

Incarceration

By Edward Weber



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Ed Weber is a retired attorney living in Toledo, Ohio, which is his hometown. Educated in the public schools, he went to Denison University, where he was Phi Beta Kappa, for his B.A. in 1953, and to Harvard Law School for his LL.B in 1956.

In 1980, he was elected to the United States Congress, where he served for one term.

While practicing law, Ed found time to be Scoutmaster to a Boy Scout troop in the center city for thirteen years and to teach as an adjunct professor in the Law College of the University of Toledo for twelve years.

In retirement he is now helping as a first-grade reading tutor in a center city school. His hobbies include hiking, playing clarinet in a community band, and sailing.

He and his wife Alice have been married for fifty-eight years. They have three children and six grandchildren.

In the United States from 1945 to 1960, the number of people in prison held steady at 100 for every 100,000 of the total population, but the crime rate was slowly increasing, and in 1961 it began to accelerate rapidly. By 1972 the crime rate had tripled relative to the rate of 1945.

A number of factors were involved. Demographics had changed; the baby boomers were coming of age, which affected the crime rate because young males account for 38% of our crime. There was also a large migration to the cities from Appalachia and the Deep South; these were people and families who came from small communities where an orderly life style was a shared value, where people knew each other, watched out for each other, and knew who was doing what—but that support system had been left behind.

Urban America of the 1960s did not have enough police, and in some cities the police had to face off against mass protests in the streets. Television carried all of it: civil rights marches, Viet Nam protests, school integration confrontations, the assassination of Martin Luther King, Jr., the Black Power movement, arson and looting, “burn baby burn.” Scenes of police brutality, the cattle prods, the snarling dogs, well-meaning people being stomped on and clubbed. College students shot down at Kent State by the National Guard. The decade gave us one “long hot summer” after another. Is it any wonder that there was a loss of respect (some people called it a “blatant” loss of respect) for the law and the police?

All this turmoil was broadly labeled “crime in the streets,” and people cried out against it and wanted it stopped. In

1968 Hubert Humphrey said crime would stop when we had decent neighborhoods, more educated people, better homes; building more prisons wouldn’t do it. But the public was not going to wait. They wanted law enforcement. “Lock ‘em up and throw away the key,” was one popular cry, “tail ‘em, nail ‘em, and jail ‘em” another. It was up to the police, the prosecutors, the judges and the legislatures to get tough on crime. In Chicago, Mayor Daley gave “shoot to kill” orders to the police if they saw an arsonist, and a large part of his electorate loved it.

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The public demanded new laws that would offset the “soft on crime” decisions of the Supreme Court under Chief Justice Earl Warren, cases that seemed to some to be freeing obviously guilty criminals because of technical violations of Constitutional standards that had never been enunciated previously. Politicians jumped at the chance to give the public what it wanted. Because judges were seen as often too lenient, mandatory minimum sentences were legislated. Many times, against their better judgment, judges were required to impose sentences they considered too harsh. (In 2005, the Supreme Court in *U.S. v. Booker* ruled that the mandatory sentence rules could only be advisory, not required, but the decision was not retroactive; it was no help to those already incarcerated.)

Stricter limits were also placed on parole boards' discretion. To get at the repeat offenders, the "three strikes and out" laws were passed: the third offense meant prison for life without parole, even if the third offense was trivial and occurred many years after the prior crimes.

The stage was set for the great American prison-building boom. How else could we house the flood of new prisoners resulting from the new sentencing laws and the get-tough approach to law enforcement?

- In the ten years from 1985 to 1995, a new prison was opened every week.
- We now have 4500 prisons and in some areas more are still needed.
- Some states have an overflow that is shipped to prisons in other states where there is extra room. California is doing this to help comply with a Supreme Court order to reduce its prison population because of overcrowded conditions.
- Texas is one of the chief places where this extra space is for rent.

Lyndon Johnson made it clear that he was tough on crime and announced that his judicial appointees would be of the same view. Richard Nixon was, if anything, even more emphatic on this point. By the time Ronald Reagan was elected in 1980, public support was solidly behind tough-on-crime policies, which Reagan framed as a choice between "society is to blame" or "individual responsibility." Punishment won out over the amelioration of social conditions. Wanting the federal government to have a visible role, even though law enforcement is primarily a state and local matter, Reagan began

the war on drugs. Nancy Reagan pushed for young people to "just say no."

The 1986 death of college basketball star Len Bias from a cocaine overdose inspired more legislation. He had been drafted by the Boston Celtics; Boston was "Tip" O'Neill country, and the Speaker of the House responded to the tragedy with the Anti-Drug Abuse Act of 1988, which included mandatory drug-sentencing. It aimed for a drug-free America by 1995.

