

# Does America Incarcerate Too Many Nonviolent Criminals?

## The Narrative

“Over the last few decades, we’ve also locked up more and more nonviolent drug offenders than ever before, for longer than ever before. And that is the real reason our prison population is so high.”<sup>1</sup>

**BARACK OBAMA**

“I . . . have a very comprehensive approach towards fixing the criminal justice system, going after systemic racism that stalks the justice system . . . and ending the incarceration of low level offenders.”<sup>2</sup>

**HILLARY CLINTON**

“Mass incarceration—not attacks on affirmative action or lax civil rights enforcement—is the most damaging manifestation of the backlash against the Civil Rights Movement.”<sup>3</sup>

**MICHELLE ALEXANDER, *The Nation***

“There is a growing consensus that the criminal justice system has incarcerated too many Americans for too many years.”<sup>4</sup>

**TIMOTHY WILLIAMS, *New York Times***

## Reality

It is not easy to land in an American prison. Most convicted felons never reach prison, and those who do are typically repeat offenders guilty of the most serious violent and property crimes. The system sends very few people to prison for simple drug possession. Drug-related convictions do not disproportionately harm the black community. To the contrary, if all drug offenders were released tomorrow, there would

be no change in the black share of prisoners.

### Only 42 percent of convicted felons are sentenced to prison

We do know, however, that putting the most dangerous criminals behind bars reduces victimization for crime-plagued communities. As the incarceration rate

for violent felons has increased, crime rates have plunged, saving countless lives and improving public safety—especially in minority neighborhoods. California, which is experimenting with “deincarceration,” is already seeing years of progress on public safety reversed in a matter of months.

## Key Findings

- 47 percent of incarcerated Americans are in prison for violent crimes, compared with only 20 percent for drug-related crimes.
  - ◆ Less than 4 percent of prisoners were convicted merely of drug possession, and many of those cases represent plea bargains from more serious offenses; out of 70,000 federal convictions in 2015, there were a total of 198 convictions for simple drug possession—of which just six were for simple possession of crack cocaine.
  - ◆ Drug convictions do not drive high rates of black incarceration: 37 percent of all prisoners are black, compared with 39 percent of drug convicts. Put another way: if all drug convicts were released tomorrow, the black share of the prison population would fall from 37.4 percent to 37.2 percent.
- Only 3 percent of violent victimizations and property crimes lead to imprisonment; even among convicted felons, less than half receive a prison term, and most of those are out in less than three years.
  - ◆ The average number of prior convictions for inmates released from state prison is five; the average number of prior arrests is more than ten.
  - ◆ Among convicted felons sent to prison, the median sentence is 30 months; for violent felons, it is 48 months.
- California’s experiment with deincarceration has reversed years of declining crime rates in a matter of months.
  - ◆ Enjoying a 14 percent decline in violent crime and a 6 percent decline in property crime over four years, California implemented Proposition 47 in November 2014 to eliminate prison sentences for various property and drug crimes. The state’s jail and prison populations began declining immediately thereafter.
  - ◆ But within six months, violent crime rose by 13 percent and property crime by 9 percent, entirely erasing the gains of the previous years. California’s prison population has stopped falling, and its jail population is rising again.

In July 2015, President Obama visited a federal penitentiary in Oklahoma and offered his analysis about the path to prison. “These are young people who made mistakes that aren’t that different than the mistakes I made and the mistakes that a lot of you guys made,” the president told the waiting reporters.<sup>5</sup> The *New York Times* echoed his conclusions: Anyone who “smoked marijuana and tried cocaine,” as the president had as a young man, reported the paper, could end up in the El Reno Federal Correctional Institution.<sup>6</sup>

This conceit is false. It takes much more than recreational marijuana or cocaine use to end up in federal prison. Less than 1 percent of federal prisoners have been convicted of drug possession, and most of those convictions were bargained down from serious trafficking charges. Yet such misconceptions—or outright deceptions—lie at the core of today’s anti-incarceration narrative.

