

Three Lessons for Criminal Law Reformers from *Locking Up Our Own*

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James Forman Jr.’s *Locking Up Our Own* is that rare nonfiction work that is a page turner even when you know the ending. That is the product of exceptional writing, meticulous historical research, and the deep empathy of the author that gives the book its voice throughout. That is why it was both a worthy recipient the Pulitzer Prize and a feature on *The Daily Show* with Trevor Noah. It is as insightful as it is entertaining, and if you do not already own a copy, you should.

In my commentary, I want to highlight three key arguments from Forman’s book. I think these three deserve closer attention from those of us seeking criminal justice reform today because of the important lessons these arguments hold.

The first point I want to emphasize is Forman’s documentation that actors from across the criminal justice landscape independently made decisions that, when taken together, created the mass incarceration problem we have today. We did not get here because of a central planner, and we will not get out of this situation with one either.

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The second key insight from the book that I want to talk about is Forman's argument that those of us interested in reform cannot just focus on the most sympathetic, nonviolent crimes if we want to make a dent in incarceration in this country.

Third and finally, I want to address the relationship between a criminal law response and the availability of options that get at the root causes of crime. Forman notes that communities wanted an all-of-the-above approach to public safety that would give communities not just police, courts, and prisons, but also jobs, schools, and housing.¹ The failure of black communities to receive these investments in infrastructure stems, at least in part, from the fact that the criminal law response stifled the energy to pursue those other avenues.

I.

THE ARCHITECTURE AND ACCOUNTABILITY OF CRIME POLICY

A central point from *Locking Up Our Own* is that we did not have some master planner that set out to build a system of mass incarceration. Instead, as Forman's various case studies from D.C. show us, we got to where we are because of many different individuals reaching the conclusion that a more punitive response was appropriate. Whether it was Eric Holder supporting Operation Ceasefire, a policing initiative to stop and search cars for guns,² or D.C. Mayor Marion Barry pledging to "find space to put those drug thugs and gun thugs,"³ we see in *Locking Up Our Own* countless examples of black political leaders pushing tougher policies to address drugs and violence in black communities. As Forman puts it, "Mass incarceration wasn't created overnight; its components were assembled piecemeal over a forty-year period."⁴

This point is critical because if we want to reverse-engineer and dismantle the criminal justice infrastructure that we currently have, we cannot simply go to one source to turn the tide. Instead, if we want to tackle mass incarceration, we must adopt one of two overarching strategies. One option, what I call the "cultural change" frame, would seek to change the way people think about punishment so that as each individual makes decisions, that person becomes less likely to turn to the punitive model. The second option would be to change the institutional architecture we use to make decisions about criminal law so that it is less about these individual assessments; a more rational structure can be put in place to make the larger policy calls.

1. JAMES FORMAN JR., *LOCKING UP OUR OWN, CRIME AND PUNISHMENT IN BLACK AMERICA* 12 (2017).

2. *Id.* at 197.

3. *Id.* at 165.

4. *Id.* at 13.

A. *The “Cultural Change” Frame*

Let us first consider the “cultural change” option that would require dramatic shifts in how people—voters, politicians, government officials—think about punishment. The success of this strategy depends on getting people to reach a different conclusion when they face disorder in their neighborhoods or the latest drug epidemic. It would require getting people to consider whether the crimes they see on the news are typical and to rationally evaluate what should be done about them.

A cultural shift along these lines could change the politics of punishment because if the electorate stops responding to tough-on-crime tactics, politicians will rely on them less. We see hints of this today in the movement to elect so-called “progressive prosecutors.” Around the country, we are seeing communities mobilize to elect a new kind of prosecutor who pledges to change the failed tough-on-crime approaches of the past. Whether it is Larry Krasner in Philadelphia, Kim Foxx in Chicago, or Rachael Rollins in Boston, we are seeing a new model of prosecutor. These prosecutors pledge to reduce demands for cash bail, divert more cases out of the criminal justice system, and find ways to support reentry and less punitive outcomes.⁵ Roughly two dozen prosecutors around the country fall within this rubric, and potentially more are on the way.⁶

One might look at this trend in electing progressive prosecutors and see it as a hopeful path forward. However, I have serious doubts that an elections-based model will ultimately prove to be transformative in a way that will make a dent on mass incarceration. Before I explain why, I want to be clear at the outset that I support the movement to elect progressive prosecutors, and I want it to succeed. In that regard, I urge those who care about electing real progressive prosecutors to make sure these prosecutors are walking the walk and not just talking the talk. Voters should make sure prosecutors are not just giving communities more of the same under different rhetoric. They should make sure these prosecutors are committed to policies—like ending cash bail and reducing pretrial detention—that we know will both improve public safety and save individuals from needless hardship.⁷ They should pursue and lobby for better reentry policies to make it easier for people to re-adjust after terms of

