

DAVID A. SKLANSKY

CRIMINAL

JUSTICE

IN

DIVIDED

AMERICA

**POLICE, PUNISHMENT,
AND THE
FUTURE OF OUR DEMOCRACY**

CRIMINAL JUSTICE IN DIVIDED AMERICA

How a broken criminal justice system has fueled the crisis of American democracy, and how we can address both problems together.

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FUTURE OF OUR DEMOCRACY

DAVID A. SKLANSKY

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For Deborah

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CRIMINAL JUSTICE IN DIVIDED AMERICA

INTRODUCTION

SHORTLY BEFORE MIDNIGHT on August 25, 2020, a white teenager named Kyle Rittenhouse shot three young white men in Kenosha, Wisconsin, killing two of them. At the time, Kenosha was the site of widespread protests, looting, and arson, sparked by the fatal police shooting of a Black man. Rittenhouse, who lived in a neighboring community, had come to Kenosha after seeing calls on social media for “armed citizens” to defend “lives and property.” He claimed that his three victims had attacked him, and a jury ultimately acquitted him of criminal responsibility for the shootings.

The Rittenhouse case received intense, nationwide attention, and from start to finish Americans’ reactions were starkly divided. Conservatives called Rittenhouse a hero. Liberals called him a violent white supremacist. Outside the courthouse during the trial, dueling crowds of protesters yelled “Kyle is a murderer!” and “Self-defense is a human right!” Right-wing commentators were outraged by the first-degree homicide charges against Rittenhouse; activists on the left were outraged by his acquittal. Following the verdict, President Donald Trump congratulated Rittenhouse on being found innocent and derided the Kenosha County district

attorney's "prosecutorial misconduct." Gavin Newsom, the Democratic governor of California, said the verdict sent a message "to armed vigilantes across the nation" that they could "shoot and kill people, and get away with it." Here is how the *New York Times* summarized responses to Rittenhouse's acquittal: "Republican Celebrations and Democratic Anger Reveal a Widening Political Divide."¹

The polarized reactions to the Rittenhouse case underscored how difficult it is for Americans to achieve anything remotely resembling consensus on questions of criminal justice. The riots in Kenosha in August 2020 were themselves a reflection of intense national divisions about police accountability and racial equity in law enforcement. If half the country lionized Kyle Rittenhouse and the other half demonized him, what chance was there for agreement on these fundamental questions about policing—or on equally fundamental questions about when and how people should be prosecuted for crimes, how they should be sentenced if convicted, and what prisons should look like? What prospects can there be for achieving justice—and for having it recognized as justice—in times as divided as ours?

These questions became even more acute during Donald Trump's campaign to regain the presidency in 2024. Trump doubled down on the politics of law and order, while in the midst of his campaign he was the subject of four criminal indictments, and then was found guilty of felony falsification of business records—the first time a former president had ever been convicted of a crime. As with the Rittenhouse verdict, reactions to Trump's conviction in Manhattan courtroom were sharply split. Democrats saw the New York verdict as confirming Trump's unfitness for office; Republicans called the trial itself fraudulent. When the Republican candidate for Senate in Maryland, the state's former governor Larry Hogan, released a bland statement calling for "all Americans to respect the verdict and the legal process," he was pilloried by Trump's supporters.²

Given the yawning chasm across which Americans increasingly debate questions of policing, prosecution, criminal trials, and punishment, it is

easy to believe that to make progress on these issues—or on any other pressing national problem—we must first heal our divisions. But this book will offer a different answer: that it is not only possible but imperative to find consensus on matters of criminal justice; that our polarized views on this subject are not just a consequence but also a principal cause of our divided and poisonous politics; and that the task of making the criminal legal system fairer and more effective is essential to the larger challenge of repairing American democracy.

Two Crises

American criminal justice is in crisis. It doesn't do nearly enough to prevent crime, and it doesn't deliver nearly enough justice. The system has four major components—policing, prosecution, adjudication, and punishment—and each of them is off the rails.

