, neither rationale seems sufficiently deeply rooted in fundamental principles to be sustained in the face of a perceived rise in disorder and violent crime.

But there may be more fertile soil for conservative arguments for reform, soil that can sustain deeper, more enduring roots: the ethical and moral impulses that, for example, animated the conservative victory on PREA. What should conservative criminal justice reform rooted in those impulses look like—especially in light of the possibility that liberal reform advocates are coalescing behind policies that will have difficulty attracting broad public support? Going forward, are there lessons to be learned from the Trump era? What concerns should animate an effective, sustainable program of conservative criminal justice reform?

Ultimately, the question is whether there is a distinctively conservative framework for analyzing criminal justice issues and proposed policy reforms. I believe there are four, which overlap and reinforce each other: the common good, human dignity, a focus on reentry, and legitimacy through accountability.

Careful Attention to the Common Good

The Republican opposition to passage of the First Step Act reconfirmed one truth: Public concern about crime rates always lurks just beneath the surface of the body politic and can easily be aroused. If that fact needed confirmation, the backlash against progressive prosecutors such as Boudin and Gascón, in some of the most liberal cities in the country, strongly suggests that there are limits to the public's willingness to sacrifice public safety for abstract reforms.

I suspect that Professor Miller is correct: The policy space for criminal justice reform in the past two decades was created by the decline in crime rates that started in the 1990s, which reduced the salience of crime as a matter of public concern. If reform threatens those gains in a sustained way, it will fail. And it ought to: Any just program of criminal justice reform must privilege the notion that the freedom to live, work, and move in public spaces without a debilitating fear of crime and violence is a fundamental human right. Securing that right must be a preeminent duty of effective governance.

Focus on Human Dignity, Not State Overreach

It seems clear that libertarian-inflected concerns about state power drove much of conservative criminal justice reform in the past two decades. And at its deepest level, concern about state overreach is connected to notions of human dignity. The libertarian impulse, properly understood, opposes the growth and power of the state not out of anarchist impulses, but because it understands that an all-powerful state is an existential threat to the autonomy that is the basis of human flourishing. That is, libertarians ought to oppose the growth of the state not for the sake of opposition, but because the hegemonic state cannot abide the persistence of those private spaces that are the locus of human dignity, self-sufficiency, and the deepest human satisfaction. With this understanding, an appropriate police function is critical to government that respects human dignity, because freedom from criminal intrusion supports the growth and persistence of these private, autonomous spaces.

All too often politics does not operate at these deeper levels, but on the surface, where the tides of emotion, sensationalism, and fear run strongest. And anti-statism, I suspect, is a thin basis on which to rest criminal justice policies. For many people, it is unlikely to survive their first contact with, say, the mugger outside the restaurant at night. America's history of criminal justice panics, from the 1980s crack statutes onward, suggests that the libertarian impulse in many citizens only runs as deep as they perceive criminal acts to be a danger to others, not themselves.

A program of criminal justice based on human dignity provides a more principled basis for policy prescriptions and might—at least one hopes—prove more resistant to the impulse for excessive punishment. Such a program is not the same as the unstinting focus on victims that has become a stalking horse for excessive punitiveness in much of the criminal justice system. Instead, a dignityfocused criminal justice system makes space for both the perpetrator and the victim, punishing crime appropriately (but not excessively) while not dehumanizing the criminal by assuming that the lives of criminal offenders lack human potential. It provides both necessary and appropriate incapacitation while also accepting the social responsibility that comes with the power to incapacitate: to help prepare offenders for their return to society, ready to reclaim their due place as part of our body politic free of continuing criminal sanction. Fundamentally, such a program sees the criminal justice system as a moral enterprise, with concurrent duties that run to the public, to victims, and to perpetrators.

