

CRIMINAL JUSTICE AND DEMOCRACY, IN AMERICA AND ELSEWHERE

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1. Introduction.

Many thanks to Professor Gatta and la Statale for inviting me to speak today, and thanks to all of you for coming.

My subject today is criminal justice and American democracy. Much of what I say will be drawn from a book that I published this past January: *Criminal Justice in Divided America: Police, Punishment, and the Future of Our Democracy*. But this lecture will depart from the book, both in content and in organization, for two reasons.

The first reason is that, as the title of the book suggests, the book is very much focused on U.S. I will try to adapt it for an Italian audience. I'll discuss how some of the arguments in my book apply, or don't apply, to Italy. And I will add some background about American institutions of criminal justice—police, prosecutors, courts, and prisons—that may help you put my arguments in context.

The second reason this lecture will depart in some ways from my book is that I finished writing the book last summer, a few months before the election that last November sent Donald Trump back to the White House—and that is a development that obviously needs to be taken into account in any discussion of the current state of American democracy.

The second presidency of Donald Trump has created new, acute, and quite dramatic threats to American democracy, threats that seem to proliferate and to assume new shapes with every passing day. To a great extent, though, DT's brand of authoritarian populism is just a more extreme version of a kind of politics that has become familiar throughout Europe and indeed around the world, especially in Italy. Much of Trump's brand of politics seems borrowed from Berlusconi, and a lot of what isn't borrowed from Berlusconi seems like a crasser, less intellectual version Mussolini.

I think the rise of authoritarian populism has important implications for how we should think about the relationship between democracy and criminal justice, and not just in the U.S. That's the argument I make in the book, and that's the argument I will make here today. It's an argument that I think has been made only more urgent by Donald Trump's return to the White House. Because part of what I want to convince you of, and part of what I argue in the book, is that the rise of Trumpism in the U.S. has a lot to do with failures of the American criminal justice system.

Maybe more than anything else, Donald Trump's return to the White House symbolizes and expresses a profound anger at American institutions in their current form.

Surveys report a deep and pervasive pessimism among the American public, cutting across ideological lines. Only a quarter of Americans think the country's best days are ahead, only one in ten thinks the government represents them well. This is broadly true both of Trump supporters and of the half of the country that voted against him.

And it's hard to think of an area of domestic policy other than criminal justice where American democracy has failed as spectacularly over the past several decades, or with worse consequences. So there's good reason to think that failures of the criminal legal system bear a lot the blame for pushing American politics toward populism, polarization, and pessimism.

And if that's true—and I think it is—then the current condition of politics in the United States has lessons for the kinds of criminal justice policies that may help other countries, maybe including Italy, strengthen their democracies in the face of populism and polarization.

So here's what I want to do in the remainder of remarks. First I want to situate what I will say within the long tradition of scholarship, especially in the U.S., about the relationship between criminal justice and democracy.

Second, I want to explain why I think that criminal justice bears much of the blame for the current crisis of democracy in the U.S.

And third, I want to assess the lessons that this history has for thinking about criminal justice today—in the U.S., in Italy, and in democratic societies around the world.

2. Context.

Ok, to begin with, there is a longstanding academic debate in the U.S. about the connections between democracy and criminal justice. This is a debate that dates back to

the late 1950s and early 1960s, and for most of its history, this debate has focused on the question, is democracy good or bad for criminal justice?

This debate seems increasingly unsatisfactory, for two reasons. First, it is disconnected from today's political realities. It ignores the rise of polarization and authoritarian populism. Second, the traditional debate among American scholars about criminal justice and democracy proceeds from a particular understanding of democracy—the theory of popular sovereignty. This is the idea that democracy just means giving “the people” what they want: giving effect to the popular will.

The problem with this view of democracy is that “the people” never all want the same thing. Different people in society want different things. And this is particularly true in a time like today, a time of extreme political polarization.

So I think that today, especially, it is important to understand democracy in a different way, a way that emphasizes pluralism. Democracy needs to be understood as a system for allowing people with widely different political views and widely different aspirations to settle their differences peacefully and govern themselves collectively.