5. See Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 *FORDHAM L. REV.* 1, 3–4 (2018). See generally EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); David S. Bernstein, *Suffolk County DA Rachael Rollins on Reforming a Broken System*, *BOS. MAG.* (Apr. 23, 2019), <https://www.bostonmagazine.com/news/2019/04/23/power-profile-rachael-rollins> [<https://perma.cc/ZGE4-TQ6E>].

6. RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 155–60 (2019); Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, *NEW YORKER*, (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/HF55-ZXH3>].

7. BARKOW, *supra* note 6, at 162.

incarceration. They should also divert cases from the criminal justice system where possible and make sure that their prisons are offering programming to help people successfully reintegrate into communities upon their release. Holding prosecutors accountable for these decisions will undoubtedly help reduce incarceration.

But I believe there are real limits with how far this strategy of electing progressive reformers will lead us. For example, even with the right metrics for judging these prosecutors, it will be difficult for progressive prosecutors to win on every front. For starters, not all of the more than 2,300 communities that elect prosecutors are politically viable for a progressive campaign.⁸ We have seen losses by candidates running on the progressive model even in jurisdictions that reformers thought presented fertile territory for change.⁹ And there are many rural and suburban communities where it is simply inconceivable that anyone other than a traditional “tough-on-crime” or “law-and-order” candidate could succeed.

Moreover, it is difficult to rely on a model of electing committed criminal justice reformers beyond prosecutorial elections because prosecutorial elections are different from those for judges, legislators, mayors, and governors in several key ways. Prosecutorial elections are local elections that focus on criminal justice alone. That means communities that have seen how our punitive policies have failed may be in a good position to try for a better model. Larry Krasner noted that a key to his winning coalition were black voters in Philadelphia, who were “more likely to have a family member who is a police officer, a family member who is in jail, and a family member who has been killed or severely victimized. They are more likely to have seen this whole thing in three dimensions.”¹⁰ These are informed voters who recognize the need for a new approach because the old rhetoric of being tough has proven itself as a failure in their day-to-day lives.

But this model will not apply equally to other elections. Outside of sheriff elections, other elected officials are running on platforms that transcend criminal justice. Mayors, governors, legislators, and judges are responsible for a range of policy issues, and voters might not consider criminal justice reform as important when electing these officials. This is particularly true as the geographic area for which these elected officials are responsible expands. The direct experience with criminal law enforcement dissipates as one gets further from urban centers and closer to suburban and rural areas. Suburban and rural voters thus rely more heavily on what they see in the media, which primes them to support more

8. *Id.* at 139.

9. Abbie Vansickle & Maurice Chammah, *California Voters Reject Prosecutor ‘Reformers,’* MARSHALL PROJ. (June 6, 2018), <https://www.themarshallproject.org/2018/06/06/california-voters-reject-prosecutor-reformers> [<https://perma.cc/CBM9-86KZ>] (describing how progressive district attorney candidates lost their races in Sacramento, Alameda, and San Diego counties).

10. BARKOW, *supra* note 6, at 159.

punitive policies because they are not seeing any tradeoffs or how ineffective these policies are.

There is an even more fundamental reason why I doubt the reach of a cultural change model where voters and elected politicians support an entirely different approach for dealing with crime. My pessimism comes from key lessons in Forman's book. There will be new drugs that spread through neighborhoods, the next heroin or crack or PCP, and people in public spaces may act erratically or appear threatening. There will be disorder and crime, and people will want immediate action. Politicians—black and white—in turn will seek to appeal to those fearful sentiments.

