



Institution for Social and Policy Studies

Problem-Solving Criminal Justice

ISPS Working Paper

Prepared for the Workshop on Governments and the Politics of Problem-Solving

December 5-6, 2024

ISPS ID 25-29

Steven Teles
Professor of Political Science
Johns Hopkins University
Senior Fellow at the Niskanen Center
steles2@jhu.edu

Problem-solving Criminal Justice

Steven Teles

Abstract

Criminal justice reform went through a prolonged period of what we might think of as “problem-solving politics” from the mid-2000s to the late 2010s. In this period, there was a widespread focus on passing measures that reduced the scale of incarceration while not increasing violent crime. There were two key structural factors behind this shift to a problem-solving mode of criminal justice reform. First, the lowered salience of the issue among the general public, and the way that key activists and organizations actively sought lower-salience venues for policymaking, facilitated repeated, incremental reforms in conservative states. Second, diminished polarization around criminal justice was a function of the increasing salience of libertarian ideas on the right in the 2010s, as well as the specifically trans-partisan strategies of activists and funders. A close analysis of the politics of criminal justice reform from the mid-2000s to the late 2010s shows that the scope of problem-solving politics is limited by features of the larger political contexts over which activists, intellectuals and experts have little influence. That said, the potential for at least some problem-solving policymaking is always present, even where higher political salience makes it challenging. However, policy entrepreneurs may need to be flexible about the specific problems that can be solved at any one period. But it may be possible even in relatively less problem-solving periods to engage in “political investments” that will bear fruit in later periods.

Key Words

criminal justice
conservatism
polarization
political investment
problem-solving
salience
Justice Reinvestment

Criminal justice reform went through a prolonged period of what we might think of as “problem-solving politics” from the mid-2000s to the late 2010s. In this period, there was a widespread focus on passing measures that reduced the scale of incarceration while not increasing violent crime. I will argue that the key structural factors behind this shift to a problem-solving mode of criminal justice reform were:

- The lowered salience of the issue among the general public, and the way that key activists and organizations actively sought lower-salience venues for policymaking and;
- Diminished polarization around criminal justice, which was a function of the increasing salience of libertarian ideas on the right in the 2010s, as well as the specifically trans-partisan strategies of activists and funders.

The broader lesson of this period is that the scope of problem-solving politics is limited by features of the larger political contexts over which activists, intellectuals and experts have little influence. That said, the potential for at least some problem-solving policymaking is always present, even where higher political salience makes it challenging. However, policy entrepreneurs may need to be flexible about the specific problems that can be solved at any one period. But it may be possible even in relatively less problem-solving periods to engage in “political investments” that will bear fruit in later periods.

Period 1

High Salience, Non-Problem-solving Criminal Justice Politics

There was a lot of criminal justice policymaking going on in the decades before the late 2000s, but it would be hard to characterize it as “problem-solving,” since so many of the policymakers involved were trying to solve fundamentally political/electoral problems of blame avoidance, position taking and credit claiming. That is not to say that none of the things that were done in this era solved problems, but that problem-solving was not the generic style of politics.

The political factors that drove tough on crime policymaking have been very widely studied. For example, Naomi Murakawa showed convincingly that cycles of bidding wars in Congress continually cranked up the intensity of punishments. If anything, these competitive dynamics played out even more durably in the states during a period when the parties were actively realigning and seeking new ways to appeal to voters. Texas, for example, experienced intense partisan competition in the 80s and 90s. This competition helped push incarceration to ever greater levels, as each party ran against the incumbent for being too soft on crime, then passed more punitive measures only to have the out-party then claim that it was being too soft. The cycle continued until the Republicans finally took control of the state legislature and the

governorship of George W. Bush signaled that the Democrats had been durably removed as a force in state-wide elections.

This competitive dynamic certainly did not mean that there was not policymaking in this era. If anything, there was too much of it. But it was not what we would want to qualify as “problem-solving.” In problem-solving politics, there is gradual normative convergence, if not on motivation then on the direction of travel. In this period there was a similar dynamic to what Kent Weaver described in welfare politics in the 1990s, in which moves by one party lead to further moves by the other in order to maintain distance, in a process of [“strategic pursuit.”](#) This dynamic was driven in large part by the high salience of the issue of crime, which meant that the “right party” (the Republicans) had every incentive to keep shifting the boundaries of acceptable severity, in order to maintain a distinct brand on the issue. This also meant that there were incentives to maintain high salience, rather than to seek the relatively low visibility venues associated with problem-solving.

