

# J PRISON SERVICE JOURNAL

September 2016 No 227



# Mass incarceration: the juggernaut of American penal expansionism

*Dr Michael Teague is Senior Lecturer in Criminology at the University of Derby.*

## Introduction

**A plethora of evidence confirms that America leads the world in imprisonment.<sup>1</sup> No serious commentator doubts mass incarceration has become a major issue for the nation. Though the United States accounts for just one in twenty of the global population, its penal industrial complex incarcerates close to a quarter of all the prisoners in the world. It is a criminological truism that the USA has the largest number of people behind bars of any nation on the planet,<sup>2</sup> with the number of inmates surpassing even the more populous nations of China and India.<sup>3</sup> With almost one in every hundred adults behind bars, the American rate of incarceration remains stubbornly locked at a substantially higher level than those of comparable Western European and other parliamentary democracies. Proportionally speaking, the USA currently imprisons seven times as many of its citizens as France, over nine times as many as Germany, and almost five times as many as England and Wales.<sup>4</sup>**

Until recently, the USA also held the dubious accolade of the world's highest per capita rate of imprisonment. It is now second only to the Seychelles, a tiny archipelago in the Indian Ocean, in per capita imprisonment. To put this in perspective, the Seychelles locks up a total of just 735 prisoners; a far cry from the 2,306,100 inmates currently incarcerated in the USA.<sup>5</sup> In 2015, President Barack Obama cited an astonishing comparative statistic: the USA imprisons as many people as the 35 leading European nations combined.<sup>6</sup> The US predilection for imprisonment was so entrenched that not even the combined incarcerated

populations of 35 countries at a comparable level of social and economic development could surpass the American prison population. Writing about the nature of American punitiveness, two academics unequivocally concluded that 'nowhere else in the democratic world, and at no other time in Western history, has there been the kind of relentless punitive spirit as has been ascendant in the United States for more than a generation'.<sup>7</sup> On February 26, 2016, the Ministry of Justice confirmed that there were a total of 85,753 people in prison in England and Wales.<sup>8</sup> If we incarcerated people at the same proportional rate as the USA, we would, by my calculation, have had a staggering total of 407,181 people behind bars in England and Wales on that very same day.

## Mass incarceration: the history

Until the start of the 1970s, imprisonment had been widely perceived in America as a punishment of last resort. President Johnson told Congress in 1965 that nation would not endure 'an endless, self-defeating cycle of imprisonment, release and re-imprisonment which fails to alter undesirable attitudes and behaviour'.<sup>9</sup> This underpinned the conviction, prevalent in 1960s America, that rehabilitative intervention, rather than incarceration, should be prioritised if criminality's root causes were to be successfully addressed. As trust in rehabilitation began to fade in 1970s America,<sup>10</sup> the dash to carceral growth began.

The unrelenting growth of imprisonment was not primarily driven by escalating crime rates (or other wider social forces outwith governmental control).<sup>11</sup> Crime rates in the USA have not risen significantly higher than in other

1. See, for example, Travis, J., B. Western, et al., Eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington DC, The National Academies Press. or Pratt, T. C. (2009). *Addicted to Incarceration: Corrections Policy and the Politics of Misinformation in the United States*. London, Sage.
2. This is the case when prisoners are counted in absolute terms.
3. International Centre for Prison Studies (2016). *World Prison Brief: Northern America*. Retrieved on Feb 1, 2016, from <http://www.prisonstudies.org/map/northern-america>.
4. International Centre for Prison Studies (2015). 'World Prison Brief.' Retrieved on 18 August 2015, from <http://www.prisonstudies.org/world-prison-brief>. Calculated from statistics from the named countries.
5. The Seychelles imprisons 799 citizens per 100,000 people in the general population, while the USA imprisons 698 people per 100,000. The US total includes those in both prisons and jails. International Centre for Prison Studies 'World Prison Brief' (2015), *Highest to Lowest - Prison Population Rate* London: Institute for Criminal Policy Research Retrieved on 12 Dec 2015.
6. Obama, B. (2015). 'Remarks by the President at the NAACP Conference.' Retrieved on 16 Dec 2015, from <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.
7. Clear, T. and N. Frost (2014). *The punishment imperative*. New York, New York University Press. p.1.
8. Ministry of Justice and NOMS (2016). *Population and Capacity Briefing for Friday 26th February 2016*. London, MoJ.
9. Johnson, L. B. (1965). '102 — Special Message to the Congress on Law Enforcement and the Administration of Justice, March 8, 1965.' Retrieved 12/12/2015, from <http://www.presidency.ucsb.edu/ws/?pid=26800>.
10. Garland, D. (2002). *The Culture of Control : Crime and Social Order in Contemporary Society*. Chicago, University Of Chicago.
11. Ruiz, R. (2010). Eyes on the Prize. *American Prospect*. Washington, Justice Policy Institute. p.3.

