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Criminal Punishment and the Politics of Place

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CRIMINAL PUNISHMENT AND THE POLITICS OF PLACE

*John F. Pfaff**

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INTRODUCTION

As a general matter, our criminal justice system focuses on the person: *who* committed the crime and what punishment does *that person* deserve? Most of the reforms that have been proposed or passed over the past nine or ten years have primarily focused on the *who* as well, seeking to change the rules under which parole boards operate, or the ways in which we train or oversee police officers, or how we address implicit racial biases in judges.¹

Yet *where* plays a significant role in crime and punishment as well. In fact, in the end, *where* likely matters more than *who*. For instance, crime is densely concentrated. Most reported crimes in any city take place in only a small fraction of city blocks, with neighborhoods often maintaining their high- or low-crime status even as the population within these neighborhoods changes.² As one scholar points out, it is easier to predict *where* a crime will happen in a city than *who* in that

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1. See, e.g., Destiny Peery, *Implicit Bias Training for Police May Help, but It's Not Enough*, HUFFINGTON POST: THE BLOG (Mar. 14, 2016, 9:29 PM), https://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo_b_9464564.html [<https://perma.cc/V8NQ-NXZ9>].

2. See generally, e.g., David Weisburd, *Place-Based Policing*, 9 IDEAS IN AM. POLICING 1 (2008) [hereinafter Weisburd, *Place-Based Policing*]; David Weisburd et al., *Trajectories of Crime at Places: A Longitudinal Study of Street Segments in the City of Seattle*, 42 CRIMINOLOGY 283 (2004).

city will commit it.³ Furthermore, racial disparities in offending are the product of place, produced in no small part by how government policies have shaped where people live. Decades of government policies, such as explicitly segregating public housing,⁴ explicitly and implicitly tolerating or encouraging redlining,⁵ and denying the GI Bill⁶ and FHA mortgages (and thus the ability to invest in higher-quality housing) to Black Americans,⁷ all worked to concentrate disadvantage and social instability in poor, predominantly minority neighborhoods.⁸ The cumulative effects of these policies are still felt today.⁹

If the story of crime is largely one of place, then the story of punishment is as well. A significant share of crimes occurs in proximity to where those who commit them live, so the geographic concentration of crime concentrates punishment as well. Some studies talk of “million dollar blocks,” which are single city blocks that have so many residents behind bars that at any given time the state is allegedly spending at least \$1 million per year to incarcerate these people.¹⁰ As a result, the costs (as well as the benefits) of

3. Weisburd, *Place-Based Policing*, *supra* note 2.

4. See J.A. Stoloff, U.S. Dep’t of Hous. & Urban Dev., Office of Policy Dev. & Research, A Brief History of Public Housing 6 (Jan. 2004) (unpublished manuscript) (on file with the Fordham Urban Law Journal) (noting that the Civil Rights Act of 1964 ended segregation of public spaces, including public housing).

5. See FED. RESERVE, CONSUMER COMPLIANCE HANDBOOK, FEDERAL FAIR LENDING REGULATIONS AND STATUTES: FAIR HOUSING ACT (Jan. 2006), https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf [<https://perma.cc/3TAB-BTSF>] (“The term refers to the presumed practice of mortgage lenders of drawing red lines around portions of a map to indicate areas or neighborhoods in which they do not want to make loans.”).

6. See IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 113, 123–28 (2005).

7. See Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, 7 RACE & SOC. PROBS. 21, 25 (2015).

8. See generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

9. See John Eligon & Robert Gebeloff, *Affluent and Black, and Still Trapped by Segregation*, N.Y. TIMES (Aug. 20, 2016), <https://www.nytimes.com/2016/08/21/us/milwaukee-segregation-wealthy-black-families.html> [<https://nyti.ms/2k2FCNb>].

10. See, e.g., *‘Million-Dollar Blocks’ Map Incarceration’s Costs*, NPR: ALL THINGS CONSIDERED (Oct. 2, 2012), <http://www.npr.org/2012/10/02/162149431/million-dollar-blocks-map-incarcerations-costs> [<https://perma.cc/Z4KD-TNMM>]. I say “allegedly” because the dollar value is computed by multiplying the average annual cost of locking someone up in prison by the number of people from that block locked up that year. But a large fraction of state prison costs is fixed, with nearly two-thirds of spending going to wages and other benefits for correctional officers and

punishment have an impact on place that extends beyond the individuals incarcerated. A simple but striking example: in one study of a high-incarceration neighborhood in Washington, D.C., scholar Donald Braman reported that so many men were behind bars that it disrupted family formation in that area.¹¹ Healthy family formation requires a male-female ratio of approximately 50-50, but in some areas, that ratio fell to about 60 men for every 100 women.¹² Since most people form relationships with those they live close to, this is a clear geographic cost of punishment.

This Essay explores another connection between punishment and place: how geography shapes the *politics* of punishment. To understand why actors in the criminal justice system act the way they do, it is essential to understand their incentives, and that requires us to carefully examine not just *who* these people are but *where* they are. What are the boundaries that define the constituents to whom these actors respond and thus their incentives and goals?

When we take a closer look at the geography of criminal justice, we soon see that what we call the “criminal justice system” is not in any way a system. It is, at best, a web of systems (plural), each of which faces different pressures and politics due in part to different geographies. Police are generally city employees who respond to a police chief who is appointed by a city-elected mayor. Prosecutors are almost always elected by county electorates, parole boards are appointed by state-elected governors, and sentencing laws are written by legislators who are nominally state officials but respond to constituencies that could span several towns (in rural areas) or barely

other staff. See CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015, at 9 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy_downloads/the-price-of-prisons-2015-state-spending-trends.pdf [<https://perma.cc/5RVW-4YE5>]. As a result, the *marginal* cost of locking up one more person is quite less than the average, often on the order of one-third to one-seventh as large. See John Pfaff (@JohnFPfaff), TWITTER (Mar. 21, 2016, 6:30 AM), <https://twitter.com/JohnFPfaff/status/711907958368694272> [<https://perma.cc/28F4-JALX>].

11. See *generally* DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2003).

12. Focusing on the male-female ratio is not meant to dismiss same-sex couples or the impact that incarceration can have on same-sex couple family formation. According to the Census, however, only about one percent of all couples identified as same-sex in 2015, so the primary impact of incarceration on family formation has been felt by heterosexual couples. See U.S. CENSUS BUREAU, CHARACTERISTICS OF SAME-SEX COUPLE HOUSEHOLDS, 2015 DATA TABLE, <https://www.census.gov/data/tables/time-series/demo/same-sex-couples/ssc-house-characteristics.html> [<https://perma.cc/4DHZ-43G8>].

one neighborhood (in dense cities).¹³ Judges can be state or county officials, who are either elected or appointed, depending on the state.¹⁴ Neighborhoods have different goals than their cities, cities than the counties in which they are located, and counties than the states they make up.

