How We Misunderstand Mass Incarceration

A new book argues that, in the effort to fix the prison epidemic, we are addressing the wrong things and missing the true problem.

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A focus on drug offenders and private prisons can distract from the larger problem. Illustration by Ben Wiseman

Reformers are famously prey to the fanaticism of reform. A sense of indignation and a good cause lead first to moral urgency, and then soon afterward to repetition, whereby the reformers become captive to their own rhetoric, usually at a cost to their cause. Crusaders against widespread alcoholism (as acute a problem in 1910 as the opioid epidemic is today) advanced to the folly of Prohibition, which created a set of organized-crime institutions whose effects have scarcely just passed. Progressive Era trade unionists, fending off corporate thugs, could steer into thuggish forms of Stalinism. Those with the moral courage to protest the Vietnam War sometimes became blinded to the reality of the North Vietnamese government—and on and on. It seems fair to say that a readiness to amend and reconsider the case being made is exactly what separates a genuine reforming instinct from a merely self-righteous one.

The fight against mass incarceration in the United States is no exception to this rule. In recent years, the horror of what Americans have done to other Americans—and

particularly white Americans to black Americans—has led to a steady, engaged anti-prison polemic, one with many authors singing more or less in unison. The numbers make their own case: 6.7 million people, mostly men, were under correctional supervision during the year 2015—more than were enslaved in antebellum America and more than resided in the Gulag Archipelago at the height of Stalin's misrule.

In a new book, "Locked In" (Basic), John F. Pfaff, a professor of law at Fordham, calls this choired voice (in which this writer has been a participant) "the Standard Story." The standard story, as he sees it, insists that, first, the root cause of incarceration is the racist persecution of young black men for drug crimes, which overpopulates the prisons with nonviolent offenders. Then mandatory-sentencing laws leave offenders serving long prison sentences for relatively minor crimes. This hugely expanded prison population, one that tracks in reverse the decline of actual crime, has led to a commerce in caged men—private-prison contractors, and a specialized lobby in favor of prison construction, which in turn demands men to feed into the system. (This exploitation is further supported by local communities in which a new prison can replace a closing factory, providing one of the few reliable sources of decent incomes for working-class, mostly white men.)

Pfaff, let there be no doubt, is a reformer. "Mass incarceration," he writes, "is one of the biggest social problems the United States faces today; our sprawling prison system imposes staggering economic, social, political, and racial costs." Nonetheless, he believes that the standard story—popularized in particular by Michelle Alexander, in her influential book, "The New Jim Crow"—is false. We are desperately in need of reform, he insists, but we must reform the right things, and address the true problem.

Pfaff takes on the elements of the standard story one by one, mostly concentrating on statistics involving state prisons, where the majority of inmates are housed. (American prisons operate in such a complicated patchwork of federal, state, and local jurisdictions that, as Pfaff points out, it is hard to get a good handle on the numbers.) First, he inspects the claim that it is predominantly nonviolent drug offenders, imprisoned against all moral logic, who populate our prisons. It's a claim that President Obama endorsed as recently as 2015: "Over the last few decades, we've also locked up more and more nonviolent drug offenders than ever before, for longer than ever before, and that is the real reason our prison population is so high."

In fact, Pfaff argues, drug convictions are a distinctly secondary factor in prison growth. During the great wave of incarceration—generally thought to have begun around 1980, and cresting about three decades later—state prisons added something like a million inmates, with about "half that growth coming from locking up more people convicted of violence," Pfaff calculates. Nonviolent drug offenses accounted for only around a fifth of the new incarcerations.