developed Western countries over the last four decades. Rather, the fast-growing penal population and the escalating length of sentences were boosted by a combination of populist politics, mandatory sentences, 'three strikes' policies, the privatization of imprisonment, and sentencing behaviour.<sup>12</sup> Both individual US states and the federal government engaged in policy initiatives which, whatever the justifications publicly advanced to support them, effectively guaranteed the relentless growth of the US population behind bars.

Though the prison population had risen by 105 percent<sup>13</sup> over the half-century prior to 1973, this growth in prisoners had simply reflected the increase in the size of the American population.<sup>14</sup> Between 1972 and 2010, the number of inmates in the US state prison system increased by no less than 708 percent.<sup>15</sup> During the same period, the combined state and federal prison populations increased from a base point of approximately 200,000 inmates to over 1.5 million. The American sociologist Wacquant concisely characterised the years of burgeoning incarceration as 'the great penal leap backwards'.<sup>16</sup> By 2008, the progress of the mass incarceration project led another academic observer to caustically observe that the USA has been fixated on a 'frenzied and brutal lockup binge' since 1981.<sup>17</sup>

After this unremitting growth, the number of people behind bars in the USA began to plateau in 2010. Attitudes on the ground were gradually beginning to soften. Some of those charged with the administration of a prison system that was bloated, prohibitively expensive, and heavily skewed in favour of punitiveness were expressing doubt about its utility. In 2010, for example, the Missouri Chief Justice William Ray Price informed the legislature of the futility of the state's pursuit of a policy of mass incarceration for nonviolent offenders:

*We are following a broken strategy of cramming inmates into prisons and not providing the type of drug treatment and job training that is necessary to break their cycle of crime. Any normal business would have abandoned this failed practice years ago...<sup>18</sup>*

## Mass incarceration: the political context

This unrelenting exponential growth in incarceration was an extraordinary occurrence for a developed democratic country. The prestigious *Committee on Causes and Consequences of High Rates of Incarceration*, having carefully weighed the evidence, concluded in 2014 that the growth of mass imprisonment in the USA was both 'historically unprecedented and internationally unique'.<sup>19</sup>

President Barack Obama's election in 2008 as the 44th president of the USA engendered initial optimism amongst reformers campaigning for a radical transformation of the nation's hard-pressed penal system.<sup>20</sup> This was the case even though Obama's otherwise comprehensive pre-election policy document 'Blueprint for Change' had contrived to omit detailed discussion of penal issues.<sup>21</sup> While his predecessor George W. Bush's retributive initiatives may be interpreted as the epitome of the traditional rightist 'tough on crime' approach favoured by Republicans, this is hardly a party political issue in the USA. The Democratic party, no less than their Republican counterparts, have a lengthy history of endorsing the US carceral state's remorseless enlargement. The doubling of the US prison population — and the biggest leap in incarceration during any presidency in history — occurred not under a Republican president, but during Bill Clinton's eight-year presidency.<sup>22</sup>

