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SPECIAL ISSUE

A developmental model of sentencing evolution: The emergence of the politics of probation in Chile

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Abstract

This article builds a developmental model of probation evolution based on the dynamics generated by its feedback effects, illustrating its claims through a case study of Chile's recent probation politics. The article posits that probation emerges out of the negative infrastructural and political feedback effects of the prison. As probation generalises, it creates its own growing negative political feedback. In time, the field can enter a state that we label the politics of probation, providing for substantial political conflict and fluctuance. The article shows how different actors mediate in the conflict around the politics of probation.

KEYWORDS
feedback effects, path dependence, probation, sentencing

1 | INTRODUCTION

Across most jurisdictions, the political evolution of probation follows common puzzling developments. At its inception, it is a fiercely contested institution (Petersilia, 1997, pp.156–157), eventually becoming a legal tool that expands itself with general acceptance of its stakeholders (p.157), and, finally, turning into a political symbol of softness on crime to be limited at all costs. Its restrictions are similarly politically significant. Researchers commonly take the view that the move away from indeterminate towards formalised sentencing, truth in sentencing programmes and the diffusion of mandatory minimums, are all expressions of the replacement of a welfarist approach with a punitive approach to social control (Allen, 1981; Duxbury, 2021; Simon, 2007, p.128; Tonry, 2013).

Probation is an institution with common fluctuating political trajectories – what was once an obscure, accepted aspect of criminal procedure becomes a hot political target.

Despite probation's enormous prevalence in contemporary criminal justice systems, there is surprisingly little research on the political development of probation. Robinson, McNeill & Maruna (2013) and McNeill & Dawson (2014) have noted the lack of engagement of contemporary penology with the persistence of probation; and they provide some initial insights on its resilience at the level of practice. In this article, we follow on their track in attempting to contribute to the sociology of probation by moving back to the level of politics, attempting to understand the legislative trajectories of sentencing and probation and to connect them with implementation. What explains the puzzling evolution of sentencing and probation policy? How can we make sense of judicial and administrative decision makers' attitudes towards these changes?

By expanding on Heather Schoenfeld's (2018) model of criminal policy development, we explore the self-reinforcing (positive feedback) and cost-generating (negative feedback) factors associated with the evolution of probation. A useful arrangement to limit prison growth, probation tends to create its own negative political feedback. In times of high crime politics, it is an easy-to-denounce tool of state leniency. The institutionalisation of probation – the fact that decision makers take for granted its existence as part of the legal order – may limit the effects of that political feedback. But when that resistance breaks down, criminal justice reaches 'the politics of probation', a stage in which the relative incompatibility of high-security demands, on the one hand, and pragmatic treatment of sentenced populations, on the other, produce conflict and fluctuation. We illustrate our claims by analysing a case in which a lasting and stable configuration of sentencing policy faced politicisation and then a strong policy shift in a short period of time, which has nonetheless failed to have effects in practice: Chile's probation politics during the 21st century.

Our article contributes to the growing literature on the political trajectory of penal institutions making use of institutionalist frameworks (Rubin, 2023) by offering a feedback-based framework to explain the political evolution of probation and its relationship with judicial and administrative decision makers. It also highlights the theoretical (McNeill & Dawson, 2014) and empirical (Phelps, 2017) significance of probation and to expand its analysis to settings beyond the best studied cases.

Our article is structured in four sections. We first engage with the institutionalist literature on the political development of crime to offer a model of the evolution of probation. The next section provides background institutional information on the Chilean case, justifies our case selection and explains our methods. We expose the findings on the Chilean case in the following section, ending up with a discussion and summary section.

2 | PATH DEPENDENCE, STABILITY AND CHANGE IN SENTENCING AND PROBATION POLITICS

By probation we designate any community-based penal sanction imposed by a judge following conviction, irrespective of local legal naming. Sentencing frameworks that regulate probation are the rules, doctrines and practices that establish the conditions under which probation may or must be granted. Both institutional objects go hand in hand: sentencing practices enable and condition the granting of probation. At the same time, the likely conditions under which probation will be granted greatly influence the design and functioning of sentencing frameworks.

In our study, we posit a developmental model of the evolution of probation by combining theoretical insights stemming from two different traditions: the literature on feedback effects

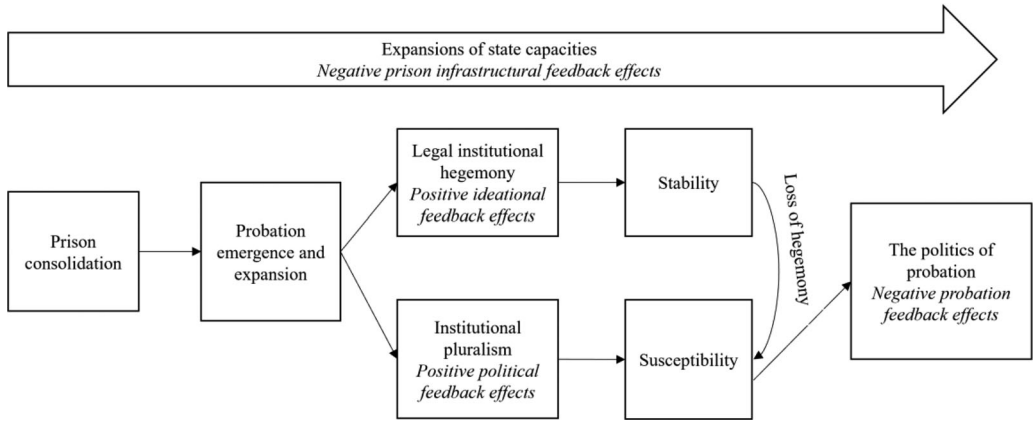

FIGURE 1 The trajectory of probation and sentencing frameworks

associated with criminal policies, on the one hand, and punishment and society studies on the relationship between formal policy and penal practice.

Feedback-based path dependence frameworks offer important insights to explain the trajectories of criminal justice policies (Dagan & Teles, 2014; Moore, 2022; Rubin, 2023). They provide a first basis for our theoretical construction. We build on Heather Schoenfeld's (2018, p.8) work connecting the trajectory of carceral institutions – including probation and early release – with three types of positive feedback effects of past policy choices (Pierson, 2000).

According to Schoenfeld, past criminal policy decisions *define the meanings* associated with future policy choices, providing state actors with 'discursive frameworks … to conceptualize social categories, policy problems, and new agendas' (p.8). Political scientists describe these cultural feedback effects of institutions as ideational (Blyth, 2001; Hall, 1993; Quirk, 1988). Ideas define the policymakers' standards to specify the goals of policy, the instruments that can be used to achieve them, and the nature of the problems they are meant to be addressing. Second, these decisions 'create politics', generating 'the spoils or motivations for state actors to mobilize', as well as providing resources in that mobilisation. Third, they may expand old or create new infrastructural state capacities, thus defining working capacities that future policy must consider.

