



The case for optimism on criminal justice reform - even under President Trump

Trump ran on a “tough on crime” platform. But the president just isn’t that powerful on these issues.

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Is criminal justice reform doomed?

It’s a question that’s come out of Donald Trump’s victory on Election Day. Trump, after all, ran a 1980s-style “tough on crime” campaign. He advocated for raising mandatory minimum sentences for drug offenses as a response to the opioid painkiller and heroin epidemic. He said police should be far more aggressive than they are today, particularly by using the controversial stop-and-frisk strategy that a court struck down in New York City because it was used to target minority Americans. Time and time again he lied about the murder rate, suggesting it’s at a 45-year high (it’s actually near historic lows) to make the case for his tough-on-crime policies.

And although we don’t know much about the specifics here or Trump’s policy ideas in general, his “tough on crime” views seem to be genuine. Trump dedicated an entire chapter in his 2000 book, *The America We Deserve*, to promoting tough-on-crime ideas. He wrote about a looming crime wave (which never happened). And he discussed in detail his support for aggressive policing, longer prison sentences, and the death penalty — all of which he framed as part of “the most important form of national defense.”

So again, is criminal justice reform doomed? Will the US continue its policy of mass incarceration, which has turned the US into the world’s leader in incarceration?

The good news for reformers is that there’s good reason to believe reform is coming anyway. Even if we assume that Trump totally gets his way in the next four or eight years, the federal government, it turns out, is actually a fairly small part of the whole criminal justice system — with most criminal justice policies decided at the local and state level. And there’s plenty of reason to believe that cities and states will continue to push for reform even if Trump does not.

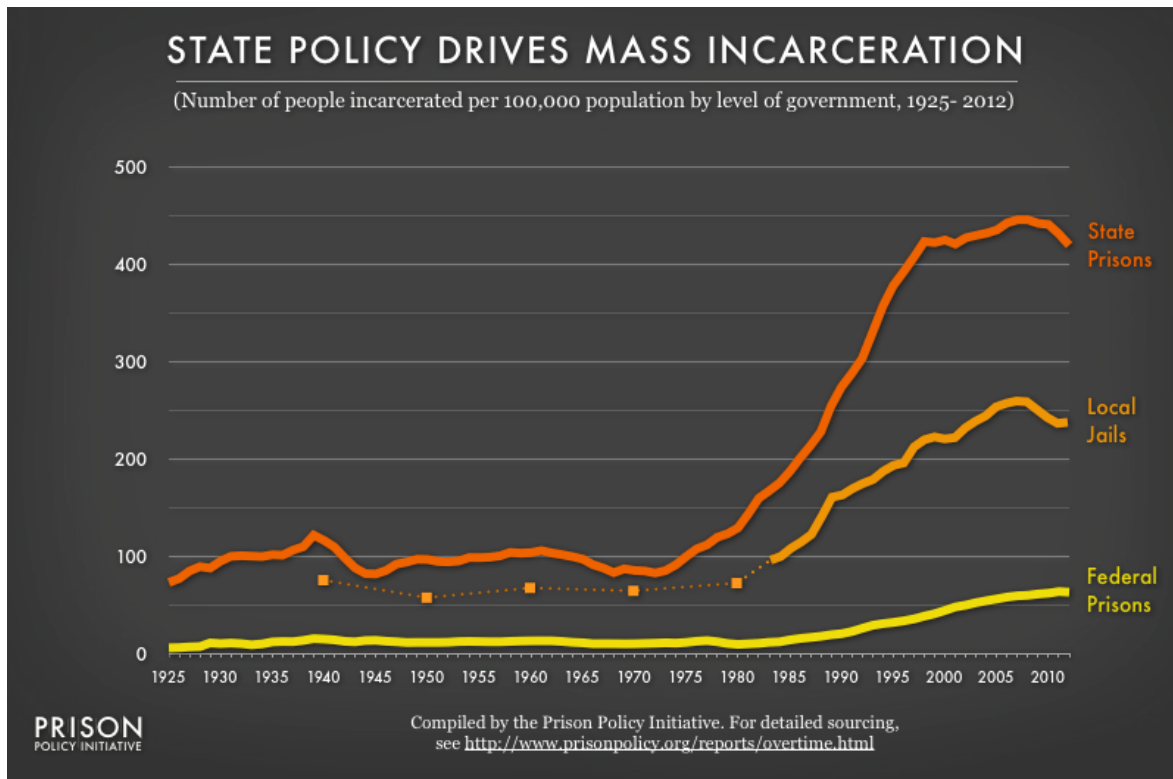
The federal government is a small part of the criminal justice system