Clinton later acknowledged that he bore responsibility for legislation to increase prison sentences, when he told the *National Association for the Advancement of Colored People's* annual conference: 'I signed a bill that made the problem worse. And I want to admit it.'<sup>23</sup> Clinton was referring to the Violent Crime Control and Law Enforcement Act of 1994 (commonly known as the 'Crime Bill'), an act of Congress which incentivised states by offering them a total of \$12.5 billion dollars (roughly equivalent to £13 million today) to increase imprisonment.<sup>24</sup> Grants were provided to construct or expand penal institutions through the Violent Offender Incarceration and Truth-in-Sentencing Incentive Formula Grant Program. Almost half of the money on offer was designated for those states which passed 'truth-in-sentencing' laws, which required convicted offenders to serve at least 85 percent of the sentence length imposed by

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12. Garland, D. (2001). 'Introduction : The Meaning of Mass Imprisonment.' *Punishment & Society* 3(1): 5-7. Pew Center on the States (2009). *1 in 31: The Long Reach of American Corrections*. Washington, Pew Charitable Trusts.
13. Between 1925 (when authoritative national prison statistics began to be compiled) and 1972, the number of state prisoners increased from 85,239 to 174,379. Pew Center on the States (2010): 'Prison Count 2010', Washington: PCOTS
14. This total fell slightly in subsequent years.
15. Tonry, M. (2009). 'Explanations of American punishment policies.' *Punishment & Society* 11(3): 377-394.
16. Wacquant, L. (2005). *The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton*. In *The New Punitiveness*. J. Pratt, D. Brown, M. Brown, S. Hallsworth and W. Morrison. Cullompton, Willan: 3-26.
17. Parenti, C. (2008). *Lockdown America: Police and Prisons in the Age of Crisis*. London, Verso. P.163.
18. Kirchhoff, S. M. (2010 ). *Economic Impacts of Prison Growth*. Washington, Congressional Research Service. p.38.
19. Travis, J., B. Western, et al., Eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington DC, The National Academies Press.
20. Teague, M. (2009). 'Barack Obama: changing American criminal justice?' *Criminal Justice Matters* 78(1): 4-5.
21. Obama, B. and J. Biden (2008). *Blueprint for change: Obama and Biden's Plan for America*. Chicago, Obama'08.
22. From 1993-2001. See Teague, M. (2008). 'America: The Great Prison Nation.' *Prison Service Journal* (176): 9-14.
23. Baker, P. (2015). Bill Clinton Disavows His Crime Law as Jailing Too Many for Too Long. July 16. *New York Times*. New York. p.A16.
24. Eisen, L.-B. and I. Chettiar (2015). *The Reverse Mass Incarceration Act*. New York, Brennan Center for Justice.

the courts.<sup>25</sup> This amount went to fund or offset the cost of increased imprisonment rates, and some 20 US states took advantage of these opportunities to increase their incarcerated populations. These incentives contributed to a boom in prison construction. The combined total of state and federal penal institutions increased from 1,277 in 1990 to 1,821 in 2015.<sup>26</sup> Life imprisonment became mandatory for a third violent felony ('three strikes and you're out'). Mandatory sentencing, in essence, prevented judges from exercising judgment in the sentencing process.

Clinton's justification for the 1994 legislation was variously 'a roaring decade of rising crime', 'gang warfare' and 'little children being shot dead on the streets'.<sup>27</sup> The former president argued that the increased rate of imprisonment was, to some extent, justified, as it had led to a reduction in recorded crime. Even so, he acknowledged the 'bad news' that 'we had a lot of people who were locked up, who were minor actors, for way too long'.<sup>28</sup> Clinton frankly admitted that:

*Our prisons and our jails are now our mental health institutions. And we wound up ... putting so many people in prison that there wasn't enough money left to educate them, train them for new jobs and increase the chances when they came out so they could live productive lives.*<sup>29</sup>

However, the former president's candid confession about that damage wrought by mass incarceration was not made until 2015, some two decades after he implemented the policies in question.

In July 2015, President Obama visited the El Reno Federal Correctional Institution in Oklahoma. While his aim was to participate in a documentary film about the justice system, his visit was historically significant; it was the first time that a sitting US president had ever visited a federal prison.<sup>30</sup> During his visit, he met six prisoners, all convicted for drug-related offending. Obama chose this occasion to make the following observation:

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sentencing, in  
essence, prevented  
judges from  
exercising judgment  
in the sentencing  
process.