In her work, Schoenfeld provides a clear framework based on feedback effects to explain the evolution of probation and parole. Yet, for our purposes, these insights have not taken sufficiently into account probation's nature as an ancillary institution of the prison. As Vanstone (2008) notes: 'probation's one common penal cornerstone, across all … different jurisdictions, was, and continues to be, the prison' (p.736). We make a first theoretical contribution by modelling probation's development in accordance with feedback effects emanating from a primary institutional arrangement, namely the hegemony of prison as a tool of penal control (see Figure 1).

Figure 1 illustrates some recurring, longer-term patterns associated with the emergence and development of probation. The process starts with the consolidation of the prison. As the carceral state develops, it creates political and infrastructural problems which scale as state capacities grow (Fonseca, 2018; Gottschalk, 2006; Schoenfeld, 2018) (see upper arrow in Figure 1). By state capacities, we refer to the state's ability to effectively implement policies, programmes and treatments to a population – in this case, its capacity to effectively police, apply judicial sanctions and incarcerate a growing number of persons. This creates escalating ethical, fiscal and population management problems.

The prison also defines, in Schoenfeld's terms, the political landscape in which mobilisation for and against probation takes place – creating further positive and negative feedback towards prisons. Negative feedback is associated here with increasing ideological opposition. Ethical and efficacy concerns with prisons influence the emergence of advocacy groups pushing for alternative, non-prison-based sanctions, as in the notorious case of John Augustus (Friedman, 1993, p.162; Hagan, 1979; Petersilia, 1997). In many countries, including Chile, rehabilitative ideals emerge out of the negative feedback of prisons and tend to find institutional space in probation (Salinero & Morales, 2019).

Figure 1 connects the emergence of probation, as a second stage, with these dynamics. Rather than breaking the hegemony of the prison, prison's negative feedback is managed by ancillary institutions. The emergence and consolidation of probation connects strongly with the tension between the negative feedback of prison development and its continuing hegemony.

Finally, we consider the positive ideational feedback effects that arise with the consolidation of probation in the passage between the second and third stage in Figure 1. The professional development of populations attending probation and parole creates, in some countries, interests and identities that align with its expansion or defence (Robinson, McNeill & Maruna, 2013). In Latin America, they generally coalesce around notions of rehabilitation (Vanstone, 2008). In all Western countries, sentencing and probation are also legally codified (Vanstone, 2008, p.738). Legal codification may lead to the institutionalisation of a legalistic understanding of probation. If legal logics maintain institutional hegemony, state actors will regard probation-granting schemes as related to legal categories, thus solving legal problems (Loader & Sparks, 2016). This typically leads to more stable trajectories, as political actors take for granted the reach of probation and sentencing schemes as part of the legal order (Lacey, 2011; Savelsberg, 1994; Tonry, 2007). In Germany, Hörnle (2013) and Albrecht (2013) depict an image of complete stability of sentencing practices based precisely on legalistic hegemony. A similar argument has been provided by McAra (2005) regarding the Scottish evolution of sentencing.

If this form of legalistic hegemony or isolation is absent or breaks, however, the opportunities to use probation as a tool of political engagement will grow (Campbell, 2018, p.228) – this is what we label 'susceptibility' in the fourth stage of the process in Figure 1. Legalism (but also a *real* social belief in rehabilitation) may thus act as a wall that contains the effects of negative political feedback out of probation. As this wall breaks, those effects will manifest. Activists can easily present probation as a tool that breaks the promise that felons will go to prison – it is an obvious target representing softness on crime (Petersilia, 1997; Robinson, McNeill & Maruna, 2013). This is what Figure 1 defines as 'the politics of probation' in the final stage. Our case illustrates the longer-term process of erosion of legalism.

Because high security/retribution goals and pragmatic concerns with diverting prison populations are largely incompatible (Tonry & Lynch, 1996), the politics of probation provide ample opportunities to challenge the status quo. Those opportunities do not immediately translate into a shift in policy trajectory. Even after changing their attitudes towards probation laws, legislators may use probation regulation to establish a back door for their own tough-on-crime reforms, limiting the negative fiscal and social effects of massive imprisonment policies even while attempting to appear tough on crime (Doob & Webster, 2006; Garland, 1996, 2002; Roché, 2007). Yet, under certain conditions that include high crime rates (Spelman, 2009) and perceptions of minority threat (Duxbury, 2021), the political treatment of probation and parole as symbols of state leniency may lead to a shift in formal policy aiming at providing substantial limitations (Miller, 2008; Page, 2011; Schoenfeld, 2018). Our case illustrates one typical condition leading to this change: the use of a scandal by advocacy groups.

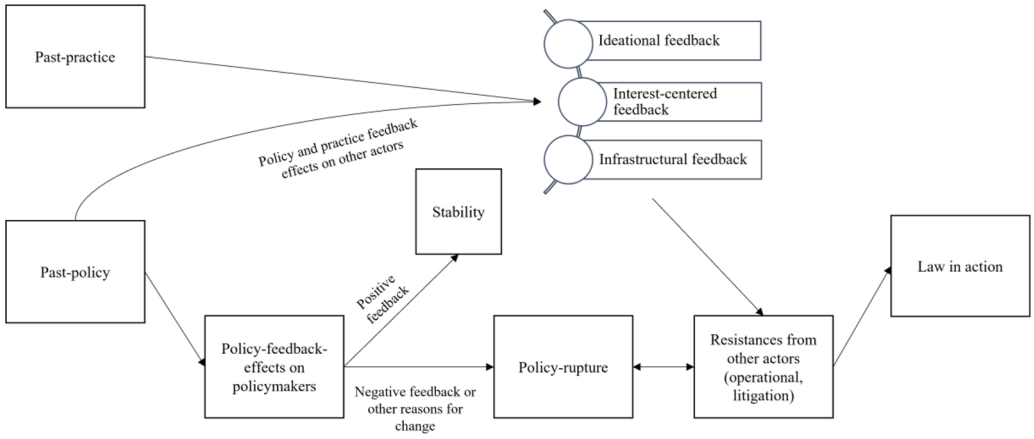

FIGURE 2 Policy feedback effects at different levels

As we will see, these insights prove helpful to understand the trajectory of sentencing and probation at the level of legislation: probation emanates and develops out of the negative effects associated with the growth of the carceral state, but its own development produces negative political feedback that eventually bears the fruits of instability.