Let's start with the police. Public confidence in law enforcement is at historic lows. Every year, police officers in the United States kill roughly a thousand people; the victims are disproportionately Black, Latino, and Native American. A good number of Americans have given up entirely on reforming police departments and want to abolish them, or at least to slash their funding. The police themselves are alienated and demoralized; many departments are shrinking through retirements and resignations. Meanwhile, homicide rates in the United States shot up during the coronavirus pandemic, and although those rates subsequently returned to pre-COVID levels, that means they remained at levels much higher than in Western Europe, the United Kingdom, Canada, and Australia.³

The other components of American criminal justice do not look much better. American prosecutors enjoy vast powers and face minimal oversight, while most criminal defendants, too poor to hire their own lawyers, rely on public defenders who are scandalously underfunded. One consequence is that wrongful convictions are distressingly common, often resulting from coerced confessions or suppressed evidence. And the central fact about criminal adjudication in America is that jury trials

are rare and getting rarer; most convictions, including many wrongful convictions, are obtained through plea bargains. Moreover, the sentences that prosecutors can threaten are so onerous that even innocent defendants can be pressured to plead guilty.⁴

As for punishment, American prisons and jails are costly, overcrowded, and notoriously violent. Although the percentage of the American population in prisons and jails has fallen slightly over the past decade, it is still higher than in virtually any other nation. Close to two million people in the United States are behind bars. Pardons, sentence commutations, and grants of humanitarian release are handed out haphazardly and remain out of reach for most prisoners. When they do leave prison, most people receive little help reentering society, and often are soon rearrested.⁵

At every point in the criminal process, race and class skew results. Poor people and people of color are more likely to be arrested, more likely to be shot by the police, more likely to be convicted and to receive lengthy sentences, more likely to serve time in prisons that are squalid and inhumane, and less likely to be released early. People who have attended college are more than twenty times less likely to be sent to prison than people who haven't, regardless of their race. The incarceration rate for Black Americans, meanwhile, is five times the rate for whites. No one has much good to say about policing, prosecution, and punishment in the United States, but people of color are especially cynical about the system.⁶

One response to the crisis of American criminal justice—the response of many knowledgeable and thoughtful people of goodwill—is that we should abolish, or at least dramatically shrink, police departments and prisons, returning responsibility for public safety to communities themselves, especially to the marginalized communities that bear the greatest impact of the criminal justice system. There is much to be said for the abolitionist agenda, both as critique and as utopian aspiration. Ultimately, though, this book will argue against abolitionism, in part because it doesn't take enough account of our current political moment.

For if American criminal justice is in crisis, so is American democracy. Political polarization and economic inequality are at their highest levels

in decades. Trust in government has plummeted. Rather than accept defeat in the 2020 presidential election, the angry incumbent stoked claims of fraud, and urged his followers to descend on the Capitol and protest the certification of the results. Congress could not agree on a bipartisan inquiry into the storming of their own legislative chambers. Years after the election, a growing majority of the ex-president's party believed his opponent's win was illegitimate. Americans increasingly live in two separate realities, unable to agree on basic facts, let alone on values or goals. Voting rights are under assault. Debates about history are being squelched. By the fall of 2023, a survey found that a quarter of all Americans believed political violence might be needed to save the country.⁷

The crisis of American democracy has two interrelated components. The first part is the worldwide rise of authoritarian forms of populism: right-wing political movements that champion the rights and interests of a restricted, morally defined segment of the population—the “people”—against corrupt outsiders and “elites.” When political scientists talk about “populism,” this is usually what they mean: not just egalitarianism, but a form of politics centered on defending the true “people” against their perceived enemies. Once in power, populists of this kind—which, for the sake of clarity, I will sometimes describe as “authoritarian” populists—often try to dismantle constitutional safeguards and to delegitimize and silence political opponents, all in the name of defending the rights of the people. Populism of this kind is on the march around the globe but no political figure has done more to rally the movement than Donald Trump—before, during, and after his presidency of the United States from 2017 to 2021.

