Building the Big House

American Institutions and the Rise of Mass Incarceration, 1970 — 1990

by David Dagan

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© 2019 David Dagan All rights reserved **Abstract**

This dissertation argues that mass incarceration in the United States occurred through a process of

fragmented state-building. Institutional fragmentation both spurred the political will and critically

enabled the bureaucratic capacity to imprison at a mass scale. By fragmentation, I mean both

federalism (the division of authority among levels of government) and the separation of powers

(the provision of independent political bases for different actors within a single level of

government). The argument has three major parts. First, the local arena played a critical role in

the rise of law-and-order politics, as fragmentation carved up the American polity in ways that

amplified punitive impulses and muffled competing voices. Second, institutional fragmentation

created a type of moral hazard by allowing actors with an interest in ramping up punishment to do

so with little or no regard to the problem of prison crowding. When the crowding problem did

become salient, it was in a crisis context that biased politicians toward underwriting mass

imprisonment by building more cells. Third, prosecutors played a critical role in this fragmented

state-building by out-organizing and out-lobbying rival actors in the criminal-justice system.

Using archival documents and news accounts, the dissertation offers a detailed case study of these

dynamics at work in Pennsylvania. It also examines the federal politics of criminal justice during

the Reagan administration and the emergence of professional associations of prosecutors.

Advisors: Adam Sheingate and Steven Teles

Secondary readers: Angus Burgin, Meredith Greif, Robert Lieberman, Katrina McDonald

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1. Introduction

In 1833, Gustave de Beaumont and Alexis de Tocqueville submitted their report "On the Penitentiary System in America" to the French government. Though it has been overshadowed by Tocqueville's *Democracy in America*, the prison study was the actual purpose for which the duo had been sent to the United States. Beaumont and Tocqueville began the report by preparing their continental readers to expect complexity and contradiction in the American system. "By the side of one state, the penitentiaries of which might serve as a model, we find another, whose jails present the example of every thing which ought to be avoided," they observed. They added that such differences showed up not just across states, but within single states such as Pennsylvania, where modern penitentiaries existed alongside archaic dungeons. "These shocking contradictions proceed chiefly from the want of unison in the various parts of government (within a state)," they wrote. "Being almost as independent of each other, as the states themselves, it results that they hardly ever act uniformly and simultaneously."¹

The result, Beaumont and Tocqueville found, was that "the best and the most

¹ Gustave de Beaumont, Francis Tocqueville, and Francis Lieber, *On the Penitentiary System in the United* States and Its Application in France (Philadelphia: Carey, Lea and Blanchard, 1833), 14, http://archive.org/details/onpenitentiarysy00beauuoft. In Democracy in America, Toqueville distinguishes between national and local interests and endorses the decentralized American approach to the latter. Alexis de Tocqueville, Phillips Bradley, and Henry Reeve, Democracy in America, vol. 1 (New York: Vintage Books, 1954), 61–101 (Ch. V)

vicious prisons are found in the United States." Nearly 200 years later, their judgment would likely be less mixed, and less positive. Regional differences remain important, but American prisons and jails have largely converged on a punitive mean that includes what is likely the world's highest incarceration rate; notoriously brutal conditions of confinement; and persistent resort to extreme penalties such as capital punishment and life without parole. And while Beaumont and Tocqueville had little to say about the racial disparities they observed in prisons, the problem remains glaring and central to debates today.

Why did the "land of the free" become the jailer to one-quarter of the world's

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² In fact, Beaumont and Tocqueville endorsed only with caution even the "progressive" prisons that relied on strict discipline and isolation, such as the penitentiaries of New York and Pennsylvania. In these, they found a model of "despotism" analogous to that which Tocqueville later diagnosed as a threat to American freedom. Beaumont, Tocqueville, and Lieber, *Penitentiary*, 47. Alexis de Tocqueville and Henry Reeve, *Democracy in America*, vol. 2 (New York, N.Y.: D. Appleton and Co., 1904), 814 Ch. XXXV. Richard Avramenko and Robert Gingerich, "Democratic Dystopia: Tocqueville and the American Penitentiary System," *Polity* 46, no. 1 (January 1, 2014): 56–80.

³ James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, USA, 2005). Marc Morjé Howard, *Unusually Cruel: Prisons, Punishment, and the Real American Exceptionalism* (Oxford, New York: Oxford University Press, 2017). "World Prison Brief" (Institute for Criminal Policy Research), accessed August 7, 2018, http://www.prisonstudies.org. Incomplete data make it difficult to know if authoritarian regimes such as China or North Korea have higher rates of incarceration. In 2014, the high range of a United Nations-reported estimate for the North Korean prison population, including ordinary and political prisoners, was 200,000, yielding a total incarceration rate of 125.6, far below U.S. levels. In any case, comparison to such regimes is of little value because their practices are qualitatively different. The U.N. conservatively estimates an annual death rate of 10 percent in North Korea's political prisons, and estimates as many as 400,000 dead over a thirty-year period. American jails and prisons are indeed harsh, but they still exist in a different universe. "Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea" (United Nations Human Rights Council, February 7, 2014), 226, 245–46.

⁴ Beaumont and Tocqueville argued that African-Americans were over-represented in prisons because they were more likely to commit crimes, a condition they claimed grew out of the effects of slavery. Beaumont, Tocqueville, and Lieber, *Penitentiary*, 60–70, 161, 240, 263–64.

prisoners? Why did this system, so disproportionately punitive toward African-Americans, develop in the wake of the Civil Rights movement? Certainly the answer is rooted in the perfect storm of racial backlash to Civil Rights and rising violent crime that descended upon the country in the late 1960s and early 1970s. But those disruptions did not occur in an institutional vacuum. They swept over a criminal-justice system that retained its deeply local character, and, despite growing interdependence among its many players, had great difficulty acting "uniformly and simultaneously."

This dissertation argues that mass incarceration occurred through a process of fragmented state-building: Institutional fragmentation both spurred the political will and critically enabled the bureaucratic capacity to imprison at a mass scale. By fragmentation, I mean both federalism (the division of authority among levels of government) and the separation of powers (the provision of independent political bases for different actors within a single level of government).

My argument has three major parts. First, explanations for the growth in political will to punish often emphasize the national arena. In contrast, I argue that the local arena played a critical role in the rise of law-and-order politics. Fragmentation carved up the American polity in ways that amplified punitive impulses and muffled competing voices. Second, bureaucratic capacity is generally assumed to have followed naturally from the political will to punish. I argue that the process was much more complicated. Institutional fragmentation meant that carceral state-builders had to push their program through multiple bureaucracies. This created gridlock that slowed the carceral state down in the

medium term, but was biased to burst in ways that would entrench it in the long term.

Third, my account shifts the spotlight toward a new set of players that both academics and reformers are only starting to understand, in particular prosecutors. I show that the carceral state developed partly because prosecutors and their allies out-organized and out-lobbied their rivals, turning structural advantages into decisive victories.

Much of the literature on American political development concludes that

American institutions discourage the broad and centralized provision of social policy, but
that is not the same as saying that they limit government. In fact, fragmentation creates
alternative paths for government expansion, paths that cumulatively can lead to "more
government" than in a Weberian system. This dissertation is a case study in this distinctly
American form of state-building — the construction of racialized, localized, coercive
capacity.

Literature: Seeing Mass Incarceration From the Bottom Up

Much of the leading scholarship on mass incarceration implies that it was a relatively coherent project. Structural accounts associate the phenomenon with deep economic, racial, or cultural forces that give incarceration a powerful logic. A Marxist

⁵ Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in United States* (Harvard University Press, 2009). Robert C. Lieberman, *Shifting The Color Line: Race and The American Welfare State* (Cambridge, Mass.: Harvard University Press, 1998). Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*, Reprint edition

(New York; London: W. W. Norton & Company, 2006). Lisa L. Miller, *The Myth of Mob Rule: Violent Crime and Democratic Politics* (New York, NY: Oxford University Press, 2016).

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perspective stresses incarceration as a way to control an urban labor force that became expendable in the age of post-Fordism. Loic Wacquant argues this was a racially-driven process, in which the prison became an extension of the ghetto. In a similar vein, Michelle Alexander famously invoked the metaphor of a "new Jim Crow" to describe mass incarceration. She argues prisons expanded "when it became clear that the old caste system was crumbling and a new one would have to take its place," and "conservative whites began, once again, to search for a new racial order that would conform to the needs and constraints of the time." Other scholars stress the cultural dimensions of the project, or the sense of order that high incarceration provides to whites. For example, David Garland and Jonathan Simon view the rise of law-and-order politics as a response to the pervasive insecurity accompanying the rise of post-Fordist economics. But while they surely capture important enabling conditions for mass incarceration, some of these stories operate at such a high level of abstraction that they risk falling into functionalism.

Another stream of scholarship introduces agents who exploited these enabling,

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⁶ Christian Parenti, *Lockdown America: Police and Prisons in the Age of Crisis* (London; New York: Verso, 2000).

⁷ Loïc Wacquant, "Deadly Symbiosis When Ghetto and Prison Meet and Mesh," *Punishment & Society* 3, no. 1 (January 1, 2001): 95–133, https://doi.org/10.1177/14624740122228276.

⁸ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Reprint (New Press, The, 2012), 22, 40 See also 2, 4, 190-220. Despite the provocative title of Alexander's book, her historical discussion is attentive to contingency and fits well with the stream of scholarship described below.

⁹ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002). Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2009). For an alternative cultural explanation of American "harsh justice," see Whitman, *Harsh Justice*.

structural conditions to generate the ideas that undergirded mass incarceration. This line of argument explains mass incarceration as rooted in the ideological maneuvering of national elites, who exploited fears of crime for electoral purposes and persuaded themselves that state violence was an effective and perfectible response to problems of urban crisis and racial discord. Pioneering works by Kathryn Beckett and Vesla Weaver emphasized the way national GOP politicians, particularly presidential candidates, used punitive, racially loaded rhetoric to appeal to the anxieties of white voters disaffected with the Democratic Party in the wake of the Civil Rights movement. Fears dating back to the age of slavery, including notions of black criminality and warnings that liberation would spark violence, were first invoked to oppose the march of Civil Rights. As the effort to preserve segregation faltered and anti-racist norms took hold in the 1960s, explicit racial references dropped out of these warnings. But the rhetoric took on a "wetold-you-so" form, as Civil Rights and liberal welfare politics were blamed for spurring a wave of disorder, including rioting and a steep rise in violent crime. Conservatives argued that only a muscular response from the state would quell these disruptions. 10 A newer wave of scholarship argues that liberals failed to fundamentally challenge these

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¹⁰ Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York; Oxford: Oxford University Press, 1999). Vesla M. Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development* 21, no. 2 (2007): 230–65, https://doi.org/10.1017/S0898588X07000211. David Dagan and Steven M. Teles, *Prison Break: Why Conservatives Turned Against Mass Incarceration* (New York: Oxford University Press, 2016). Taking a longer historical view, Marie Gottschalk argues that elites have repeatedly promoted and exploited "moral panics" as an opportunity to improve their electoral or bureaucratic fortunes. As each round of this game created new crime-fighting institutions, the effects of subsequent rounds were multiplied, and the legitimacy and scope of federal law enforcement grew. Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006).

ideas, and in many cases entrenched them.¹¹

The problem with all these accounts is that the "carceral state" is actually a collection of hundreds of carceral jurisdictions. On any given day in 2015, state prisons incarcerated 1.2 million people and local jails held 730,000. The federal government, with its 200,000 prisoners, accounted for about 9 percent of the total U.S. inmate population of 2.2 million.¹² The national-politics stories tell us little about what local and state officials, who sit at the actual levers of incarceration in America, were doing. Nor do they offer us a theoretically grounded, institutional explanation for how the federal system would have enabled them to do it.¹³

The tendency to overlook local and state officials is mirrored by a tendency to smooth out bureaucratic complexity. In the dominant story, told most persuasively by David Garland, the ethos of "penal-welfarism" in the correctional apparatus simply

fact, Elizabeth Hinton argues that liberals consented to that expansion and midwifed an effective merger of welfare and crime-control policy in part because they never managed a clean break with notions of black "pathology." Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass

Incarceration in America (Cambridge, Massachusetts: Harvard University Press, 2016).

As Naomi Murakawa argues, conservatives were able to give the argument a respectable pedigree by connecting it to a previous tradition of civil-rights promotion: the notion that robust federal intervention was necessary to protect citizens from lawless violence. They thus transported to the realm of private street crime an argument that liberals had made in the very different context of ending violence sanctioned or perpetrated by the Jim Crow *state*. Instead of contesting this co-optation of their ideas, liberals of the 1970s and 1980s fixated on procedural changes designed to scrub racism out of individual decisions in the criminal-justice system. In doing so, they failed to challenge the overall expansion of that system. Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford University Press, 2014). In

¹² Danielle Kaeble and Lauren E. Glaze, "Correctional Populations in the United States, 2015" (U.S. Bureau of Justice Statistics, December 2016), Appendix Table 6, http://bit.ly/2evNPfH.

¹³ This is not to say the existing scholarship ignores American institutions. Murakawa, for example, shows how the two-party structure drives punitive "bidding wars" in Congress. Murakawa, *The First Civil Right*. Weaver argues that conservatives' repackaging of racial fears into the "crime issue" represented a strategic response to a new institutional terrain that disadvantaged old tropes. Weaver, "Frontlash."

crumbled under an onslaught of conservative backlash and liberal suspicions, to be readily replaced by the embrace of sweeping and austere incarceration.¹⁴ But as I will emphasize below, the criminal-justice bureaucracy is exceptionally fragmented, even by American standards, and the historical record suggests it did not undergo a sudden conversion from one model to another. Prisons are usually identified as the key site of transition from the philosophy of rehabilitation to one of incapacitation and deterrence. As late as 1987, however, conservative scholar John Dilulio found a full spectrum of prison-management models. In fact, his book Governing Prisons was in part a persuasive exercise, arguing that the "control" approach of Texas prisons was superior to the "responsibility" approach of Michigan and the "consensual" model of California. 15 Garland also overstates the degree of consensus that existed around the "penal-welfare" model even at its mid-century height.¹⁶ Certainly the plantation models that dominated Southern prisons in this era were a long way from any ideology of "penal-welfare," and it took decades of intrusive court supervision to change them. The upshot is that prison bureaucracies have always been sites of struggle and contestation, and one paradigm rarely crushes its competitors as thoroughly as the "carceral state" literature sometimes

¹⁴ Garland, *The Culture of Control*.

¹⁵ John J. DiIulio, *Governing Prisons* (Simon and Schuster, 1990).

¹⁶ Mona Lynch, "Mass Incarceration, Legal Change, and Locale," *Criminology & Public Policy* 10, no. 3 (2011): 686, https://doi.org/10.1111/j.1745-9133.2011.00734.x.

implies.17

An emerging stream of carceral-state literature in sociology, history, and political science has begun to address these problems with case studies of individual states, including Arizona, California, Florida, Pennsylvania, Texas, and New York. My contribution to this literature is twofold. First, I offer a more thoroughly intergovernmental account than we have previously seen, one that takes full account of local-government complexity and weaves it together with the state and federal levels of analysis. Second, rather than emphasizing variation across the states, I am searching for commonalities. Incarceration rates vary widely across jurisdictions, but the overriding trend since the 1960s has been one of overwhelming growth. Since 1972, prison incarceration in every state of the union has grown by at least 100 percent, and the modal

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¹⁷ Philip Goodman, Joshua Page, and Michelle Phelps, *Breaking the Pendulum: The Long Struggle Over Criminal Justice* (Oxford, New York: Oxford University Press, 2017).

¹⁸ Vanessa Barker, The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders (Oxford; New York: Oxford University Press, 2009). M. C. Campbell, "Ornery Alligators and Soap on a Rope: Texas Prosecutors and Punishment Reform in the Lone Star State," Theoretical Criminology 16, no. 3 (August 1, 2012): 289-311. Michael C. Campbell, "Are All Politics Local? A Case Study of Local Conditions in a Period of 'Law and Order' Politics," The ANNALS of the American Academy of Political and Social Science 664, no. 1 (March 1, 2016): 43-61. James Forman, Jr., Locking Up Our Own: Crime and Punishment in Black America (New York: Farrar, Straus and Giroux, 2017). Michael Javen Fortner, Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment (Cambridge, Massachusetts: Harvard University Press, 2015). Mona Pauline Lynch, Sunbelt Justice: Arizona and the Transformation of American Punishment (Stanford, Calif.: Stanford Law Books, 2010). Lisa L. Miller, The Perils of Federalism: Race, Poverty, and the Politics of Crime Control (Oxford; New York: Oxford University Press, 2010). Joshua Page, The Toughest Beat: Politics, Punishment, and the Prison Officers Union in California (Oxford University Press, 2013). Robert Perkinson, Texas Tough: The Rise of America's Prison Empire (Picador, 2010). Heather Schoenfeld, Building the Prison State: Race and the Politics of Mass Incarceration (Chicago: University of Chicago Press, 2018). For an important synthesis, see Michael C. Campbell and Heather Schoenfeld, "The Transformation of America's Penal Order: A Historicized Political Sociology of Punishment," American Journal of Sociology 118, no. 5 (March 2013): 1375-1423.

increase has been around 500 percent.¹⁹

In short, the literature on mass incarceration has a persuasive account of structural causes and national politics and a growing array of explanations for how these played out differently in individual states. But it remains largely silent about how law-and-order politics arose from the local arena, thus missing a key force in the creation of political will to punish. And it lacks a theory of how that political will led to the bureaucratic transformation and construction that was required to put 2 million Americans behind bars. Both of these problems are the result of insufficient attention to the fragmented institutions that structure the politics of punishment.

Theory: Interdependent Fragmentation and American Justice

Building an institutional theory of mass incarceration requires us to begin with a full accounting of institutional fragmentation in the American state. Its most familiar dimensions are the separation of powers and federalism. These are commonly understood as the division of government into three branches and the division of jurisdiction by geographical units, where most of the emphasis is on the federal-state balance. But drilling down further into the federal system muddies our sense of what it means to "separate powers." That's because additional splintering of executive and judiciary

¹⁹ Franklin E. Zimring, "The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects," *Journal of Criminal Law and Criminology* 100, no. 3 (2010).

powers is common at the sub-national level, where government is characterized by a Jacksonian proliferation of elected positions. Where governors, attorneys general, treasurers, mayors, district attorneys, sheriffs, and judges all stand for election separately, inter-branch competition is further complicated by within-branch competition. In the following discussion, I use the term "units of government" to cover a range of actors placed at different positions in the system, including agencies, branches, and administrative levels (local, state, or federal). The rationale is that the dynamics I discuss apply to all of these units, and they often interact with each other across their systemic positions.

It is critical to recognize that fragmentation does not suggest isolation – far from it. Fragmentation has always been accompanied by a high degree of interdependence among units of government. That interdependence is both horizontal, e.g., one agency of local government relying on another, and vertical, with responsibilities shared by local, state, and federal governments. Far from being scrupulously coordinated, these interactions are messy. Jurisdictions overlap, boundaries are crossed, and responsibilities are scuffled over. The image is less of fighter jets flying in formation and more of dirt bikes jostling for position. Thus, the defining condition of American government is one of *interdependent fragmentation*.

In the remainder of this section, I elaborate the theoretical steps of the argument that interdependent fragmentation fostered carceral growth. First, I offer a historically grounded theory of how the intense localism of criminal-justice authority interacted with

political conditions in American cities from the late 1960s through the 1980s to favor punitive forces. I also argue that local officials have significant influence in setting state and national policy agendas. Second, I theorize that interdependent fragmentation creates a type of moral hazard in which the agencies that drive incarceration may be indifferent to its costs. Third, I move from structure to agency by arguing that a framework of professional competition explains how different criminal-justice actors responded to the mix of institutional and political incentives laid out in the previous steps.

I. Federalism and law-and-order politics

In this section, I argue that crime is particularly likely to be salient in local politics and that district attorneys, in particular, were positioned to exploit the issue to their political advantage in the post-war era. I then argue that the flow of ideas across levels of government reinforced the salience and punitive framing of the issue.

A. Local politics of law and order

The American constitutional structure places the primary responsibility for crime control on local officials. Three major factors are likely to structure the behavior of these officials. The first is the level of "racial threat" in the relevant jurisdiction — the extent to which a dominant racial group feels threatened by others by reason of demographics or

political or economic change. The second, all too often closely related, is public anxiety over particular crime threats, real or perceived, and the dominant understanding of their causes. The third is the structure of local politics. Of course, these factors can be interactive. For example, racial change may bring about a change in political structures that in turn may lead elites to conjure up crime anxieties that otherwise would lie dormant. But in the era of mass incarceration, all three factors were independently in motion. Racial tensions were high in many American cities. Violent crime was also rising. And local political institutions were in flux.

The public salience of crime has a cyclical and racialized character in American politics. There is a long history of "moral panics" arising, particularly around drugs, with specific ethnic or racial groups often singled out as the source of the threat.²⁰ These flames are often fanned by opportunistic national politicians, and the political-science and mass-incarceration literatures tend to emphasize this dimension of the phenomenon.²¹ But upon closer inspection, both theory and empirics suggest that such fears tend to have deeply local roots. Theoretically, we might expect crime to register particularly acutely on the local agenda. For while fears of crime may indeed stand in for concerns about racial and economic dislocation, they are also fears about victimization in the particular place where one lives. "Fear of crime affects people in their very sense of belonging to a

²⁰ James A. Morone, *Hellfire Nation: The Politics of Sin in American History* (Yale University Press, 2004). Gottschalk, *Prison and the Gallows*.

²¹ Beckett, *Making Crime Pay*. Weaver, "Frontlash." Alexander, *The New Jim Crow*, 40–58. Kathleen Frydl, *The Drug Wars in America*, 1940-1973 (New York: Cambridge University Press, 2013). Hinton, *From the War on Poverty to the War on Crime*.

specific community through their home and their use of neighborhood parks and streets."²² Given local control over police and so many justice functions, it is likely citizens seeking redress over crime concerns would turn to their local officials first. Empirically, we know that the "use of neighborhood parks and streets" became objectively more dangerous during the period preceding mass incarceration. As Lisa Miller has shown, an increase in public anxiety over crime in this era was both justified and "normal" in comparative context. Homicide rates were trending up sharply, with all demographic groups facing higher exposure. And such crime increases inspired public reaction in all the political systems Miller studied.²³ While elite behavior was thus certainly important, there was also a lived, local experience underlying the fears that gave rise to mass incarceration. The point is driven home by recent works by James Forman, Jr., and Michael Fortner. In a powerful study of Harlem from the 1940s through the 1970s, Fortner shows that a "black silent majority" in the neighborhood became increasingly punitive as drug abuse and violence spiraled. Fortner finds little evidence of racism driving the policy preferences of white New Yorkers in his study, in part because the state was so efficiently segregated by the late 1960s that the races had very different experiences of crime.²⁴ But in more diverse jurisdictions, racist fears rooted in local conflicts have often fueled "moral panics." Warnings about Chinese or Mexican

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²² Simon, Governing Through Crime, 154.

²³ Miller, *The Myth of Mob Rule*.

²⁴ Fortner, *Black Silent Majority*. Forman, Jr., *Locking Up Our Own*.

immigrants spreading drugs spiked when labor-market competition was high in California. In the cities of the East, the drive for Prohibition and the crusade against "white slavery" occurred at times of great anxiety over the influx of European migrants.²⁵ Indeed, racial tensions are likely to weigh more heavily at the local than at the national level, where voters factor in broader issues such as macro-economics and national security.

The question is how the third factor we have highlighted, the structure of local politics, channels such fears. In all but four states, the district attorney is independently elected at the local level. 26 While much scholarship has focused on the perils of election for judges, the effect of district-attorney elections is both straightforward and underappreciated in the carceral-state literature. When citizens are worried about crime, elections for a post that is dedicated solely to law enforcement are a natural outlet for such fears. Virtually the only tool that a district attorney can wield against crime is punishment. She is powerless to tackle underlying social conditions, and can have only an indirect influence on policing strategies (by emphasizing categories of cases she will prosecute or decline to pursue). Acute crime fears among citizens should thus prompt candidates for the office to promise more punishment, either for all defendants or for a particular subset. Such a policy may be popular with voters on the merits. Just as

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²⁵ Gottschalk, *Prison and the Gallows*.

²⁶ Prosecutors are appointed in Connecticut, Delaware, New Jersey, and Rhode Island. Michael J. Ellis, "The Origins of the Elected Prosecutor," *Yale Law Journal* 121, no. 6 (April 2012): 1528–69.

importantly, "tough" rhetoric is an obvious signaling mechanism that voters can use to assess who is most committed to fighting the crime problem. These pressures are even more likely to influence district attorneys than judges, because the D.A. is a single, high-profile post while judges are numerous and often obscure. Judicial elections are also less frequent and, because seats may initially be secured by appointment, less open to outsiders.

The combination of elections and local crime fears can make the rise of "law and order" district attorneys seem inevitable, but the broader structure of local politics matters, too. Historically, urban crime politics were heavily mediated by the needs of party machines. On the one hand, urban elites fostered a rhetoric of black criminality through the inter-war era. In this storyline, offending by African-Americans was ascribed to cultural deficiencies rather than structural conditions. ²⁷ On the other hand, the machines often worked hand-in-hand with the criminal organizations that controlled urban vice activity, resulting in sporadic and at times symbolic enforcement. As Khalil Gibran Muhammad observes of Philadelphia, "Having the least political influence, black residents in vice districts were more likely to experience two extreme forms of policing: widespread corruption and frequent raids." ²⁸

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²⁷ On urban rhetoric, see Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2010). On the way this ideology influenced liberals through the 1960s and beyond, see Hinton, *From the War on Poverty to the War on Crime*.

²⁸ Muhammad, *The Condemnation of Blackness*, 260. On prosecutors and political machines, see Ellis, "The Origins of the Elected Prosecutor."

Theory suggests that the machines also checked prosecutors in the same way that they checked all ambitious politicians. Since a small cadre of "bosses" generally decided upon standard-bearers and promotions, there was little incentive for a district attorney to use his office in order to develop a personal political "brand."²⁹ The intensive fragmentation of the local executive — where mayors, treasurers, county commissioners, sheriffs, and so on may all be elected separately — in this world was counteracted by the unifying force of party. But these restrictions loosened as the machines began to crumble and the eradication of corruption became a major issue in urban politics. In fact, district attorneys' first major political opportunity was to put themselves in the vanguard of the assault on corruption, rather than street crime as such.³⁰ In New York City, Republican Thomas Dewey showed the way as early as the 1930s. Backed by Fiorello LaGuardia, the GOP mayor and Roosevelt-allied New Dealer, Dewey declared a war on the organizedcrime enterprises that had flourished under the city's long-standing Democratic machine. Working first as a special prosecutor appointed to circumvent the machine, then as Manhattan District Attorney, Dewey made brilliant use of media and became a national hero.³¹ His crusade was followed by a tenure as New York governor, two GOP

²⁹ Steven P. Erie, *Rainbow's End: Irish-Americans and the Dilemmas of Urban Machine Politics, 1840-1985* (Berkeley: University of California Press, 1990) p. 26, 86, 101.

³⁰ Anne M. Heinz, Herbert Jacob, and Robert L. Lineberry, *Crime in City Politics* (Longman, 1983).

³¹ Michael Woodiwiss, *Crime Crusades and Corruption: Prohibitions in the United States 1900-1987* (Totowa, N.J: Rowman & Littlefield Publishers, 1988). Jed Shugerman, "The Rise of the Prosecutor Politicians": Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017," *SHUGERBLOG* (blog), July 7, 2017, https://shugerblog.com/2017/07/07/the-rise-of-

presidential nominations, and lasting influence within the national party, where he became an ally of Richard Nixon's. In coming years, the prosecuting function would become a springboard for many other ambitious politicians.

The decline of the machines also ushered in a period of relatively high party competition. This dynamic privileged the votes of white swing voters who veered between the GOP and the Democrats. By the 1970s, African-Americans were already a reliable voting bloc for urban Democrats.³² Republicans could win only by capturing an overwhelming majority of white voters; Democrats had to pick off enough of those whites to form a coalition with their black vote in order to win. Meanwhile, just as national political candidates recognized crime as an effective outlet for racial anxieties in the post-Civil Rights era, candidates for local office were also searching for such outlets.³³ Cities were undergoing profound demographic change in this era, with shrinking white populations often living in tension with growing black populations.³⁴ The stage was thus set for district attorneys to launch their own anti-crime crusades, using punitive rhetoric that served similar functions as it did on the national level.

the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/.

³² The argument mirrors Paul Frymer's about African-Americans as a "captured" bloc. Paul Frymer, *Uneasy Alliances: Race and Party Competition in America* (Princeton, N.J.; Woodstock: Princeton University Press, 2010).

³³ Weaver, "Frontlash."

³⁴ See, for example, Kevin M. Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* (Princeton, N.J.; Woodstock: Princeton University Press, 2007).

B. How local concerns reach the state and federal agendas

American federalism assigns primary responsibility for crime-fighting to localities, but that does not mean the issue is destined to stay a purely local one. There are a number of mechanisms that can push concerns shared in a wide range of localities onto state and national agendas. Federalism enables policy entrepreneurs unhappy with the status quo to attempt to change the venue for their issue to a different level of government, and they may seek to move up the federal ladder as well as down it. The election of members of state legislatures and Congress by geographic constituencies leads those members to think in particularistic terms about their districts. They may well choose to put these particular concerns on the national agenda if they can find likeminded colleagues. Meanwhile, gubernatorial and presidential candidates will not abstain from making hay out of an issue that affects numerous localities simply because they lack policy levers to address it. In some cases, they will seek to develop the necessary policy levers. In others, they will be content to take a position without intervening further.

These choices by state and national politicians — about which issues to highlight, and how deeply to intervene in them — can also be decisively influenced by their local counterparts. Federalism encourages the creation of local political organizations that state

³⁵ Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics*, 2nd ed. (University Of Chicago Press, 2009), Ch. 11.

³⁶ David R. Mayhew, Congress: The Electoral Connection (Yale University Press, 1974).

and national officials may rely on to deliver votes.³⁷ These political linkages can wax and wane on their own schedule, in part as a function of the density of party organization.³⁸ But at some level they are always essential to electoral success (not to mention governance). They thus give local officials significant, if somewhat subterranean, influence on higher-level agendas. Patterns of agenda-setting are also influenced by the fact that local officials often go on to become state and federal officials. As politicians travel from one venue to another, they take with them the ideas and technologies they have learned at their previous station.

Local officials may wish to raise an issue on the state or national agenda if they believe doing so will generate subsidies or favorable political attention without unduly jeopardizing their control. They may also wish to deflect blame for a problem by arguing it cannot be solved without higher-level intervention. Finally, they may seek to manipulate the state and national agenda to win some institutional or legal advantage over local rivals. In the case of mass incarceration, local politicians pushed crime onto higher-level agendas for all of these reasons.

While the carceral-state literature has rightly highlighted the rich history of presidential candidates engaging in crime-related demagoguery, it also shows that many of the key innovators in this rhetoric were in fact locally-nested actors. Vesla Weaver

³⁷ Erie stresses the importance of intergovernmental linkages to the development of urban Irish machines, for example. Erie, *Rainbow's End*.

³⁸ Baumgartner and Jones argue that transmission of policy agendas is more likely during periods of close intergovernmental cooperation, when the policy and fiscal relationships between federal and subnational governments are tightened. Baumgartner and Jones, *Agendas and Instability in American Politics*, Ch. 11.

shows that much of the "frontlash" rhetoric linking civil rights to crime came from members of the U.S. House.³⁹ Marie Gottschalk argues that "local officials, especially mayors, were critical in maneuvering the Truman administration and other federal authorities into taking a more aggressive approach to crime, in particular organized crime."⁴⁰ In the 1970s and 1980s, former local prosecutors played key roles in the development of punitive federal policy, from Edward Kennedy to Arlen Specter. And as I will show, prosecutors have often lobbied state and federal government to assist in resolving their local political problems.

II. Buckpassing and crisis

Crime became both highly salient and deeply politicized because of the intersection of historical events and institutional structure described so far.

Interdependent fragmentation also helps to explain why that politicization brought about the policy choices that resulted in high incarceration, and why policy feedback functioned to entrench those choices rather than undermine them.

The first effect of interdependent fragmentation on policy choice is more a background condition than a driving force. In the historical context of a limited social-policy state, legislators failed to muster comprehensive solutions that would address root

³⁹ Weaver, "Frontlash."

⁴⁰ Gottschalk, *Prison and the Gallows*, 72.

causes of crime, such as unemployment and poor schooling. Doing so would have involved the types of systemic changes that multiple veto points make difficult. The result is what Lisa Miller calls the politics of the "legislative least common denominator," in which the approach most legislators do agree on, even if it is not their preferred choice, wins. As she argues, that "least common denominator" ended up being repression.⁴¹

But there was also a second, more immediate "least common denominator" dynamic at work in the rise of mass incarceration. Even within a framework that emphasized repression over welfare, the fragmentation of the criminal-justice system disincentivized systematic thinking about the most effective, affordable crime interventions. The reason is that interdependent fragmentation enables pervasive accountability-shifting:

Cost-shifting occurs when decisions made by one unit of government impose direct costs on another unit, either financial (as in the case of subsidies and guarantees) or in terms of workload (as in the case of a referral from welfare to employment services). Such cost-shifting is usually benign, part of the routine operation of government. But occasionally imbalances can occur. When a government unit imposes costs on other government units at an unsustainable rate, it is effectively exploiting a free-riding problem.

Liability-shifting is the traveling companion of cost-shifting. It can take the form of

⁴¹ Miller, *The Myth of Mob Rule*.

classic buckpassing, in which a government unit refuses to do a job by arguing another unit is responsible. In another form, liability-shifting occurs when multiple government units are involved in a policy that goes awry and subsequently point fingers at one another for creating the problem, making it difficult for the public to assign blame.

Residents of Flint, Michigan, and New Orleans can attest to this phenomenon. In practice, the two forms of liability-shifting often overlap.⁴²

Culpability-shifting is a more rare form of accountability evasion, but one of crucial importance in fields that require the application of force, such as criminal justice and the military. In these fields, individuals may be required by their professional roles to perform tasks that under ordinary conditions would violate social norms. Their work is thus "both lawful and transgressive." Culpability-shifting occurs when individuals can resolve the mental pressure created by these demands by noting that they are merely one step in a long chain of decision-makers who authorize, implement, and adjudicate the action.

