

The Myth of Mass Incarceration

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KEY TAKEAWAYS

Those who push the “mass incarceration” myth seek to divide the U.S. along racial lines—while ignoring the scope of violent crime and what should be done about it.

Proponents count too many people as being “incarcerated” and ignore the millions of crime victims across the country when discussing crime rates.

In fact, there is a yawning gap between the number of crimes known to victims and the number of perpetrators caught, tried, convicted, and sent to prison.

A casual observer could be forgiven for thinking that mass incarceration is one of the major problems plaguing the U.S. criminal justice system today. It has been the topic of best-selling books, award-winning documentaries, and numerous newspaper and magazine articles. One problem exists: It is not true. Mass incarceration is a myth. While the United States does lock up more people than many other countries, the United States also—sadly—suffers from much higher violent crime rates. There may be sociological reasons why this remains true, but it does not change the fact that once someone commits a violent felony or other serious crime, justice usually demands they do the time.¹

Still, the idea that the U.S. has a mass incarceration problem has a superficial appeal. And it has led those who buy into it to push for policies that will result in far fewer people being locked up—even those convicted of very violent crimes like murder, rape, and

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robbery. This is bad policy, and a closer look shows that at least two flawed assumptions underlie the mass incarceration myth: First, proponents count too many people as being “incarcerated,” and second, they ignore the millions of crime victims across the country when discussing crime rates.

To put a finer point on these two flaws, a quick inspection of the relevant literature shows that those who push the mass incarceration myth use a capacious definition of “incarceration,” often including those who are not actually behind bars. This makes the “mass” in mass incarceration appear much bigger than it actually is. They also use the term mass incarceration as a quick proxy for their argument that the criminal justice system in the United States is systemically racist, which it is not. Moreover, they often fail to account for the fact that the *actual* violent crime rates in the United States are higher than the already high *reported* violent crime rates. After all, victims do not report all crimes. Police do not make arrests for all reported crimes. Prosecutors do not prosecute all of those arrested. And juries do not convict all of those who are prosecuted.

Relatedly, there is often little discussion of the amount of time convicted felons actually serve in prison, or the fact that people in jail pending trial or serving a misdemeanor sentence (who are included in the “mass incarceration” numbers) often serve relatively little time in jail pending trial. That is likely because those facts water down, if not drown out, the justification for the mass incarceration mantra.

To clarify issues surrounding incarceration rates in the United States and to combat the myth that the U.S. has a mass incarceration problem, this *Legal Memorandum* proceeds in three parts.

1. It will talk about the ideological underpinnings of the mass incarceration movement and the efforts to mainstream this myth.
2. It will explain why the current criminal justice system in the United States is not systematically racist.
3. It will explain why those who believe in mass incarceration use a very generous definition of incarceration and do not adequately account for the true, higher-than-reported violent crime rates.

The Mass Incarceration Myth: Beginnings

In his 1987 book, *The Conflict of Visions: Ideological Origins of Political Struggles*,² Thomas Sowell observes that people often line up on different

sides of an issue because they “are reasoning from fundamentally different premises”³ and have “different visions of how the world works.”⁴ That is certainly true in the criminal justice context, where those who believe mass incarceration exists fundamentally believe that few, if any, people should be imprisoned, largely because of supposed systemic racism in our criminal justice system. Of course, that is a vision that many, including these authors, do not share.

Ideological Underpinnings: The Prison Abolition Movement.

Angela Davis, a political activist and avowed Marxist, asked readers of her 2003 book, *Are Prisons Obsolete?* to “imagine a world without prisons.”⁵ As the putative leader of the prison abolition movement, she opined that “the prison has become a black hole into which the detritus of contemporary capitalism is deposited,”⁶ and that “prisons are racist institutions.”⁷ An ardent defender of cop killer Mumia Abu-Jamal (AKA Wesley Cook)⁸ and other convicted violent criminals,⁹ Davis turbocharged the phrase “prison industrial complex”¹⁰ into the mainstream lexicon and wrote that the United States has a “racist and class-based justice system.”¹¹ She also opined that “enormous numbers of people are in prison simply because they are, for example, black, Chicano, Vietnamese, Native American or poor.”¹² Never mind their crimes.

As a result of her radical views, Davis supports abolishing all prisons, and says that there needs to be a “continuum of alternatives to imprisonment,” including “demilitarization of schools, revitalization of education at all levels, a health care system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.”¹³ She wants all drugs to be decriminalized¹⁴ and argues for open borders.¹⁵ Davis promotes her ideas, which are highly influential in certain spheres of society.

Interestingly, some who share her views have not always done so. For example, Randall Kennedy, a Harvard Law School Professor and well-known public intellectual, wrote a comment in the *Harvard Law Review* in which he acknowledged that “the principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but under-enforcement of the laws. The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity.”¹⁶ He wrote something similar in his book, *Race, Crime and the Law*,¹⁷ adding that “behind high rates of blacks perpetrating violent crimes are high rates of black victimization. Black teenagers are nine times more likely to be murdered than their white counterparts.”¹⁸

In a comment that is true to this day, but ignored by those who perpetuate the myth of mass incarceration, Kennedy noted, “In terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of their racial ‘brothers’ and ‘sisters’ than they do from the racist misconduct of white police officers.”¹⁹ Of course, this observation is at odds with the idea that too many black individuals are locked up or that systemic racism is to blame.

Kennedy also identified four “contending ideological camps about the race question in criminal law.”²⁰

1. According to Kennedy, the first camp is the “law and order” camp, which, he says, has “made the control of street crime through punitive measures a high priority on its political agenda.”²¹ Kennedy says that this first camp was dominated for three decades by the Republican Party, but was later joined by President Bill Clinton.
2. He believes that the second camp is “populated by people passionately dedicated to limiting governmental power,”²² who are “libertarian conservatives.” Those in camp two are “convinced that, if left unchecked, officials will virtually always tend to overstep their authority.”
3. The third camp is “constituted by people who claim to disavow *all* types of racial discrimination.”²³ They march “under the banner of the color-blind constitution,” and “its primary target of late has been that form of racial discrimination known as ‘affirmative action.’”²⁴ Kennedy opined that this camp suffered from a glaring inconsistency: While those in this camp oppose affirmative action, they do not oppose “racial discrimination by law enforcement officers.”²⁵ They are, for lack of a better term, hypocrites, in his view.
4. The fourth camp is “peopled by those dedicated to specifically advancing the interests of blacks.”²⁶ He embraces their “admirable labors on behalf of America’s paradigmatic racial pariah, the Negro.”²⁷ At the same time, Kennedy notes that “some activists in this fourth camp all too often make the formulaic allegations of racial misconduct without even bothering to grapple with evidence and arguments that challenge their conclusions.”²⁸ Tellingly, Kennedy writes, “Those who do this not only damage their own credibility; worse, they undermine the credibility of all who protest against racial wrongs.”²⁹

Over the years, Kennedy has come to embrace the concept of mass incarceration,³⁰ which is odd, given that many who support this position seemingly fall squarely into that segment of camp four that Kennedy criticized.

Efforts to Mainstream the Myth of Mass Incarceration. And yet, there has been an entire cottage industry devoted to making the types of claims that Kennedy originally decried. For example, Ava DuVernay's Emmy-Award winning documentary, *13TH*, starts with former-President Barack Obama saying, "So let's look at the statistics. The United States is home to five percent of the world's population, but twenty-five percent of the world's prisoners. Think about that."³¹ Van Jones, the controversial Obama Administration Special Advisor on Green Jobs who was fired shortly after joining the Administration,³² came next and disquietingly intoned that "A little country with five percent of the world's population, having 25 [percent] of the world's prisoners? One out of four? One out of four human beings with their hands on bars, shackled, in the world are locked up here, in the land of the free." In 2014, before participating in the documentary, Jones launched #cut50, a communications campaign with the stated goal of cutting the U.S. prison population by half in 10 years.³³ Bryan Stevenson, Founder and Executive Director of the Equal Justice Initiative, and best-selling author of *Just Mercy*, chimed in, saying, "We had a prison population of 300,000 in 1972. Today, we have a prison population of 2.3 million. The United States now has the highest rate of incarceration in the world."

Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, next comes on camera and more explicitly weaves the thread that supposedly exists between racism and mass incarceration. She says, "So, you see, now suddenly there is an awakening that, 'Oh, perhaps we need to downsize our prison system.' It's gotten too expensive. It's gotten too out of hand. But the very folks who often express so much concern about the cost and the expense of the system are often very unwilling to talk in any serious way about remedying the harm that has been done." Kevin Gannon, then a Professor at Grand View University in Des Moines next says, "History is not just stuff that happens by accident. We are the products of the history that our ancestors chose, if we're white. If we are black, we are product of the history that our ancestors most likely did not choose. Yet here we are all together, the products of that set of choices. And we have to understand that in order to escape from it."

Gannon sets the stage for the theme of the rest of the documentary, saying, "The Thirteenth Amendment to the Constitution, makes it unconstitutional for someone to be held as a slave. In other words, it grants freedom to all Americans. There are exceptions, including criminals." Khalil G. Muhammad,

Professor of History, Race and Public Policy at Harvard University, takes over, saying, “There’s a clause, a loophole.” Gannon later concludes that “If you have that in the structure, in this constitutional language, then it’s there to be used as a tool, for whichever purposes one wants to use it.” Essentially, the film is an homage to the idea that ever since slavery was abolished, and especially today, white people have used criminal law to re-enslave black people, and that prisons are modern-day slave plantations.

Noticeably absent is any mention of the number of crimes, especially violent crimes, committed by criminals in the United States. Not one person featured in *13TH* mentions the fact that in 2015, the year before the documentary was released, there were, according to the FBI’s Uniform Crime Report, 15,696 homicides in the United States,³⁴ which was more than all of Canada (604);³⁵ the European Union (EU) countries (5,000);³⁶ Japan (933);³⁷ Australia (229);³⁸ and New Zealand (47)³⁹ combined, and that those fifteen-plus thousand murders represented a rate of 4.9 murders per 100,000 people in the United States. In raw numbers, the United States has a homicide problem when compared to those other countries. Furthermore, no one mentioned that there were an estimated 1,197,704 violent crimes in 2015 across the United States, according to FBI statistics, which, not surprisingly, dwarfed violent crimes in Canada, the EU, Japan, Australia, and New Zealand.

But this documentary does not stand alone. It is part of a concerted effort that has gained new steam during the past two decades to push the idea that too many people in this country are in prison. In fact, there is an entire genre of books dedicated to the subject, some of which are best sellers. These books include *The New Jim Crow* by Michelle Alexander; *Policing the Black Man: Arrest, Prosecution, and Imprisonment* by Angela Davis; *Just Mercy* by Bryan Stevenson; *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* by Rachael Elise Barkow; *Locking Up Our Own: Crime and Punishment in Black America* by James Forman, Jr.; *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* by Emily Bazelon; *Understanding Mass Incarceration: A People’s Guide to the Key Civil Rights Struggle of Our Time* by James Kilgore, and *Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How it Can Recover* by Jeffrey Bellin, just to name a few of the more widely read books on the subject.⁴⁰

And, not surprisingly, given the liberal tilt of the legal academy, there are literally dozens of law review articles about mass incarceration.⁴¹

In 2016, in order to “solve” the mass incarceration problem, the Brennan Center for Justice issued a study calling for a 39 percent reduction in the prison population in the United States.⁴² The authors of that study

concluded that 576,000 people were behind bars “with little public safety rationale.”⁴³ Not to be outdone, the American Civil Liberties Union (ACLU) called for a 50 percent reduction in state prisons and jails.⁴⁴ The mission of the ACLU’s Campaign for Smart Justice is to “cut the nation’s jail and prison populations and to drive down racial disparities in incarceration.”⁴⁵

Anyone who has read this entire genre of books, law review articles, and studies; watched the movies; listened to the pundits; and visited the websites of the organizations listed above could not be blamed for believing that U.S. society is unfair and complicit in a criminal justice system that is rigged against black men. He would surely come away with the opinion that police routinely stop black men and prosecutors seek to send those individuals to jail simply for being black. That is the logical implication for much of what those who push the myth of mass incarceration say.

But no matter how often they say it, it is simply not true, which becomes evident when one views the entire picture. These advocates ignore the ugly reality that criminals commit a lot of violent crimes in the United States. And sadly, young black men commit many of those crimes—often against other young black men. So, high incarceration rates—even among young black men—are not the result of police or prosecutors targeting these individuals, but they instead are the result of criminal conduct. But those who believe in mass incarceration refuse to believe that these individuals are truly culpable for the crimes they committed and instead place the blame on systemic racism that they believe is inherent and endemic to our criminal justice system.

Supposed Systemic Racism in the Criminal Justice System. The United States criminal justice system is not systematically racist.⁴⁶ The U.S. Constitution, as amended, provides for an imperfect but color-blind society. But those who believe that mass incarceration has been designed to subjugate black individuals reject this fact. As a result, they seek to convince the public that the tools of the criminal justice system are used to harm black Americans. And they want the public to view the decisions of police, prosecutors, and judges to ignore, or underenforce, the law as humane and even necessary correctives. This is the entire goal of the rogue prosecutor movement.⁴⁷

Yet the accusation that systemic racism afflicts the whole criminal justice enterprise does not withstand even the most superficial scrutiny, and the persistence of that belief comes from the term’s frequent, imprecise use in popular discourse, not from its merit. Assessing the accusation requires some grasp of what structural, or systemic, racism means. Racism, in general, is “a belief that race is a fundamental determinant of human traits and

capacities and that racial differences produce an inherent superiority of a particular race.”⁴⁸ Thus, to be a structurally racist system, the criminal justice system must implement the belief that blacks are by their very nature inferior and should be confined to lower social and economic orders.⁴⁹

Humans, of course, erect the structures under which they are governed. So, if racist beliefs suffuse the criminal justice system, they must be held or adopted by those persons charged with creating, maintaining, and applying our laws and policies—namely legislators, attorneys general, prosecutors, and law enforcement officers. While it is common to speak of the criminal justice system as a single, unitary entity, it is in fact comprised of multiple separate systems operating at the local, state, and federal levels. So, to indict the entire criminal justice apparatus as racist, critics must give an account covering the wide variety of actors, motives, and situations involved. But they do not. And, in practice, most critics dispense with nuance when inveighing against “the system.” Instead, they deploy “racist” or “racism” to describe *any* outcome that blacks experience with greater statistical frequency than non-blacks.⁵⁰

This is problematic for many reasons. To begin with the basics, the laws and policies comprising the criminal justice system are facially neutral—they make *no* distinctions based on race.⁵¹ The Constitution flatly forbids legislatures, whether state or federal, from enacting laws that make race-based distinctions except in the rarest of cases in which they can identify a compelling government interest and demonstrate that the racial considerations are the most narrowly tailored means of achieving that interest, though even those are on shaky constitutional grounds.⁵² In practice, legislators have made such distinctions not in criminal law, but in areas like education, based on their belief that racial distinctions should be used to increase the representation of black and other non-white and non-Asian-Americans in academic institutions.⁵³

This color-blind system of neutral laws is the product of a conscientious, if sometimes halting, effort to move American society away from prior regimes that enshrined racial hierarchies in law, such as the system of chattel slavery predating the Thirteenth Amendment and the era of separate-but-equal segregation typified by the Supreme Court’s 1896 decision in *Plessy v. Ferguson*.⁵⁴ Because the letter of the law no longer relegates blacks to a lower social caste, evidence of racism must be found elsewhere in the criminal justice system.

