

# Populism, Pluralism, and Criminal Justice

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The story that James Forman Jr. tells in his superb book, *Locking Up Our Own*,<sup>1</sup> is local and nuanced. Forman explains that mass incarceration resulted from many small decisions made in many different places.<sup>2</sup> Although all of those decisions were shaped by the legacies of racism and racial oppression, Forman shows that mass incarceration was not *only* a product of racism and racial oppression, or at least that the lines of causation are long and complicated.

The story that Forman tells may therefore seem disconnected from the election of Donald Trump and from the nationwide resurgence of racism, nativism, and anti-Semitism since 2016. The fear and hate that Trump has whipped up have been anything but nuanced, and this is a national story, not a local one. It may therefore seem misguided to ask what Forman's book can tell us about the distinctive challenges of the Trump era, other than to remind us of the continued, critical importance of local politics in criminal justice.

Ultimately, though, *Locking Up Our Own* is about policing, prosecution, and punishment in a democracy. The direction that our national politics has taken in the past few years gives us reason to rethink democracy; not whether it is a good thing, but what it should mean, and what it requires to flourish. And Forman's book does have some lessons about that, beyond "think local." It can help us think more sensibly about the connections between criminal justice and democracy at the national as well as the local level. The most important lesson the book offers in this regard is that we should worry more about making criminal justice safe for democracy than about making democracy safe for criminal justice.

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1. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

2. *See id.* at 13–14.

To see why, we have to talk first about what we mean—or should mean—by “democracy.” There are two different ways to think about democracy. We can call them “popular sovereignty” and “collective self-government.”

The motto of popular sovereignty is, “Here, the People rule.” Democracy is a matter of control over the levers of power. It is a kind of transmission belt: the people want certain things, and in a democracy those desires are translated into policy.

The motto of collective self-government, on the other hand, is “E Pluribus Unum.” There is no one, single “people”; the public is comprised of lots of different kinds of people and lots of different groups. And people’s wants and preferences are not just there; they are themselves generated and shaped through politics and living together. Under this second view, sometimes called “democratic pluralism,” democracy is not a matter of the “People,”—whoever they are—getting what they want; rather, it is about a diverse society finding ways to govern itself peacefully and equitably.

Each of these two ways of thinking about democracy has weaknesses. The weakness of popular sovereignty is that it can degenerate into populism, not in the sense of the American agrarian movement of the late nineteenth century, which took aim at concentrations of economic power,<sup>3</sup> but in the sense of what we used to think of as European or Latin American populism, an authoritarian form of politics in which “only some of the people are really the people,”<sup>4</sup> and in which anything done in the name of those people is treated as, by definition, democratic. The weakness of democratic pluralism, on the other hand, is that it can drift into rule by elites and leave everyone else alienated and disaffected.<sup>5</sup>

Which of these dangers seems most pressing has varied over time. In the immediate aftermath of the Second World War, populism seemed the greater danger, so democratic pluralism gained lots of adherents. In fact, it became the orthodox academic account of American democracy.<sup>6</sup> That orthodoxy came under attack in the 1960s and 1970s, partly because it had become orthodox but also because the threat of populist authoritarianism seemed to have receded, and the threats of elitism, alienation, and disengagement loomed larger.<sup>7</sup> Theories of popular sovereignty grew more attractive. Today, with alarming forms of

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3. See, e.g., WILLIAM DAVIES, *NERVOUS STATES: DEMOCRACY AND THE DECLINE OF REASON* 220 (2019).

4. JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 21 (2016); see also, e.g., Nicola Lacey, *Populism and the Rule of Law*, 15 *ANN. REV. L. & SOC. SCI.* (forthcoming 2019).

5. See, e.g., PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* (1967); Darryl Baskin, *American Pluralism: Theory, Practice, and Ideology*, 32 *J. POL.* 71, 80 (1970).

6. See, e.g., DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 13–32 (2008); Theodore J. Lowi, *Foreword* to KENNETH PREWITT & ALAN STONE, *THE RULING ELITES: ELITE THEORY, POWER, AND AMERICAN DEMOCRACY*, at vii (1973).

7. See, e.g., SKLANSKY, *supra* note 6, at 61–65; William E. Connolly, *The Challenge to Pluralist Theory*, in *THE BIAS OF PLURALISM* 3 (1971).

populism on the march, not only in the United States, but around the globe, the ideas associated with democratic pluralism are regaining some of their appeal.

These two sets of ideas of democracy—popular sovereignty and democratic pluralism—raise different kinds of questions about the relationship between democracy and criminal justice. If you think democracy means popular sovereignty, the questions you are likely to ask are: What kinds of processes lead to criminal justice policies that reflect the popular will? And are those kinds of processes in tension with, or instead a way of producing, criminal justice policies that are fair, humane, and effective?

Partly because popular sovereignty has attracted so many adherents over the past couple of decades, there is a big debate about the latter question. Some scholars blame the worst excesses of American criminal justice over the past several decades—including mass incarceration—on an excess of democracy, and more particularly on what is sometimes labeled “penal populism,” basing policies on the public’s emotional responses to crime.<sup>8</sup> Other scholars, though, argue that popular sovereignty is the way to *correct* the wrong turns we made in criminal justice: the way to make criminal justice fairer, more humane, and more effective is to put it in the hands of the communities that share a linked fate with criminal suspects and criminal defendants, because they include the parents, children, partners, neighbors, and co-parishioners of those suspects and defendants.<sup>9</sup>

What is noteworthy about the story Forman tells is that it does not really support either side of this debate. Elites were heavily complicit in mass incarceration, but so were the communities that were supposed to share a fate with the direct victims of mass incarceration. *Locking Up Our Own* suggests that whether elites or the masses are to blame for mass incarceration may be the wrong question to ask.

