“Every law not based on wisdom is a menace to the state”

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The number of people imprisoned in the United States has fallen every year for the past three years, yet the land of the free still has a far higher incarceration rate than any other developed nation, as Peter Mares discovered on a recent visit

Order through architecture: Philadelphia’s Eastern State Penitentiary.

FROM the outside it resembles a medieval castle, with towering stone walls topped by battlements and turrets. But the fortifications were only ever for show. “There was no need to repel invaders and the turrets didn’t serve as watchtowers,” explains our tour guide, Dan. “The architecture was symbolic, designed to be foreboding and intimidating from the outside – a looming warning in the landscape against breaking the law.”

Dan is showing us around the Eastern State Penitentiary in Philadelphia, which now operates as a historical site with tourist appeal. When it opened in 1829, Eastern State was the world’s first “modern” prison. It had been built at the urging of the Philadelphia Society for Alleviating the Miseries of Public Prisons, an organisation established forty years earlier and influenced by the Quaker ideals of Pennsylvania’s founders. The society counted such figures as Benjamin Franklin among its number.

These reformers wanted the penitentiary to mark a break with the brutality of the past, Dan tells us. The harsh physical punishment and ritual humiliation embodied in practices like public floggings and the stocks would be replaced by a humane system designed to reform wrongdoers through reflection and labour. In place of overcrowded, violent and unhygienic mass jails, where inmates would gamble, drink and fight, the new penitentiary was designed to hold prisoners in individual cells, safe from the negative influences and violent predations of their fellows. Because vice spread like an infectious disease – or so they thought – isolation, contemplation and prayer would lead to true penitence and rehabilitation by bringing fallen men and women closer to God. To counteract the dangers of idleness, the inmates would be put to work, learning a craft from tradesmen who doubled as warders.

The penitentiary gave architectural expression to the emerging view that systems of bureaucratic organisation and control could impose order on the unruly reality of human behaviour. The cells were arranged along corridors radiating off a central chamber, allowing maximum supervision from a single, central vantage point. A technological marvel for its time, the prison had a central heating system, and each cell was equipped with running water and a toilet.

As Dan shows us through the dark and cramped spaces, illuminated only by a small skylight, he explains that each cell originally led onto an equally tiny exercise yard at the rear. Inmates were permitted in the yard twice a day, for two half-hour recreation breaks. The breaks were staggered, to stop prisoners communicating across the courtyard wall. The other twenty-three hours of each day were to be spent alone in the cell, working, studying the Bible and contemplating past sins.

Eastern State served as a model for hundreds of other prisons around the world. Social reformers came from far and wide, among them Charles Dickens, who toured the penitentiary in 1842. After interviewing inmates, however, Dickens went away horrified, recognising immediately that solitary confinement was more likely to lead to madness than to rehabilitation.
As Dickens wrote in *American Notes*, he found men “buried alive… dead to everything but torturing anxieties and horrible despair.” While acknowledging that the intention of the isolation system was “kind, humane, and meant for reformation,” he concluded that its effects were “cruel and wrong”:

> I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.

I came across a reference to Dickens’s thoughts on the Eastern State Penitentiary in a remarkable book, which looks a lot like a graphic novel, but is in fact a work of non-fiction. In *Race to Incarcerate: A Graphic Retelling*, artist Sabrina Jones has drawn the history of America’s corrections system from Eastern State Penitentiary onwards, although the focus of the book is the explosion in the prison population between 1970 and 2010. Using stark images and hard data, Jones shows that almost two centuries after building the world’s first “modern” prison, the United States is no closer to finding a humane and effective approach to questions of crime, punishment and rehabilitation.

When we meet in the Brooklyn apartment that doubles as her studio, Jones tells me that the idea for an illustrated account of such a serious and complex topic came from a prison inmate. “Our publisher, the New Press, gets grants to promote books to non-traditional audiences,” she says. “As part of their program they send books to prisoners.” One of the publications New Press sent to jails was *Race to Incarcerate*, a detailed critique of the US corrections system by leading prison researcher Marc Mauer, long-time executive director of the Washington-based research and advocacy organisation The Sentencing Project.

“All of Marc’s book ended up with a prisoner called Carnell Hunnicutt, who started drawing it up,” explains Jones, and this inspired New Press to commission her more comprehensive graphic retelling. (One of Hunnicutt’s images is included in the book as a coda.)

Jones sees her version of Mauer’s book as an advocacy tool and is excited to know that student activists have been using it in educational workshops. “Mass incarceration is an issue that needs to be brought into the public consciousness,” she says. “People – predominantly white people – are not aware of what a huge prison population we have in this country. If this book helps people resist a fear-mongering politician, then it’s done its job. If anybody wants to read it just for the art value, well that’s good too,” she adds.