These insights are limited, however, in their ability to make sense of probation and sentencing development at the level of practice – that is, regarding the decision-making processes taken by judicial or administrative actors that lead to the real treatment of individuals. To our knowledge, developmental frameworks of penal institutions have not dealt with these systematic connections.

Our second theoretical contribution lies in attempting to model these connections, that is, in tracing the dots between the development of political practices, on the one hand, and judicial or administrative implementation on the other. A rich tradition of punishment and society studies provide evidence on the mechanisms that drive resistance or adaptation to formal policies and help explain the 'gap' between policy and practice (Lynch, 1998; Rengifo, Stemen & Amidon, 2017; Rubin & Reiter, 2018). The study of the divergence between the expectations associated with formal legal rules ('law in the books') and the operation of legal institutions ('law in practice') was the main focus of early sociolegal scholarship (Macaulay, 1963; Pound, 1910) and remains an important topic (for a review, see Gould & Barclay (2012)). In criminal justice, the gap is typically modelled as the result of societal and organisational factors influencing the operationalisation ('the law-in-between') of formal policy changes through active interpretative responses (Jenness & Grattet, 2005; Rudes, 2012; Verma, 2015). A plethora of case studies provides rich descriptions of the factors that drive local actors to resist change. But this literature rarely connects the 'law-in-between' with the factors that gave rise to the policy shift in the first place. We claim that feedback effects provide useful tools to think about these connections between legislative politics and judicial and administrative implementation as well.

We illustrate this process in Figure 2 by dividing the trajectory of feedback effects on policymakers (lower part) and on the actors charged with the implementation of policy (upper part). The central claim connected with this illustration is that policy feedback takes place at different levels and with different valence regarding different institutional actors. In the case of probation, these feedback effects tend to be positive at both levels in an initial stage. With time, however, ideational positive feedback frames, such as legalism, may lose ground on policymakers while influencing judicial or administrative actors. Figure 2 illustrates this case: the waning influence of positive

feedback of probation and its growing negative feedback drive policy-rupture at the third stage of the lower echelon. However, these feedback effects may still hold at the upper (operational) level, driving resistance. Ideational positive feedback effects generated by policy decisions made decades before may still hold influence on judicial or administrative decision makers after those policies' formal demise or reform.

This is not a unique finding. Several bodies of criminological literature show the persisting causal effects of political entities that have somehow ceased (Farrall, Hay & Gray, 2020, p.4). Despite their 'ceasing', they are causal factors of current events. In punishment and society, a new generation of studies refers to this phenomenon through different terms such as 'penal layers' (Rubin, 2016) or 'palimpsestic penalty' (Quinn, Canossini & Evans, 2020). They describe the enduring effect that past institutional frameworks and technologies exercise even after their demise. They show how reforming technologies and practices only symbolically replace the entities that they target, maintaining and building over part of their operation.

Our case shows legacy effects of a different nature: legal actors keep on identifying a displaced legislative framework as defining the right approach to their decision making in sentencing. These legacy feedback effects drive resistance against reform, generating a process of negotiated reform – thus ours is as much a history of continuity as it is of change.

As we will see, our case highlights the complex interplay between these layers and the different paces at which policy irradiates feedback effects, contributing to an operational practice that remains stable even after legislative policymaking changed radically. We certainly cannot claim that the precise form of these interactions holds true in other settings. But our case provides material to think about the political evolution of probation and its reception at the level of practice.

3 | CASE, SETTING AND METHODS

We illustrate these dynamics by analysing a case that international academic literature has largely ignored, namely the evolution of sentencing and probation in Chile in the last two decades. In this section, we give background information on the case, briefly justify our case selection, and provide an overview of our analytical strategy.

3.1 | Case institutional background

Chile's sentencing practices are remarkably simple, stable, formalistic and lenient. As a civil law country, the legislature sets sentencing frameworks. Formally, in the law on the books, most offences are penalised according to a scale of eight grades of prison time. Each grade establishes a range of possible sentences; the lowest grade allows a sentence from 61 to 540 days of imprisonment, while the highest grade includes life imprisonment with restricted eligibility for parole. Judges ought to set the prison time to be served within the applicable range according to several proportionality criteria (Couso, 2011).

Probation is regulated in Act 18216, a statute that reaches back to 20th-century experimentation with prison diversion tools. We use the term 'probation' (in Chilean law: *penas sustitutivas*) to refer collectively to community supervision penalties. As all penalties are set in prison time, probation is deemed to substitute for incarceration (Galleguillos et al., 2022). The requirements of the different forms of community supervision vary depending on the degree of control associated

with the penalty. Yet, in general, Act 18216 allows judges to grant probation if they establish there is a low recidivism risk; if the sentenced penalty does not exceed five years of imprisonment; and if the defendant is not a reoffender.

However, the law in action – *the real institution of sentencing* – deviates considerably from this framework, simplifying it and making it more lenient. Two informal rules govern Chilean judicial practice: judges almost always sentence defendants to the shortest term within the range that is applicable to an offence; and the sentencing judge will grant probation by looking only at two of the statutory criteria: the length of the nominal penalty and non-recidivism (Wilenmann et al., 2018). Presentencing reports are rare, and judges do not rely on them to grant probation. Sentencing and probation operate through simple formal reasoning. In practice, only defendants convicted of crimes whose lower abstract penalty reaches five years and a day, or reoffenders, are likely to be incarcerated.

Although empirical research on sentencing in Chile is limited, we do have quantitative and qualitative evidence that this has been the shape of practice since at least the late 1990s (Hurtado & Junemann, 2001) and that it has an extremely high prevalence (Wilenmann et al., 2018). Judges deviate rarely from the sentencing in action framework, which is well entrenched in judges' attitudes and opinions (Morales Peillard & Salinero Echeverría, 2020).

The institutional history of this framework points to a legalistic hegemony in criminal justice, with probation used primarily to address the negative infrastructural feedback associated with the development of the prison. Act 18216 emerged out of a history of legislative experimentation with allowing judges to grant exceptions to the imposition of real prison time during the 20th century (Salinero & Morales, 2019). Prior laws made non-recidivist offenders convicted to less than one year (1940s) and then three years (1970s) of prison time eligible for probation. Surprisingly, it was the military dictatorship that, in 1983, consolidated these statutes and made all non-recidivist offenders convicted to under five years of prison time eligible for probation.

The historical sources on these changes are scarce (Salinero & Morales, 2019). They tend to cite 'general criminological knowledge' on the ineffectiveness of short prison terms and commitment to rehabilitative ideas – an important diffusion frame in the history of probation (Vanstone, 2008, pp.745–746). Even during the highly repressive military dictatorship of Pinochet, the argument apparently proved to be convincing to the Ministry of Justice (headed by the lawyer Mónica Madariaga, a cousin of dictator Pinochet) and then to the ruling Military Junta (BCN, 1983, p.4).