And when you think about democracy this way, the most important question is not whether democracy is good or bad for criminal justice. In fact, that question no longer even makes sense. The most important question about the connection between democracy and criminal justice, from a pluralist perspective, is what kinds of criminal justice can help to strengthen democracy. I think that failures of criminal justice helped to get American democracy into its current mess, and that better criminal justice policies could help get it out.

3. How criminal justice helped break American democracy.

Over the past half-century or so, bad criminal justice policies undermined American democracy in three ways: through the politics of crime, through the poison of police abuse, and through a spiral of fear. Let me take each of these in turn. I'll start with the *politics of crime*. Much of Donald Trump's successful presidential campaign last year had to do with the fear of violent crime. A Trump ad that aired nearly 6000 times in just six days right around this time last year, just weeks before the election, accused Trump's opponent, then Vice President Kamala Harris, of complicity in the deaths of women nationwide who were “bludgeoned, raped, strangled, stabbed, shot, and murdered”

And the largest Republican ad buy of final weeks—an ad that was aired more than 8000 times—told viewers that “After a little girl was raped and buried alive...Kamala allowed convicted sex offenders to live near schools and parks.... Kamala Harris has always put criminals first, don't make America her next victim.”

These ads were examples of what has become a completely familiar part of American presidential races. But crime wasn't always part of national politics in the U.S. It was never a significant part of any presidential race until the mid-1960s.

Trump's electoral victory last November is culmination of a long, rightward shift in conservative politics in the US that began in the 1960s and continued in the following decades.

The politics of crime has often been mixed with the politics of race. But the politics of crime has never been *just* about race, and one sign of that is the progress that Trump made last year in attracting a significant share of Latino and African-American voters.

Fear of crime also isn't tightly anchored to crime rates. Lots of Americans think crime is higher today than ever, and Trump has repeatedly made that claim—and this is flatly untrue. Crime in the United States has been declining significantly since the pandemic. A lot of the politics of crime is fearmongering.

But it's not all fearmongering, just like it's not all race-baiting. Crime is consistently higher in US than in almost any other society that most Americans would want to compare themselves with. Even today, the annual homicide rate in the United States is around 5 per 100,000 people. This is around five times the rate in Italy, and there is a similar disparity between American homicide rates and rates elsewhere in Europe, and in the United Kingdom. And as high as violent crime is in the US today from a global perspective, things were much worse in the late 1960s, 1970s, and 1980s.

There are a lot of explanations for high crime rates in the US, and the exceptionally high crime rates of the US in the 1960s, 1970s, and 1980s. The institutions of criminal justice can't take all of the blame. But they can take a good share of the blame. That's especially true of policing. The conventional wisdom among scholars and even many police executives in the 1960s and 1970s was that the police could do little to control crime.

But there's now good evidence that the police *can* reduce crime, at least when they are properly funded and properly managed. There is lots of evidence that crime can be reduced by the right kind of policing—policing that relies both on ample funding and staffing but also on extensive consultation and trust-building with a broad cross-section of the public. This is pretty much the opposite of the kind of policing that had become standard in the United States by the 1960s and 1970s, and so it wasn't crazy to blame the criminal justice system for high crime rates.

3.1. Poison of police abuse.

One reason the American police departments of the 1960s and 1970s struggled to respond effectively and consistently to crime—especially homicide—was widespread

distrust of police in poor neighborhoods, especially poor neighborhoods of color, and most especially poor, African-American neighborhoods.

And this distrust fed the politics of crime in two ways: it made policing more difficult, and it led to an epochal wave of rioting in the poor, predominantly African American ghettos found in cities throughout the country.

These riots, which began in the late 1960s and continued into the 1970s, played a pivotal role in the rightward shift of the Republican party and the polarization of American politics. And the riots themselves were rooted in failures of the American legal system, especially the police. Many grievances contributed to the riots, but none were more important than complaints about the police, and about the way the legal system failed to hold the police accountable. African Americans complained both about the police ignoring crime in the ghetto, and about the police brutalizing residents of the ghetto.

The flashpoint for each of the hundreds of urban riots that convulsed the United States in the 1960s and 1970s was virtually always either an instance of police violence against a young Black man, or the failure of the police officers involved to be criminally charged or convicted.