In addition, at least in the case of sentencing (policing had other dynamics), the tough on crime period saw an underplaying of cost-benefit considerations, driven in large part by the perception that “nothing works” (other than incarceration). But the suppression of utilitarian considerations in sentencing was also influenced by a sense that applying cost-benefit analysis was something that Republicans did to the Democrats’ parts of government, whereas prisons (like the military) were “ours,” and thus inappropriate for utilitarian calculation. The combination of “strategic pursuit,” suppressed consideration of tradeoffs, and identity affiliation with prisons suppressed the desire of Republicans in particular to [process negative information](#) about policy effects of mass incarceration in balance with positive. The result was a sharp, seemingly irrepressible march upward in the severity of punishment.

That said, this period was also characterized, especially near the end of it, by what we might call “proto-problem-solving.” Proto-problem-solving can be thought of as a form of [political investment](#), in which actors spend resources in more hostile periods in the hopes that they will bear fruit later on. Conservatives who had a conversion experience on incarceration—like Pat Nolan and Charles Colson—created a network of organizations and movements that began when the tough on crime era was still in its peak, like Prison Fellowship. In addition to doing work to persuade elite conservatives that concern for prisoners was consistent with social and religious conservatism, they also pushed for reforms that at least set a precedent for lawmaking that treated conditions in prisons as a legitimate agenda item (like the [Prison Rape Elimination Act](#) of 2003). Many of the activists in this early wave of mostly marginal reform formed the core of the conservative identity vouching project in the next period.

Period 2

Low Salience Problem-solving

The proto-problem-solving dynamic of the earlier period gradually became the dominant mode of criminal justice reform in the late 2000s. While this shift was influenced by a great deal of creative organization-building and strategy, the best explanation for the change is structural. In short, violent crime and public concern about crime went down, and this created a permissive environment for policy entrepreneurs offering low visibility, trans-partisan strategies for incremental reform.

Table One shows the basic data. The mid-90s were a period that saw both very high levels of violent crime, and extraordinary levels of public salience. While framing and media effects certainly matter, it is hard to ignore that levels of crime and salience seem quite related (albeit with a predictable lag). But what is really striking is the collapse of the salience of violent crime, which happened as rates of violent crime began their steady drop in the 1990s and 2000s. An issue that once dominated public attention and provided an irresistible target for ambitious policy-makers suddenly disappeared from public concern (replaced, to some degree, by homeland security in the aftermath of the War on Terror). The combined force of the great crime drop and the national panic over terrorism meant that the potency of classic “tough on crime” politics waned. Citizens thus faced fewer cues from policymakers to prioritize the issue, leading politicians to emphasize it less, in a virtuous cycle.

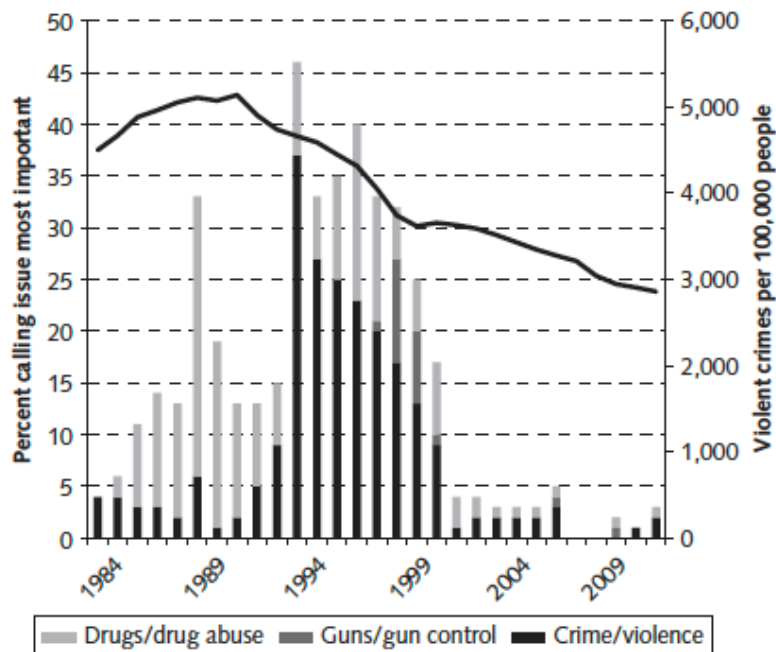


Table One

This changed structural environment created a permissive environment for limited but consequential problem-solving politics. The critical term here is *permissive*. There was never a point in this period where engaging in problem-solving criminal justice reform was particularly politically potent, in the sense of generating electoral rewards for elected officials. In fact, a variety of surveys showed that public opinion continued to be mostly punitive in orientation. However, what was important is that elected officials had every reason to believe that the public simply did not care very much about criminal justice reform, and thus within a fairly narrow band of reforms, they could get away with it.