Although the arguments registered in the discussion of Act 18216 relate to general notions of rehabilitation, management of prison growth also may have influenced the Junta's surprising approach to probation and early prison release.

Figure 3 shows a significant increase in prison population during the 1980s (Arriagada, Farias & Walker, 2021; Salinero, 2012), which certainly pales in comparison to the massive increase of the 2000s. Except for a short-term increase in 1974, that growth does not appear to relate to the Junta's repressive policy (Morales, 2012). On the contrary, the increase in ordinary imprisonment presented a challenge to the government. Although we cannot determine the precise effects of the dictatorship's prison management policies because of data limitations, we do know that it made a significant use of general pardons (five out of the 14 general pardons that have taken place in 200 years of Chilean history), extended probation through Act 18216, and made similar extensions to the applicability of parole. This suggests a growing concern with prison population management.

After the end of the dictatorship in 1990, the new centrist governments were initially more concerned with expanding due process guarantees and civil freedoms than with changing a rather liberal sentencing and probation-granting framework (Dammert, 2006; Morales, 2012; Wilenmann, 2020). Yet prison population management concerns remained. In 1990, a new general

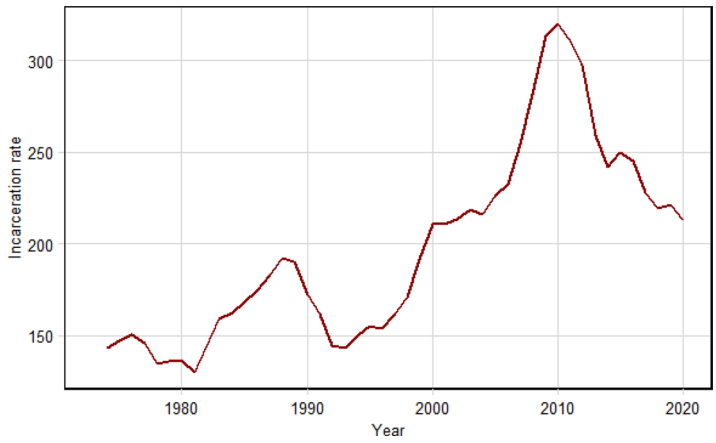

FIGURE 3 Incarceration rate evolution 1973–2020
Source: Gendarmeria de Chile. The data represent the yearly mean prison stock population registered at the end of each month by Gendarmería de Chile.

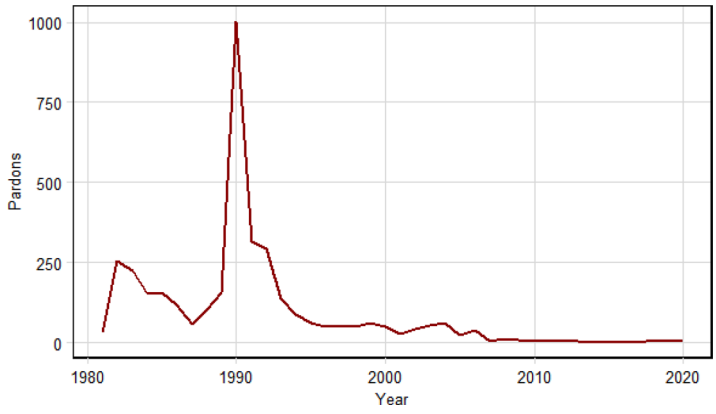

FIGURE 4 Evolution of individual pardons in Chile
Source: Data on individual pardons sent to the researchers by the Ministry of Justice.

pardon granted by Act 18978 benefitted an estimated 1,700 inmates, and another 1,000 convicts received individual pardons – an extremely high number when compared with other years as shown in Figure 4.

As shown above in Figure 3, the prison population decreased in the 1990s. This decrease appears connected to the liberal policies of that time (Dammert, 2006; Morales, 2012). We know of no attempt to push against the prevailing sentencing and probation-granting framework – it was simply constructed as part of the content of criminal law. Policymakers did not even consider reforming sentencing in the mid-1990s, when the country made a complete overhaul of its criminal justice system under the 1995 Criminal Procedure Reform (Wilenmann, 2020). Lenient sentence policymaking continued into 2001, when a general pardon requested by the Catholic Church benefitted an estimated 3,000 inmates. Thus, the prehistory of our case is marked by legalistic hegemony and low politicisation of sentencing policies. However, things started to change around 2003, the period in which the focus of our analysis begins.

A second aspect of the institutional background of our case deals with constitutional litigation – it will be relevant near the end of our story. As in most civil law countries, constitutional challenges to any piece of legislation must be submitted before the Chilean Constitutional Court (CC). Most challenges take place through inapplicability writs. Under these actions, a party requests the CC to command an ordinary court to restrain from applying a statutory provision deemed incompatible with the constitution. In a central premise for our analysis, the sentencing in action framework

still persists unabated despite new laws restricting the applicability of probation enacted since 2014 because of inapplicability decisions by the CC (Grez & Wilenmann, 2019). The CC has impeded more than 4,000 applications of these new probation laws and the few empirical studies on sentencing undertaken after 2014 do not show changes in the practices and attitudes of criminal judges. We thus assume in our analysis that sentencing in practice has not changed even after the formal sentencing framework started to change in 2014.

3.2 | Case selection

We select Chilean sentencing policy in the last decades as a heuristic, single case study. Our selection is informed by prior knowledge of the outcome, as we had familiarity with the general evolution prior to systematically studying it. As such, the case is meant to provide an illustration of our claims on the dynamics of evolution of sentencing and probation politics rather than to test our theoretical expectations. Besides illustration, our case provides two further points of interest.

First, our case allows us to look at a significant change in sentencing and probation policy in a short span of time (2004–2019). In this period, criminal policy in Chile transitioned first from a stage of legalistic hegemony to a politicised approach to criminal justice policy that did not reach sentencing and probation. A few years later, it transitioned again to the situation that we have termed the 'politics of probation' – a political situation in which probation becomes a highly-contested political symbol. We can thus observe a quick succession of changes after a long stasis period.

Second, our case allows us to look at the patterns of political behaviour surrounding sentencing and probation, and their relation to practice, beyond the best-studied cases. Chile is a unitary country based on a civil law tradition and located in Latin America. It allows us to study the trajectory of sentencing policies and practices beyond the narrow focus on the Global North and common-law countries. Most importantly, despite the continuing lack of empirical data of law in action in Latin America, we do have data on the configuration and variation in sentencing practices in the case of Chile. We can leverage this information to look at the interplay of sentencing politics and practice.