These dynamics are still operating in the United States today, and continuing to fuel polarization and populism. The movement to “defund the police”, which rose to prominence five years ago, in the summer of 2020, responded to and was shaped by the sense that American police, and the American legal system, still do not behave as though “Black Lives Matter.”

For a brief period in 2020, before Kamala Harris was named as Joe Biden’s running mate, and Harris endorsed calls to “defund the police” — and that position was used effectively against her in last year’s presidential race.

3.2. Spiral of fear.

Oddly enough, tough-on-crime polices were the subject of a strong and striking bipartisan consensus in the 1980s and into the 1990s in the United States. Throughout that period, Democrats competed with Republicans to take the hardest possible line on crime. The exceptionally harsh criminal penalties that were adopted during this period — and the resulting explosion in prison populations in the United States were not responsible for the dramatic drop in crime rates the United States experienced in the 1990s: we know this, because the same decline happened in Canada, without any similar changes in criminal justice policies or rates of incarceration.

But those sentences, and other tough-on-crime policies, spread pervasive fear of crime, and the sense that job of govt was to keep bad people away from good people — what

David Garland has called the “culture of control,” Jonathan Simon has called “governing through crime.”

The fear of crime inculcated by these changes in criminal justice policies changed the architecture of homes, schools, and public spaces; it fueled the spread of private security; it remade prisons into warehouses; it transformed debates about immigration, away from concerns about draining public resources to concerns about “criminal aliens”; and it lay the groundwork for populist arguments that “true” Americans were under assault by malevolent others—and that they needed a strongman to protect them.

4. Lessons for criminal justice today.

I think this history has five lessons for how criminal justice policies can help to protect democracy, instead of helping to erode it, and I think these lessons probably apply not just in the United States, but also in other countries, including Italy. The first lesson is to keep people safe. The second is to treat people fairly and with decency and dignity. The third is to build coalitions. The fourth less is to teach skills and habits of democratic citizenship, and the fifth is to disperse power. I’ll say a few words about each of these lessons.

First, about keeping people safe: the apparatus of criminal justice isn’t aimed solely at making people feel safe, but that is probably what most people want most from it. And when police and prosecutors fail in this mission, it threatens democracy—first and foremost providing fuel for divisive forms of populism.

Serious crimes have effects that reach beyond the immediate victims of these crimes, and beyond their families. They tear at the fabric of communities, and they can warp a society’s political culture. High levels of serious crime stymie the creation of the vibrant communities and mutual trust; they tend to produce neighborhoods, and societies, characterized by fear and social disengagement.

At the neighborhood level, this stymies the kind of bargaining and accommodation on which democratic pluralism depends. At the societal level, it erodes trust and cooperation across lines of race, cultural affiliation, and social class. It creates an opening for political appeals on intergroup fear, on promises of authority and control, and on the muscular use of state violence.

So the first imperative for criminal justice in an era of populism and polarization—the first thing way it can support democracy in times like these—is to help keep people safe, and to make clear that this mission is taken seriously.

The second imperative is to treat people fairly, with decency, and with dignity. Democratic pluralism depends on a certain, baseline degree of mutual tolerance and trust between competing groups.

But to see themselves as part of a broader, inclusive society, people need to believe that the government is working, at least in part and least to some degree, for them and for people like them. And in the lives of many people, particularly people who are socially marginalized or economically disadvantaged, the primary forms in which government power manifests itself is the police.

So the police, and the criminal legal system for which they serve as an entry point, do a lot to influence, for good or for ill, the perceived legitimacy of the government and the degree to which people feel part of, or alienated from, the larger society.

How the police treat people does a lot to shape those perceptions, and so does the ways that prisons operate, especially when rates of incarceration are as high as they are in the United States, and when incarceration is concentrated among particular parts of the population—poor people and people of color. Especially among those parts of the American population, it is common for people either to have been incarcerated themselves, or to know someone who was incarcerated. When prisons become sites of cruelty and needlessly severe punishment, it sends a message about how people are valued and deserve to be treated. And it sends this message not just to people who are incarcerated, and to their families and other people who know them, but to the public as a whole.

