



Heather Mac Donald

Is the Criminal-Justice System Racist?

No: the high percentage of blacks behind bars reflects crime rates, not bigotry.

Spring 2008

The race industry and its elite enablers take it as self-evident that high black incarceration rates result from discrimination. At a presidential primary debate this Martin Luther King Day, for instance, Senator Barack Obama charged that blacks and whites “are arrested at very different rates, are convicted at very different rates, [and] receive very different sentences . . . for the same crime.” Not to be outdone, Senator Hillary Clinton promptly denounced the “disgrace of a criminal-justice system that incarcerates so many more African-Americans proportionately than whites.”

If a listener didn’t know anything about crime, such charges of disparate treatment might seem plausible. After all, in 2006, blacks were 37.5 percent of all state and federal prisoners, though they’re under 13 percent of the national population. About one in 33 black men was in prison in 2006, compared with one in 205 white men and one in 79 Hispanic men. Eleven percent of all black males between the ages of 20 and 34 are in prison or jail. The dramatic rise in the prison and jail population over the last three decades—to 2.3 million people at the end of 2007 (see box)—has only amplified the racial accusations against the criminal-justice system.

The favorite culprits for high black prison rates include a biased legal system, draconian drug enforcement, and even prison itself. None of these explanations stands up to scrutiny. The black incarceration rate is overwhelmingly a function of black crime. Insisting otherwise only worsens black alienation and further defers a real solution to the black crime problem.

Racial activists usually remain assiduously silent about that problem. But in 2005, the black homicide rate was over seven times higher than that of whites and Hispanics combined, according to the federal Bureau of Justice Statistics. From 1976 to 2005, blacks committed over 52 percent of all murders in America. In 2006, the black arrest rate for most crimes was two to nearly three times blacks’ representation in the population. Blacks constituted 39.3 percent of all violent-crime arrests, including 56.3 percent of all robbery and 34.5 percent of all aggravated-assault arrests, and 29.4 percent of all property-crime arrests.

The advocates acknowledge such crime data only indirectly: by charging bias on the part of the system’s decision makers. As Obama suggested in the Martin Luther King debate, police, prosecutors, and judges treat blacks and whites differently “for the same crime.”

Let’s start with the idea that cops over-arrest blacks and ignore white criminals. In fact, the race of criminals reported by crime victims matches arrest data. As long ago as 1978, a study of robbery and aggravated assault in eight cities found parity between the race of assailants in victim identifications and in arrests—a finding replicated many times since, across a range of crimes. No one has ever come up with a plausible argument as to why crime victims would be biased in their reports.

Moving up the enforcement chain, the campaign against the criminal-justice system next claims that prosecutors overcharge and judges oversentence blacks. Obama describes this alleged postarrest treatment as “Scooter Libby justice for some and Jena justice for others.” Jena, Louisiana, of course, was where a D.A. initially lodged attempted second-degree murder charges against black students who, in December 2006, slammed a white student’s head against a concrete beam, knocking him unconscious, and then stomped and kicked him in the head while he was down. As Charlotte Allen has brilliantly chronicled in *The Weekly Standard*, a local civil rights activist crafted a narrative linking the attack to an unrelated incident months earlier, in which three white students hung two nooses from a schoolyard tree—a display that may or may not have been intended as a racial provocation. This entrepreneur then embellished the tale with other alleged instances of redneck racism—above all, the initial attempted-murder charges. An enthusiastic national press responded to the bait exactly as intended, transforming the “Jena Six” into victims rather than perpetrators. In the seven months of ensuing headlines and protests, Jena became a symbol of systemic racial unfairness in America’s court system. If blacks were disproportionately in prison, the refrain went, it was because they faced biased prosecutors—like the one in Jena—as well as biased juries and judges.