3.3 | Methods

Our study deals with *sentencing and probation policy behaviour*. It does not provide original empirical research on judicial sentencing practice, but rather assumes stability of judicial sentencing practice based on literary findings references above.

We do provide new data to analyse legislative behaviour. Our main source of data corresponds to legislative materials. We sampled data on all laws that have modified the criminal code or law 18216 in the database of the Chilean Library of Congress (BCN). The website (www.bcn.cl) provides a useful query method to search for all bodies of legislation that have modified other legislative acts. The assumption in our method is that significant pieces of criminal policy will very likely modify either of these two statutes. Our query extends back to 1996, the earliest date accessible in the BCN's database. The resulting selection of 76 statutes, and the legislative records connected to each of them, comprise our main data sources. Beyond this, we make use of the available secondary materials on the political background of some of these central pieces of legislation.

Our data-gathering strategy has two important limitations. The first limitation relates to the content of our query. We decided to limit it to reforms of the criminal code and Act 18216 to avoid biases and non-systematic data collection by making an ad hoc selection of reform statutes. But this method provides some false negatives, as a few relevant criminal statutes (such as drugs and guns) are excluded. However, as we are interested in trends, we think that these limitations should not affect our ability to detect differences in behaviour of legislation across time.

The second limitation relates to the use of legislative materials to analyse the motivations and frames related to criminal policy. The BCN keeps extensive legislative records which are easily available online, but they do not include pre-legislative information. Media information is another helpful source of information, but sampling and analysing that type of data would probably overshoot our goals. In case of some major turning points in our story, we compensated the lack of media data sampling by making use of the available studies on the subject.

Our data analysis strategy proceeds in two steps. We first applied a simple codification scheme to all statutes in our database to detect trends and periodise our case. After this periodisation step, we analysed the materials connected to each bill.

We combine two theoretical insights to tailor our periodisation to detect patterns of political behaviour in probation and sentencing politics. First, we use Campbell & Schoenfeld's (2013) model of development of crime politics. They distinguish three phases: political actors first make some tentative attempts to make political gains from penal reforms (*emergent crime politics*). Second, as these penal reforms provide political returns, political actors prioritise crime in political agendas and politicise penal policies (*high crime politics*). Third, as these policies become entrenched, they define the future trajectories of the field (*captured crime politics*).

The second insight stems from distinguishing operational and symbolic crime politics. An important body of literature shows that political actors make use of legislation and (usually imported) tough-on-crime frameworks to produce mostly symbolic effects (Garland, 1996; Jones & Newburn, 2006; Zimring, 2005). This is particularly common in legislation regarding sentencing. Such reforms are not meant to change the operation of criminal justice. However, we do know of cases of high crime politics in which sentencing reform aimed at, and did produce, substantial operational changes (Zimring, Hawkins & Kamin, 2001).

We combine both models by operationalising criteria to differentiate *criminal reforms with no punitive effects*, those *with only apparent punitive effects*, and those *with real punitive effects*, to establish their frequency and establish periods of emergent and high crime politics. We characterise periods of non-politicisation of crime as periods in which non-punitive criminal justice reforms dominate; periods of emergent crime politics as periods dominated by only apparent punitive reforms; and periods of high crime politics as those with clear trends of real punitive reforms.

To operationalise the systematic codification of criminal reforms related to these three categories, we apply a strategy based on the interaction of criminal bills with the sentencing framework in action that rules Chilean practice. We label criminal reforms as having real punitive aims if they alter the sentencing framework to limit probation or if they change penalties beyond the five years mark (precluding probation). Here, criminal reform implies real punitive increases on each sentenced individual. Criminal reforms with only apparent punitive effects are those that lead to increases in penalties for some offences, but which do not modify the general sentencing framework nor increase any penalty beyond the five years mark. Because of the configuration of sentencing practice in Chile, such reforms change only marginally the likelihood of probation. Finally, we label the remaining reforms as non-punitive. Such cases include decriminalisation reforms and reforms aimed at solving technical problems, lowering penalties, etc.

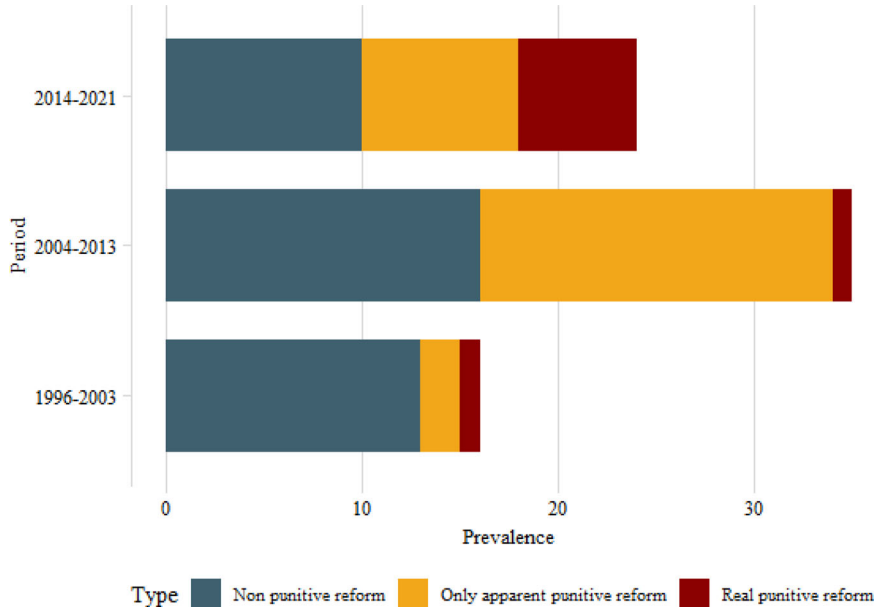

FIGURE 5 Evolution of legislative practice on sentencing in Chile 1996–2021
Source: Derived following query method of the Biblioteca del Congreso Nacional database explained in the text.

In the second stage of our analysis, we conduct qualitative analysis of the records connected to each bill in our database. We searched for the passages that discuss sentencing changes and analysed the motivations behind them. We focused specifically on the motivations behind probation limitation initiatives.

4 | FINDINGS

4.1 | Crime politicisation as symbolic commitment: Chile's emerging politics of crime

To provide evidence and illustrate the trends of political behaviour in our case, we start by showing the results of our periodisation. Figure 5 plots the results of our analysis.

Figure 5 shows a developing change in criminal legislation in Chile. In the first period going up to the year 2004, the legislature showed a predominant orientation towards non-punitive reforms. But after 2005 the ratio of at least apparently punitive statutes increased substantially.