Forman shows in his book how this dynamic played out in D.C. In the 1970s, reformers had built momentum for a less punitive approach to marijuana but ended up failing. The ravages of heroin led the black community to endorse a more punitive approach to drug use and trafficking and the crimes associated with it. Marijuana got tied up in that imagery because people were concerned it would be a gateway to heroin and more serious drug use.¹¹ The impact of the drug trade on communities prompted many voters and politicians to support ever-harsher punishments,¹² including ultimately mandatory minimum sentences.¹³ The simple message that “[c]rime is out of hand, so we must get tough” and “stop[] the ‘revolving door’” resonated with voters.¹⁴ Those campaigning for mandatory minimums “walk[ed] from one murder scene to another” to make their concern with violence vivid to voters,¹⁵ just as politicians today use outlier cases to support their own calls for tough responses.¹⁶ During the peak crack years of the 1980s and 1990s, the association between crack and violence was a powerful political force.¹⁷ And because crack was associated with black people—“a black drug, sold by black men”—it prompted an even greater, racialized fear that provoked extreme legislative punitiveness.¹⁸ There is no reason to believe this dynamic will end or that a new drug or threat is not just around the corner. Even now, we see this pattern playing out with fentanyl and other opioids.¹⁹

When this panic takes hold, it is a hard sell to convince voters that tougher approaches are the wrong way to go. Getting at root causes of addiction and crime takes time, not to mention significant financial investment. People concerned with violence want immediate action, and there is no sign that there is enough voter support to invest in communities to get at the structural decay

11. FORMAN, *supra* note 1, at 40, 44.

12. *Id.* at 129, 134.

13. *Id.* at 136, 139, 143.

14. *Id.* at 140.

15. *Id.* at 142.

16. BARKOW, *supra* note 6, at 74–78, 110–12.

17. FORMAN, *supra* note 1, at 162–64, 173–75.

18. *Id.* at 164.

19. BARKOW, *supra* note 6, at 13.

that causes so much criminal activity and drug use in the first place. As Forman points out, “in times of crisis, even a bad answer beats no answer at all.”²⁰

Forman points out in his book that those who opposed mandatory minimum drug laws failed to offer an alternative by portraying drug addiction as a national health crisis.²¹ He suggests if they had, perhaps voters would have been persuaded not to see law enforcement as the only answer.²² While I agree with Forman that seeing drug addiction as a health crisis is the right framework, I am less optimistic that viewing it that way would change much. The current opioid crisis offers a counterpoint. Plenty of people, including the president’s task force, have pointed out that this is a public health crisis.²³ But for every person who speaks of the need to offer treatment and health care, there are just as many, if not more, who call for a punitive approach that relies on arrests, prosecutions, and substantial prison time.²⁴

That is true of just about every social problem. Whether it is the banking and investment practices that led to the 2008 financial crisis or the prevalence of guns and gun-related crimes in certain neighborhoods, the answer the public demands is typically the same: using the hammer of criminal law. And all too often, the solution is one that relies less on greater detection and more on longer sentences and more severe collateral consequences that are supposed to deter. However, these overly punitive practices end up undermining public safety because they make it very hard for people to reintegrate successfully into society after serving out their terms of incarceration.

So while we might have election wins for more reform-minded prosecutors, we see at the very same time—and in some of these very same places—adoption of more punitive laws. We may have eased up on crack, but not on fentanyl, heroin, and opioids. When users share their drugs and the person they shared with overdoses and dies, prosecutors are choosing to charge the sharers with murder and seeking long sentences. And they are not losing elections with this strategy, even though we know it does not work.²⁵

20. FORMAN, *supra* note 1, at 146.

21. *Id.* at 147–48.

22. *Id.* at 148.

23. CHRIS CHRISTIE ET AL., THE PRESIDENT’S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS (2017) https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf [<https://perma.cc/HH7B-KSTN>] (calling the opioid epidemic a “public health” crisis).

24. For example, despite calling the opioid crisis a “public health” crisis, the president’s task force still recommends punitive measures. *Id.* at 10–11 (recommending enhanced drug-trafficking surveillance, increased sentencing penalties for trafficking fentanyl and fentanyl analogues, and the establishment of additional drug courts, arguing that “[f]or many people, being arrested and sent to a drug court is what saved their lives”).

25. See, e.g., Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html> [<https://perma.cc/AML6-S5JB>] (describing increased arrests and prosecutions for “murder by overdose”); Jamie Peck, *Why Heroin Addicts Are Being Charged With Murder*, ROLLING STONE (Aug. 2, 2018), <https://www.rollingstone.com/culture/culture-features/heroin-opioid->

B. The “Institutional Change” Frame

The limits of a model that depends on a cultural change in attitudes among voters and elected officials lead us to consider an alternative strategy: institutional change. This strategy deals more effectively with the fact that mass incarceration is the product of lots of individual decisions and not something created by a central planner. For this option to work, we still need people who are sufficiently mobilized to address mass incarceration. But instead of asking for changes to particular substantive laws or policies, voters should use their political capital to advocate for changes to the institutional architecture that created mass incarceration in the first place. Institutional changes will be more durable when the next crime panic occurs. Put another way, to get to the root of this dynamic, we need a different institutional architecture in place than one that just responds to immediate voter impulses and that gets us the accountability that we currently lack. This is the model I advocate for in a recent book, and I think it is critical to dismantling mass incarceration.²⁶