⁴² Weaver identifies them as "buckpassing" and "scapegoating" in his seminal 1986 article on "blame avoidance." Pal and Weaver comment briefly on how federalism can encourage both behaviors in later work. R. Kent Weaver, "The Politics of Blame Avoidance," *Journal of Public Policy* 6, no. 4 (October 1986): 371–398, https://doi.org/10.1017/S0143814X00004219. Leslie A. Pal and R. Kent Weaver, *The Government Taketh Away: The Politics of Pain in the United States and Canada* (Georgetown University Press, 2003), 12.

⁴³ David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Belknap Press, 2012). The importance of such individual ethical considerations is highlighted by examples in which they have driven change. One well-known criminal-justice example was the decision of Illinois Governor George Ryan to commute the sentences of every death-row inmate in his state in 2003. In general, however, the splintered nature of criminal punishment in the U.S. makes it easier for policy makers to avoid such "moments of truth."

The policy consequences of accountability-shifting depend on how different forms of it are combined and how easily each in a series of linked agencies can engage in them. In general, cost-shifting and blame-shifting are much easier to remedy when both government units involved report to the same political masters; when non-payment or shirking is a viable option for the "receiving" units; and when the cost relationship among the units is two-way, so each has a stake in the other's health. When all the players in a policy system are operating at the same level of government, accountability evasion is mitigated somewhat by the likelihood that although agencies may have different political masters, they draw on the same budget, and that the shared ecosystem decreases the ability to shift blame. Accountability becomes even harder to maintain when authority is shared vertically, however.

To understand how these dynamics unfolded in matters of crime and punishment, it is helpful to explicate the fragmentation of the American criminal-justice system, and then consider the linkages that do exist among the constituent parts. A relatively bare analysis of the institutional incentives created by such a system sets the stage for us to understand how it interacted with the political context of the 1970s and 1980s. As many as six agencies may be involved in a single case as it moves through the process from arrest to release. Figure 1 lays out these steps and shows (crudely) who each agency is accountable to in a typical big-city setting. As it shows, the agencies involved tend to have different political masters. Moreover, while the ability to shirk is relatively high

among front-end agencies — the police and district attorney — it is extremely low for players at the middle and end of the process. Police can decide not to investigate crimes or make arrests; district attorneys can dismiss charges. Public defenders and judges cannot decline cases, however, and jailers cannot refuse custody of an inmate without setting off a crisis. Probation and parole agencies also cannot reject cases, but they can engage in minimal supervision — though it's a risky strategy, given the potential for backlash if a supervisee commits a new crime.

Table 1–1 – Fragmentation in a typical urban criminal-justice system

Agency	Function	Principal
Police	Arrest	Mayor / council
D.A.	Charge / convict*	Elected
Public defenders	Defend	County / state government
Judges	Sentence	Elected or appointed
Sheriffs	Incarcerate	Elected
State prison Incarcerate	Incarcerate	Governor / Legislature /
		Courts
Probation/parole	Supervise	County / state government

^{*} The "convict" function is assigned to the district attorney because the vast majority of cases are disposed of by guilty pleas, with no trial.

⁴⁴ On D.A. discretion, see Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (Oxford; New York: Oxford University Press, 2009).

The result is a type of moral hazard: The agents who send people behind bars are not held accountable for the costs or conditions of confinement. Prosecutors have little connection to either local jails or state prisons, and no incentive to help them manage intake. In addition, while long sentences are served in state prisons, they are generally decided upon by courts responsible to local governments, who do not pay the cost of such sentences. Under these conditions, prisons are likely to be filled beyond capacity. Without taxing power of their own, they will seek aid from county and state officials who control the pocketbooks.

State elected officials like legislators and governors certainly could try to respond. They could spend taxpayer money to increase cell capacity or push policies that reduce prisoner numbers. But there is little political upside to doing so as long as prison crowding does not seem like a real threat to constituents. There is plenty of downside, on the other hand: Decarceration is likely to be complex and controversial, and spending on prisons has to be traded off against other priorities. Absent robust and abiding public concern for prisoners, these state-level politicians can expect the crowding issue to come onto their agenda only rarely. And given the multiple principals involved in the system, deflecting blame for the problem should be rather easy when it does rear its head. All the

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⁴⁵ This is what Zimring and Hawkins famously called the "correctional free lunch." Franklin E. Zimring and Gordon J. Hawkins, *The Scale of Imprisonment* (University of Chicago Press, 1993). See also W. David Ball, "Defunding State Prisons," *Crim. L. Bull.* 50 (2014): 1060. Nicola Lacey and David Soskice, "Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy," *Punishment & Society* 17, no. 4 (October 1, 2015): 454–81, https://doi.org/10.1177/1462474515604042.

incentives thus point them to engage in their own form of liability shifting — classic blame avoidance. 46 Of course, legislators and governors may recognize that there is some risk this situation will lead the prisons to blow up with a violent disturbance, and that such a disturbance will be connected to them. But until it happens, taking that risk will seem a better gamble than directly and individually linking themselves to solutions that will be unpopular with voters.

If a crisis does erupt, however, the calculus changes. A crisis will draw public attention, and make jailers' pleas for more resources visible and salient to the public. Now, legislators and governors will find an attentive public is able to link them to the problem. The imperative now is for the disturbance to be controlled. But given the public attention, it is even less likely than before that elected officials will embrace decarceration alternatives. Reducing the number of incoming prisoners is controversial and difficult, and not likely to sit well with prosecutors, which makes it a bad option in the high-salience environment of a crisis. On the other hand, simply expanding space is visible, easy to understand, and does not expose politicians to charges of giving in to criminals. The logic will drive politicians to expand prison space, giving their official blessing to the broad net police and prosecutors have cast at the front end of the system.

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⁴⁶ Weaver, "The Politics of Blame Avoidance."

III. How "policrat" prosecutors seized the advantage

The mix of institutional analysis and historical context we have adduced so far goes a long way to explain how the conditions for mass incarceration were put in place. But it remains to be explained how agents actually seized the opportunity to shift the equilibrium of American politics. The environment I have described can be understood as a "complex system" featuring all of the characteristics that Adam Sheingate has described as facilitating political entrepreneurship: "First, entrepreneurship will be more likely where institutional complexities generate uncertainty and create speculative opportunities for innovation...Second, institutional heterogeneity multiplies resources for creative recombination...Third, entrepreneurs can more easily consolidate their innovations when they occupy ambiguous positions within institutions." The combination of complexity and the crisis brought on by rising violent crime and the multiplicity of agencies and confusing borders of criminal justice certainly created opportunities for entrepreneurship. As will become clear, those opportunities were seized in large part by players who occupied positions of great ambiguity: prosecutors.

Many legal scholars have observed a rapid expansion in the power of prosecutors, arguing that in recent decades they have become by far the dominant actors in criminal courts. At the same time, prosecutors are said to have become much more aggressive in

⁴⁷ Adam D. Sheingate, "Political Entrepreneurship, Institutional Change, and American Political Development," *Studies in American Political Development* 17, no. 2 (October 2003): 193, https://doi.org/10.1017/S0898588X03000129.

their charging practices, contributing significantly to the rise of mass incarceration. ⁴⁸ As David Alan Sklansky notes, "The starting point for virtually every discussion of prosecutors in the United States is their tremendous clout." ⁴⁹ Numerous trends are blamed for the rise of the prosecuting juggernaut, with mandatory sentencing schemes and expanded plea bargaining among the favored culprits. But ironically, the literature on the rise of prosecutors rarely gives these figures much agency in the growth of their own power. ⁵⁰ Sklansky argues there is a deeper cause underlying the rise of prosecutors.

Prosecutors, he observes, "are first and foremost mediating figures. They mediate between law and discretion, between vengeance and mercy, between the adversarial and inquisitorial system, and between courts and police." Such "boundary-blurring" functions have been in high demand, Sklansky argues, to mitigate the proliferation of legal rules and surveillance capabilities enabling the enforcement of those rules. Thus, "prosecutors blur boundaries not because they have grabbed power, and not because the ambiguity of their role has escaped notice, but because boundary blurring has been what we have

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⁴⁸ John Pfaff advances the claim most forcefully. John F. Pfaff, "The Micro and Macro Causes of Prison Growth," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, July 20, 2012), http://papers.ssrn.com/abstract=2181062. Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform (New York: Basic Books, 2017).

⁴⁹ David Alan Sklansky, "The Nature and Function of Prosecutorial Power," *Journal Of Criminal Law & Criminology* 106, no. 3 (2016) p. 6. For an overview of the literature on expanding prosecutorial power, see Sklansky p. 6-8. For critiques of this literature, see Rodney L. Engen, "Have Sentencing Reforms Displaced Discretion Over Sentencing From Judges to Prosecutors?," in *The Changing Role of the American Prosecutor, The*, ed. John Worrall and M. Elaine Nugent-Borakove (SUNY Press, 2014). Jeffrey Bellin, "Reassessing Prosecutorial Power Through the Lens of Mass Incarceration," *Michigan Law Review* 116, no. 6 (April 1, 2018): 835–57.

⁵⁰ Important exceptions include William J. Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100, no. 3 (December 1, 2001): 505–600, https://doi.org/10.2307/1290411. Miller, *The Perils of Federalism*. Campbell, "Ornery Alligators and Soap on a Rope."

wanted prosecutors to do."⁵¹ In fact, I will argue that Sklansky's understanding of the prosecutor as boundary-blurring is not inconsistent with a theory of prosecutors engaging in something akin to a "power grab."

Prosecutors have actively contributed to the expansion of their power, and this behavior can be explained through the lens of professional conflict. Sociologist Andrew Abbott defined professions as "exclusive occupational groups applying somewhat abstract knowledge to particular cases," using the processes of diagnosis, inference, and treatment.⁵² For Abbott, the definitive problem of any profession is how to maintain control over a given set of tasks against intrusions by perceived outsiders. Professions compete for control of particular tasks primarily by making "jurisdictional claims" about the nature of those tasks and their unique ability to carry them out. These claims are presented in three different venues: the public, the legal (including legislatures and courts), and the workplace arenas. They must always be tied to a broad, cultural legitimating value, such as "justice" in the case of law. 53 Jurisdictional claims can be destabilized by tensions in the images presented across the three arenas; by the intrusion of new technologies and organizational forms; and by assaults from rival professions. While Abbott conceived of the capture of professional control as an end in itself, and thought of professionals and politicians as distinct groups, I argue that politicians

⁵¹ Sklansky, "Prosecutorial Power" p. 4, 32, 33.

⁵² Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press, 1988), 8, 40.

⁵³ Abbott cites this specific example at 184-85.

themselves can make professional claims to advance electoral and ideological interests.

Prosecutors in most states are elected to their positions. This practice, which is completely unique to the United States, grew out of a reaction to perceived abuses of patronage in the Jacksonian era and was intended to enhance local accountability. He But although prosecutors are elected by the people, legal observers have long argued that they must be more than mere hired guns for the majority. In the classic statement, Supreme Court Justice George Sutherland declared that the prosecutor represents an impartial sovereignty "whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law." In fact, prosecutors are tasked with an essentially bureaucratic function. In theory, their job is to merely apply statutes and rules established by legislatures and courts to particular situations. Meanwhile, they differ from classic executive actors such as presidents, governors, and mayors in that they do not claim broad mandates to assure the welfare of the people and do not have official legislative responsibilities or command of multiple, subsidiary bureaucracies.

Prosecutors thus float in a state of structural ambivalence. Like many other officials in state and local politics, they are what we might call *policrats*, combining the work of elected politicians with that of civil servants. The sustainability of this condition

⁵⁴ Michael J. Ellis, "The Origins of the Elected Prosecutor," *Yale Law Journal* 121, no. 6 (April 2012): 1528.

⁵⁵ Berger v. New York, 255 U.S. 22 (1921). The statement applied to U.S. attorneys, federal prosecutors appointed by the president, but has since been taken to extend to all prosecutors. Sklansky, "Prosecutorial Power."

depends in part on external forces. For many decades, the policrat's linkage of electoral and bureaucratic incentives was justified by a transactional understanding of democracy as driven by the distribution of the spoils.⁵⁶ But as we shall see, the ambivalence of policrats' position also makes them vulnerable to professional attack, and ultimately may require that they create a compelling identity *as a professional group*. Professionalism, we might say, is a response to the existential angst of the modern policrat.

As I will show, prosecutors responded to this problem in the 1950s by forming a national association to represent their interests, and by creating or strengthening similar associations in all 50 states. These associations became important vehicles for diffusing ideas and techniques and for lobbying state legislatures. Along the way, prosecutors created a professional identity that cast them as "chief law enforcement officers," the rightful leaders of local criminal-justice systems, and the authorities that had to be consulted before making any major changes to the criminal law.

A focus on professional ideology also brings into focus the puzzle of how political rhetoric influenced the "street-level" agents who had to implement mass incarceration.⁵⁷ The overall picture most observers have taken from the literature is that politicians endorsed a no-holds-barred war on crime, demonized drug users, and advocated wholesale street sweeps. This was certainly true of some politicians all of the

⁵⁶ Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982). Erie, *Rainbow's End.*

⁵⁷ Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service*, 30th anniversary edition (New York: Russell Sage Foundation, 2010).

time, and many politicians some of the time. But a closer look at the rhetoric of mass incarceration, among politicians but especially among professionals, reveals important qualifications. In particular, for decades there has been a promise to focus on violent, "career criminal" offenders or on drug "kingpins" instead of mules. The implication has been that the criminal-justice system would sift out the "worst of the worst" and incapacitate them while giving the rest a chance at redemption.

This need for subtlety, while acknowledged by politicians and understood as a truism at the level of abstract professional ideology, was often lost amid the bombast, however. A politician who vows no mercy for criminals and then adds that he is only talking about a small subset can imagine which part of the statement will stick, both with the public and with implementing agents. As street-level police and front-line assistant district attorneys came under pressure to deliver visible results, they produced "low-quality" arrests and convictions, which their political or bureaucratic superiors continued to justify as targeted and efficient. As I will show, this dynamic unfolded among federal U.S. attorneys steered by the Reagan Justice Department. Elizabeth Hinton observes a similar dynamic with respect to federal sting operations in the 1970s: "Policymakers supported these projects in the name of attacking organized crime. In the main battlegrounds of the War on Crime, however, these methods quickly evolved into an attack on black petty thieves." Of course, the institutional logics of the criminal-justice system did little to reinforce discipline in the face of these pressures.

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⁵⁸ Hinton, From the War on Poverty to the War on Crime, 209.

Methods: Process-Tracing in Pennsylvania

If the major gap facing the mass incarceration literature is that between national politics and local outcomes, or between structural causes and local effects, then the appropriate research strategy is the case study. As Gerring observed, the case study "may allow one to peer into the box of causality to locate the intermediate factors lying between some structural cause and its purported effect." This is partly because "tracing causal mechanisms is about cultivating sensitivity to a local context," which a large-N study rarely permits. ⁵⁹ This dissertation closely examines the rise of mass incarceration in Pennsylvania. It also provides context by exploring the national professional networks and the federal politics that influenced the strategies criminal-justice actors used to grapple with the politics of fragmentation and enhance their own positions. The research strategy thus combines close examination of a single sample from the 50-state universe with analysis of national dynamics likely to influence the whole universe.

I. Case selection

The sampling of a single case responds to the demand of the theory that local,

⁵⁹ John Gerring, "The Case Study: What It Is and What It Does," in *The Oxford Handbook of Political Science*, ed. Robert E. Goodin, online, 2013, http://bit.ly/2rj3rr3.

state, and federal government must all be considered interactively. In fact, to my knowledge this is the only study of mass incarceration to integrate all three levels of analysis. Future research, of course, should add carefully selected cases to further test the theory and increase its explanatory leverage. For the present, depth and theory-building were chosen over breadth. Close study of a single case allows me to generate historically-grounded theory about the intermediate factors and causal mechanisms that ratcheted the United States toward mass incarceration. The specific approach employed here is process-tracing, "a tool to investigate *how* X contributes to Y through a causal mechanism" where "we already either know that there is a causal relationship between X and Y, or have good theoretical and/or empirical grounds for assuming that there is one." My inductive approach, in which hypotheses arise "in the course of interpreting the empirical material itself," is fundamental to historical-institutionalist analysis, which combines the complexity of history with the parsimony of institutional analysis. ⁶¹

I begin by tracing the process of carceral growth "on the ground" in Philadelphia and then the state of Pennsylvania. Why Pennsylvania? In important ways, the state represents a "typical" case for mass incarceration. Focus on a typical case is appropriate

⁶⁰ Derek Beach and Rasmus Brun Pedersen, "Case Selection Techniques in Process-Tracing and the Implications of Taking the Study of Causal Mechanisms Seriously," 2012, http://bit.ly/2x2RAgd. Beach and Pederson argue that process-tracing is distinguished from other qualitative methods by its logic rather than its inductive approach: "The focus is not upon defining the full variation of the concept (differences in degree), but instead is on defining the concept itself (i.e., the concept is present or not present) (differences in kind)." p. 5.

⁶¹ Sven Steinmo, Kathleen Thelen, and Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press, 1992).

for process-tracing that aims to build theory, as the focus on mechanisms requires the presence of both the hypothesized X and Y to a fairly representative degree. 62 Pennsylvania is on the moderate end of incarceration, with a rate ranking 33rd in the country as of 1999. But that was barely changed from the state's 1983 position of 34th. With regard to incarceration growth, then, Pennsylvania is highly typical. (These years mark the beginning and end point of state-level data that combines both prison and jail incarceration.⁶³) In fact, most states maintained a stable ranking during this 16-year period, which marked the breakthrough to "mass incarceration" on the national level. The mean, median, and modal ranking change among states was zero. Prior studies have focused on explaining the wide variation in the growth of incarceration across states. That is clearly an important question, but it should not obscure the fact that every state in the union at least doubled its total incarceration.⁶⁴ (Another difficulty with these studies is that they are based only on state-level measures of incarceration, which miss the huge factor of local jails.) My goal here is different — to hone in on forces that influenced all of the states. For this purpose, a case that provides a median level of variation on the

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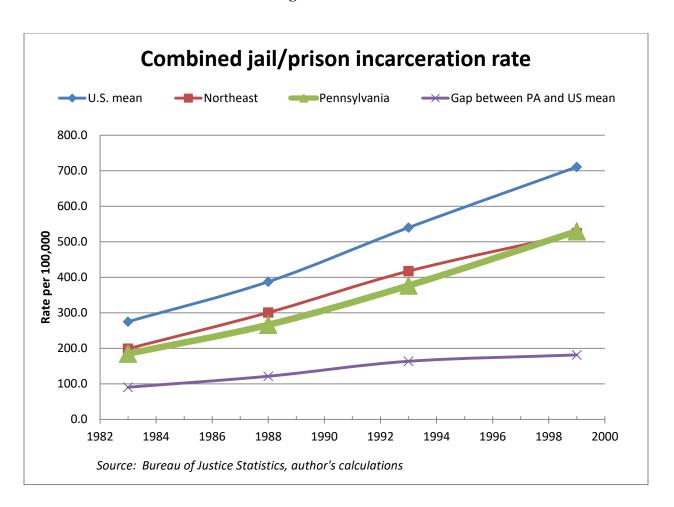
⁶² Beach and Pedersen, "Case Selection Techniques.". As the authors explain, "The ambition in theorycentric variants is to build generalizable theories about mechanisms that can travel across cases, within the context in which they are predicted to operate. Causal mechanisms are treated as middle-range theories, and are expected to be present in a population of cases when the causal conditions that trigger them are present, and they are within the proper scope conditions." p. 7. See also Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (University of Michigan Press, 2013).

⁶³ Author's calculations from Paige Harrison, "Total Number of Persons Under Local, State, or Federal Correctional Supervision, 1993, 1988, 1983," spreadsheet (Washington, D.C: Bureau of Justice Statistics, June 20, 2000), http://www.bjs.gov/content/data/corpop33.csv. Allen Beck, "Prison and Jail Inmates at Midyear 1999" (Washington, D.C: Bureau of Justice Statistics, April 19, 2000), http://bit.ly/2x488V9.

⁶⁴ Zimring, "The Scale of Imprisonment in the United States."

independent variable is appropriate.⁶⁵ Figure 1-1 shows Pennsylvania's incarceration position graphically.

Figure 1-1



⁶⁵ Pennsylvania looks different in other measures and across a longer time period. Measured by growth in state-level incarceration from 1983 to 2013, the Pew Charitable Trusts ranked Pennsylvania fourth. Pew also created a "punishment rate" index that compares imprisonment to severity-weighted crime rates. Pennsylvania ranked 10th for growth in this "punishment rate." "The Punishment Rate" (The Pew Charitable Trusts, March 23, 2016), http://pew.org/1RBTAin.

Pennsylvania represents a reasonably "typical" case in other important respects.

Consistent with narratives that identify Republican politicians as driving punitive ideology at the national level, one might expect GOP control of state government to contribute to incarceration growth. 66 As Table 1-1 shows, Pennsylvania offers variation in party control during the period I study most intensely, from the mid-1970s to the early 1990s — the era Campbell and Schoenfeld have identified as the period of "contested crime politics" that preceded a decisive pivot to "captured crime politics" by 1994.

Democrats replaced Republicans as the dominant party in control of government in the 1970s, but after a brief Republican resurgence in 1981 - 1982, divided government became the norm. The rest of the 1980s saw Republicans controlling the Senate and Democrats the House, with the governor's mansion shifting.

⁶⁶ As Thomas D. Stucky, Karen Heimer, and Joseph B. Lang, "Partisan Politics, Electoral Competition and Imprisonment: An Analysis of States Over Time," *Criminology* 43, no. 1 (2005): explain, findings from the empirical scholarship on this point are mixed. Studies finding a partisan effect include Joseph Dillon Davey, *The Politics of Prison Expansion: Winning Elections by Waging War on Crime* (Greenwood Publishing Group, 1998). Katherine Beckett and Bruce Western, "Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy," *Punishment & Society* 3, no. 1 (January 1, 2001): 43–59. David Jacobs and Jason T. Carmichael, "The Politics of Punishment Across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates," *Social Forces* 80, no. 1 (September 1, 2001): 61–89. Kevin B. Smith, "The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates," *The Journal of Politics* 66, no. 3 (2004): 925–38. Stucky, Heimer, and Lang, "Partisan Politics, Electoral Competition and Imprisonment."

Table 1-2

Year	Senate	House	Governor
1960	Republican	Democratic	Democratic
1961	Democratic	Democratic	Democratic
1962	Democratic	Democratic	Democratic
1963	Republican	Republican	Republican
1964	Republican	Republican	Republican
1965	Republican	Democratic	Republican
1966	Republican	Democratic	Republican
1967	Republican	Republican	Republican
1968	Republican	Republican	Republican
1969	Republican	Democratic	Republican
1970	Republican	Democratic	Republican
1971	Democratic	Democratic	Democratic
1972	Democratic	Democratic	Democratic
1973	Democratic	Republican	Democratic
1974	Democratic	Republican	Democratic
1975	Democratic	Democratic	Democratic
1976	Democratic	Democratic	Democratic
1977	Democratic	Democratic	Democratic
1978	Democratic	Democratic	Democratic
1979	Democratic	Republican	Republican
1980	Democratic	Republican	Republican
1981	Republican	Republican	Republican
1982	Republican	Republican	Republican
1983	Republican	Democratic	Republican
1984	Republican	Democratic	Republican
1985	Republican	Democratic	Republican
1986	Republican	Democratic	Republican
1987	Republican	Democratic	Democratic
1988	Republican	Democratic	Democratic
1989	Republican	Democratic	Democratic
1990	Republican	Democratic	Democratic
1991	Republican	Democratic	Democratic
1992	Republican	Democratic	Democratic
1993	Democratic	Democratic	Democratic
1994	Republican	Democratic	Democratic
1995	Republican	Republican	Republican

Source: Klarner, Carl, 2013, "State Partisan Balance Data, 1937 – 2011", http://hdl.handle.net/1902.1/20403.

Variation in party control, however, might imply a level of competitiveness that itself could tilt the state in a more punitive direction, given the central role of electoral politics in much of the carceral-state literature.⁶⁷ Indeed, as Figure 1-2 shows, legislative majorities were slim in 1980s Pennsylvania, particularly for House Democrats.

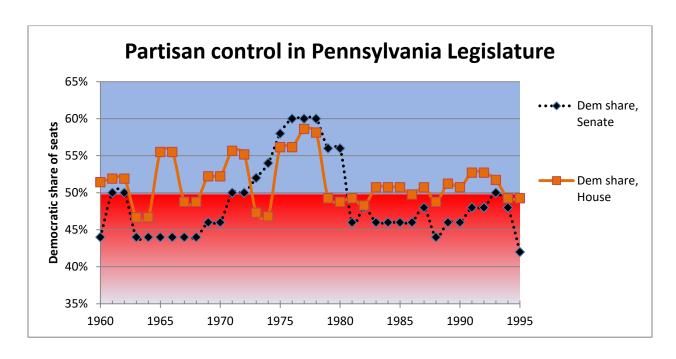


Figure 1-2

Source: Klarner, Carl, 2013, "State Partisan Balance Data, 1937 – 2011", http://hdl.handle.net/1902.1/20403.

What was behind this close balance, and how typical was it? The state-politics literature uses two primary measures of competitiveness, state- and district-level. The

⁶⁷ Stucky, Heimer, and Lang, "Partisan Politics, Electoral Competition and Imprisonment." Murakawa, *The First Civil Right*.

major state-level score ranked Pennsylvania as ninth-most competitive during the period 1981-1988, but it was nonetheless reasonably close to the median state: .97 as compared to .84, on a scale measuring .5 to 1.⁶⁸ A composite, district-level index compiled for the period 1982 to 1986 ranked Pennsylvania 26th in competitiveness.⁶⁹ Over a longer period, from 1968 to 1988, Pennsylvania ranked 25th among states on another measure of district-level competitiveness — the portion of legislative races in which the victor claimed no more than 60 percent of the vote.⁷⁰ Table 1-2 presents the marginal rankings for all 50 states. This suggests that party constituencies were fairly efficiently divided among districts, leaving a small number of "swing seats." Process-tracing should be attentive to whether legislators representing such seats played a pivotal role at any point.

⁶⁸ This is the folded Ranney score. Rankings are in Thomas M. Holbrook and Emily Van Dunk, "Electoral Competition in the American States," *The American Political Science Review* 87, no. 4 (1993): 955–62.

⁶⁹ Holbrook and Van Dunk.

⁷⁰ Both major parties ran candidates in almost 90 percent of the races, ranking the state 10th in races contested. Rankings calculated with data from Emily Van Dunk and Ronald E. Weber, "Constituency-Level Competition in the U. S. States, 1968-1988: A Pooled Analysis," *Legislative Studies Quarterly* 22, no. 2 (1997): 141–59. Excludes Vermont (data unavailable).

Table 1-3

State legislative races, 1968 - 1988

	% close	
State	races*	Rank
North Dakota	66.1%	1
South Dakota	56.5%	2
lowa	54.8%	3
Indiana	52.8%	4
Nebraska	52.6%	5
Montana	51.9%	6
Connecticut	49.7%	7
Alaska	49.3%	8
New Jersey	49.3%	9
Wyoming	48.9%	10
Minnesota	46.4%	11
West Virginia	46.4%	12
Utah	43.8%	13
Oregon	43.5%	14
Maine	43.1%	15
Colorado	41.2%	16
Idaho	41.0%	17
Washington	40.8%	18
Kansas	39.5%	19
New Mexico	37.9%	20
Delaware	37.8%	21
Wisconsin	36.5%	22
Ohio	34.9%	23
North Carolina	33.8%	24
Pennsylvania	32.9%	25
Nevada	32.3%	26
Arizona	32.2%	27
Virginia	31.6%	28
New Hampshire	29.5%	29
Michigan	28.0%	30
Rhode Island	27.9%	31
Florida	27.4%	32
California	26.0%	33
Hawaii	25.9%	34
Missouri	25.3%	35

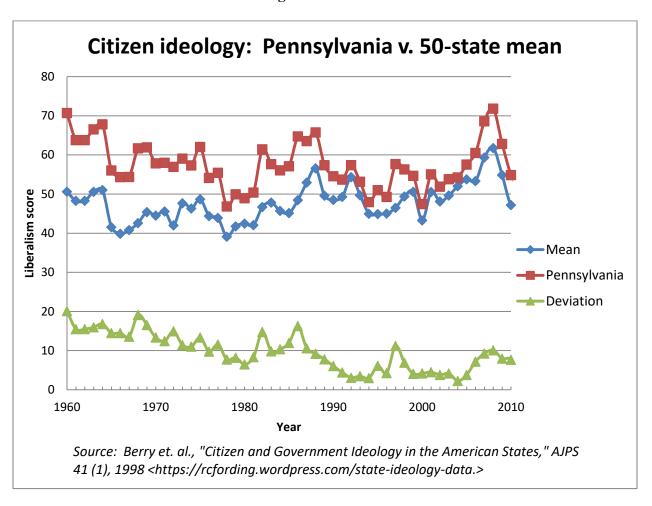
New York	25.3%	36
Louisiana	23.1%	37
Maryland	22.9%	38
Tennessee	22.8%	39
Kentucky	22.3%	40
Illinois	21.1%	41
South Carolina	20.7%	42
Oklahoma	20.0%	43
Texas	16.5%	44
Massachusetts	15.8%	45
Mississippi	9.6%	46
Georgia	9.1%	47
Alabama	8.8%	48
Arkansas	6.4%	49

^{*}Mean proportion of races for both houses in which the winner captured 60 percent or less of the vote over the study period. Source: Van Dunk and Weber, 1997.

Another factor found in the literature to influence state incarceration rates is citizen ideology. The case for Pennsylvania as typical on this dimension is weaker. According to Berry et. al.'s measure of citizen ideology, the state follows national swings in direction, but with a higher amplitude. As Figure 1-3 shows, Pennsylvania starts the period emphasized in this study significantly more liberal than the national mean and ends it with a near-convergence on the mean in 1994. A Democratic governor and legislators from an increasingly-liberalizing Philadelphia are key players in the later parts of the case, mitigating the possibility that rising conservatism is explaining results I attribute to institutions. But the case should be read with caution on this point.

¹ Jacobs and Carmichael, "Politics of Punishment." David F. Greenberg and Valerie West, "State Prison Populations and Their Growth, 1971-1991," *Criminology* 39, no. 3 (August 2001): 615–53. Garrick L. Percival, "Ideology, Diversity, and Imprisonment: Considering the Influence of Local Politics on Racial and Ethnic Minority Incarceration Rates," *Social Science Quarterly* 91, no. 4 (December 2010): 1063–82.

Figure 1-3



The argument for Pennsylvania as a typical case is satisfactory on the demographic front. The size of the state's non-white, non-Hispanic population was within the third quintile of the 50-state distribution in 1970, 1980, and 1990. It slips into the fourth quintile in 2000 and 2010, but those decades are beyond the scope of this study. The rate of change in Pennsylvania's non-white, non-Hispanic population was slower than the national mean.²

² Source: Campbell Gibson and Kay Jung, "Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States," Working Paper Series (Washington, D.C: U. S. Census Bureau, September 2002), http://bit.ly/2usmRfM. "The White Population: 2000" (Washington, D.C: U. S. Census Bureau, September 2001),

Table 1-4

	1970	1980	1990	2000	2010
Pennsylvania	90.3%	89.1%	87.7%	84.1%	79.5%
National mean	84.0%	82.0%	79.9%	74.9%	70.7%
3rd quintile	84.1 to 91.8	82.2 to 90.1	79.3 to 87.6	72.5 to 83.2	67 to 78.2
PA in third	Y	Υ	Υ	N	N
quintile?					
Mean change (%		-2.1	-2.0	-5.1	-4.2
points)					
Change in Penna		-1.2	-1.4	-3.6	-4.6

Source: U.S. Census

These are admittedly crude measures of minority dynamics, but the racial-threat literature has not yet specified more precise pathways that can easily be operationalized at the state level. A handful of studies have found a positive relationship between the size of a state's minority population and its imprisonment rate.³ Other studies have found no

http://bit.ly/2uZUvVq. Lindsay Hixson, Bradford B. Hepler, and Myoung Ouk Kim, "The White Population: 2010," 2010 Census Briefs (Washington, D.C: U. S. Census Bureau, September 2011), http://bit.ly/2uH52Kb. Extracted via "List of U.S. States by Non-Hispanic White Population," *Wikipedia*, May 19, 2017, http://bit.ly/2i3KSUH., verified and analyzed by author.

³ Greenberg and West, "State Prison Populations and Their Growth, 1971-1991", summarize earlier research and find an effect of their own. Jacobs and Carmichael, "Politics of Punishment." Smith, "Politics of Punishment." Percival, "Ideology, Diversity, and Imprisonment" finds county-level effects.

effect, and Yates and Fording argue that larger minority populations exercise electoral power that *limits* the positive relationship between elite conservatism and incarceration rates.⁴ Qualitative case studies such as this one can shed more light on such dynamics.

Pennsylvania also stands out in ways that are useful. First, Pennsylvania is an important case for its own contribution to the run-up in U.S. incarceration. As the sixth largest state by population (in 2000) it ranks seventh in its contribution to the total increase in the prisoner population in the 16-year period 1983-1999.⁵ Table 1-4 reports these data.

⁴ Stucky, Heimer, and Lang, "Partisan Politics, Electoral Competition and Imprisonment." Examining other correlations, studies have found positive relationships between *urban* minority population and police strength or arrest rates, but effects on post-arrest sentencing are mixed in the findings Bradley Keen and David Jacobs, "Racial Threat, Partisan Politics, and Racial Disparities in Prison Admissions: A Panel Analysis," *Criminology* 47, no. 1 (February 1, 2009): 209–38.

⁵ Author's calculations, from Bureau of Justice Statistics data.

Table 1-5

Jail and Prison Population Growth, 1983 to 1999			
Jurisdiction	Inmate growth	Share of growth	
Nationwide	1,296,607	100%	
California	161,920	12.5%	
Texas	153,627	11.8%	
Federal	104,047	8.0%	
Florida	79,618	6.1%	
New York	60,707	4.7%	
Georgia	49,351	3.8%	
Pennsylvania	41,638	3.2%	
Michigan	39,735	3.1%	
Ohio	38,599	3.0%	
Illinois	36,864	2.8%	
Source: Bureau of Justice Statistics, author's calculations			

On the dimension of political culture, Pennsylvania arguably represents a "hard" case for the theory proposed here. Vanessa Barker identifies it as a state with an "elitist-pragmatist" political culture, in which public involvement is low and elites bargain out their differences. This is a political culture that should mitigate against the fragmentation dynamics I have theorized. If we nonetheless see them at work, and can link them to an incarceration increase that was moderate by national standards, there will be strong grounds for research to examine their role in more extreme cases.