Legislators could hide racist intent beneath neutral language, knowing that a given law’s operation will target blacks for exclusion or subordination. Or law enforcement might apply otherwise well-intentioned laws in

a discriminatory fashion by pursuing and prosecuting only black offenders while allowing non-blacks to offend at will. But the march of American society away from *Plessy* and Jim Crow segregation has resulted in a criminal justice system that has sought to identify and remedy racial discrimination.⁵⁵ Thus, there exist mechanisms like *Batson* challenges, named from the Supreme Court case establishing the rule that prevents prosecutors from using race to disqualify potential jurors from serving in a particular case.⁵⁶

There is no evidence that racist attitudes pervade the actors working at the various levels of law enforcement, and even in the rare cases in which that might occur, the justice system has guardrails to prevent such invidious motives from taking free rein.

Instead, critics take two avenues to sidestep the difficulty of generalizing about the often-unknowable motives of so many actors across a variety of circumstances: disparate impact and implicit bias.

Disparate Impact. The disparate-impact argument is premised on the assertion that racially unequal outcomes evidence racist motivations or that unequal outcomes suffice to show racism regardless of intent.⁵⁷ In criminal law, advocates point to high rates of arrest and incarceration within black communities, particularly among black men, as evidence that the justice system is racist.

From a legal standpoint, the argument is a non-starter.⁵⁸ The Supreme Court has turned aside many attempts to incorporate disparate impact into its review of criminal laws, explaining that “even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”⁵⁹ Disparate impact is, at most, a form of circumstantial evidence about possible intentions; it does not do the necessary work of identifying the actual motives behind a given policy or piece of legislation.

One criminal law often cited as a quintessential example of racism based on its disparate impact is the Anti-Drug Abuse Act of 1986, a centerpiece in the ongoing War on Drugs, which targeted the sale and use of crack cocaine by imposing stringent mandatory minimum sentences for possession of relatively small amounts of crack.⁶⁰ The act contained no express racial considerations, but its enforcement resulted in many black offenders being arrested, convicted, and given lengthy sentences for drug-related crimes.⁶¹ Thus, the law’s impact fell heavily on black communities with many fathers, brothers, and sons being removed for years to penal facilities. For critics, the point is not that these offenders were innocent or that crack is not dangerous (or at least no more dangerous than powder cocaine), but that the act targeted wrongs black Americans were more prone to committing than

whites for enforcement and harsh punishment,⁶² while the sentences for powder cocaine, which was seen as less prevalent in—though not absent from—many predominantly black communities were less severe.

Yet even for the Anti-Drug Abuse Act, the case that the law was enacted based on racist motivations is not compelling. Often ignored is the fact that the law passed with nearly unanimous support from the Congressional Black Caucus.⁶³ Those representatives were not deceived by mendacious white lawmakers—concerns from their own districts for black victims of crack-driven crime and underenforcement in black communities prompted their support of the legislation.⁶⁴ Black legislators saw the act as a means of protecting black communities.

The efficacy of the act can fairly be questioned, but the accusation of racism is unfounded. Subsequent congressional actions, such as reducing the sentencing disparity between crack cocaine and powder cocaine and making that more lenient sentencing standard retroactive, do not validate assertions that the act itself was racist from the start.

From the standpoint of enforcement, disparate impact's focus on arrest and incarceration rates shorn of broader context presents a misleading picture. It is true that on a per capita basis black individuals are a higher percentage of the prison population than they are in the national population. But it is equally true that black individuals comprise a higher percentage of criminal offenders than other racial demographic groups.⁶⁵ Critics argue that the higher arrest rate is a direct product of over-policing in black neighborhoods.

But that rejoinder is question-begging. Police make most effective use of their limited resources when they concentrate their efforts in high-crime areas. Predominantly black neighborhoods not only have a higher frequency of crimes and a higher concentrations of criminals, they are also theaters for so-called street crime, e.g., corner drug sales, theft, mugging, murder, etc., that are more readily detectable and subject to enforcement than subtler offenses like white collar crime.⁶⁶ Routinely, police departments receive calls about criminal activity from predominately black neighborhoods; police officers, of course, respond to those calls.⁶⁷

Phrases like “mass incarceration” evoke thoughts of innocent men imprisoned without justification. But American prisons are not filled with inmates who were over-sentenced for simple drug possession.⁶⁸ The stubborn fact remains that most black inmates are incarcerated for violent offenses.⁶⁹ Nor is it true that black offenders routinely get longer sentences than non-black offenders for comparable crimes; sentencing data indicate that any disparity between black and non-black offenders is “relatively small.”⁷⁰

Implicit Bias. The other route fashionable among critics for grappling with the difficulty of proving racist intent is to cite so-called implicit bias studies. These social-scientific experiments aim to show that white Americans, including those who explicitly reject racism, are predisposed to demonstrate racist reactions toward non-whites at a subconscious level.⁷¹ By extension, most everything whites do, including the legislation they write and the interactions they have, is pervaded by a subconscious belief in the inferiority of black Americans.⁷²

The problems with these experiments and their foundational assumptions are myriad. These authors canvass but a few here. The implicit-bias experiments record reaction times to the pairings of photo images with select racial stereotypes; some of the latter are merely disfavored political views such as disapproval of affirmative action.⁷³ The difference between a so-called neutral reaction and a so-called racist one is a matter of milliseconds.⁷⁴ Moreover, the experiments fail to control for non-racial considerations that can slow reaction times, making the alleged correlation between reaction times and racial bias even weaker.⁷⁵ Needless to say, implicit bias experiments provide no firm answers regarding the extent to which supposed subconscious animus actually affects legislative or enforcement choices in the criminal justice system.

Alleged Indifference. When all else fails, critics contend that the alleged indifference of policymakers and the public to the lingering effects of past laws or the burdens of current laws is itself racism.⁷⁶ But here, critics have it backwards. Their critique focuses on the small segment of the black community that commits criminal offenses. Often discounted in their assessment is the much larger portion of the black community that desperately needs protection from the violent, destabilizing crime that has afflicted black communities for decades.

A system of criminal justice is necessary “to punish offenders [and] to deter or incapacitate them from harming others.”⁷⁷ It protects individuals, families, and the stability and integrity of the communities in which they live. When black offenders find themselves subject to the restraints and sanctions of the criminal justice system, it is often because of wrongs they have committed against other members of the black community. Black Americans suffer from violent crime at much higher rates than white Americans. They are murdered at higher rates and even in greater absolute numbers than whites, even though blacks are only 13.6 percent of the population.⁷⁸ The violence comes overwhelmingly at the hands of other black Americans.⁷⁹

Given these facts, the true mark of indifference would be to withhold law enforcement resources from black communities and to abandon their

populations to the permanent insecurity that arises wherever violent crime is both pervasive and undeterred. There would be no simpler way of ensuring that black Americans were permanently confined to a lower social caste than to turn a blind eye to the crime that bedevils their communities. Crime acts as a regressive form of taxation on black communities, forcing the constituent businesses and families to incur crime-preventing costs and forego productive activities out of fear.⁸⁰ Thus, nowhere are the rationales of criminal law better served than when those laws are enforced in communities ravaged by criminality—indeed, there may be no way to advance toward a more stable future for black communities absent such enforcement.⁸¹

The True Story About Incarceration

But what does it mean to be incarcerated? Advocates for the mass incarceration myth do not have a straightforward answer for this seemingly simple question. And yet this question, and the answer to it, are critical. After all, whether someone is “incarcerated” determines whether that person counts as someone “victimized” by mass incarceration.