That narrative holds that the U.S. has been on a mindless, vindictive crusade to lock away harmless sad sacks; the driving force behind that crusade is said to be racism. The disproportionate number of blacks in prison allegedly reflects bias by police, prosecutors, and judges. President Obama told the NAACP national conference in July 2015: “The bottom line is that in too many places, black boys and black men, Latino boys and Latino

men experience being treated differently under the law.” Incarceration, he said, “disproportionately impacts communities of color. African Americans and Latinos make up 30 percent of our population; they make up 60 percent of our inmates.”<sup>7</sup>

## Serious Criminals Are Behind Bars

Yet Obama said not one word about crime rates. It is not marijuana-smoking that lands a skewed number of black men in prison but their greatly elevated rates of violent and property crime. Prison today remains a lifetime achievement award for persistence in criminal offending. Far from being prison-happy, the criminal-justice system tries to divert as many people as possible from long-term confinement. “Most cases are triaged with deferred judgments, deferred sentences, probation, workender jail sentences, [and] weekender jail sentences,” writes criminologist Matt Delisi in the *Journal of Criminal Justice*. Offenders who have been given community alternatives “are afforded multiple opportunities to violate these sanctions only to receive additional conditions, additional months on their sentence, or often, no additional punishments at all,” Delisi adds.<sup>8</sup>

## On the Record

America has so many prisoners because it has so much serious crime. Only a fraction of convictions, let alone crimes, lead to imprisonment—typically for dangerous repeat offenders. The deincarceration movement, built on the innumerate accusation that our criminal-justice system is racist, is delegitimizing law enforcement and risking a rise in crime.

**Heather Mac Donald**, Senior Fellow, Manhattan Institute

Criminals who do get sent to prison either have committed a very serious felony or have racked up an extensive criminal record. The average number of prior convictions for inmates released from state prison in 2005 was five, and the average number of prior arrests was more than ten. Nearly 90 percent had at least three prior arrests.<sup>9</sup> The JFA Institute estimated in 2007 that in only 3 percent of violent victimizations and property crimes does the offender end up in prison.<sup>10</sup> Most perpetrators are never caught. If they are caught, they are likely to get an alternative to prison—if they are prosecuted at all. In 2009, 25 percent of convicted felons in the 75 largest counties received a community sentence of probation or treatment, and 33 percent were sentenced to jail, where sentences top out at one year but are usually completed in a few weeks or months. Only 42 percent of convicted felons in 2009 received a prison term;<sup>11</sup> the median sentence length was 30 months; for violent felons, it was 48 months.<sup>12</sup>

Contrary to the anti-incarceration narrative, drug prosecutions do not drive America's prison population. In 2013, drug offenders made up less than 16 percent of the state prison population (which accounts for 87 percent of America's prisoners), whereas violent felons constituted 53 percent of the rolls and property offenders accounted for 19 percent. Only 3.6 percent of state prisoners were serving time for drug possession, usually as the result of a plea bargain.<sup>13</sup> Nor is it true that rising drug prosecutions drove the increase in the U.S. prison population from the late 1970s to the present. During 1980–2009, drug offenses accounted for only 21 percent of state prison growth, while violent and property offenders accounted for more than two-thirds of the growth.<sup>14</sup>

Drug traffickers make up a larger (though declining) portion of the federal prison population: half in 2014. But federal prisons hold only 13 percent of America's prison population.<sup>15</sup> Thus, across state and federal prison systems combined, 47 percent of inmates were imprisoned for violent crimes, compared with 20 percent for drug-related crimes.<sup>16</sup>

Moreover, it is hardly the case that “but for the grace of God,” as Obama put it, he could have been incarcerated in Oklahoma's El Reno for getting stoned as a student. There were 198 federal convictions for simple possession in 2015 (six for simple possession of crack cocaine) out of 70,000 total federal convictions.<sup>17</sup>