The first and last chapters of the empirical study explore national politics with a view to illuminating the dynamics uncovered in the middle chapters on Pennsylvania, particularly the rise of prosecutors with an aggressive law-enforcement ideology and claims to leadership in the "war on crime." Chapter 2 focuses on the Reagan administration because it is widely understood to have re-launched the wars on drugs and crime, and should provide strong evidence for the channels by which federal politics

⁶ Barker, *Politics of Imprisonment*, 183.

influenced subnational government. Chapter 5 examines the professional development of prosecutors and their ideologies. The study is anchored by a close examination of the National District Attorneys Association because, as the preeminent national organization of the profession, its behavior should reflect (if not shape) prevailing ideas among prosecutors. I also gathered what data was available on the creation of NDAA's statelevel affiliates by searching legal and news databases.

II. Data

The Pennsylvania portion of the study is focused on the years 1975 to 1990, based on Campbell and Miller's periodization of these years as the era of "contested crime politics" that preceded a decisive pivot to "capture" of the crime issue by lawenforcement interests in the 1990s. In keeping with the inductive approach of historical-institutionalism, I adjusted this timeline where events appeared to demand it. The Pennsylvania case study begins with a focus on Philadelphia because, as the state's largest city, it has a powerful influence on state politics and presents all the elements theoretically implicated in mass incarceration — racial diversity, high crime rates, an active media market. I built a historical narrative using news archives. After identifying key themes, such as D.A. policy, anxiety over crime, or relations with the judiciary, I used word-searching where it was available to develop the record. The review covered the following sources:

Source	Format	Dates covered	Database	Method
Philadelphia Inquirer	Microfilm	April 1 through May 31, 1977; Oct. 16 through Dec. 31, 1980 (key election periods)		Manual review
Philadelphia Inquirer	Digital	1981 — 1990	Access World News	Keyword searches
Philadelphia Daily News	Digital	1978 — 1990	Access World News	Keyword searches
Philadelphia Tribune	Digital	1970 - 1990	ProQuest Historical	Keyword searches
PR Newswire	Digital	1980 — 1990	LexisNexis	Keyword / key politician searches.
Pittsburgh Tribune	Digital	1970 - 1980	Newspapers.com	Keyword searches
The (Allentown) Morning Call	Digital	1984 — 1990	Access World News	Keyword searches
The (Harrisburg) Patriot-News	Digital	1986 — 1990	Access World News	Keyword searches

Thousands of articles were reviewed and 186 extracted for detailed analysis. The content analysis was then supplemented with research at the Pennsylvania State Archives, including private files of key individuals and public reports, studies, and pronouncements. Using a dataset of Pennsylvania legislative hearings on crime developed by Lisa Miller and supplemented by additional research, I obtained and analyzed transcripts of these hearings where they were available. I also obtained data on prison populations from the Pennsylvania Department of Corrections.

For the chapter on federal politics, my data once again include news accounts, searched by a similar method, and archival research in the Ronald Reagan Presidential Library and the National Archives and Records Administration's Department of Justice records. My study of prosecutorial ideology is based heavily on newsletters produced by

the profession's main advocacy group, a choice I explain further in that chapter. I also compiled a list of reports issued by NDAA and reviewed nine of them in detail. This was supplemented by extensive word searches in the legal database HeinOnline and on ProQuest's Historical Newspapers collection. These allowed me to begin reconstructing the creation of state-level prosecutors' organizations across the country.

Chapter Preview

Chapter 2 lays groundwork for the study by examining the role of the federal government in the emergence of mass incarceration. The chapter focuses on the Reagan era, when the American incarceration rate first broke its prior, 1939 record. I show that federal funding to subnational law enforcement was not a significant contributor to this trend. However, I argue that under Reagan, federal law enforcement agencies expanded their ambitions and helped to diffuse important ideas and techniques among their subnational counterparts. The chapter also introduces the idea that law-and-order rhetoric makes it more difficult for the law enforcement bureaucracy to exercise restraint.

Chapter 3 begins the discussion of subnational politics in Pennsylvania by examining the rise of law-and-order politics in Philadelphia. This chapter shows that the breakdown of machine rule resulted in the rise of prominent, independent district attorneys at the same time that crime began a steep rise. Candidates soon began to adopt the law-and-order style, and the highly racialized structure of local party competition limited challenges to that style. The new politics met with resistance from some elements of the local criminal-justice system, notably judges.

Chapter 4 explains how interdependent fragmentation influenced agenda-setting

and policy feedback in Pennsylvania. Motivated in part by their clashes with other criminal-justice actors, prosecutors from Philadelphia and elsewhere in Pennsylvania began to recast the agenda in Harrisburg toward law-and-order politics. The Pennsylvania District Attorneys Association became an influential player in the state Capitol. As policy in Pennsylvania became more punitive and the incarcerated population grew, pervasive cost-shifting and liability-shifting dynamics prevented a reckoning with the costs of housing the rising tide of inmates. Governor and legislature, counties and state traded blame as jail and prison-crowding turned into a full-blown crisis. Ultimately, it took a violent eruption to break through these dynamics, and then the preferred solution was the "least common denominator" alternative of simply building more prison cells.⁷

Chapter 5 pans back out for a broader examination of the key player in this overwound clockwork of state and local ties, the prosecutor. This chapter shows that amid rising crime and political changes, prosecutors faced serious, high-level critiques of their place in the criminal-justice system, and they responded with a surge of professionalization. I show that in the public arena, prosecutors developed claims of professional jurisdiction that matched the electoral incentives toward law-and-order politics. In the legal arena, they developed an infrastructure to push for legislation that would entrench their power.

Chapter 6 concludes by relating my findings to larger themes in the study of American political development, criminal justice, and reform.

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⁷ Miller, *The Myth of Mob Rule*.

2. "This is Not a War on Crime:"

LEAA, the Reagan Administration, and Mass Incarceration

Ronald Reagan stepped before an audience of police chiefs in September 1981 and painted an alarming picture: "The portrait is that of a stark, staring face, a face that belongs to a frightening reality of our time — the face of a human predator, the face of the habitual criminal. Nothing in nature is more cruel and more dangerous." But if the chiefs were hoping to hear that the Reagan administration would open a gusher of resources to help in the fight against the "human predator," they were disappointed. Later in his speech, Reagan declared only that law enforcement was "an important area in our effort to restore and renew federalism. We seek to end duplication and bring about greater cooperation between federal, state, and local law enforcement agencies." 1

This chapter provides historical background and introduces themes that will reappear throughout the study. First, the chapter pushes back against the argument that federal funding was a pivotal force in the rise of mass incarceration. In doing so, the chapter also introduces a key tension of the 1970s and 1980s period — the trade-off between expanded punishment and costs. Mass incarceration was a much more fraught shift in public policy than much of the existing literature would suggest, generating initial conflict and incoherence as the will to punish had to be reconciled with the desire to avoid large new public expenditures. Second, the chapter offers a study of the Reagan administration's ideology on crime and argues it was more nuanced than often assumed.

¹ Ronald Reagan, "Remarks in New Orleans, Louisiana, at the Annual Meeting of the International Association of Chiefs of Police," September 28, 1981, http://www.presidency.ucsb.edu/ws/?pid=44300.

When push came to shove, support for punishment was stronger than support for alternatives. But Reagan officials harbored important doubts about waging a "war on crime." This reinforces my assumption that a purely ideational or even electoral story about the rise of mass incarceration will be incomplete. Third, the study introduces professional dynamics that contributed to the rise of mass incarceration. I provide evidence that fiery rhetoric from politicians empowered the hawks in the bureaucracy. I also show that Reagan officials worked to create professional networks in law enforcement, and that these served to diffuse and legitimate concepts of harsh punishment.

The federal government's initial response to the crime scare of the 1960s had been straightforward: handing out money. The 1968 Safe Streets Act created the Law Enforcement Assistance Administration, which disbursed gushers of cash to state and local law enforcement in the ensuing decade. The share of local and state criminal-justice expenditure paid for by the feds grew from 3 percent in 1971 to a peak of 12 percent in 1976 (and the figure had been zero as recently as 1962). This was more, Weaver notes, than even the federal share of spending on local school systems. Meanwhile, Gottschalk shows how LEAA financing directed key social movements, including feminists fighting rape and domestic violence and advocates for victims generally, toward punitive framings of their causes.²

Nonetheless, LEAA's independent impact should not be overestimated. Total U.S. justice spending rose more than 40 percent during the 1970s, and state and local

² Vesla Weaver, "The Significance of Policy Failures in Political Development: The Law Enforcement Assistance Administration and the Growth of the Carceral State," in *Living Legislation: Durability, Change, and the Politics of American Lawmaking*, ed. Jeffery A. Jenkins and Eric M. Patashnik (University of Chicago Press, 2012). Gottschalk, *Prison and the Gallows*.

governments had to cough up the majority of that money alone.³ We should thus look skeptically upon the claim that absent federal intervention, "it is entirely possible that state and local governments would have decided to invest in an entirely different set of priorities."⁴

And while LEAA surely added brawn to American law enforcement, it failed in its central ambition: adding brains. The central condition attached to LEAA funds had been for lower levels of government to set up "state planning agencies" and "regional planning agencies" that federal officials hoped would rationalize the criminal-justice system, working on the basis of needs assessments, independent research, system-wide coordination, and rigorous program evaluation. Virtually none of that happened, as Malcom Feeley and Austin Sarat concluded in 1980, because of the vague mandate that LEAA had been given. Without a clear direction from its political overseers on how to fight crime, the agency lacked the legitimacy to dictate strategy to the states. The planning units devolved into pie-sharing operations, with boards that allocated resources on the basis of agencies' political power. This failure to unify the many arms of a fragmented criminal-justice system around a common strategy would become a defining characteristic of carceral-state growth.

³ From \$70.5 billion to \$98 billion, in 2014 dollars. Calculated from Bureau of Justice Statistics, "Justice Expenditure and Employment in the U.S., 1971 – 1979."

⁴ Hinton, From the War on Poverty to the War on Crime, 8.

⁵ Simon frames the point differently when he casts LEAA as a success of "governing through crime," arguing that its procedural fixation and orientation toward mass imprisonment liberated LEAA from New Deal expectations with "security from crime as the public good" to be delivered. Simon, *Governing Through Crime*, 159.

⁶ Malcolm Feeley and Austin Sarat, *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration*, 1968-1978 (U of Minnesota Press, 1980).

If LEAA's story is not one of successful planning, neither can it be read as a case of seamless institutional aggrandizement by law-enforcement interests. While LEAA did cultivate a law-enforcement lobby, as Weaver shows, it did not simply become an endless gravy train. Quite the opposite: By the late 1970s a bipartisan consensus had emerged that LEAA had been a colossal waste of resources. The agency's authorization was allowed to lapse, and only a shell of it continued in the form of the Office of Justice Assistance, Research and Statistics. As Table 2-1 shows, state and local assistance remained modest throughout Reagan's tenure. The late 1980s and early 1990s saw a respectable recovery, but never to anything close to the peak of LEAA assistance calculated by Weaver, when the federal government covered 12 percent of state and local crime budgets.

Table 2-1: Federal share of state and local criminal-justice spending⁸

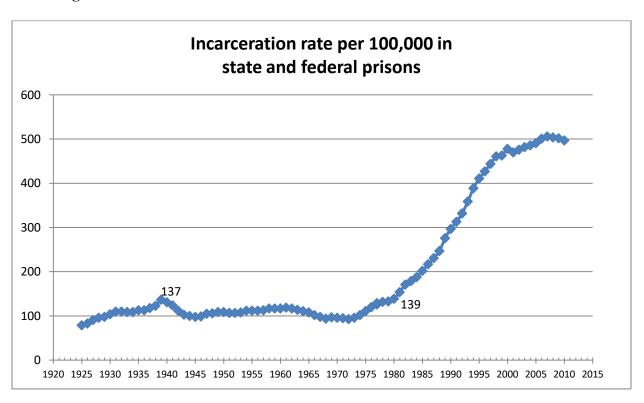
Year	State + local CJ spending (billions, 2014	Change	Federal share
	dollars)		
1982	\$95.5		0.6%
1987	\$128.2	34.2%	0.5%
1992	\$171.8	34.0%	4.4%
1997	\$207.9	21.0%	5.4%
2000	\$220.9	6.3%	3.3%

⁷ Weaver, "Policy Failures."

⁸ Lynn Bauer, "Total, Direct, and Intergovernmental Justice Expenditure and Percent Change, by Level of Government, Fiscal Years 1982-2001," Justice Expenditure and Employment in the United States 2001 (Washington, D.C.: Bureau of Justice Statistics, February 4, 2004).

At the same time, the 1980s were the "takeoff" era for mass incarceration. While the 1970s saw rapid growth in the nation's incarceration rate, this expansion was still within the bounds of historical experience. It was only in 1980 that the rate surpassed its previous peak (reached in 1939) of 137 prisoners per 100,000 people. And it kept climbing rapidly: The average incarceration rate during the Reagan administration was 50 percent higher than during the Carter administration.





The timing of the prison boom thus casts some doubt on the proposition that LEAA drove it. To be sure, "LEAA created the capacity to arrest more, convict more,

⁹ University at Albany, Hindelang Criminal Justice Research Center, Sourcebook of Criminal Justice Statistics, n.d.. Administration calculations by author.

and imprison more," and it would make sense for the effect on incarceration rates to be lagged. Dut it would also be curious for that effect to appear so suddenly in the early 1980s, just when federal subsidy was being revoked. Just as we should not overstate the impact of LEAA money, we should not assume that federal influence disappeared the moment the checks stopped. The story of criminal-justice federalism is much more complicated than that.

The Moderates That Weren't

Congress would soon regain its enthusiasm for federal assistance, but the Reagan administration was adamantly opposed to reviving anything like LEAA. The president's FY 1983 budget declared: "An important theme in the administration of justice in 1983 is for the Federal Government to improve the nation's law enforcement — not through the past practice of financial assistance to State and local governments — but through the more direct approach of Federal law enforcement agencies cooperating closely with their State and local counterparts." It added: "Public safety is primarily a state and local responsibility. This administration does not believe that providing criminal justice assistance in the form of grants or contracts is an appropriate or effective use of Federal funds."

The hostility to subsidies was in keeping with the administration's philosophy of

¹⁰ Weaver, "Policy Failures." Weaver also shows that LEAA-financed organizations had a decisive influence on the legislative frameworks governing criminal justice in many states. For example, these organizations were instrumental in getting many states to adopt determinate-sentencing statutes.

¹¹ The administration did acknowledge a more modest federal role, however, in providing training and technical assistance. "Budget of the U.S. Government, FY 1983, Part V," 1982, 172–177.

federalism. But it also grew out of a crime-fighting philosophy that was more nuanced, or at least more conflicted, than the scholarship has recognized. To be sure, Reagan has a well-deserved reputation for fiery law-and-order rhetoric, of which he was an early pioneer. In 1966, for example, Reagan swept to victory in the California gubernatorial election by decrying the turmoil at the University of California at Berkeley. He warned that an appearance on campus of civil-rights activist Stokely Carmichael would bring on racial violence; claimed (with wild exaggeration) that a campus dance had descended into an orgy; and chastised the sitting governor, Pat Brown, for not having grabbed upstart students "by the scruff of the neck and thrown them off campus - personally." In his 1981 speech to the police chiefs, Reagan declared, "The war on crime will only be won when ... a change of heart takes place in America, when certain truths take hold again and plant their roots deep in our national consciousness, truths like: Right and wrong matters. Individuals are responsible for their actions ... Theft is not a form of political or cultural expression; it is theft, and it is wrong."

This rhetoric fused conservative anxieties about racial change and a perceived breakdown in traditional norms to fears about the very real problem of violent crime.¹⁴ Reagan painted crime in moral terms, as a product of the evil inherent in human nature, and blamed the nation's crime problem on a broader permissiveness that had allowed those evil impulses to run amok. Combined with his rhetoric on welfare, the (clearly

¹² Rick Perlstein, *The Invisible Bridge: The Fall of Nixon and the Rise of Reagan*, Reprint edition (Simon & Schuster, 2014), 88.

¹³ Ronald Reagan, "Remarks in New Orleans."

¹⁴ Beckett, *Making Crime Pay*. Dagan and Teles, *Prison Break: Why Conservatives Turned Against Mass Incarceration*. Lisa L. Miller, "What's Violence Got to Do with It? Inequality, Punishment, and State Failure in US Politics," *Punishment & Society* 17, no. 2 (April 1, 2015): 184–210.

intentional) effect was to paint an implicit picture of a dangerous, parasitic, black underclass that needed to be controlled. ¹⁵ As a governing strategy, this view would imply an across-the-board crackdown, with harsh sentencing and aggressive policing measures.

In fact, Reagan's senior officials took a more subtle view of how to govern. In California, Reagan had overseen a 34 percent reduction in the state's prison population. That drop can be credited in part to a law passed by his Democratic predecessor that encouraged the use of probation rather than incarceration, but Reagan took ownership of it, both in his oversight of the state's correctional authorities and in his rhetoric. 16 Reagan's tenure in California suggests that he and his trusted advisors – among them future Attorney General Edwin Meese III – drew a clear line between offenders they considered dangerous and incorrigible and those who could be re-integrated into society. In 1971, Reagan blamed a riot at San Quentin Prison on the fact that the composition of the prison population had shifted under his watch, with less dangerous offenders released and more dangerous ones left behind. As a result, Reagan said, "we now have an overwhelming percentage of the true violent type of criminal" behind bars. The governor declared that despite the riot, California would not "go backward with regard to our No. 1 position in the nation in modern prison reform." But he added: "We do have another goal; and that goal is we're also going to be No. 1 in restraining the mad-dog type of criminal and revolutionary."17

¹⁵ Beckett, Making Crime Pay. Weaver, "Frontlash." Dagan and Teles, Prison Break: Why Conservatives Turned Against Mass Incarceration.

¹⁶ Rosemary Gartner, Anthony N. Doob, and Franklin E. Zimring, "The Past as Prologue? Decarceration in California Then and Now," *Criminology & Public Policy* 10, no. 2 (May 1, 2011): 287–89, https://doi.org/10.1111/j.1745-9133.2011.00723.x.

¹⁷ United Press International, "Reagan Assails 'Mad Dog' Convicts," *The Washington Post*, September 5, 1971.

This mix of iron-fistedness and moderation was also manifest as the Reagan administration took over in Washington ten years later. Day-to-day justice policy was directed by Attorney General William French Smith, a personal friend of the president's, but the strategic guidance that reached the president's ear most consistently came from Meese, a longtime advisor who served as a senior White House aide and in 1985 would replace Smith at the Justice Department. 18 Meese and Smith shared a commitment to reversing the Carter Justice Department's tack away from street crime and toward whitecollar concerns — an understandable instinct given that the U.S. homicide rate hit a new peak in 1980, the year Reagan was elected. 19 Meese also had a longstanding concern for the rights of victims — a reflection of the victims' movement's early strength in his home state of California. The priorities were reflected in the early creation of two task forces – one on violent crime and another on victims. More than half of the violent-crime task force's recommendations concerned drugs, and violent crime and narcotics would become the signal enforcement priorities for the duration of the Reagan administration (though Meese, when he succeeded Smith as attorney general, also devoted much energy to an unsuccessful attempt to crack down on pornography).²⁰

By all accounts, Smith took an aggressive view of the crime problem, reportedly parrying an early effort by Reagan's budget director to slash DOJ funding by calling his

¹⁸ Ted Gest, Crime & Politics: Big Government's Erratic Campaign for Law and Order (Oxford University Press, 2003), 3.

¹⁹ Gest, 3.

²⁰ Beckett, *Making Crime Pay*, 53.

department "the internal arm of the national defense." ²¹ But key officials, including Meese, voiced skepticism about how much government could accomplish and how aggressively the administration should frame its anti-crime campaign. "This is not a 'war on crime," warned an early, unsigned memorandum that was archived in Meese's files, and which he said in an interview may well have been authored by him. "Past presidents have declared a 'war on crime' and lost."²² Similar skepticisms were voiced on the drug front. In 1987, Reagan's senior drug-policy advisor, Carleton Turner, warned, "The umbrella of strong law enforcement is necessary, but the key to long-term success is preventing people from starting illegal drug use and getting the drug users to stop. We cannot let this become a law-enforcement approach or it will fail."²³ Financial concerns also loomed large. "More money and staff are not necessarily the answer to the problems facing the criminal justice system," White House aide Ed Harper wrote to Ed Meese in 1981.²⁴ In 1986, aide Fred Ryan wrote to Chief of Staff Don Regan that a drug initiative the administration was developing would be judged by its cost, and declared, "We must shift the debate from the cost that the federal government is willing to pay, to an emphasis on the role that all Americans must play"; in another memo, a staffer warned of

²¹ David Stockman, *The Triumph of Politics: Why the Reagan Revolution Failed* (New York: PublicAffairs, 2013).

²² "Proposed Criminal Justice Program," 1981, folder "Criminal Justice," box OA 9452, Edwin Meese III files, Ronald Reagan Library; Edwin Meese III, personal interview, Washington, D.C., September 16, 2015.

²³ Carleton Turner, "Memorandum for Joe Rodota: Talking Points on Drug Abuse," August 15, 1986, folder Drug Initiative I, Box 12, W. Dennis Thomas files, Ronald Reagan Library.

²⁴ Ed Harper, "Memorandum for Ed Meese: Violent Crime Task Force Report / A Low Cost Approach," September 28, 1981, folder [Crime] Attorney General's Task Force, Box OA 9452, Edwin Meese files, Ronald Reagan Library.

the danger of "being pushed by the Congress into a major spending program." ²⁵

And while Congress was engaged in "bidding wars" over which party could prove itself more punitive during the 1980s, the Reagan administration appears to have largely stayed out of the debates over sentencing policy. The administration supported the 1984 law that ushered in determinate sentencing for federal inmates, but internal memoranda show much more emphasis on overhauling criminal procedure — court-ordered policies that consistently drew the ire of law enforcement. They included the rule excluding illegally obtained evidence from admission in court; the perceived lenity of bail policies; and the insanity defense. As the memo in Meese's files declared: "Elimination of or major modification of the exclusionary rule might be worth more than all the past efforts of LEAA."

But while the president's aides may have seen the risks of a "war" strategy in practice, rhetorical restraint was not Reagan's strong suit. As early as 1982, the president used the term "drug war" in a radio address to the nation, and his tone on drugs grew more strident as the decade progressed.²⁸ While the literature has emphasized the electoral and party-building calculus underlying such rhetoric, the archival record suggests two other factors loomed large: inter-branch competition and ideology.

When the drug-abuse panics of 1986 and 1988 broke out, the administration's key

²⁵ Bob Sweet, "Memorandum for Drug Policy: Legislative Strategy / Drug Policy," August 30, 1986, folder "Drug Abuse Policy September 86," Series 1, Box 24, Ralph C. Bledsoe files, Ronald Reagan Library; Frederick J. Ryan, Jr., "Memorandum for Donald T. Regan: Private Sector Involvement in Drug Initiative," August 13, 1986, folder "Drug Abuse Policy September 86," Series 1, Box 23, Ralph C. Bledsoe files.

²⁶ Murakawa, *The First Civil Right*.

²⁷ "Proposed Criminal Justice Program."

²⁸ Ronald Reagan and Nancy Reagan, "Radio Address to the Nation on Federal Drug Policy," October 2, 1982, http://www.presidency.ucsb.edu/ws/?pid=43085.

concern was to ensure Reagan appeared to be in charge. Pressure from the Hill was intense: In 1986, Newt Gingrich was circulating a document calling for a mobilization on the scale of World War II.²⁹ After a June meeting on drugs with Gingrich and Trent Lott, White House aide Mitch Daniels observed, "They want it radical."³⁰ In July, senior aide Dennis Thomas wrote to a White House planning group that the top goal was "securing President Reagan's rightful leadership role in the national campaign to prevent drug abuse and stop drug trafficking."³¹ Likewise, Domestic Policy Council staffer Robert Sweet urged intervening in the congressional debate to "keep the President in the lead."³² Taking the lead in this case meant reproducing the rhetoric of existential crisis that was emanating from Congress, and thus magnifying it to a broader stage. "Drugs are menacing our society," the president declared in September. "They're threatening our values and undercutting our institutions. They're killing our children." For good measure, he mimicked Gingrich in comparing the campaign against drugs to World War II, warning, "Now, we're in another war for our freedom."³³

Ideology appears to have contributed to this existential rhetoric as much as calculus. By the time of the 1986 and 1988 panics, the White House had already overseen a significant expansion of federal law enforcement (which will be described below) and

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²⁹ Newt Gingrich, "Toward a Drug Free America: A Proposal for an Effective War on Cocaine and Heroin," July 29, 1986, folder "Drug Initiative II," series "Office of the Chief of Staff," Box 12, W. Dennis Thomas files, Ronald Reagan Library.

³⁰ Mitch Daniels, "Memorandum for Will Ball, Dennis Thomas," June 24, 1986, folder "Political Affairs," box 5, Dennis Thomas files, Ronald Reagan Library.

³¹ Dennis Thomas, "TO: PLANNING GROUP," July 8, 1986, folder "Drug Initiative II," Box 12, W. Dennis Thomas files, Ronald Reagan Library.

³² Bob Sweet, "Memorandum for Drug Policy: Legislative Strategy / Drug Policy."

³³ Ronald Reagan, "Address to the Nation on the Campaign Against Drug Abuse," September 14, 1986, http://bit.ly/1VbjFsw.

was reluctant to do much more. Instead, it proposed addressing the drug problem through demand reduction — but it did so in the context of an "individual responsibility" philosophy that stigmatized drug users and framed them as criminals. Documents circulated among senior White House officials declared that drug users were "financing our Nation's suicide."³⁴ Likewise, even as drug-advisor Carleton Turner acknowledged that the drug problem could only be fought on the demand side, the approach he advised was heavy on deterrence and stigmatization of users: "This initiative does not emphasize law enforcement, but focuses on a crusade to stop demand. The public accepts the fact that we must create an intolerance for illegal drug use in this country."³⁵

In other words, the Reagan administration appears to have accepted the mantra that "law enforcement" could not solve the drug problem, but failed to fully comprehend its meaning. To the Reagan White House, the notion that "law enforcement" was futile meant only that it was impossible to eliminate the supply of drugs. The Reaganites appear not to have appreciated, or wanted to see, that their view of the "demand" side — reduction through stigma and deterrence — also implied bringing down the hammer of law-enforcement, on users.

The view that law enforcement's job was to stigmatize drug abuse was also the one that prosecutors seized on in their own communications. This becomes clear in a 1988 report from the Executive Working Group for Federal-State-Local Prosecutorial Relations, a DOJ-sponsored roundtable that included representatives of the National District Attorneys Association and the National Association of Attorneys General. The

³⁴ See, for example, Dennis Thomas, "TO: PLANNING GROUP."

³⁵ Carleton Turner, "Memorandum for Joe Rodota: Talking Points on Drug Abuse."

report emphasized that the drug war can only be won by demand reduction — but the demand reduction strategy it advocated was harsh punishment of casual users, modeled on what it said was the cultural change spawned by a crackdown on drunk drivers. To this end, the report appealed to law enforcement to shut down open-air drug markets: "By moving drug marketplaces out of sight, the law enforcement community can help to keep the drug culture out of mind as well." Given that whites were more likely than minorities to conduct retail drug transactions behind closed doors, the recommendation implicitly put minorities at the heart of "drug culture" and legitimated the racially imbalanced policing of the drug war.³⁶

In the next section, I show that while the administration was unwilling to subsidize subnational law enforcement, it was happy to beef up federal agents and aimed to make them models and leaders for their state and local peers. At the same time, however, the administration failed to enforce rhetorical (or operational) discipline on federal law enforcement agencies any more than it did on itself.

The New Sheriffs

While they might have been hostile to LEAA-style financial aid, the Reaganites were happy to beef up the federal police apparatus to fight violent crime and drugs. Even so, the administration was consistently more cautious than Congress about increasing budgets. Between 1982 and 1988, the average annual increase Reagan proposed in the

^{36 &}quot;Toward a Drug-Free America: A Nationwide Blueprint for State and Local Drug Control Strategies"

⁽Executive Working Group for Federal-State-Local Prosecutorial Relations; National Association of Attorneys General; National District Attorneys Association, 1988), http://l.usa.gov/16XTCS5.

justice budget was 5 percent. The budget hikes he got from Congress were, on average, more than double as much — 12 percent. Reagan proposed level-funding the justice budget on two occasions and only once proposed a double-digit increase; Congress provided double-digit increases in every year but one.³⁷ As a result, federal justice employment rose 28 percent between 1982 and 1987, from roughly 95,000 to 121,000 workers.³⁸

The administration deployed these resources to consciously establish federal agents as both leaders and models in the fight against street crime in communities across the nation. One feature of professionalization is "a commonly recognized hierarchy of status, of center and periphery" organizations within the profession.³⁹ Reagan moved quickly to put federal agents at the top of that hierarchy.

One of the administration's signature programs was the South Florida Task Force, a cooperative endeavor that brought together federal, state, and local police and the military to battle drug smugglers who had brought a wave of violence to the region. Vice President George H.W. Bush was made the high-profile overseer of the effort, a grooming that prepared him to escalate the nation's drug war even further when he took over the White House in 1988. Soon, the Department of Justice created "Organized Crime Drug Enforcement Task Forces," modeled on the South Florida group, around the

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³⁷ "Budget of the U.S. Government, F.Y. 1982 - 1988," 1981 - 1987.

³⁸ Sidra Lea Gifford, "Total Employees, by Activity and Level of Government, 1980-99" (U.S. Bureau of Justice Statistics, December 5, 2001), http://l.usa.gov/1KO8uOR.

³⁹ Paul J. DiMaggio and Walter W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," *American Sociological Review* 48, no. 2 (April 1, 1983): 147–60, https://doi.org/10.2307/2095101.

country. U.S. Attorneys "played central leadership roles" in these task forces. 40

Meanwhile, the Justice Department's Executive Office of U.S. Attorneys took parallel steps to establish the U.S. Attorneys' status as the senior law-enforcement authority in their districts. The federal prosecutors were required to establish "Law Enforcement Coordinating Committees" that would bring together state, local, and federal law-enforcement officials to develop a comprehensive crime-fighting plan for their districts. As it turned out, many LECCs did not end up fostering much coordination — that was generally done through informal conversations among prosecutors at various levels. He are the program did establish local visibility and leadership for U.S. Attorneys as a DOJ priority. These leadership claims extended even beyond the enforcement arena: For example, the U.S. Attorney in Philadelphia hosted a meeting on drug-abuse prevention attended by the state attorney general, legislators, and representatives from a range of agencies.

U.S. Attorneys extended their leadership claims at the same time that federal sentencing reforms were increasing their power in the plea-bargaining process and that they were pursuing more defendants more aggressively than ever before. The new enforcement posture was a clear product of guidance from the Department of Justice. A December 1981 memorandum to U.S. Attorneys from Lowell Jensen, assistant attorney

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⁴⁰ Roger Conner, Michael Hayes Dettmer, and Redding Pitt, "The Office of U.S. Attorney and Public Safety: A Brief History Prepared for the 'Changing Role of U.S. Attorneys' Offices in Public Safety' Symposium," *Capital University Law Review* 28, no. 4 (January 3, 2000): 753–73.

⁴¹ Malcolm Russell-Einhorn, Shawn Ward, and Amy Seeherman, "Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982–1999: Drugs, Weapons, and Gangs" (U.S. Department of Justice, May 2000).

⁴² Conner, Dettmer, and Pitt, "The Office of U.S. Attorney and Public Safety."

⁴³ James I.K. Knapp, "Intergovernmental Cooperation in Criminal Prosecutions Under the Reagan Administration" (February 6, 1986), http://bit.ly/1Q9pou7.

general for the criminal division, declared: "No law enforcement problem is more important or more complicated than how best to enforce drug laws, and no section of your law enforcement plan will be more difficult or more vital." It called on prosecutors to review whether drug offenders in their districts were receiving "undue leniency" and, if so, to develop a remedial plan.⁴⁴

Publicly, administration officials stressed that the federal role was to go after major traffickers who moved drugs across national and state borders, not to engage in street-level enforcement. Rudolph Giuliani, a senior architect of the LECC and OCDETF strategies, argued that a similar initiative launched during the Nixon administration failed because the federal agencies spread themselves too thin. "Street-level drug dealing is so massive that it dwarfs the resources available to federal law enforcement," he wrote. 45 But that reasoning dropped out of the guidance given to U.S. Attorneys. In fact, Jensen's 1981 memo declared, "Once a drug has been chosen for priority attention, even relatively small-scale trafficking in that drug should be treated as a serious matter." One Reagan U.S. Attorney told a journalist approvingly that he believed DOJ was using the narcotics issue to bulk up prosecutorial powers. Another objected to diverting resources to drugs, and resigned. 47 Meanwhile, the FBI was ordered to get into the business of drug enforcement, a matter the agency had long assiduously avoided. Funding for it and the

⁴⁴ D. Lowell Jensen, "Consideration of Drug Trafficking in District Law Enforcement Plans," December 29, 1981, folder "Law Enforcement Coordinating Committees 1982," Box 155, William French Smith files, National Archives and Record Administration, College Park, Md.

⁴⁵ Rudolph W. Giuliani, "Organizing Law Enforcement as Well as Organized Crime," *Public Administration Review* 45 (November 1, 1985): 712–17, https://doi.org/10.2307/3135025.

⁴⁶ D. Lowell Jensen, "Consideration of Drug Trafficking in District Law Enforcement Plans."

⁴⁷ Dan Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* (Little, Brown, 1996), 147–49.

Drug Enforcement Administration shot up.48

The result was that the number of criminal defendants charged by the federal government grew almost 40 percent during the Reagan administration, rivaling the pace of expansion under Nixon. More than half of Reagan's caseload expansion came from drug filings, which increased over 100 percent. And while Nixon's overburdened prosecutors had dismissed cases at a rate of about 20 percent annually, Reagan's expanding force kept that figure at only 15 percent.⁴⁹

This aggressive posture became more than just an implicit model for local district attorneys. In 1987, the National District Attorneys Association informed its members that a new "federal narcotics prosecution strategy" called for shifting resources from street-level prosecutions and toward higher-level targets (itself a sign that Giuliani's vow to stay off the streets had not been followed). 50 As a result, NDAA officials wrote in their magazine, local prosecutors would have to pick up the slack. "This change will have significant consequences for local prosecutors," NDAA President Richard Arcana wrote. "It will require state and local prosecutors to increase and intensify their efforts against regional and local narcotics traffickers, dealers, and users."