Including Those *Not* Behind Bars. Open up any dictionary and look up the word “incarceration.” The definition is the same. The word “incarceration” means “confinement in a jail or prison.”⁸² Similarly, the word “mass,” as in “mass incarceration,” means “a large body of persons in a group.”⁸³ Similarly, the word prison denotes a facility designed to hold convicted criminals sentenced to serve a year or more in confinement. Each state, and the federal government, has prisons. A jail, on the other hand, is a confinement facility at the local level, usually associated with a local trial court, that houses, broadly speaking, two types of individuals: (1) people in pretrial custody and (2) convicted criminals sentenced to less than one year of confinement.

Based on these definitions, it would be natural to think that those subjected to “mass incarceration” are people in prison—or maybe jail. That makes sense, because words have meaning, or at least they should. Whether you subscribe to the idea that words should have their original public meaning when interpreting them, or you believe that words evolve over time, there is little wiggle room to the definition of the word “incarceration.”

But not to leading decarcerationists.

They play fast and loose with the definition of incarceration. Michelle Alexander, perhaps the leading voice in the movement, equates “mass incarceration” with “correctional control,” even though “the overwhelming majority of people under such ‘control’ are at large in the community.”⁸⁴ Her definition of mass incarceration, and the one largely used by those in the movement, includes

people on probation and parole, which represent a huge portion of people involved in the criminal justice system.

As Barry Latzer notes in *The Myth of Overpunishment*, “Alexander adopts an inflated, and essentially dishonest, definition of mass incarceration.”⁸⁵ Citing U.S. Department of Justice statistics, Latzer points out that “only one-third of criminal defendants in the United States are incarcerated in prison or jail; two-thirds are free on probation or parole.”⁸⁶ Latzer correctly notes that “incarceration, mass or otherwise, should not be inflated to include its very opposite, non-incarceration. This is especially true when the non-incarcerative controls imposed by the criminal justice system are minimal.”⁸⁷ Yet those who push the myth of mass incarceration do just that.

Different Types of Incarceration

Another sleight of hand often used by those who complain about mass incarceration is that they make it sound like everyone behind bars is serving time in state or federal prison for long terms of imprisonment. But again, that is not true.

Those in Jail. For example, when Bryan Stevenson wrote in a 2006 article published by the *Harvard Civil Rights–Civil Liberties Law Review* that the United States had “almost 2.3 million people imprisoned today,”⁸⁸ it is not immediately apparent that he includes in that number people serving short terms of confinement in local jails. According to the Bureau of Justice Statistics, in 2005 (the year Stevenson was referring to in his Harvard article), there were 2,193,798 inmates in custody, of which 179,220 were in federal prison, 1,259,905 in state prison, and 747,529 in local jails.⁸⁹

In other words, in 2005, about one-third of the detained population that year were in local jails. And while prison populations have gone down dramatically since at least 2011, the local jail population has remained relatively steady numbers-wise during that time period, as depicted in Table 1.⁹⁰ This is important because it means that the *percentage* of people in jail relative to the overall incarcerated population (those in prison plus those in jail) has gone up.

Keep in mind that men and women in prison are convicted felons, serving a sentence of one year or more. The vast majority of them are in prison, as discussed below, because they were convicted of violent crimes.

In contrast, people in local jails are detained for one (or more) of several reasons:⁹¹

- They have not yet had their bail hearings;

TABLE 1

Jail to Prison Population Ratio

Year	Number of People in Prison	Number of People in Jail ¹	People in Jail as a Percentage of People in Prison
2011	1,599,000	735,600	46.0%
2012	1,570,400	744,500	47.4%
2013	1,577,000	731,200	46.4%
2014	1,562,300	744,600	47.7%
2015	1,526,600	727,400	47.6%
2016	1,508,100	740,700	49.1%
2017	1,489,200	745,200	50.0%
2018	1,464,400	738,400	50.4%
2019	1,430,200	734,500	51.4%
2020	1,221,200	549,100	45.0%
2021	1,204,300	636,300	52.8%

SOURCES: See Appendix 2.

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- They had their bail hearings and are trying to get the money to post bond (usually 10 percent of the bail set by the judge);
- The judge denied their bail requests, or, because of the crimes they were charged with, bail was not available to them. Thus, they are awaiting trial or an alternative disposition of their cases;
- They are serving sentences of less than one year;
- They are pending arraignment;
- They are mentally ill persons and waiting to be moved to an appropriate health facility;
- They are being held for the military, for protective custody, for contempt, or for the courts as witnesses;
- They are being held pending transfer to the federal government, other states, or other authorities;

- They are being housed for federal authorities, other states, or other authorities because of overcrowding in their facilities;
- They have been readmitted after a probation, parole, or bail-bond violation; or
- They are juveniles who have been temporarily detained pending transfer to juvenile authorities and juvenile facilities.

The Bureau of Justice Statistics, which is part of the Justice Department's Office of Justice Programs, tracks local jail statistics every year. As of 2019, there were approximately 2,850 local jail jurisdictions operating in the United States.⁹² Contrary to the picture painted by those who decry mass incarceration, inmates do not languish in local jails across the country for long periods of time. In fact, as depicted in Table 2, inmates in local jails spend, on average, around a month in jail, depending on the year. Approximately one-third of people in jails across the country are there because they have been convicted of a crime.

The fact that people in local jails, on average, serve so little time may come as a surprise. What is equally eye-opening is the fact that most people admitted to local jails were charged with felonies. For example, according to 2022 statistics, approximately 76 percent of the jail population was held for felony.⁹³ As explained below, the year 2022 was no outlier. Table 3 depicts the percentage of people in local jails in a given year charged with a felony.⁹⁴

In 2022, the racial and ethnic composition of the jail population remained the same as in the previous year. Just under half of the population (48 percent) were white, 35 percent were black, and 14 percent were Hispanic.⁹⁵ And although the incarceration rate for blacks (558 per 100,000) was 3.4 times the rate for whites in 2022 (162 per 100,000), as depicted by the Chart 1, the incarceration rate of blacks in 2021 was at its lowest rate since 1990—not counting 2020 when the rates were abnormally low due to the pandemic and the desire by prison officials to decrease the prison population so as not to spread the disease.⁹⁶

These facts run counter to the impression created that jails and prisons are filled to the brim with people, as Angela Davis wrote, “simply because they are, for example, black.”

In summary, although yearly admissions to local jails are in the millions, the reality is that people in jails across this country are often detained for less than a month. One-third of those in jails have been duly convicted of a crime, and over 66 percent of those in jails have been

TABLE 2

Time Spent in Jail

Year	Average Number Days Spent in Jail	Percentage Convicted vs Awaiting Trial
2011 ²	—	39%–60%
2012 ³	—	39%–60%
2013 ⁴	—	38%–62%
2014 ⁵	—	37%–62%
2015 ⁶	—	37%–62%
2016 ⁷	25	34%–65%
2017 ⁸	26	35%–65%
2018 ⁹	25	33%–66%
2019 ¹⁰	26	35%–65%
2020 ¹¹	28	—
2021 ¹²	33	19%–81%
2022 ¹³	32	30%–70%

SOURCES: See Appendix 2.

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TABLE 3

Percentage of People in Local Jails Charged with a Felony

Year	Percentage of People with Felony Charges
2015	67.9% ¹⁴
2016	69.7%
2017	69.4%
2018	68.4%
2019	70.0%
2020	76.7%
2021	76.3% ¹⁵

SOURCES: See Appendix 2.

