

## To End Mass Incarceration, Our Society Must Look Beyond the “Non-Violent Drug Offenders”

By Asar Imhotep Amen

January 15, 2016

President Obama took a laudable step in July 2015 by granting clemency to 46 people convicted of non-violent drug offenses and using his bully pulpit to decry mass incarceration in the United States. The President's historic move comes on the heels of important scholarship—such as Michelle Alexander's celebrated book *The New Jim Crow* describing the role of the “War on Drugs” in contributing to our bloated and racially disparate imprisonment rates. The growing recognition across the political spectrum that American criminal courts punish nonviolent drug offenses in a racially disproportional and counterproductive way is a good thing, and a sign of good things to come, for criminal justice reform. But while Obama's focus on criminal justice reform is welcome, and arguably unprecedented, rhetoric suggesting that we curtail mass incarceration through a **focus** and leniency toward “non-violent drug offenders” is flawed and counterproductive.

First, it obscures the fact that “violent crime,” and not “drug crime,” is the primary engine of mass incarceration in this country. Economist and criminal justice scholar John Pfaff of Fordham Law School, using numbers from the National Prisoner Statistics Database, has shown that between 1980 and 2009, the increase in drug prosecutions accounted for only 21% of growth in state prison populations, while the increase in people convicted of violent offenses during that period accounted for over half of all prison population growth. Many have demanded reforms and leniency for drug convictions by pointing to the way these convictions target people of color, primarily Black communities; these racist policies should no doubt be challenged. However, huge racial disparities also exist in violent crime prosecution rates, and within every level of the criminal justice system. If we want to significantly reduce the number of people in American prisons and jails, while also decreasing the racial disparities in our prison populations, we cannot focus solely, or even primarily, on non-violent drug offenses.

Second, rhetoric treating prisoners locked up for non-violent drug convictions as qualitatively different from other prisoners belies the non-violent drug-related motives and conduct underlying many crimes labeled “dangerous” or “violent” under most criminal codes. A war veteran struggling with heroin abuse who enters a house to steal some tools to feed his drug habit has committed a first-degree burglary, a “violent” crime under many state codes. A drug-motivated unarmed robbery in which the person pushes someone, takes cash from his wallet, and runs away is also a “violent” crime under most state laws. Any person with a felony who even possesses a firearm is guilty of a “dangerous” federal offense, and a person who has a firearm in his house while engaging in a drug deal, intending to exercise control over the firearm, has committed “crime of violence” under the federal sentencing guidelines. In short, “violent crime” is a legally constructed term that includes within its broad reach a great deal of drug-related conduct that fails to meet the profile of a “violent crime,” as Americans generally use and understand the term.

Additionally, the routine strong-arming of guilty pleas through use of mandatory-minimum sentences and repeat-offender enhancements are fixtures not merely of drug prosecutions, but of all prosecutions in the modern tough-on-crime era where politicians can score easy political points—without meaningfully reducing crime—by proposing gratuitous increases in punishment for violent offenses. In Washington DC, an eighteen year old with a pocket knife who tells someone to get out of his car, and then takes the car for a quick ride, faces a mandatory 15 years in prison for “armed carjacking.” In California, even after recent reforms to its three-strikes

law, someone who takes the car from a driver by a verbal "threat," even if unarmed, would receive a mandatory life sentence if he had two prior convictions for serious felonies - which could include, for example, selling drugs to minors (essentially, selling drugs) or burglary of a garage. In most states, people selling drugs at a low-level can be guilty of first-degree murder of higher-ups in their operation, so long as those murders were foreseeable and in furtherance of the operation, under the broad theories of "co-conspirator" liability. Under the felony murder rule, a person committing a robbery, even if unarmed, is guilty of first-degree murder in many states if someone's death can be causally linked to the act, even if the death was purely accidental. And with a prior conviction for any felony, however low-level, many violent offenses absent physical injury, such as unarmed robbery, carry significant mandatory time in prison and maximum sentences up to 40 or more years.

To demonstrate this country's unparalleled obsession with locking people up, regardless of whether it is for serious or minor convictions, we can look at global comparisons in how we deal with those who are deemed the "most serious offenders" - people sentenced to Life Without the Possibility of Parole (LWOPP). The United States is virtually alone in its willingness to sentence people to die behind bars. Nearly 100 countries have signed the Rome Statute, which requires that all life sentences be reviewed after 25 years. A few countries have abolished LWOPP, and a handful of European countries have no statutes that mention life imprisonment, let alone LWOPP, even for what they define as the "most serious, violent crimes." According to a University of San Francisco School of Law study, the per capita number of prisoners serving LWOPP sentences in the United States is 51 times that of Australia, 173 times that of the United Kingdom, and 29 times that of the Netherlands. Even China and Pakistan provide review of all life sentences after 25 years imprisonment. So while the rest of the world can see other ways of dealing with "serious crimes" (however imperfectly), the U.S. can't imagine alternatives to harsh sentences, punishment, or LWOPP - practices that in no way seek to address the root causes of "crime" in society.

Finally, focusing on people imprisoned for non-violent drug related convictions as a special group - or the only group - deserving leniency and freedom hardens the belief that imprisonment is acceptable for everyone else locked in a cage. If we are serious about taking on mass incarceration, it is counterproductive to pit classes of prisoners against each other. For instance, we must avoid pushing that belief that those inside for drug offenses can and should be released, but only at the expense of the "real criminals" that deserve to be locked up. Using this kind of rhetoric only reinforces the prison system's racist notion of "crime," and ultimately further deepens the hole that we are trying to get ourselves out of.

While the country celebrates the bipartisan movement to reform drug sentences, we should not allow the rhetoric about "non-violent drug offenders" to distract us from the simultaneous imperative to challenge imprisonment for anyone. Addressing the racism that targets Black and Brown people disproportionately for "serious offenses" is a necessary step toward shrinking this country's bloated prison system. The sooner lawmakers and reformers come to terms with that uncomfortable truth, the sooner the U.S. can move beyond the scourge of mass incarceration.

### **What are we really afraid of?**

We are never going to get to the root of the problem unless we get to the heart of the "punishment and torture paradigm," and the way we can do that is by asking, "is punishment and imprisonment keeping us safe, and does it even address social problems?"

Some policymakers and prisoner advocates worry that the discussion of how to release people from prison is fraught with race and class biases. In other words, by basing the sentencing decisions on static factors and immutable characteristics—like the defendant's education level, socioeconomic background, or neighborhood—they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.

Policymakers claim our parole policies are harsh because they are afraid to release so-called dangerous people onto our streets. I take exception to the underbelly of the word "dangerous", because what society is really afraid of is men of color—not "crime." People lean on the criminal justice system as a way of keeping those scary people away from them. If we see people as "the other," we are less likely to have empathy towards them, respond to their needs, and truly begin to address the root causes of harm and "crime" in our society.

*Asar is currently imprisoned at California State Prison – Los Angeles County. He can be reached at:*

*Troy T. Thomas, H01001  
A-1-137-UP  
PO Box 4430  
CSP-LAC  
Lancaster, CA 93539*