Forman points out that one of the perversities of our current approach is that none of the individual actors who collectively contribute to mass incarceration takes responsibility “because nobody is responsible.”²⁷ And that lack of accountability matters because our punitive approach is a failure. As Forman argues:

In one respect, the policies to combat drugs and guns have had a similar impact: the majority of those punished have been low-income, poorly educated black men. In other respect, however they have had a similar *lack of* impact: they have failed to prevent marijuana use, and they have failed to protect the community from gun violence.²⁸

So how do we shift things to get accountability in a system this diffuse? We need to set up agencies responsible for establishing criminal justice policies that are held accountable for their choices and must explain how they will promote public safety and make the best use of limited resources. We already do this for other areas of health and safety, whether in air, water, or our workplaces. We ask agencies to look at data and make the best judgment about how to balance the various tradeoffs, and we subject those decisions to cost-benefit analysis and judicial review. We should demand at least as much from criminal justice policies designed to promote us personal safety and that allow the government to use the power to take away liberty as part of the regulatory structure. In the

addicts-charged-with-murder-o-d-703242 [https://perma.cc/KM7D-ABXY] (arguing that this practice is ineffective and harmful); *see also* Jack Shuler, *Overdose and Punishment*, NEW REPUBLIC (Sept. 10, 2018), <https://newrepublic.com/article/150465/prosecutors-reviving-reagan-era-drug-induced-homicide-laws> [https://perma.cc/Z6AX-WEM6] (recounting a narrative account of one person who was charged with manslaughter and faced up to 15 years in prison when his friend overdosed on cocaine and heroin).

26. BARKOW, *supra* note 6, at 1–16, 139–41.

27. FORMAN, *supra* note 1, at 14.

28. *Id.* at 76.

spaces where we use the agency model in criminal law, we can see how it has helped. The U.S. Sentencing Commission, for example, retroactively reduced federal drug sentences by citing data showing those reductions could take place without any increased recidivism.²⁹ That resulted in more than thirty-one thousand people obtaining lower sentences.³⁰

We also need to set up curbs against treating prisons as a free resource for prosecutors to use at will without bearing the costs. Franklin Zimring and Gordon Hawkins long ago coined the phrase “the correctional free lunch” to describe the phenomenon that allows local officials to make free use of state prisons.³¹ It is no wonder they rely on it excessively without thinking of other options. States need to set limits on how much any locality can use prisons without contributing to the costs, which will force local officials to find alternatives.³² We have seen how this can be an effective decarceration model in California, where a Supreme Court decision forced the state to release more than thirty thousand state prisoners and sparked a policy of realignment where local communities had to bear more of their incarceration costs.³³ The state reduced incarceration without raising crime rates, making California a model of the kind rationing that can lead to better decisions.³⁴

This Supreme Court decision prompted changes in California, but the Court has not pushed back elsewhere against many other mass-incarceration trends. We have constitutional protections that should be doing more to curb government abuse in criminal matters, but we have a bench that has not been willing to enforce them. To change that, we need a bench with more diverse professional backgrounds than what we currently have. For example, almost half of all federal judges are former prosecutors, and state judiciaries are similarly dominated by those with prosecution experience.³⁵ When Forman talks about the judge in his book who gives the Martin Luther King, Jr., speech,³⁶ I wonder whether that judge is a former prosecutor, if only because the odds favor the answer being yes.³⁷

29. In 2014, the U.S. Sentencing Commission recommended amending federal sentencing guidelines to reduce by two levels the base level offense of a given drug and applying these changes retroactively.

30. See U.S. SENTENCING COMMISSION, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20180829-Drug-Retro-Analysis.pdf> [<https://perma.cc/FH6C-EKCR>].

31. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991).

32. BARKOW, *supra* note 6, at 167.

33. See *Brown v. Plata*, 563 U.S. 493 (2011).

34. BARKOW, *supra* note 6, at 186–87.

35. *Id.* at 200.