As this book was being finished, Trump was once again the Republican Party's standard bearer, and it was unclear whether he would return to the White House. A second Trump presidency, if it happens, will pose new and acute threats to American democracy, many of them largely separate from the problems of criminal justice addressed in this book. Those threats will have a backstory, though, and the backstory has a lot to do with criminal justice. It will be important to understand the backstory, regardless of whether Trump regains the presidency.

Authoritarian populism—the kind of populism exemplified by Donald Trump—draws strength from and in turn amplifies social fragmentation and political polarization. This is the second part of the crisis of American democracy: the rising tendency to view political opponents as illegitimate outsiders, existential threats to the survival of the true people. Across the political spectrum, there has been a dramatic rise in what political scientists call *affective polarization*, the tendency to view co-partisans in positive terms and members of the opposing party negatively. This helps to explain why political polarization has been growing, even as a growing percentage of Americans do not report membership in either major political party. Conservatives may not identify as Republicans, but they *hate* Democrats, and liberals who do not see themselves as Democrats nonetheless abhor Republicans.⁸

The rise in affective polarization, particularly the negative kind, is linked with another new aspect of partisanship in the United States: the emergence of political affiliation as the dominant, overarching form of social identity—subsuming and increasingly overriding more traditional ties of race, religion, and class. In America it is increasingly unusual to have a different political affiliation than one's parents, or to marry a member of the opposite political party. Political scientists have called this new form of polarization *political sectarianism*; it focuses “less on triumphs of ideas than on dominating the abhorrent supporters of the opposing party.” The dominant political emotion is loathing. This is not just an American phenomenon; it can be found in Europe and the United Kingdom, as well. But it is especially pronounced in the United States.⁹

Two centuries ago, Alexis de Tocqueville wrote admiringly of the constant hubbub of political argument in the United States, the spirited debates in which Americans found much of their daily happiness. Today, most ordinary Americans work hard to avoid face-to-face discussions of politics with members of the opposite political camp, and the exchanges that do occur, primarily on social media, are rarely experienced as enjoyable. Americans live increasingly in fear of and repugnance for each other.¹⁰

The crises of American criminal justice and American democracy are usually discussed separately, but they are deeply linked. Plummeting confidence in the police is part of a broader loss of faith in American institutions, a more general mistrust that extends to Congress, government agencies, big business, and the news media. But the connections go further than that. It's hard to think of an area of domestic policy other than criminal justice where American democracy has failed as spectacularly over the past several decades, or with worse consequences. When the Great Society collapsed in 1968 and the nation began its long journey toward right-wing populism, no issue fueled conservative discontent more than the failure of government to provide "law and order." Throughout the closing decades of the twentieth century, Democrats competed with Republicans to propose the harshest anti-crime policies, and the eventual results were the disasters of mass incarceration and hypermilitarized policing. Those developments, in turn, led in the summer of 2020—during a pandemic, no less—to the most widespread protests and civil disturbances the country had seen in decades. They led, as well, to the wholesale discrediting of what had been an extraordinarily promising program of police reform—the community policing movement. Bridges that had taken a quarter-century to build between police departments and minority neighborhoods suddenly collapsed. The level of trust in law enforcement is lower now than it has been for decades. But calls to defund or abolish the police also leave many Americans bewildered, angered, and feeling personally under threat.

Failures of American criminal justice played a major role in precipitating the current crisis in American democracy, fueling both populism and political polarization. By the same token, this book will argue, reforming policing, prosecution, adjudication, and punishment in the United States can help repair our democracy. But for criminal justice reform to serve that purpose, or even just to succeed on its own terms, it needs to take account of the daunting challenges of our current political moment and their origins.