*Over the last 20 years, we've seen a shift in incarceration rates that is really unprecedented. We've seen a doubling of the prison population. A large percentage of that is for nonviolent drug offences... The war on drugs, the crack epidemic, it became, I think, a bipartisan cause to get tough on crime. Incarceration became an easy, simple recipe in the minds of a lot of folks.*<sup>31</sup>

This statement, made towards the end of his second and final term as President, offered a clear recognition of the scale of the problem. However, there is a world of difference between presidential aspirations — a penal reforming 'wish list' — and the pragmatic political realities of what can be achieved. As President, he was able to commute the sentences of 46 drug offenders, on the basis that they had already served sentences disproportionate to their offending.<sup>32</sup> Root and branch reform of the entire penal system presents a much greater challenge.

### The Jail System

The US penal system is not a homogenous or unified entity.<sup>33</sup> Much of the background material on the American prison system available in Europe conflates the

prison and jail systems. There are, in fact, three distinct categories of adult penal institutions in the USA:

- The Jail System
- The State Prison System
- The Federal Prison System

The jails system consists of locally run county or municipal confinement facilities, which are usually administered by the local sheriff or corrections department. Jails hold short-term prisoners and also those arrested and charged with a criminal offence, but not yet convicted. With around 12 million admissions to jail in the USA in a typical year, it is no surprise that the jail system has been labelled the 'front door' to mass incarceration.<sup>34</sup> They are the 'main feeders of people sentenced to a term of custody in state or

25. Ditton, P. M. and D. J. Wilson (1999). *Special Report: Truth in Sentencing in State Prisons*. Washington, DC, Bureau of Justice Statistics.

26. Eisen, L.-B. and I. Chettiar (2015). *The Reverse Mass Incarceration Act*. New York, Brennan Center for Justice.

27. See note 24.

28. Ibid.

29. Ibid.

30. Baker, P. (2015). President Visits Federal Prison. July 17. *New York Times*. New York. p.A1.

31. LoBianco, T. (2015, July 17). 'President Barack Obama makes historic trip to prison, pushes reform.' Retrieved on Aug 18, 2015, from <http://edition.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit/>.

32. Horwitz, S. and J. Eilperin (2015). 'Obama commutes sentences of 46 nonviolent drug offenders.' Retrieved on Jan 4, 2016, from [https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drug-offenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09\\_story.html](https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drug-offenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09_story.html).

33. Teague, M. (2012). Neoliberalism, Prisons and Probation in the USA and England and Wales. *Organising Neoliberalism: Markets, Privatisation and Justice*. P. Whitehead and P. Crawshaw. London, Anthem: 44-80.

34. Subramanian, R., R. Delaney, et al. (2015). *Incarceration's Front Door: The Misuse of Jail in America*. New York, Vera Institute of Justice. p.1.

federal prisons'.<sup>35</sup> Although on a typical day state and federal prisons hold about twice the number of people as jails, jails nevertheless have nearly nineteen times the number of annual admissions as prisons. There are around 3,000 jails in the USA. The 159 largest jails hold over 1,000 inmates each, though the majority of jails have a much smaller capacity.<sup>36</sup>

Since the great expansion of incarceration in the early 1970s, the jail population has increased at roughly the same pace as the inmate population in state prisons. It is mainly, though not exclusively, concentrated in large urban counties. In Los Angeles County alone, for example, there are eight jails holding up a total of around 17,000 prisoners. Around a fifth of those prisoners have been clinically diagnosed with mental health issues. On a recent visit to the Twin Towers Correctional Facility (the 'county jail') in downtown Los Angeles, I was struck by the sheer scale of its penal containment, and the brutal visibility of apparently unmet mental health needs. It is the world's largest jail, holding almost 4,500 prisoners, and requires some 2,400 staff to operate it. The visitor has a sense that it is effectively a psychiatric hospital, filling the vacuum created by the 1970s closure of state psychiatric hospitals.<sup>37</sup> Plans were recently approved to move 1,000 mentally ill prisoners out of other Los Angeles Jails into a modern jail designed to focus on the treatment of mental health issues.<sup>38</sup> A review of Los Angeles Jails had unequivocally declared that:

*Of all the jails I have had the occasion to visit, tour, or conduct investigations within, domestically and internationally, I have never experienced any facility exhibiting the volume and repetitive patterns of violence, misfeasance, and malfeasance impacting the Los Angeles County jail system...<sup>39</sup>*

Confirming the scale of unmet mental health in the Los Angeles jail system, no fewer than 10 suicides were recorded in that system alone in 2013.<sup>40</sup> It is estimated that, nationally, 14.5 percent of men and 31 percent of women in currently in jails have serious clinical mental health problems, including psychotic illness. Those who are jailed are frequently from backgrounds reflecting extreme poverty and limited access to education, as well as experience of victimization. Over two thirds of those jailed have a history of either alcohol or drug abuse, or both.<sup>41</sup> The impact of poverty should not be underestimated; an analysis of data from New York City jails concluded that over half of those held in jail would have been released had they been able to afford pay bail fees of \$2,500. This fee indicate that these were low-risk, misdemeanour offenders.

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### The State Prison System

The administration of state prisons is a function of the executive branch of state governments, and state prisons are generally operated by one of the fifty state departments of corrections. This means that each state differs in terms of how they organise their system of imprisonment, and levels of imprisonment in different states vary hugely. While the national rate of incarceration rose almost five-fold between 1972 and 2010, in some states this rise was much lower (for example, in Massachusetts, Minnesota and Maine), while in other states it was significantly higher (for example, in the southern states of Mississippi and Louisiana).<sup>42</sup> State prisons mainly incarcerate convicted prisoners serving sentences of a year or longer, and generally hold around 1.4 million prisoners. The states of Hawaii, Alaska, Connecticut, Delaware, Rhode Island and Vermont are exceptional in that they are they only US states which operate a system which combines jails and prisons.

Gangs are endemic in the state prison system. An authoritative survey indicates that there were 307,621 gang

35. Subramanian, R., C. Henrichson, et al. (2015). *In Our Own Backyard: Confronting Growth and Disparities in American Jails*. New York, Vera Institute. p.5.  
36. Henrichson, C., J. Rinaldi, et al. (2015). *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, New York, Vera Institute of Justice.  
37. The declared aim of the closures was to deinstitutionalise those with mental health issues.  
38. Sewell, A. and C. Chang (2015). 'L.A. County to relocate some inmates, build jail to treat the mentally ill.' Aug 11, 2015. Retrieved on Jan 2, 2016, from <http://www.latimes.com/local/lanow/la-me-ln-jail-size-vote-20150811-story.html>.  
39. Liebowitz, S., P. Eliasberg, et al. (2011). *Cruel and Usual Punishment: How a Savage Gang of Deputies Controls LA County Jails*. Southern California, ACLU. p.1.  
40. Sewell, A. and C. Chang (2015). 'L.A. County to relocate some inmates, build jail to treat the mentally ill.' Aug 11, 2015. Retrieved on Jan 2, 2016, from <http://www.latimes.com/local/lanow/la-me-ln-jail-size-vote-20150811-story.html>.  
41. Subramanian, R., R. Delaney, et al. (2015). *Incarceration's Front Door: The Misuse of Jail in America*. New York, Vera Institute of Justice, Subramanian, R., C. Henrichson, et al. (2015). *In Our Own Backyard: Confronting Growth and Disparities in American Jails*. New York, Vera Institute.  
42. Travis, J., B. Western, et al., Eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington DC, The National Academies Press.

members in prison at the beginning of 2009.<sup>43</sup> One academic, writing about California's prison system, felt compelled to conclude that 'the question of how to manage prisons has resolved itself into the question of how to manage gangs'.<sup>44</sup> The Californian state system, which has the USA's second highest inmate population, has attempted to manage gangs within prison in two different ways. Originally, the aim was to split up the gangs and distribute their members around the system in geographically distant prisons. This had the opposite effect to that which was intended, and enabled individual gangs to significantly grow their membership throughout the prison system. Subsequently, it became policy to incarcerate most of the key players in a single prison, Pelican Bay in California.