Backing up this bias claim has been the holy grail of criminology for decades—and the prize remains as elusive as ever. In 1997, criminologists Robert Sampson and Janet Lauritsen reviewed the massive literature on charging and sentencing. They concluded that “large racial differences in criminal offending,” not racism, explained why more blacks were in prison proportionately than whites and for longer terms. A 1987 analysis of Georgia felony convictions, for example, found that blacks frequently received disproportionately lenient punishment. A 1990 study of 11,000 California cases found that slight racial disparities in sentence length resulted from blacks’ prior records and other legally relevant variables. A 1994 Justice Department survey of felony cases from the country’s 75 largest urban areas discovered that blacks actually had a lower chance of prosecution following a felony than whites did and that they were less likely to be found guilty at trial. Following conviction, blacks were more likely to receive prison sentences, however—an outcome that reflected the gravity of their offenses as well as their criminal records.

Another criminologist—easily as liberal as Sampson—reached the same conclusion in 1995: “Racial differences in patterns of offending, not racial bias by police and other officials, are the principal reason that such greater proportions of blacks than whites are arrested, prosecuted, convicted and imprisoned,” Michael Tonry wrote in *Malign Neglect*. (Tonry did go on to impute malign racial motives to drug enforcement, however.) The media’s favorite criminologist, Alfred Blumstein, found in 1993 that blacks were significantly underrepresented in prison for homicide compared with their presence in arrest.

This consensus hasn’t made the slightest dent in the ongoing search for systemic racism. An entire industry in the law schools now dedicates itself to flushing out prosecutorial and judicial bias, using ever more complicated statistical artillery. The net result? A few new studies show tiny, unexplained racial disparities in sentencing, while other analyses continue to find none. Any differences that do show up are trivially small compared with the exponentially greater rates of criminal offending among blacks. No criminologist would claim, moreover, to have controlled for every legal factor that affects criminal-justice outcomes, says Patrick Langan, former senior statistician for the Bureau of Justice Statistics. Prosecutors and judges observe the heinousness of a defendant’s conduct, for example, but a number-crunching researcher has no easy way to discover and quantify that variable.

Some criminologists replace statistics with High Theory in their search for racism. The criminal-justice

system does treat individual suspects and criminals equally, they concede. But the problem is how society *defines* crime and criminals. Crime is a social construction designed to marginalize minorities, these theorists argue. A liberal use of scare quotes is virtually mandatory in such discussions, to signal one's distance from primitive notions like "law-abiding" and "dangerous." Arguably, vice crimes are partly definitional (though even there, the law enforcement system focuses on them to the extent that they harm communities). But the social constructivists are talking about all crime, and it's hard to see how one could "socially reconstruct" assault or robbery so as to convince victims that they haven't been injured.

Unfair drug policies are an equally popular explanation for black incarceration rates. Legions of pundits, activists, and academics charge that the war on drugs is a war on minorities—a de facto war at best, an intentional one at worst.

Playing a starring role in this conceit are federal crack penalties, the source of the greatest amount of misinformation in the race and incarceration debate. Crack is a smokeable and highly addictive cocaine concentrate, created by cooking powder cocaine until it hardens into pellets called "rocks." Crack produces a faster—and more potent—high than powder cocaine, and it's easier to use, since smoking avoids the unpleasantness of needles and is more efficient than snorting. Under the 1986 federal Anti-Drug Abuse Act, getting caught with five grams of crack carries a mandatory minimum five-year sentence in federal court; to trigger the same five-year minimum, powder-cocaine traffickers would have to get caught with 500 grams. On average, federal crack sentences are three to six times longer than powder sentences for equivalent amounts.

The media love to target the federal crack penalties because crack defendants are likely to be black. In 2006, 81 percent of federal crack defendants were black, while only 27 percent of federal powder-cocaine defendants were. Since federal crack rules are more severe than those for powder, and crack offenders are disproportionately black, those rules must explain why so many blacks are in prison, the conventional wisdom holds.

But consider the actual number of crack sellers sentenced in federal court each year. In 2006, 5,619 were tried federally, 4,495 of them black. From 1996 to 2000, the federal courts sentenced more powder traffickers (23,743) than crack traffickers (23,121). It's going to take a lot more than 5,000 or so crack defendants a year to account for the 562,000 black prisoners in state and federal facilities at the end of 2006—or the 858,000 black prisoners in custody overall, if one includes the population of county and city jails. Nor do crack/powder disparities at the state level explain black incarceration rates: only 13 states distinguish between crack and powder sentences, and they employ much smaller sentence differentials.