The prospects for democracy thus depend, in part, on the ability of police departments and prison systems—along with prosecutors and courts—to protect disadvantaged and politically marginalized groups—and to protect them not just from crime, but also from police violence and other forms of unfair treatment by the apparatus of criminal justice itself. When the criminal justice system fails in this regard, it erodes trust, it erodes its own ability to fight crime effectively, and it can trigger forms of protest and disruption that in turn add further fuel to the politics of crime.

If the first imperative for criminal justice in an era of populism and polarization is to keep people safe, and the second is to treat people fairly, the third is to build coalitions. Because the hard facts of criminal justice reform are that they take time to prove their effectiveness, and they are unlikely to be given that time if they don't find broad support across lines of ideology. The history of American police reform, in particular, is littered with promising programs that are abandoned prematurely when politics shift and a new administration comes into power at the city, state, or federal level.

Particularly in a time of polarization, criminal justice reform is pretty much a nonstarter unless it can find broad, bi-partisan support. This was one reason why calls to “defund the police” were doomed to failure, even if they had made perfect sense as a matter of

policy – which I don’t think they did. And it’s why the Trump Administration’s policies of tougher policing, released from systems of oversight, are doomed to failure, even they made sense as a matter of policy – which they don’t.

Fortunately, the criminal justice strategies that make the most sense as matters of policy tend also to be the ones for which it is easiest to find bi-partisan support. At least that is true in the U.S., and I suspect it is true in Europe as well. In the U.S., for example, there is strong, bi-partisan support for reviving and strengthening the community policing policies of the twentieth century and earlier twenty-first century – that is to say, for reviving and strengthening approaches to policing that emphasize consultation and cooperation with a broad cross-section of the public. There is also bi-partisan, cross-ideological support among Americans for moderating the extremely harsh sentencing laws that were adopted in the 1980s and 1990s and that have played a large role in fueling the extraordinarily high levels of incarceration in the U.S.

Beyond keeping people safe, treating people fairly, and building coalitions, there’s a fourth imperative for criminal justice in an era of populism and polarization, and this is to equip people for collective self-government, by building the skills of habits of citizenship on which democratic pluralism depends. How this can best be done will vary from country to country, because different countries have different institutions that can be used for this purpose.

In the United States, for example, an important tool for building democratic skills and habits is the jury. If you were going to design a process to try to build the kinds of skills and habits required for democratic citizenship, it would look a lot like a jury, which brings together people from across social divides and ask them to reason together based on evidence to arrive at agreed-upon facts. And in fact, there is evidence that serving on criminal juries *does* increase people’s trust in institutions and commitment to democratic processes.

And it could do a lot more. One thing that stops jury service from doing as much as it could to strengthen American democracy is that not enough people serve on criminal juries, because not enough criminal cases end in trials. More than 90% of criminal cases in the United States are resolved not through trials but through plea bargaining. And, because of the ways in which jurors are selected, they don’t represent a good cross-section of the American public. Furthermore, we don’t give juries enough information to allow them to take full ownership of their decision-making. But even with these limitations, criminal jury service plays an important role in spreading the skills and habits of democratic citizenship in the United States. And there is reason to think reform of jury service and expansion of jury trials could find broad bi-partisan support.

Juries aren’t the only way that criminal justice can build democratic capacity. I’ve mentioned community policing, which was enormously popular in the United States in the 1980s and 1990s, across ideological and racial divides, and remains broadly popular

among people toward the middle of the political spectrum — moderate conservatives as well as moderate liberals, moderate Blacks and Latinos as well as moderate whites.

And for good reason. Community policing was often just a slogan, or a way that police departments marketed themselves and deflected criticism. At its best, though, community policing was a way for police departments to bring a wide range of people into discussions about public safety, to give them a degree of collective responsibility for how their neighborhoods were policed. It also provided them with structured practice in addressing hard issues of public policy across boundaries of race, class, and ideology.

Community policing is valuable not just because it provides a way for the police and the public to work together to reduce crime, increase people’s sense of public safety, and reduce levels of police abuse. And the process of doing all of that can also build political capital within a community.

There’s a fifth and final way that criminal justice can support democracy in a time of populism and polarization, and that is by dispersing power.

Trumpism, like other populist movements that have gained strength around the world over the past two decades, is built in part around promises of hardline measures to defend the country’s “real” people against outsiders and elites.