So let's assume Trump gets his way. He refuses to sign federal criminal justice reform into law. He instructs the Department of Justice to stop investigating police departments for racist practices and brutality, ending the Obama administration's crusade for policing reform. And Trump or his attorney general reverses the Obama administration's instructions to federal prosecutors to incarcerate fewer low-level drug offenders.

For anyone interested in reform, all of this is bad. It would set back or at least stall any possibility of criminal justice reform at the federal level for four or eight years.

But there's some good news: The federal government is a tiny part of the US criminal justice system.

Consider incarceration, the big target of reform efforts. In the US, federal prisons house only about 13 percent of the overall prison population. That is, to be sure, a significant number in such a big system. But it's relatively small in the grand scheme of things, as this chart from the Prison Policy Initiative shows:



Prison Policy Initiative

One way to think about this is what would happen if President Trump used his pardon powers to their maximum potential — meaning the president pardoned every single person in federal prison right now. That would push America's overall incarcerated population from about 2.2 million to 2 million.

That would be a hefty reduction. But it also wouldn't undo mass incarceration, as the US would still lead all but one country in incarceration — with an incarceration rate of about 629 per 100,000 people, only the tiny island country of Seychelles would come ahead.

And while the federal government can incentivize states to adopt specific criminal justice policies, studies show that previous efforts — such as the 1994 federal crime law — had little to no impact. By and large, it seems states will only embrace federal incentives on criminal justice issues if they actually want to adopt the policies being encouraged.

So to really pull back mass incarceration, states will need to make changes. (And that will likely involve more than reforming drug laws: About 53 percent of state prisoners are in for violent crimes, and just 16 percent are in for drug offenses.)

Similarly, almost all police work is done at the local and state level. There are nearly 18,000 law enforcement agencies in America — only a dozen or so of which are federal agencies.

So the tasks of ending mass incarceration and reforming the police are going to fall almost wholly to cities and states. And even as they elected Trump, they looked very willing to live up to the task.

States have welcomed criminal justice reform, even those that voted for Trump

Okay, you might say, but doesn't the fact that people at the local and state level elected Trump suggest that a bulk of Americans don't want or at least don't care for criminal justice reform?

The reality is that Election Day actually *disproves* this assertion.

As Americans voted for Trump, they also largely backed criminal justice reform. Marijuana legalization won in California, Massachusetts, and Nevada — and looks very likely to win in Maine. Initiatives to reduce prison sentences passed in California and Oklahoma. And New Mexico passed a constitutional amendment that dictates no one should be jailed because they can't afford bail — a major reform to make sure people aren't locked up just because they're poor.

Meanwhile, candidates for prosecutor who campaigned on criminal justice reform won in several states, including places like Florida and Texas that voted for Trump.

These prosecutors are very important to the criminal justice system. For instance, in 2014 then-Brooklyn District Attorney Kenneth Thompson announced that he will no longer enforce low-level marijuana arrests. Think about how this works: Pot is still very much illegal in New York, but the district attorney flat-out said that he will ignore that aspect of the law — and it was completely within his discretion to do so. Not only did that mean people would no longer be prosecuted for these crimes, but it discouraged police from enforcing them.