US prison gangs are now highly sophisticated organisations that perform essential functions within the prison system. They regulate the prison black market, work on conflict resolution with prisoners, and increase the stability of prisons and effectively provide essential extra-legal governance in the prison. Some even have constitutions, bureaucratic structures, and what are effectively business-development plans — far removed from the thuggish stereotype. Skarbek argues that the governance imposed by the gangs enables the prison system to operate in a more ordered and stable manner.<sup>45</sup>

### The Federal Prison System

Any offender sentenced to a term of imprisonment in a federal court is the responsibility of the Bureau of Prisons (BOP). The BOP currently incarcerates prisoners in 121 federal institutions under its jurisdiction. Since 1980, the federal prison population has grown more than eight-fold, rising from approximately 24,600 inmates in 1980 to almost 219,300 prisoners. By the end of 2014, however, the total federal prison population had dipped to 210,567. It held 13 per cent of the entire US prison population. Around four fifths of these inmates are held in federal-run correctional institutions or detention centres, and the remaining fifth are in secure privately managed or community-based facilities and local jails. A long standing problem with the federal prison system has been overcrowding federal institutions continue to be about 30 percent overcrowded.

The federal system includes United States Penitentiaries.<sup>46</sup> These are high-security institutions where all

prisoner movement is minutely controlled. They have the highest staff-to-prisoner ratio in the system. The most prominent federal penal institution, which holds those prisoners classified as posing the greatest risk and therefore requiring the tightest control, is the federal supermax prison in Florence, Colorado.

For almost fifty years, federal prisons mainly held bank robbers, extortionists and white-collar criminals, as the jurisdiction of federal law was limited to specific felonies such as bank robbery, extortion and offences committed on federal property. Now, almost half of the inmate population has been sentenced for drug offending.<sup>47</sup> The 'War on Drugs' exerted a significant impact not just on the total of offenders in the federal system, but also the type of offenders held. In addition, new federal sentencing guidelines introduced in 1987 significantly increased the probability of incarceration in federal penal institutions.

### Race and Imprisonment in America

The fact that US imprisonment rates are disproportionately higher for African Americans<sup>48</sup> may come as little surprise in a country which was engaged in civil war to perpetuate slavery only two lifetimes ago. Race is a key analytic in US penalty, not least because black males in the USA are incarcerated at a rate of six times that of their white counterparts.<sup>49</sup> Over two million African Americans are currently under the control of the correctional system, whether in custody, on probation, or on parole. The penal system is riddled with racial disparities. There is a significant disproportionality in terms of race in the jail system; African Americans go to jail at almost four times the rate of their white peers. According to Alexander, the experience of African Americans within the US correctional system reflects, in essence, a 'comprehensive and well-disguised system of racialized social control'<sup>50</sup> which warehouses black people. It has been persuasively argued by Wacquant that

*Slavery and mass imprisonment are genealogically linked and that one cannot understand the latter—its timing, composition, and smooth onset as well as the quiet ignorance or acceptance of its deleterious effects on those it affects—without returning to the former as historic starting point and functional analogue.<sup>51</sup>*

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43. Winterdyk, J. and R. Ruddel (2010). 'Managing prison gangs: Results from a survey of US prisons.' *Journal of Criminal Justice Education* 38: 730-736. p.733.
44. John J. Dilulio Jr., cited in Skarbek, D. (2014). *The social order of the underworld: How prison gangs govern the American penal system*. Oxford, Oxford University Press.
45. Ibid.
46. The first prisons in USA were labelled 'penitentiaries' in order identify inmates as religious 'penitents', who were presumably atoning for their sins in prison.
47. Then and Now.
48. Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, The New Press.
49. Ruiz, R. (2010). Eyes on the Prize. *American Prospect*. Washington, Justice Policy Institute.
50. See note 49, p.20.
51. Wacquant, L. (2002). 'From Slavery to Mass Incarceration: Rethinking the 'race question' in the US.' *New Left Review* (13): 41-60. p.41-2.