Sometimes the jurisdictional lines we draw may make sense, but quite often they appear to be haphazard, if not completely arbitrary. Why, for instance, do we choose prosecutors along county lines? As we will see, many actors in the criminal justice system face troubling or perverse incentives, in no small part because of the constituents to whom they respond (or the people to whom they don't respond).¹⁵

To examine the role of place in the politics of punishment, this Essay considers two examples: (1) the decision to elect prosecutors at the county level, and (2) the impact of locating prisons in rural communities. Both push us towards greater punitiveness and away from often-sensible reforms in subtle but important ways that have started to garner attention among scholars and activists but are still under-appreciated. One weakness of current reform efforts is that they rarely target these underlying geographic (and other structural) issues that led to mass incarceration in the first place. Many of the same pressures that caused us to over-react to rising crime in the 1970s and 1980s and under-react to falling crime since the 1990s remain; unless reforms confront these structural issues, it may not take much of a rise in crime to see many reforms undone.

I. COUNTY PROSECUTORS, CITY CRIME

Perhaps the single most important actor in the criminal justice system today is the prosecutor.¹⁶ Unfortunately, there is a geographic disconnect that distorts the incentives many of them face in deeply problematic ways. As a general matter, prosecutors are elected by

13. See Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

14. See, e.g., *Methods of Judicial Selection: Selection of Judges*, NAT'L CTR. FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state [<https://perma.cc/2MPS-2QRF>].

15. See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

16. See generally *id.*; John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237 (2012) [hereinafter Pfaff, *The Micro and Macro Causes of Prison Growth*]. See also German Lopez, *If You Care About Ending Mass Incarceration, Look at What Philadelphia Just Did*, VOX (Nov. 8, 2017, 10:30 AM), <https://www.vox.com/policy-and-politics/2017/11/8/16622438/larry-krasner-philadelphia-election-prosecutor> [<https://perma.cc/57G2-5XYE>].

county electorates, but the communities with the most voting power are rarely those whose members are most likely to face prosecution.¹⁷ As we will see, this separates the costs and benefits of aggressive enforcement in ways that can lead prosecutors to both under-enforce and over-enforce criminal laws.

It is hard to understate the power of prosecutors. Granted nearly-unfettered and nearly-unreviewable discretion, prosecutors determine almost every aspect of a defendant's case: they decide whether to press charges or drop the case, whether to divert the case to some sort of alternative court or push through for a conviction, whether to charge the defendant with a felony or a misdemeanor, whether to file a charge that carries a mandatory minimum sentence, whether to seek jail or prison time as part of the plea bargaining process, and so on.¹⁸ Moreover, prosecutors' offices are better funded and staffed than government-provided counsel who represent the 80% of defendants who face prison or jail time and qualify as indigent. This funding disparity further increases prosecutors' advantage.¹⁹

As a result, prosecutors played a central role in pushing up prison admissions and populations, especially over the course of the 1990s and 2000s, as the crime rate fell steadily and the rate of serious crime fell steeply.²⁰ Between 1994 and 2008, total arrests fell by about 10% while the number of felony cases filed in state court rose by around 40%; fewer people were entering the system, but more people were entering prison.²¹ That increase in filings, a decision wholly within the purview of the prosecutor, drove prison growth; the other two plausible sources of prison growth, namely the probability that a felony case resulted in an admission to prison and the time spent in prison if admitted, both remained stable over this time.²² At least

17. See PFAFF, *supra* note 15, at 7.

18. See John F. Pfaff, *Prosecutorial Guidelines*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 101, 104 (Erik Luna ed., 2017).

19. See *id.* at 106.

20. For more detail, see generally Pfaff, *The Micro and Macro Causes of Prison Growth*, *supra* note 16.

21. See PFAFF, *supra* note 15, at 72. The dates reflect the years for which data was available.

22. Even if we accept the findings by the Pew Charitable Trusts—that time served between 1990 and 2009 for property and drug crimes rose by about six months, and for violent crimes by less than 1.5 years—those increases are still not enough to explain all that much of the rise in prison populations over the 1990s and 2000s. See PEW CHARITABLE TRS., PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 3 (2012), http://www.pewtrusts.org/~media/assets/2012/06/06/time_served_report.pdf [https://perma.cc/88K8-R5JH]; PFAFF, *supra* note 15, at 58–59.

during the period of crime decline, rising incarceration rates were propelled most significantly by prosecutorial charging decisions.²³

Prosecutors have also driven prison growth in other less immediately-obvious but no less important ways. For example, some critics of the view that prosecutors are central to prison growth have argued that legislatures and the judiciary bear a big part of the blame instead, but this claim ignores the fact that district attorneys shape these institutions as well.²⁴ District Attorney associations are effective advocates for harsh new laws and are generally against efforts at reform.²⁵ And many judges are former prosecutors—far more than are former defense attorneys—who likely bring with them a prosecutorial mindset, even if just subconsciously.²⁶

By almost all accounts, their aggressive emphasis on incarceration was unnecessary, if not actually counterproductive.²⁷ And, as we will see, geography played an important role in driving this prosecutorial overreach. But first, it is also useful to look at a far less appreciated story of problematic prosecutorial leniency that further highlights the importance of place. As William Stuntz points out, over the 1960s, as

23. See Pfaff, *The Micro and Macro Causes of Prison Growth*, *supra* note 16, at 1252.

24. See Jeffrey Bellin, *The Limits of Prosecutorial Power*, THE MARSHALL PROJECT (May 2, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/05/02/the-limits-of-prosecutorial-power> [<https://perma.cc/G9VZ-KU64>].

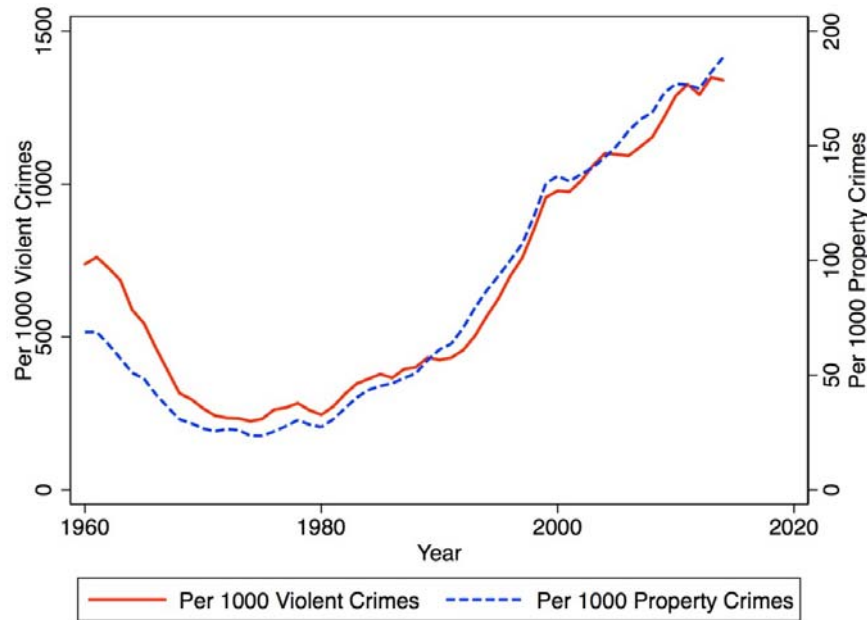
25. The California Correctional Peace Officers Association has been particularly effective at arguing for and defending tough-on-crime policies; recent reform efforts in Louisiana, while admirable, were weakened almost solely due to prosecutorial concerns; reform efforts in Wyoming, on the verge of success, were scuttled when a leading prosecutor weighed in in opposition; and so on. See, e.g., Andrew Graham, *Who Killed Criminal Justice Reform?*, WYOFIL (Sept. 26, 2017), <http://www.wyofile.com/killed-criminal-justice-reform/> [<https://perma.cc/M5HG-93V9>]; Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, THE NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/> [<https://perma.cc/B8CH-B3XR>].