The press almost never mentions the federal methamphetamine-trafficking penalties, which are identical to those for crack: five grams of meth net you a mandatory minimum five-year sentence. In 2006, the 5,391 sentenced federal meth defendants (nearly as many as the crack defendants) were 54 percent white, 39 percent Hispanic, and 2 percent black. But no one calls the federal meth laws anti-Hispanic or anti-white.

Nevertheless, the federal crack penalties dominate discussions on race and incarceration because they seem to provide a concrete example of egregious racial disparity. This leads to a commonly expressed

sylllogism: crack penalties have a disparate impact on blacks; disparate impact is racist; therefore, crack penalties are racist. This syllogism has been particularly prominent recently, thanks to the U.S. Sentencing Commission's 2007 decision to lighten federal crack penalties retroactively in the name of racial equity.

The press has covered this development voraciously, serving up a massive dose of crack revisionism aimed at proving the racist origins of the war on crack. Crack was never a big deal, the revisionist story line goes. But when Boston Celtics draft pick Len Bias died of a crack overdose in 1986, the media went into overdrive covering the crack phenomenon. "Images—or perhaps anecdotes—about the evils of crack, and the street crime it was presumed to stoke" circulated, as the *New York Times* archly put it in a December 2007 article. A "moral panic" (Michael Tonry's term) ensued about an imaginary threat from a powerless minority group. Whites feared that addicted blacks would invade their neighborhoods. Sensational stories about "crack babies" surfaced. All this hysteria resulted in the unnecessary federal crack penalties.

Since the 1980s, the revisionist narrative continues, experts have determined that powder and crack show more pharmacological "similarities than differences," in the *Times's* words, and that crack is no more damaging to fetuses than alcohol. The belief that crack was an inner-city scourge was thus a racist illusion, and the sentencing structure to quell it a racist assault. Or, as U.S. District Judge Clyde Cahill put it, in what one hopes is not a representative sample of the federal judicial temperament: "Legislators' unconscious racial aversion towards blacks, sparked by unsubstantiated reports of the effects of crack, reactionary media prodding, and an agitated constituency, motivated the legislators . . . to produce a dual system of punishment."

Leave aside the irony of the press's now declaring smugly that the press exaggerated the ravages of crack. (The same *New York Times* that now sneers at "images—or perhaps anecdotes—about the evils of crack" ran searing photos of crack addicts in 1993 that included a woman kneeling before a crack dealer, unzipping his fly, a baby clinging to her back; such degraded prostitutes, known as "strawberries," were pervasive casualties of the epidemic.) The biggest problem with the revisionist narrative is its unreality. The assertion that concern about crack resulted from "unconscious racial aversion towards blacks" ignores a key fact: black leaders were the first to sound the alarm about the drug, as Harvard law professor Randall Kennedy documents in *Race, Crime, and the Law*. Harlem congressman Charles Rangel initiated the federal response to the epidemic, warning the House of Representatives in March 1986 that crack had made cocaine "frightening[ly]" accessible to youth. A few months later, Brooklyn congressman Major Owens explicitly rejected what is now received wisdom about media hype. "None of the press accounts really have exaggerated what is actually going on," Owens said; the crack epidemic was "as bad as any articles have stated." Queens congressman Alton Waldon then 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." The bill that eventually passed, containing the crack/powder distinction, won majority support among black congressmen, none of whom, as Kennedy points out, objected to it as racist.

These politicians were reacting to a devastating outbreak of inner-city violence and addiction unleashed by the new form of cocaine. Because crack came in small, easily digestible amounts, it democratized what had been a rarefied drug, making an intense high available to people with very little money. The crack market differed radically from the discreet phone transactions and private deliveries that characterized powder-cocaine distribution: volatile young dealers sold crack on street corners, using guns to establish

their turf. Crack, homicides, and assaults went hand in hand; certain areas of New York became “like a war zone,” retired DEA special agent Robert Stutman told PBS’s *Frontline* in 2000. The large national spike in violence in the mid-1980s was largely due to the crack trade, and its victims were overwhelmingly black inner-city residents.