The other important structural feature of this period was the increasingly libertarian character of Republican politics. The high point of conservative criminal justice reform coincided with the rise of the Tea Party in the aftermath of President Barack Obama's election in 2008. The Tea Party was interpreted by elected officials as signaling that the Republican party's base had taken a sharp anti-statist turn. This turn took a range of issues out of the domain of problem-solving, limiting the perceived room for Republicans to search for solutions to widely accepted social problems. But on criminal justice, the new frame was conducive to anti-statist reform. Whereas Republicans in the tough on crime era had treated criminal justice as an exception to their generalized skepticism to the state, the Tea Party was interpreted as heralding a more generalized Republican anti-statism. While a range of [good social science](#) has shown that this interpretation of the actual motives of Tea Party grassroots activists was at best shaky, for our purposes what mattered is that Republican officials believed it, encouraged by donors like the Koch Brothers who had genuinely strong pro-reform beliefs on criminal justice. The rhetoric of conservative activists like Grover Norquist, that prison guards were just "social workers with guns," reflected this new way of framing criminal justice reform as a move toward greater ideological consistency, rather than as convergence with the left.

While polarization around anti-statism was helping to create the conditions for criminal justice reform, the polarization of state politics also had other ironic pro-reform effects. In particular, polarization was leading a number of formerly politically competitive states to become more dominated by one party. As states like Texas shifted hard red, the incentive to maintain distance from Democrats on criminal justice diminished, which allowed for other dimensions of the issue to increase in significance. For example, under Gov. Rick Perry Texas' budget came under pressure, at the same time as previous commitments were driving up incarceration levels. Under diminished electoral pressure, the Republican House Speaker Tom Craddick gave his new criminal justice committee chair Jerry Madden, a simple instruction: "Don't build more prisons. They cost too much." This was the beginning of a wave of reforms that stopped and then began a slow decline in incarceration levels in the state. Republicans in the state were coming to see prisons in the same light as other spending, rather than as an exception to their skeptical attitude to the rest of government.

These structural shifts in the context of criminal justice created an environment that was ripe for the emergence of new actors who could provide cover for a problem-solving politics, and new institutional frameworks that provided a low visibility context for policymakers to process information in a mostly stable, consensual fashion. This stability was partially a function of an agreement that reform should focus on the “low hanging fruit” — areas where excessive punitiveness generated few if any gains in crime control. The normative structure of this mode of criminal justice politics was at least a close cousin to efficiency. There was a widespread assumption that the intense politics of the tough on crime era had insulated criminal justice from the normal cost-benefit framework that had been applied to much of the rest of government. Consequently, there were consensual agreements to be struck where neither right nor left would have to give up anything—the left could get (somewhat) less punitiveness, while the right would not have to give up on crime control (and had at least the potential for long-term spending control).

The best example of this politics of problem-solving were the various versions of the Justice Reinvestment Initiative (JRI). JRI began life as a somewhat more left-leaning concept, which envisioned transferring spending on incarceration into investments in high-crime communities. This model, supported by the left-leaning Open Society Foundation, was an early and very incremental cousin of decarceration, in the sense that it was inspired by a more critical view of the criminal justice system, and a belief that crime could only be reduced by greater investment in poor communities.

Over time, this framing of JRI gradually evolved into a framework that focused more specifically on redistributing spending from incarceration into other interventions that were believed to have a stronger evidence base for reducing crime. This was driven in large part by a shift in philanthropic leadership from OSF to the more centrist, bipartisan Pew Charitable Trust, under the criminal justice program leadership of Adam Gelb. When Pew began to get engaged with JRI, it publicly stated that its objectives were “protecting public safety, holding offenders accountable, controlling corrections costs,” which represented a distinct shift from the more critical approach of the earlier version of JRI. This shift reflected the sense within Pew that a more technocratic framing of the JRI process could exploit early signs of a skeptical approach to criminal justice in red states like Texas. As David Dagan and I argued in *Prison Break*, the change in strategy, “focused on squeezing the most reform possible out of politicians’ existing preferences, rather than organizing to try to fundamentally change them.” Where OSF aimed precisely at changing policymaker preferences, Pew’s strategy was explicitly problem-solving (to the degree that problem-solving implies consensual goals).