The Drug Enforcement Administration evinced similar leadership ambitions as

⁴⁸ Beckett, *Making Crime Pay*, 52–55. Jim McGee and Brian Duffy, *Main Justice: The Men and Women Who Enforce the Nation's Criminial Laws and Guard Its Liberties* (Simon and Schuster, 1997), 96.

⁴⁹ "Criminal Defendants Disposed of in U.S. District Courts," in *Sourcebook of Criminal Justice Statistics*, Online (University at Albany, School of Criminal Justice, n.d.), 5.22.2010, http://www.albany.edu/sourcebook/.

⁵⁰ As it turned out, this did not change after 1987, either. A U.S. Sentencing Commission report found that "mules" and other low-level traffickers are a significant chunk of the federal drug offender population. "Report to the Congress: Cocaine and Federal Sentencing Policy" (United States Sentencing Commission, May 2007), 25, http://bit.ly/1KkLXxq.

⁵¹ Jack Yelverton, "Federal Narcotics Prosecution Strategy," *The Prosecutor* 21, no. 2 (Fall 1987): 4; Richard Arcana, "NDAA's Role in the War on Drugs," *The Prosecutor* 21, no. 3 (Winter 1988).

the U.S. Attorneys. In 1984, DEA sponsored a "National Conference on the Control and Diversion of Controlled Substances" with senior policy makers from around the nation. At a follow-up conference in 1986, a DEA executive "charged conferees ... to return to their homes as advocates for new legislation" and called for drug control to be the project of a "national community' consisting of both Federal and state officials." The agency explicitly pointed to the federal government as a model. Attendees were urged not only to adopt asset-forfeiture policies that mimicked recent federal adoptions but also to "review their penalty structures using the Federal laws as a floor or minimum" (this may have been a reference merely to penalties for licit-drug diversion, however) and to adopt "realistic, determinate sentences without parole." At the federal level, DEA officials told the audience, such measures had yielded a "record number of 'man-hours' behind bars for drug dealers and other criminals." After a third such conference, in 1987, the DEA administrator sent governors of all 50 states letters urging these measures.⁵⁴ These efforts were matched by publicity work aimed at increasing news coverage of the crack epidemic.55

Conclusion

Understanding the thinking behind Reagan's rhetoric and policy agenda

⁵⁴ G.B. Prince, "Letter to Phillip D. Brady," July 6, 1988, folder "Drugs," Box CF 1315, Phillip D. Brady files, Ronald Reagan Library.

⁵² "Conference Report : 2nd National Conference on the Control and Diversion of Controlled Substances" (U.S. Department of Justice, 1986), 21, http://hdl.handle.net/2027/purl.32754078874371.

⁵³ Ibid., 6.

⁵⁵ Beckett, Making Crime Pay, 56.

illuminates the dynamics that drove it, and revises the conclusions of previous scholarship. The conclusion that much Republican rhetoric on crime was a calculated effort to woo disaffected white voters through racist imagery is well documented in previous work and remains inescapable, despite the fact that the archival record provides little additional evidence for it. 56 But the history recounted here does suggest that senior figures in the Reagan administration were inclined to govern more moderately than the president had campaigned. One reason they failed to do so was the pressure they perceived from congressional Republicans. The other reason is that they took a moralistic view of drug abuse that undermined their policy instincts, which told them that pursuing low-level offenders on a war-like footing was sure to be a losing battle. Bureaucratic politics also mattered: Under Smith, the Justice Department was more hawkish than the White House and there is no evidence that Meese, when he took the reins at DOJ, undermined the aggressive marching orders the Smith team had given its U.S. Attorneys.

Public rhetoric was one way federal officials were able to influence lower levels of government. In theory, control over grants would have been another. But as the tortured history of LEAA made clear, imposing discipline and "planning" from above onto the fractious criminal-justice system was always a tall order. With Reagan's determination to pull out of the grant-making game, this avenue of influence was closed almost completely. Instead, the Reagan team embraced a new vision: local leadership by bulked-up representatives of federal law enforcement. This rendition of federalism channeled professional hierarchies (and perhaps jealousies) to make the federal government a model to be emulated.

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⁵⁶ Beckett, Making Crime Pay. Dagan and Teles, Prison Break: Why Conservatives Turned Against Mass Incarceration.

3. Philadelphia and the Local Roots of Law and Order

Channel-surfing Philadelphians saw a strange new commercial on their screens in the summer of 1982. "From now on, a crime with a gun means you're in for five years," a voice intoned. "No deals, no parole, no exceptions." Actors playing prisoners warned of the horrors that awaited offenders behind bars. "There are times in here when you become so desperate you want to call out to someone," said one. "Sometimes you wake up in the nighttime and you will scream," warned another. The ads were announcing a new mandatory-minimum sentencing law that Philadelphia District Attorney Ed Rendell claimed to have written and pushed through the state legislature. Rendell was also chairman of a private foundation that paid for the advertising. In addition to its potential deterrent effect on would-be gunslingers, of course, the ad generated publicity for the D.A. himself. A rising star, Rendell would go on to become mayor of Philadelphia and then a two-term governor of Pennsylvania.

Chapter 1 argued that the breakdown of party machines led prosecutors to become independent, entrepreneurial political operators who had to develop distinctive, personal brands. The need to promote a personal brand would lead prosecutors to develop a higher media profile, ignore or potentially attack members of the party establishment, and make their own claims to party leadership. Chapter 1 also argued that elections for the post of district attorney in a high-crime context would be focused on punishment. If that were true, we would expect to see Philadelphia district attorneys win by emphasizing

¹ Jill Lawrence, "TV Spots Dramatize Pennsylvania's New Sentencing Law," The Associated Press, July

punishment, as crime was high relative to historic rates throughout the period covered by this dissertation. Finally, if urban elections were driven by white swing voters, we would expect to see politicians consciously wooing such voters in ways we could distinguish from the simple "tough on crime" campaigning predicted for a high-crime environment. This chapter examines these propositions through a case study of Philadelphia.

The Populist D.A.

Rendell was not the first to realize that the Philadelphia district attorney's office was a promising avenue for an ambitious politician seeking the spotlight. The office became such a platform amid profound shifts in Philadelphia's governance in the postwar era. For decades, Philadelphia had been ruled by a Republican machine. Civic and business elites were growing impatient with the machine's corruption, however. The New Deal's generosity to the white working class and the migration of African-Americans created a new pool of voters for the Democratic Party, which allied with the reformers to topple the GOP machine and elect a Democratic mayor in 1951. But there were tensions in the new regime. The reform elites clashed with street-level politicians more interested in replacing GOP machine politics with Democratic machine politics than eliminating the model altogether. The organization men ultimately triumphed in the 1960s, but by the 1970s they had fallen out into their own factional disputes.² The reform era had discredited but not destroyed machine politics. Its legacy was a Democratic organization that dominated the city, but not with the iron grip the GOP had enjoyed in its heyday. The

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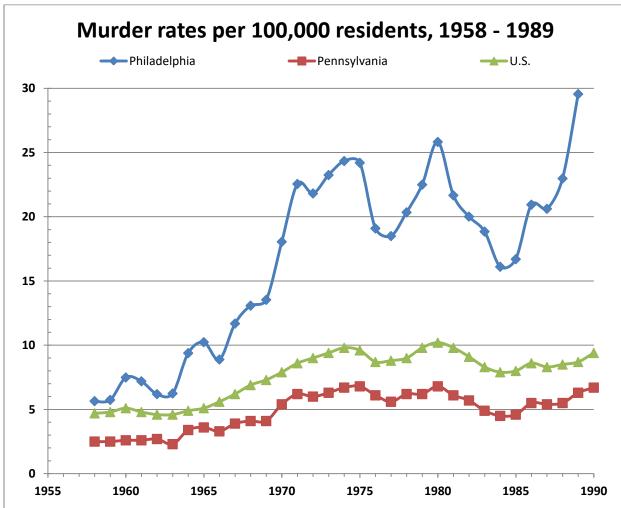
² Peter C. Buffum and Rita Sagi, "Philadelphia: Politics of Reform and Retreat," in *Crime in City Politics*, ed. Anne Heinz, Herbert Jacob, and Robert L. Lineberry (New York: Longman, 1983), 97–130.

Democrats were always vulnerable to insurgencies from Republicans or their own underdog factions.

In this constellation, the office of district attorney would take on new importance. As the city's second-highest elected office, it was considered a stepping stone to the mayoralty. The office's investigative powers also allowed outsiders to argue they would use it to police the dominant faction and chip away at patronage and corruption. There was another reason the D.A. office was due for the spotlight. Philadelphia's homicide rate began a consistent, steep, upward climb in 1963, increasing by 65 percent in just two years, and more than doubling again by the mid-1970s. Figure 1 shows this trend alongside murder rates for Pennsylvania and the entire U.S. The rise in violent crime was punctuated in 1964 by a major riot in the city's largely black North Central district.³ In this context, it was perhaps inevitable that elections for a post entirely devoted to prosecuting crime would be conducted in shrill tones. Figure 2 again shows the homicide rate, overlaid with the political milestones related in the following narrative.

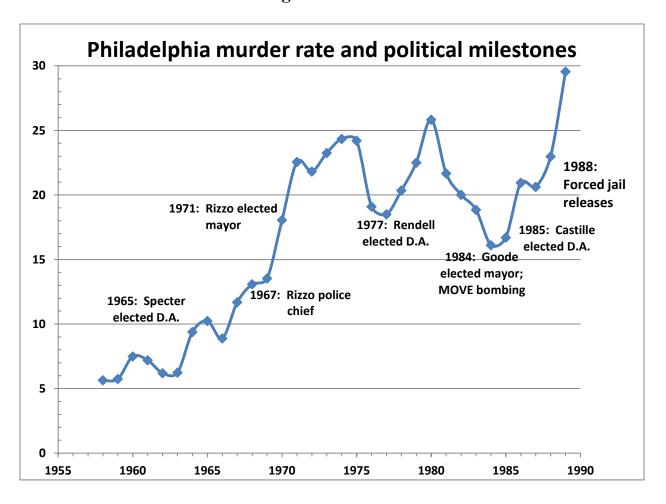
³ Buffum and Sagi, 118. Jake Blumgart, "The Riots of 1964: Lessons from the Looting of Columbia Avenue," *Mycitypaper.com*, August 28, 2014.

Figure 3-1



Source: FBI Uniform Crime Reports (print and online), U.S. Census Bureau. Population based on decennial census only for Phila, 1950s and 60s, and Penna., 1950s. Thereafter, census and inter-censal estimates.

Figure 3-2



Indeed, punitive populism soon took hold in Philadelphia. It was a politics always conducted with an eye to the white voters who occupied a swing position in the new urban regime. At the outset, law-and-order rhetoric was obviously associated with racial hostility, and African-Americans came out strongly against its proponents, notably the 1970s-era policeman-turned-mayor Frank Rizzo. But Rizzo was such an extreme figure that the cause of unseating him became black voters' top priority, creating room for the mayor's opponents to use similar, if less overt, law-and-order language. By the 1980s,

tough talk on crime had become accepted as a standard repertoire for all candidates.

It started in 1965, when a Republican candidate for district attorney named Arlen Specter ran what in later years would look like a classic "tough on crime" campaign. For example, Specter aired a television commercial showing a woman walking alone down a city street, the footsteps of her high heels followed by those of a predator. Notably, this was a campaign aimed squarely at disaffected white Democrats, and they rewarded Specter with their votes.⁴

The punitive populism quickly spilled over into mayoral politics. Two years after winning the D.A. post, Specter challenged the incumbent Democratic mayor, James Tate. To ward off the threat, Tate had to perform a racial balancing act. His foundation would be the black electorate, but with African-Americans accounting for under 30 percent of city voters, Tate needed to capture a considerable minority of white voters to put him over the top.⁵ Tate wooed black voters by appointing African-Americans to key posts and creating a short-lived youth employment program. To counter Specter's law-and-order appeal to whites, he appointed a new police commissioner, Frank Rizzo, who had a reputation for shooting first and asking questions later. Rizzo had most recently made headlines with a controversial raid on offices of the Student Nonviolent Coordinating Committee.⁶ Throughout his campaign, Tate used Rizzo as a prop.⁷ Tate ultimately won

⁴ Joseph R. Daughen and Peter Binzen, *The Cop Who Would Be King: Mayor Frank Rizzo* (Boston: Little, Brown, 1977), 102.

⁵ Daughen and Binzen, 102.

⁶ Daughen and Binzen, 99–100, 103.

⁷ Daughen and Binzen, 103.

the black vote by a 2-to-1 margin and hung on to enough white voters to be reelected.8

Pioneered by a Republican playing for a majority among whites, mimicked by a Democrat hoping to prevent white erosion while holding his black base, the dynamic in Philadelphia almost perfectly mirrored the electoral conditions underlying law and order at the presidential level. On the national stage, it was Barry Goldwater who brought the discourse to prominence, and Lyndon Johnson who scrambled to catch up, in part by pushing through the Safe Streets Act of 1967. As the most frequent victims of crime, it is possible that black Philadelphians sympathized with the concept of cracking down. But as pitched by Specter and Tate, the tough-on-crime talk was widely understood to be addressed to white voters. That gap in the implied audience would soon widen dramatically.

In 1971, the retiring Tate and the powerful chairman of the Democratic city committee, Peter Camiel, encouraged Rizzo to run for mayor as the party's nominee, believing he "could stem the flow of white working-class voters away from the Democrats." Rizzo ran a campaign almost completely focused on crime and devoted all his time to white wards. In the Democratic primary, his challengers were a white liberal and an African-American. Rizzo declared: "My rivals can't talk law and order ... If they did, they'd lose all the support they've got." It was a clear implication that his opponents, and their voters, were on the side of the lawless. Rizzo won the primary with 48 percent

⁸ Buffum and Sagi, "Philadelphia: Politics of Reform and Retreat," 119–20.

⁹ Weaver, "Frontlash."

¹⁰ Daughen and Binzen, *The Cop*, 157.

¹¹ Daughen and Binzen, 165.

of the vote. Of the 37 wards that backed him, 36 were overwhelmingly white. 12

Rizzo's implicit reliance on racial tensions was drawn into the open by his opponents in the general election. Republicans flipped their usual formula for winning and campaigned for the black vote by casting Rizzo as a racist. The city's Republican boss said the issue in the campaign was "black against white, that's what Mr. Rizzo is trying to make it. He doesn't have the intestinal fortitude or guts to say so in so many words, but you know it and I know it." The Republican candidate, W. Thacher Longstreth, took Rizzo to task for his slogans. Longstreth charged that the line "'Rizzo means business'" was threatening to blacks, while "'Firm but fair'" actually meant "Firm to the blacks, fair to the whites." Longstreth warned: "Should Rizzo become mayor, Philadelphia will become a Newark, New Jersey, where the whites eliminated black participation in government...Finally, the blacks won and took control, but what did they win? Nothing but a dead and deserted city." 13

Others in positions of authority reinforced the message. Richardson Dilworth, the Democratic reform mayor who had served in the 1950s, charged that Rizzo's campaign was based on fear and that the former commissioner was telling supporters at "off the record" gatherings: "I know how to keep the blacks in their place." Five of the city's NAACP branches actively campaigned against Rizzo, an "unprecedented involvement in partisan politics." A leading black pastor and businessman, the Rev. Dr. Leon Sullivan, rejected Rizzo's claim to the "law-and-order" mantle as divisive. "Should Mr. Rizzo be

¹² Of the 23 majority-black wards, Rizzo won just one, in which an ally commanded a following. His share of the vote in those 23 wards was 19 percent. Almost 20,000 Republicans switched their registration to vote in the Democratic primary. Daughen and Binzen, 170.

¹³ Daughen and Binzen, 174.

¹⁴ Daughen and Binzen, 174, citing *Philadelphia Evening Bulletin*, Oct. 7, 1971.

elected, we will unquestionably have a divided city," he declared. "It is a question of law and order and progress under Thacher Longstreth or law and order and terror under Rizzo." The brusque policeman decried his critics as the ones who were polarizing the city and boasted that he would win the black vote. He stuck to a message of lambasting lenient judges while promising to hold the line on taxes, hire 2,000 more cops, and fire a liberal schools superintendent who he alleged had lost control of the students. Rizzo never visited a black ward. The law-and-order balancing act that Tate had performed in response to Specter had now turned into a bitter choice of sides.

Amid a record voter turnout of 77 percent, Rizzo won the 1971 general election by 50,000 votes while once again picking up just one out of 23 black wards. ¹⁷ President Richard Nixon called to offer the conservative Democrat his congratulations. The two had a friendly relationship going back to 1952, when Rizzo had managed a motorcade for Nixon. They met occasionally at the Philadelphia airport, and after Rizzo became mayor, he was granted a 45-minute audience with the president in the White House. Rizzo soon endorsed Nixon for re-election and was rewarded with a gusher of federal money for the city. ¹⁸ At the same time, Rizzo governed much as he had campaigned, shutting African-Americans out of city government and hurling inflammatory remarks that generated increasing public hostility. A falling-out with Camiel, the Democratic boss, earned Rizzo

¹⁵ Donald Janson, "Rizzo's Election Rival Gains Support," *The New York Times*, October 24, 1971, sec. Archives, https://nyti.ms/2OyD6hG.

¹⁶ Daughen and Binzen, *The Cop*, 175.

¹⁷ Daughen and Binzen, 182.

¹⁸ Robert Mason, *Richard Nixon and the Quest for a New Majority* (Univ of North Carolina Press, 2005), 174–75. Tom Fox, "The Big Bambino Renews an Old Friendship," *Philadelphia Daily News*, January 25, 1972.

the enmity of the party machine. He nonetheless won re-election in 1975, as the opposition vote was split among the Republican and a third party led by Charles Bowser, an African-American lawyer and activist. 19

Discontent with the fiery mayor grew in Rizzo's second term, especially when his promise in his 1975 re-election campaign to hold the line on taxes proved illusory. By the time Ed Rendell launched his bid to become district attorney in 1977, the key issue in Philadelphia politics was Rizzo himself. Rendell ran as an anti-Rizzo Democrat. The incumbent D.A., Democrat Emmett Fitzpatrick, was widely viewed as too indulgent of Rizzo's corruption, and Rendell vowed a change in course. He also promised to go after police brutality, a hot topic in a decade where Rizzo was widely perceived to have given his forces a long leash, particularly after a Pulitzer-winning newspaper series about police killings. At the same time, Rendell billed himself as tough on crime, vowing to end pleabargaining in serious felony cases and to create a special unit to prosecute rape.²⁰

The law-and-order framing of the crime problem would never again be seriously challenged during the 1980s. The likeliest source of opposition would have been the black community, and indeed, some black politicians occasionally criticized Rendell's tactics. "It will apply basically to blacks, the poor and disadvantaged," state Rep. David Richardson said of the mandatory-minimum law Rendell promoted in the TV ads.²¹
Rendell rebuffed such claims by insisting that most black Philadelphians supported his

¹⁹ Daughen and Binzen, *The Cop* passim.

²⁰ "Endorsements: Lazin for District Attorney," *Philadelphia Inquirer*, November 6, 1977. Howard S. Shapiro, "Rendell, Lazin -- Lookalikes," *Philadelphia Inquirer*, November 6, 1977, sec. A1.

²¹ Lynette Hazelton, "D.A. Rendell Says: Thugs Roll Dice with Mandatory Sentencing," *Philadelphia Tribune*, June 8, 1982.

hardheaded approach to crime.²² The debate never had a chance of being put to the test given the structure of partisan politics in this era, however. Leaders of both parties believed law-and-order was essential to winning white swing voters. While the share of African-Americans in Philadelphia grew steadily, they were still in a minority, both in the general electorate and within the Democratic Party, where they accounted for 45 percent of voters in 1985.²³ At the same time, the post-Rizzo era saw African-Americans make tremendous strides in city politics. The Democratic Party became a welcoming home once again. Rizzo's successor, Democrat William J. Green III, had promised in his 1979 mayoral campaign to make an African-American the managing director, the number two post in city government.²⁴ He made good on that vow, and African-Americans also won other coveted appointments. There was thus little incentive for black insiders to pick a fight with the party.

Besides, Rendell was a popular figure. He won points in the black community by prosecuting police brutality cases that in another era may have been swept under the rug; on one occasion, police officers even demonstrated outside his office. More generally, he was a charismatic and skilled politician. He made no secret of his ambitions — "I'd like to be President of the United States some day," he told a reporter — but he packaged them in a down-to-earth, conversational style. He was widely viewed as a master of public relations, offering reporters a steady stream of headlines and quotations while avoiding the bomb-throwing that was Rizzo's hallmark. He also worked hard to make

²² Tony Green, "Ed Rendell Is Mad as Hell," *Philadelphia*, March 1980.

²³ Thomas Ferrick Jr., "Race For D.A. Is Attracting Little Interest," *Philadelphia Inquirer*, April 28, 1985, Final edition, sec. Local.

²⁴ Thomas Ferrick Jr., "Goode Wins Mayoral Contest," *Philadelphia Inquirer*, November 9, 1983.

himself accessible, relentlessly making the rounds at community meetings and holding a weekly forum in which he fielded all manner of citizen requests and dispatched staffers to follow up.²⁵

Rendell coasted to victory in his 1981 re-election campaign with support from most of the city's black establishment. Given the D.A.'s overwhelming popularity and the obscurity of his Republican opponent, it was an affair that captured little media interest. Rendell offered a platform that included lobbying for the state to embrace mandatory-minimum sentencing and prison construction. His Republican opponent accused him of clogging the courts by reducing plea bargains, but the D.A. insisted the people were behind him. "My opponent says we should do more plea bargaining," Rendell remarked. "If they heard him say that, they'd tear him limb from limb."

The black proportion of voters grew enough that by 1984 they could elect the city's first black mayor in coalition with the liberal white wards. The winner, Wilson Goode, had been Green's managing director. In the Democratic primary, Goode had faced Frank Rizzo, who was hoping for a comeback. With the city in financial crisis, overall management and economics were front and center. On crime, Rizzo largely offered his reputation and the charge that crime had risen while Goode worked in City Hall. Goode, for his part, issue a crime plan that called for reassigning 300 cops to street patrol and for police to prioritize the pursuit of drug dealers and suspects in major crimes.

²⁵ Green, "Ed Rendell Is Mad as Hell."

²⁶ Larry Eichel, Roger Cohn, and Terry E. Johnson, "GOP Loses Every Race in the City," *Philadelphia Inquirer*, November 4, 1981, sec. Local. Larry Eichel, "Quiet Races Stir Little Interest in an 'Off-Off' Year," *Philadelphia Inquirer*, November 1, 1981, sec. Local. Paul Taylor, "With a Bevy of Backers, Rendell - to Run Again for District Attorney," *Philadelphia Inquirer*, January 8, 1981, sec. Local. Larry Eichel, "Rendell Keeps His Campaign in the Fast Lane," *Philadelphia Inquirer*, October 23, 1981, sec. Local.

Goode also touted the mandatory sentencing concept that Rendell had popularized — in this case for crimes against the elderly or children.²⁷ Goode's rhetoric skirted the root causes of crime and instead offered the platitudes of toughness. "I intend to make sure that any criminal - be he black or white, young or old - understand one thing: When I'm mayor, you're not welcome in Philadelphia," went one common refrain, the references to race apparently intended to reassure white voters the mayor would play no favorites. The menu largely mirrored what was on offer from candidates running in the Republican primary.²⁸

Law and order continued as a minor theme in the general election. Immediately after the primary, Goode's Republican opponent had boasted: "I think I have a natural appeal to the Rizzo voter on such things as crime. I mean, when I spoke about crime, it was pretty strong." A week later, Goode appeared with Rendell to receive the popular district attorney's endorsement. Rendell declared: "I don't think the people of this city are yet aware of the hard-line positions Wilson Goode has taken on crime. I have a reputation of being a hard-liner, but in some ways he makes me look like a softy." In September, Goode again touted his crime program and visited a police station to reiterate, "As mayor, I'll make certain that people understand one thing. I don't care who you are black or white, rich or poor. If you commit a crime in this town when I am mayor, you'll pay for that crime." His victory came with 98 percent of the vote in majority-black wards and 24 percent in majority-white wards.

²⁷ The plan also included prison-education programs and an inspector general to investigate police corruption. Earni Young and Christopher Hepp, "Goode Targets Crime," *Philadelphia Daily News*, April 26, 1983, sec. Local.

²⁸ Larry Eichel, "Doing a Delicate Dance on the Crime Issue," *Philadelphia Inquirer*, April 7, 1983, sec. Local.

Even Goode's victory did not give Democrats confidence that their troubles with whites were over, however. In fact, many believed that after Rendell, their next candidate for district attorney also had to be white. The thinking was that even liberal white Democrats might not want to see both of the city's top elected offices occupied by African-Americans. As the *Philadelphia Inquirer* reported, "Black and white politicians have become sensitive to what they call balance, which is their way of saying the party should be careful to run racially and ethnically balanced tickets." The primary victor turned out to be an African-American, a former judge named Robert W. Williams. The candidate's advisers reportedly bought into the logic of "balance," though, and opted to keep their candidate largely out of sight, so that white voters would not realize his race. (In fact, Williams' advisers accused the Republican candidate, Ronald Castille, of touching up a photo of the candidate in a television commercial to ensure he appeared black. The solution of the candidate in a television commercial to ensure he appeared black.

The Democratic primary had offered some hint that Williams was more dovishly inclined than Rendell, suggesting that his election might have marked a change from the city's punitive course. While neither Williams nor his primary opponent would criticize the district attorney directly, they did allow some daylight with Rendell. Both men were former judges, and said they would ease the D.A.'s hostile relationship to the city's bench. Both also said they wanted to give assistant district attorneys more discretion, implying more flexible plea-bargaining policies. Those ideas were balanced, however, by

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²⁹ Thomas Ferrick Jr., "Democrats Jockey, Cautiously, for D.A. Race," *Philadelphia Inquirer*, November 26, 1984.

³⁰ Paul Nussbaum, "In D.A. Race, GOP Looks to Break Democrats' Lock," *Philadelphia Inquirer*, November 3, 1985, sec. Local. John F. Morrison, "Castille Day: Underdog Takes DA Race," *Philadelphia Daily News*, November 6, 1985, sec. Local.

vows to "devote more resources to the prosecution of drug dealers and juveniles who are repeated offenders."³¹

But with Williams keeping a low profile, the field was open for Castille to set the terms of the race. A veteran who had lost a leg in Vietnam and a longtime deputy to Rendell, Castille had opted at the last minute to run on the Republican ticket. The ex-Marine left no doubt about his intention to claim that he was the true heir to the Rendell's crackdown policies, not Williams. "I look forward to running on our respective records," Castille told an interviewer on the night of the primaries, "mine as a career prosecutor, and (Williams') as a judge who is lenient in his dealings with violent street criminals." Williams, inevitably, declared: "I've always been tough on crime. At least that's what they tell me." Similar exchanges took place over the airwaves, with Castille airing an ad attacking Williams as a lenient judge and the Democrat responding with a spot alleging that as an assistant D.A., Castille let offenders go "scot free" with a probation program. 33

Castille also "portrayed Williams as beholden to Goode and the city's Democratic leaders, questioning his ability to aggressively prosecute crimes that might embarrass or involve city officials." This was an effective line of attack in an era where corruption concerns still loomed large. In endorsing Castille, the *Philadelphia Inquirer* argued that "Mr. Williams' allegiance to — and fund-raising reliance upon — the Goode

³¹ Thomas Ferrick Jr., "Little Interest."

³² Ron Goldwyn, "It's Williams vs. Castille For DA In Nov.," *Philadelphia Daily News*, May 22, 1985, sec. Local. Paul Nussbaum, "D.A. Candidates Miss a Confrontation," *Philadelphia Inquirer*, October 23, 1985, Final edition, sec. Local.

³³ Kevin Haney, "New TV Spot Adds Static To Williams-Castille Race," *Philadelphia Daily News*, October 24, 1985, 9Star edition, sec. Local.

³⁴ Paul Nussbaum, "In D.A. Race, GOP Looks To Break Democrats' Lock," *Philadelphia Inquirer*, November 3, 1985, Final edition, sec. Local.

administration is troubling" and that the Republican was not only a more forceful personality, but that he would have more "political latitude than his opponent." Williams' proximity to Goode was especially disadvantageous since this was the first election since the disastrous MOVE incident, in which a police bombing of a militant hideout resulted in 11 deaths and the destruction of three complete city blocks. In the end, it wasn't close: Castille trounced Williams in white wards by as much as 6-1, and the Democrat's own strategists estimated that he got just 85 percent of the black vote, well below his 93 percent target. Even some black members of the Democratic organization reportedly backed Castille.

The politics of law-and-order were a response to a real and severe crime problem in Philadelphia, but they were wrapped in racial and partisan competition in ways that made an honest accounting with that crime problem almost impossible. The singular flaw in the law-and-order framing was that it conflated crime control almost completely with criminal punishment. There was a strong case that greater incapacitation of offenders was in fact necessary, but the effect of the punitive frame was to shut out discussion of community-based responses such as probation or restitution, let alone "root causes" of crime. This framing was only challenged directly in the 1971 mayoral contest between

³⁵ "Castille Is Recommended For District Attorney Post," *Philadelphia Inquirer*, November 1, 1985, Final edition, sec. Editorial.

³⁶ Alex Arbuckle, "1985: When Philly Police Dropped a Bomb on a Residential Neighborhood," Mashable, accessed August 2, 2016, http://mashable.com/2016/01/10/1985-move-bombing/.

³⁷ Vernon Loeb and Paul Nussbaum, "Castille Elected D.A. in Upset: Storms Past Rival Williams," *Philadelphia Inquirer*, November 6, 1985, Final edition, sec. Local. John F. Morrison, "Castille Day: Underdog Takes DA Race," *Philadelphia Daily News*, November 6, 1985, 9Star edition, sec. Local.

³⁸ Paul Nussbaum, "Failure To Debate Castille Apparently Hurt Williams," *Philadelphia Inquirer*, November 6, 1985, Final edition, sec. Local.

W. Thacher Longstreth and Frank Rizzo.³⁹ In that case, African-Americans overwhelmingly rejected it while white voters embraced it. Thereafter, the picture for black voters became muddier. Black politicians began using the language of law-and-order in citywide campaigns. Much more than their white counterparts, black voters experienced ambivalence about this tone. They were, after all, the most frequent victims of crime — but theirs were also the communities that bore the brunt of aggressive policing and harsh sentencing.⁴⁰ Even if black voters may have objected, the cost of defection would have been to cede electoral politics entirely to the two parties that were competing for what was still a white majority in the city, while being shut out of economic and patronage interests that were lodged within the Democratic Party. On crime, the black vote was thus both conflicted and captured.⁴¹

The D.A. Goes to Court

The rise of local law-and-order politics had profound implications for criminaljustice policy in Philadelphia. In addition to throwing rhetorical bombs, Mayor Rizzo saw
to it that the police force expanded in Philadelphia even as other agencies saw severe
cutbacks. Lasting policy changes also came from the new, crusading district attorneys —
Specter, Rendell, and Castille. They mounted public attacks on judges they considered

³⁹ It appears to have been less of an issue in the three-way race of 1975, but that is a question that requires further research.

 $^{^{40}}$ On black support for harsh measures, see Fortner, *Black Silent Majority*. Forman, Jr., *Locking Up Our Own*.

⁴¹ On African-American voters as "captured" in the two-party system, see Frymer, *Uneasy Alliances*.

lazy (with some justification) and lenient. Meanwhile, they proved much less willing than was customary to dismiss low-level cases and to offer plea bargains that would avoid the burdens of trial. Combined with the inevitable growth in caseloads that was a product of rising crime (and more assertive policing), the effect of these changes was to disrupt the "courtroom communities" in which cases are handled according to local norms and repertoires that bind defense attorneys, prosecutors, and judges together. ⁴² By the 1980s, prosecutors and judges were engaged in open warfare, and Harrisburg was being called to provide reinforcements on behalf of the D.A.'s.

Public attacks on judicial leniency began with Specter. The Republican D.A. had his assistants routinely give judges sentencing recommendations in trials, which was not a standard practice in this era. Judges who strayed from his advice could find themselves denounced at a press conference. Although they were of different parties, Specter and Rizzo considered themselves allies, and the district attorney backed Rizzo in his own strident assaults on the judiciary. While he was still police commissioner, Rizzo accused a certain few judges of playing a deadly game of Russian roulette, with the citizens of Philadelphia as the potential victims." In 1969, Specter sat in on a "highly publicized meeting" between Rizzo and 16 judges, at which Rizzo admonished the judges for their lenity. Philadelphia newspapers later published a letter of protest that a prominent black attorney had sent the president judge, warning that Rizzo's tactics could result in judges being "scared into unjudicial and senseless sentences, mainly on Negroes." Since judges

⁴² James Eisenstein, Roy B. Flemming, and Peter F. Nardulli, *The Contours of Justice: Communities and Their Courts* (University Press of America, 1988).

⁴³ John Guinther, "Is It True What They Say About Emmett?," *Philadelphia*, 1977, 77.

⁴⁴ Daughen and Binzen, *The Cop*, 142.

were elected, this was no idle concern. Specter also made his campaign against judicial leniency visible at the state level. He proposed a bill to the legislature to have sentencing done by "panels" including lay people, not judges alone. He also told legislators in 1973 that sentencing should be done on a "statewide" basis, foreshadowing future interventions by Harrisburg.⁴⁵

Specter's successor, Emmett Fitzpatrick, eschewed such methods. But when Rendell took over in 1977, he soon resumed the Specter tactics, only with greater sophistication and consistency. Rendell had served in the D.A.'s office under Specter, rising to chief of homicide prosecutions. As D.A., Rendell had an assistant send a weekly register of sentencing decisions to the press. Particularly lenient sentences were rewarded with special press releases or comments from Rendell at his weekly press conference. The practice went so far that the president judge of the city's Common Pleas Court filed a disciplinary complaint against Rendell with the state Supreme Court. As one observer remarked, however, "It is a war that the judges can't win ... The issue is not only popular with the press but also with the public."