Though the elites are furiously rewriting crack history, many people who lived through it are not. In April 2007, Los Angeles prosecutor Robert Grace won the conviction of a crack dealer who had raped and strangled to death ten strawberries between 1987 and 1998. The “crack epidemic was one of the worst things that happened to the black and brown community,” Grace asserts. Matthew Kennedy managed an infamous public housing project in Watts during the crack epidemic. “Some of us remember how bad it was,” he says. When children avoid school for fear of getting shot by drug gangs, “you’ve just lost that generation.” Lawrence Tolliver has witnessed his share of shootings outside his South Central barbershop. “Sometimes it was so bad you had to scout the horizon like a gazelle at a watering hole in Africa,” he recalls.

It takes shameless sleight of hand to turn an effort to protect blacks into a conspiracy against them. If Congress had ignored black legislators’ calls to increase cocaine-trafficking penalties, the outcry among the groups now crying racism would have been deafening. Yes, a legislative bidding war drove federal crack penalties ultimately to an arbitrary and excessive point; the reduction of those penalties is appropriate. But what led to the crack-sentencing scheme wasn’t racism but legal logic. Prosecutors rely on heavy statutory penalties to induce defendants to spill the beans on their criminal colleagues. “An amazing public spirit is engendered when you tell someone he is facing 150 years to life but has the possibility of getting out after eight if he tells you who committed a string of homicides,” says Walter Arsenault, who headed the Manhattan district attorney’s homicide-investigation unit in the 1980s and 1990s.

Race activists endlessly promote the claim that the draconian federal crack laws are sweeping up mere sad sacks with a little extra crack to spare. But anyone who fits that description is exempt from the federal sentencing scheme. Traffickers with only a modest criminal history who didn’t injure others or have a gun when arrested can escape the mandatory federal sentences if they don’t lie to the government about their offense (there is no requirement to rat out others). In 2006, only 15.4 percent of crack-cocaine defendants qualified for this safety-valve provision, compared with 48.4 percent of powder-cocaine offenders; in 2000, even fewer crack defendants qualified—12.6 percent. Crack sellers seldom merit the escape clause because their criminal histories tend to be much more severe than powder sellers’ and because they’re more likely to have or use weapons. The congressional distinction between crack and powder sellers, it turns out, had a firm grounding.

Equally misleading is the criticism that few crack “kingpins” can be found in federal prison. This is not surprising, because “kingpins” in the traditional sense—heads of major drug-importing rings—don’t exist in the crack world. Crack is not imported but cooked up locally. Its supply and distribution scheme is more horizontal than vertical, unlike that of powder cocaine and heroin. Federal crack enforcement wasn’t about stopping the flow of illegal drugs into the country; it was about stopping urban violence. And that violence was coming from street dealers.

Critics follow up their charges about crack with several empirical claims about drugs and imprisonment. None is true. The first is that drug enforcement has been the most important cause of the overall rising

incarceration rate since the 1980s. Yet even during the most rapid period of population growth in prisons—from 1980 to 1990—36 percent of the growth in state prisons (where 88 percent of the nation’s prisoners are housed) came from violent crimes, compared with 33 percent from drug crimes. Since then, drug offenders have played an even smaller role in state prison expansion. From 1990 to 2000, violent offenders accounted for 53 percent of the census increase—and all of the increase from 1999 to 2004.

Next, critics blame drug enforcement for rising racial disparities in prison. Again, the facts say otherwise. In 2006, blacks were 37.5 percent of the 1,274,600 state prisoners. If you remove drug prisoners from that population, the percentage of black prisoners drops to 37 percent—half of a percentage point, hardly a significant difference. (No criminologist, to the best of my knowledge, has ever performed this exercise.)

The rise of drug cases in the criminal-justice system has been dramatic, it’s important to acknowledge. In 1979, drug offenders were 6.4 percent of the state prison population; in 2004, they were 20 percent. Even so, violent and property offenders continue to dominate the ranks: in 2004, 52 percent of state prisoners were serving time for violence and 21 percent for property crimes, for a combined total over three and a half times that of state drug offenders. In federal prisons, drug offenders went from 25 percent of all federal inmates in 1980 to 47.6 percent of all federal inmates in 2006. Drug-war opponents focus almost exclusively on federal, as opposed to state, prisons because the proportion of drug offenders is highest there. But the federal system held just 12.3 percent of the nation’s prisoners in 2006.