What's more, many of the drug convictions were meant to be what Pfaff calls "pretextual attacks on violence." Violent crimes that are associated with drug dealing are more difficult to prosecute than drug offenses themselves, which usually involve hard

evidence rather than the testimony of witnesses. This argument sets off some suspicious-skeptical alarms, since it seems cousin to the idea that we might as well lock 'em up for drugs as for anything else, since, if we didn't, "they" would be committing violent offenses anyway. "It is, of course, completely fair to debate the morality . . . of using drug charges to tackle underlying violence," Pfaff observes, to his credit. He accepts that "blacks are systematically denied access to the more successful paths to economic stability," and therefore "face systematically greater pressure to turn to other alternatives." But he also makes a more complicated argument, following recent sociological research: it's not that the prohibition of drugs attracts crime, which then produces violence; it's that violence thrives among young men deprived of a faith in their own upward mobility, making drug dealing an attractive business. In plain English, young men without a way out of poverty turn to gangs, and gangs always turn to violence. Since efficient drug dealing is, by its illicit nature, likely to involve violence, those accustomed to violence are drawn to drug dealing. One sees the logic: Lucky Luciano and Al Capone weren't ambitious street kids who chose bootlegging as a business, and were then compelled to become gangsters to pursue it, as in "Boardwalk Empire." They were already cadet gangsters, who saw that their acquired skills lined up neatly with those demanded by bootlegging.

And so the war on drugs, however misguided as social policy, was not, Pfaff insists, a prime mover of the epidemic of incarceration—the numbers just aren't there. Even in New York State, famous for its Draconian "Rockefeller laws," the decline in the number of inmates imprisoned for drug offenses in the past fifteen years has been dramatic—without changing the face, or the fact, of mass incarceration. Pfaff calls this his core claim: "If we define the people in prison as a result of the war on drugs to be those serving time for a drug conviction, then that war simply hasn't sent enough people to state prisons for it to be a major engine of state prison growth."

What about mandatory sentences? Pfaff notes that these outsized punishments are given to a very small part of the actual prison population. Most new inmates are serving relatively short sentences. This, Pfaff observes, is essentially good news. "Prison admissions are a flow, not a stock," he writes. "They depend far more on choices made today than on the lingering effects of thousands of past decisions." Pfaff deals with the issue of for-profit prisons with similar statistical efficiency: even if private prisons were banned tomorrow and all their inmates released, the prison population would drop by, at most, eight per cent. The numbers just aren't there.

So what makes for the madness of American incarceration? If it isn't crazy drug laws or outrageous sentences or profit-seeking prison keepers, what is it? Pfaff has a simple explanation: it's prosecutors. They are political creatures, who get political rewards for locking people up and almost unlimited power to do it.

Pfaff, in making his case, points to a surprising pattern. While violent crime was increasing by a hundred per cent between 1970 and 1990, the number of “line” prosecutors rose by only seventeen per cent. But between 1990 and 2007, while the crime rate began to fall, the number of line prosecutors went up by fifty per cent, and the number of prisoners rose with it. That fact may explain the central paradox of mass incarceration: fewer crimes, more criminals; less wrongdoing to imprison people for, more people imprisoned. A political current was at work, too. Pfaff thinks prosecutors were elevated in status by the surge in crime from the sixties to the nineties. “It could be that as the officials spearheading the war on crime,” he writes, “district attorneys have seen their political options expand, and this has encouraged them to remain tough on crime even as crime has fallen.”

Meanwhile, prosecutors grew more powerful. “There is basically no limit to how prosecutors can use the charges available to them to threaten defendants,” Pfaff observes. That’s why mandatory-sentencing rules can affect the justice system even if the mandatory minimums are relatively rarely enforced. A defendant, forced to choose between a thirty-year sentence if convicted of using a gun in a crime and pleading to a lesser drug offense, is bound to cop to the latter. Some ninety-five per cent of criminal cases in the U.S. are decided by plea bargains—the risk of being convicted of a more serious offense and getting a much longer sentence is a formidable incentive—and so prosecutors can determine another man’s crime and punishment while scarcely setting foot in a courtroom. “Nearly everyone in prison ended up there by signing a piece of paper in a dingy conference room in a county office building,” Pfaff writes.

In a justice system designed to be adversarial, the prosecutor has few adversaries. Though the legendary Gideon v. Wainwright decision insisted that people facing jail time have the right to a lawyer, the system of public defenders—and the vast majority of the accused can depend only on a public defender—is simply too overwhelmed to offer them much help. (Pfaff cites the journalist Amy Bach, who once watched an

overburdened public defender “plead out” forty-eight clients in a row in a single courtroom.)