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charged with a felony. Those peddling the mass incarceration mantra must certainly be aware of these facts, yet they lump these people, who pass through jails for less than a month, into the contrived definition of “mass” incarceration.

TABLE 4

Participants for National Crime Victimization Survey

Year	HOUSEHOLDS		INDIVIDUALS	
	Eligible to Be Interviewed	Interviewed	Eligible to Be Interviewed	Interviewed
2012	106,720	92,389	187,684	162,937
2013	107,378	90,629	182,699	160,044
2014	108,204	90,376	181,178	158,089
2015	117,324	95,758	189,711	163,879
2016	173,289	134,685	266,639	224,521
2017	192,111	145,508	285,904	239,541
2018	208,171	151,055	296,017	242,928
2019 ¹⁶	218,802	155,076	301,100	249,008
2020	205,206	138,327	270,566	223,079
2021	223,456	150,138	291,878	238,043
2022	224,927	142,794	277,892	226,962

SOURCES: See Appendix 2.

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Those in Prison. Then there is prison. People in prison have been convicted of at least one felony that carries with it a term of imprisonment for more than one year. One of the omnipresent arguments by those who rail against mass incarceration is that drug possession and drug-related crimes are responsible for many of those currently in prison—especially black individuals. Michelle Alexander and others have claimed this to be true, and many likely take it at face value as being true. But, once again, it is not true.

The vast majority of people in prison are serving time in state prisons. Federal prisons hold, relatively speaking, very few people. The vast majority of state prisoners are there after being convicted of a violent crime, including things like murder, manslaughter, rape or sexual assault, robbery, or aggravated assault, among others. According to 2022 statistics, those convicted of violent crimes make up 62.9 percent of all state prisoners.

The racial breakdown of those serving time for various crimes might also come as a surprise. As of December 31, 2021, of those state prisoners incarcerated for murder, 11.5 percent were white, 14.2 percent were Hispanic, and 18.7 percent were black. But whites, as a percentage, far outnumbered blacks and Hispanics for rape and sexual assault, burglary, larceny/theft, and drug possession.⁹⁷


TABLE 5

Serving Time, by Crime and Racial Group

RACIAL GROUP, AS PERCENTAGE OF STATE PRISONERS

Offense	White	Black	Hispanic
Violent	54.8%	68.4%	71.3%
Murder	11.5%	18.7%	14.2%
Manslaughter	1.7%	1.1%	1.4%
Rape/Sexual Assault	19.8%	9.8%	19.1%
Robbery	6.3%	18.6%	11.9%
Property	17.9%	10.4%	8.5%
Burglary	9.1%	6.6%	5.2%
Larceny/Theft	4.0%	1.8%	1.1%
Motor Vehicle Theft	0.9%	0.4%	0.7%
Fraud	1.8%	0.7%	0.5%
Drugs	15.0%	10.2%	10.1%
Possession	4.9%	2.2%	2.7%
Distribution, etc.	10.1%	8.0%	7.3%
Public Order	11.4%	10.6%	9.8%
Weapons	2.6%	5.3%	3.4%
DUI/DWI	2.0%	0.6%	2.0%

SOURCES: See Appendix 2.

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Black offenders are disproportionately serving time for committing violent offenses. Of the 1,021,300 persons in state prison at the end of 2021, 642,500 (63 percent) were serving sentences for a violent offense, 132,800 (13 percent) for a property crime, 127,300 (13 percent) for a drug offense, and 111,900 (11 percent) for a public order offense.⁹⁸ Of those 642,500 violent offenders, 227,000 were black and 176,400 were white.⁹⁹ And of those, 36,900 whites and 62,200 blacks were serving time for murder.¹⁰⁰

But despite the fact that most prisoners are serving time for committing violent crimes, the prison population has been falling. Between 2011 and 2021, the prison population declined by 24.7 percent.¹⁰¹ Contrary to the narrative perpetuated by Angela Davis, Michelle Alexander, and their cohort about blacks and incarceration, over that same 10-year period, there was a 32.1 percent decline of black individuals in prison.¹⁰² The numbers for whites imprisoned also declined during that decade, but not to the same extent.¹⁰³

These are important facts to take into account when evaluating the decarceration aspirations of the Brennan Center or the ACLU, which have called for a 39 percent and 50 percent reduction in state prison populations, respectively.¹⁰⁴ Since 62.9 percent of prisoners are there after having been convicted of a violent offense, who, exactly, does the Brennan Center or ACLU suggest should be freed from prison? All felons not convicted of murder, manslaughter, or rape? Or maybe even some of those individuals? Should the release authority take into consideration the crimes that were dropped, and the underlying conduct, in deciding who might be a viable candidate for outright release?

Given that the majority of homicides, and the super-majority of rapes, robberies, aggravated assaults, and scores of other crimes goes unsolved in this country, is it not reasonable to suspect or even assume that some of the people currently incarcerated after having been convicted of those crimes likely committed some of these unsolved crimes, too? After all, many of those who would have to be released to meet these goals have long criminal records.

These and other related questions, and honest answers to those questions, demonstrate the absurdity of proposals to cut the prison population by 39 percent or 50 percent—or more. Unleashing known criminals (whose *full* criminal history is not known) into a society that does not apprehend, much less hold to account and imprison, most violent criminals is dangerous, and most who support these radical proposals either avoid this uncomfortable fact or are downright dishonest about it.

Violent Crime: Higher Than Reported

In a perfect world, each person who committed a violent crime—such as murder, rape, robbery, aggravated assault, etc.—would be held criminally accountable for his or her actions, and most (if not all) would or should serve time in prison.

The reality, however, is that more than half of those people who commit murder do not serve any time in prison. This means that there are, cumulatively, thousands (if not more) of murderers in the United States who have not been caught and will not spend a day in prison for their heinous crimes. As if that is not bad enough, a super-majority of those who commit the other crimes listed above, and scores of other crimes not listed above, will not be caught and thus will not serve a day in prison for the crimes they committed.

In the mass incarceration literature, there is barely a mention of the scope and scale of crime in this country. While the individuals discussing this supposed phenomenon myopically focus on the number of people in prison, they notably ignore, to a fault, the number and nature of crimes committed—especially the number of unreported crimes. But it is understandable why they ignore it: Crime is the Achilles heel of their entire narrative.

Even though it is impossible to know exactly how many crimes have been committed across the country, the best gauge of crime victimization can be found by in a yearly collection of data by the Justice Department. The U.S. Department of Justice administers two statistical programs to measure the magnitude, nature, and impact of crime in the nation. These are the FBI Uniform Crime Reporting Program Summary Reporting System (UCR SRS) and the Bureau of Justice Statistics National Crime Victimization Survey (NCVS).¹⁰⁵ The latter was established in 1973 to complement the USC SRS and to measure crime that was not reported to the police.¹⁰⁶

Although there is no way to know to a mathematical certainty the amount of crime that occurs in the United States in any given year, or the exact number of crimes not reported to the police, these two tools provide the most “comprehensive understanding of crime in the United States.”¹⁰⁷ In other words, they provide the best estimate of the amount of crime actually taking place, both reported and unreported.