36. FORMAN, *supra* note 1, at 3–4.

37. BARKOW, *supra* note 6, at 200 (noting forty-three percent of federal judges have prosecutorial experience).

Some may argue that these changes essentially make criminal justice policy anti-democratic. But it is no less democratic than how we deal with any number of other critical problems in society. We do not turn to the voters to decide whether to approve a vaccine or decide how much of a chemical should be allowed in the air. Instead, we let the voters set the goal, but we have experts figure out the means based on the best available evidence and with an eye toward limited resources. We know people want security and order. They want neighborhoods where they are not afraid to walk around. They want public safety. This goal leads them to support the means that are offered them—typically more punishment—but only because no other options are on the table. But we could imagine a different decision-making architecture that focused on the outcome, one that improved public safety and held decision-makers accountable for that result.

Our current approach puts a thumb on the scale in favor of prisons and more incarceration time. Other approaches are the exception rather than the rule. For example, Forman tells the story of one of his clients who wanted a drug treatment program, but the prosecutor rejected the request because two prior attempts at drug treatment did not work.³⁸ Forman asks the prosecutor, “How come with drug programs, we act as if one or two chances is all you should get? How come we don’t treat prison the same way?”³⁹ Forman points out that people serve sentences and then go back out and commit more crimes. And yet, as Forman highlights, in my favorite quote in his book, “our system never treated the failure of prison as a reason not to try more prison.”⁴⁰ Until we get new institutional structures in place, prisons will continue to be used in this way because there is no real limit on its use and no institutional architecture in place to demand proof that it is working by reducing crime.

II.

MOVING BEYOND THE MOST SYMPATHETIC CASES

This shift in architecture is critical to tackle the second point I want to emphasize from *Locking Up Our Own* that is essential for reformers to confront: as Forman argues, any shift in thinking about crime and punishment cannot be limited to nonviolent crimes, but also has to tackle cases that involve violence or serious threats of violence and guns. We do not only over-punish drug crimes, but all crimes, including crimes of violence. But it is almost impossible to have a rational conversation about violence as part of the political process. Forman gives us the historical perspective. He shows, for example, how high-profile shootings prompted demands for stiff penalties involving guns, including mandatory minimums.⁴¹ As Forman describes it, this is the “standard response

38. FORMAN, *supra* note 1, at 123.

39. *Id.*

40. *Id.*

41. *Id.* at 60, 73.

in American criminal justice: When you want to stop people from doing something, take away discretion and impose more prison time.”⁴² It was true among the black community in D.C. in the 1970s, even when the community knew that the burdens of those punishments would fall disproportionately on black men.⁴³ Indeed, a concern with violence drove support in the black community for a host of tough measures. It helped explain why the black community in D.C. did not want decriminalization of marijuana—because they thought there was a link between marijuana and heroin, and in turn, a link between heroin and violence⁴⁴—and why they accepted pretextual traffic stops by police officers looking for guns.⁴⁵

While over time members of the black community have come to doubt the War on Drugs and have started to question whether it is worth the severe punishments, the support for harsh approaches to violence remains.⁴⁶ The reader of Forman’s account sees time and again examples of black people supporting these measures because they want some immediate response to violence in their communities, and they are willing to take the punitive one if that is what works the fastest.

When one gets to the epilogue of the book, Forman looks to criminal law reform today and rightly says that if we want real change in our system, we cannot just talk about non-violent offenses.⁴⁷ We need to reform how we deal with violence. Certainly if we want to deal with mass incarceration, we need to tackle violence. As Forman points out in the book, only twenty percent of the people who are incarcerated are there for drug charges; many of them have violence in their records as well.⁴⁸ Fifty-three percent of people in state prison are there for an offense labeled as violent.⁴⁹

But here is the puzzle. How can you expect any community—black, white, or brown—to make a shift in their thinking about violence if it is fearful for the personal safety of its members? The book gives us chapter after chapter of examples where that fear led the black community to support tough responses. And that is a community that has been directly aware of the costs of that approach, including the costs of long sentences. Maybe the black community was not aware of the costs of rejecting marijuana decriminalization in the 1970s because it was initially not sentenced that harshly. But as time went on, and we get to the 1990s, they certainly knew how harsh punishments had become. And yet they still supported pretextual stops to get at guns and supported mandatory

42. *Id.* at 61.

43. *Id.*

44. *Id.* at 40, 44.

45. *Id.* at 202–04.

46. *Id.* at 204–06, 217–20.

47. *Id.* at 228–31.

48. *Id.* at 228.

49. *Id.* at 230.

minimums. This is because voters' concern with violence overrides whatever dissatisfaction they have about the costs for that approach.