So much for the claim that blacks are disproportionately imprisoned because of the war on drugs. But a final, even more audacious, argument maintains that incarceration itself, not criminals, causes crime in black neighborhoods. Because blacks have the highest prison rate, this argument holds, incarceration constitutes an unjust and disproportionate burden on them. This idea has gained wide currency in the academic world and in anti-incarceration think tanks. Columbia University law professor Jeffrey Fagan offered a representative version of the theory in a 2003 law review article coauthored with two public health researchers. Sending black males to prison “weakens the general social control of children and especially adolescents,” Fagan writes. Incarceration increases the number of single-parent households. With adult males missing from their neighborhoods, boys will be more likely to get involved in crime, since they lack proper supervision. The net result: “Incarceration begets more incarceration [in] a vicious cycle.”

A few questions present themselves. How many convicts were living in a stable relationship with the mother (or one of the mothers) of their children before being sent upstate? (Forget even asking about their marriage rate.) What kind of positive guidance do men who are committing enough crimes to end up in prison, rather than on probation (an exceedingly high threshold), provide to young people? Further, if Fagan is right that keeping criminals out of prison and on the streets preserves a community’s social capital, inner cities should have thrived during the 1960s and early 1970s, when prison resources contracted sharply. In fact, New York’s poorest neighborhoods—the subject of Fagan’s analysis—turned around only in the 1990s, when the prison population reached its zenith.

Fagan, like many other criminologists, conflates the effects of prison and crime. Neighborhoods with high incarceration rates suffer disproportionate burdens, he claims. Firms are reluctant to locate in such areas, decreasing job opportunities. Police pay closer attention to these high-incarceration zones, increasing the chance that any given criminal within them will wind up arrested. Thus, incarceration

“provides a steady supply of offenders for more incarceration.” But if business owners think twice about certain communities, it’s because they fear crime, not a high concentration of ex-convicts per se. It’s unlikely that prospective employers even know the population of ex-cons in a neighborhood; what they are aware of is its crime rates. And an employer who hesitates to hire an ex-con is almost certainly reacting to his criminal record, even if he has been given community probation instead of prison. Likewise, if the police give extra scrutiny to neighborhoods with many ex-convicts, it’s because those convicts commit a lot of crime. Finally, putting more criminals on probation, rather than sending them to prison—as Fagan and others advocate—would only increase law enforcement surveillance of high-crime neighborhoods.

This popular “social ecological” analysis of incarceration, as Fagan and other criminologists call it, treats prison like an outbreak of infectious disease that takes over certain communities, felling people on a seemingly random basis. “As the risks of going to jail or prison grow over time for persons living in those areas, their prospects for marriage or earning a living and family-sustaining wage diminish as the incarceration rates around them rise,” Fagan says. This analysis elides the role of individual will. Fagan and others assume that once one lives in a high-incarceration—that is, high-crime—area, one can do little to avoid prison. But even in the most frayed urban communities, plenty of people choose to avoid the “Life.” Far from facing diminished marriage prospects, an upstanding, reliable young man in the inner city would be regarded as a valuable catch.

No one doubts that having a criminal record—whether it results in community probation or prison—is a serious handicap. People convicted of crimes compete for jobs at a clear disadvantage with those who have stayed crime-free. But for all the popularity of the view that the system is to blame, it’s not hard to find dissenters who believe that individuals are responsible for the decision to break the law. “My position is not hard,” says public housing manager Matthew Kennedy. “You don’t have to do that crime.” Kennedy supported President Bill Clinton’s controversial 1996 “one-strike” rule for public housing, which allowed housing authorities to evict drug dealers and other lawbreaking tenants on their first offense. “I’m trying to protect the good people in my community,” Kennedy explains. “A criminal record is preventable. It’s all on you.” Kennedy has no truck with the argument that it is unfair to send ex-offenders back to prison for violations of their parole conditions, such as staying away from their gang associates and hangouts. “Where do they take responsibility for their own actions?” he wonders. “You’ve been told, ‘Don’t come back to this community.’ Why would you come back here? You’ve got to change your ways, change the habits that got you in there in the first place.”