## **Incarceration Is *Not* About Race**

Many law-abiding residents of communities plagued with open-air drug markets wish that drug dealers got longer sentences, not greater leniency. Go to any police-community meeting in a high-crime area, and you will inevitably hear some variant of the following complaint: “Why can't you keep the dealers off the corner? You arrest them, and they're back the next day.” In 1986, it was members of the Congressional Black Caucus who demanded that Congress respond forcefully to the crack cocaine epidemic. Congressman Alton Waldon, from Queens, New York,

called on his colleagues to act: “For those of us who are black, this self-inflicted pain is the worst oppression we have known since slavery. . . . Let us . . . pledge to crack down on crack.”<sup>18</sup>

Drug sentences do not explain blacks' overrepresentation in prison. Blacks represent 39 percent of drug convicts, compared with 37 percent of all prisoners.<sup>19</sup> This means that if all drug convicts were removed from America's prisons tomorrow, the share of black prisoners would drop from 37.4 percent to 37.2 percent. In the federal system, blacks accounted for 24 percent of 2015 drug-trafficking convictions and 6 percent of convictions for simple possession.<sup>20</sup> It is blacks' disproportionate involvement in violent street and property crimes that causes their overrepresentation in prison, not drug prosecutions. In the 75 largest county jurisdictions in 2009, for example, blacks were 62 percent of robbery defendants, 61 percent of weapons offenders, 57 percent of murder defendants, and 50 percent of forgery cases, even though they made up only 15 percent of the population in those counties.<sup>21</sup>

## **Deincarceration Is *Not* the Answer**

Prison remains a squalid, spirit-crushing affair that can, in some instances, turn borderline offenders into more hardened criminals. If there were alternatives to incarceration that offered communities the same protection from predation, they should be implemented. But the alternatives to penal custody that are now being proposed were tried in the late 1960s and early 1970s—and crime spun out of control as a result. In the three decades from 1960 to 1990, U.S. violent crime increased by 353 percent.<sup>22</sup> In response, legislators lengthened sentences, especially for repeat felony offenders, and pressed for a greater rate of confinement. Incapacitating more career criminals for longer periods eventually stopped and reversed America's crime increase, in conjunction with the data-driven revolution in policing that began in New York City in 1994 and spread nationwide.

Some deincarceration advocates argue that social programs for criminals can significantly reduce the risks of letting offenders out early or not confining them in the first place. But the number of proven programs, especially for adult reentry, is in short supply, as Stanford Law School's Joan Petersilia has acknowledged. Even if a program produces an effect in its initial iteration, that result may not be replicable, especially at a larger scale. None of the six programs for prisoner reentry evaluated by the Justice Department, for example, was rated as effective.<sup>23</sup>

The most promising concept in alternatives to incarceration is swift-and-certain punishment: sending substance abusers on probation and parole back to jail for short periods immediately following a dirty urine test. Expanding the swift-and-certain concept to a larger group of offenders, especially in big urban jurisdictions, is a challenge worth pursuing. And all probationers and parolees should work as part of their rehabilitation.

California, however, is pressing ahead with a robust deincarceration agenda. In November 2014, voters passed Proposition 47, which reclassified a range of drug and property felonies as misdemeanors, so that the offender would face no chance of a prison sentence, no matter how egregious his criminal history. By June 2015, the state's jail population had fallen 11 percent,<sup>24</sup> and its prison population was down 5 percent.<sup>25</sup> In the first half of 2015, violent crime rose by 13 percent and property crime by 9 percent in California cities with populations over 100,000,<sup>26</sup> erasing the 14 percent decline in violent crime and 6 percent decline in property crime over the previous four years.<sup>27</sup>

America's prisons can be greatly improved: above all, every prisoner should be engaged in a productive job. Vocational training should be widely available. And correctional institutions must be safe for inmates and officers. But if the U.S. prison population were not a reminder of a reality—the black crime rate—that the nation's political and academic establishment would rather cover up, it is unlikely that the deincarceration movement would have generated the same momentum. Some reasonable modifications of federal drug penalties may certainly be possible. But the greater danger in the current criminal-justice reform movement lies in the false premise that animates it: that America's criminal-justice system is racist.