The book offers the moving example of a client that Forman calls Dante, who commits a robbery by threatening violence.⁵⁰ Forman investigates Dante's background and learns that Dante excelled in his woodshop classes.⁵¹ Dante's mother found a carpentry and counseling program with a local pastor that would accept Dante into his program, and James got the victim of Dante's crime to agree to the program as an alternative to incarceration.⁵² When I read that, I was of course happy to see things worked out for Dante.

But then, I thought, surely people in the black community know someone like Dante. Surely they know firsthand the potential of these people. Indeed, surely the people in any community know the potential of people who make mistakes to change and evolve. And yet we still see the concerns with violence trumping that common-sense knowledge and voters accepting tough on crime responses to it.

That is why someone like President Obama, a stated criminal justice reformer, continued to make a strong distinction between violent and non-violent crimes. When he outlined his criminal reform agenda in a speech in 2015, he emphasized reforming sentences for non-violent offenders, but stated that he did "not . . . have a lot of sympathy when it comes to violent crime."⁵³ He was willing to pursue some modest changes for people who committed non-violent crimes, but he also continued to talk about the need to stay tough on violence. We saw that same rhetoric in the context of immigration enforcement where he emphasized targeting "felons, not families."⁵⁴ Indeed, he even spoke of about people who engaged in violence as "thugs."⁵⁵ His stated criteria for his clemency initiative ruled out people with violence in their past, even if they showed change and growth during their time in prison.⁵⁶

50. *Id.* at 222–23.

51. *Id.* at 226.

52. *Id.* at 227, 231–36.

53. *Id.* at 221.

54. See President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/D9TR-WUBG>] (saying he would focus law enforcement resources on "[f]elons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids").

55. Andrew Prokop, *Obama Calls Baltimore Rioters "Criminals," but Calls for "Soul-searching" on Larger Issues*, VOX (Apr. 28, 2015), <https://www.vox.com/2015/4/28/8508981/obama-baltimore-riots> [<https://perma.cc/L66D-MUSV>] (describing how Obama described Baltimore rioters, who were among those protesting police brutality, as "criminals and thugs who tore up the place").

56. See James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting (Jan. 30, 2014), <https://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar> [<https://perma.cc/PQ4E-6Y7V>]; Press Release, U.S. Dep't of Justice, Announcing New Clemency Initiative, Deputy Att'y Gen. James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new> [<https://perma.cc/A4JU->

We know people and circumstances change. Yet when it comes to violence, our political process throws away the key on thousands of people with lengthy sentences, leaving no mechanism to look again to see whether the person or circumstances have changed over time. The political process is not capable of doing a better job addressing and discussing violent crimes because voters have the worst cases in mind that they see on the media—the larger social context of those crimes is lost. Voters are not thinking of the people committing violent acts as *people*, with individual stories and the potential for change. So they support tough sentences and policing practices to deal with that violence. That is why even people like President Obama speak of having “no sympathy” or “no tolerance” for those who engage in violence.⁵⁷ As Forman points out, this “effectively mark[s] this larger group of violent offenders as permanently out-of-bounds.”⁵⁸

The way out of this situation is to take decisions away from wholesale politics, which is driven by media accounts, soundbites, and often racial stereotypes. Instead, we should aim to create an institutional architecture that takes an individualized approach and accounts for a person’s potential as well as his or her crime. This means we must have second-look mechanisms to reevaluate people and policies over time and reduce sentences as circumstances change. We used to do this regularly throughout the country with parole and clemency, but those mechanisms fell victim to irrational tough-on-crime politics in the past few decades.⁵⁹ People interested in reform must seek to reinvigorate these second looks and avoid laws that rule out someone’s eligibility simply because their offense involved violence.

But violence cannot only be addressed on the back end. Some cases involving violence should be diverted from criminal treatment at the outset because there are better options for addressing the underlying causes of the behavior, such as drug treatment or mental health services. We need better funding for defense lawyers to find out individual circumstances, and we need to give more discretion to judges to analyze cases instead of being tied by mandatory minimums.

Even this will not be enough, however, because the people making these individualized decisions—whether about diversion, pretrial detention, or sentencing—are likely to be risk-averse and fearful of a decision that could lead to more violence. That is where the use of data and evidence is critical. Research shows that many assumptions about violence are false. For instance, evidence reveals that we mislabel some crimes, such as burglary, as violent, even when

YNJD] (noting the department would prioritize clemency applicants who meet six factors, including “no history of violence prior to or during their current term of imprisonment”).