This change of behaviour appears connected to change in the political incentives at the time. Crime became a more salient issue. We cannot provide here evidence on the impact of actual changes in crime rates in this evolution, as reliable national crime statistics were largely absent up to the year 2005 and Chilean victimisation surveys have been subject to important methodological criticisms (Araya-Moreno, 2021; Quinteros et al., 2019). But, for the purpose of connecting legislative behaviour to changing political incentives, actual changes in crime prevalence remain secondary to public opinion changes. Figure 6 depicts data from

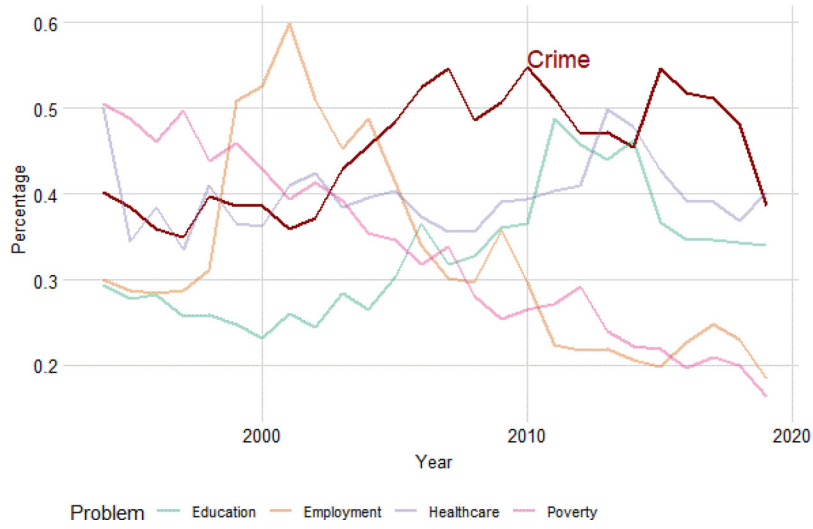

FIGURE 6 Evolution of most pressing political topics 1994–2020, CEP survey
Source: From CEP survey data results. Available at: https://www.cepchile.cl/cep/site/edic/base/port/graficador.html [Accessed 8 November 2022].

representative national surveys, carried out by a respected local institution (Centro de Estudios Públicos (CEP)), showing the evolution of public opinion regarding the most important political topic since 1994.

As shown by Figure 6, crime came to be seen as the most pressing political issue in the country by the mid-2000s. The legislature reacted to this change and addressed the demand for public safety by enacting legislation to increase criminal penalties – as shown by the 2004–2013 bin in Figure 5. In other words, criminal policy became politicised. At first, however, Congress simply increased nominal penalties associated with different sets of offences, but they were careful to stay inside the range making probation applicable. Just as in other jurisdictions (Campbell & Schoenfeld, 2013; Sozzo, 2016), emerging crime politics dominated this first period.

During this period, the discussion on the first major bill signalling a new punitive approach to questions of criminal policy related precisely to the role of sentencing. In 2004, Congress reacted to a high-profile sex scandal – the 'Spiniak case' involving a local businessman organising sexual parties involving young sex workers – by increasing the penalties associated with child pornography, child prostitution, and other forms of sex offences (Act 19927). In the justification of the bill, its authors criticise the ineffectiveness of the existing criminal regulation of sex, because the applicability of probation associated with Act 18216 fails to deter offenders and prevents the penal law from having real effects – a criticism that was supported by some criminal law experts (BCN, 2004, p.104). Despite this, the statute ended up simply increasing penalties without materially affecting eligibility for probation.

This basic script characterised the legislative approach to criminal policy for the following decade (2004–2014): Congress would address criminal issues by increasing some offences' penalties but taking care to stay inside the limits of eligibility for probation. At least 19 such statutes were enacted in areas such as urban fraud (Act 19932), use and carrying of weapons (Act 19975), domestic violence (Acts 20066, 20480), robbery (Act 20601), and sexual crimes against minors (Act 20685), among others. For example, in Act 20685, the legislature changed the nominal penalty

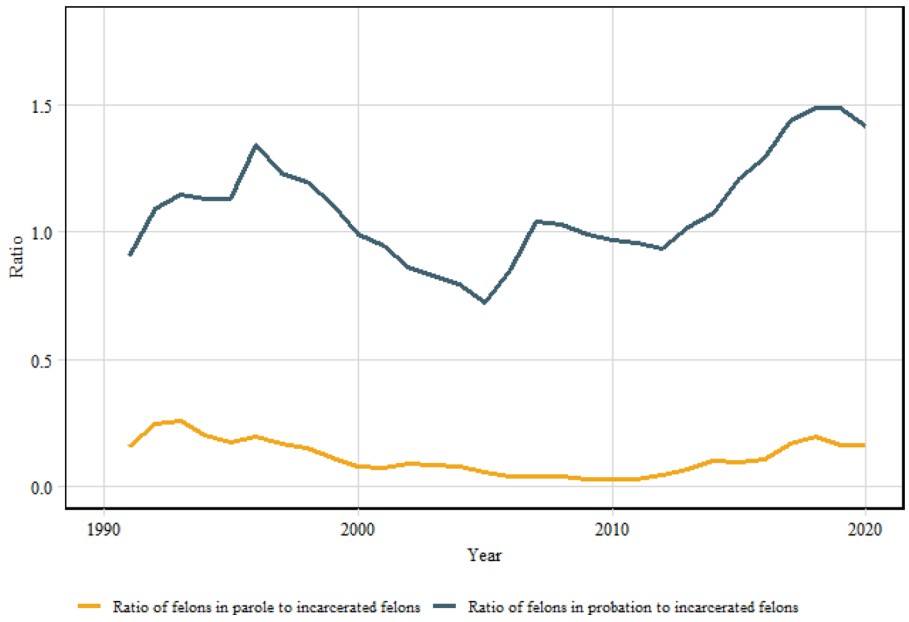

FIGURE 7 Ratio of probation and parole felons to incarcerated felons
Source : Gendarmeria de Chile. Data calculated from the yearly mean prison, probation and parole stock population at the end of each month.

applicable to the commercialisation of child pornography from a range of 541 days to five years of imprisonment to a range of three to five years of imprisonment. This may look like a major increase in punitiveness, but because the sentencing period stays inside the five years mark, most convicted defendants will be granted probation.