The two grave threats to American democracy today—polarization and populism—have complicated roots. Political polarization is connected

with other ways in which American society has splintered over recent decades. Culturally and economically as well as politically, Americans have lost much of their sense of common purpose since the middle of the twentieth century, along with their perception that their fortunes are interdependent and will rise or fall together. There has been a particularly dramatic increase in financial inequality, shrinking the share of aggregate income earned by middle-class households, and narrowing the possibilities for upward mobility. The increasingly stark divide between the richest Americans and everyone else has left many people in the United States feeling cheated, left behind, and locked out—sentiments that have plainly contributed both to polarization and to the rise of populism.¹¹

Political polarization builds on itself. Partisan state legislatures, for example, create gerrymandered electoral districts, and by doing so decrease the number of competitive congressional seats. This in turn drives congressional candidates further to the extremes, only reinforcing the affective partisanship of their constituents and further polarizing Congress. Processes like these are accelerants, though; they don't explain where the division begins, and they don't explain why so much of it takes the form of populism. The main drivers of populism and polarization, in the United States as across the Atlantic, have been cultural and racial, not economic or institutional.¹²

The consensus of political scientists who study political polarization in the United States is that the process has been driven more by elites—politicians and opinion leaders—than by the general public, and more by the GOP than by the Democratic Party. Congressional polarization, for example, accelerated about a decade before ticket-splitting by voters began its precipitous decline. And congressional polarization has largely been driven by the rightward shift of congressional Republicans, whose positions on controversial issues such as abortion, environmental protection, and tax reform have become increasingly distant from those of the average member of the public since the late 1970s. The positions of congressional Democrats, meanwhile, have remained where they always were: slightly left of center (although that is partly because, on

some key issues, public opinion as a whole has moved to the left). Among the general public, there is also some evidence that Republicans identify more strongly as Republicans than Democrats do as Democrats. But this is a matter of degree; affective polarization and political sectarianism have increased dramatically on both sides of the partisan divide.¹³

Nonetheless, the central story in American politics since the 1960s has been the rise of modern conservatism—the conservatism of Barry Goldwater, Richard Nixon, and Ronald Reagan—and then its transformation into Trumpian populism. And that is a story about the rightward movement of the Republican party: its transformation from a party that contained conservatives, moderates, and even liberals into a party that was more strongly and uniformly conservative, and then into the party of Trump, united above all else by its fear and disdain of liberals and liberalism. To understand how the United States became so polarized, and how populism became such a potent threat to democratic norms and practices, we must understand what happened to the Republican Party. That is a story in which race, and the backlash to the Civil Rights Movement, play key roles. But it is also, to a remarkable extent, a story about criminal justice.

Criminal justice policies cannot bear all the blame, of course, for the GOP's swing to the right, for the rise of populism, or for the worsening of polarization. Other issues of public policy—notably taxes, education, and immigration—played key roles, too. And debates about criminal justice, like the fights over taxes, education, and immigration, can't be separated from the ongoing politics of race. Racial conflicts and racial anxieties were at the center of the rise of modern conservatism, and debates about crime, policing, and punishment were suffused with them, just as they were everywhere in struggles over taxes, education, and immigration. All of these areas of public policy often functioned as arenas for relitigating the civil rights revolution. But it matters how and where battles are joined. Fighting on the terrain of crime, policing, and punishment, rather than on the terrain of anti-discrimination laws, allowed conservatives to address racial anxieties in ways that seemed more fair-minded,

less bigoted. And although issues of race have pervaded debates about criminal justice for the past half-century, those debates have never been only about race. Liberals who wrote off concerns about crime in the 1960s and 1970s as just coded racism were making a key mistake—a mistake it is important to avoid repeating today.¹⁴

The Politics of Law and Order

If the timeline leading to our current political moment has a critical inflection point, it is the four-year period beginning with Barry Goldwater's failure to win the presidency in 1964 and culminating with Richard Nixon's victory of 1968. This was when the Republican party began its momentous shift to the right, and when the seeds of Trumpian populism and extreme polarization were planted. And the hinge on which American politics turned from 1964 to 1968 was law and order—the interlocking issues of crime, policing, and punishment.