George H.W. Bush, elected in 1988, ran a full scale public relations campaign for more prisons to be built. (Willie Horton, a Massachusetts inmate who had committed murder while on a prison furlough, loomed large in Bush's TV ads against his opponent, Massachusetts governor Michael Dukakis.) Inconveniently for this policy, a Justice Department study had found that "the most striking finding is that incapacitation does not appear to achieve large reductions in crime." Bush brushed those words aside and instead released a heavily criticized opinion of the kind Bush wanted to hear, written by Edwin Zedlewski, who claimed that every prisoner saved America \$405,000. It became a slogan: "Save \$405,000 for every incarceration."

Bill Clinton was not to be left off the bandwagon. He sent Congress a new crime bill directed against violent offenders, including mandatory sentencing. States were given incentives to increase sentences of illegal aliens if they wanted a share in the \$30 billion appropriation for prison construction and more police. When Clinton's Attorney General, Janet Reno, came across as soft on crime, Clinton took crime issues away from her, and a report commissioned by her that exposed problems with mandatory sentencing was suppressed for six months. The report finally became public when an assistant attorney general resigned in protest and leaked

it to the *New York Times*. There was never anything new in Clinton's approach to crime—just more prisons, more police, more arrests.

Along with all the new prisons and the millions of new prisoners came powerful forces that have a vested interest in the prison system. Marc Mauer in *The Race to Incarcerate* mentions our more than 600,000 (in 1999; now, 800,000) prison personnel—about the same number as in the auto industry—jail guards, administrators, service workers, and others who represent a powerful political opposition to any scaling down of the system.

Prison operation has become a big industry. It can be so big a boost to local economies that communities have dropped the old "not in my backyard" mentality. Privatization has arrived; several companies operate prisons under contract with state governments, the biggest being Corrections Corporation of America, which operates prisons in 20 states, holding 90,000 prisoners, and takes in \$1.7 billion in annual revenue. The typical contract runs for a long term, at a per diem rate per prisoner and a government guarantee of 90% occupancy. These companies have sometimes offered to buy the prison or build a new prison just so they can get the operating contract.

These are all people who badly want *more* prisoners, not fewer. They have their lobby, the American Legislative Exchange Council, which spent \$19 million in 2012 in an effort to pass laws authorizing more prison privatization and to mandate severe sentences. The "stop and prove your identity" law in Arizona was drafted word-for-word by the Council.

So, after decades of pursuing these policies, what do our prisons look like now?

750,000 people are sent to America's prisons each year. In proportion to our population, this is actually not as high a rate of new prisoners as in many European countries; what keeps our incarceration rate high is that we keep them there longer and that two-thirds of the prisoners we release will be put back in prison for probation violations. We need to devise effective measures for probation violations to replace the revolving prison door.

Half a million people are held in jail or prison because of drug offenses—17% of those held in state prisons, 48% in federal prisons. Most of these are not high-level traffickers and for most of these it is their first offense. In federal prison they will on average be serving a little more than five years.

Two-thirds of prisoners have had alcohol or drug problems, and more than half are mentally ill. In the words of Nicholas Kristoff, the New York Times writer, the largest mental health center in America is the Chicago jail. It's the same everywhere; prisons are filling in for mental health centers and substance abuse facilities. The system treats them as criminals. It is little wonder that many of them wind up in prison again after they are released. They are not cured, and the system does not offer enough support or rehabilitation to help them lead a different life.

26,100 men and women in U.S. prisons are now age 65 or older, a problem likely to grow worse because of the huge numbers that are serving long-term sentences. At some point prisons will need nursing home wings, with round-the-clock medical care, wheel-chair accessible cells and bathrooms, hospice care and other services. This is going to be expensive.

Who are the prisoners? Race, poverty, low education, and joblessness are recurring factors in the prison population.

- A survey of state prisons in 1991 showed that only 65% had completed high school; 53% were earning less than \$10,000; 50% had no job or worked part-time.
- 60% of black men who are high school drop-outs will be in prison before age 35.
- 2.7 million children now have or have had a parent in jail or prison. 70% of these children will be in prison themselves some day.
- In high poverty neighborhoods, regardless of race, where men are out of work and women are the heads of the household, violent crime will be higher.
- The likelihood of being in prison at some time in your life for a black man is 1 in 3; 1 in 6 if you are Hispanic, 1 in 17 if you are white.

70% of prisoners expect to live with their family after being released, but as men and women cycle in and out of prison, family life suffers. 60% of the prisoners have children under age 18. Who raises the children of women who are doing hard time because of drug trafficking? Who is the male role model if your daddy is in prison? When you go to school and one of the other kids wants to know about your daddy, do you say, "Daddy is in jail"? When daddy gets out and comes home, he's most likely to be like a stranger. Imagine the anxiety of children living in such situations, as if they didn't already have obstacles enough to overcome. Broken homes in America are nothing extraordinary, but should the prison system unnecessarily be aggravating the situation?