The politicisation of criminal policy is also easily perceivable in changes in campaign behaviour. Campaigning on public security issues started to draw political gains, breaking the liberal consensus of the 1990s. In 2009, a right-wing coalition won a presidential election for the first time since the end of the dictatorship, on an electoral platform based partially on a tough-on-crime stance (Castiglioni, 2010, pp.237–238; Dammert, 2013). Yet this did not immediately lead to a strong tough-on-crime policy. For the right-wing administration of Sebastián Piñera, it was the growth of incarceration rates that resulted in a political problem. It put pressure on the carceral capacities of the country, with the incarceration rate reaching a peak in 2010 of about 330 inmates per 100,000 inhabitants (Salinero, 2012; Wilenmann, 2020).

Faced with a major carceral crisis when a prison fire caused more than 80 deaths in 2010, Piñera's government was forced to develop prison reduction policies. In 2012 the right-wing government championed an effort to reform Act 18216 and to increase parole-granting. Act 20603 introduced stronger forms of community control through electronic monitoring and, in some cases, a more intense oversight by probation officers (*libertad vigilada intensiva*), but generally consolidated and extended the application of probation to sentences under five years.

The expansion of probation and parole in relationship to the prison in the following years is easy to perceive in Figure 7.

Chilean administrative data for probation and parole is unfortunately only available since 1990. Figure 7 suggests that the significance of probation had been gaining ground in the 1980s, but the

decrease in the level of state control in the 1990s corresponded with falling probation numbers. However, this tendency reversed steeply around 2005. By the mid-2010s, probation had expanded its operations substantially.

We certainly cannot claim from these data that probation expanded by design – although the expansion is coetaneous with the efforts to reduce carceral populations. Probation may have rather expanded as a result of the increasing prevalence of convictions through quick procedures following the Criminal Procedure Reform (Duce, 2019). Or criminal justice agencies may have also adopted informal practices seeking to increase non-incarcerating sentences to reduce prison growth tendencies. But, whatever its cause, the fact remains: alongside the steep drop of the incarceration rate in Chile in the 2010s, the sharp increase in the ratio of probationers to incarcerated felons provides evidence that, unlike other jurisdictions (Phelps, 2013, 2017), probation was acting mostly as an incarceration reduction tool by 2014.

4.2 | Breaking inertia

Ironically, it was during the progressive second administration of Michelle Bachelet that the halo of invincibility of the Chilean sentencing framework faded. Act 20770 – popularly known as the 'Emilia Act' after the baby whose death in a drunk-driving accident motivated the bill – inaugurated this new period of criminal policy in 2014. The statute established a mandatory prison term of at least one year, with no eligibility for probation, for all cases of drunk driving resulting in the death or serious injury of a third party.

The Emilia Act is a central part of our history, as it embodies *the* step in which emergent and mostly symbolic crime policies gave way to a policy seeking operational change. Sentencing policy had certainly been politicised for over a decade, but before the Emilia Act this did not lead to formal policy seeking to alter the operation and expansion of probation. The Emilia Act thus marks a major policy shift.

Part of the explanation for this development derives from the specific circumstances around the bill and the case that surrounded it. Mr Fariña, the defendant, was sentenced to two years of probation after he caused a fatal car crash by driving under the influence of alcohol. A baby was killed in this accident. Her parents, working with multiple advocacy groups, started a campaign to prevent drunk drivers who cause serious injuries or death from going 'unpunished' – they sought to end the availability of *probation* for such cases. In a case study on the discussion of the bill, Paula Medina (2020) depicts a long struggle. Following the accident and the baby's death, most legislators were eager to join the campaign with Emilia's parents and made strong claims about the need to get tough on drunk drivers. Yet they initially presented and defended bills that only provided for some alterations of the nominal punishment.

This business-as-usual approach was resisted tenaciously by the family. As usual, Congress invited criminal law experts to comment on the project, all of whom initially rejected the idea of limiting probation as demanded by the family. In repeated statements, the family's position was denounced as 'penal populism'. Even the highly conservative Chilean mainstream media shared this opinion (*El Mercurio*, 2013a, 2013b). Yet, pressure increased when the defendant was released on probation during the discussion of the bill. Legislators started to demand the government to mediate and deliver the 'Emilia Act' championed by the family, that is, legislation that would put an end to the perceived impunity of drunk drivers enabled by probation laws. After some months, the left-wing government of Michelle Bachelet introduced a new bill in this direction whose provisions were supported almost unanimously.

The speeches given by legislators to justify their votes show different attitudes on the right and left. Most legislators connected to the right showed an open support and welcomed putting an end to the 'perceptions of impunity' connected to drunk driving and crime in general. For centre-left or left-wing legislators, their speeches show ambiguity. Many of them (deputies Cariola, Gutiérrez, Fernández, Venegas, Navarro and Gabriel Boric, the current President of Chile) expressed this ambiguous support by pointing to their commitment against simply increasing penalties or calling the government to develop more robust carceral policies (senators De Urresti and Letelier). Some even acknowledged that the project implied a rupture in the historical trajectory of the field: 'We need to acknowledge this: it will be the only area with special rules on sentencing. With this, we break what has been the system contained in the Criminal Code and Act 18216' (senator Araya, BCN 2014, p.115). Yet their interventions followed a common recipe: after pointing to these problems, they claimed that a special message was needed in this case, and they voted in support of the bill.

The experience of the Emilia Act changed the institutional attitudes on the field. Legislators stopped limiting their actions in the face of sentencing. Probation appeared less as a taken-for-granted part of the criminal justice system and more as an artificial limitation on the real effects that criminal policy should have, namely sending people to prison. By 2022, at least four bills had followed in the footsteps of the Emilia Act. In criminal bills still not enacted, it has become common practice to include similar rules. After holding steady for almost 40 years, criminal policy has entered a new phase in which breaking with the general sentencing framework and limiting probation is part of any relevant piece of criminal legislation.

4.3 | Policy shift and resistance from other actors

That policy change, however, has failed to have significant effects on judicial and administrative practice: the sentencing framework in action still rules unabated and virtually unchanged. This is the final part of our story. Starting in January 2016, the CC has consistently held that the limitations of probation created under the Emilia Act and similar statutes are unconstitutional, effectively resisting the policy shift.

This development may appear unexpected to international readers because of the ideological alignment of the CC. The Court has been labelled as a deeply conservative institution whose mission lies in impeding alterations of the neo-liberal political and economic institutions left by the military dictatorship (Ahumada, 2018; Atria, 2013). Moreover, after the first presidency of Sebastián Piñera in 2013, the Court became divided between two groups of five liberal and conservative justices each. But in 2016, the conservative group started to build a clear majority based on some lucky designations and retirements. This right-wing majority has no homogeneous ideology, combining conservative Catholic lawyers with pragmatic political advisors committed to right-wing laissez-faire policies.