Jones was no stranger to the issues when she took on the job of drawing *Race to Incarcerate*. Previously she had produced a set of comics highlighting the human and economic price of mass incarceration for The Real Costs of Prisons Project. “But everything I knew was second hand,” she says, so she joined a Quaker worship group that met weekly with a group of men at Arthur Kill Correctional Facility on Staten Island (since closed down). “It helped me at the drawing table,” says Jones. “Thinking about people I know helped me to put my heart into the work, so it became less abstract and not completely intellectual.”

Jones generally works in scratchboard style, scraping the surface of a clay-coated board to create an image that can be printed. “It’s good for creating large areas of dark, which lends itself to ominous subject matter,” she explains. To tell the personal story of Kemba Smith, however, she shifted to the softer medium of pencil. Smith was sentenced to 294 months in jail without parole at the age of twenty-four, when she was seven months pregnant. Her crime, if it can be called that, was to be involved with a violent and abusive boyfriend, who was a
major crack cocaine dealer.

“Her case history is exemplary of everything wrong with mandatory sentencing and the war on drugs,” says Jones. “Her tangential involvement in a crime had very high costs.” Smith did not sell or use drugs, though she sometimes “ran errands” for her boyfriend. At her trial, she pleaded guilty, admitting to the court that she knew she was living on his drug money. None of this helped reduce her sentence.

Smith was imprisoned and her son was taken from her at birth, to be raised by her parents. Yet in some respects she was fortunate because she came from an articulate, middle-class family. “Her parents had the resources to lobby for her,” says Jones. After a public campaign, Smith was eventually released in December 2000, having served seven years — about a quarter of her sentence. Her reprieve came only after intervention from the highest office in the land: Smith was pardoned, along with 175 other prisoners, in an act of clemency during Bill Clinton’s final days as president.

Thousands of other inmates continue to serve long jail sentences for relatively minor drug offences, even though it has long been recognised that the crack cocaine laws under which they were convicted were deeply unjust. Most, like Kemba Smith, are African-American.

“EVERY law not based on wisdom is a menace to the State.” These words, carved in stone below a statue outside the Appellate Division of the New York State Supreme Court in Manhattan, offer a remarkably prescient commentary on the perverse effects of the mandatory minimum sentences that have been a hallmark of the US war on drugs, and a major contributor to the explosion of the US prison population. According to Sentencing Project data, the total US prison population (in state, federal and local jails) grew by more than 500 per cent between 1972 and 2010, massively outstripping population growth. With 2.2 million people in jail, the United States has 730 prisoners for every 100,000 residents, by far the highest incarceration rate of any developed nation in the world. The closest competitors for this dubious title are Russia, with an incarceration rate of 500 per 100,000 people, and Iran, with a rate of 350 per 100,000. Australia’s incarceration rate is around 130 per 100,000 people.

With the expansion of the prison population has come an explosion in costs to an estimated $60 billion annually. From a purely financial perspective, mandatory sentencing appears to well and truly fit the criteria of being a menace to the state. The case is even stronger when considered from the perspective of justice.

When crack cocaine swept through American cities in the 1980s, the panicked response of lawmakers was tough penalties with minimum mandatory terms. Even though crack and powdered cocaine are the same drug in different forms, the quantity that triggered a mandatory jail term was one hundred times greater for one than for the other.

“Essentially, if you were selling 500 grams of powdered cocaine you’d get a five-year mandatory prison term,” explains the Sentencing Project’s Marc Mauer. “But for crack cocaine all it took was five grams to get that same five-year penalty.” The rationale was that crack supposedly led to much greater violence, but Mauer says there is now “a growing consensus” that “much of that argument was based on mythology.”

“It was sensationalised that crack made people more violent,” says Mauer. He argues that the violence associated with the drug was largely a function of its impact on an unstable market and had little to do with its pharmacological effect. “You had this new drug that made its appearance. You had young men and indeed young women with easy access to guns and you had these turf battles because there weren’t established markets set up already. In many ways this is very similar to what we’ve seen in the past when new drug markets are emerging.”