Populism measures democracy by whether it is honoring the will of the true people. And it measures fairness and justice in the same way.

So, once in power, populists tend want all parts of the government to align with the north star of the popular will. That makes them enemies of professionalism and career bureaucrats. And it inclines populist governments to what political scientists have called “discriminatory legalism”: the coopting of legal processes to serve as a weapon against political enemies.

Police, prosecutions, and prisons—the apparatus of criminal justice—provide discriminatory legalism with its most dangerous weapons. And one lesson of the last hundred years is that it is impossible to put those weapons securely beyond the reach of authoritarian regimes. Legal doctrines can be twisted, the professionalism of judges and prosecutors can be subverted, and constitutional checks can be broken. This includes constitutional checks designed to accommodate dissent, to give political minorities a continuing say in how government power is exercised.

But it takes time for authoritarian regimes to defeat protections of this kind. That means that constitutional divisions of power, like professionalism, and like legal guarantees of fairness and impartiality, can provide brakes on authoritarianism. They can give democracy breathing room, by giving opponents of the regime time and space to regroup.

Different democratic societies, and different democratic constitutions, have different ways of dividing up power. They have different ways of allowing political minorities to keep a toehold in the tasks of governance—including, crucially, the tasks of policing, prosecution, and punishment. One important way the United States does this is by dividing responsibility for criminal justice between the federal government and the states.

And every modern, diverse democracy, including the United States, relies heavily on professional, nonpartisan legal bureaucracies—not just the judiciary, but also the bureaucracies of public prosecutors and publicly funded defense counsel—to disaggregate control over the criminal legal system, and to protect against discriminatory legalism. Those bureaucracies are currently under focused attack by the Trump Administration, and it's not clear how well they will survive the coming months and years, at least at the federal level. Which is why the division of power between the federal governments and the states with respect to criminal justice may become increasingly important in the US in the months and years ahead.

Most criminal justice carried at state and local level, which means that local district attorneys more important than the federal prosecutors employed by the federal Department of Justice. And here's another oddity of US justice: local district attorneys are elected, and so are most judges.

Prosecutors' and judges' races used to be sleepy affairs, but that is no longer true. Now, the pattern seems to be wide swings of the political pendulum, especially for prosecutors. Prosecutors from the left of the political spectrum are replaced with prosecutors from the right of the political spectrum, and then the pendulum swings the other way.

Maybe the most salient fact about US prosecutors, though, isn't that they are elected—it is their enormous, largely unchecked power. Largely unconstrained in choice of charges, in structuring plea offer, only loosely overseen by courts. Judges see themselves as referees, not as factfinders.

The huge powers of prosecutors, and the increasingly ideological nature of prosecutors' races, help feed a narrative that law is just another venue for politics; that there is no such thing as objectivity; that's it's all a matter of who has the power. That's a set of ideas that is corrosive of democratic pluralism. We should want prosecutors to have less discretion, to be more constrained by law.

And could build consensus around that right now. Because oddly enough, this may be the best opportunity the US has had in years to reform prosecutorial power. Left has long been critical – now right is critical both of “progressive prosecutors”, and of Trump prosecutions. Room for consensus. So far, Trump Administration has shown no interest

in that. But there is room for consensus at state and local level, where most of the criminal justice system actually operates.

I have some fear that everything I have said may sound both banal and trivial. It may seem obvious that systems of policing, prosecution, and punishment in democratic societies should work to keep people safe, to bolster their commitment to peaceful politics, to help them learn to work with each other, and to provide protections against authoritarian abuse. Furthermore, none of these tasks are exclusively, or even primarily, the responsibility of the criminal legal system.

But I think it is important to see the ways in which democracy needs not just restraint but active assistance from the criminal legal system, and it is important to be clear that what democracy asks of the criminal legal system is not fidelity to a mythical popular will, but safety, fairness, consensus policymaking, and processes that help people with conflicting views and aspirations learn how to govern themselves peacefully and equitably. That's a lesson that I think the rest of the world can and should take from the recent history of the United States, and in particular from the ways in which criminal justice failures have contributed to the rise of Trumpism and the current threats to democracy in the United States.