In poor neighborhoods with high rates of crime, going to jail becomes the

norm, and the justice system loses any power to intimidate. Going to jail or prison is meant to be humiliating and shameful, as well as an ordeal, but as Harvard's Bruce Western observes, "The deterrent effect of incarceration is lessened if it becomes so common it no longer carries any stigma" (Gudrais).

So we must ask: do we need 2.4 million people in prisons and jails to make us safe? During the incarceration boom that began in 1972, the violent crime rate continued to increase until it hit 758.2 (per 100,000 inhabitants) in 1991 and then started going down (Federal Bureau of Investigation report). The crime rate is now at 387 per 100,000—the same rate that it was when the prison boom began. But at the same time that crime was going down, the rate at which people were being sent to prison kept going up. We have reached and gone beyond the point of diminishing returns that was supposed to result from increasing the number of people in prison.

Adam Gopnik points out in *The New Yorker* (January 30, 2012) that in New York state the incarceration rate and the crime rate both went down at the same time, and in New York City crime dropped 40% more than crime dropped nationwide. This is amazing. In 1980 New York City's violent crime was considered to be a problem the city would have forever; today violent crime in the Big Apple is virtually gone.

What should our policy look like going forward? Many ideas have been advanced, but consensus is hard to achieve.

Frank Zimring's new book *The City That Became Safe* offers one answer. (Here I draw on Adam Gopnik's summary of Zimring's thesis.) Stopping crime wasn't the result of changing the socio-economic conditions; it was the result of good police work.

Police were put where they could stop crime from happening—all the spots where lots of crimes occur. Zimring says New York should keep using “stop and frisk.” Minority neighborhoods complain about the stop-and-frisks, but they also gain the most by having crime stopped.

Addressing the recidivism rate will take better support systems and rehabilitation upon a prisoner’s release.

“Tough on crime” should be replaced by “smart about crime.” Protect streets and neighborhoods by better policing. Shift tax dollars from prison operations to helping prisoners re-enter society when they are released. Obviously, we need better results from our public schools and more jobs.

There is strong evidence and a good argument that we can reduce prison population without losing control of crime. By doing so, we reduce the enormous expense of maintaining our prisons and reduce the impact that incarceration has on society, particularly in communities having high numbers of poor people and people of color. Be mindful, however, if the goal is to reduce the cost of prisons, then the reduction in prison population will need to be significant enough to allow a prison or at least a cell block to be shut down, for 80% of the cost of prison operation is in staff, guards, and other workers who are required at the facility as long as it is open.

One sure way to reduce prison population is to shorten sentences and

release prisoners earlier. Do away with mandatory sentences and three-strikes laws. Give judges the flexibility in sentencing that they once had, perhaps with sentence guidelines as in Ohio. For minor offenses, use alternative sentences more frequently, such as performing public service and attending job training. Allow parole boards the discretion they once had for early release.

Progress is being made. The Senate Judiciary Committee has reported out the Smarter Sentencing Act, which would cut the time of mandatory sentences at least in half and would operate retroactively. Former Attorney General Eric Holder announced plans to eliminate mandatory minimum sentences for nonviolent drug offenders, to divert low-level drug offenders into treatment programs and community service, and to allow for the release of elderly, non-violent drug offenders from prison. It was not too surprising, though, that prosecutors quickly protested that without the threat of severe sentences, their ability to get good plea bargains would be seriously affected.

Can we reduce recidivism? Nationally, two-thirds of the prisoners who are released will be rearrested within three years; half will go back into prison. Addressing the recidivism rate will take better support systems and rehabilitation upon a prisoner’s release. It will not be easy. The chances of a black man with a prison record of getting a job are not good; his having a job, though, is the surest way for him to avoid going back to prison. Surveys show that prisoners want to have help in transitioning back into society; they know that they will need counseling and job assistance.

We also need a new drug policy. In forty years, a trillion dollars has been spent fighting the war on drugs. In 2011 a global commission of world statesmen, including Paul Volcker and

George Schultz, declared that the war on drugs had failed. It recommended that governments experiment with legalization of drugs. In the U.S., several states have now legalized marijuana, licensing growers and taxing sales. Other knowledgeable people protest that marijuana is an entry drug to much more serious addictions, and decriminalization would be very unwise.

My friends, the costs are too high for us to continue ignoring that in the United States we have an incarceration problem. Let the debate begin! Let some changes begin to happen!

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