26. See, e.g., Casey Tolan, *Why Public Defenders Are Less Likely to Become Judges—And Why That Matters*, SPLINTER NEWS (Mar. 18, 2016, 2:43 PM), <https://splinternews.com/why-public-defenders-are-less-likely-to-become-judges-a-1793855687> [<https://perma.cc/FG35-2NWQ>].

27. See, e.g., DAVID ROODMAN, OPEN PHILANTHROPY PROJECT, THE IMPACTS OF INCARCERATION ON CRIME 7 (2017), http://files.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf [<https://perma.cc/9SAY-ZR89>]; Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275, 277 (2012); Michael Mueller-Smith, *The Criminal and Market Impacts of Incarceration*, at 3 (Aug. 18, 2015) (unpublished manuscript) (on file with the University of Michigan, Department of Economics), <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf> [<https://perma.cc/XFP6-CYB9>].

crime appeared to start rising sharply,²⁸ incarceration stayed flat, and at times *declined*.²⁹ Figure 1, which plots the incarceration rate not in terms of per 100,000 people (as it usually is shown) but in terms of per 1000 reported violent and property crimes, illustrates this clearly. Prosecutors (as well as police and other law enforcement officials) appear to have *under*-responded to rising crime in the 1960s and 1970s just as much as they *over*-responded to falling crime in the 1990s and 2000s.

Figure 1. “Effective” Incarceration Rate³⁰



28. I say “appeared” because there is an intriguing discrepancy in our crime statistics. Over the 1970s and 1980s, serious violent crime rose according to the Uniform Crime Reports (“UCR”), but generally fell according to the National Crime Victimization Survey (“NCVS”). The two studies measure crime in very different ways—the UCR measures crimes reported to local police departments, while the NCVS surveys thousands of people nationwide about their victimization experiences—but are trying to describe the same outcome. Some have argued that the NCVS was a better measure in the 1960s and 1970s, but the explanations often turn on hard-to-validate and highly contestable assumptions. See, e.g., Janet L. Lauritsen et al., *When Choice of Data Matters: Analyses of U.S. Crime Trends, 1973–2012*, 32 J. QUANTITATIVE CRIMINOLOGY 335, 336 (2016).

29. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 28 (2011).

30. U.S. BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICAL ANALYSIS TOOL, <https://www.bjs.gov/index.cfm?ty=daa> [<https://perma.cc/PMG7-FREK>] (data on file with author).

Both of these mis-reactions are troubling. The over-reaction in the 1990s and 2000s sent thousands of people to prison with little benefit to public safety—and might have even made things worse.³¹ And the under-reaction in the 1960s and 1970s not only led to excessive victimization, especially among poorer and more-minority populations, but it also surely contributed to the tough-on-crime backlash against seemingly-weak criminal justice policies that helped drive punitive practices in the 1980s and well into the years after.³²

Geography helps us understand both of these mis-reactions, because both are tied to how prosecutors are elected. The United States is the only country in the world that elects its prosecutors, and in forty-seven states these prosecutors are elected at either the county or (in a few states) the cluster-of-a-few-counties level.³³ The decision to elect at the county level may seem to be an innocuous decision about voting district size, but it is one that has likely played a major role in driving, or at least sustaining, punitive practices in the United States.

The problem with electing prosecutors at the county level arises from the geographic concentration of crime. To start, crime is much more frequent in cities than in suburbs. A Brookings Institute study, for example, reported that in 2008, cities had a violent crime rate of 2129 per 100,000 people, compared to a rate half that, or 1062 per 100,000 people, in those cities' suburbs; for murder, the most high-profile crime, the relative gap was even larger, at 12 per 100,000 people for cities and 3 per 100,000 people for suburbs.³⁴ Even within cities, crime is often highly localized, with some studies reporting that half of all reported crime occurs in fewer than 10% of all city blocks, and almost all reported crime in at most half.³⁵ For instance, in 2015, nearly half the increase in murders in Chicago took place in just five

31. Whatever impact prison had on crime in the past, as it stands now, it is likely that the marginal contribution of an inmate is close to zero, if not zero or negative. See Johnson & Raphael, *supra* note 27, at 275–310; Mueller-Smith, *supra* note 27.

32. See STUNTZ, *supra* note 29, at 251–52.

33. Ellis, *supra* note 13, at 1530. The only states that do not elect prosecutors at the county level are Alaska, Connecticut, and New Jersey. George Coppolo, *States That Elect Their Chief Prosecutors*, CONN. GEN. ASSEMBLY (Feb. 24, 2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm> [<https://perma.cc/G4CA-9MNX>].

34. Elizabeth Kneebone & Steven Raphael, *City and Suburban Crime Trends in Metropolitan America*, BROOKINGS INST. (May 2011), <https://gspp.berkeley.edu/assets/uploads/research/pdf/p66.pdf> [<https://perma.cc/MR5L-GZRQ>].

35. Weisburd, *Place-Based Policing*, *supra* note 2, at 5.

neighborhoods, which were home to under 10% of the city's population.³⁶

As a result of this concentration of crime, the costs (as well as the benefits) of enforcement are also concentrated. Crime imposes serious costs,³⁷ but so too does enforcement. We often focus on the fiscal costs of enforcement—the approximately \$100 billion spent on policing, the approximately \$50 billion spent on state prisons, and the approximately \$30 billion spent on county jails—but there are far more costs that come from exposure to prison and punishment.³⁸ Prison is a serious vector of sexually transmitted diseases and diseases like tuberculosis; a study in New York suggested that in the short run, each year spent in prison shortens life expectancy by two years; the risk of death from a drug overdose rises precipitously upon release from prison.³⁹ Prison disrupts existing families, and it impedes marriage and family formation.⁴⁰ It leads to significant declines in already-low incomes for those who go to prison, and it imposes often-exorbitant costs on incarcerated persons' families (such as collect calls that have been known to cost more than \$1 per minute).⁴¹ No one

36. MAX KAPUSTIN ET AL., UNIV. CHI. CRIME LAB, GUN VIOLENCE IN CHICAGO, 2016, at 17 (2017), <https://urbanlabs.uchicago.edu/attachments/store/2435a5d4658e2ca19f4f225b810ce0dbdb9231cbdb8d702e784087469ee3/UChicagoCrimeLab+Gun+Violence+in+Chicago+2016.pdf> [<https://perma.cc/NY4Y-3GJW>]. Those five neighborhoods ended up explaining 10% of the *national* increase in homicides between 2015 and 2016. John F. Pfaff (@JohnFPfaff), TWITTER (Sept. 25, 2017, 6:13 AM), <https://twitter.com/JohnFPfaff/status/912304075961708544> [<https://perma.cc/2SNZ-2JSX>].