## Endnotes

- <sup>1</sup> See <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.
- <sup>2</sup> See <http://thinkprogress.org/politics/2016/03/06/3757126/hillary-clinton-mass-incarceration-mistake>.
- <sup>3</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012), p. 11.
- <sup>4</sup> See <http://www.nytimes.com/2016/07/05/us/mass-incarceration-drug-offenses-zero-tolerance-prisons.html>.
- <sup>5</sup> See <https://www.whitehouse.gov/the-press-office/2015/07/16/remarks-president-after-visit-el-reno-federal-correctional-institution>.
- <sup>6</sup> See [http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html?\\_r=0](http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html?_r=0).
- <sup>7</sup> See <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.
- <sup>8</sup> See <http://www.sciencedirect.com/science/article/pii/S0047235215000781>.
- <sup>9</sup> See <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>, table 5.
- <sup>10</sup> See <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>, table 5.
- <sup>11</sup> See <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>, table 24.
- <sup>12</sup> *Ibid.*, table 25.
- <sup>13</sup> See <http://www.bjs.gov/content/pub/pdf/p14.pdf>, table 11.
- <sup>14</sup> See [http://harvardjoi.com/wp-content/uploads/2015/06/HLL104\\_crop1.pdf](http://harvardjoi.com/wp-content/uploads/2015/06/HLL104_crop1.pdf), p. 182.
- <sup>15</sup> See n. 12 above, table 12.
- <sup>16</sup> See *ibid.*, tables 11–12.
- <sup>17</sup> See <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table33.pdf>.
- <sup>18</sup> Quoted in Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage, 1997), p. 372.
- <sup>19</sup> See n. 12 above, tables 11–12.
- <sup>20</sup> See <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table04.pdf>.
- <sup>21</sup> See <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>, table 5.
- <sup>22</sup> Barry Latzer, *The Rise and Fall of Violent Crime in America* (New York: Encounter, 2016), p. 110.
- <sup>23</sup> See [https://www.law.stanford.edu/sites/default/files/publication/580250/doc/slspublic/Petersilia\\_Liberal%20But%20Not%20Stupid\\_2015%20April.pdf](https://www.law.stanford.edu/sites/default/files/publication/580250/doc/slspublic/Petersilia_Liberal%20But%20Not%20Stupid_2015%20April.pdf).
- <sup>24</sup> See [http://www.bsc.ca.gov/downloads/2014\\_3rd\\_Qtr\\_JPS\\_Full\\_Report.pdf](http://www.bsc.ca.gov/downloads/2014_3rd_Qtr_JPS_Full_Report.pdf) and <http://www.bsc.ca.gov/downloads/2Q15%20JPS%20Full%20Report%202.8.16.pdf>.
- <sup>25</sup> See [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad1410.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1410.pdf); and [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad1506.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1506.pdf).
- <sup>26</sup> See [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2015/preliminary-semiannual-uniform-crime-report-january-june-2015/tables/table-4/table\\_4\\_january\\_to\\_june\\_2015\\_offenses\\_reported\\_to\\_law\\_enforcement\\_by\\_state\\_by\\_city\\_100-000\\_and\\_over\\_in\\_population/view](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2015/preliminary-semiannual-uniform-crime-report-january-june-2015/tables/table-4/table_4_january_to_june_2015_offenses_reported_to_law_enforcement_by_state_by_city_100-000_and_over_in_population/view).
- <sup>27</sup> *Ibid.* and <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-jun-2011/data-tables/table-4/table-4/view>.