Judges were indeed poorly positioned to defend themselves against these assaults. There is a fair argument that the system in this era was excessively lenient: Rendell, for example, claimed that when he took office, 18 percent of people convicted for homicide in Philadelphia merely received probation. There was also truth to the critics' claims that the bench was stained by incompetence and laziness. The Philadelphia courts had long

⁴⁵ Arlen Specter, "In Re: House Bill No. 749," Committee on Judiciary, Subcommittee on Corrections (Pennsylvania Senate: 1973), 35-36.

⁴⁶ Green, "Ed Rendell Is Mad as Hell," 118–19.

⁴⁷ Green, 197.

been patronage mills. Judges were appointed to vacancies by political allies, allowing them to run in subsequent elections with the advantage of incumbency. Even more important were the official party organization's endorsements, which guided voters through what otherwise was an impossibly long ballot.⁴⁸ The resulting mediocrity of the judiciary was widely acknowledged. "At least they're not all bums," an aide to Democratic Gov. Milton Shapp declared in 1972, when the governor made new appointments to the bench.⁴⁹ More than a decade later, a justice of the Pennsylvania Supreme Court charged with improving the city's courts would resign in frustration, declaring, "A more mal-administered court system would be difficult to imagine. It is bloated by patronage abuse, fiscally unsound, profligate, and badly inefficient."⁵⁰

Ironically, the patronage that made the courts so easy to criticize also gave

Rendell an added avenue of influence over them. As a major player in the Democratic

organization, widely seen as a future mayoral or gubernatorial contender, Rendell

exercised significant influence over the selection of judicial candidates. Thus, even while

Rendell (apparently sincerely) pushed for legislation that would create commissions to

recommend judges on the basis of merit, he used his pull to place his own allies on the

bench. For example, *The Philadelphia Inquirer* in 1983 reported that Rendell's top

deputy had been recommended for appointment to the Common Pleas Court "with the

⁴⁸ Fredric N. Tulsky, "'Raw Politics' Stalling Selection Of Common Pleas Judges," *Philadelphia Inquirer*, March 7, 1983, Final edition, sec. Local. H.G. Bissinger and Daniel R. Biddle, "Politics In Justice: Fuel For Suspicion," *Philadelphia Inquirer*, January 28, 1986, Final edition, sec. Local. Fredric N. Tulsky and Dan Meyers, "Judicial Struggle Develops: Nominees Facing Party Opposition," *Philadelphia Inquirer*, March 8, 1987, Final edition, sec. Local. Daniel R. Biddle, "Election Of Judges Should Stop, Casey Panel Told," *Philadelphia Inquirer*, September 17, 1987, Final edition, sec. Local.

⁴⁹ John Guinther, "In Search of the Perfect D.A.: How Does the Current Public Prosecutor Stack Up Against His Predecessors?," *Philadelphia*, March 1980.

⁵⁰ Lawrence J. Haas, "Phila. Courts Swirl in Controversy," *Pittsburgh Post-Gazette*, July 23, 1983.

strong support of his boss."⁵¹ Rendell also leveraged his popularity on behalf of his favored candidates, offering public endorsements, speaking in radio ads, and recommending them to his extensive mailing list. "Some who have won judgeships acknowledge openly that they could not have done so without Rendell's support," The *Inquirer* reported in 1986.⁵²

Rendell's successor, Castille, continued to inveigh against judicial leniency.⁵³ In 1986, when a citizens' group issued a report complaining that not enough drug dealers were being sentenced to prison, Castille said the findings "really support what I've been saying all along, that judges in City Hall don't take drug cases seriously." (Castille did not mention that the study included offenders whose charges his own office had dismissed before they even made it to a judge.)⁵⁴ Castille did get involved in judicial elections, at one point even battling his own party bosses over the choice of candidates, but as a Republican, his influence was inevitably more limited.⁵⁵

Judicial leniency notwithstanding, the district attorney had a direct influence on the fates of people charged with crimes. Data from the Philadelphia courts offers a partial picture of shifting policies in the district attorney's office. Stricter district-attorney policies manifest numerically in decisions about charging and plea-bargaining. One way to measure charging policy is by evaluating how often charges are *dismissed*. High

⁵¹ Fredric N. Tulsky, "Raw Politics."

⁵² Bissinger and Biddle, "Politics in Justice."

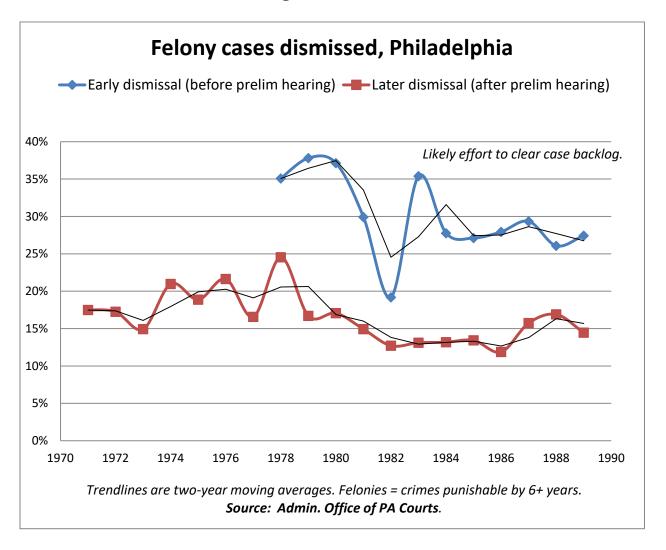
⁵³ Lucinda Fleeson, "Judging Castille: The Jury's Still Out On The New D.A.," *Philadelphia Inquirer*, August 3, 1986, Final edition, sec. Editorial Review & Opinion.

⁵⁴ Lucinda Fleeson, "Citing Study, Citizens Crime Commission Calls For Stiffer Drug Sentences," *Philadelphia Inquirer*, October 23, 1986, Final edition, sec. Local.

⁵⁵ Fredric N. Tulsky and Dan Meyers, "Judicial Struggle." S. A. Paolantonio, "Castille: Vietnam Vet With a Stubborn Streak," *Philadelphia Inquirer*, May 13, 1991.

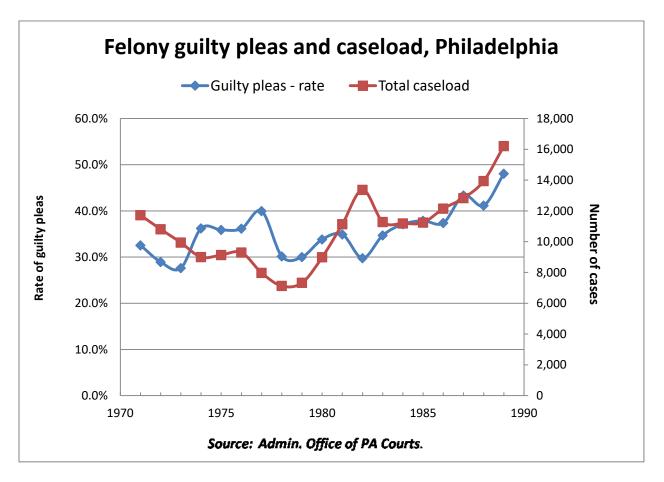
dismissal rates suggest the district attorney is willing to bargain away or drop charges. Especially at early stages of a case, dismissals can also be driven by police error, such as "over-charging," inadequate evidence, or an illegal search. Figure 3-2 shows dismissal rates in serious felony cases both at an early stage — the preliminary hearing — and at later stages. Between the 1970s and the 1980s, dismissals at both stages dropped, as indicated by the trendlines in the chart.

Figure 3-3



Plea bargains show a less consistent trend. Here, I measure them by counting guilty pleas, which rarely come without a concession from the prosecutor. This data must be interpreted carefully. On the one hand, rising rates of guilty pleas in recent years have been taken as an indicator that prosecutors hold all the leverage and defendants fear going to trial. Lower rates of guilty pleas can thus indicate less coercive power. On the other hand, a lower rate of guilty pleas can *also* suggest that prosecutors are being so tough in negotiations that defendants are choosing trial anyway.

Figure 3-4



The political context and workload pressure on the courts provide important context for understanding these data. The numbers presented here begin during the term of Emmett Fitzpatrick, who succeeded Specter as D.A. Specter had taken a hard line during his time in office. He had vowed to roll back plea bargaining in his 1965 campaign. He not only made good on that promise, but also increased the total number of cases entering the court system by becoming much more aggressive about moving forward with minor offenses that previous district attorneys would have simply

dismissed.⁵⁶ These policies created an enormous backlog in the city's courts, which Fitzpatrick inherited. He responded by reverting back to more generous dismissal and bargaining policies, essentially returning the court community to its previous way of doing business. The backlog was successfully reduced, but Fitzpatrick was not rewarded for it. In fact, the return to increased bargaining and dismissal was one of the points on which the D.A. was skewered both by the media and by Rendell, his primary opponent.⁵⁷

Rendell resumed a hard line on plea bargains. By the time he announced his candidacy for re-election in 1981, he boasted that he had reduced the number of plea bargains in felony crimes by 80 percent (a claim that appears wildly exaggerated in light of the data presented here). Rendell also attacked dismissals. In his second term, he wrested the power to file charges away from the police. The net effect could have gone either way — lawyers screening cases early on could have prevented some from ever making it to court. But there was a significant impact on the culture of negotiation in the courthouse, according to Benjamin Lerner, the city's chief public defender at the time. Previously, it had been widely assumed that police "over-charged" defendants, Lerner said, but when the charges were filed by the D.A., the office became much less willing to drop them. There was widespread agreement that these practices contributed once again to a ballooning of the case backlog in the court system, but Rendell largely disavowed

⁵⁶ John Guinther, "What They Say About Emmett."

⁵⁷ Ibid.

⁵⁸ Paul Taylor, "With A Bevy Of Backers, Rendell To Run Again For District Attorney," *Philadelphia Inquirer*, January 8, 1981, sec. Local.

⁵⁹ Tom Infield, "D.A. To Take Over Filing Of Charges From Police," *Philadelphia Inquirer*, September 1, 1982, F edition, sec. Local.

⁶⁰ Benjamin Lerner, interview by David Dagan, 2016.

responsibility for that problem.⁶¹ The pressures appeared in the statistics of his successor, Castille, who again increased rates of dismissal and plea-bargaining substantially.

Conclusion

This chapter has shown that far from being driven by national politicians, lawand-order politics in Philadelphia had deeply local roots — as we should expect in a
policy domain that is so tied up with place and where power and political responsibility is
so devolved. The three drivers of crime's political salience — racial tension, fear of
victimization, and local political structure — were all trending in a direction favorable to
law and order politics.

The chapter provides strong evidence for our key propositions. Rendell's attack on Democratic corruption in 1977 and on Democratic judges throughout his tenure, and his high-profile campaigning for the Democratic mayoral candidate Wilson Goode, all show the incentives for aspiring district attorneys to develop personal brands. There is no evidence that Rendell was beholden to Peter Camiel or other party bosses in these decisions.

Elections for the D.A. post did emphasize punishment, though not as uniformly as I expected. As mentioned, anti-corruption was a major theme for Rendell in his 1977 D.A. primary, along with police brutality; in general, that race was defined by opposition to Frank Rizzo's racial polarization. The punishment emphasis was also not exclusive to the district attorneys' office — Rizzo made it a cornerstone of his brand, and Wilson

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⁶¹ Debbie M. Price, "Reviewing Rendell's DA Record: Mayoral Challenger Won Critics & Fans," *Philadelphia Daily News*, May 4, 1987, Late edition, sec. Local.

Goode made sure he covered his law-and-order flank as well.

There is abundant evidence that politicians were positioning themselves primarily to appeal to white swing voters throughout the period, from Specter's ad featuring a white crime victim to Tate's use of Rizzo to Rizzo's extreme appeals and the Democratic Party's 1980s attempts at "balance."

We also saw some evidence that the black vote on crime was "captured." The last politician to campaign for black votes by opposing law-and-order rhetoric was Republican Thacher Longstreth, who won the black vote against Frank Rizzo. But disaggregating the anti-law-and-order vote from the anti-racist vote among African-Americans in that election is not possible. After Longstreth, black voters were never again offered a politician who pushed back against law-and-order rhetoric, and in some sense that question was moot — Rizzo had so polarized the city that he set a low bar on racial progressivism. It was not until the election of 2017 that a serious candidate — Larry Krasner — ran for D.A. on a platform reversing the tough-on-crime status quo. He won the primary easily (thanks in part to hefty backing from financier George Soros). 62

Meanwhile, the fragmentation of the criminal-justice system allowed the Philadelphia district attorney to set his own policy without regard for the concerns of judges or jailers, laying the seeds for a crisis. As the next chapter will show, both the political climate and the policy divisions within criminal justice would soon be poisoned further by the intrusion of state politics.

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⁶² Chris Brennan, "Krasner Declared Winner of Democratic Primary for DA in Philly," *Http://www.philly.com*, May 16, 2017, http://www2.philly.com/philly/news/politics/city/Krasner-holds-early-lead-in-Democratic-primary-for-DA-in-Philly.html.

4. Cost and Crisis in Pennsylvania

In the late afternoon on October 25, 1989, guards at the State Correctional Institution at Camp Hill, near Harrisburg, Pennsylvania, escorted almost 1,000 inmates from an exercise break back to their cell block. One of the prisoners attacked a guard, and others piled on, swiftly overwhelming him. Other guards retreated to a secure building, but the mob broke inside. The prisoners soon had eight hostages and began setting fires. Authorities cordoned off the northwest edge of the prison where the unrest was occurring, and later that evening a heavily armed phalanx of state police persuaded the rioters to stand down. But the prisoners did not remain subdued for long. The next night, inmates exploited a faulty locking system to break out of cells across the prison. They took five more hostages and again started fires. As the flames leapt dozens of feet into the air, police from the many small towns clustered around the prison rushed to the scene to establish a secure perimeter. Two law-enforcement teams assaulted the prison early the next morning, October 27. They regained control, but more than 100 people were hurt. Thirty had to be hospitalized, including a guard and an inmate who were critically injured. With almost half the buildings at Camp Hill destroyed, the authorities began busing inmates to other institutions.

As Governor Robert P. Casey monitored the crisis from his office just two miles away, he must have immediately thought about overcrowding. Built in 1941 to house 1,826 inmates, Camp Hill was holding some 2,600 at the time of the unrest. Other state lockups were equally overcrowded, putting the Pennsylvania Department of Corrections

at 48 percent over capacity system-wide.¹ Whatever immediate grievance had stimulated the riot, there was no doubt that crowding would be fingered as the underlying cause. The day after the uprising ended, Casey held a press conference and vowed to "provide additional cell space throughout our state correctional system on as fast a track as possible." A week later, he unveiled the largest prison-construction program in Pennsylvania history.

Chapter 1 argued that interdependent fragmentation should lead to a "contagion" of law-and-order politics from the bottom-up. If that were so, we would expect to see local officials lobbying higher-level officials for assistance with punishing crime and making those appeals public, and we would expect the lobbying from the bottom to come first in the sequence. We might also observe local officials ascending to higher office and taking ideas developed at their prior stations with them. The chapter also predicted that cost-shifting dynamics would make prosecutors and legislators generally indifferent to crowding problems in prisons. If that were true, we would expect them to not coordinate their activities with prison officials and to not change their behavior even when prison officials asked them to. A third proposition was that legislators would seek to evade blame for crowding problems so long as these fell short of a crisis. If that were true, we would expect to see them ducking calls to fund prisons or decarcerate and avoiding doing anything to put the question on the agenda. Finally, the theory predicted that crisis would change the political calculus of inaction and would discourage decarceration-based solutions. If that were true, we would expect to see a crisis politicized and see a rush for

¹ Michael Decourcy Hinds, "Rioters Destroy Nearly Half the Buildings in a Pennsylvania Prison," *The New York Times*, October 28, 1989, sec. U.S., https://www.nytimes.com/1989/10/28/us/rioters-destroy-nearly-half-the-buildings-in-a-pennsylvania-prison.html. Jason Scott, "Looking Back at the 1989 Camp Hill Prison Riots," *The Sentinel*, October 24, 2009, http://bit.ly/2vEcnbV.

visible, simple solutions in its wake.

Prison Crowding and the Reluctance to Build

Across the country, prisons were strained to the limit by the mid-1980s, with corrections officials warning publicly about a looming explosion. Nonetheless, budgeters dug in their heels and refused to construct adequate facilities. So far, this stalemate has received only minimal attention in the scholarship on mass incarceration, which generally has overlooked countervailing forces and counterfactual paths by which the prison boom might have been avoided.²

It is difficult to overstate how severe a problem inmate overcrowding became in the United States during the 1970s and early 1980s. As UPI reported in 1982, "Most state prisons today find themselves bursting at the seams and facing a potential for disaster." In roughly half the states, the service noted, judges had issued court orders restricting incarceration to ease unconstitutional prison conditions. Inmates were sleeping in hallways, and jailers were turning to tents, trailers, gymnasiums, old motels, and other stopgap measures to house their charges.³ And that was the state of play when the number of state-prison inmates was a mere 350,000, and the nation had not yet even breached its prior, Prohibition-era incarceration-rate record.

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² David Dagan and Steven M. Teles, "Locked In? Conservative Reform and the Future of Mass Incarceration," *The Annals of the American Academy of Political and Social Science* 651, no. 1 (January 1, 2014): 266–76. For a notable exception, see Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law & Society Review* 44, no. 3–4 (2010): 731–768.

³ Joseph Mianowany, "Pressures Rise in Nation's Prisons: Voters in Many Areas Turn Deaf Ear to Complaints About Overcrowding," *UPI / Los Angeles Times*, January 31, 1982. Bill Curry, "Population Bomb Hits U.S. Prisons," *Los Angeles Times*, June 15, 1982.

Politicians were wary, however, of spending too much money to address the problem. To be sure, massive amounts were appropriated in the 1970s and early 1980s to build new facilities. The U.S. Justice Department's National Institute of Corrections in 1982 estimated that more than \$1.6 billion in prison construction had been started or approved, and states were considering another \$1.5 billion. But the problem still dwarfed the outlays. A year earlier, a different DOJ agency — the National Institute of Justice — had estimated that \$8 billion to \$10 billion in spending was needed just to cover the immediate gap in cell space, and even then its projections proved conservative.⁴

Evidence was abundant that voters would punish prison spending. In Michigan, voters in 1978 approved a referendum eliminating "good time" and establishing minimum sentences by a 2-1 margin. "Yet two years later," the *Los Angeles Times* reported, "voters by the same 2-1 margin rejected a state income tax increase to pay for more prisons." In New York, a proposed \$500 million prison bond went down to defeat at the polls in 1981. Oregon voters in 1982 defeated a \$60 million borrowing proposal for new prisons despite a court order to reduce crowding. As UPI concluded, "In virtually every region of the country, voters appear to have turned a deaf ear to complaints about prison overcrowding ... State legislatures have followed suit...many have virtually ignored the problem." What tended to get passed were patches. When California approved a \$495 million bond for new prisons in 1982, it was expected to keep pace with the inmate population for just one year. To avoid having to go back to the voters, legislators dubiously restructured subsequent bonds as revenue-backed by directing one

⁴ Curry, "Population Bomb."

⁵ Mianowany, "Pressures Rise." Curry, "Population Bomb."

state agency pay "rent" to another. When the \$60 million Oregon bond measure was defeated, the state appropriated a mere \$500,000 for a new prison camp, instead. When Illinois opened two new prisons in 1980 to halt a wave of court-ordered prisoner releases, they filled up within six months and releases resumed.

Conservative politicians frequently framed the problem as driven by unreasonable demands from prisoners and courts, even though their own corrections officials were often quietly cooperating with the lawsuits. Reacting to a court ruling that threatened to ban the practice of double- or triple-celling inmates in spaces built for one, Texas Attorney General Mark White, a conservative Democrat and future governor, likened the order to a demand for hotel accommodation: "Overcrowding is a problem and we're trying to correct the problem as quickly as possible. But we maintain that the inmates are not entitled to private rooms as the federal court says."

It was only an accumulation of crisis over years or a major explosion that could force significant action, and in that case the answer was virtually always to build more prison capacity rather than to re-examine how many people were being incarcerated. The trigger point varied from state to state depending on local context. Some, like Illinois, even proved willing to drag through multiple rounds of court-ordered prisoner releases

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⁶ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007), 97–102.

⁷ Curry, "Population Bomb."

⁸ Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York, N.Y.: Cambridge University Press, 2000).

⁹ Mianowany, "Pressures Rise." Such complaints were well established as a reaction to court-ordered reform. Alabama Gov. George Wallace in 1976 said a sweeping reform order in that state would "bring a hotel atmosphere and catering service" into the prisons, echoing the complaints of many small newspapers around the state. One newspaper deplored the "red carpet, soft pillow treatment" while another compared inmates' "nice living facility" to Auburn University dorms. Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (Oxford University Press, 1989), 104.

before biting the bullet. But the fundamental pattern was the same — crisis-driven construction that amounted to haphazard state-building. Figure 4-1 shows states' capital outlays on prisons between 1982 and 2010. There were three big peaks in spending — in 1986, 1991, and 1996. Each came shortly after a new record in the population of state prison inmates. The following narrative unpacks how cost-shifting, liability-shifting, and crisis interacted in the Keystone State.

Institutional capital outlay expenditures and change in state prison population, FY 1982-2010 Dollars (in billions) Change in number of inmates 5 100,000 90,000 **= 80,000** 70,000 60,000 50,000 Capital expenditures 40,000 30,000 20,000 10,000 Number of inmates -10,000 '08 '06 Note: Expenditures for fiscal years preceding 2010 were inflation-adjusted to 2010 dollars, as appropriate for state spending. See Methodology. Source: U.S. Census Bureau, Annual Survey of State Government Finances 1982-2010.

Figure 4-1

Reproduced from Tracy Kycklehahn, "State Corrections Expenditures, FY 1982-2010," NCJ 239672 (U.S. Bureau of Justice Statistics, rev. April 30, 2014).

Cost-Shifting: Filling the Prisons, 1979 - 1989

Philadelphia's district attorneys set an aggressive tone for crime politics in their election campaigns; pressured judges to impose tough sentences; and made policy decisions that directly increased the city's incarceration rate. By the late 1970s, both their rhetorical style and their policy preferences were being reinforced by the weight of the state government — in large part thanks to the efforts of the D.A.'s themselves, together with their colleagues across Pennsylvania. As the criminal-justice problems of Philadelphia (and Pittsburgh) became salient at the state level, they also became embroiled in urban-rural conflict, in which the harsher practices of rural judges facing much smaller caseloads were contrasted favorably with those of their urban colleagues.

In 1976, the Pennsylvania Senate passed a bill to impose mandatory-minimum sentences on serious, repeat felons. The measure had been championed by Arlen Specter. ¹⁰ He was no longer D.A., but remained frustrated with the relative leniency of the sentences issued in Philadelphia, compared with those handed down elsewhere in the state, particularly rural counties. ¹¹ (Specter was also in the midst of a tough GOP primary for U.S. Senate, which he narrowly lost to John Heinz III.) In other words, one wing of Philadelphia's local criminal-justice system found itself in conflict with another, and sought to win the battle by reaching upward to deploy the power of the state on its behalf. Pennsylvania House liberals barely managed to fight off the mandatory-sentencing

¹⁰ Susan Martin, "The Politics of Sentencing Reform - Sentencing Guidelines in Pennsylvania and Minnesota," in *Research on Sentencing: The Search for Reform*, ed. Alfred Blumstein et al., vol. 2, 2 vols. (National Academies Press, 1983), 265–304.

¹¹ Martin. John H Kramer and Jeffery T Ulmer, *Sentencing Guidelines: Lessons From Pennsylvania* (Boulder: Lynne Rienner Publishers, 2009), Ch. 2.

measure, and as a compromise, the two sides agreed in fall 1978 to create a commission that would design guidelines for sentencing all types of offenders.¹² The commission was thus given the difficult charge of reconciling the more lenient sentencing practices of urban counties with the tougher stance of rural counties.

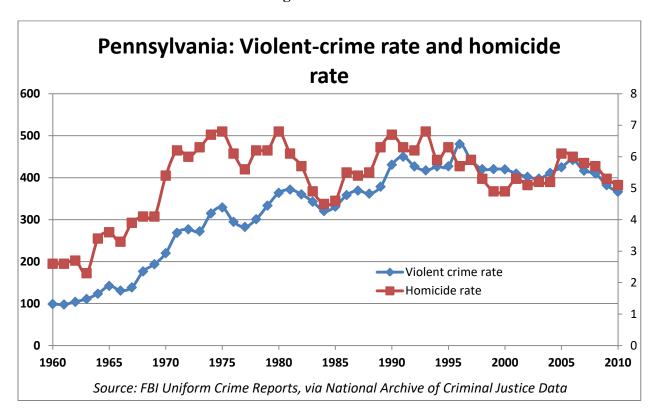
Meanwhile, the tone of crime politics was sharpening further as a Republican prosecutor took the reigns in Harrisburg — former Pittsburgh U.S. Attorney Dick Thornburgh. He had campaigned for the governor's office in 1978 on his record of prosecuting public corruption. But as the state's violent-crime rate climbed toward a new record and Ronald Reagan swept into the White House promising law and order, Thornburgh turned his rhetorical fire on street crime.¹³

¹² Martin, "Sentencing Reform," 272.

¹³ National Archive of Criminal Justice Data, "National Archive of Criminal Justice Data," accessed March 11, 2014,

http://www.icpsr.umich.edu/icpsrweb/NACJD/;jsessionid=D178F499C500365757D750E2DC31EA96. Stephan Salisbury, "Governor's Prison Budget Draws Praise and Criticism," *The Philadelphia Inquirer*, February 5, 1981.

Figure 4-2



In a 1981 address to the Legislature, the governor vowed to "put fear to work for the people and to put punks and thugs and pushers firmly within the walls of a prison." The same year, the Pennsylvania Sentencing Commission issued its first set of recommended guidelines. Mindful that the state faced severe constraints on prison space, commission members proposed a compromise of reversion to the mean, in which higher sentences from urban areas would be compensated with lower sentences from rural areas. Prosecutors and rural judges revolted against the idea that they roll back sentences, however, and the commission was sent back to the drawing board. Thus, while some advocates of sentencing commissions imagined them as a way to impose discipline on the

¹⁴ Associated Press, "No Tax Boost in Thornburgh Budget," *Observer & Reporter*, February 3, 1981.

¹⁵ Martin, "Sentencing Reform." Kramer and Ulmer, Sentencing Guidelines, Ch. 2.

criminal-justice system, Pennsylvania's commission became primarily a venue for combat among different factions within that system.

Thornburgh and Ed Rendell, the young Philadelphia D.A. and rising star of Pennsylvania politics, were not content to wait for the revised guidelines. In 1981, they pushed legislators to adopt a five-year mandatory minimum sentence for violent crimes involving a gun. As described in Chapter 3, a foundation led by Rendell would later pay for TV ads touting the new law. Rendell in 1983 also proposed doubling maximum sentences for assault to as high as 20 years. ¹⁶ The humbled sentencing commission eventually came back with a new set of sentencing guidelines that set higher floors for punishment. Even so, the appetite for mandatory minimums remained. ¹⁷ In 1984, Rendell planted the idea of imposing mandatory minimums for drug dealing.¹⁸ At a September 1986 hearing, members of the Senate Judiciary Committee chastised the Sentencing Commission for statistics showing that a third of convicted drug dealers served no prison time. 19 That number became a hobbyhorse for Republicans throughout 1987, as they repeatedly urged passage of the mandatory-minimum drug measure that had originated with Rendell²⁰, who was no longer D.A. Pressure from prosecutors helped get the legislation over the finish line. In January 1988, Corrections Secretary David S. Owens

¹⁶ Leon Taylor, "Bill Would Double Assault Sentence," *Philadelphia Daily News*, January 20, 1983.

¹⁷ Frederick Cusick, "In Vote For Mandatory Sentencing, Pa. House Shoots Down The Liberals," *Philadelphia Inquirer*, November 29, 1981, sec. Editorial / Opinion. Martin, "Sentencing Reform." Kramer and Ulmer, *Sentencing Guidelines*, Ch. 2.

¹⁸ John M. Baer, "Drug Bills Bottled Up in State Legislature," *Philadelphia Daily News*, October 10, 1988. "Remarks, Pennsylvania Senate Journal, P. 1784," February 23, 1988.

¹⁹ Kenn Marshall and Carmen Brutto, "Mandatory Terms Urged for Dealers: State Bill Aimed at Drug Sellers," *The Patriot-News*, September 30, 1986, sec. B1.

²⁰ "Death Sentence Proposed for Big-Time Drug Dealers," *The Patriot-News*, April 7, 1987. Frederick Cusick, "Prosecutors Differ Over Drug Bill," *The Philadelphia Inquirer*, June 10, 1987.

reported to Casey that key legislators were lining up behind the bill as a result of lobbying by the Pennsylvania District Attorneys Association (PDAA) and Ronald Castille, Rendell's successor in Philadelphia.²¹ The bill was passed despite the fact that it was forecast to increase the state prison population by at least 600 over five years, at a cost of between \$15 million and \$90 million.²² Meanwhile, yielding to the pressure, the Sentencing Commission prepared new guidelines in 1988 that were estimated to increase the state prison population again by as many as 1,000 over five years.²³

The prosecutors also pushed House lawmakers to strip from the bill imposing the new drug mandatory minimums a provision that would have allowed inmates to earn time off their sentences for good behavior. The Republican minority leader, William Ryan, said in debate that PDAA had "absolutely besieged us with reasons why this should be removed ... to reject the argument of the district attorneys of Pennsylvania on this very important law-and-order provision I think would be a mistake at this time." A supporter of "good time" retorted, "We are not supposed to come here and make an immediate, knee-jerk reaction to a D.A.'s entreaty, a D.A. who wants to put himself or herself on television and allow the jail door to slam." But the Democrat-controlled House voted 147-42 to slam that door.²⁴

The combustible rhetoric and policy changes that began in 1976 had an effect. As

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²¹ David S. Owens Jr., "Biweekly Highlight Report January 1 Thru 13," January 1988, folder 4/11, "Corrections, January-July," AGBB 132 (Cabinet Reports, 1987-1994), Group 2: 1988, papers of Robert P. Casey, Pennsylvania State Archives.

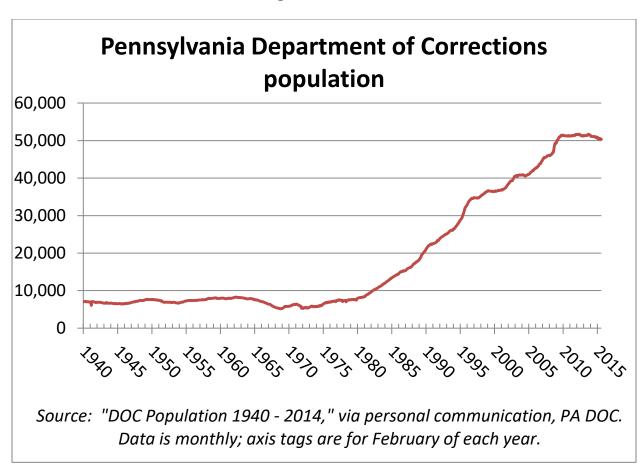
²² Russell E. Eshleman Jr, "Important Bills Facing Legislature," *Philadelphia Inquirer*, January 25, 1988. Owens, "Bi-Weekly Report, Jan. 1-13."

²³ Owens, "Bi-Weekly Report, Jan. 1-13." Kramer and Ulmer, Sentencing Guidelines Ch. 3.

²⁴ Pennsylvania House Journal, March 16, 1988, pg. 361, 364, 367.

Figure 4-3 shows, the population of the state Department of Corrections had dipped below historical averages during the 1970s, but it began to slope up in December 1979 and took a dramatic upward turn in 1981.

Figure 4-3



Between January 1980 and April 1988, the number of prisoners in the state system more than doubled, from 7,865 to 17,041.²⁵ An analysis by the state found that an increase in the amount of time prisoners served explained about a quarter of this growth.

²⁵ "DOC Population 1940-2014," via 12/14/15 e-mail from Kristofer Bucklen, Pennsylvania Department of Corrections.

Another quarter came from an increase in the number of parolees being sent back to prison for violating the conditions of their release. The remainder of the growth, about half, was the result of higher court commitments, or more people being sent to prison in the first place. That was happening in part because police were making more arrests, but primarily because the system was being tougher with people after the point of arrest.

Total arrests in Pennsylvania rose by about a third between 1980 and 1990, but court commitments to Pennsylvania prisons more than doubled. The data does not allow for analysis of where in the decision-making chain the system was growing harsher — among prosecutors or judges — but the answer is likely both.

Liability-Shifting: Ignoring the Warnings, 1981-1988

Even as they ramped up punishment, policy makers proved extremely reluctant to spend money on more lockups to house all the new prisoners. Partly this was just a matter of hard-headed political calculus. As Thornburgh noted it in his biography, spending on prisons was "never the public's favorite." So long as prison construction was viewed as merely improving the living conditions of criminals, it would expose politicians to risk. There was also an opportunity cost, as dollars spent on lockups could not be put elsewhere. Amid this reluctance, government fragmentation enabled continuing punitiveness by allowing key policy makers to pass the buck on prison costs. At the state

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²⁶ Darrell Steffensmeier, "Incarceration and Crime: Facing Fiscal Realities in Pennsylvania" (Center for the Study of Law and Society, Pennsylvania State University, September 29, 1992), folder 14/1, "Corrections" AGBB 132 (Cabinet Reports, 1987-1994), Group 6: 1992, papers of Robert P. Casey.

²⁷ Dick Thornburgh, *Where the Evidence Leads: An Autobiography* (University of Pittsburgh Press, 2003), 157.

level, the separation of powers allowed the governor and legislature to blame each other for the problem, and the fact that county officials did the sentencing allowed them to pass blame downwards. At the county level, the splitting of executive functions meant that prosecutors did not share the funding concerns of sheriffs and county commissioners. Meanwhile, the fact that the criminal code was given by the state allowed local officials to blame their problems on state mandates. In turn, those local officials often appealed back to the state or even the federal government to solve their problems, rather than taking on their D.A.'s. In many cases, they also bit the bullet and built more jail space (albeit never enough to keep up with population). At the state level, however, most politicians did not champion prison construction until the crowding had reached the point of a public-safety crisis, and the cause could be framed as another symbol of cracking down on criminals, rather than spending money on them.