37. A tool developed by RAND Corporation suggests that the total cost of reported serious crime in 2016 was on the order of \$324 billion dollars, with almost \$150 billion just from homicide. *Cost of Crime Calculator*, RAND CORP. (using *2016 Crime in the United States*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> [<https://perma.cc/36ZW-26NS>]), <https://www.rand.org/jie/justice-policy/centers/quality-policing/cost-of-crime.html> [<https://perma.cc/RVG8-WVZR>]. However, more than half of all violent crimes and nearly two-thirds of all property crimes go unreported, so an estimate based on reported crime will be off by more than a factor of two. See John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RES. CTR. (Mar. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/> [<https://perma.cc/B5DV-494H>]. Any estimate of crime is noisy and rests on a host of methodological choices and assumptions, but the magnitude of the estimate is still an informative ballpark figure, though one whose uncertainty must always be kept in mind.

38. See TRACEY KYCKELHAHN, U.S. BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2012–PRELIMINARY (2015), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239> [<https://perma.cc/6QXJ-264K>].

39. See PFAFF, *supra* note 15, at 118–23.

40. *Id.* at 121.

41. *Id.*

has attempted to rigorously aggregate these costs, but they are no doubt vast.

In short, the costs of crime and punishment are densely—and disproportionately—concentrated in cities (and within cities). Voters, however, are distributed much differently. Most Americans live in suburban or rural areas, not in cities, with a plurality in the suburbs.⁴² Conventional studies of urbanization compare urban counties (such as Cook County, Illinois, the home of Chicago) to adjacent suburban counties (such as DeKalb County, Illinois), and find that there are about two suburbanites for every urbanite.⁴³ Since the focus of this Essay is on prosecutors, who are elected *within* counties, what matters is the urban/suburban split within those urban counties. There is far less comprehensive data on this division, but in general, it suggests that the suburbs make up a significant share of urban county populations. There are 472,000 people in Atlanta but over 1 million in Fulton County; only 250,000 people in Buffalo but nearly 1 million in Erie County; 377,000 in Tampa but 1.3 million in Hillsborough County; Los Angeles the city has a population of almost 4 million, but the county has over 10 million; and so forth.⁴⁴

Not only do suburbs often have higher population counts, but they seem likely to vote at higher rates as well, at least in urban areas. Data from the Census Bureau indicate that turnout is higher among voters who are white, older, and wealthier, all of which tend to describe residents of many near-urban suburbs.⁴⁵ Criminal justice policies play a role here as well. Not only do forty-eight states

42. Jed Kolko, *How Suburban Are Big American Cities?*, FIVETHIRTYEIGHT (May 21, 2015, 6:39 AM), <https://fivethirtyeight.com/features/how-suburban-are-big-american-cities/> [<https://perma.cc/9ZP7-W7YH>].

43. *Id.*

44. *See generally* U.S. CENSUS BUREAU, <https://www.census.gov/en.html> [<https://perma.cc/YSW3-MSZH>]. Population data for Milwaukee, Minneapolis and Madison City from the U.S. Census Bureau, *Public Data*, GOOGLE, https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&idim=place:5553000:5548000:2743000&hl=en&dl=en [<https://perma.cc/G7JZ-ZYKR>]. There are, of course, certainly plenty of exceptions: Milwaukee the city, for example, has 595,000 people, which is more than half of Milwaukee the county's 958,000 people. *Id.*

45. Celia Llopis-Jepsen, *Shawnee County Voter Turnout Varies Widely, Low-Income Communities Have the Least Say*, TOPEKA CAPITAL-J. (Jan. 21, 2017, 5:30 PM), <http://cjonline.com/news/state-government/2017-01-21/shawnee-county-voter-turnout-varies-widely-low-income-communities> [<https://perma.cc/9E65-M3QA>]. *See generally* THOM FILE, U.S. CENSUS BUREAU, WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978–2014 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf> [<https://perma.cc/3JPM-5UD7>].

prevent those in prison from voting (an issue we will turn to again below), but over thirty deny the vote to those on probation or parole, and twelve restrict or ban voting even after parole has expired.⁴⁶ Given that minorities are over-represented in the criminal justice system(s), they will be over-represented among those whose votes are restricted.⁴⁷ And even when not formally excluded from voting, areas with more minority voters often face larger practical hurdles for voting, and these hurdles have only grown worse in places where protections under the Voting Rights Act were weakened following the Supreme Court's decision in *Shelby County v. Holder*.⁴⁸

The story within cities is somewhat more complicated, but still shares important parallels with the broader urban/suburban one. On the one hand, we should see the suburban story replicated to some extent, albeit perhaps to a lesser degree. Crime is not only concentrated within cities as compared to suburbs, but even within neighborhoods in those cities.⁴⁹ The safer neighborhoods will be wealthier and whiter, and more likely to have higher voter turnout rates.⁵⁰ Like their suburban counterparts, these safer urbanites will view crime and punishment more as abstractions than lived experiences. On the other hand, urban residents tend to be more liberal than those in the suburbs, and they are more likely to have at least some contact with people exposed to the criminal justice system, which may—*may*—make them more sensitive to the costs of enforcement.

46. *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (Apr. 28, 2014), <http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/> [<https://perma.cc/9Q2B-FE22>].

47. The impact of felony disenfranchisement laws is unclear. Some have argued it plays an important role, especially in close elections. See, e.g., Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 778 (2002). Thomas J. Miles, however, has suggested that this effect could be overstated. Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 85 (2004).

48. 570 U.S. 2 (2013). For the impact of *Shelby County*, see *Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUSTICE (Sept. 28, 2016), <https://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers> [<https://perma.cc/Q2M4-89QR>]. See generally Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, THE ATLANTIC (Jan. 10, 2014), <https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/> [<https://perma.cc/D9K9-8FT2>].

49. See David A. Graham, *Red State, Blue City: The United States Is Coming to Resemble Two Countries, One Rural and One Urban. What Happens When They Go to War?*, THE ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/> [<https://perma.cc/XE8M-638F>].

50. See *id.*

Taken together, these competing distributions of crime and punishment on the one hand, and voting power on the other, strongly suggest that those with the most political power when it comes to electing the prosecutor will be those least exposed to the costs of that prosecutor's enforcement decisions. This account can help explain the two trends we noted at the start of this section. When crime started to rise in the 1960s, suburbanites were relatively indifferent, since they were not really experiencing the harms—and as Figure 1 indicates, prosecutorial behavior appears to have reflected that. After the urban riots in the 1960s and 1970s, suburbanites and white urbanites began to fear crime more, and likely began to fear urban social disorder more generally—less because of the direct physical threat it posed to them and more because it stoked racial fears and resentments.⁵¹ And so suburban voters cracked down.⁵² But the demand for prosecutorial punitiveness did not stop when the crime rate started to fall, since those with political power appreciated the sense of safety (and perhaps benefited from it as they moved back to city), but they still did not bear the costs of excessive or inefficient punishment.⁵³

In other words, prosecutorial reactions to crime are not driven (entirely) by the crime rate, but rather by how that crime rate shapes the attitudes of those voters *least* exposed to it. Right now, those attitudes appear to lead to excessive punitiveness, but in the past they also appear to have contributed to excessive indifference. Both cases highlight the problem of separating the costs and benefits of a program from those who decide what the program should look like. Furthermore, while there exists very little research on this issue, this geographic split between political power and the experience of crime and punishment may explain some other irregularities we see in criminal justice outcomes. For example, some critics of current policies argue that our priorities are often misplaced, pointing out that we made over 1.5 million arrests for drug offenses and over 1 million arrests for various vice crimes, even while more than one-third of all murders resulted in no arrest (and, if past data are any indication, perhaps as many as two-thirds of all murders of Black

51. For a discussion on the impact of urban riots in places such as Detroit and their impact on white America's views on criminal justice, see STUNTZ, *supra* note 29, at 35.