Though you’d never know it from reading the academic literature, some people in minority communities even see prison as potentially positive for individuals as well as for communities. “I don’t buy the idea that there’s no sense to prison,” says Clyde Fulford, a 54-year-old lifelong resident of the William Mead Homes, a downtown Los Angeles housing project. Having raised his children to be hardworking, law-abiding citizens, Fulford is a real role model for his neighborhood, not the specious drug-dealing kind posited by the “social ecological” theory of incarceration. “I know a lot of people who went to prison,” Fulford says. “A lot changed they life for the better. Prison was they wake-up call.” Is prison unavoidable and thus unfair? “They knew they was going to pay. It’s up to that person.” What if the prisoners hadn’t been locked up? “Many would be six feet under.”

Robert Grace, the Los Angeles prosecutor, is acutely aware of the fragility and preciousness of the rule of law. “As a civilized society, we can’t allow what’s happening in Latin America to take over here,” he

says. “Venezuela and Mexico are awash in appalling violence because they don’t respect the law.” Thus, when prominent figures like Barack Obama make sweeping claims about racial unfairness in the criminal-justice system, they play with fire. “For any political candidate to make such claims out of expediency is wrong,” Grace says. “If they have statistics that back up the claim, I’d like to see them. But to create phony perceptions of injustice is as wrong as not doing anything about the real thing.”

The evidence is clear: black prison rates result from crime, not racism. America’s comparatively high rates of incarceration are nothing to celebrate, of course, but the alternative is far worse. The dramatic drop in crime in the 1990s, to which stricter sentencing policies unquestionably contributed, has freed thousands of law-abiding inner-city residents from the bondage of fear. Commerce and street life have revived in those urban neighborhoods where crime has fallen most.

The pressure to divert even more offenders from prison, however, will undoubtedly grow. If a probation system can finally be crafted that provides as much public safety as prison, we should welcome it. But the continuing search for the chimera of criminal-justice bigotry is a useless distraction that diverts energy and attention from the crucial imperative of helping more inner-city boys stay in school—and out of trouble.

Punishment and Crime

Those who tar the criminal-justice system as racist often make a broader claim: incarceration doesn’t even lower crime, making the nation’s skyrocketing prison rolls a particularly senseless injustice.

Incarceration foes are right about one thing: the U.S. prison population has swollen dramatically over the last three decades. The per-capita rate of imprisonment increased three times from 1973 to 2000; the number of state and federal prisoners grew fivefold between 1977 and 2007, from 300,000 to 1.59 million. When inmates in jails are included, the total number in correctional facilities at the end of 2007 was 2.3 million, according to the Pew Center on the States. One in 100 adults is in custody.

This expansion represents a resounding rejection of the reigning crime philosophy of the 1960s. The 1967 report of the President’s Commission on Law Enforcement and Administration of Justice, a classic Great Society document, argued that society could reduce crime only by eliminating poverty and racism, ideally through government-funded social programs. Consistent with this theory, prison capacity began dropping during the sixties and only stopped falling during the late 1970s, when crime reached intolerable levels. Thereafter, the states started adding prison beds and passing laws to keep offenders locked up longer and to reduce judicial discretion to issue very lenient sentences.

Few subjects have proved more contested in criminology than whether this prison buildup lowered crime—and, if so, by how much. Anyone entering the thickets of incarceration studies should abandon all commonsense assumptions, such as that locking away, say, a burglar, would reduce burglary rates. Not so, say the criminologists, and at first glance, the crime data from the late-twentieth-century prison expansion seem to support them. Only after 1991 was the rise in incarceration consistently accompanied by decreasing crime rates; in the 1980s, crime went up and down, even as the prison population steadily grew. And now that crime is falling, the criminology world finds itself even more puzzled by why the prison population keeps increasing.