The NCVS is particularly helpful in this regard. It is a national survey of households and “certain other persons” (the term used by the survey) regarding the impact of violent crime on their household or person. Like most surveys, there is a pool of eligible interviewees, a given number of households or people who were actually interviewed, and a participation rate for each. As depicted below, the NCVS casts a very wide net, which provides the U.S. Department of Justice the best data available on the scale and scope of violent crime across America.¹⁰⁸

According to the NCVS, during the 10-year period from 2011 to 2020, the rate of violent crime¹⁰⁹ declined from 22.6 to 16.4 victimizations per 1,000 persons ages 12 or older.¹¹⁰ During that same period, the NCVS rate of violent crime reported to the police decreased from 11.1 to 6.6 victimizations per 1000 persons ages 12 or older, a decline of 40 percent.¹¹¹

Declining overall crime rates (both reported and unreported) and declining rates of reported crimes are, at first glance, good news. But the fact is that in the United States, there is a yawning gap between the number of crimes known to victims and the number of perpetrators caught, tried, convicted, and sent to prison. In fact, as shown in the Justice Department data in Table 6, most criminals not only get away with their crimes, but for those

TABLE 6

Crimes Resulting in Imprisonment, 2019

Crime	Claimed by Victims	Known to Police	Arrests	Admitted to Prison
Murder	—	16,425	9,352	8,033 (48.9%)
Rape	459,310	139,815	19,592	22,583 (4.9%)
Robbery	534,420	267,988	65,560	30,385 (5.7%)
Aggravated Assault	1,019,490	821,182	317,632	55,268 (5.4%)

SOURCES: See Appendix 2.

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caught, *most do not go to prison*.¹¹² According to the interviews of victims and other available data, while nearly half of murderers were caught and imprisoned, less than 6 percent of those who committed rape, robbery, or aggravated assault met a similar fate.¹¹³

Barry Latzer has repeatedly made this point. As detailed in Table 6, there were 459,301 claims of rape by victims in 2019. That number fell to 139,815 that were reported to police, which resulted in 19,592 arrests. A mere 22,583 offenders were sentenced to prison.¹¹⁴ The same grim statistics hold true for robbery and aggravated assault, according to Latzer.

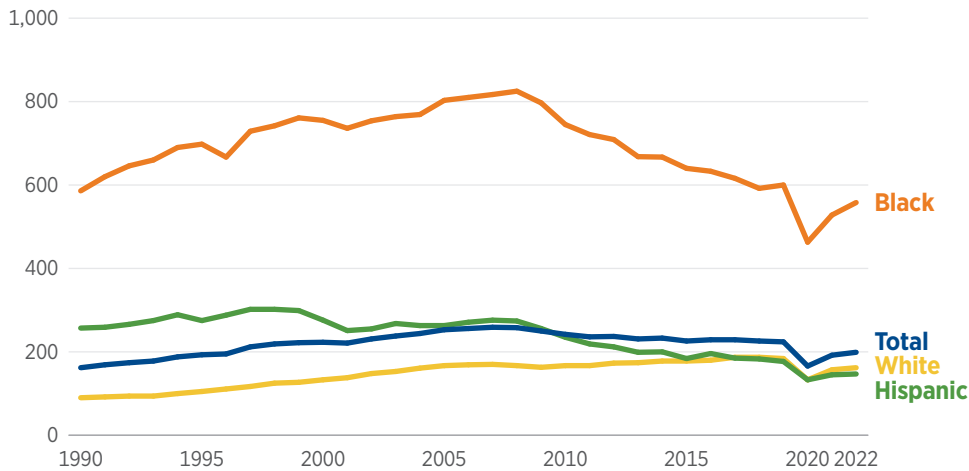
And of the 16,425 murders (which includes non-negligent homicide) in 2019, there were only 9,352 arrests, and, of those, only 8,033 went to prison.¹¹⁵ What happened to the other murderers? Did they get away with the ultimate crime? With advances in DNA technology and other forensic testing, some of them may be caught in another year. But there is no doubt that many people are getting away with murder—literally—every year.

It is also worth noting that most of those who are sent to prison do not serve their full sentences. This seems to cut against the argument made by the decarceration crowd that prison sentences are too long, especially compared to other countries. For example, in the year 2000, only 19.6 percent of state prisoners who were released had completed their full terms.¹¹⁶ When parole and “good time” credit are added, only about 20 percent of state prisoners actually serve their full sentences in prison. Even more surprising is that, on average, released prisoners only served 2.6 years, and the median time served is a mere one year and four months.¹¹⁷ For violent crimes, the median time served is slightly higher at 4.7 years, but, relatively speaking, that is not much.¹¹⁸

CHART 1

Percentage of People in Local Jails Charged with a Felony

RATES PER 100,000 POPULATION



SOURCES: See Appendix 2.

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Conclusion

The idea that the United States is an overly carceral country infected with the scourge of “mass incarceration” is deeply embedded into the mainstream media, academia, and pop culture. But it is just not true, especially taking into account what the phrase actually means in practice and comparing the number of people in prison to the scope and scale of crimes committed. Only a fraction of people who commit crimes are imprisoned—even those who commit violent crimes. Those who support a radical decarceration agenda have gained some headway in their goals by pushing out through various channels the myth that the United States locks up too many people. In reality, the United States likely locks up too few.

Mass incarceration is a myth—and a harmful one at that. Those who push it seek to divide the country on racial lines, all the while ignoring the reality of the scope of violent crime, and what should be done about it. And, ultimately, everyone pays the price.

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Appendix 1

APPENDIX TABLE 1

Jail Incarceration Rates by Race or Ethnicity

PER 100,000 POPULATION

Year	Total	White	Black	Hispanic
1990	162	90	586	257
1991	169	92	620	259
1992	174	94	646	266
1993	178	94	660	275
1994	188	100	690	289
1995	193	105	698	275
1996	195	111	667	288
1997	212	117	729	302
1998	219	125	742	302
1999	222	127	761	299
2000	223	133	755	276
2001	221	138	736	251
2002	231	148	754	255
2003	238	153	764	268
2004	244	161	769	263
2005	253	167	803	263
2006	256	169	810	271
2007	259	170	817	276
2008	258	167	825	274
2009	250	163	797	256
2010	242	167	745	235
2011	236	167	721	219
2012	237	173	709	212
2013	231	174	668	199
2014	233	178	667	200
2015	226	178	640	184
2016	229	180	633	196
2017	229	187	616	185
2018	226	187	592	183
2019	224	184	600	177
2020	166	133	463	133
2021	192	157	528	145
2022	199	162	558	147

SOURCES: See Appendix 2.

Appendix 2: Data Visual Sources

Table 1

1. The jail numbers depicted are the average daily population (ADP), which is the sum of all inmates in jail each day for one year, divided by the number of days in the year. The ADP is not to be confused with the total number of admissions for any given year. The number of annual admissions into local jails has declined substantially in the past decade. The following numbers represent the total annual admissions by year: 2022 (7.3M); 2021 (6.9M); 2020 (8.7M); 2019 (10.3M); 2018 (10.7M); 2017 (10.6M); 2016 (10.6M); 2015 (10.7M); 2014 (11.4M); 2013 (11.7M); 2012 (11.6M). *See* ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2022—STATISTICAL TABLES (Dec. 2023), Table 1, at 2.

Table 2

2. *See* ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2022 3–4 (Dec. 2023).
3. *See* ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2021 1, 3 (Dec. 2022).
4. *See* TODD D. MINTON AND ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2020 4 (Dec. 2021). The global COVID-19 pandemic effected the numbers of persons in prison and jail. By early March 2020, the United States started to feel the full impact of the pandemic. Local, state, and the federal government enacted numerous measures that, at the time, they deemed in the interests of public health and safety. One of the many measures taken across various states in 2020 was the decision not to arrest people for the commission of misdemeanors, not send people to jail, and release people from jails and prisons. These actions, which varied by state, are beyond the scope of this paper. Nevertheless, these actions warped the jail and prison numbers for 2020 and part of 2021.
5. *See* ZENG AND MINTON, *supra* note 92, at 6 and 8.
6. *See* ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2018 1 (Mar. 2020).