This focus on human dignity can also be instructive as an organizing principle as conservatives consider the impact that technology has and will continue to have on the criminal justice system. Technology, when it comes to justice, is a double-edged sword. It has tremendous potential to

promote beneficial outcomes, such as removing barriers to reentry, supporting the restoration of family and community bonds, and promoting transparency and accountability in the system. Improved data collection, retention, and analysis can help to hone interventions and reforms that support the common good and human dignity. But we have ample reason to fear the dehumanizing potential of emerging technologies such as biometrics, electronic surveillance, and machine learning. Current legal doctrines, caught in the increasingly absurd arcana of Fourth Amendment case law, seem incapable of dealing with these challenges in a satisfying way. After all, it made sense to resort to a division between public and private when law enforcement lacked the capacity to track more than a handful of public interactions at any given time. In an era when police can track, store, and analyze the movements of millions through public spaces, this distinction makes little sense (Rizer 2020). Reorganizing our approach to this problem around the principles of the common good and human dignity may be a way out of the thickets of increasingly stale legal analysis that bear little relation to people's moral intuition about the use of these technologies.

Preparation for Reentry as a Moral, Political, and Social Duty

It may seem strange to move from loftier notions of the common good and human dignity to something as apparently quotidian as reentry. But in truth, careful attention to reentry—I use the term in the technical sense of reentry from prison but also in the larger sense of reintegrating justice-involved persons into our nation's cultural and social fabric—is deeply connected to these principles. Reentry is the place where our level of attention to these larger notions is likely to be most evident in a practical sense. Successful reentry is both rehabilitation and prevention, as it reduces the likelihood of future crime by perpetrators and gives victims the peace that can come with knowing that their victimization was not in vain and that future victims can be prevented. If we cared about the human dignity of both the perpetrators and victims of crime, we would make reentry the most important element of the criminal justice system. It would be the place where we lavish research, resources, and attention.

Unfortunately, our reentry system—in both of the senses in which I use the word—would be a joke if it were not so sad. About a third of all persons on post-incarceration supervision end up going back to prison, often for violation of some technical supervision condition that is not a criminal offense (Pew Charit. Trusts 2018). One meta-analysis concluded that there is no evidence that our multi-billion-dollar system of post-incarceration supervision has any effect at all on recidivism, for good or ill (Bonta et al. 2010). Research strongly suggests that current models of intensive compliance monitoring unaccompanied by assistance to help supervisees access education, employment, and treatment are counterproductive, actually driving up re-arrest rates (Aos et al. 2006). And we have almost no data on whether supervision helps people reintegrate into society, such as by helping them to access substance abuse treatment or find meaningful long-term employment.

As currently practiced, supervision is largely a box-checking exercise where one box—did the supervisee avoid going back to prison?—is left unchecked one-third of the time or more. Of course this is so: Incarcerated persons dumped out of the justice system, branded as offenders (with all the crushing difficulties that causes in terms of accessing housing, employment, and rebuilding social ties), frequently saddled with unpayable fines and fees, and left to navigate reentry almost entirely on their own, often cannot but revert to criminal activity or otherwise fail to reenter successfully. To expect otherwise is to ask the superhuman.

Criminal justice reform that is focused on the common good would seek to prevent this reversion—that is, prevent future victims of crime—by assisting justice-involved persons to avoid future criminal activity. Likewise, criminal justice reform that is animated by a concern for human

dignity would seek to assist justice-involved persons in successfully reintegrating by giving them the tools to navigate reentry and not marking them with the lifelong brand of felon, which limits their opportunities in almost every sphere of life. Conservative criminal justice reform can and should aim to serve both of these goals. Reentry is where the rubber hits the road to a safer, more just society.

Legitimacy Through Accountability

If there is a blind spot in many conservatives' views of criminal justice, it concerns policing. That Republicans and conservatives hold far more positive views of police and are far less likely to support reforms that make police more accountable for misconduct are consistent findings in public opinion surveys going back decades. Even in the current environment, where the favorability of police has fallen and the public's openness to policing reforms has risen, conservatives are far more likely to defer reflexively to police. This impulse seems likely to be strengthened as police abolitionism and "defund the police" views become among the social cues that mark the liberal self-identity.