The reluctance to spend money on prisons is remarkable given the litany of warnings politicians received that they were rigging up a time bomb. A siege at a prison outside Philadelphia in 1981 had been blamed on crowded conditions. Two years later, prison guards again warned at a legislative hearing that they were losing control. "At any time, if the inmates want to take the institution, they could take the institution," one guard told legislators. The same year, a work group set up by the Pennsylvania Commission on Crime and Delinquency identified crowding as the most critical issue in corrections and declared it was "crippling the ability of already antiquated facilities to accommodate

²⁸ Bonny Rodden, "State Prison Guard's Fear: Cons Can Take Over 'Any Time," *Philadelphia Daily News*, June 2, 1983, sec. local.

offenders in any sense of safety, humaneness, or decency."²⁹ It was the first of four such committees that would be convened throughout the decade.

Recognizing that cost was the Achilles' heel of the lock-'em-up crowd, incarceration skeptics occasionally tried to render the expenses more visible. Thus Hardy Williams, an African-American representative from Philadelphia, protested at length in 1981 when the Pennsylvania House decided to separate a mandatory-minimum bill from an appropriation to pay for new prison cells, on what the sponsor said were constitutional grounds. Williams urged the House not to accept the amendment splitting the measures, declaring: "Saving money for the taxpayer is as American as apple pie, and so is getting crime off the backs of our citizens ... The amendment does a very skillful and elusive thing on those bottom-line questions that we all agree on. It says, big program; no money." (A single pro-mandatory minimum legislator backed Williams, saying he did not want to "sugarcoat" the cost). Nonetheless, Williams was unsuccessful; the amendment passed, 155-38.30 Williams also failed in a subsequent bid to attach a fiscal note to the sentencing measure, whose sponsors had already publicly estimated the cost at a minimum of \$112 million. The legislator presiding over the floor debate told Williams: "It is the opinion of the chair there are no fiscal implications to the bill as it appears before the House in its amended form." An appeal of that decision failed, 113-73.31

The hawks in the legislature occasionally acknowledged the strain tough-on-crime

²⁹ "Prison and Jail Overcrowding in Pennsylvania: A Report to the Prison and Jail Overcrowding Task Force" (Pennsylvania Commission on Crime and Delinquency, August 1983), https://www.ncjrs.gov/app/publications/abstract.aspx?id=95866, National Criminal Justice Reference Service p. 21.

³⁰ Pennsylvania House Journal, Nov. 24, 1981, 2168-69.

³¹ Pennsylvania House Journal, Nov. 24, 1981, 2170-71.

measures were putting on the prisons, but their responses only revealed how little that pressure was actually weighing on them. In 1984, Democratic Senator Michael O'Pake proposed a five-year mandatory minimum sentence for drug dealers. At the time, he was also serving on a task force studying the crowding problem, and he allowed his bill "may mean judges will have to sentence less threatening and less dangerous criminals to something other than a jail sentence."32 But he did not offer a plan to encourage this. In 1988, O'Pake and his Senate colleagues did support time off for good behavior, including it in the drug-mandatory-minimum bill the Pennsylvania District Attorneys Association was advocating. O'Pake was also forthright about the expense of the measure, telling senators it would cost more than \$100 million over five years and that they "should be prepared to vote for the funding."33 But the House stripped the time-off measure back out, as the representatives flatly denied that they were running the state into a capacity problem. Republican Minority Floor Leader Matthew J. Ryan, for example, declared that legislators would provide the necessary space to house inmates sentenced under the new law. "I believe the legislature is responsible enough that if we pass legislation—at least, we should be responsible enough—if we pass legislation that calls for mandatory jail sentences, then by golly, we have the obligation to provide the jails."³⁴ In fact, there had been talk of attaching such funding to an earlier iteration of the bill, but it never happened.³⁵ Other legislators simply rejected the idea that cost or crowding should be a relevant consideration. Bucks County Republican David Heckler said that if cost was a

³² Carol Morello, "Tough Drug Sentencing Proposed," *Philadelphia Inquirer*, March 15, 1984.

³³ Pennsylvania Senate Journal, Feb. 23, 1988, pg. 1784.

³⁴ Pennsylvania House Journal, March 16, 1988, pg. 361.

³⁵ Owens, "Bi-Weekly Report, Jan. 1-13."

reason to pass earned time, the legislature might as well "just declare an amnesty for a while until things thin out in the prisons and costs go down."³⁶ His GOP colleague Jeffrey Piccola, a longtime hawk, rebuffed warnings that without earned time, the crowding might lead to unrest. "We had better let them out, because they are going to riot. In my mind, Mr. Speaker, that is blackmail, pure and simple."³⁷

Another approach was to highlight the need for more cells, but blame the governor for not providing them. This was the route chosen in 1988 by the bipartisan Legislative Budget and Finance Committee and in particular its Republican chairman, Clarence Bell. The committee conducted a performance audit of the Department of Corrections and issued a blistering report highlighting the crowding problem and chiding Democratic Gov. Robert P. Casey for gutting a DOC request for more guards in his latest budget proposal.³⁸ Upon the release of the report, Bell told reporters that DOC was "another stepchild of Governor Casey's administration" and warned, "We're playing with dynamite."³⁹ What Bell did not mention was that the Legislature ultimately controlled the purse strings and was perfectly capable of providing adequate prison funding. The report seemed to acknowledge this reality when it declared, "Sufficient funding has not been requested by the Governors and provided by the General Assembly over the years to finance adequate (staffing) levels."⁴⁰ Behind closed doors, Bell did acknowledge the

³⁶ Pennsylvania House Journal, March 16, 1988, pg. 364.

³⁷ Pennsylvania House Journal, March 16, 1988, pg. 367.

³⁸ Legislative Budget and Finance Committee, "Report on a Performance Audit of the Pennsylania Department of Corrections" (Harrisburg, Pa.: Pennsylvania General Assembly, April 1988), 62–63.

³⁹ Michael Blood, "Pa. Report: Prisons Too Crowded," *Philadelphia Inquirer*, April 14, 1988.

⁴⁰ Legislative Budget and Finance Committee, "Performance Audit," 62–63.

legislature's responsibility. A few days after speaking with the press, he sent Casey a private letter in which his tone was far friendlier. "My dear Bob," Bell wrote. "I call your attention to the dangerous condition that now exists in our state prisons." Bell asked Casey not to relegate the issue to his legislative liaison, Scott Thornsley. Instead, he wrote, "my suggestion is to have one of your top inner-circle advisers meet with the Chairman of the responsible Committee of the House and Senate and try to come up with an answer." But the attacks in the media had presumably soured the mood. The governor's response six weeks later was canned and defensive, assuring Bell, "I want you to know that I share your concerns."

In fact, governors had a much greater incentive than legislators to pay attention to prison crowding, since it was obvious that initial responsibility for any disturbances would fall on them. Governors were also constantly hearing from their corrections secretaries about the crisis they were facing in their systems. Thus, it was Thornburgh who insisted that the era's first mandatory-sentencing law, in 1982, come packaged with a building plan for 2,880 new cells, "to make the tough sentences credible." When drug panic swept the nation in 1989, Casey presented a plan to stiffen sentences but also paid for the projected increase in the inmate population by proposing two new prisons.

Even governors were unwilling to fully shoulder the burden of prison construction, however. The state made six appropriations for new construction worth a

⁴¹ Clarence D. Bell, "Letter from Clarence Bell to Bob Casey," April 15, 1988, folder 2/1, "Corrections, Jack Tighes Camp Hill Files," AGBB 138, Governor's personal file, 1987-1995, papers of Robert P. Casey, Pennsylvania State Archives.

⁴² Robert P. Casey, "Letter from Bob Casey to Clarence Bell," May 31, 1988, folder 1/22, AGBB 62, files of the secretary for legislative affairs, 1987-1994, papers of Robert P. Casey, Pennsylvania State Archives.

⁴³ Frederick Cusick, "Mandatory Sentencing." Thornburgh, Where the Evidence Leads, 157.

total of \$270.8 million under Thornburgh, but it was clear well before he left office that all this spending was not enough. 44 A task force reported in February 1985 that even once all the authorized cells were built, the prison system would be at least 18 percent overcrowded. "The inmate population is expected to keep ahead of the additional capacity," it warned. "If the Legislature or the Sentencing Commission were to increase the severity of sentences, the shortage will become even more severe." Thornburgh never called for new construction to fill this gap. In 1986, the state's auditor general reported that the governor and legislature had both repeatedly denied DOC requests for funding to hire a full complement of guards, and shared his findings with the incoming Casey administration. 46

Casey took over in 1987 and proved even more queasy about building new lockups. Despite repeated pleas from his Corrections Secretary, David Owens, the governor remained stingy with the prisons budget. Owens had been appointed at the urging of black Philadelphia lawmakers, who simultaneously put crowding on the governor's agenda by asking him to set up an "Interdepartmental Task Force on Corrections." In October 1987 the task force reported: "The importance of the overcrowding problem cannot be overstated. As the population grows, the ratio of staff to inmates is lowered, resulting in decreased services and less control of the inmate

⁴⁴ Robert W. Lorenz, "Major Construction Projects" (Pa. Department of Corrections, Bureau of Facility Services, March 2, 1987), folder 2/3, "Corrections, January-July," AGBB 132 (Cabinet Reports, 1987-1994), Group 1: 1987, papers of Robert P. Casey, Pennsylvania State Archives.

⁴⁵ Pennsylvania Commission on Crime and Delinquency et al., *A Strategy to Alleviate Overcrowding in Pennsylvania's Prisons and Jails* (Harrisburg, Pa.: Pennsylvania Commission on Crime and Delinquency, 1985).

⁴⁶ Don Bailey, "Untitled Press Release on Prisons," *PR Newswire*, December 11, 1986, Lexis Nexis Academic.

population."⁴⁷ The same month, Owens took to the pages of the DOC newsletter to call on the state to build new cells. ⁴⁸ But the task force report languished, as did the construction idea. The following year saw the LBFC report with Bell's public critiques. That November, Owens warned in a report shared with the media, "It is critical that we take action now to avoid a major criminal justice crisis."⁴⁹ His words fell on deaf ears. The logic laid out in 1982 by the Philadelphia Inquirer still held: "So far the governor and the legislature have opted for continuing to double-cell, holding the line on spending and hoping that the worst won't happen. That is a politically expedient approach at best, based on the assumption that the public doesn't care about how prison inmates are housed, just so long as they are off the streets."⁵⁰

The counties

The tougher sentencing that drove up the state prison population also squeezed county jails, which faced crowding rates as high as 100 percent.⁵¹ The problem was hoisted onto the shoulders of local wardens, who ran the overstuffed institutions, and

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⁴⁷ Governor 's Press Office, "Casey Receives Report to Improve State Prison System" (Governor's Press Office, October 22, 1987). Pete Shellem, "Casey Criticized on Prisons - GOP Playing Politics, Administration Claims," *The Sunday Patriot-News*, December 10, 1989.

⁴⁸ "Owens Speaks on the Issues," Correctional Newsfront (Harrisburg, Pa.: Pennsylvania Department of Corrections, November 1987).

⁴⁹ "State Can't Build Jails Fast Enough," Pittsburgh Post-Gazette, December 19, 1988.

⁵⁰ Philadelphia Inquirer Editorial, "Tough Anti-Crime Policy Requires More Tax Money," *Philadelphia Inquirer*, August 16, 1982.

⁵¹ Howard Goodman, "No Room At The Jail: Officials Across PA Lament Overcrowding," *Philadelphia Inquirer*, September 11, 1990, http://articles.philly.com/1990-09-11/news/25876601_1_county-jail-stover-clark-project-director.

county commissioners, who had to vote to spend local money to expand them. Unlike state government, many counties did make a valiant attempt to build their way out of the problem. Collectively, they made staggering capital investments in jail expansion: more than \$350 million during the 1980s, with an additional \$550 million in the pipeline at the dawn of the 1990s. ⁵² In some cases, federal courts had ordered the building in response to prisoner lawsuits about overcrowding. Even where the courts did not intervene, the threat of such lawsuits was a spur to county leaders.

But efforts to manage the problem at the county level were often mired in local battles. In Philadelphia, the D.A.'s office was intent on containing the crowding problem from spilling over into a decision-forcing crisis. Thus, Rendell boasted that he "pressured the state Legislature to repeal an old state law requiring only one prisoner to a jail cell." Both Rendell and his successor, Ronald Castille, battled court orders to reduce crowding in the Philadelphia jail. When Castille was denied standing in a key case, he persuaded the legislature to pass a law giving him the authority to intervene. Meanwhile, the D.A. was hostile to alternatives to incarceration; Castille reportedly pushed hard against the use of electronic monitoring in lieu of incarceration, for example. The city also failed to institute a local version of "earned time" that would reward good behavior in the jail with shorter sentences, reportedly amid a battle between City Council and the Board of Judges over who had authority to set up the system (and reluctance by the city's chastened

⁵² Goodman.

⁵³ "Philadelphia D.A. Will Speak in Bethlehem," *The Morning Call*, April 16, 1985, 4th edition.

⁵⁴ Pennsylvania House Journal, March 16, 1988, pg. 363.

judges to do so).55

Meanwhile, county officials also argued that Harrisburg had largely created their problem with the creation of guidelines and mandatory sentences, and therefore should help pay for it. The Pennsylvania State Association of County Commissioners, for example, repeatedly pressed for counties to be paid a per diem for inmates sentenced to jail under a tough new DUI law.⁵⁶ Counties also expended great energy attempting to shift prisoners to the state. A key battleground was the status of prisoners who were officially in state custody, but were housed in county jails. The chief dispute was over inmates sentenced to between two and five years of incarceration. In most states, such prisoners would have automatically gone to state prison, but in Pennsylvania, judges had the option of sentencing them to the county jail. State parole violators were also frequently housed in county jails rather than state prisons. The result was that 12 percent of the inmates in county jails were actually under the jurisdiction of the state. The matter spawned bitter litigation between counties and the state. Pittsburgh's Allegheny County even sued the state, claiming that it had to take certain prisoners sentenced to under two years—a claim that was rejected by the state Supreme Court, but accepted by a federal court.⁵⁷ As late as 1990, a report from the Pennsylvania Commission on Crime and Delinquency called state-sentenced prisoners "a significant contributing factor to the local crowding problem" and recommended the state pay counties a per diem fee for

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⁵⁵ Allen M. Hornblum, "Hearing on Prison Overcrowding," Committee on Judiciary (Pennsylvania House of Representatives: 1989).

⁵⁶ William Reznor, "Hearing on Prison Overcrowding," Committee on Judiciary (Pennsylvania House of Representatives: 1989), 140.

⁵⁷ David S. Owens Jr., "Biweekly Highlight Report November 17 through November 30, 1988," December 1, 1988, folder 4/12, "Corrections, August-December," AGBB 132 (Cabinet Reports, 1987-1994), Group 2: 1988, papers of Robert P. Casey, Pennsylvania State Archives.

housing such inmates.⁵⁸ The Pennsylvania Prison Wardens Association also demanded reimbursement for housing state prisoners in local jails.⁵⁹

When the House voted to adopt still more mandatory minimum sentences for drug offenses in 1989, a legislative tug-of-war ensued about where the new inmates swept in by the laws would be housed. Philadelphia Democrat Anthony Williams offered an amendment stipulating that offenders sentenced under the new minimums had to serve their terms in state prison, even if they were under two years (normally the province of county jails). "If we are serious ... about putting these people away," he declared, "we have to make provisions at the State level to put them away." Two legislators from counties struggling with jail crowding also spoke in support of the amendment. Democrat Thomas Michlovic of Pittsburgh told his colleagues, "We have got to face the cost factor and not shift that cost factor onto the counties, who are less able than we are, given their tax structure, to cope with the kinds of increased demands there are on our prison facilities." The amendment was passed, 119-82.60 The governor's office quickly struck back. Legislative Affairs Secretary Thomas Lamb wrote a letter to Senate Judiciary Chairman Stewart Greenleaf asking him to strip the provision out when his committee took up the bills.61

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⁵⁸ Pennsylvania Commission on Crime and Delinquency, "Containing Pennsylvania Offenders: The Final Report of the Pennsylvania Commission on Crime and Delinquency Corrections Overcrowding Committee," March 1990.

⁵⁹ "State Is Asked to Pay for Inmates in County Jail," *The Morning Call*, August 4, 1989. Arthur M. Wallenstein, "Hearing on Alternative Sentencing for Non-Violent Offenders (SB 718 of 1989)," Senate Judiciary Committee (Pennsylvania Senate: 1989).

⁶⁰ Three bills were amended in this way, all by similar margins. Pennsylvania House Journal, Oct. 11, 1989, 1614-1616, 1619-1620, 1622-1623.

⁶¹ Thomas F. Lamb, "Letter from Thomas Lamb to Stewart Greenleaf," October 26, 1989, folder 5/5 ("Legislator File: Greenleaf, Stewart"), AGBB 62, files of the secretary for legislative affairs, 1987-1994, papers of Robert P. Casey, Pennsylvania State Archives.

A 1989 exchange between Democratic Rep. Michael Bortner of York County and William Reznor of the Pennsylvania State Association of County Commissioners suggests how fragmentation split the competing pressures for harsher punishment on the one hand and fiscal austerity on the other between the two levels of government.⁶²

<u>Bortner</u>: "The same people that put you in office and elect you to run your county (jail) come to me and say, 'Bortner, we want tougher penalties, we want tougher legislation. We want more people going out to the York County jail and going to the State prison."

Reznor: "Well, that same public comes to me and asks the questions, 'Why are we putting so many people in jail and why are our tax dollars having to go up and why are they living in air-conditioned environments? ... You haven't heard anybody say anything at all concerning the need to build a \$20 million new jail?"

<u>Bortner</u>: "Ah ha, that's different. That's different. Now you're talking about paying for it."

Reznor: "That's what I am talking about."

<u>Bortner</u>: "That's a different question, and yeah, I think there's a lot of—that's where some of the hypocrisy comes in... Everybody wants a lot of people in jail but aren't willing to pay the price."

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⁶² William Reznor, "Hearing on Prison Overcrowding," Committee on Judiciary (Pennsylvania House of Representatives: 1989), 149-50.

Crisis Re-Frames Costs, 1988-1989

Until mid-1988, the dominant approach to the cost issue in corrections was to put it off, defer responsibility, or deny the problem. But that summer, politicians began mustering the confidence to openly advocate for more cells (though many still sought to push the cost away from their own jurisdictions). The increasingly aggressive tone of the drug war was one factor persuading politicians that the public would get behind prison spending. It began in May when a new Republican candidate for attorney general, Lackawanna County District Attorney Ernie Preate, declared that the war on drugs would be his top concern. Preate urged the state to build more prison cells, telling reporters: "If we're really serious about winning the war against drugs, we've got to spend some money."63

More important, however, was the breach of a taboo that Pennsylvania jailers had so far been able to avoid: emergency releases. In June, a federal judge forced the Philadelphia jail to release non-violent inmates to comply with a court-ordered population cap. The prisoner releases dominated the news and spooked residents. Fiery rhetoric made things worse. Republican D.A. Ronald D. Castille, for example, issued this dire warning: "Lock your door, lock up your car, stay home and guard your possessions. Somebody is going to end up dead." The Philadelphia crisis spawned new demands for Harrisburg to finance more construction at both the state and local level. Three

⁶³ Robert Zausner, "Preate Calls for War on Drug Dealers," *Philadelphia Inquirer*, May 24, 1988.

⁶⁴ "The '91 Race Is On - Those of High Ambition Measuring Their Steps," *Philadelphia Inquirer*, June 26, 1988.

million to build a 1,000-bed state prison for drug abusers—and an additional \$50 million to build a new Philadelphia jail. The legislators also proposed that offenders who skip bail should be sent to state prison once apprehended, an obvious play to shift population to the state. Asked whether the state prisons had room for bail-jumpers, the lead legislator behind the package, Democratic Sen. Vincent J. Fumo, gave a telling reply. The state Corrections Secretary "doesn't want them," Fumo said. "But if you send them to him, he's got to take them." A legislator from Pittsburgh, another city facing a crowding crisis, was separately proposing a new state prison as well. The *Philadelphia Inquirer* blessed such construction as "worthwhile." In September, Castille teamed up with GOP legislators to offer an even more ambitious plan: a \$250 million bond issue to finance construction of new cells at both the state and county level. The Philadelphia crisis was also a gift to Preate, who invoked the releases to renew his call for prison construction at a Capitol press conference.

Casey did not respond to these initiatives, and legislative leaders continued to hold onto their wallets.⁶⁸ The Legislature in October opted to appropriate funds for just the \$50 million state prison Fumo and his colleagues had proposed.⁶⁹ (When Casey did not act on the appropriation, Fumo in late January circulated a Senate resolution calling

⁶⁵ John Woestendiek, "Fumo Has Proposals on Prisons - Would Move Inmates and Add Five Judges," *Philadelphia Inquirer*, June 18, 1988.

⁶⁶ "A Prison Plan That Makes Sense," Editorial, *Philadelphia Inquirer*, June 24, 1988.

⁶⁷ "Candidate for Attorney General Urges More Prison Cells in State," *The Patriot-News*, June 28, 1988.

⁶⁸ Shellem, "Casey Criticized on Prisons - GOP Playing Politics, Administration Claims."

⁶⁹ David S. Owens Jr., "Biweekly Highlight Report October 6 through 19," October 1988, folder 4/12, "Corrections, August-December," AGBB 132 (Cabinet Reports, 1987-1994), Group 2: 1988, papers of Robert P. Casey, Pennsylvania State Archives.

on the governor to move the project ahead. 70 Casey finally approved it in February 1989 at 600 to 700 beds.⁷¹) The governor grew more aggressive in the summer of 1989, finally acting on a longstanding proposal to convert a former mental hospital into a 1,000-bed prison and asking the legislature to appropriate \$86 million to build a brand-new, 1,000bed facility. The plan still fell short of what others were demanding. In the Senate, Fumo joined a group led by O'Pake, the longtime hawk and a Democrat from the Philadelphia suburbs. They proposed a \$100 million ballot measure that would draw on state coffers exclusively to fund county-level prison construction. ⁷² On the Republican side, Jon Fox, a former assistant district attorney from suburban Philadelphia, led a reprise of the GOP's previous \$250 million proposal in the House. Meanwhile, Philadelphia D.A. Castille changed tactics. After learning at a National District Attorneys Association meeting of a jurisdiction that raised the sales tax to fund prison construction, he urged legislators to adopt the idea. 73 Castille, who at the time was facing re-election, proposed raising \$500 million annually to build 10,000 cells.⁷⁴ Despite this pressure, the Legislature did not make the new, \$86 million prison appropriation Casey sought, let alone move forward the bigger plans.

⁷⁰ Vincent J. Fumo, "Resolution Urging the Governor to Release Appropriated Money for a Correctional Facility," January 1988, folder ("Legislator File: Fumo, Vincent"), AGBB 62, files of the secretary for legislative affairs, 1987-1994, papers of Robert P. Casey, Pennsylvania State Archives.

⁷¹ David S. Owens Jr., "Biweekly Highlight Report February 2 through 15," February 1989, folder 7/3, "Corrections," AGBB 132 (Cabinet Reports, 1987-1994), Group 3: 1989, papers of Robert P. Casey, Pennsylvania State Archives.

⁷² Senate Bill 969; Regular Session 1989-1990.

⁷³ Charles Gallagher, "Hearing on Prison Overcrowding," Committee on Judiciary (Pennsylvania House of Representatives: 1989)

⁷⁴ John M. Baer, "In Harrisburg, Drug Bill Gridlock Why Big Push Seems in Vain," *Philadelphia Daily News*, July 25, 1989.

That hesitation was swept aside, however, when the Camp Hill riot took the sense of crisis statewide. Before the unrest had even ended, Ernie Preate, by now the attorney general, issued a statement calling it "the predictable result of a prison crowding crisis that has been allowed to fester for too long." Two weeks later, Casey unveiled plans to construct more than 4,400 new state prison cells, a capacity boost of more than 30 percent. (Long-term plans called for capacity to rise to more than 50 percent by 1993, to some 25,000 cells. He would also go on to approve a ballot question authorizing a \$200 million bond issue to help counties build jail space. With Casey's re-election challenge less than a year away, it was a crucial covering maneuver. Casey's announcement of his construction program did not halt the pressure, however. Preate immediately responded: "It is regrettable that it took the tragedy at Camp Hill to spur the governor to action." He also argued that Casey's proposal mirrored previous Republican ideas without crediting them. "I hope that is not a sign that he intends to treat this as a partisan political issue," Preate declared, in standard attack language.

Casey's Republican opponent for governor, Barbara Hafer, was perfectly

⁷⁵ Ernie Preate, "Preate Calls Riots Predictable Result of Ignored Overcrowding" (PR Newswire, October 26, 1989).

⁷⁶ Pennsylvania Department of Corrections, "Management Comments on Pa. Auditor General's Report on State Correctional Institution Camp Hill," November 20, 1989, folder 7/3, "Corrections," AGBB 132 (Cabinet Reports, 1987-1994), Group 3: 1989, papers of Robert P. Casey, Pennsylvania State Archives.

⁷⁷ Pennsylvania Commission on Crime and Delinquency, "Containing Pennsylvania Offenders: The Final Report of the Pennsylvania Commission on Crime and Delinquency Corrections Overcrowding Committee," 12.

⁷⁸ Goodman, "No Room." In a nod to alternatives, that funding was tied to a measure creating "intermediate punishments" that aimed to divert offenders from county jails, but the inmate population kept rising. Pennsylvania Commission on Crime and Delinquency, "Average Daily County Jail Population Per 100,000 Pennsylvanians, 1994 - 2009," http://bit.ly/2dvBqYo.

⁷⁹ Ernie Preate, "Casey Prison Plan Good but Overdue" (PR Newswire, November 9, 1989).

positioned to exploit the issue. As auditor general, Hafer had audited SCI Camp Hill shortly before the riots erupted. When her report was released in November, she issued a statement declaring, "It is obvious that we need a comprehensive plan to resolve current and projected overcrowding. Failure to act will aggravate already unacceptable conditions."80 The criticism persisted in December. A front-page Sunday story in Harrisburg's *Patriot-News* began by listing the many committees that had warned about the dangers of overcrowding over the years. It mentioned a letter from a Republican senator to Casey in which the legislator charged that the governor could take credit for building only 60 new cells. Not least, the piece quoted Piccola — who a year earlier had dismissed an earned-time proposal designed to ease crowding as "blackmail" without offering any funding plans — calling the governor's building program "an attempted catch-up" that "won't even solve the problem we have now."81 Hafer also did not let up. In February, the *Morning Call* of Allentown reported that Hafer was making Camp Hill "a focus of her campaign."82 Her running mate, Harold Mowery Jr., was a state legislator from the borough.83

The riot and its aftermath focused responsibility for the costs of punitive sentencing squarely on the state. Had Thornburgh, Casey, and legislative leaders been forced to confront these costs as they actually accrued, they might have avoided racking up a greater deficit of prison space. Now the reckoning came in the form of a crisis that

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⁸⁰ Barbara Hafer, "Untitled Press Release" (Pennsylvania Office of the Auditor General, November 21, 1989).

⁸¹ Shellem, "Casey Criticized on Prisons - GOP Playing Politics, Administration Claims."

⁸² Tim Reeves, "Camp Hill Decisions: Good Governing or Bad? - Riot Aftermath," *The Morning Call*, February 18, 1990.

⁸³ Reeves, "Camp Hill Decisions."

would have made a retreat from tough sentencing look tantamount to surrender. Casey appreciated this reality. When a reporter asked him whether "Pennsylvania can still afford the luxury of its stiff sentencing," Casey replied, "I think the fact of life is that the stiff sentencing is going to continue....that people are in support of that and the legislature is, not just here but around the country, are continuing to impose (tough sentences)."

The Philadelphia prisoner releases and Camp Hill riot were a culmination of political dynamics that long allowed politicians to evade the cost of punitive sentencing. In some ways, the crises merely marked the final ratchet of a wheel that was steadily turning toward mass incarceration. But these incidents also ushered in a new and different dynamic in the punishment politics of Pennsylvania. No longer was cost the dirty little secret of sentencing hawks. The willingness to spend money on prisons itself became a symbol for a politician's commitment to public safety. Prison expansion was no longer about pampering inmates—no longer about whether they would be "living in airconditioned environments." It was about keeping the menace away from society. With the cost restriction blown off, the stage was set for politicians to enter a new, even more extreme round of tough-on-crime politicking—and to grab for what was shaping up to be a bonanza of state spending.

⁸⁴ William Reznor, "Hearing on Prison Overcrowding," Committee on Judiciary (Pennsylvania House of Representatives: 1989), 149.

Conclusion

This chapter provides strong evidence for my arguments about the effects of interdependent fragmentation on policy agendas and policy feedback. It is true that Governor Dick Thornburgh put crime on the state's agenda with his election campaign, rather than the issue bubbling up from local officials. But Thornburgh himself came from a background as a prosecutor, albeit a federal one. At key moments, prosecutors collectively and visibly lobbied Harrisburg for stiffer punishment, often with success, and pushed back against even modest decarceration measures such as earned time. Some contagion also came in the form of county officials trying to put their jail-crowding problems on the ballot.

Cost-shifting and blame-shifting dynamics, however, meant these efforts would not succeed. Prosecutors and legislators repeatedly and explicitly rejected efforts to make prison space a factor in setting punishment, and went so far as to separate cost estimates from punishment legislation. Behavior certainly did not change in response to pleas from the jails and the prison system. We did not find a complete abdication of legislative responsibility. Clarence Bell did highlight the urgency of the crowding problem in 1988, and apparently sought to work out a response out of the public spotlight. But as we saw, he could not resist blaming Gov. Bob Casey for the problem in public before reaching out to the governor in private. Legislators from badly affected counties did begin to request state funding before the major crisis of Philadelphia releases and Camp Hill, but their leadership and colleagues remained deaf to these appeals. Finally, I argued that crisis would transform the political logic of blame-shifting and leave legislators with no choice but to expand prison capacity. Indeed, we saw that the crisis was swiftly politicized, with

dire warnings from Philadelphia's Republican district attorney and attacks on Casey from the Republican attorney general. And Casey responded swiftly by proposing a major prison expansion.

What if such cost- and liability-shifting had not been possible? Would Pennsylvania have incarcerated fewer people? The fact is that politicians ignored alternatives that a series of blue-ribbon committees and jailers tried to offer them. Most prominently, they spurned even the modest intervention of offering prison inmates "good time" to create incentives for good behavior and ease crowding. It is impossible to know for certain whether the ideology of law-and-order would have still overwhelmed such alternatives in a different institutional context. But the evidence provided in this chapter that prison construction was highly unpopular with voters suggests that, given different institutional incentives, they would have taken a hard look.

Prosecutors were key players in the Pennsylvania prison boom. They made policy decisions that sent more people behind bars. They championed a punitive political style that suggested the only hardheaded response to the state's crime problem was more incarceration. And they provided crucial lobbying muscle at the state level to institute mandatory minimums and punitive sentencing guidelines, to kill moderate reforms like earned time, and eventually to lobby for prison-construction funding. But the local and state political context alone is insufficient to explain how and why prosecutors amassed this kind of power and adopted such punitive ideology. As the next chapter shows, prosecutors grew ascendant not only because they mastered public-facing politics, but also because they succeeded in the more subtle art of professional warfare.

5. "Chief Law Enforcement Officer":

Professional Competition and the Rise of the American Prosecutor

In 1982, Boston District Attorney Newman Flanagan issued a call to arms to his colleagues around the country. Public confidence in government was sagging, and the Reagan revolution promised a turn away from state-led solutions. But Flanagan argued that in the realm of crime-fighting, government should do more rather than less — and prosecutors should be in the lead. In his inaugural address as president of the National District Attorneys Association, Flanagan declared:

First, we must arouse the public and their legislative representatives out of the resigned, defeatist 'nothing can be done' apathy which is presently the hallmark of the public mood. It may not be possible to control the disease of crime but it is certainly possible to control the symptoms. Second, we must show how much more strict enforcement can reduce the crime rate, and third, we must educate the public to make the connection between strict enforcement and what that entails in terms of expanding and streamlining an interdependent criminal justice system.¹

The "streamlining" Flanagan had in mind likely involved putting more power in the hands of prosecutors. That is exactly what happened in the following two decades, as

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¹ "Flanagan Assumes Presidency, Announces Three Point Program for Year Ahead," *Capital Perspective* 1, no. 9 (August 1982): 1–2.

federal and state legislatures passed determinate-sentencing laws to bind the hands of judges; raised criminal penalties in ways that incentivized defendants to accept plea bargains; and made it easier for prosecutors and police to seize assets.

Flanagan's pep talk highlights an important but overlooked factor in the rise of mass incarceration: activism by local prosecutors. Chapter 1 argued that politicians can make professional claims to advance electoral and ideological interests, particularly when they have the vulnerabilities of being policrats — elected bureaucrats. If this is correct, we would expect to see prosecutors attacked on professional grounds and organizing in response. We would also expect to see prosecutors make professional claims that match their electoral interests. However, these claims should be made in ways that distinguish them from mere political rhetoric and endow them with the stamp of expertise — using particular organizations, forums, or language. And if this professionalization indeed helps explain the expansion of prosecutorial power, we should look for evidence that prosecutors in fact developed increasing influence over policy outcomes as a result of their new organization.

This chapter offers a close study of the organizational development and discourse of the National District Attorneys Association, based primarily on a range of publicly available NDAA publications, which are indicated in the chart below. I sought out the earliest publications publicly available and tracked them through 1991, the point that Campbell and Schoenfeld have identified as a transition from a period in which crime policy was highly contested to one where it was "captured" by a punitive consensus, anchored in part by law-enforcement associations. I supplemented my review of the

² Campbell and Schoenfeld, "The Transformation of America's Penal Order."

journals with NDAA special reports and white papers that spoke to key themes of the chapter.

Publication	Type	Dates circulated*	Dates reviewed
Journal of Criminal	"Articles, Reports, and	1959-1962	1959-1962
Law and Criminology	Notes of the National		
	District Attorneys'		
	Association"		
The Prosecutor	Main organizational	1967-present	1967-1991**
	journal		
Capital Perspective	Newsletter on federal	1981-1987	1981-1987
	politics		
NDAA Bulletin	Continuation of "C.P."	1987-1992	1987-1992
Select NDAA reports			

^{*} Based on Library of Congress records or HeinOnline.

I present this NDAA history as a window into the professional struggles and evolving ideology of prosecutors, assuming that as a national organization, it broadly reflected trends in the field. I do not claim that NDAA itself was especially influential in advancing the professional status of prosecutors. However, I do present evidence that NDAA's state-level counterparts played an important role in professional battles that played out in state houses. I briefly examine the development of these state-level organizations and highlight instances in which they shaped legislation, drawing primarily on accounts in news and law-journal articles.