57. FORMAN, *supra* note 1, at 230.

58. *Id.*

59. BARKOW, *supra* note 7, at 73–84.

they rarely pose any risk of physical injury.⁶⁰ It also teaches that violent behaviors by people are susceptible to change over time, with most people aging out of violent crime commission.⁶¹ Our policies should reflect this data, with sentencing and programming to match what we know. That can only happen if we put institutional structures in place charged with using evidence, instead of raw emotion, to set policies. The political system writ large is simply not capable of getting past the assumptions and gut feelings about violence, and it yields exactly the kind of mass incarceration we see today. It is the most tragic of ironies that we end up with approaches that make violence more likely, not less, because we cannot see past our emotions to investigate what would work better.

III.

GETTING TO ALL OF THE ABOVE

The last point I want to raise is the hardest to address. It is the failure of the communities, like those described in Forman's book, to get a Marshall Plan to combat crime, a strategy by which the government would rebuild the ghettos in our inner cities, just as America rebuilt Europe after World War II.⁶² Forman consistently shows in *Locking Up Our Own* that the same members of the black community who supported tougher sentences or proactive policing because of their concerns with violent crime, also asked for other solutions that tackled the root causes of violence: poverty, failing schools, lack of jobs, and economic opportunities. For example, those seeking harsher sentences for gun crimes also wanted "to attack racial disparities in health, employment, and education."⁶³ Or consider Isaac Fulwood, a leader in the Washington, DC police department who later became its chief, who spearheaded an aggressive policing operation to clear the streets of drug dealers in 1986. He commented that his high "arrest figures are a sad commentary on the situation in the District" and that "[w]e have to do a heck of a lot more in terms of education and treatment."⁶⁴ Likewise, Eric Holder, when he served as United States Attorney for the District, argued it was necessary "to deal with the social conditions that breed crime," even while at the same time he heralded an aggressive policy of investigatory stops by the police.⁶⁵

Forman thus shows that the same communities of people who accepted more policing and punishment also wanted options that cover structural reform. But not everyone concerned with crime advocated for getting at root causes. Forman reminds us that, "[w]hile many blacks embraced an all-of the-above

60. See Richard F. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998–2007*, 29–31 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf> [<https://perma.cc/S7DQ-E84M>] (finding that between 0.9 % and 7.6 % of burglaries between 1998 and 2007 resulted in actual violence and only 2.7 % of all burglaries involved actual physical injury).

61. BARKOW, *supra* note 7, at 44–45.

62. FORMAN, *supra* note 1, at 157.

63. *Id.* at 76.

64. *Id.* at 168–69.

65. *Id.* at 197.

strategy that combined increasing criminal penalties with attacking inequality, conservatives often framed the choice as either-or.”⁶⁶ The conservative viewpoint ultimately won out, and support for funding to get at the root causes of crime has not been sufficiently strong. As a result, we have the “worst of all possible worlds” where “[g]uns—and gun violence—saturate our inner cities, while the people who go to prison for possessing guns are overwhelmingly black and brown.”⁶⁷ “[B]lack America had gotten only one of the above: punitive crime measures.”⁶⁸

We have empirical study after study reminding us that investing in education, housing, health care, and infrastructure would be more cost effective and produce better public safety results than relying on mass incarceration.⁶⁹ But it is hard to see a viable strategy for getting broad support for those investments. It would require rethinking the role of government and what citizens owe to each other. The all-of-the-above model goes well beyond criminal law and policy.

At the same time, criminal law and policy plays a role in dampening enthusiasm for investing in these other options. That is because having a punitive response as an option makes it easier for the political system to ignore broader investments by taking away the urgency for change.

Locking Up Our Own shows us how this dynamic plays out. For example, supporters of tougher gun laws and gun control in D.C. simultaneously recognized there were “social causes” of gun crimes and wanted to get better opportunities for housing, employment, and health care.⁷⁰ But they argued that restricting guns was a useful step, even if it did not solve the entire problem.⁷¹ There was thus no worry there was mutual exclusivity at play. But then the book shows us that the political dynamics played out otherwise. The black community did not keep clamoring in a sustained and energized way for the other things with

66. *Id.* at 76.

67. *Id.* at 77.

68. *Id.* at 157.