52. *See id.*

53. To be clear, I am not proposing geography as some sort of mono-causal theory here. Other factors surely explain toughness and leniency. Geography, however, is a key factor that either helped drive the trends or at least enabled the other forces shaping them to push things more dramatically.

men).⁵⁴ Some of the emphasis on drug and vice crimes may be justifiable—some argue that low-level arrests are important ways to gather information to clear serious crimes like homicide and rape⁵⁵—but the geographic story I describe above suggests that at least some of the focus on drugs and vice is excessive. I suspect that this discrepancy exists because those in safer urban and suburban neighborhoods can envision drug and vice crimes as ones which might affect them or their families. Their children are unlikely to be killed, but they could be exposed to drugs. So they have an incentive to push law enforcement and prosecutors to target crimes such as drug trafficking.

The policy recommendation that immediately flows from this is that we should not elect prosecutors at the county level, but at a more local level. At the very least, perhaps we should have two elected offices in urban counties: one for the city and another for the non-city parts. So rather than a Cook County office or an Erie County office, we would have a Chicago office and non-Chicago Cook County office, or a Buffalo Office and a non-Buffalo Erie County office. It may not be necessary for every ring suburb to have its own separate prosecutor's office—there are surely some efficiencies of scale we should take into account—but an urban-suburban split deserves far more attention than it gets.

To be clear, such a split does not automatically mean that city prosecutors would immediately become less punitive (although given that more-progressive prosecutors won numerous elections in 2016, that would likely be the case at this particular moment in time).⁵⁶ In

54. *2016 Crime in the United States: Estimated Number of Arrests*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-18> [<https://perma.cc/GGR3-VW3Y>]; *2016 Crime in the United States: Clearances*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances> [<https://perma.cc/NX7L-ANL4>]. For the clearance rates for Black male victims, see generally, JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015).

55. See, e.g., Peter Moskos (@PeterMoskos), TWITTER (Sept. 27, 2017, 11:19 AM), <https://twitter.com/PeterMoskos/status/913105759453552652> [<https://perma.cc/7UZ4-JWA7>]; @deputybarksdale, TWITTER (Sept. 27, 2017, 12:01 PM), <https://twitter.com/deputybarksdale/status/913116354722582528> [<https://perma.cc/38LX-VHM3>] (Twitter conversation between the author and former law enforcement officers who offer anecdotal support for this assertion).

56. See, e.g., Robert J. Smith & Whitney Tymas, *Election Night Saw Victories in Local Criminal-Justice Reform—This Should Be the Beginning*, THE NATION (Nov. 12, 2016), <https://www.thenation.com/article/election-night-saw-victories-in-local-criminal-justice-reform-this-should-be-the-beginning> [<https://perma.cc/CUZ4-Q5N3>] (describing how progressive candidates won local prosecutor races in November 2016).

fact, they could end up being harsher in many cases—but that could be a good thing. We want prosecutors to respond to changing conditions, including cracking down as crime rises, something we *did not* see happen in the 1960s and early 1970s. Ideally, however, more-local prosecutors would respond to these increases in smarter ways than they did in the past, and in ways that better reflect the policy preferences of urban constituents. I also expect that they would be more likely to rein in their punitiveness faster were crime rates to decline.

A slightly more modest approach—one that does not require any jurisdictional shakeups and has already been implemented to at least some degree in several counties—is “community prosecution,” which emphasizes the need for district attorneys’ offices to take local community concerns into account.⁵⁷ Jurisdictions that embrace this idea establish satellite offices in neighborhoods throughout the county so that assistant prosecutors have better contact with those communities and thus respond more readily to their shifting concerns.⁵⁸ The elected prosecutor at the top is still chosen by an electorate over-represented by suburbanites, but the more-local offices are likely an improvement over traditional, more-centralized approaches.⁵⁹

There is a growing appreciation for the power of prosecutors and their impact on incarceration rates and on punishment rates more broadly—and thus a growing awareness that reforms need to focus on regulating their behavior. A key part of understanding *who* prosecutors are and *what* they do, however, is understanding *where* they are, and what that means about the incentives that they face.

Before moving on, a brief but important point: while I have focused here on the views of those least affected by crime and punishment—since they have the largest political voice—I do not want to silence those who are most affected but have the weaker say

57. See, e.g., JOHN S. GOLDKAMP ET AL., BUREAU OF JUSTICE ASSISTANCE, COMMUNITY PROSECUTION STRATEGIES: MEASURING IMPACT 1 (2002), <https://www.ncjrs.gov/pdffiles1/bja/192826.pdf> [<https://perma.cc/5X6P-FAC6>].

58. *Id.* at 5–6.

59. There are few empirical assessments of community prosecution. One of the few argues that it seems to effectively reduce some crimes with little to no downside. See Thomas J. Miles, *Does the “Community Prosecution” Strategy Reduce Crime? A Test of Chicago’s Experience*, 16 AM. L. & ECON. REV. 117, 117 (2013). Note, though, that the only metric of success that Miles looks at is “reduced crime.” While this metric is important, there are surely other margins that concern us as well. If community prosecution has no clear impact on crime but improves the public’s view of the criminal justice system or makes people feel more acknowledged by a major government agency, then community prosecution may still be quite justifiable.

in elections. It is easy to tell a story in which the criminal justice system consists of white suburban and urban voters imposing a repressive regime on Black citizens who lack any political clout to resist. And there is certainly some validity to this claim. Yet the views of those who live in poorer, higher-crime communities are complex and deserve our attention. Several recent studies, for example, have shown that Black elites in these communities have often pushed for tough-on-crime laws when crime rates are rising, since it is their communities that have borne the brunt of those harms.⁶⁰ The attitudes of those in high-crime areas, however, are frequently far more pragmatic than those who live elsewhere: tougher when crime goes up, but less tough as crime goes down, with a greater emphasis on what actually works rather than what is symbolically satisfying.⁶¹ Any full accounting of the politics of punishment thus needs to also account for both the political resistance and support that arises in black communities.

II. PRISONS AND THE CENSUS

Another way in which geography shapes the politics of punishment is through the physical location of prisons. Not surprisingly, the surge in prisoners in the United States led to a simultaneous boom in prison construction, and between 1970 and 2010, state and federal agencies

60. See generally JAMES FORMAN JR., *LOCKING UP OUR OWN* (2017); MICHAEL J. FORTNER, *BLACK SILENT MAJORITY* (2015). But see Vesla M. Weaver, *The Untold Story of Mass Incarceration*, BOS. REV. (Oct. 24, 2017), <http://bostonreview.net/race-law-justice/vesla-m-weaver-untold-story-mass-incarceration> [<https://perma.cc/LFR3-7HVP>].