Two of the most common theories as to why prison doesn’t lower crime are logically weak and

empirically ungrounded. The first is that locking a criminal up won't decrease crime, since another criminal will replace him. Yet while crimes meeting an illicit consumer demand may operate within a supply-and-demand framework, opportunities for violence and property crimes hit no natural ceiling. There are plenty of potential victims of violence and theft to go around; a potential robber need not wait for a competitor to go to jail before he can begin his own crime spree.

The second theory to explain why prison doesn't work applies the law of diminishing returns to incarceration. As we lock up ever more people, we start scraping the bottom of the criminal barrel, the critics say. The prisoners we incarcerate become more innocuous than those picked up initially, so we get a diminishing bang for the buck for every new prisoner sent away.

However impeccable the economic reasoning behind this claim, there is no empirical evidence for it. The diminishing-returns argument assumes that the universe of unapprehended and unincarcerated criminals is shrinking. It is not. The chances of getting caught and sent to prison remain extraordinarily low. The JFA Institute, an anti-incarceration advocacy group, estimated in 2007 that in only 3 percent of violent victimizations and property crimes does the offender end up in prison. In 2004, only 1.6 percent of burglars were in prison, according to the Bureau of Justice Statistics. The people in prison today, says statistician Patrick Langan, are "not very different from prisoners in the past, in terms of their prior records."

In the overwhelming majority of cases, whatever the race of the convicted, prison remains what it has always been: a lifetime achievement award for persistence in criminal offending. Absent recidivism or a violent crime, the criminal-justice system will do everything it can to keep you out of the state or federal slammer. It can be disconcerting for the average law-abiding citizen to hear a prosecutor's typology of the crime universe: most thefts, for example, are considered "nonserious crimes" that do not merit prison sentences, unless they concern a huge amount of money or took place in the victim's presence. Steal an unoccupied car or burgle an unoccupied home and you'll probably get probation; hijack a car from a driver or stick up a pedestrian, however, and you'll probably go to prison.

Columbia University law professor Dan Richman had a chance to test the "harmless offenders in prison" claim as chair of New York City's Local Conditional Release Commission. Richman studied the criminal profile of Rikers jail inmates in late 2004. Jails are supposed to be where the most "innocuous" lawbreakers end up—those with misdemeanor convictions or sentences of less than a year. "It struck me how serious the offenders were," he says. "I'd come from the academy, where there's persuasive writing about over-incarceration. I had assumed there would be mostly first-time offenders in jail, but it wasn't true." About 40 percent of the inmates had prior felony convictions, Richman discovered, and the inmates' most recent offenses, which had put them in jail this time around, were usually serious. People in for assault would have pleaded down from attempted manslaughter; possession pleaded down from distribution. "These weren't people who were there by accident," says Richman.

One can also test the theory that locking away offenders doesn't lower crime by seeing what prisoners do when they get out. The Bureau of Justice Statistics studied the postprison careers of over 272,000 state prisoners released in 1994. Within three years, 67.5 percent of the group had been rearrested for 744,000 new felonies and serious misdemeanors. How many additional crimes they committed during those three years before getting arrested is unknown; estimates of the number of crimes that a typical unapprehended criminal commits per year range from zero to several hundred. And the ex-

cons' post-release crime spree seems not to have resulted from the negative effects of prison itself, since convicts who spent the longest time behind bars had significantly lower rearrest rates than others.

Not all criminologists and law professors dispute that prison lowers crime. University of Chicago economist Steve Levitt hypothesized in 1996 that had incarceration rates not risen sharply from 1971 to 1993, violent crime would have been 70 percent higher and property crime almost 50 percent higher. More typical estimates attribute 10 to 25 percent of the 1990s crime drop to incarceration. And Berkeley law professor Franklin Zimring rejected the diminishing-returns argument against incarceration in his 2007 book *The Great American Crime Decline*. The fact that crime started dropping consistently only at the end of the decades-long prison buildup makes perfect sense, he argued, since that's when the greatest number of criminals were off the streets.

Heather Mac Donald is a contributing editor of City Journal and the John M. Olin Fellow at the Manhattan Institute. Her latest book, coauthored with Victor Davis Hanson and Steven Malanga, is [The Immigration Solution](#).