As political issues, criminal justice and race were never completely separate. Talking about street crime was always, in part, a way of talking about race. Sometimes the mapping was intentional, when a call for law and order was meant to tap into the racial anxieties of white voters without sounding like an out-and-out bigotry. And even when the issue of crime wasn't this strategic, it was Black crime, in particular, that white voters mostly feared. Policing, meanwhile, was experienced very differently by people of color—especially Blacks and Latinos—than by whites, partly but not only because in the late 1960s police officers were themselves overwhelmingly white. Politicians knew all of this. So issues of race were never far below the surface in debates about criminal justice, when they were submerged at all.

Still, it is wrong to dismiss the politics of law and order in the late twentieth century as simply dressed-up racism. To begin with, even when law and order *was* just a way to talk about race, it mattered that the debate took place on the terrain of crime, policing, and punishment. Not only did the terms of the debate allow the disguising of racial appeals, the

focus on crime also resulted in ruinous policies, like mass incarceration and hypermilitarized policing, that were themselves further polarizing. Moreover, fear of crime was genuine, and it spanned racial divides—just as it does today. (This is one reason the GOP has gained strength among Black Americans and Latinos over the past decade.) In the runup to the 2024 presidential race, Republican voters told pollsters they cared more about “law and order” than about battling “wokeness.” And talking about crime was a way to engage with a whole range of topics other than race. Part of the reason the politics of law of order proved so powerful was that crime served as a master symbol, facilitating a broad critique of modern American liberalism—a critique, that is to say, not just of the “rights revolution,” but of the welfare state, government bureaucracy, and elite expertise.¹⁵

Barry Goldwater was the first major-party presidential candidate in American history to make crime a principal focus of his campaign. At the time it was an odd focus for a candidate for national office, especially a Republican, because Americans had always thought of crime as first and foremost a local concern. The Goldwater campaign seized on the issue partly out of desperation (unseating Johnson in 1964 always looked like a long shot and, by late summer, polls suggested Goldwater would lose badly), partly because talking about crime was a neutral-sounding way to address white fears, and partly because crime served as a kind of synecdoche for the general societal decline that Goldwater laid at the feet of liberalism. Goldwater lumped rising crime rates together with civil disobedience, urban riots, government corruption, pornography, and a weakening of individual responsibility. He blamed it all on a lack of moral leadership, and on the coddling paternalism of the welfare state.

Goldwater’s calls for law and order, his jeremiads about “the license of the mob and of the jungle,” addressed real concerns about physical safety. But the fears were themselves highly racialized. Running for the Democratic presidential nomination in 1964, George Wallace did surprisingly well in primaries beyond the Deep South—winning 33 percent of primary votes in Wisconsin, 30 percent in Indiana, and 43 percent in

Maryland—and much of his success came by stoking white fears of Black crime. Goldwater was not a Wallace-style racist, but his campaign did much to capitalize on those same anxieties. It made political hay, for example, of high crime rates in Washington, DC—a majority Black city. And in calling for law and order, Goldwater never distinguished between rioting and peaceful protest, or spoke out against white violence against African Americans.