Garland attests that there are two defining features of mass imprisonment. One is that a society imprisons more than the accepted norm for other comparable societies. He labels the second as 'the social concentration of imprisonment's effects'<sup>52</sup> — the methodical and systematic incarceration of whole groups of the population. There is an abundance of evidence to confirm that African-Americans are disproportionately imprisoned.<sup>53</sup> The scale of this disproportionality is reflected in the shocking observation that the USA incarcerates a greater proportion of its black population than South Africa did at the zenith of apartheid.<sup>54</sup>

### Mass incarceration: a change in the direction of travel?

It is only now, after four decades, that American penal expansionism has finally begun to ease. At the start of 2010, the USA's state prison population for the first time in almost 40 years. A year-to-year drop (of just 0.3 percent) in the number of state prisoners was recorded.<sup>55</sup> The drop was not huge, but as the first fall in state prisoners since 1972,<sup>56</sup> it signalled a directional shift in the overall tide.<sup>57</sup> The unrestricted use of imprisonment was beginning to be questioned for a range of reasons. These included fiscal pressures and a decline in public revenues as economic austerity began to bite, though these were not the only arguments advanced. Political factors played a role, as did a burgeoning awareness of the growing empirical evidence that incarceration has a relatively limited impact on recidivism. It was becoming increasingly difficult to construct a credible argument that mass imprisonment made America feel safer.

It was also evident in some states (California, for example) that the social utility of mass incarceration was being reassessed and found wanting. California's Public

Safety Realignment policy<sup>58</sup> had ensured that newly sentenced prisoners whose offences were non-violent and non-sexual, and who were assessed as posing a relatively low risk, were diverted from state prison to serve time either in local jails or under community supervision by probation staff.

### Conclusion

There is no doubt that America's penal institutions contain some individuals who pose a substantial public risk. Of the 1,325,305 sentenced inmates held by state prisons at the end of 2013, over half had committed a violent offence. No fewer than 165,600 were sentenced for murder. A further 166,200 prisoners had been sentenced for rape and sexual assault.<sup>59</sup> However, there is significant scope to limit

incarceration for a range of offenders, including those convicted of drug offences. President Obama has recognised the enormous impact of the 'War on Drugs' on the expanding penal population.<sup>60</sup> His administration boosted the drug court programme, with the aim of diverting non-violent drug offenders away from custody. There is a recognition the decades-long 'War' has ultimately been counterproductive, and that

incarcerating low-level drugs offenders not only destroys families, but may lead to further offending. The fiscal argument has also been made, citing research which demonstrates that every dollar spent on substance abuse treatment saves not just four dollars in healthcare costs, but also seven dollars in criminal justice costs.<sup>61</sup>

Even so, at the end of 2014, some six years into Obama's presidency, the United States held 1,561,500 prisoners in state and federal prisons and penal facilities.<sup>62</sup> A further 744,600 inmates were imprisoned in local and county jails.<sup>63</sup> This means that USA's current total incarcerated population (including prisoners in state and

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52. See note 10, p.6.  
53. For example, Walker, S., C. Spohn, et al. (2006). *The Color of Justice: Race, Ethnicity, and Crime in America*. Belmont CA, Wadsworth Publishing Company, Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, The New Press, Miller, J. (2010). *Search and Destroy: African-American Males in the Criminal Justice System*. Cambridge, Cambridge University Press.  
54. See note 49. p.7.  
55. This applies only to the state prison population, which totalled 1,404,053 prisoners on January 1, 2010. This was 4,777 (0.3 percent) fewer than there were on December 31, 2008. Pew Center on the States (2010). *Prison Count 2010*. Washington, PCOTS.  
56. Ibid.  
57. In addition, the total of those supervised by community corrections fell by almost one percent during 2009 for the first time since annual recording began in 1980 (Glaze et al. , 2010).  
58. Carson, E. A. (2015). *Prisoners in 2014*. Washington, US Department of Justice. p.2.  
59. Ibid. p.30.  
60. Obama, B. (2014). *National Drug Control Strategy*. Washington DC, Executive Office of the President of the USA.  
61. Etner, S., Huang, D., Evans, E., Ash, D. R., Hardy, M., Jourabchi, M., & Yih-Ing, H. (2006) Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment 'Pay for Itself'? *Health Services Research*. 41(1): 192–213.  
62. See note 59.  
63. The most up-to-date figure is for mid-21014. See Minton, Todd D., and Zhen Zeng. 2015. 'Jail Inmates At Midyear 2014.' Washington DC: Bureau of Justice Statistics.