61. On racial differences in pragmatic versus expressive views of punishment, see generally Steven F. Cohn et al., *Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict*, 38 SOC. PROBS. 287 (1991). A 2016 survey of crime victims by the Alliance for Safety and Justice revealed this more pragmatic take clearly. The report demonstrated that victims tend to hold views that are *less* punitive than the public as a whole, and less punitive than what our policies look like. The reason for this quickly becomes clear. The survey's sample is disproportionately young and minority—because crime victims tend to be young and minority. Given both their greater exposure to the harms of overly-aggressive enforcement and their greater understanding of blurry lines between “offender” and “victim” (people fall into both categories far more often than our simple narratives suggest), they are less likely to emphasize punitive responses to crime and more likely to favor “restorative justice” approaches that aim to reintegrate the people guilty of the crime while still taking accountability for the harms they caused. See ALL. FOR SAFETY & JUSTICE, *CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE* 4–5 (2016), <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [<https://perma.cc/YV5T-BC3W>].

built over 1100 new prisons.⁶² These prisons had to be sited somewhere, and in the end they were frequently located away from urban centers; nearly 70% of prisons are now in non-metropolitan towns.⁶³

This geographic choice has certainly not gone unnoticed, although most of the scholarship has focused on the impact of prisons on the economic health of these rural communities.⁶⁴ There has also been some analysis of the impact of rural prison siting on prisoners and their families, given that crimes (and thus prisoners) are disproportionately concentrated in urban areas. In the New York State system, for example, about 45% of all people sent to prison in 2016 were from New York City⁶⁵—yet over half the state’s maximum security prisons are at least 200 miles away from New York City, and there have been no state prisons located in New York City itself since the Arthur Kill facility on Staten Island was closed in 2011.⁶⁶ In 2004 (the last year with data), about two-thirds of all prisoners nationwide were housed more than 101 miles away from home, with over 10% more than 500 miles away.⁶⁷ Such distance imposes real emotional costs on inmates and their families: it impedes visits, it forces families to rely more on expensive collect calls, and it creates other significant financial costs, such as the resources needed to go visit loved ones in far-flung prisons (bus fare, hotel rooms, lost wages, etc.).⁶⁸ There is

62. John M. Eason, *Prisons as Panacea or Pariah? The Countervailing Consequences of the Prison Boom on the Political Economy of Rural Towns*, 6 SOC. SCI. 7, 7–8 (2017) (surveying prison boom in rural communities).

63. *Id.*

64. *Id.* The general finding in this literature is that the impact of prisons is slight at best, if not moderately harmful, although Eason’s work suggests that these results may be too pessimistic once we account for selection bias; the towns that seek out prisons are ones that are already suffering more than others, and so prisons may not make things improve, but they could slow or stop the decline already underway. *Id.*

65. *2012–2016 Dispositions of Adult Arrests*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/index.htm> [<https://perma.cc/G2XQ-DAS3>].

66. Post Staff Report, *SI’s Arthur Kill Correctional Facility Closed, Six Others Shuttered*, N.Y. POST (Jan. 3, 2012, 2:26 PM), <http://nypost.com/2012/01/03/sis-arthur-kill-correctional-facility-closed-six-others-shuttered> [<https://perma.cc/K4CR-TPLM>]; *Facilities Overview*, N.Y.C. DEP’T OF CORR., <http://www1.nyc.gov/site/doc/about/facilities.page> [<https://perma.cc/GZ4Q-J7HP>] (providing an overview of state penal facilities in New York City, with none having been constructed since the Arthur Kill facility closed).

67. See Bernadette Rabuy & Daniel Koph, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POL’Y INITIATIVE (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html> [<https://perma.cc/7EHW-SP92>].

68. See generally Meghan M. Mitchell et al., *The Effect of Prison Visitation on Reentry Success: A Meta-Analysis*, 47 J. CRIM. JUST. 74 (2016).

also some mixed evidence that making visits more difficult weakens family ties in ways that lead to a greater risk of recidivism upon release.⁶⁹

In this Essay, however, I want to examine how the decisions about where to locate prisons shape the *politics* of punishment in general and of prison reform more specifically. In particular, it is important to understand how prison siting and Census Bureau policies interact to create a powerful group opposed to reducing prison populations: rural legislators. Legislators with prisons in their districts already have an incentive to resist closures because of the perceived economic benefits; the Census issue only strengthens that resistance, in important but often underappreciated ways.

The key issue is this: for the purposes of Census enumeration, where does a prisoner “reside”? Does he live in the prison? Or does he live at his last known address prior to incarceration? The Census relies on the “usual residence” rule—where the person “lives and sleeps most of the time”—which for incarcerated people that means the facilities in which they are serving their time.⁷⁰ And forty-six states (all but California, Delaware, Maryland and New York) choose to follow the Census rule: incarcerated people “live” in their prisons.⁷¹ As a result, having prisons filled to capacity may not just be an issue of economic gain for rural legislators, but one of political survival.

There are two intertwined effects at play. The first, and most obvious, is one of apportionment. When states are drawing the lines for local, state, and federal election districts, they are required to ensure that all districts have roughly the same number of people.⁷² Counting prisoners as “residing” in their prison cells (even though many state codes and constitutions explicitly state that prison cells

69. The effect is not as clear as a quick look at the data suggests; it is hard to separate the extent to which family visits reduce the risk of re-arrest or readmission from the fact that those least likely to recidivate in the first place probably have stronger family ties and thus more visits. *Id.*

70. RESIDENCE RULE AND RESIDENCE SITUATIONS FOR THE 2010 CENSUS, U.S. CENSUS BUREAU, https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html [<https://perma.cc/4QLM-AQWL>].

71. Note that in California and Delaware the move away from the Census rule does not take effect until after the 2020 Census. *See Prison Gerrymandering Project, PRISON POL’Y INITIATIVE*, <https://www.prisonersofthecensus.org> [<https://perma.cc/N7EX-AZ4G>].

72. *See, e.g., Brown v. Thompson*, 462 U.S. 835, 842–44 (1983).

cannot be considered “residences”⁷³) shifts representation from more-urban areas (where crime is concentrated) to more-rural ones (where prisons are often located).

In more-local elections, this sort of “prison gerrymandering” can have outsized effects. In perhaps the most infamous case, one municipal district in Anamosa, Iowa, consisted of 58 real, voting residents, compared to nearly 1400 in all other districts, because the rest of its population was incarcerated in the local jail (and therefore unable to vote); that district’s representative won his election with exactly two votes.⁷⁴ In Wyoming, two state senate districts were redrawn to shift a state prison from one district to the other to ensure that two incumbents did not have to challenge each other in the wake of redistricting.⁷⁵ More broadly, in Pennsylvania eight districts drawn subsequent to the 2000 Census would not have met equal-vote requirements were it not for their prisons,⁷⁶ and when New York State abolished prison gerrymandering, Republican legislators successfully pushed to add a seat to the senate—an effort to offset their expected losses from the resulting redistricting that favored more-liberal New York City.⁷⁷

As touched upon earlier, there is a second, even more pernicious impact from counting prisoners as “residing” where they are incarcerated. In all but two of the forty-six states that “prison gerrymander” (the exceptions being Maine and Vermont), people incarcerated in prisons cannot vote while behind bars.⁷⁸ This turns a

73. See Peter Wagner et al., *Fixing Prison-Based Gerrymandering After the 2010 Census: A 50 State Guide*, PRISON POL’Y INITIATIVE (Mar. 2010), <https://www.prisonersofthecensus.org/50states> [<https://perma.cc/32Q8-BWAY>].