In July 1964, when the fatal police shooting of an African American teenager set off six nights of rioting in Harlem—the first of the major urban disruptions that would erupt in African American communities across the country through the end of the decade, most triggered by interactions with the police—Goldwater reached out to Johnson for an agreement not to exploit the racial tensions for political gain. Nonetheless, images of Black rioters cropped up in pro-Goldwater advertisements, most notoriously in a half-hour commercial called “Choice,” nominally produced by an independent group but in fact conceived and backed by the Goldwater campaign. In startling montages, “Choice” interleaved wholesome images of white schoolchildren reciting the pledge of allegiance and manual laborers engaged in honest work with lurid images of people cavorting in gay bars and strip clubs—and African Americans chanting, marching, dancing, and looting. Facing an outcry, Goldwater denounced the film as racist and had it shelved just before it was set to air nationwide on NBC. But the episode reinforced the widespread impression, accepted by most journalists at the time, that Goldwater’s calls for law and order were little more than appeals to white racism. That was one reason that law and order didn’t prove to be a winning issue for Goldwater. The other reason was that, at least on a national basis, violent crime was very low in historical terms. The total US homicide rate, for example, was lower from the early 1950s to the early 1960s than it had been since the first decade of the twentieth century.¹⁶

Still, by 1964, violent crime was sharply on the rise—the homicide rate would more than double over the following decade to a historic high in the mid-1970s—with momentous political consequences. And the rioting

that began that year in Harlem, then spread across the country, dominated network news broadcasts summer after summer, combining with the escalating war in Vietnam to create a deepening sense of national crisis. In August 1965, a week of rioting in the Los Angeles neighborhood of Watts, again sparked by an episode of police violence, left thirty-four people dead and more than a thousand injured. Ronald Reagan made the Watts riots and rising crime a central theme of his successful campaign for the California governorship the following year, linking calls for law and order—as Goldwater had—with consternation about broader moral decline. The argument hit home: the top concerns reported by Californians to pollsters in 1966 were crime, drugs, and juvenile delinquency.¹⁷

By 1968, Americans nationwide identified “crime and lawlessness” as the leading domestic problem. Two-thirds told pollsters the courts were too lenient with accused criminals; half of all women said they were afraid to walk home alone at night. George Wallace and Richard Nixon both hitched their campaigns to the theme of law and order. If anything, Nixon talked about it even more than Wallace. Nixon spoke relentlessly about crime, policing, and order, and he picked a running mate—Governor Spiro Agnew of Maryland—who had made these his flagship issues. “This time,” Nixon’s campaign slogan urged Americans, “vote like your whole world depended on it.” Nixon likely owed his victory to the crime issue, and he followed through on it. Once elected, he made crime and policing his core domestic focus. (It is an irony frequently noted that Agnew and Nixon would both ultimately resign because of their own lawbreaking—Agnew for taking bribes while serving as governor, and Nixon for covering up the Watergate break-in.)¹⁸

Nixon’s 1968 campaign—particularly his “Southern strategy” and his focus on law and order—provided the template for the next several decades of Republican office-seekers, driving American politics to the right and laying the groundwork for what eventually developed into Trumpian populism. The crime issue proved to have staying power by dominating mayoral elections in 1969, yielding conservative upsets in Minneapolis and Los Angeles and seriously threatening the reelection of

John Lindsay, the one-time Republican whose liberal policies as mayor of New York cost him the party's support. As a political issue, law and order tapped into anxieties about neighborhood safety, racial upheaval, campus protests, drug use, and a general sense of moral decline and social unraveling. From the outset, the issue also had a proto-populist, anti-elitist component—resentment at the power being wielded over people's daily lives by unelected experts, bureaucrats, and judges. The politics of law and order therefore offered conservatives another bludgeon to use against "big government," which is to say, against the legacy of the New Deal and the Great Society.¹⁹

The proto-populism of law-and-order politics got a boost from the role the Supreme Court played during the 1960s in reforming criminal justice. Under the leadership of Chief Justice Earl Warren, the court issued a wide range of rulings in the 1950s and 1960s that were anathema to conservatives, especially but not only in the South. The list of complaints started with the integration of schools and the reapportionment of voting districts, but by the close of the 1960s they were centering, increasingly, on protections the court had given to criminal suspects and criminal defendants, including the exclusionary rule, the *Miranda* warnings, restrictions on eyewitness identifications, and expansions of the right to counsel. Goldwater and Nixon both turned the Supreme Court's criminal procedure decisions into an election issue; both charged that the court was coddling criminals and leaving victims unprotected. Here, too, the Republican presidential campaigns of 1964 and 1968 set a pattern which conservative politicians would continue to follow for decades to come—including, notably, Ronald Reagan in the 1980s. Judicial decisions "handcuffing the police" were a convenient focus of conservative outrage, in part because they linked together concerns about elitism, declining morality, and physical safety. The *Miranda* ruling, in 1966, was especially controversial; it seemed to epitomize rules handed down by elites to protect criminals at the expense of ordinary Americans.²⁰