Although international readers might expect conservatives to show deference to tough-on-crime policy (Dolovich, 2017), and this had been the historical behaviour of the CC (Carroll & Tiede, 2011, 2012), the Court shifted towards strict control of sentencing schemes precisely around the time that the conservative majority arose in 2016 (Grez & Wilenmann, 2019). This has been by far the main area of work of the CC since then, as shown by Table 1.

Table 1 summarises the production of sentences by the CC between 2018 and 2020 based on the organisation's annual report. It shows that around 80% of its production (2,459 out of 3,083 inapplicability sentences) centres on this issue alone. Through a quick web scrapping of the CC's

TABLE 1 Constitutional court writs of inapplicability 2018–2020

	Emilia Act and other probation restricting rules	All other matters combined	Percentage
Writs of inapplicability	3,706	5,702	65%
Inapplicability sentences	2,459	613	80%

Source: Derived from CC's annual reports. Available at: https://www2.tribunalconstitucional.cl/publicaciones/cuenta-publica/ [Accessed 8 November 2022].

website, we found 1,017 further inapplicability sentences in 2021. Although we have no data on 2017, the total count of times that the CC has impeded the application of probation sentencing rules between 2017 (when this behaviour started) and 2022 is thus likely to surpass 4,000.

We certainly cannot claim that no court has ever applied these probation-limiting laws, but that behaviour is marginal at best. Unlike right-wing legislators who showed no problems but rather celebrated 'attacking impunity' through the Emilia Law, it is this politised, right-wing judicial majority that has consistently voted against the constitutionality of restricting the general probation framework, citing both a right of the sentenced party to rehabilitation (sentence by the CC numbers 2983–2016, points 23–24) and concerns with unequal treatment regarding felons sentenced under other crimes (sentence by the CC numbers 2995–2017, point 12).

5 | DISCUSSION AND SUMMARY

Our case shows an evolution that illustrates well our claims on the development of probation based on feedback effects. Probation's expansion in Chile was sustained by negative infrastructural and ideational feedback connected to the expansion of the prison, giving rise to efforts to contain prison growth through probation and to its identification with a rehabilitative ideal. The legalistic construction that arose from this development – Act 18216 – appears to have institutionalised slowly, providing stability. Legislators and politicians hardly questioned this framework even as crime politics started to emerge. But in 2014 a major policy shift took place driven by a scandal connected to probation-granting. How can we make sense of this trajectory?

Our case certainly appears to connect well with the well-known phenomenon of stasis violently interrupted by rupture driven by external factors (Thelen & Conran, 2016). The scandal that drove a policy shift during the discussion of the Emilia Act certainly played a relevant role in accounting for change. It would be an analytical mistake, though, to lose sight of the fact that the increasing opportunities for success in the use of the scandal were driven by a longer-term erosion of the ideational, self-stabilising mechanisms driving probation expansion. This aligns well with recent penological literature emphasising continuity between the mechanisms that drive continuity and those that end up undermining an institution (Moore, 2022; Rubin, 2023; Schoenfeld, 2018).

Our case also reflects a history of negotiation with the increasing political costs (negative feedback) associated with probation. The first source of negative feedback relates to the enormous expansion of probation following first the Criminal Procedure Reform and more eloquently the San Miguel prison fire in 2010 (see Figure 7). The formal start of the politics of probation followed on the heels of this operational expansion. Opportunities to make political gains denouncing leniency grew. The Emilia Act expresses this growth of opportunities: victims and advocacy organisations were successful in turning probation into a symbol of political struggle.

The expansion of legalistic institutions and their ideology – an important sustaining element of sentencing and probation stability in Chile – also generated their own resistance. From the year 2005, as the new criminal system was fully installed in Santiago, judicial proceedings acquired new visibility in the face of public opinion. And they became a political target, with judges and law professors being labelled as 'garantistas' – a pejorative term indicating someone only concerned with defending criminals rather than standing for victims. By 2009, it was already commonplace to campaign on promising to stop 'the shifting door' of criminal justice.

The expansion of opportunities to press for change certainly does not automatically materialise that change. Our case reflects the longer (emerging crime politics, waning influence of legalism on policymakers) and shorter run (media campaigns, scandal) dynamics that explain the shift materialised in the Emilia Act (for a review of discrete policy change causes, see Annison (2022)).

Yet, our case shows that these negative effects (as much as the diminishing authority of legalism) stroke differently outside legislative politics, bringing more nuance to the idea of radical rupture and change.

The fact that conservative justices drove this resistance may appear as simply a local idiosyncrasy. Yet, perhaps, the association of the conservative legal movement and tolerance of harsh crime policies based on the US case (Dolovich, 2017) may hide some important insights. Ian Loader (2020) has pointed to a seemingly contradictory configuration of conservative ideologies on crime with the image that it possesses 'two faces'. Conservative ideology is not only committed to constructing crime as a moral problem and to the restoration of order. 'Conservatism is also a skeptical creed, attentive to the limits and overreach of government' (p.1184). Both in its neoconservative and neo-liberal variants – both well represented by the CC's justices – conservative ideology tends to oppose rapid change and is openly averse to ideational shifts. In an era of regulatory expansion, sentencing reforms limiting probation for specific crimes may have commonly provoked conservative hostility towards state expansion. Conservatives may not only come to internalise and identify with an artificial framework, such as the sentencing framework in Chile, but also more emphatically oppose changes at different levels by construing changes on that framework as state expansionism.

This resistance illustrates the complex negotiations that judicial and administrative actors undertake with a policy shift and the wider reach of both positive and negative feedback associated with crime policies. Even in the face of an open erosion of the stability of sentencing and probation policies at the level of legislature, judges and other actors have checked the erosion of the general sentencing framework in practice.

This resistance has also ensured the continuous operation of probation-granting schemes and may have played a role in incarceration trends. The prison population in Chile has continued to fall during the last decade and probation still comprises a larger share of the sanctions imposed by the system. There is no evidence in our case to suggest the resisting justices were thinking about prison population dynamics as they opposed sentencing changes, but this resistance may have significant infrastructural consequences in the long term.

This resistance has so far prevented the cycle of high crime politics from acquiring part of their self-reinforcing properties. In their studies of several US states, Campbell & Schoenfeld (2013) argue that high crime politics ignite a new process of path dependence by entrenching punishing institutions. As the scale of law enforcement and punishment institutions grows: 'captured crime politics is in significant part sustained by the organisational strength and political activism of crime-related special interest groups' (p.1408). This process appears connected to the real infrastructural expansion of the carceral state associated with high crime politics. In Chile, however, high crime politics has not been associated with carceral expansion. The only policy that had a

(perhaps marginal) aptitude to produce such an expansion, has been resisted. This is certainly a welcome development.

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