Another example of pro-reform Trump voters: Oklahoma. The state overwhelmingly elected Trump, with 65.3 percent of voters backing him. Yet they voted, with 58.2 percent support, to cut prison sentences by reclassifying certain property offenses and simple drug possession to misdemeanor crimes instead of felonies. And they also voted, with 56.2 percent support, to use the money saved from cutting prison sentences to create a rehabilitation fund for mental health

and drug abuse treatment programs. These are fairly big margins in favor of criminal justice reform.

I'm not sure how voters reconcile their votes for Trump and this initiative. Maybe they just didn't take Trump's stances on criminal justice seriously, or their interests in his other stances overshadowed his ideas on criminal justice. Whatever the case, their preferences are made clear by the ballot initiatives.

Okay, fine, you might say, but that only shows that *voters* want reform, but reform is going to take the work of Republican lawmakers that now control most of the state governments. What's to guarantee they'll do it?

There is no guarantee. But there is good reason to think they will do it.

For one, there are powerful *conservative* special interest groups that want criminal justice reform. The Koch Institute and Heritage Foundation support it, and the Koch brothers in particular have helped seed money out to state-level efforts — like Right on Crime — focused on bringing criminal justice reform.

Some of the biggest backers of criminal justice reform have also been Republicans at the state level. It is absolutely true that many of these states, such as Georgia and Texas, have higher incarceration rates than the national average. But it is also true that they've been working to bring down their national average over the past several years. Just look at Texas's incarceration rate, which sharply dropped under former Republican Gov. Rick Perry:



Prison

Policy Initiative

It's not just Texas, either. After a 2014 Atlanta Journal-Constitution report found that “substantially fewer African-Americans are being locked up in Georgia,” Republican Gov. Nathan Deal responded in glowing terms, highlighting his reform efforts:

Since taking office, I have spearheaded legislation to overhaul Georgia's adult and juvenile criminal justice systems because we simply could not afford the continually increasing costs of incarceration. Accountability court funding and improved rules for probation detention centers have successfully addressed the large jail backlog and high costs paid to counties housing state offenders. By identifying low-risk, nonviolent offenders and more effective ways to rehabilitate them, we are steering these offenders away from a life of crime and reserving our expensive prison beds for the violent offenders who pose a public safety risk.

Texas, Georgia, and other Republican states still have a lot of work to do. They are, again, still above the national average on incarceration, suggesting that they still have relatively punitive criminal justice policies compared with everyone else.

And there is also admittedly less movement on police reforms. But that's likely because it's a relatively new issue — getting traction only in the past couple of years, following the 2014 police shooting of Michael Brown in Ferguson, Missouri. It is possible that there will be more movement on this end over time, but it's hard to say for certain.

Still, there's good reason to believe that progress will keep coming — not just because reform seemed to win in down-ballot local and state-level races on Election Day, but also because that's what the broader public has said it wants.

The public has been warming up to criminal justice reform for a long time

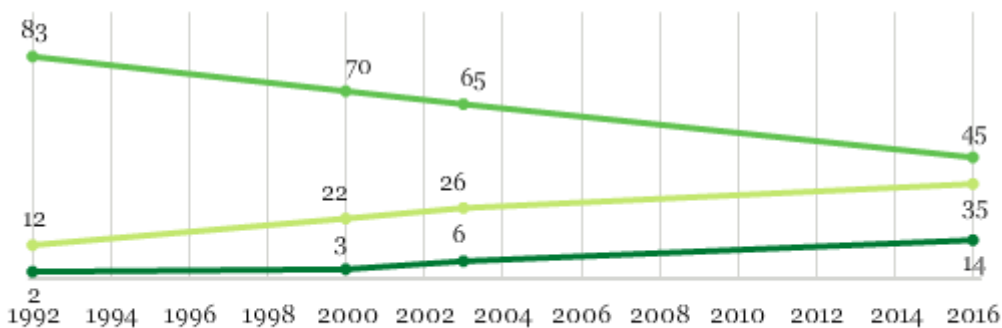
Surveys have consistently found that Americans want criminal justice reform.