You are apt to ask a different question about the relationship between democracy and criminal justice if you are democratic pluralist. If your motto is “E Pluribus Unum”—if you think democracy means, first and foremost, figuring out ways for diverse groups of people to govern themselves and settle their differences peaceably and fairly—then the question you are apt to ask is not how do we keep criminal justice safe from democracy. Instead you will ask how we keep democracy safe from criminal justice. You will want to know which criminal justice policies are likely to make it easier for a diverse society to govern itself peacefully and equitably and which ones will make that more difficult.

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8. See e.g., RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 5 (2019); JOHN PRATT, *PENAL POPULISM* (2007); JULIAN V. ROBERTS ET AL., *PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES* (2002); see also FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001).

9. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017); Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

And if you think that the greatest threat to democracy today, around the globe and here in the United States, is a divisive form of populism that starts with the premise that only some of the people count—that only some people are part of “the People”—then you will be particularly worried about criminal justice policies that dehumanize criminal suspects, criminal defendants, and incarcerated people. You will be worried about policies that write all of these people out of “the People” who are supposed to rule.

The first and most important reason to oppose dehumanizing criminal justice policies is that it is wrong to treat any human being as something other than a human being. It is wrong to treat anyone as no better than the worst things he or she has ever done. But if you are a democratic pluralist you have a second reason to oppose policies of that kind: they provide training for other forms of divisive politics. One might think that the othering of criminal defendants and criminal suspects stands apart from the othering of African Americans, or Jews, or people who define their gender differently. But it does not. Historically, they link together, and historically the othering of criminal defendants has often been the first step that authoritarians take down the road to a more thoroughgoing politics of scapegoating and exclusion. That was the story of the Reichstag fire. It is the story of fear-mongering around “criminal aliens.” It is the story of “Lock her up.” It is the story of the demonization of George Soros. It is the story of the celebration of police brutality. Othering feeds on itself; dehumanizing criminal suspects and criminal defendants leads to more dehumanizing.

With these two reasons to oppose criminal justice policies that dehumanize criminal suspects, criminal defendants, and people who are serving or have served prison sentences, what kinds of policies will you be most concerned about? Obviously practices such as felon disenfranchisement. But you will also be concerned about any system of incarceration that acts, as ours does, as a de facto system of semi-permanent banishment, in conditions of intentional brutality. You will be concerned about employment and professional licensing rules that keep formerly incarcerated people officially excluded from full citizenship, officially fenced out of “the People” who are supposed to govern.

In closing, let me mention one other aspect of criminal justice you are apt to be concerned about if you do not want criminal suspects and criminal defendants to be dehumanized. It is an aspect of criminal justice that shows up throughout Forman’s book, but one that he may be too modest to give the emphasis it deserves: the role of indigent defense.

There is one person in the courtroom whose job it is to make sure that the defendant is treated as a human being, and that is the defendant’s lawyer. Sure, everyone in the criminal justice system, including prosecutors, should take responsibility to ensure that criminal defendants are treated as human beings. And there are prosecutors who know that and are being elected on that basis. Darcel Clark, the Bronx County District Attorney, likes to say that prosecutors need to remember that they represent all of the people, not just the victims and

their families, but the defendants and their families as well.<sup>10</sup> But Darcel Clark is the prosecutor. She has lots of jobs.<sup>11</sup> The defense attorney has one job, and it is a critical one.

We have known for decades that indigent defense in the United States is underfunded, but we have not fixed it.<sup>12</sup> We need to. And I would urge any of you who think that indigent defense might be something you would like to pursue to give it even more consideration because it is a noble and important job.

Forman starts his book with a story of a time when he failed to accomplish what he wanted to accomplish—when he failed to do what he thought his job was as a criminal defense attorney. It is a story about a young man Forman represented, a fifteen-year-old defendant named Brandon. Forman sought, unsuccessfully, to keep Brandon from being sent to D.C.’s juvenile detention facility.<sup>13</sup> But it would have been far worse if Forman was not there; if no one was there to tell the judge that he was wrong and to let Brandon know that there were people who saw him and knew him as a human being. Moreover, if we funded and supported indigent defense properly, we might not have as many stories like Brandon’s.

The point is not that everyone should be a defense attorney. You can do good and important work as a prosecutor. I was a prosecutor, and many of my best friends are or were prosecutors. The point is that there are reasons—reasons intrinsic to criminal justice as well as reasons having to do with the future of democracy in this country and around the world—for us to focus intensely on ensuring that people accused of crimes are treated as human beings, and defense attorneys are at the heart of that mission. Forman’s book helps us see that the relationship between democracy and criminal justice is complicated, and in some ways the opposite of what we sometimes assume. Democratic politics are no guarantee of fair and humane penal practices. But fair and humane penal practices may be essential for the kind of democracy worth defending.

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10. See, e.g., Kia Gregory, *Bronx District Attorney Darcel Clark Says Criminal Justice is More Than Locking People Up*, UNDEFEATED (Nov. 1, 2017), <https://theundefeated.com/features/bronx-district-attorney-darcel-clark-says-criminal-justice-is-more-than-locking-people-up> [<https://perma.cc/3HXL-6F8K>].

11. See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016).

12. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1570–89 (2018); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2160–71 (2013).

13. See FORMAN, *supra* note 1, at 1–9.