74. Anamosa has since fixed this problem. See *Prison-Based Gerrymandering in Iowa*, PRISON POL’Y INITIATIVE (Dec. 8, 2010), <https://www.prisonersofthecensus.org/factsheets/ia/iowa.pdf> [<https://perma.cc/L5NF-V5YK>].

75. See Peter Wagner, *Intentional Prison-Based Gerrymandering Found in Wyoming*, PRISON POL’Y INITIATIVE (Mar. 4, 2012), <https://www.prisonersofthecensus.org/news/2012/03/04/wyoming> [<https://perma.cc/8UWY-RTUM>].

76. See *Fixing Prison-Based Gerrymandering After the 2010 Census: Pennsylvania*, PRISON POL’Y INITIATIVE (Mar. 2010), <https://www.prisonersofthecensus.org/50states/PA.html> [<https://perma.cc/VS6W-KKGT>].

77. See Sasha Chavkin & Michael Keller, *GOP Wants New Senate Seat*, N.Y. WORLD (Jan. 12, 2012), http://www.qchron.com/editions/queenswide/gop-wants-new-senate-seat/article_8ce4df3c-7eb3-5b21-8ce2-b53fc1bbe2ae.html [<https://perma.cc/2YW8-ACHJ>].

78. See LALEH ISPAHANI & TRICIA FORBES, AM. CIV. LIBERTIES UNION & RIGHT TO VOTE, VOTING WHILE INCARCERATED: A TOOL KIT FOR ADVOCATES SEEKING TO REGISTER, AND FACILITATE VOTING BY, ELIGIBLE PEOPLE IN JAIL, at iii (2005),

geographic distortion into a partisan one. In 2015, approximately 35% of prisoners were Black and 22% were Hispanic; only 34% were white (with approximately 9% other races).⁷⁹ Both Black and Hispanic individuals are disproportionately likely to vote for Democratic candidates: one study by the Pew Research Center in 2014 reported that 80% of Black citizens and 56% of Hispanic citizens identified as Democrats and Democratic-leaning.⁸⁰ Yet rural counties—where prisons tend to be located—are generally conservative and have grown increasingly so.⁸¹

In other words, prisons shift Democratic-leaning voters to more-Republican districts where they count for representation but cannot vote. Even if those who engage in criminal behavior are less likely to vote in the first place (perhaps because of age, poverty, or other personal traits),⁸² shifting their residency to more-rural areas weakens the political power of the communities from which they come, which (like the prisoners themselves) are disproportionately Democratic-leaning.⁸³

To drive the point home bluntly: prison gerrymandering is, in a very real way, an even-worse *Five-Fifths Compromise*.⁸⁴

https://www.aclu.org/files/pdfs/votingrights/votingwhileincarc_20051123.pdf
[<https://perma.cc/PJ6L-JXVW>].

79. See E. Ann Carson & Elizabeth Anderson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2015*, BULL. NO. NCJ 250229, Dec. 2016, at 13 tbl.8, <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/SG49-FJTN>].

“Hispanic,” of course, is not a race, but an ethnicity. Here, “white” refers to “white, non-Hispanic” and Black to “black, non-Hispanic.” Thus “Hispanic” includes both Blacks and whites.

80. See *A Deep Dive into Party Affiliation: Sharp Difference by Race, Gender, Generation, Education*, PEW RESEARCH CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation> [<https://perma.cc/MWV7-WAT2>]. Furthermore, even though whites tend to lean Republican, poorer whites have generally been less likely to be Republican than richer whites. See generally Razib Khan, *The Upper Class Is More Republican*, DISCOVER MAG.: BLOG (Mar. 25, 2012, 3:31 PM), <http://blogs.discovermagazine.com/gnxp/2012/03/the-upper-class-is-more-republican/> [<https://perma.cc/Y7M7-K95R>]. To the extent that prisoners, including white inmates, come from poorer communities, the white voters in prison are likely disproportionately Democratic compared to whites outside of prison.

81. See Lazaro Gamio, *Urban and Rural America Are Becoming Increasingly Polarized*, WASH. POST (Nov. 17, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/urban-rural-vote-swing> [<https://perma.cc/Q9UM-Y2CW>].

82. See, e.g., Miles, *supra* note 47, at 115 (suggesting that disenfranchisement laws have little electoral effect because of the seeming pre-disenfranchisement voting behavior of the disenfranchised).

83. See, e.g., Graham, *supra* note 49.

84. The Three-Fifths Compromise in the U.S. Constitution counted slaves in slave-owning states as three-fifths of a person for enumeration purposes. Leah Sakala, *Prison-Based Gerrymandering's Striking Resemblance to the Infamous*

The impact of prison gerrymandering on prison reform is clear: it creates a strong constituency that is opposed to reform because their very jobs depend on keeping the prisons near them full. Politicians in prison districts care about the economic benefits of prisons, but that is an issue more of staffing than of prisoners: a half-empty prison with a full staff of guards is just as economically beneficial as that prison with the same number of guards, but more prisoners.⁸⁵ The way the Census data is used for district apportionment, however, forces those politicians to care about the number of prisoners, and thus makes them resistant to all but the most tepid of reforms.

Eliminating prison gerrymandering will be tricky. Look back at the four states that have replaced it: California, Delaware, Maryland, and New York. A common trait is that all four are solidly Democratic states; in fact, when each passed its law reversing prison gerrymandering, the Democrats controlled both chambers of the legislature and the governor's mansion.⁸⁶ Such a "trifecta" is likely

Three-Fifths Clause, PRISON POL'Y INITIATIVE (Sept. 9, 2011), <https://www.prisonersofthecensus.org/news/2011/09/09/three-fifths/> [<https://perma.cc/5B2U-4UFW>]. Today, like slaves then, prisoners cannot vote, but they count as a full (five-fifths) person for purposes of representation, moving even more political "weight" to areas where they are detained without political voice.

85. States are often quite adept at cutting prison populations while keeping facilities open and guards employed. *See, e.g.*, Ken Stier, *NYS Prison Budget Climbs, Despite Fewer Inmates*, CITY LIMITS (Nov. 10, 2015), <https://citylimits.org/2015/11/10/nys-prison-budget-climbs-despite-fewer-inmates/> [<https://perma.cc/7TPG-DC6G>]; *see also* PFAFF, *supra* note 15, at 98–104.