Years of polls from [Gallup](#) demonstrate this: In 1992, 83 percent of Americans said the justice system's handling of crime wasn't tough enough. In 2016, only 45 percent said it wasn't tough enough — a 46 percent decline.

Americans' Views of the U.S. Justice System's Handling of Crime, 1992-2016

In general, do you think the criminal justice system in this country is too tough, not tough enough or about right in its handling of crime?

■ % Too tough ■ % Not tough enough ■ % About right



GALLUP®

[Recent polling](#) by Vox and Morning Consult told a similar story. About 51 percent said there are too many people in prison in the US, while just 19 percent said there were not enough. And although most still don't want to reduce prison sentences for violent offenders (who make up about [40 percent](#) of the prison system), 78 percent said they support reducing prison time for nonviolent offenders with a low risk of committing another crime.

Similarly, polls have found broad agreement on some policing reforms. [A 2015 survey](#) from the libertarian Cato Institute and polling firm YouGov, for example, found that 92 percent of Americans support equipping police with body cameras, and 55 percent said they would be willing to see an increase in their personal tax bill to pay for police-worn body cameras. Similarly, [a 2015 survey](#) by the Progressive Change Institute found that 61 percent of likely 2016 voters support requiring special prosecutors to investigate and prosecute killings by police.

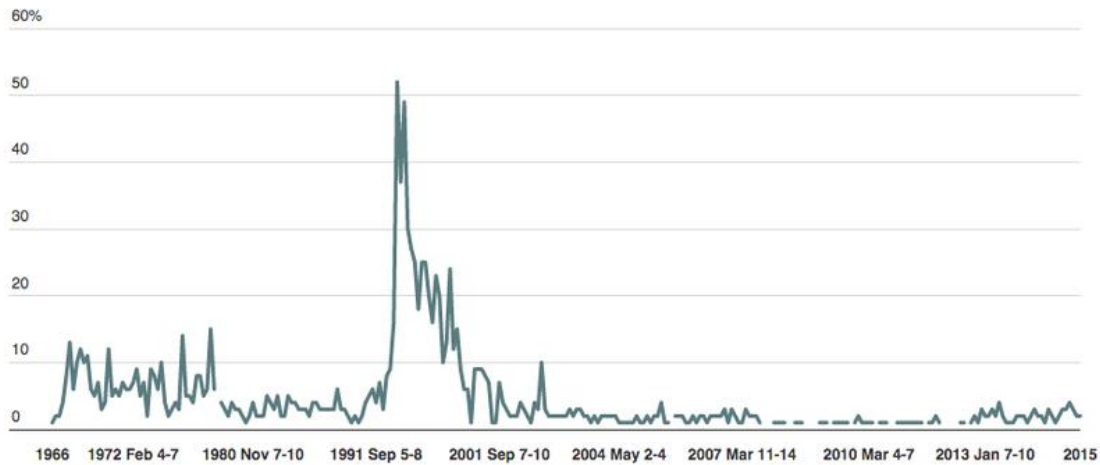
Then there are the big reform movements going on, from Black Lives Matter to the Koch brothers-funded effort to reform the criminal justice system and make it less punitive.

One reason for this softening on criminal justice issues may be that there's not, despite Trump's warnings, that much crime anymore. The latest FBI report [showed](#) an uptick in the murder rate

— the most reliable proxy for broader crime rates — in 2015, but the murder rate still remained *half* of what it was at its peak in the 1990s.

Unsurprisingly, then, the polls show that Americans really are much less worried about crime than they were decades ago. Gallup’s polling shows Americans in the 1960s, ’70s, ’80s, and especially the early ’90s were much more likely than they are today to say that crime was “the most important problem” facing the US.

Percent of Americans who said crime is "the most important problem"



Source: Gallup

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Looking at these trends, it seems pretty clear where the public is going. While Trump’s victory is definitely alarming for the prospects of criminal justice reform at the federal level, there’s good reason to believe that local and state governments — where a bulk of lawmaking happens — will continue to push toward reform.