7. *See* ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2017 6, 8 (Apr. 2019).
8. *See* ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2016 4, 6 (Feb. 2018).
9. *See* TODD D. MINTON AND ZHEN ZENG BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2015 5 (Dec. 2016). The Bureau of Justice Statistics did not include the average number of days a person served in jail before the year 2016. Thus, there is no official data in years 2015 or earlier. There is no reason to believe, however, that the number of average days served by a person in jail was much higher or lower than 2016 and later, as the purpose of jail has not changed.
10. *See* TODD D. MINTON AND ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES AT MIDYEAR 2014 4 (June 2015).
11. *See* TODD D. MINTON AND ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., MAY 2014, JAIL INMATES AT MIDYEAR 2013 7 (May 2014).
12. *See* TODD D. MINTON, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., MAY 2013, JAIL INMATES AT MIDYEAR 2012 6 (MAY 2013).
13. *Id.*

Table 3

14. *See* ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2021 1, 3 (DEC. 2022), Table 6, at 11. Table 6 contains the percentage of the local jail population charged with a felony for years 2016–2021.
15. *See* TODD D. MINTON AND ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2020 4 (DEC. 2021) at 11. The Department of Justice yearly jail inmate reports before 2015 do not list the percentage of jail inmates charged with felonies.

Table 4

16. See ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., JAIL INMATES IN 2021 1, 3 (DEC. 2022), at Table 4, at 10 for years 2019–2022.

Table 5

17. See E. ANN CARSON AND RICH KLUCKOW, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., PRISONERS IN 2022—STATISTICAL TABLES (NOV. 2023).

Table 6

18. See Erika Harrell, Rachel Morgan, Alexandra Thompson, Jennifer Truman, Susannah Tapp, and Emilie Coen, *Participation Rates (Households and Persons) for the National Crime Victimization Survey (NCVS), 1973–2022*, <https://bjs.ojp.gov/data-collection/ncvs#9-0>.

Chart 1

19. See LATZER, *supra* note 68, at 107; see also U.S. DEP'T. OF JUST., BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION, 2019 (2020), Table 1 (see intro., n. 3); FED. BUREAU INVESTIGATION, UNIFORM CRIME REPORTS 2019, Table 1 (see intro., n. 4); FED. BUREAU INVESTIGATION, CRIME DATA EXPLORER, Arrest Data; NAT'L CORRECTIONS REP'ING Program, 1991–2019: Selected Variables (July 15, 2021), <https://www.icpsr.umich.edu/web/NACJD/studies/38048>.

Appendix Table 1

20. See LATZER, *supra* note 68, at 107; see also U.S. DEP'T. OF JUST., BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION, 2019 (2020), Table 1 (see intro., n. 3); FED. BUREAU INVESTIGATION, UNIFORM CRIME REPORTS 2019, Table 1 (see intro., n. 4); FED. BUREAU INVESTIGATION, CRIME DATA EXPLORER, Arrest Data; NAT'L CORRECTIONS REP'ING Program, 1991–2019: Selected Variables (July 15, 2021), <https://www.icpsr.umich.edu/web/NACJD/studies/38048>.

Endnotes

1. Even this is somewhat misleading, though, given the myriad alternatives to incarceration that already exist.
2. THOMAS SOWELL, *A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES* (1987).
3. *Id.*
4. *Id.*
5. See ANGELA DAVIS, *ARE PRISONS OBSOLETE?* 8 (2003).
6. *Id.* at 16.
7. *Id.* at 25.
8. *Id.* at 55.
9. *Id.* at 61–64.
10. *Id.* at 84.
11. *Id.* at 113.
12. *Id.*
13. *Id.* at 107.
14. *Id.* at 109–10.
15. *Id.* at 110.
16. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994).
17. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997).
18. *Id.*
19. *Id.* at 20.
20. *Id.* at 3.
21. *Id.*
22. *Id.* at 5.
23. *Id.* at 6 (emphasis in original).
24. *Id.*
25. *Id.*
26. *Id.* at 7.
27. *Id.*
28. *Id.*
29. *Id.*
30. See, e.g., Nico Perrino, *So To Speak Podcast featuring Professor Randall Kennedy on 'The Forgotten Origins of the Constitution on Campus,' FIRE* (Jan. 25, 2018), <https://www.thefire.org/news/so-speak-podcast-professor-randall-kennedy-forgotten-origins-constitution-campus>.
31. See 13TH (Netflix 2016) (directed by Ava DuVernay), available at <https://www.youtube.com/watch?v=krfcq5pF8u8>.
32. Van Jones, who was appointed by then-President Barack Obama to be the Green Jobs Czar, resigned after it was discovered that he had signed a letter in 2004 suggesting that President George W. Bush had inside and prior knowledge of the September 11, 2001, terrorist attacks against the United States. Not only was Van Jones a so-called “9/11 Truther,” as a member of the Obama Administration he had called Republicans “assholes” and was a self-described communist and Marxist in the 1990s. See Michael Burnham, *Embattled Van Jones Quits, But ‘Czar’ Debates Rage On*, N. Y. TIMES (Sept. 9, 2009), <https://archive.nytimes.com/www.nytimes.com/gwire/2009/09/08/08greenwire-embattled-van-jones-quits-but-czar-debates-rage-9373.html>; see also Joseph Williams, *The Return of Van Jones*, POLITICO (Nov. 26, 2011), <https://www.politico.com/story/2011/11/the-return-of-van-jones-069083>.
33. See #cut50, Change.org, <https://web.archive.org/web/20210920124240/https://www.change.org/o/cut50>.
34. See FED. BUREAU OF INVESTIGATION, UNIF. CRIME REPS., 2015 CRIME IN THE UNITED STATES, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/murder> (last accessed Jan. 17, 2024).
35. See Stats. Can., *Homicide In Canada, 2015*, <https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14668-eng.htm> (last visited Jan. 17, 2024).