But there is, or ought to be, a distinctively conservative view on policing that connects the need for police accountability to the principles of attention to the common good and human dignity that I describe above. Psychologist Tom Tyler has written extensively about the importance of legitimacy as the basis for the public order: People obey the law when they believe that the law is legitimate. Legitimacy, according to Tyler, is tied up with notions of procedural fairness and even-handed application of authority. Although they may break the law in specific instances, in general people accept the legitimacy of enforcement of the law because they see it being applied fairly, justly, and without favor (Tyler 2003, 2006). What many researchers have dubbed legal cynicism develops once people come to believe that they cannot rely on even-handed and fair enforcement: They refuse to cooperate with police in their task of ensuring public order and develop alternative codes to govern their behavior, outside of state sanction (Fagan & Meares 2000, Sampson & Bartusch 1998). This tracks my own experience as a police officer, where it became evident just how important it was to effective policing to have "buy-in" from the local community and how difficult it is for police when that buy-in is lacking. It also appears that one major element in the increasing antipathy between police and communities they serve is a widespread sense that there is no effective avenue for citizens to seek redress when they believe their rights have been violated by police (Ekins 2017).

This formulation, connecting the legitimacy of law enforcement to the maintenance of the public order and the common good, sidesteps the somewhat stale debate on the right between police absolutists (such as the bevy of policy analysts at the Manhattan Institute) and civil libertarians. It also provides an alternative framing to the law-and-order conservatives who reflexively insist that police action is legitimate because the police are the police. Attorney General William Barr encapsulated this view in 2019 when he told the Fraternal Order of Police that the onus is on citizens to "comply first [with police orders], and, if warranted, complain later" (Sheth 2019) and later warned at an awards ceremony that unless communities "start showing, more than they do, the respect and support that law enforcement deserves...they may find themselves without the police protection they need" (Benner 2019). Barr's formulation leaves out the reality that many Americans do not believe there is any effective venue in which to "complain later" about police misconduct and obtain redress. But more importantly, whatever value these precepts may have in an individual encounter, as an organizing principle on a societal level, they are flatly wrong. As a normative matter, in a democratic republic, citizens comply with police demands because the police act legitimately in enforcing the law without fear or favor, not simply because they are agents of the state to whom compliance is required.

I believe that there is strong evidence that policing in the United States increasingly lacks legitimacy among large segments of the population—especially communities of color—because police too often do not apply the law even-handedly. This is not to say that all cops are racist, or that policing is systematically racist, but simply that the evidence seems to me clear that race often plays an impermissible role in both whether and how police enforce the law. But in a certain sense, whether this perception is true is immaterial. Once the perception has set in, the crisis of legitimacy has arrived. It is no solution to say, as Barr did, that the people must accede to the police because they are legitimate. In a democratic republic, the onus is on the police to establish their legitimacy in the first instance, through fair and even-handed enforcement of the law. When they fail to do so, that failure is just as mortal a threat to the common good as widespread public antagonism to the police. Indeed, the two are likely to move hand in hand.

This formulation—one that I believe draws on deeply held conservative principles—should not be understood either as reflexive police boosterism or police antagonism. Nor does it necessarily implicate specific policy proposals (although it may be suggestive of some, especially the crying need for reform of the legal doctrine of qualified immunity). Instead, it should be an organizing principle, a lens through which conservatives should assess policies, tactics, and operations of police departments: Does this policy, tactic, or proposal advance the fair, even-handed policing that is foundational to the public order and the common good?

CONCLUSION

Nonconservatives may well be tempted to ask: Why should anyone else care about how and why conservatives think about criminal justice reform? The answer, I would venture, is that lasting reforms to the criminal justice system have only become possible since conservatives embraced these issues as part of their own identity. And although many liberals now see heady opportunities for left-driven reforms—and have notched undeniable policy achievements in a few deep-blue states—the sleeping giant of a public backlash against unproven and dangerous-seeming ideas seems to be stirring.

Conservative criminal justice reform is at a crossroads. But that is so in part because the reform movement as a whole finds itself in a precarious moment. For the first time in decades, we may be about to test public willingness to continue these reform experiments in the face of the increasing salience of crime. If that is so, criminal justice reform will need all its advocates, of whatever stripe, on board.

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