Pew worked with the Council on State Governments and, eventually, received funding from the federal government and other foundations to bring the JRI model to a range of states. The Bureau

of Justice Assistance [description](#) of JRI is an almost perfect summation of what a problem-solving politics looks like:

- *A collaborative process that engages and builds consensus with a wide range of state and local stakeholders and system leaders*
- *System-spanning data analysis to understand large-scale challenges, namely the drivers of prison and jail admissions, recidivism, and corrections costs, as well as more focused concerns such as returns to prison and jail from community supervision and high utilization of behavioral health and criminal justice resources by specific populations*
- *In-depth assessments of current statutes, policies, and practices to provide context for the data*
- *Clear and compelling findings that identify areas for improvement or innovation*
- *Stakeholder engagement to learn about on-the-ground dynamics and inform findings and recommendations*
- *Multiagency implementation support, including training, performance measurement and quality assurance, and the opportunity to apply for funding to seed successful implementation.*

Pew and CSG provided technical assistance for JRI engagements and also helped to structure the process to emphasize consensual goals and a focus on data and a rational weighing of costs and benefits. But just as important, Pew actually made investments in shaping policymakers' preferences, especially on the right, to make them more consistent with a politics of problem-solving. Pew supported the growing coalition of conservative groups engaged with criminal justice reform, such as the American Legislative Exchange Council, and the newly created organization Right on Crime, which was a part of the very conservative Texas Public Policy Foundation. These investments were part of a strategy of "identity vouching" on the right. Supporting reform in Texas in particular was critical to creating political space for conservatives in other states to engage with the technocratic JRI process, since as Gelb says, "People think if Texas does something, by definition it's not going to be soft." This was a particular motivation for Pew's early support for Right on Crime, which helped sell the Texas Story to conservatives in the rest of the country. By convincing Republicans that engagement with JRI would not be a threat to their conservative identity, it allowed them to process information in a less partisan, more problem-solving mode. Pew created a forum for problem-solving politics, but just as important they addressed the political identity concerns that had to be satisfied before they could look at data in a technocratic fashion.

The JRI helped produce multiple rounds of criminal justice reform in the 2010s that helped slow and then gradually reduce incarceration levels in a number of states, including Republican ones

that would have previously been thought to be a hard sell, such as Georgia and South Carolina. The scope of these changes was mostly well within the parameters that Pew had established when it launched its program: “protecting public safety, holding offenders accountable, controlling corrections costs.” It would turn out that at the height of the success of this model of reform, another mode was on the rise, that would undermine the consensual foundations of JRI-style reform.

Lesson-Drawing for Political Science and Policymaking

The problem-solving criminal justice politics of the 2000s and 2010s now seem like a world away. The JRI model had largely sidelined both the abolitionist-adjacent movements of the left, and the more punitive forces on the right, within a context of low-visibility, technocratic, empirical governance. But this became more unstable in the late 2010s and 2020s, as the politics of criminal justice returned to the front of the political agenda. The issue moved back into high visibility in the wake of the BLM movement and the presidency of Donald Trump, who made the issue of “law and order” the first topic in his Republican nomination speech in Cleveland in 2016. This held out the possibility that the politics of criminal justice would repolarize, with Democrats sympathetic to the cause of deeper cuts in incarceration stepping on the gas, while Republicans affiliated with Trumpism reversing their previous gains.

In the short term, it did not seem like that was what was going on. If anything, the First Step Act, passed during the lame duck session in 2018, looked like a Congressional version of the JRI-style politics that had been going on in the states. But in the slightly longer term, it does look as if the energy behind cross-partisan reform has lost some of its energy. What looked like a constantly recurring cycle of state reforms has slowed, and the excitement of Republicans in Congress in particular has cooled considerably. Meanwhile, much of the energy (and funding) in criminal justice has moved toward much more comprehensive critiques of the criminal justice system, with (at best) ambiguous effects in practice.

That said, much of the organizational apparatus of problem-solving criminal justice reform has, if anything, expanded in the last few years. For example, Gelb left Pew to run the Council on Criminal Justice, which brings together practitioners across the country to drive reform from the inside. The Niskanen Center (where I am a fellow) created a new criminal justice program that advances reforms in the spirit of the trans-partisan era, but with a greater emphasis on directly reducing crime without recourse to increasing incarceration. The policy infrastructure for that style of reform is much greater than it was even at the peak of trans-partisan reform. But unlike a decade ago, this enhanced policy infrastructure is now very much fighting uphill.

There are a few lessons to be drawn from this thumbnail sketch of problem-solving politics around criminal justice reform, which I roughly divide into “structural” and “agentic.”

Structural

- a) Problem-solving politics goes hand in hand with low visibility;
- b) Problem-solving is easier in a context of diminished partisan competition (which is both cause and effect of low visibility).

Agentic

- c) The information processing dimension of problem-solving occurs by satisfying, rather than ignoring, ideological and partisan identities. Empowering technocratic processes begins with identity vouching activities by culturally prestigious non-technocrats;
- d) Creating a problem-solving politics may require speculative investments when structural conditions may not seem entirely ripe;
- e) Permissive structural conditions are not sufficient for a politics of problem-solving. Designing institutions (like JRI) that can facilitate an empirical, evidence based, trans-partisan, low visibility context for reform is necessary to get the most out of those conditions.