86. *See California State Assembly Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/California_State_Assembly_elections,_2010 [<https://perma.cc/D44U-VQF4>] (California passed its law in 2011); *California State Senate Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/California_State_Senate_elections,_2010 [<https://perma.cc/CA3J-6ENG>] (California's governor at the time was Democrat Jerry Brown); *Delaware House of Representatives Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/Delaware_House_of_Representatives_elections,_2010 [<https://perma.cc/5NUR-X9QE>] (Delaware passed its law in 2010); *Delaware State Senate Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/Delaware_State_Senate_elections,_2010 [<https://perma.cc/7MQH-8XBB>] (Delaware's governor at the time was Democrat Jack Markell); *Maryland House of Delegates Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/Maryland_House_of_Delegates_elections,_2010 [<https://perma.cc/DM4J-6XZT>] (Maryland passed its law in 2010); *Maryland State Senate Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/Maryland_State_Senate_elections,_2010 [<https://perma.cc/SAD2-7CBK>] (Maryland's governor at the time was Democrat Martin O'Malley); *New York State Assembly Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/New_York_State_Assembly_elections,_2010 [<https://perma.cc/Q427-A6UF>] (New York passed its law in 2010); *New York State Senate Elections, 2010*, BALLOTPEDIA (2010), https://ballotpedia.org/New_York_State_Senate_elections,_2010 [<https://perma.cc/FRY4-FVZ8>] (New York's governor was Democrat Andrew Cuomo, and 2010 was one year before the creation of the Independent Democratic Caucus, a breakaway group of eight Democratic Senators who caucus

essential for any law to repeal prison gerrymandering, given the explicitly Republican-leaning partisan impact of counting people from cities as non-voting rural residents.

That political reality suggests that state-level reforms of prison gerrymandering will be rare these days. As of 2017, only six states have Democratic trifectas, and two of those are California and Delaware.⁸⁷ It only takes one Republican institution to block a reform bill, especially if the legislature cannot override a veto. There was a push in 2016 to get the U.S. Census Bureau to reform its policy and count prisoners as “residing” where they had lived prior to their incarceration,⁸⁸ but as of now Census has not acted on the proposal, and given the general chaos engulfing that agency right now, any sort of action would be surprising, even before accounting for likely partisan resistance.⁸⁹ But had the Census Bureau decided to change the rule (and to be clear, its preferred position entering discussions was to keep counting prisoners as residing in prisons), it is likely that few, if any, states or local communities would have taken steps to re-gerrymander their counts. This is one area where the federal government could have had a major, almost instantaneous impact on criminal justice policy. That, however, seems unlikely to happen right now.

Yet there is some potential for reform, at least at the local level. Even if the federal and state governments refuse to change their districting laws, local governments remain free to avoid gerrymandering for local seats—and hundreds of counties and cities

with the Republican Party and thus give the Republicans control of the senate despite having a minority of the members).

87. The remaining four are Connecticut, Hawaii, Oregon, and Rhode Island. For a list of states with trifectas, see *State Government Trifectas*, BALLOTPEdia, https://ballotpedia.org/State_government_trifectas [https://perma.cc/2397-CF7H].

88. See *A Sample of the Comment Letters Submitted in 2016 to the Census Bureau Calling for an End to Prison Gerrymandering*, PRISON POL’Y INITIATIVE, <https://www.prisonersofthecensus.org/letters/FRN2016.html> [https://perma.cc/URL7-6QJM].

89. The Director of the U.S. Census Bureau unexpectedly resigned in May of 2017, and Trump’s first budget was seen as substantially underfunding the Census Bureau as it prepares for the 2020 Census. See Tara Bahrapour, *U.S. Census Director Resigns Amid Turmoil Over Funding of 2020 Count*, WASH. POST (May 9, 2017), https://www.washingtonpost.com/local/social-issues/us-census-director-resigns-amid-turmoil-over-funding-of-2020-count/2017/05/09/8f8657c6-34ea-11e7-b412-62beef8121f7_story.html?utm_term=.67a85ebb3314 [https://perma.cc/MDJ7-CH45]; Clare Foran, *Why Did the U.S. Census Director Resign?*, THE ATLANTIC (May 10, 2017), <https://www.theatlantic.com/politics/archive/2017/05/census-director-resigns-2020-funding-concern/526107/> [https://perma.cc/UZ7V-VQE5].

have done just that.⁹⁰ And the fact is that gerrymandering will have its biggest impact at the smaller, more-local levels. A New York State Assembly district has nearly 130,000 people in it, and a state senate seat almost 315,000.⁹¹ The largest prisons in New York hold approximately 2000 to 3000 prisoners each day,⁹² so the overall impact is not that large (although, eliminating prison gerrymandering statewide likely resulted in shifting partisan control of at least one Senate seat overall). For elections in prison towns, however, 2000 to 3000 inmates would have a far bigger impact—though, of course, those municipal representatives are not setting major criminal-justice policies.⁹³

CONCLUSION

The criminal justice system is not a single coherent “system,” but rather a somewhat—or sometimes extremely—chaotic collection of agencies, each responding to a unique set of incentives.⁹⁴ And these incentives are, quite frequently, strongly shaped by who the constituents are, which is determined by *where* the constituents are.⁹⁵ The two examples above highlight the need to account for place, and how thinking about *where* these agencies are helps us better understand *what* they are going to do, and thus what sorts of reforms we may need to enact.⁹⁶ These are, of course, not the only examples of place’s role in shaping punishment: one effort to abolish plea bargaining famously failed because the city police refused to make the changes that the county prosecutors asked of them,⁹⁷ and the slow

90. *Local Governments that Avoid Prison-Based Gerrymandering*, PRISON POL’Y INITIATIVE (Nov. 19, 2016), <https://www.prisonersofthecensus.org/local/> [https://perma.cc/YC9A-SQHW].

91. *2010 Census Population for NYS Legislative Districts and Congress*, CTR. FOR URBAN RESEARCH (2017), <https://www.gc.cuny.edu/Page-Elements/Academics-Research-Centers-Initiatives/Centers-and-Institutes/Center-for-Urban-Research/CUR-research-initiatives/2010-Census-population-for-NYS-legislative-district/> [https://perma.cc/D25U-264T].

92. *See, e.g.*, Don Melvin, *History of Tough Inmates*, CNN (June 8, 2015), <http://www.cnn.com/2015/06/08/us/new-york-clinton-correctional-facility/index.html> [https://perma.cc/ZF6W-CVW9].

93. The local official with the most power to shape criminal justice outcomes—the prosecutor—is unaffected by gerrymandering. His constituency is determined by the physical borders of the county, not by the number of people in it or where they are classified as living.

94. *See* discussion *supra* Introduction.

95. *Id.*

96. *Id.*

97. When Harry Connick, Sr., the district attorney for Orleans Parish, LA (yes, Harry Connick, Jr.’s father) attempted to abolish plea bargaining, the New Orleans

decline in prison populations we have seen since 2010 has not been the result of *states* decarcerating, but of urban counties in those states decarcerating even as rural counties in the same states continued to become more punitive.⁹⁸ The examples here, however, do demonstrate the importance of thinking carefully about where criminal justice actors are when deciding what reforms to adopt.

(city) Police Department refused to change its procedures in the way he wished. Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2059 (2006).

98. This suggests not just that divisions *within* counties explain prosecutorial behavior, but differences *across* counties as well. Josh Keller & Adam Pearce, *This Small Indiana County Sends More People to Prison than San Francisco and Durham, N.C. Combined. Why?*, N.Y. TIMES: THE UPSHOT (Sept. 2, 2016), <https://www.nytimes.com/2016/09/02/upshot/new-geography-of-prisons.html> [https://nyti.ms/2jQTP2O].