federal prisons, and also all those in the local and county jail system) is some 2,306,100 prisoners. However, this total represents a small annual decrease in the number of those behind bars. The state and federal prison population dropped by approximately one percent in 2014, and the jail population in mid-2014 was also significantly lower than the peak of 785,500 prisoners some six years earlier.

Is the juggernaut of American penal expansionism now grinding to a halt? The overall picture is of a pause, and even a slight reverse, in the race to incarcerate. There has also been a noticeable difference in the mood music surrounding imprisonment in America; there is now substantially more discussion, both academic and political, about whether it is now time to call a halt to imprisonment as a first resort in addressing offending. America may now be witnessing the end of an ill-starred forty year experiment with mass incarceration. However, it was never going to be easy to check the progress of the juggernaut of penal expansionism, and whether history will record that Obama's presidency signalled a change in the course of US penal justice remains to be seen. Amongst the reasons why a reversal of mass incarceration may not succeed are 'the enormous scale of imprisonment that must be confronted, limited mechanisms available to release inmates, (and) lack of quality alternative programs'.<sup>64</sup> At the same time, 'the waning legitimacy of the paradigm of mass incarceration'<sup>65</sup> means that if American policy on imprisonment is to change, the current climate may offer the best framework in which that change can be achieved. Has a major paradigm shift in the American approach to incarceration occurred? Overall, the growth of the mass incarceration may not have gone into sharp reverse, but — at the very least — it appears to have halted.

Will significant change in penal policy occur after the 2016 presidential election? There is much to suggest that other pressing economic and political issues have taken precedence. At the time of writing, the identity of the next president is unclear. The Democratic presidential hopeful Hillary Clinton has raised the issue of penal reform during her campaign, publicly pledging to end mass imprisonment, reform mandatory minimum sentences, and close down private prisons. To this end, she has vowed to provide treatment and rehabilitation, rather than incarceration, for low risk drug offenders.<sup>66</sup> Some American criminologists have interpreted her entreaty to halt the national experiment with mass incarceration as a refutation of the consensus on penal expansionism, which has been associated with previous administrations of all parties. Alternatively, a Donald Trump presidency would render radical penal reform improbable. His analysis is that:

'Criminals are often returned to society because of forgiving judges... The rest of us need to rethink prisons and punishment. The next time you hear someone saying there are too many people in prison, ask them how many thugs they're willing to relocate to their neighbourhood. The answer: None.'<sup>67</sup>

When President Obama visited the federal prison in Oklahoma, his conclusion was one which may resonate in the mind of every politician who ever had to seek electoral approval, and speaks volumes about the politicisation of penal policy in America: 'Nobody ever lost an election because they were too tough on crime.'<sup>68</sup> While American government policy on the use of imprisonment may yet undergo radical change, much will depend on who succeeds Obama as president.

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64. Petersilia, J. and F. T. Cullen (2015). 'Liberal but not stupid: meeting the promise of downsizing prisons.' *Stanford Journal of Criminal Law and Policy*. p.1.

65. Ibid.

66. Clinton, H. (2016). 'Hillary for America.' Retrieved on Jan 4, 2016, from <https://www.hillaryclinton.com/issues/criminal-justice-reform/>.

67. Trump, D. J. (2000). *The America We Deserve*. Los Angeles, Renaissance Books. p.106-7

68. LoBianco, T. (2015, July 17). 'President Barack Obama makes historic trip to prison, pushes reform.' Retrieved on Aug 18, 2015, from <http://edition.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit/>.