Prosecutors, of course, are merely a subset of the broader legal profession, but as we shall see, they make their particular claims — to be specialists not only in criminal-law enforcement, but also in crime reduction — independently of other lawyers.³ They

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^{**} I was unable to secure access for the years 1970-1974.

³ Abbott, System of Professions p. 82.

also wage their battles for professional control against competitors distinct from those facing the general bar, including police, prison managers and guards, probation and parole authorities, and social workers. And they have repeatedly clashed with other branches of the legal profession, notably the bench and the defense bar. In this sense of defending their jurisdictions, prosecutors have been "professionals" virtually since the inception of the job. When I discuss their "professionalization" in this chapter, however, I refer to conscious efforts to craft an identity as specialists whose expert knowledge grants them control over particular tasks.

Threats to Jurisdiction, and the Professional Response

Professionalization reshaped virtually all sectors of American criminal justice over the course of the 20th century. The trend proceeded unevenly. As Ashley Rubin has shown, prison wardens were early innovators in the formation of professional organizations and identities, using them to defend their practices as early as the mid-19th century. By the middle of the 20th century, prison administration (at least in the North) had become so firmly overtaken by professionals operating within the liberal ethos of "corrections" that the whole justice system could be described as guided by a philosophy of "penal-welfarism." Pressure to professionalize hit American police forces hard after the 1960s, when the Kerner Commission found that corrupt, racist, and inept policing had been a major contributor to urban unrest. In the 1970s, the federal government, through

⁴ Ashley T. Rubin, "Professionalizing Prison: Primitive Professionalization and the Administrative Defense of Eastern State Penitentiary, 1829–1879," *Law & Social Inquiry*, November 1, 2016, n/a-n/a, https://doi.org/10.1111/lsi.12263.

⁵ Garland, *The Culture of Control*.

the Law Enforcement Assistance Administration, poured millions into efforts to improve recruitment and training at the local level and to develop the academic study of policing. Prosecutors would follow their own path to professionalization.

Andrew Abbott identifies two major sources of disturbance to the system of professions: change in organizations, and the rise of new tasks demanding professional attention. For district attorneys, the transformation of American urban politics between the New Deal and the Great Society brought both types of change. The result was a series of threats and opportunities that were simultaneously professional and political. Assaults on the professional legitimacy of prosecutors threatened to diminish the power of their office. Ironically, to defend their status as local, elected officials, prosecutors had to assert a more clearly *professional* jurisdiction for law enforcement, one that went beyond their electoral mandates.

As changing demographics and dwindling patronage resources strained traditional urban machines, reformers grew bolder in their attacks on longstanding forms of corruption. The result was that pressure grew on prosecutors to use their offices to investigate machine politicians. Meanwhile, urban uprisings, rising violent crime, and the advent of law-and-order candidates such as Barry Goldwater on the national stage made the task of ensuring public safety newly salient, and imbued it with the overtones of racial conflict. These circumstances created new opportunities for prosecutors to build profile. The axiomatic example of the anti-corruption prosecutor was Thomas Dewey, the Manhattan D.A. who made his name as a crusader against the mob in the 1930s and almost toppled Harry Truman in 1946. Meanwhile, the possibilities for seizing on fears of

⁶ Abbott, System of Professions p. 91-94.

violent crime were demonstrated early by Arlen Specter, who became Philadelphia district attorney by vowing to crack down on street crime and went on to a long career in the U.S. Senate.

But the demise of machine politics and the growing national preoccupation with crime also presented a challenge, as district attorneys could be accused of complicity, incompetence, or both. The threat crystallized with Senator Estes Kefauver's barnstorming investigation of organized crime from 1950 to 1951. The Tennessee Democrat convened hearings that revealed collusion between mobsters and public officials in cities ranging from San Francisco to Chicago to Kansas City to Philadelphia. In addition to airing outright corruption, the Kefauver Committee declared that the overlapping and ambiguous jurisdictions of various police agencies and prosecutors "lends itself to buck-passing and evasion of responsibility which can only inure to the benefit of gangsters and racketeers." For example, the committee found that the local prosecutor "sometimes works with and sometimes against both the police and the sheriff." These "patterns of local law enforcement...require thorough overhauling," the committee argued. It urged each state to conduct a top-to-bottom review of the structures of their law-enforcement systems. That review, it said, should consider "the provision of a greater degree of centralized control of the work of local prosecutors, either through the Attorney General or the Governor's office."

Other critics went further. The American Bar Association in 1951 issued a report that called for D.A.'s to be appointed to office by the governor rather than standing for

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⁷ U.S. Senate, Special Committee to Investigate Organized Crime in Interstate Commerce, "Third Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce," S. Rep. (82nd Congress, May 1, 1951), http://www.onewal.com/kef/kef3.html.

local election, and to be supervised by a state-level Department of Justice. It also called for assistant district attorneys to become civil servants rather than political appointees. Adding insult to injury, the report discouraged mandatory sentencing on the grounds that prosecutors used such laws "as an effective bargaining weapon in getting defendants to plead guilty to a lesser offense. Thus mandatory provisions are found in practice actually to lessen penalties." The report was co-authored by Robert Patterson, a former federal judge and secretary of war. In a blistering op-ed headlined "The Scandal of Our District Attorneys," Patterson argued that local prosecutors usually owed their election to party machines that were themselves deeply entangled with organized crime. Even if a D.A. was honest, Patterson wrote, his assistants were often political appointees who did not necessarily take directions from their ostensible superior. The result, Patterson said, was that D.A. offices were dens of patronage rather than professionalism:

Most prosecutors have no understanding of or interest in the causes of crime in their community, the use of the probation or parole system and the subject of penology generally...Few D.A.'s are known to subscribe to the criminology journals or to support institutes devoted to the study of crime and punishment. The ordinary D.A. spends too much of his time at political lunches, banquets and public gatherings.⁹

It was in this environment that 16 D.A.'s joined in 1950 to form the National

⁸ Robert Patterson et al, "Report of the ABA Commission on Organized Crime: Report of Special Committee of the Association," *Annual Report of the American Bar Association* 76 (1951): 401–3, 411–12.

⁹ Robert Patterson, "The Scandal of Our District Attorneys," *Los Angeles Times*, January 13, 1952. Though most of the fire was directed at local D.A.'s, similar critiques were leveled against U.S. attorneys, who were appointed largely at the discretion of their home-state senators. See Drew Pearson, "Laxity of Prosecutors Scored," *The Washington Post*, March 31, 1951, sec. Local News.

Association of County and Prosecuting Attorneys. In its founding charter, the group declared its intention to hold regular meetings of D.A.'s, facilitate the exchange of ideas, enable coordination of law-enforcement agencies, and encourage uniformity of laws across jurisdictions. The group's motto, "organized law enforcement against organized crime," made clear that it intended to rebut those critics who believed localized prosecution was, as the Kefauver Committee had put it, an attempt "to control jet-plane criminality by ... horse-and-buggy methods."10 (Kefauver himself attended the association's first meeting, where he asked for help in pushing elements of his anti-crime agenda through Congress; in later years, he even managed to have the organization endorse his recommendation for a "National Advisory Commission on Interstate Crime," which was staunchly opposed by the U.S. Department of Justice and had been ignored since he first offered it in 1951.¹¹) The new association soon began offering scholarships and setting up continuing-education seminars. 12 Its annual conference was addressed by Truman and Eisenhower's attorneys general. 13 By 1958, the group had 1,100 members. 14 By 1960 it had renamed itself the National District Attorneys Association and received a

^{10 &}quot;Note: The National Association of County and Prosecuting Attorneys," *Journal of Criminal Law, Criminology and Police Science* 49 (1959 1958): 295–295. U.S. Senate, Special Committee to Investigate Organized Crime in Interstate Commerce, "Third Interim Report."

¹¹ "Sen. Kefauver Applauds Boyle Fight on Crime: Addresses Prosecutors' Conference Session," *Chicago Daily Tribune (1923-1963)*, August 12, 1951, sec. PART 1. "Kefauver Renews Plea: Asks County Attorneys to Aid Drive for Laws on Crime," *New York Times*, August 12, 1951. Tom Cameron, "Crime Advisory Board Vital, Says Kefauver: Local Authorities Must Spearhead Drive on Lawless, District Attorney Group Told," *Los Angeles Times (1923-Current File)*, March 12, 1961, sec. B.

¹² "Prosecutors Get Grants: Six in Nation Win Scholarships for Special Courses of Study," *New York Times*, July 25, 1953. "District Attorney Aides Leave to Attend Institute," *Los Angeles Times* (1923-Current File), December 3, 1953.

¹³ "M'Grath to Summon Prosecutors' Parley," *New York Times*, August 11, 1951, sec. Business & Finance. "Brownell Lauds Prosecutors: Says Each Is Vital in Fight on Crime," *Afro-American (1893-1988)*, August 27, 1955.

¹⁴ "County and Prosecuting Attorneys."

dedicated space in the *Journal of Criminal Law and Criminology* to publish association news and articles.

If NDAA's immediate goal was to prevent a radical restructuring of local justice along the lines suggested by Kefauver and the ABA, it was certainly successful. In 1952, the Council of State Governments, in cooperation with the ABA, did approve model legislation based on the ABA's stinging critique. But instead of calling for the abolition of the locally-elected prosecutor, the model legislation merely defined conditions under which a state attorney general could intervene in a local prosecution.¹⁵ Still, funding limited NDAA's activities until it landed a foundation grant of more than \$100,000 in 1964 to "foster a growing professionalism among prosecutors, and in so doing...increase the protection afforded our communities and their citizens." With the new support, NDAA added educational seminars, which reached 700 participants in 1965, and published handbooks and pamphlets. It also produced two crime-related public-service announcements that were distributed to local television stations, a textbook example of a jurisdictional claim being made in the public arena. ¹⁶ Meanwhile, it continued to guard the professional prerogatives of its members, harshly criticizing the Warren Court's controversial decisions on criminal procedure and carrying on a public spat with its original nemesis, the American Bar Association, about ethical standards that would affect prosecutors.17

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¹⁵ "Something You Can Do to Help Smash Crime," *Changing Times* 7, no. 8 (August 1953): 27. Brevard E. Crihfield and Herbert Wiltsee, "Recent Developments in Interstate Crime Control Legislation," *Journal of Criminal Law, Criminology & Police Science* 45 (1955 1954): 641–51.

¹⁶ George M. Scott, "National District Attorney's Association, Right Arm of the Prosecutor," *American Criminal Law Quarterly* 6 (1968 1967): 41–43.

¹⁷ Sidney E. Zion, "District Attorneys to Ask Delay In Action on Bar Unit's Program," *New York Times*, March 15, 1968.

In language that signaled NDAA's commitment to redefining prosecution as a bona fide profession, the organization wrote in a report to its funder, "The National District Attorneys Association is the only organization which represents attorneys who are specialists in law-enforcement administration." In fact, NDAA was not the first organization of prosecutors: a handful of forerunners had existed at the state level for decades. The first appears to have been founded in 1896 in Illinois. California and New York followed a few years later. But unlike NDAA, these early organizations made no pretense of being above the fray of electoral politics. In Illinois, the district attorneys injected themselves into gubernatorial politics in 1909 by endorsing one of their own to run for the job. The partisan line was even bolder in New York, where the largely Republican D.A.'s repeatedly pushed aggressive Prohibition-enforcement measures that were widely understood to be designed to highlight the "wet" sympathies of Democratic governor and presidential hopeful Al Smith.

The pressure and the incentives for prosecutors to advance their professional identity only increased in the 1960s and 1970s. As to pressure, local district attorneys found themselves being outflanked in prominence and at times jurisdiction by state attorneys general in this period. Across the country, attorneys general were asserting

¹⁸ Scott, "National District Attorney's Association, Right Arm of the Prosecutor," 41–43.

¹⁹ "State's Attorneys Will Meet: Third Annual Session of Their Association to Be Held at Ottawa Wednesday and Thursday," *Chicago Daily Tribune* (1872-1922), June 25, 1899.

²⁰ "Boom for Wayman as Next Governor: Thomas D. Knight Launches It and Illinois State's Attorneys Cheer Idea," *Chicago Daily Tribune (1872-1922)*, June 10, 1909. "M'Ewen Aids Wayman's Boom: Judge Favors State's Attorney as Nominee for Governorship," *Chicago Daily Tribune (1872-1922)*, June 11, 1909.

²¹ "Republicans Forcing State Dry Law Issue: Democrats Call It Sharp Play by Opponents to Kill Governor Smith's Presidential Chances -- Crowding His Measures Out of Legislative Limelight.," *New York Times*, March 16, 1924.

themselves as tribunes of the people, allying with the consumer movement, and finding the office a convenient launching pad for political careers, as the Wall Street Journal reported in 1972. In 1970, the New Jersey Attorney General won unprecedented rights to intervene in local prosecutions. In Illinois, the State's Attorneys Association worked hard to fight off a similar challenge.²² NDAA Executive Director Patrick Healy told the Journal that attorneys general, "except in name and language(,) are trying to build a kingdom. What's so bad with the system we have now?"23 Meanwhile, renewed expert attention on the criminal-justice system was yielding findings that were not always convenient for local district attorneys. In 1973, for example, a "National Advisory Commission on Criminal Justice Standards and Goals" recommended cutting in half the rate at which juveniles accused of crimes were formally processed through court and eliminating juvenile detention at the state level; imposing a 10-year moratorium on stateprison construction; and the abolition of plea-bargaining, which had long been a standard tool to keep busy courtrooms humming and was only growing in popularity.²⁴ Retorted Healy: "Plea-bargaining is here to stay and they should accept it. I don't think they have the slightest idea of the problems prosecutors face."²⁵

Incentives were also growing for prosecutors to broaden their professional claims.

²² Jeffrey A. Tannenbaum, "New Muscle: In Many States, Office Of Attorney General Grows More Powerful," *Wall Street Journal*, January 7, 1972. In Florida, the Prosecuting Attorneys Association was battling a proposal to create a statewide prosecutor for organized crime, but plans varied on whether that official would report to the attorney general. R. Scott Palmer and Barbara M. Linthicum, "The Statewide Prosecutor: A New Weapon against Organized Crime," *Florida State University Law Review* 13 (1986 1985): 653.

²³ Tannenbaum, "New Muscle."

²⁴ National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime* (Washington: U.S. Department of Justice, 1973), 34, 149–50, 187.

²⁵ John O'Brien, "Panel Seeks to Abolish Plea Deals," *Chicago Tribune*, January 13, 1973, sec. 1.

In 1967, Congress passed and President Johnson signed the Safe Streets Act, creating the Law Enforcement Assistance Administration. Rather than just the information clearinghouse Kefauver had unsuccessfully proposed 16 years earlier, LEAA was a grant-making agency that provided significant funding to state and local governments and nonprofits involved in crime control. Professionalizing law enforcement was a major LEAA commitment, and that included prosecution. It was LEAA that set up the National Advisory Commission on Criminal Justice Standards and Goals, the body that upset prosecutors by recommending the end of plea bargaining. But the same commission also advocated an expansion of prosecutorial budgets and personnel. As the commission explained,

The prosecutor occupies a critical position in the criminal justice system. His office combines legal, administrative, and judicial functions which require experienced, professional personnel and a rational and efficient organizational structure ... The personnel policies, size, and organization of many prosecutors' offices are not conducive to meeting the complex demands of the criminal justice system. ²⁷

The result was a windfall for the NDAA, which by 1978 had units devoted to planning and research; civil and corporate relations; educational conferences; publications;

²⁶ Feeley and Sarat, *The Policy Dilemma*. Weaver, "The Significance of Policy Failures in Political Development: The Law Enforcement Assistance Administration and the Growth of the Carceral State."

²⁷ National Advisory Commission on Criminal Justice Standards and Goals, *Strategy to Reduce Crime*, 159–60. This language was repeated almost verbatim in the foreword to the Nat'l Prosecution Standards, 1977 (pg. i.)

prosecution administration; and more.²⁸ The group had also cooperated in 1970 with the American Bar Association and two trial-lawyers' associations to create the National College of District Attorneys at the University of Houston.²⁹

Professional Claims in Political Context

Becoming a district attorney does not require any specialized training beyond a law degree. Erecting higher barriers to entry would be in tension with preserving the legitimacy the office draws from representing voters, and would set off significant internal conflict as incumbent prosecutors who lacked advanced training would resist. But even without such training, NDAA officials made a claim of professional jurisdiction by arguing that prosecutors were specialists of a kind. To this end, they offered a syllogism: since prosecutors were the central node in the criminal-justice system, and since the central node should lead, prosecutors were qualified to lead. From this claim that prosecutors held expertise in "law enforcement administration" arose derivative claims that prosecutors commanded the expertise to tackle a broad range of social problems, from drug abuse to environmental pollution.

This professional identity had to be defined in a way that would be consistent both with prosecutors' ideological predispositions and their electoral incentives to permit congruence across the public, legal, and workplace arenas in which professions make jurisdictional claims. Thus, prosecutors were also cast as the rightful leaders of the justice

²⁸ "NDAA Proposed Structural Changes," *The Prosecutor: Journal of the National District Attorneys Association* 14, no. 6 (1978): 4.

²⁹ "Prosecutors Open National College," New York Times, June 16, 1970, sec. Business & Finance.

system precisely because they *rejected* those forms of expertise that critiqued American criminal justice as excessively punitive. NDAA documents consistently cast crime as an existential problem rooted in moral decay, one that required a hard line to counteract. Rival groups such as judges or the defense bar were often cast as complicit in the nation's ethical slippage. In this view, prosecutors were the only players in the post-arrest justice system who could be relied on to ensure defendants were held to account as the public demanded. Professionalization in this instance was partly an exercise in anti-intellectualism: where abstract knowledge clashed with "common sense," prosecutors defined themselves as the people who would bet on the latter. This language meshed easily with the rhetoric being advanced by conservative politicians in this era. ³⁰ As Abbott's theory suggests, prosecutors thus connected their expert claims with dominant cultural values. In doing so, they also advanced their electoral interests, and what appears for many to have been a sincerely held ideology of law and order.

From its founding, but with greater urgency in the 1970s and 1980s, NDAA advocated the idea that prosecutors should aspire to greater influence within the criminal-justice system — and beyond. "You are the chief law enforcement officers of America," Utah Senator and two-time NDAA President Frank Moss told members in 1960, using a phrase that would often be repeated. "The office which you hold," Moss added, "is to a degree more important than any other office in government." In documents related to its 1964 grant, NDAA declared, "Potentially, the Prosecuting Attorneys of the United States

³⁰ For analysis of that rhetoric, see Beckett, *Making Crime Pay*. Weaver, "Frontlash." Simon, *Governing Through Crime*. Murakawa, *The First Civil Right*. Hinton, *From the War on Poverty to the War on Crime*. Dagan and Teles, *Prison Break: Why Conservatives Turned Against Mass Incarceration*.

³¹ Frank E. Moss, "Articles, Reports, and Notes of the National District Attorneys Association: The Professional Prosecutor," ed. Duane R. Nedrud, *Journal of Criminal Law and Criminology* 51, no. 4 (Winter 1960): 461–64.

are the greatest collective force for the improvement of criminal justice that exists in the United States."³²

These claims evolved into calls for leadership in shaping legislation and public opinion. In 1976, NDAA President Louis Bergna wrote, "It is because of the central position of the prosecutor in the criminal-justice system, and in our society as a whole, that NDAA has appealed since its very inception to prosecutors to assume and advance their leadership role at all levels of government."³³ This idea was institutionalized the following year, when NDAA released the first-ever "National Prosecution Standards," designed as a benchmark local offices could use to evaluate their operations and a template from which to borrow policies.³⁴ Standard 2.3, on "legal reform and code revision," declared:

Because of the prosecution's unique position as the prime mover in enforcement of the laws, the prosecutor should assume a leadership role in the process of law reform. If the prosecutor should abdicate this role it can be expected that others, less qualified and less experienced, will fill this leadership role to the ultimate detriment of society. 35

³² Quoted in Scott, "National District Attorney's Association, Right Arm of the Prosecutor."

³³ Louis P. Bergna, "The President's Page," *The Prosecutor: Journal of the National District Attorneys Association* 12, no. 1 (1976).

³⁴ National District Attorneys Association, *National Prosecution Standards*, 1st ed. (Chicago: National District Attorneys Association, 1977), ii.

³⁵ National District Attorneys Association, *National Prosecution Standards* (1977). There is similar language in Standards 1.3, The Prosecutor: Responsibilities, which says at part D: "The prosecutor should consider all available models of control of human behavior from the standpoint of the ultimate benefit to society. The prosecutor should at all times be zealous in the desire to protect the rights of individuals, but must place the rights of society in a paramount position…" (9)

To fulfill this obligation, the standard said, prosecutors should be "well-informed" not only on "penological thought," but also on "the attitudes and views in the community concerning the propriety of any and all modes of human behavior" — an astonishingly sweeping claim of jurisdiction whose implications became clear in commentary which claimed that "for many homosexuals the adolescent victim represents the primary sex object" and that "homosexuals are prone to violence." Prosecutors should make their views on these matters known to their communities, constituents, legislative bodies, and the judiciary, the standard added.³⁶

In 1982, Bergna's successor at NDAA, Suffolk County (Boston) District Attorney Newman Flanagan, connected the exhortation to prosecutorial leadership to the broader conservative attack on the Great Society, which was back in full force with the recent election of Ronald Reagan. Speaking at his inauguration as NDAA president, Flanagan declared:

An era of social interventionism which held out the false dogma that a benign government could solve all our problems has given way to an era of social withdrawal ... which holds what is assuredly yet another false dogma ... that government makes no difference, that our problems are insoluble...Nowhere is this belief more prevalent and its insidious repercussions more pervasive than in both public and political attitudes to law enforcement and the criminal justice system.

³⁶ National District Attorneys Association, p, 33, 35. The standard's only qualification of its "any and all" guideline is to note that the prosecutor should advocate for that "model of control of human behavior" that they view as "best suited to balance the interests of personal liberty and the interests of society in preserving order and maintaining and improving the qualify of life through collective action."

This was a claim that a government which had failed to prevent the economic dislocations of the 1970s and was retreating before the market could regain its legitimacy through the exercise of coercive power - what Simon has called "governing through crime." Flanagan continued with the words cited in the introduction to this chapter, urging prosecutors to mount a campaign of public persuasion and, implicitly, to assert greater professional jurisdiction within criminal justice by "expanding and streamlining" the system under the mantle of "strict enforcement." The encouragement continued throughout the 1980s. In 1986, James Chapman, a former NDAA member who had gone on to Congress, encouraged the organization to make itself a source of expertise for legislators.

The people who get to testify and the people that...congressmen rely on...are going to be people who are recognized as experts in the field. So your task, and your goal as an Association, should be to make available the brightest and most knowledgeable minds on the issues of criminal justice...so when questions are asked people will come to this Association for answers.

NDAA's account of the speech reported a stirring conclusion: "Through this Association you can become the leading voice in America for law-abiding citizens,' the former D.A. closed to vigorous applause." In 1988, another NDAA president observed,

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³⁷ Simon, Governing Through Crime.

³⁸ "Congressman Chapman's View from Hill," *Capital Perspective* 5, no. 3 (June 1986): 1–2.

The profile of today's prosecutor includes diversified leadership roles...(prosecutors) must actively participate in debates on corrections and sentencing, legislation, and judicial selection. They must be the activists for the reform of a lenient juvenile court system which too often condones criminal conduct by young offenders. ³⁹

The organization also had the ambition to push prosecutors into new policy areas, among them the environment. In 1989, an article in an NDAA journal announced that a newly formed Environmental Control Committee would hold a day-long symposium to which President George H.W. Bush had been invited. It declared, "This problem is no longer within the exclusive jurisdiction of the federal prosecutor or state Attorney General ... As the chief law enforcement officer in your community, you must exercise leadership when the environment is a crime victim."

NDAA leaders suffused these claims to leadership in the campaign against crime with language suggesting the struggle was one of existential proportions. Frequently, they relied on the metaphors of war to highlight the stakes, or used metaphors of disease to suggest that even petty crime carried a potentially lethal taint. In many documents, NDAA officials acknowledge that crime was a problem with many complexities and subtleties — the typical mark of expert work. But these insights were always wrapped in a message of uncompromising struggle. Where the realities of criminal-justice

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³⁹ Fred L. Foreman, "Message from the President: The District Attorney: Profiles in Leadership," *The Prosecutor: Journal of the National District Attorneys Association* 22, no. 2 (Fall 1988): 2.

⁴⁰ Fred L. Foreman, "Message from the President: The Environment as Crime Victim," *The Prosecutor: Journal of the National District Attorneys Association* 22, no. 4 (Spring 1989): 2. See also Theodore M. Hammett and Joel Epstein, "Local Prosecution of Environmental Crime," Issues and Practices (Washington, D.C.: Abt Associates Inc., for U.S. Department of Justice, National Institue of Justice, June 1993), https://www.ncjrs.gov/pdffiles1/Digitization/143270NCJRS.pdf..

administration clashed with the expression of values, NDAA leaders appeared inclined to emphasize the latter. Professional claims were thus adapted to ideological and political demands.

In 1973, NDAA issued what was on its face a wonky position paper intended to rebut critics of decentralized prosecution. But the opening struck a chilling tone: "Imagine a deadly and infectious force that invades a society to murder, assault, plunder, and destroy whatever it strikes. The creature assumes many forms and disguises, and employs various methods in its insidious work." Explaining that the force in question was crime, the paper observed: "It simply is no exaggeration that the problem of crime in America is the single greatest challenge to our form of democracy ... today." Several pages later, however, the same paper dismissed claims that local prosecution should be centralized by declaring that crime problems were exaggerated. Even in a document where they found it in their interest to advance a sober approach to the crime problem, NDAA officials apparently could not resist the rhetoric of civilizational breakdown.⁴¹

As mentioned above, the National Prosecution Standards of 1977 urged prosecutors to get involved in "law reform" after studying different approaches to controlling human behavior. Various models of "law reform" were outlined in the appended commentary, and while the standards did not endorse any of them, it was clear where the drafters stood. The most space was devoted to the "law enforcement model," and this section quoted liberally from an article by Los Angeles Police Chief Ed Davis to

⁴¹ National District Attorneys Association, "The Role of the Local Prosecutor in a Changing Society: A Confrontation With the Major Issues of the Seventies," NDAA Position Paper (Chicago: National District Attorneys Association, 1973).

advance a zero-tolerance view of enforcement:42

Every violation of law, however well concealed, and despite the apparent lack of personal danger, has a corrosive effect on society ... Crimes of the 'victimless' character attack the individuality which is so highly valued by Americans for they have an eroding effect upon our principles and values ... From each act erroneously labeled a 'victimless crime' flows a stream of murder, suicide, accidental death, disease, violence and corruption.

The editors concluded the discussion by arguing that "the key issue" on the question of victimless crime was "whether society has a right to preserve a certain quality of life desired by a majority of its citizens." They said that the Supreme Court had answered this question in the affirmative in its cases on obscenity and environmental regulation, and "it would seem strange (to) turn away from application of the same principle in other areas of human conduct."

To be sure, this militancy was balanced by language encouraging thoughtful treatment of pre-trial and low-level defendants. The standards discouraged the use of money bail and advocated the abolition of the bail-bond industry, noting in commentary that it had been "very prone to abuse." The standards also urged district attorneys to adopt "diversion," an idea that emerged in the 1970s to withhold prosecution from

⁴² Davis, "Victimless Crimes - the Case for Continued Enforcement," Journal of Police Science and Administration (1973), quoted in National District Attorneys Association, *National Prosecution Standards* (1977).

⁴³ National District Attorneys Association, pg. 36.

⁴⁴ National District Attorneys Association, pg. 142.

defendants who participated in rehabilitative programs in the community. D.A.'s were "encouraged to have an input" in the development of employment, educational, counseling, and drug and alcohol programs. The editors noted, "The benefits of diversion should be obvious to both prosecutors and the public ... it greatly expands the resources that can be employed to deal with offenders; it enables individualized processing of people, not statistics and cases; and it greatly enhances the potential of rehabilitation as opposed to legislatively mandated punishment." Nuance also appeared on the issue of whether prosecutors should recommend a sentence to a judge following trial. The standards allowed it, but lengthy commentary followed noting that some district attorneys felt the practice was inappropriate. (When the standards were revised in 1991, the bail and diversion sections were largely unchanged, but the standard on sentencing recommendations was changed to tilt more definitively in favor of D.A. participation.)

NDAA's public rhetoric carried on the language of war throughout the 1980s, however. At a 1982 hearing, Philadelphia District Attorney Ed Rendell, representing NDAA, pleaded with lawmakers to invest in crime-fighting as heavily as they did in national security. Aid to a country like Pakistan, he said, "isn't as important as money to fight crime in Philadelphia, Detroit, Dallas, and Chicago ... the scorecard in the city of Philadelphia for the last decade reads people killed by the Russians is (sic) zero. People

⁴⁵ National District Attorneys Association, pg. 387.

⁴⁶ National District Attorneys Association, pg. 150.

⁴⁷ National District Attorneys Association, pg. 289.

⁴⁸ National District Attorneys Association, *National Prosecution Standards*, 2nd ed. (Alexandria, Va.: National District Attorneys Association, 1991), http://www.ndaa.org/pdf/ndaa natl prosecution standards 2.pdf, pg. 236.

killed by the criminals is 42,000."⁴⁹ Meanwhile, NDAA President David Armstrong declared, "Crime is literally threatening our existence as a free civilization ... If local or foreign terrorists should wreak this havoc on our society we would be outraged, and we would surely mount a response designed to immediately eradicate the perpetrators."⁵⁰

NDAA officials also embraced the metaphor of a "drug war" as substance abuse burst back onto the national agenda in 1986, following the overdose death of basketball star Len Bias, and 1988, amid George H.W. Bush's reelection campaign. Officials referred to the drug war as the "Vietnam of the 1980s" to imply that the nation lacked the will to fight narcotics. In one such writing, NDAA's president complained, "We free the enemy, the drug dealers, so that they can import more drugs to sell to our schoolchildren and wage domestic terrorism ... Has America lost the will to win?"⁵¹ (Perhaps not coincidentally, the Vietnam metaphor was also invoked in a 1986 memorandum circulated by Newt Gingrich, then a little-known Georgia Congressman; he urged a campaign on the scale of World War II.⁵²) Even when Scott Harshbarger, a Massachusetts D.A. with a leadership role in NDAA, advocated a relatively moderate program emphasizing demand reduction through education, and international interdiction rather than domestic policing, his framing was that the nation had yet to fight a true "war"

⁴⁹ In fact, homicides and non-negligent manslaughters for the entire state of Pennsylvania totaled 8,117 in that period. Total U.S. killings stood at 225,000. Author's calculations from "Uniform Crime Reporting Statistics Data Tool" (Federal Bureau of Investigation, 2018), ucrdatatool.gov.

⁵⁰ "Federal Financial Assistance to State and Local Law Enforcement," Subcommittee on Juvenile Justice of the Committee on the Judiciary (U.S. Senate: 1982), Rendell at 121, Armstrong at 154.

⁵¹ Fred L. Foreman, "Message From the President: The Drug Czar: An Open Letter," *The Prosecutor: Journal of the National District Attorneys Association* 22, no. 3 (Winter 1989): 2. The Vietnam comparison appears in Foreman, "Profiles in Leadership."

⁵² Newt Gingrich, "Toward a Drug Free America: A Proposal for an Effective War on Cocaine and Heroin," July 29, 1986, folder "Drug Initiative II," series "Office of the Chief of Staff," Box 12, W. Dennis Thomas files, Ronald Reagan Library.

against drugs and thus should not "surrender" by legalizing them.⁵³ Drug users occupied a gray zone, now cast as victims and now as perpetrators, but there was an overwhelming sense that drugs carried a dark taint. One column on undercover drug buys argued that since the police officers involved in these operations had bought narcotics, they would seem untrustworthy to a jury and had to be trained to fight that impression.⁵⁴

In this context of existential struggle, rival sources of expertise were cast as not only misguided, but dangerous. In 1991, NDAA President Richard Ieyoub proposed a zero-sum relationship between studying the causes of crime and fighting it, writing to members: "As community leaders and criminal justice policy makers we must resist being drawn into the discursive search for the 'roots of crime' at the expense of our efforts to bring crime under control now," and warned against ideas "heavily and dangerously grounded in sociological theory." If prosecutors were on the side of lawabiding citizens, then the defense bar and its allies were committed to the protection of criminals. The primary tools the professional enemy wielded were the due-process protections created by the Warren Court. The exclusionary rule and insanity defenses drew particular ire. As NDAA's professional standards observed, the opposition arsenal also included dilatory tactics and "tortuous appeals." 1975.

Ed Meese, the Reagan adviser and former California district attorney who would

⁵³ Scott Harshbarger, "Legalization Is Simply the Wrong Answer to the Drug Problem," *The Prosecutor: Journal of the National District Attorneys Association* 22, no. 3 (Winter 1989): 7–8.

⁵⁴ Powell A. Layton, Jr., "How Prosecutors Can Assist the Police in Developing Easy Evidence in Drug Cases," *The Prosecutor: Journal of the National District Attorneys Association* 22, no. 2 (Fall 1988): 23–25

⁵⁵ Richard Ieyoub, "Message from the President: Dangerous Naivete," *The Prosecutor: Journal of the National District Attorneys Association* 24, no. 4 (Spring 1991): 2.

⁵⁶ National District Attorneys Association, *National Prosecution Standards* (1977).

go on to become U.S. attorney general, articulated some of these views at a breakfast meeting with leading prosecutors in 1982. An NDAA account paraphrased Meese as saying that "for too long prosecutors have not been able to compete with organizations like the ACLU and other lobbyists who represent the defendant" and that such groups were "upsetting the administration of justice." In 1990, NDAA Executive Director Jack Yelverton reported on a battle within the ABA about changes to the professional standards of conduct that would affect prosecutors. "Accusing prosecuting attorneys of unethical conduct has long been a standard stratagem for criminal defense lawyers," Yelverton wrote. The ABA standards, he added, "do not exist for the use of criminal defense lawyers to obstruct justice."58 In the same publication, Yelverton condemned the LAPD officers involved in the Rodney King beating but expressed sympathy for cops "whom we hire to deal with the dregs of humanity." 59

Such rhetoric was consistent with the racially loaded discourse that had been circulating in national politics since at least the 1960s, in which crime was explained as a product of individual depravity, enabled by lenient law enforcement and concessions in the realms of civil rights or welfare.⁶⁰ While we still know relatively little about the campaign practices of district attorneys in this era, the available evidence suggests they also deployed the conservative discourse to woo voters — and at times laced it with

⁵⁷ "Miller, Meese Launch APRI at White House Breakfast Meeting," Capital Perspective 3, no. 1 (December 1983): 1.