Meanwhile, all the rewards for the prosecutor, at any level, are for making more prisoners. Since most prosecutors are elected, they might seem responsive to democratic discipline. In truth, they are so easily reëlected that a common path for a successful prosecutor is toward higher office. And the one thing that can cripple a prosecutor’s political ascent is a reputation, even if based on only a single case, for being too lenient. In short, our system has huge incentives for brutality, and no incentives at all for mercy.

Add to that the reality that the office of a prosecutor is too often a “black box,” where nobody knows anything about the deliberations that produced a particular outcome, and one sees that prosecutors in our time have something like the authority of Inquisitors in the old days of the Church. Though supposedly merely the instruments of investigation, they really hold all the effective power, reporting to no one save God, or their own ambition.

If prosecutorial discretion is indeed the cause of the prison epidemic, what can be done about it? Pfaff proposes guidelines that would curb overaggressive charging, and better funding for public defenders; he likes the idea that the costs of housing prisoners would be borne in part by the D.A.’s county budget, not just by the state budget. A solution that Pfaff proposes for the rest of us is to pay more attention to local elections. Instead of just checking off the boxes on our favored party’s ballot, as most of us do, we should educate ourselves about the specific record of the prosecutor when he runs for reëlection, to be sure that “the person voted into the office has values that align with the electorate’s.” The problem here is that very few people have the time or the inclination to assess the values of their local prosecutor, if they even know who he or she is.

The other path to reform that Pfaff outlines is, in effect, to care less about crime. Criminal violence, he shows, is “a phase, not a state.” Most such prisoners effectively “age out,” and, past the age of forty, are unlikely to re-offend. This is one of those statistical truths—like the negligible effect of batting orders in baseball—which everyone who has looked at the numbers knows, and which everyone who refuses to look at the numbers vehemently rejects. The fact is that if we let everyone convicted of a violent crime out of prison on his fortieth birthday there would be little risk for the rest of us. Like lifelong “sex offenders,” violent recidivists are rarer than you might think.

Since this idea is an obvious non-starter, Pfaff advocates a program of “graduated release,” in which a small number of inmates would be released at the age of forty, and then tracked, in order to demonstrate to the public how small the actual risk of re-offending is. This program would, of course, be fatally vulnerable to a single Willie Horton: one recidivist would overwhelm, in the public mind, a thousand non-offenders. But it is worth a try. The true cause of crime is being a young man, Pfaff suggests; convincing the public of this is one of the jobs of educators.

Putting aside quarrels about the specific numbers, one can accept the broad truth of Pfaff's data without necessarily buying into his position completely. The first thing that, say, Michelle Alexander might assert is that not all social sins can be measured by counting. It has been pointed out, for example, that the great majority of gun crimes in America have nothing to do with schoolroom or movie-house massacres or the like. Yet we draw on Newtown and Aurora for moral ammunition against the madness of uncontrolled gun use. Newtown is not what's wrong with American gun policy; but American gun policy is what allows something as wrong as Newtown to happen. "Relatively rare" doesn't mean morally unimportant.

Kindred issues arise with mass incarceration. Even if private prisons account for a relatively small proportion of the prison population, that they are allowed to exist at all is an indictment of our system. Dickens, in writing about the injustice of debtors' prisons, was unaffected by the fact that those institutions were largely in decline by the time he wrote. "Sanity is not statistical," Winston says, in "1984," and morality is not numerical. When we are talking about such immense numbers, the fact that anyone would be imprisoned for a long term for a nonviolent drug offense is a scandal. That anyone would be housed in a prison kept for profit by an entrepreneurial concern is an evil.

Similarly, although the data on differential rates of prosecution for African-Americans and white Americans may, upon closer inspection, betray less bigotry than they suggest at first glance, it would be absurd, as Pfaff recognizes, to look at a typical prison population and deny that it is connected with a history of racial oppression—a history that radically contours our life chances based on our color. Reformers must avoid fanaticism and listen to the facts; but the friends of reform must keep their indignation intact, and not be blinded to suffering by the news that our model of how people suffer should be retuned. "A Robin Redbreast in a Cage," Blake wrote, "Puts all Heaven in a Rage." Liberals should remain indignant about all those cages, even as we argue the particulars of their condition. ♦

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