69. See, e.g., Robert H. DeFina & Thomas M. Arvanites, *The Weak Effect of Imprisonment on Crime: 1971–1998*, 83 SOC. SCI. Q. 635 (2002) (finding that imprisonment rates are not significantly correlated to crime rates); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports* (2001) (Nat’l Bureau of Econ. Research, Working Paper No. 8605) (showing how schooling reduces crime rates). Studies show that imprisonment rates do not have a significant correlation to other societal trends. See, e.g., Michelle Kondo et al., *Effects of Greening and Community Reuse of Vacant Lots on Crime*, 53 URB. STUD. J. 3279 (2016) (infrastructure); María B. Vélez et al., *Neighborhood Housing Investments and Violent Crime in Seattle, 1981–2007*, 50 CRIMINOLOGY 1025 (2012) (housing); Samuel R. Bondurant et al., *Substance Abuse Treatment Centers and Local Crime 1–40* (2015) (Nat’l Bureau of Econ. Research, Working Paper No. 22610) (health care). See generally *Economic Perspectives on Incarceration and the Criminal Justice System* (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf [<https://perma.cc/UH2W-UEXL>] (summarizing academic literature on the benefits to public safety of social investment over mass incarceration).

70. FORMAN, *supra* note 1, at 63–64.

71. *Id.* at 63.

the same vigor once the punitive response came in. They still wanted those things, to be sure, but the political urgency was not the same.

That is certainly true when one moves beyond the local black community affected by violence to the broader political community, including white people, that would have to support greater investments in schools, jobs, and housing. A major reason that greater use of the police state and criminalization overshadows the other options for addressing crime and violence is that a critical mass of the white community shares the desire for the criminalization response; there is interest convergence in Derrick Bell's formulation.⁷² In contrast, white voters have been less enthusiastic about structural reform for the poor, particularly if it is focused on more diverse inner cities.⁷³ There are many possible reasons, including entrenched, systemic racism, but one of the reasons this happens is that if the criminalization response stops the violence—or at least appears to stop it—a majority outside the black community may no longer care. They care about violence because they are worried it might spill over and affect them. If the threat seems gone, their concern goes away.

The band-aid of criminal punishment may therefore stop the broader momentum to get bigger structural changes in place. If prison became less of an option—either because courts started putting real bite in the Eighth Amendment or because an electorate put caps on prison use causing local communities to rely on it less—voters and government officials would have to give more consideration to other strategies to deal with violence and disorder. They might start seeing public health models and school programming as viable alternatives. If the police could not be as aggressive in policing communities, other responders might begin to tackle community concerns using a social work model instead of a law enforcement one. If an agency responsible for addressing social disorder had to consider all possible options for addressing it and choose the most cost-effective option, we would undoubtedly see less prison and more investment in diversion programs. A seemingly endless supply of criminal punishment with no accountability for whether it works means we do not put much pressure on government officials to consider other options. To the extent we can make punishment a finite resource, it may ultimately lead to those broader investments.

Even then, the investments are likely to be limited and targeted to those individuals who would otherwise yield a criminal justice response. We see that now with problem-solving courts and programming that are not open to the broader community, but instead target those individuals who have committed crimes and proven themselves to be a threat to some sense of public order. It is

72. See generally Derrick A. Bell Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that black people obtain favorable policy outcomes only to the extent those policies also coincide with the interests of white people).

73. Chauncey Devega, *White Americans Support Welfare Programs – But Only For Themselves, Says New Research*, SALON (Aug. 1, 2018), <https://www.salon.com/2018/08/01/white-americans-support-welfare-programs-but-only-for-themselves-says-new-research> [<https://perma.cc/EK7N-TD5Q>].

one thing to make investments for that much smaller proportion of a community and quite another to tackle the larger population with real investment. But perhaps these smaller investments would ultimately show how valuable they are, thus paving the way for more.

To even get started, however, the criminal law option needs to be removed from the list of alternatives or at least dramatically curtailed as an available strategy for addressing urban blight. *Locking Up Our Own* masterfully shows us the doomed fate of the all-of-the-above strategy. The aggressive use of criminal law enforcement and punishment ends up obscuring and deflecting from better approaches and ultimately putting communities even further behind.

CONCLUSION

The ultimate tragedy of mass incarceration, and the punitive turn in American politics, is that it has exacerbated racial inequalities and made already vulnerable communities even worse off, all while failing to achieve its public safety goals. We still see sky-high rates of recidivism in these communities. Mass incarceration creates the false sense that we are doing something to address the problem of crime and disorder, but in fact it just makes everything worse.

Locking Up Our Own tells that story better than any other book I have read, and it serves as a cautionary tale for anyone—black or white—who thinks that mass incarceration is a path we should continue to follow.