⁵⁸ Jack E. Yelverton, "From Where I Sit: Rolling Out the Cannons of Ethics," *The Prosecutor: Journal of* the National District Attorneys Association 24, no. 1 (Summer 1990): 4.

⁵⁹ Jack E. Yelverton, "From Where I Sit: A Few Thugs in Blue," *The Prosecutor: Journal of the National* District Attorneys Association 24, no. 4 (Spring 1991): 4.

⁶⁰ Beckett, Making Crime Pay. Weaver, "Frontlash." Simon, Governing Through Crime. Murakawa, The First Civil Right. Hinton, From the War on Poverty to the War on Crime. Dagan and Teles, Prison Break: Why Conservatives Turned Against Mass Incarceration..

attacks on rival professions. In Philadelphia, as we have seen, Republican District Attorney Arlen Specter allied himself with Frank Rizzo, the Democratic police commissioner whose noxious racial politics would later win him the mayoralty, ⁶¹ in attacking judges for excessive leniency. The same charge would be leveled with great success over a decade later by another district attorney, Ed Rendell. And Rendell's successor, Frank Castille, won his own election by condemning his opponent as "a judge who is lenient in his dealings with violent street criminals." Specter and Rendell went from these local battles with judges to higher office, underscoring the potential of the D.A.'s office as a political launchpad.

Lobbying for Legal Advantage

Prior sections have emphasized the identity prosecutors sought to cultivate for themselves and in the public mind. In this section, I briefly show that prosecutors also began to deploy their professional identities and organizations to expand their prerogatives in the legal arena, by lobbying legislatures for more powers, and in the workplace, by offering quasi-social programming.

Prosecutors could exhort one another to professionalize their operations and take charge of an excessively lenient criminal-justice system. They could tell the media and other politicians that they were doing so. But making that vision a reality also required money, training, information monitoring, and coordination. As Abbott put it, "In contests

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⁶¹ Daughen and Binzen, *The Cop*, 142.

⁶² Green, "Ed Rendell Is Mad as Hell." Goldwyn, "Williams vs. Castille." Paul Nussbaum, "Confrontation."

between professions, the profession with more extensive organization usually wins."63 Prosecutors had a decent start in this regard by the time Kefauver Committee launched its critique. As noted above, the earliest state-level organizations of local prosecutors were deeply involved in electoral politics. However, these organizations also delved into the nuts and bolts of criminal-justice policy. In California, Illinois, and New York, district attorneys suggested, and lobbied for, changes to the procedural and substantive criminal law. For example, California D.A's in 1913 decided to send a delegation of prosecutors to Sacramento to press for changes such as making the passing of a bad check a criminal offense.⁶⁴ In Illinois, the district attorneys in 1909 declared their intention to overturn an indeterminate sentencing law the Legislature had recently adopted, a battle that would last for years and culminate in 1926 with parole officials, who supported the system, being barred from entering a D.A. association meeting.⁶⁵ In New York, the prosecutors joined a coalition that pushed through the Legislature a package including a law that mandated life imprisonment upon a fourth conviction — a forerunner of the modern "Three Strikes" legislation. 66 In an early example of ideas diffusing through professional channels, an Illinois D.A. cited the New York law and a similar one in Michigan to propose the same measure in his state.⁶⁷

⁶³ Abbott, System of Professions, 83.

⁶⁴ "Law Enforcers Make Law, Too: District Attorneys to Go to Legislature," *Los Angeles Times (1886-1922)*, January 15, 1913, sec. Editorial.

⁶⁵ "Boom for Wayman as Next Governor." "M'Ewen Aids Wayman's Boom." "Parole Chief Clashes With Prosecutors: Convention Bars 45 Clabaugh Agents.," *Chicago Daily Tribune (1923-1963)*, December 29, 1926

⁶⁶ "Baumes Laws Lessens Crime, Is Belief of Law Officers: Life Imprisonment for Fourth Offenders Indorsed by Bench and Bar," *The Christian Science Monitor* (1908-Current File), January 10, 1927.

⁶⁷ Dewey L. Fleming, "Baumes Statute Urged in Illinois: Official Says Habitual Criminal Law Would Limit Gangster Methods," *The Sun (1837-1991)*, December 28, 1928.

By 1954, at least half the states had their own district attorney associations, but they appear to have varied widely in terms of their independence (many combined their meetings with those of their state bar associations); activity; and political influence. The 1973 report of the National Advisory Commission on Criminal Justice Standards and Goals, the body established to advise LEAA, recommended that all states "establish and support an independent agency or specialized unit in the attorney general's office to provide technical assistance and supplement support services to local prosecutors." States heeded the call, and the 1970s and 1980s were a crucial period of development. Key states — including Alabama, Arizona, Georgia, Louisiana, North Carolina, and Texas — first formed prosecutor associations during this period, or began to grant them funding, statutory recognition, and other state supports. NDAA took much of the credit for these developments. "At the state level we have instituted and promoted the various State Prosecutor Associations," NDAA President Louis Bergna wrote in the association's newsletter in 1976.

In numerous states, prosecutors soon wielded their muscle on behalf of tough-oncrime positions. In Texas, Gov. Bill Clements entrusted the task of selling a historic

⁶⁸ National Advisory Commission on Criminal Justice Standards and Goals, *Strategy to Reduce Crime*.

⁶⁹ "OPS-Home," State of Alabama - Office of Prosecution Services, September 10, 2012, http://wayback.archive-it.org/org-62/20120910130708/http://prosecutionservices.org/. "Alabama District Attorneys Association - GuideStar Profile," accessed July 13, 2018, https://www.guidestar.org/profile/63-0645795.

[&]quot;About APAAC," Arizona Prosecuting Attorneys' Advisory Council, accessed July 12, 2018, http://apaac.az.gov/about-apaac. { | anon. About PAC | Prosecuting Attorneys' Council of Georgia, no date | |zu:1322275:3XNB2BRX} "Babin, Dinvaut Guide D.A.s through Louisiana District Attorney's Association," *L'Observateur*, August 23, 2017, https://www.lobservateur.com/?p=94151. "NC Conference of District Attorneys," North Carolina Conference of District Attorneys, accessed July 12, 2018, http://www.ncdistrictattorney.org/about.html. Campbell, "Ornery Alligators and Soap on a Rope."

⁷⁰ Bergna, "The President's Page."

prison-building proposal to a skeptical public to a key aide who sat on the NDAA board and had previously been a member of the Texas District and County Attorneys Association. TDCAA itself "was a key organization in shaping crime and punishment policy."⁷¹ As early as 1972, TDCAA proposed revisions to the state's penal code.⁷² Similarly, district attorneys in Florida lobbied for the state to build more prisons, led by Florida Prosecuting Attorneys Association President Janet Reno. 73 In Pennsylvania, prosecutors and their association were also an influential voice in crime policy-making at the legislature. In Louisiana, the D.A.'s teamed up with the NAACP and the Louisiana Moral and Civic Association to urge passage of a constitutional amendment making it easier to seize assets allegedly used in a crime.⁷⁴ In Missouri, NDAA and the Missouri Association of Prosecuting Attorneys helped draft legislation that would have raised many drug penalties, enabled asset forfeiture, and imposed a death penalty for drugrelated murders.⁷⁵ In Minnesota, prosecutors joined a "united front of law enforcement" in 1988 pushing for sentencing guidelines to be stiffened and prison capacity added. 76 In Oregon, the D.A. association endorsed the Republican attorney general in his

⁷¹ Michael C. Campbell, "Politics, Prisons, and Law Enforcement: An Examination of the Emergence of 'Law and Order' Politics in Texas," *Law & Society Review* 45, no. 3 (September 1, 2011): 652, 655, https://doi.org/10.1111/j.1540-5893.2011.00446.x.

⁷² James C. Watson, "Efficiency Is the Name of the Game (Comments)," *Texas Bar Journal* 35, no. 2 (February 22, 1972): 102.

⁷³ Tom Scherberger, "Prosecutors Call for More Prisons, Judges," *Orlando Sentinel*, October 11, 1985, sec. LOCAL/STATE.

⁷⁴ Bill McMahon, "PAC Formed for Amendment on Property Seizure," *State Times*, August 17, 1989.

⁷⁵ Kathryn Rogers, "Senate Drug Bill Would Impose Death Penalty," *St. Louis Post - Dispatch*, January 13, 1989.

⁷⁶ Dennis Cassano, Conrad deFiebre, and Staff Writers, "New Prison, Longer Sentences Asked: Guideline Increases 'Inadequate," *Star Tribune*, December 8, 1988, sec. NEWS.

unsuccessful 1990 gubernatorial bid, citing in part his cooperation with them on advancing bills in the legislature.⁷⁷ Thoroughly understanding the influence of these organizations, of course will require further research.

At the national level, NDAA became an active legal voice, filing amicus briefs in major criminal procedure cases before the Supreme Court since the mid-1960s and joining numerous state cases as well.⁷⁸ Prosecutors also exercised influence in Congress, but in a diffuse manner. While the public record suggests NDAA itself was not a frequent player on Capitol Hill, individual prosecutors likely did have the ears of their representatives in Washington. As Texas prosecutor-turned-Congressman James Chapman told his former colleagues in 1986,

You are an enormously influential person in your community, and your congressman knows that. I underestimated this, quite frankly, when I sat on (the NDAA) Board of Directors and when I served eight years as an elected D.A. I didn't think my congressman would pay that much attention, or care what I thought...I really undersold the impact that I could have had on what he did. Don't undersell yourself!⁷⁹

Perhaps most importantly, Chapman had many peers in Congress whose formative political experience had been to act as prosecutors in the harshening

⁷⁷ Jeff Mapes, "Frohnmayer Receives Endorsement of DA's," *The Oregonian*, August 23, 1990.

⁷⁸ See, e.g., mention of NDAA involvement in Mapp v. Ohio, 368 U.S. 871 (1961), 82; Malloy v. Hogan, 378 U.S. 1 (1964), 84; Miranda v. Arizona, 384 U.S. 436 (1966), 86; Batson v. Kentucky, 476 U.S. 79 (1986), 106; Commonwealth v. O'Neal, 369 Mass. 242 (1975), 339 N.E.2d 676; People v. Prysock, 127 Cal. App. 3d 972 (1982), 180 Cal. Rptr. 15.

⁷⁹ "Chapman's View."

professional environment of the 1960s and 1970s. In 1984, two former prosecutors, Pennsylvania Senator Arlen Specter and New Jersey Rep. William Hughes, formed a bipartisan, bicameral "crime caucus" in Congress; they announced that 30 of the 79 founding members were former prosecutors. ⁸⁰ Both Specter and Hughes were influential tough-on-crime voices throughout the 1980s, especially Specter.

Another important player in crime policy on Capitol Hill was Senator Ted
Kennedy, a critical co-author of the legislation that created the federal sentencing
guidelines, which today are widely criticized as too harsh. Kennedy's acquiescence to
severe sentencing has been explained as a trade-off granted to achieve greater
uniformity.⁸¹ But the senator had done a short stint in the Suffolk County District
Attorney's office before going to Washington. He maintained a strong relationship with
NDAA that suggests the "liberal lion" was on board with the hard-line view in at least
one respect — the tactical idea that a subset of criminals required severe sentences. In a
1982 address to the organization, Kennedy called for a focus on what he called the "tiny
minority" of repeat and violent offenders, and for trying violent juveniles as adults.⁸²
Kennedy again revealed his affinity for prosecutors a few years later, in a debate over
who should write the guidelines. Kennedy spoke to oppose an amendment that would
have transferred that responsibility from a commission including judges and other experts
entirely to the United States Judicial Conference. In language that could have been lifted

^{80 &}quot;Specter, Hughes Form Congressional Crime Caucus," Capital Perspective 3, no. 3 (April 1984): 5.

⁸¹ Murakawa, *The First Civil Right*, 107–9. Kate Stith and Steve Y. Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," *Wake Forest L. Rev.* 28 (1993): 223.

⁸² "Kennedy, Meese Speak Out on Fed's (Sic) Role in Crime Fight," *Capital Perspective* 1, no. 9 (August 1982): 1, 3. Murakawa also quotes Kennedy dismissing as myth the notion that prisons can rehabilitate. Murakawa, *The First Civil Right*, 110.

from the pages of the NDAA journal, Kennedy declared:

The criminals themselves and the defense attorneys understand all too well that if they go before X judge they get a heavy sentence and if they go before Y judge they get a lenient one. The American people understand that. The victims of the crimes understand that. The prosecutors understand that. 83

In the end, a former NDAA member who went on to become a U.S. District Judge was chosen to chair the U.S. Sentencing Commission as it drafted the first-ever federal sentencing guidelines (he assured his former colleagues that the commission would not consider limits on prison capacity in making its recommendations⁸⁴).

In addition to tackling the legal arena, prosecutors made significant changes to their workplace practices. Perhaps most importantly, John Pfaff has argued that prosecutors became much more likely to press charges rather than drop them, resulting in more defendants being incarcerated. But prosecutors also began to increasingly assert authority over social programs. In 1989, an NDAA periodical featured an article about an Oklahoma City task force to combat juvenile delinquency. Led by the local district attorney, the task force brought together a range of social-service agencies with law enforcement in a bid to identify troubled youth early and undertake holistic efforts to address their problems. Elizabeth Hinton argues that such blending of law enforcement with social services had been advocated by federal policy makers since the 1960s, and

⁸³ Edward M. Kennedy, "Senate - Tuesday, January 31, 1984," Congressional Record 130 (1984): 975.

⁸⁴ "U.S. Sentencing Commission Chairman Sketches Future of Sentencing Guidelines," *Capital Perspective* 5, no. 3 (June 1986): 6.

⁸⁵ Pfaff, Locked In.

ultimately served to stigmatize African-American youth and entrench punitive views.⁸⁶ Indeed, while the Oklahoma City task force was led by an educator, the district attorney also placed an experienced capital litigator in charge of his juvenile division. The same article that endorsed a holistic approach to youth problems also declared: "We can no longer afford the luxury of trying to 'save' all children and must realize that some children can't be 'saved.⁸⁷'" Juvenile delinquency was not the only arena in which prosecutors began to claim more ground. A 1994 report issued by the National Institute of Justice documented the experiences of five prosecutors' offices, including Oklahoma City, in "redefining and expanding the role of the prosecutor to include civic activism and policymaking with respect to the entire drug problem in their communities."⁸⁸

Conclusion

This chapter has shown that professionalization was an important and effective tactic by which prosecutors entrenched their ideological and political interests, allowing them to become key players in the rise of mass incarceration.

The first empirical section showed that prosecutors faced rising challenges to their professional legitimacy in the postwar era and organized in response. The second empirical section, focused on the public arena, showed that prosecutors made claims of

⁸⁷ John J. Foley and Pamela Harrell, "Juvenile Delinquency - The System's Crime," *The Prosecutor: Journal of the National District Attorneys Association* 22, no. 4 (Spring 1989): 21–28.

⁸⁶ Hinton, From the War on Poverty to the War on Crime.

⁸⁸ Barbara Boland and Kerry M. Healey, "Prosecutorial Response to Heavy Drug Caseloads: Comprehensive Problem-Reduction Strategies," Issues and Practices in Criminal Justice (National Institute of Justice, October 1, 1994).

professional jurisdiction that meshed well with and to some degree shaped the conservative politics of law and order. The third empirical section, focused on the legal arena, showed that prosecutors lobbied actively for measures that would enhance their power relative to rival professionals, both inside and outside the criminal-justice system. This section also offered examples of prosecutors advancing their professional claims in the workplace arena.

The upshot is that prosecutors were not merely passive beneficiaries of the demographic, cultural, and electoral shifts that accompanied the rise of the conservative coalition in the post-Civil Rights era. They worked to actively define themselves as professionals associated with the values, though not necessarily the party, of that coalition. They developed this distinctive professional identity in part as a matter of defense: to ward off critics who viewed their local, elected status as incompatible with their bureaucratic and judicial responsibilities. But the same identity, and the organizations that fostered it, also allowed prosecutors to go on offense and lobby actively for additional powers, such as stiffer criminal statutes.

6. Conclusion

"The highest responsibility is to be attained, in a simple structure of government, for the great body of the people never steadily attend to the operations of government, and for want of due information are liable to be imposed on."

— Centinel, Anti-Federalist No. 47

During the Democratic presidential primary in 2016, it became fashionable to lambaste Bill and Hillary Clinton as partial authors of mass incarceration. Both indulged the rhetoric of black criminality, critics argued, and Bill Clinton signed the 1994 federal crime bill that offered the states prison-construction money in exchange for tougher sentencing. But while the critique of the Clintons' rhetoric is certainly justified, the heavy weight attached to the 1994 crime bill is not.¹ This dissertation has argued that mass incarceration was driven at the local and state level, and the evidence suggests that the key pivot toward unrestrained construction of prison cells happened well before 1994.

Mass incarceration was not a product of federal administrative leadership or the centralizing impulse that drove other expansions of the American state in the 20th century. Mass incarceration was a product of fragmented state-building — a process in which electoral incentives were carved up in ways that amplified punitive impulses, jurisdictions were interwoven in ways that blurred accountability for the costs of the

¹ Two studies of the prison-construction incentives program found that it had moderate to minor effects on state policy. "Truth in Sentencing: Availability of Federal Grants Influenced Laws in Some States," Report to Congressional Requesters (Washington, D.C: United States General Accounting Office, February 1998). William J. Sabol et al., "Influences of Truth-in-Sentencing Reforms on Changes in States' Sentencing Practices and Prison Populations," Report to the U.S. Department of Justice (Washington, D.C: Urban Institute, 2002).

experiment, and policrats armed with newfound organizational might devised informal institutional linkages that favored their project of strengthening prosecutorial authority.

An institutional view of mass incarceration

This dissertation has offered a historical-institutional approach to understanding the rise of mass incarceration. Understanding how institutions channel political, racial, and economic conflict and bind together political actors allows us to more closely trace the chain of causality and identify the branching points that brought us to the present moment. As Marie Gottschalk puts it, the task is to identify those "features of the institutional and political landscape...that mediate the emergence of a powerful elite consensus." This approach allows us to follow Lisa Miller's call to move "away from narratives of meaning and representation and toward causal mechanisms and analyses of how power is actually mobilized and deployed."³

Most of the power over caging bodies in America is deployed at the local and state level. The simultaneous expansion of this power across so many decentralized jurisdictions is a remarkable development in the 20th century state. It makes intuitive sense to assume that federal leadership is the mechanism coordinating these developments, but this dissertation complicates that narrative. While the posturing of national politicians was certainly important in setting the ideological tone for the nation, actual administrative measures to direct criminal-justice policy at the subnational level

² Gottschalk, Prison and the Gallows, 9.

³ Lisa L. Miller, "The Local and the Legal," Criminology & Public Policy 10, no. 3 (2011): 726, https://doi.org/10.1111/j.1745-9133.2011.00747.x.

were highly limited, particularly after the 1970s. In fact, arguably the most hawkish crime administration — Reagan's — actively avoided taking such measures. To be sure, Reagan spurred impressive growth in the federal crime apparatus. But the effect of this growth on subnational actors was to lay out an example, not a mandate. As a Drug Enforcement Agency official put it, the Reagan administration sought to build a "national community" of law-enforcement officials.⁴

To explain why localities and states largely joined that community, however, we must understand the political conditions they faced. The picture of local politics that emerges from this case study is one of extreme conflict among different government actors. The Philadelphia district attorney, the Philadelphia judges, the Philadelphia sheriff, and the federal district court that was supervising jail conditions fought running battles over at least a two-decade span. Structural forces of race and economics did not produce an inexorable consensus in favor of punishment in Philadelphia. Instead, the political logic of elections in an era of party-machine breakdown, violent crime, and shifting demographics led candidates for key offices, including mayor and district attorney, to privilege the views of whites who were drawn to law-and-order appeals. The "capture" of African-Americans within the Democratic Party foreclosed an electoral process that would seriously test competing views within that community. Even so, judges and jailers resisted the expansion of the district attorney's prisoner pipeline. The city's legislature and chief executive never intervened decisively in these disputes, because they did not have to.

The interdependent fragmentation of subnational government set the stage for

⁴ "Conference Report: 2nd National Conference on the Control and Diversion of Controlled Substances" (U.S. Department of Justice, 1986), 21, http://hdl.handle.net/2027/pur1.32754078874371.

these battles in Philadelphia. It also made possible a particular type of solution: the recruitment of allies from other jurisdictions. The fact that local judges were working with a criminal code written by the state meant prosecutors could seek assistance from legislators in Harrisburg. Prisoners and reformers, meanwhile, could appeal to their own allies — the federal courts — to push back on the overcrowding plaguing local and state lockups. "The outcome of all conflict is determined by the scope of its contagion," E.E. Schattschneider observed almost 60 years ago. Interdependent fragmentation is a recipe for contagion. This, too, was something Schattschneider recognized: "One of the most remarkable developments in recent American politics is the extent to which the federal, state, and local governments have become involved in *doing the same kinds of things* in large areas of public policy, so that it is possible for contestants to move freely from one level of government to another."

Was the outcome of these expanded conflicts foreordained? Certainly, powerful electoral and ideological forces were operating to push not only prosecutors, but also legislators and governors toward a punitive approach to the crime problem. But there was also ammunition available to critics of the emerging carceral state. As Vesla Weaver has shown in the case of Philadelphia, there was potential for grassroots movements to resist punishment-first approaches to crime. Even within the neoliberal logic that dominated

⁵ Elmer Eric Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (Holt, Rinehart and Winston, 1960).

⁶ Schattschneider.

⁷ Vesla Weaver, "The Missed Opportunity of Robert Woodson," The Marshall Project, February 25, 2015, https://www.themarshallproject.org/2015/02/25/the-missed-opportunity-of-robert-woodson.

punishment debates, there was a countervailing impulse⁸: the logic of cost-saving and the suspicions of bureaucracy that animated so much of the rest of conservatives' approach to domestic policy. As conservatives are recognizing today, the carceral form of neoliberal discipline was very expensive and very inefficient.⁹

Institutional arrangements, however, conspired with the pitched environment of the 1980s to tamp down this tension. In an environment of high crime and racialized anxiety about crime, politicians had many incentives to demonstrate they were cracking down. Fragmentation made it easy to follow those incentives while obscuring the most unpopular consequences of the anti-crime agenda, pressure on state and local budgets. Cost-shifting allowed prosecutors and legislators to keep filling prisons without worrying about the bill. Blame-shifting allowed them to point fingers at each other or at governors and other county officials when cost did occasionally become visible to the public. Not until crises made the overcrowding problem unavoidable, and re-framed it as a direct threat to the public rather than a matter of prisoners' well-being, were politicians willing to confront it directly. In the process, their trepidations about the spending required were greatly reduced.

The ideological environment that gave politicians incentives to emphasize punishment and de-emphasize cost was not merely an exogenous influence on the criminal-justice system. Prosecutors actively stoked that environment with their campaign rhetoric. And they drew upon that environment to make claims of professional jurisdiction that helped them to expand their powers at the expense of competing actors in

⁸ One manifestation of this logic was the application of rational-actor theories to crime. James Wilson, *Thinking About Crime*, revised edition (New York: Basic Books, 2013).

⁹ Dagan and Teles, *Prison Break: Why Conservatives Turned Against Mass Incarceration*.

the system. If the 20th century was marked by a progression from arms-length alliances between administrators and professionals to the growth of a "proministrative" state in which the professions were embedded, the conversion of elected prosecutors into professionals represents yet a further step.¹⁰

Argument and Evidence

In short, the ideational and structural factors already identified in the mass incarceration literature — notably rising crime and backlash to civil rights — were necessary but not sufficient to produce the distinctive policy response of mass incarceration. Also necessary was a fragmented, non-Weberian institutional environment that allowed a punitive, undisciplined ideology of law enforcement to flourish. Combining these factors together generates sufficient conditions for the rise of mass incarceration.

I have made three primary arguments about how fragmentation contributed to the rise of mass incarceration. First, fragmentation allowed local district attorneys to become high-profile, elected officials who were relatively independent of other justice actors.

This development was already under way early in the 20th century, but it accelerated in the post-war era with the breakdown of the extra-constitutional mediating structure provided by party machines. The federal system amplified concerns about crime as district attorneys and legislators transmitted ideas developed in local criminal-justice politics to higher levels of government. Second, fragmentation structured policy choices and policy

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¹⁰ Brian Balogh, *The Associational State: American Governance in the Twentieth Century* (Philadelphia: University of Pennsylvania Press, 2015).

feedback in ways that made it easier for politicians to ignore inconvenient factors, notably cost. Third, these effects were reinforced by the professionalization of prosecutors and their success in claiming leadership of the justice system and influence with lawmakers. These claims are broken into their component parts and matched to key findings from the empirical study in the chart below.

Major claim	Supporting claims	Confirming evidence	Disconfirming evidence
I. Localism favored punitive forces			
	D.A. elections in crime context will emphasize punishment	Specter 1965 (law-and-order ad); Rendell 1977 (partial); Rendell 1981 (mandatory minimums, etc.); Castille 1985 (partial). [Ch. 3]	Rendell runs against Dem mayor and police brutality in 1977, Castille against Dem control 1985. Mayoral campaigns also highlight crime (esp. Rizzo). [Ch. 3]
	Prosecutors raise profile v. party	Rendell runs against Dem corruption (1977); attacks but also helps appoint Dem judges; major P.R. push. [Ch. 3]	
	Urban elections hinge on white swing vote; black vote "captured"	Machine recruits Rizzo; Rizzo's racial appeals; Rizzo polarizes city; 80s Democrats seek racial "balance" among candidates. [Ch. 3]	_
	Local officials push crime to state/national agendas	Thornburgh elected governor; D.A.'s push guidelines, mandatory minimums, etc. [Ch. 4] Congress drives federal drug panic (e.g., "They want it radical"). [Ch. 2]	Reagan drawn to aggressive crime rhetoric externally, admin officials take law-and-order view of drugs internally, without local or congressional influence. [Ch. 2]

Major claim	Supporting claims	Confirming evidence	Disconfirming evidence
II. Fragmentation enabled carceral state-building			
	Prosecutors and legislators shift costs	Indifference to pressure on prisons, resisting de-crowding measures. [Ch. 4]	Legislators from hard-hit counties raise issue, but seek state funding; isolated attention to crowding problem otherwise. [Ch. 4]
	Politicians shift blame to avoid facing cost	Detaching cost estimates from bills; blaming governor (e.g., Clarence Bell); acknowledging lack of incentive to curb punishment (e.g., Bortner). [Ch. 4]	Some efforts to pass marginal "earned-time" reform; limited construction advocated by governors. [Ch. 4]
	Crisis transforms calculus	Crisis politicized (e.g., Castille, Preate); Casey responds rapidly with visible program, legislature approves. [Ch. 4]	_

Major claim	Supporting claims	Confirming evidence	Disconfirming evidence
III. Prosecutor professionalization entrenches punitive approach			
	D.A.'s professionalize to ward off jurisdictional threats	Rapid professionalization and attempts to coopt after Kefauver, other critics call for centralization. Further efforts after 1970s reforms that are also viewed as threatening. [Ch. 5]	Later development incentivized by LEAA. [Ch. 5]
	D.A.'s develop punitive ideology claiming CJ leadership	Internal statements consistent with campaign-style rhetoric; claims of expertise in "law enforcement administration;" knowledge creation; dismissing alternate frameworks. [Ch. 5]	
	D.A.'s build pro-punishment coalition with legislators	Associations formed at state level; lobbying activity; evidence of clout in Pennsylvania, Texas, Missouri; NDAA has friendly relations with Reagan administration, key members of Congress (e.g., Kennedy). [Ch. 4, 5]	

Implications

The emergence of mass incarceration was less top-down and Washington-led than the literature often assumes. We can think of the electoral politics and ideological support for more incarceration as the "demand" side of punishment and the implementation of arrests, convictions, and incarceration as the "supply" side. The federal role was probably larger in creating the demand for punishment than the supply of punishment. But even here, the process appears to have been iterative, with the local and national levels reinforcing one another rather than the national level simply filtering down ideas. Future studies might use discourse analysis or policy-agenda measures such as those developed by the Policy Agendas Project to track the relationship between subnational and national punishment "demand."

This study also suggests concrete mechanisms by which higher "demand" for punishment led to higher "supply." First, cost-shifting and blame-shifting allowed the problem of prison overcrowding to fester until politicians saw no solution but to build hundreds of new prisons. Second, harsh rhetoric from politicians empowered hawks within the criminal-justice system. The chapter on professional organizing showed that prosecutors echoed and reinforced other politicians' rhetoric about crime to shore up their power within the criminal-justice system. The chapter on the Reagan administration suggested that harsh rhetoric helped the hawks in the bureaucracy to cast a wide net, notwithstanding their public commitment to pursue only the most serious cases. Thus, Rudolph Giuliani wrote in a published article that street-level dealing was beyond the resources of federal law enforcement, but U.S. Attorneys were told that "even relatively

small-scale trafficking" in priority drugs "should be treated as a serious matter." Future research should look more closely at this phenomenon of enforcement slippage, perhaps by examining the gradual broadening of the "career criminal" concept.

This dissertation also suggests that scholars should peer more deeply inside the criminal-justice system itself to understand the rise of mass incarceration. There is much more to know about how prosecutors operationalized their ideas and changed enforcement practices on the ground. Also open for investigation is how prisons evolved to accommodate a "new normal" of overcrowding, which persisted in many states even after massive construction programs. The failure of judges or the defense bar to seriously resist the expansion of plea bargaining, the rise of sentencing guidelines, and other practices that tended to shift power to prosecutors also merit further attention.

My findings reinforce the argument made by Michael Campbell and Heather Schoenfeld that mass incarceration did not arise in a continuous political trend and that it must be viewed as a development that occurred in distinct periods. The findings confirm the distinction Campbell and Schoenfeld make between a period of "contestation" in which the punitive turn was not yet consolidated and a period of "reconstruction," beginning roughly in 1992, that marked a full embrace of mass incarceration.² A crucial pivot point between these periods was the decision by a range of states to commit to massive building programs. The precise paths states took to these decisions varied, but crisis was a common theme.³ Future studies might explore how well the logic of cost-

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¹ D. Lowell Jensen, "Consideration of Drug Trafficking in District Law Enforcement Plans."

² Campbell and Schoenfeld, "The Transformation of America's Penal Order."

³ In Florida, as Schoenfeld shows, the choice was a response to pressure from prison-conditions litigation. Schoenfeld, *Building the Prison State*.

shifting and liability-shifting outlined here explains the paths taken by other states. If indeed this logic drove the politics of crime control in most states, then institutional fragmentation should be understood as a significant causal variable in the path to mass incarceration.

In the last decade, we have entered a new period in the politics of mass incarceration that might fairly be termed "re-evaluation." On the left, there is much grassroots energy for repudiating prisons, and substantial elite commitment to retrenchment. A robust retrenchment movement has also emerged on the right, driven mostly by elite actors. The combination of much lower crime rates, lower partisan competition in states where Republicans consolidated their control in the 2000s, redoubled anti-statism, and evangelical activism helped bring about this change among conservatives. Since 2016, we have seen the emergence of a third strain, which casts the punitive turn of the 1990s as a major success that must be defended. This positive "re-evaluation" of mass incarceration was made possible by the rise of Donald Trump, who is combining anti-immigrant and law-and-order rhetoric in newly powerful ways. Its second major standard-bearer, of course, has been former Attorney General Jeff Sessions. But even Trump has been persuaded to commit to limited criminal-justice reforms, indicating the strength of the retrenchment movement.

The question is what politicians and activists on the left and the right should do to seize this opportunity. Fortunately, the cause of changing prosecutorial politics has been gaining ground. Reformist prosecutors have been elected in a number of major cities, including Philadelphia. New organizations have emerged that aim to help prosecutors

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⁴ Dagan and Teles, *Prison Break: Why Conservatives Turned Against Mass Incarceration*.

limit their reliance on incarceration. Legislative reforms have included reductions in penalties on the books, cash infusions for programs such as drug courts and in-prison drug treatment, and efforts to end the use of bail in local incarceration. To date, however, there has been little attention paid to the question of changing the basic institutional wiring of the criminal-justice system.⁵ As this study has stressed, authority over criminal justice is scrambled among the local, state, and federal levels, and even within jurisdictions, agencies may report to different political principals. Observers of the system have noted for generations that this splintering of political authority frustrates coordination and consistent division of responsibilities, especially under conditions of high public anxiety and attention to crime. 6 Scholars have recently engaged in some debate over how centralization or decentralization might affect criminal-justice outcomes. But the level of *centralization* may be less important than the level of coherence. One could imagine a justice system that is highly localized but that unifies authority over policing, prosecutors, and prisons under a single office, forcing trade-offs within the system to be reconciled in a hierarchical fashion and making those trade-offs more visible to voters. Reformers and scholars must keep pushing for an answer to the problem that has bedeviled American criminal justice since before the rise of mass incarceration — how splintered institutions can be overhauled to deliver on a vision of

⁵ For one exception, see "Justice Reinvestment," Ideas for an Open Society (Open Society Institute, November 2003), https://osf.to/2DQuil0.

⁶ Ronald F. Wright, "The Wickersham Commission and Local Control of Criminal Prosecution," *Marquette Law Review* 96, no. 4 (Summer 2013): 1199–1219. U.S. Senate, Special Committee to Investigate Organized Crime in Interstate Commerce, "Third Interim Report." National Advisory Commission on Criminal Justice Standards and Goals, *Strategy to Reduce Crime*.

⁷ William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, Mass: Belknap Press, 2011). Miller, *The Perils of Federalism*. Lacey and Soskice, "Crime, Punishment and Segregation in the United States."

justice that meets the demands of a modern, democratic polity.

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Curriculum Vitae

David Dagan was born in Bonn, Germany, in 1981. He attended Bonn American High School and Bonn International School, where he graduated with the International Baccalaureate in 1999. He graduated from Brandeis University in 2002 with a B.A. in Politics, including a minor in Economics, and he received an M.A. in Politics from Brandeis in 2003. He is the author, with Steven Teles, of *Prison Break: Why Conservatives Turned Against Mass Incarceration* (Oxford University Press, 2016). His areas of teaching and research include American political development, constitutional law, criminal justice, and comparative politics.