36. See Eurostat, *Intentional Homicide Victims in the EU* (Feb. 22, 2018), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20180222-1>. In 2015, France had 1,017 homicides, Germany 682, Poland 530, and Italy 469. On a per capita basis, Lithuania had the highest number, with 5.89 homicide victims per 100,000 inhabitants, followed by Latvia (3.37), Estonia (3.19), Bulgaria (1.79) and Cyprus (1.77). The lowest per capita numbers that year were in Austria (0.51), the Netherlands (0.62), Spain (0.65), the Czech Republic (0.75), and Italy (0.77).
37. See Statista, *Number of Homicide Cases Recorded by Police in Japan from 2013 to 2022*, <https://www.statista.com/statistics/1039166/japan-number-of-murders/> (last visited Jan. 17, 2024).
38. See Samantha Bricknell, Aust'l'n Inst. of Criminology, *Homicide in Australia 2015–2016*, AIC STAT. REP. 17, https://www.aic.gov.au/sites/default/files/2020-05/sr17_homicide_in_australia_2015-16.pdf (last visited Jan. 17, 2024).
39. See N.Z. Police, *Homicide Victims Report 2021 and Historic Murder Rate Report 1926–2021* (June 2023), <https://www.police.govt.nz/about-us/publication/homicide-victims-report-2021-and-historic-nz-murder-rate-report-1926-2021>.
40. See JEFFREY BELLIN, *MASS INCARCERATION NATION* (2022); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2021); EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2020); ANGELA J. DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (2018); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2018); JAMES KILGORE, *UNDERSTANDING MASS INCARCERATION: A PEOPLE'S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME* (2015); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2015); AND MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).
41. See e.g. Brianna Borrelli, *The Interplay of Mass Incarceration and Poverty*, 30 GEO.J. ON POVERTY L. & POL'Y 287 (2023); Nicole P. Dyszlewski, Lucinda Harrison-Cox, & Raquel Ortiz, *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U.L.REV. 471 (2016); Jonathan Simon, Adrian A. Kragan, *Ending Mass Incarceration In a Moral Imperative*, *Federal Sentencing Reporter*, Vol. 26, No. 4 (Apr. 2014); Katherine Beckett, Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANN.REV.L. & SOC.SCI. 433 (2020); Cecil J. Hunt II, *The Jim Crow Effect: Denial, Dignity, Human Rights, and Racialized Mass Incarceration*, 29 J.CIV.RTS & ECON.DEV. 15 (2016).
42. See LAUREN-BROOKE EISEN, et al., The Brennan Ctr., *How Many Americans Are Unnecessarily Incarcerated* (Dec. 9, 2016), <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>.
43. *Id.*
44. See Amn. C.L. Union, *Campaign for Smart Justice*, <https://50stateblueprint.aclu.org/> (last visited Jan. 13, 2024).
45. *Id.*
46. Large portions of this section are excerpted from the authors' book. See ZACK SMITH AND CHARLES D. STIMSON, *ROGUE PROSECUTORS: HOW RADICAL SOROS LAWYERS ARE DESTROYING AMERICA'S COMMUNITIES* (2023).
47. *Id.*
48. *Racism*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/racism> (last visited Mar. 2, 2024).
49. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 184 (rev. ed. 2012).
50. See Paul J. Larkin and Giancarlo Canaparo, *The Fallacy of Systemic Racism in the American Criminal Justice System*, 18 LIBERTY U. L. REV. 1 (2023) [hereinafter *Criminal Justice System*] at 3–4.
51. *Id.* at 72.
52. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).
53. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). *But cf.* *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).
54. See Larkin and Canaparo, *supra* note 50, at 50–55.
55. *Id.*
56. *Id.* at 65 (citing *Batson v. Kentucky*, 476 U.S. 79, 93–96 (1986) and its progeny).
57. *Id.* at 3–4.
58. *Id.* at 68.
59. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 260 (1979).
60. See Larkin and Canaparo, *Criminal Justice System*, *supra* note 50, at 112–125.
61. *Id.* at 126.
62. *Id.* at 125–128.
63. *Id.* at 140–141.
64. *Id.*
65. *Id.* at 73–76, nn. 190,192 (citing MICHAEL TONRY, *MALIGN NEGLECT: RACE CRIME AND PUNISHMENT IN AMERICA* 79 (1995) and CHARLES MURRAY, *FACING REALITY: TWO TRUTHS ABOUT RACE IN AMERICA* 51–52 (2021)).

66. *Id.* at 73–76, 177–178.
67. *Id.* at 82–83.
68. See BARRY LATZER, *THE MYTH OF OVERPUNISHMENT: A DEFENSE OF THE AMERICAN JUSTICE SYSTEM AND A PROPOSAL TO REDUCE INCARCERATION WHILE PROTECTING THE PUBLIC* (2022).
69. See Larkin and Canaparo, *Criminal Justice System*, *supra* note 50, at 150–152.
70. *Id.* at 68 n. 176 (citations omitted).
71. *Id.* at 36–37.
72. *Id.*
73. *Id.* at 36–42.
74. *Id.* at 37.
75. *Id.* at 39–41.
76. *Id.* at 138.
77. *Id.* at 72.
78. *Id.* at 79 (citing statistics compiled by the U.S. Dep’t. of Just.).
79. *Id.*
80. *Id.* at 83–84 n. 214.
81. See, e.g., GARY A. HAUGEN, VICTOR BOUTROS, AND ARTHUR MOREY, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* (2014).
82. See *Incarceration*, MERRIAM-WEBSTER NINTH NEW COLLEGIATE DICTIONARY (1991).
83. *Id.*
84. See LATZER, *supra* note 68, at 88.
85. *Id.*
86. *Id.*
87. *Id.* at 89.
88. See Bryan Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HAR. CIV. RTS.–CIV. LIBERTIES L. REV. 339, 340 (2006).
89. See PAIGE M. HARRISON AND ALLEN J. BECK, BUREAU OF JUST. STATS., U.S. DEP’T. OF JUST., PRISONERS IN 2005 2 (Nov. 2006), <https://bjs.ojp.gov/content/pub/pdf/p05.pdf>.
90. See E. ANN CARSON AND RICH KLUCKOW, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP’T. OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2021—STATISTICAL TABLES 4 (Feb. 2023).
91. See ALLEN J. BECK AND JENNIFER C. KARBERG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP’T. OF JUST., PRISON AND JAIL INMATES AT MIDYEAR 2000 6 (MAR. 2001).
92. See ZHEN ZENG AND TODD D. MINTON, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP’T. OF JUST., JAIL INMATES IN 2019 7 (Mar. 2021).
93. See ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP’T. OF JUST., JAIL INMATES IN 2022 3–4 (Dec. 2023), at 3 and Table 6.
94. *Id.* See also MINTON AND ZENG, *supra* note 92, at Table 6, at 11.
95. See ZENG, *supra* note 93 at 3.
96. See ZENG AND MINTON, *supra* note 92, at 4, 13, Appendix Table 1. See also ZHEN ZENG, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP’T. OF JUST., JAIL INMATES IN 2018 1 (MAR. 2020), at 13, Appendix Table 2.
97. See E. ANN CARSON AND RICH KLUCKOW, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP’T. OF JUST., PRISONERS IN 2022—STATISTICAL TABLES (Nov. 2023), Table 16, at 29.
98. *Id.*
99. *Id.*, at Table 17, at 30.
100. *Id.*
101. See E. ANNE CARSON AND RICH KLUCKOW, U.S. DEP’T. OF JUST., OFC. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., CORRECTIONAL POPULATION IN THE UNITED STATES, 2021—STATISTICAL TABLES (Feb. 2023), Table 1, at 4.
102. *Id.* at 11.
103. *Id.*

104. See EISEN, *supra* note 42, and Amn. C.L. Union, *supra* note 44.
105. See RACHEL E. MORGAN AND ALEXANDRA THOMPSON, BUREAU OF JUST. STATS., OFC. OF JUST. PROGRAMS, U.S. DEP'T. OF JUST., THE NATION'S TWO CRIME MEASURES, 2011–2020 1 (Feb. 2022).
106. *Id.*
107. *Id.*
108. See Erika Harrell, Rachel Morgan, Alexandra Thompson, Jennifer Truman, Susannah Tapp, and Emilie Coen, *Participation Rates (Households and Persons) for the National Crime Victimization Survey (NCVS), 1973–2022*, <https://bjs.ojp.gov/data-collection/ncvs#9-0>.
109. The term “violent crime” for purposes of the NCVS includes rape, sexual assault, robbery, aggravated assault, and simple assault.
110. See MORGAN AND THOMPSON, *supra* note 105, at 1.
111. *Id.* at 1–2.
112. See SMITH AND STIMSON, *supra* note 46, at 256–68 (discussing more fully the issue).
113. *Id.*
114. LATZER, *supra* note 68, at 107 n. 131. The fact that more people were admitted to prison than were arrested for this crime in 2019 might seem odd at first glance. But according to Latzer, “Prison admissions for rape include other sexual offenses...and [p]rison admissions in 2019 include some crimes committed and arrests made in previous years.”
115. *Id.*
116. See BUREAU OF JUST. STATS., U.S. DEP'T. OF JUST., REENTRY TRENDS IN THE U.S. (2004), <https://bjs.ojp.gov/content/pub/pdf/reentry.pdf>.
117. See LATZER, *supra* note 68, at 110.
118. *Id.*