The Supreme Court intervened in the criminal justice system even more controversially in 1972, ruling that the death penalty as it was then

administered in the United States violated the constitutional ban on “cruel and unusual punishments”; four years later, the court approved new capital punishment schemes that had been adopted by some states in the wake of the 1972 decision. Between 1972 and 1976, it wasn’t clear whether executions would ever take place in the United States, and for conservatives the legal limbo helped turn the death penalty into an even stronger issue than the restrictions imposed on police by the Supreme Court in the 1960s. Ronald Reagan was a particularly vocal supporter of the death penalty throughout the 1970s; it played a limited but important role in helping him win the presidency in 1980. Reagan’s vice president, George H. W. Bush, successfully used the issue against Michael Dukakis in his own presidential campaign in 1988. The legal scholar Jonathan Simon notes that the 1972 Supreme Court decision striking down all existing forms of the death penalty in the United States helped make capital punishment “an issue in virtually every American election, especially for executive offices.” And it was an issue that pushed conservative politics in a populist direction, elevating the importance of fear, and building support for muscular action by the executive branch in a highly moralized context. The resulting accommodation of popular feelings, as Simon points out, had “implications far beyond criminal justice.”²¹

The Supreme Court’s decisions regarding policing and the death penalty in the late 1960s and the early 1970s were prime targets for conservative attacks for the same reason that law and order was a stronger issue for Nixon in 1968 than it had been for Goldwater in 1964. America’s crime rates had escalated, and the increases in homicides, rapes, and robberies in the nation’s largest cities were especially sharp. Some liberals at the time tried to explain away the jump in crime rates as a statistical fallacy, and that argument is still made today. It is true that statistics on arrests and reported crimes are subject to manipulation by police departments. But there is no real doubt that crime spiked in the 1960s and 1970s. According to the FBI, over the course of just the one decade of the 1960s, violent crimes doubled—and then increased by another 50 percent in the 1970s. The homicide rate, a crime statistic that is harder to manipulate

than others, also doubled on a national basis from the early 1960s to the 1970s, with the rise much steeper in major cities. Homicides increased sixfold in New York, for example, and eightfold in Detroit. Arguments that these figures were misleading only fed the narrative that liberals didn't care about crime victims.²²

There was no denying the riots of the 1960s, either. There was and remains debate about whether *riot* was always the right word, as opposed to *uprising* or *rebellion*. But the frequency, violence, and political importance of these events were clear to almost everyone. The historian Elizabeth Hinton counts 2,239 separate disturbances in cities across the United States from 1964 to 1972. During those eight years, she notes, "every major urban center in the country burned," and the country witnessed "internal violence on a scale not seen since the Civil War." In the late 1960s and early 1970s the rioting spread to prisons. Across just the three years of 1970, 1971, and 1972, there were more than a hundred riots behind prison walls. The forty-eight that occurred in 1972 marked a level not exceeded in any other year in the nation's history.²³

For the past half-century, Hinton argues, "Americans have been living in a nation and a national culture created in part by the extreme violence of the 1960s and early 1970s." She is writing about the violence of the urban disorders, but the same could be said about the consequences of that period's high violent crime levels and the reactions they prompted. The most immediate ones were the highly punitive criminal justice policies adopted in the 1970s, 1980s, and 1990s, including the sentencing practices that have given the United States the world's highest rate of imprisonment. The politics of crime proved so powerful for Republicans that as early as the 1960s the Democrats were responding in kind, refusing to be out-toughed on matters of public safety. Lyndon Johnson, after defeating Barry Goldwater in 1964, began to transform his war on poverty into a war on crime, to try to neutralize the issues of policing and punishment. Signing the Law Enforcement Assistance Act of 1965—which made tens of millions of federal grant money available to local police departments, to support "the frontline soldier[s] in our war against

crime”—Johnson said he would “not be satisfied until every woman and child in this Nation can walk any street, enjoy any park, drive on any highway, and live in any community at any time of the day or night without fear of being harmed.” By the 1980s, long sentences and aggressive policing had become matters of bipartisan consensus.²⁴

But as with the death penalty, so with prisons and policing: the politics of public safety in the late twentieth century have had repercussions that go well beyond criminal justice. For reasons we will explore below, the bipartisan consensus for “tough on crime” policies in the late twentieth and early twenty-first centuries did not lay the groundwork for a broader pattern of bipartisanship. Just the opposite: it helped splinter the country and incubate divisive, hate-driven forms of populism. It bears some of the blame for the crisis now facing American democracy.

There were ways of responding to the crime wave of the late 1960s and early 1970s that could have helped to unite the country instead of, ultimately, driving it apart. The transformation of crime into a national political issue, the punitive policies that eventually were embraced by both parties, and the linkage of crime with anxieties about race and social upheaval—all of this was driven, to a significant extent, by elected officials, office-seekers, and campaign strategists; it didn’t just bubble up from the concerns of voters. The blame lies more with the politics of crime than with crime itself. But it was actual crime and disorder in the 1960s and early 1970s that helped make the politics of crime possible.²⁵

It wasn’t unreasonable at the time to blame those problems at least in part on criminal justice policies, and especially on the US approach to policing. Crime rates are influenced by many things beyond law enforcement, including unemployment rates, levels of education and economic inequality, the strength of the social safety net, and the age distribution of a population. Indeed, the conventional wisdom among scholars and even many police executives by the late twentieth century was that law enforcement was not an influence at all; neither varying the number of officers nor changing their policing strategies and tactics seemed to have any effect on crime rates. But there’s good evidence now that this is wrong,

and the right kind of policing can do a lot to reduce crime. Chapter 1 will review that evidence and discuss in some detail what constitutes the right kind of policing. For now, what matters is that the right kind of policing relies on extensive consultation and trust-building with a broad cross-section of the public—which is pretty much the opposite of the kind of “professional” policing that had become standard in the United States by the 1960s and 1970s.²⁶

Obviously, bad policing can’t take all the blame for the high crime rates of the late 1960s and the 1970s, let alone for the rightward shift of the Republican Party, the eventual rise of divisive forms of populism in the United States, or the extreme polarization that now plagues our politics. But it contributed to all of these problems, and not just by its ineffectiveness. The biggest problem with the police in the 1960s and the 1970s wasn’t their failure to keep crime down; it was their abusive and frequently brutal treatment of African Americans, members of other racial minorities, and left-wing protesters. The police didn’t just fail to control the riots of the 1960s and 1970s: abusive policing is what triggered almost all of these riots in the first place.

Policing in Black and White

The causes of the widespread urban rioting of the 1960s and 1970s have been exhaustively investigated by a long string of journalists, scholars, and government commissions. The answers have been remarkably consistent: the riots were fueled by a wide range of grievances among African Americans about persistent racism and unfairness, but at the very top of the list was police practices. The unrest almost always was triggered by something the police did to a Black man—arresting him without cause, beating him up, or killing him. The disturbances grew into riots, and the riots spread, because of pent-up frustrations about a whole set of interlocking institutions that built racialized ghettos and kept them impoverished and isolated. The most important of those frustrations, though, were about law enforcement.²⁷

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