Since crack cocaine users were more likely to be poor and black, whereas powdered cocaine users were more likely to be affluent and white, the laws had a disproportionate impact on the already skewed racial makeup of the prison population. Overall, African Americans are no more likely to use illicit drugs than white Americans. In fact, with the exception of crack, survey evidence suggests that white Americans are more likely to have used most drugs, including marijuana, cocaine, hallucinogens (like LSD), stimulants (like methamphetamines) and inhalants (like glue). The proportion that have used heroin is equal in both communities. Yet while African
Americans make up less than 13 per cent of the US population, they account for 38 per cent of people in prison. In 2010, at the urging of the Obama administration, Congress passed the Fair Sentencing Act, which reduced the disparity between sentences for crack and powdered cocaine from 100-to-one to eighteen-to-one. Mauer welcomed the change, which he says has resulted in “a significant reduction in the number of crack offenders who get those mandatory penalties.” Yet he points out that “it is still far more likely that crack cocaine offenders will be punished more severely than powdered cocaine offenders.” And because “the legislation was silent on retroactivity,” he adds, it has failed to make significant inroads into the number of prisoners. As Yale legal scholar Linda Greenhouse wrote in the New York Times, there are still thousands of inmates in crack cocaine limbo, “serving time under sentences that would not have been imposed under the new law.”

In a bipartisan political effort to address deficiencies of the original law, Democrat Senator Dick Durbin from Illinois and Republican Senator Mike Lee of Utah have joined forces to draft follow-up legislation, which they call the Smarter Sentencing Act. “Mandatory minimum sentences for non-violent drug offences have played a huge role in the explosion of the US prison population,” said Durbin, announcing the bill. “Once seen as a strong deterrent, these mandatory sentences have too often been unfair, fiscally irresponsible and a threat to public safety.” Lee said that the “current scheme of mandatory minimum sentences is irrational and wasteful.” If it became law, the Act would give judges the discretion to review mandatory sentences handed down to non-violent drug offenders. Durbin argued that judges should no longer be bound to “outdated laws that have proven not to work and cost taxpayers billions.”

After six months of committee hearings, the Smarter Sentencing Act has been sent back to Congress for consideration and is given a better than even chance of eventually being passed into law. In the meantime, the only recourse for prisoners serving mandatory sentences under the old crack cocaine laws is to appeal for clemency from the White House. In December, Barack Obama commuted the sentences of just eight inmates. “President Obama has been the stingiest president in modern American history in using those powers, and it’s certainly not been for any lack of appropriate cases,” says Mauer. “One can only imagine that it’s just political considerations at the White House that have been holding him back.”

DESPITE the acknowledged failings of crack cocaine laws, Mauer says there is still a tendency to apply the same type of mandatory minimum penalties to methamphetamines and other drugs. Yet there is also growing resistance to a tough-on-crime approach, and it seems to cut across political divisions. Sabrina Jones notes that Republican candidate Joe Lhota “tried to use a TV commercial to fear monger about crime” during last year’s mayoral race in New York. “It just did not go over well, and looked tired and pathetic,” she says. Tour guide Dan says that when Eastern State Penitentiary organised for a liberal Democrat and a conservative Republican to debate the corrections system, the two politicians ended up agreeing on the urgent need to reduce the prison population, even though they reached their conclusions via completely different routes. “The liberal was concerned about racism and injustice,” says Dan. “The conservative was worried about the expense and the need to reduce costs.”

In fact, as the Sentencing Project has documented, the United States has recently begun “to experience a shift in the thirty-year buildup to a world record prison system,” with the number of inmates in state prisons declining for three years in a row. In some states, the fall has been pronounced. “If you look at New York State,” says Mauer, “it has reduced its prison population by about 20 per cent over the last decade and there has been no major uptick in crime as a result.”

While tough policing and harsh sentences can contribute to reductions in crime simply by taking offenders off the street, there is no direct correlation between imprisonment rates and crime rates. As Mauer points out, such rates are “all over the map across different states” in the United States. He rejects the conservative argument that the drop in crime since the mid 1990s is proof that locking up record numbers of people has been effective. “The best research today shows that on the optimistic side about 25 per cent of the reduction in crime is due to more incarceration,” he says, “but there are equally some studies that show it’s as little as ten per cent.”

Even if the upper estimate is closer to being correct, this is not evidence that incarcerating more offenders is the best way to reduce crime. “If you are going to spend a million dollars to reduce crime by building prisons or
investing in preschool programs or in substance abuse treatment, there is good research out there that shows that incarceration is less effective in achieving that than some of these other interventions are.”

Mauer says lower crime rates are explained by a complex combination of factors, including a decline in crack cocaine use. “People started turning away from that drug because of all the harm it was causing,” he says, “and that is similar to what we have seen in relation to other drug epidemics.” There is even research suggesting that falling crime rates are linked to declining lead pollution. “You have children growing up who are less exposed to lead and they are less likely to engage in violent behaviour as well.”

Despite being heartened by falling crime rates and the small overall decline in prison numbers, Mauer is conscious that corrections reform remains a monumental challenge. Even if every US state matched New York and prison populations fell by twenty per cent across the nation, the incarceration rate would still be around 580 per 100,000 people, or roughly four times the rate in most comparable liberal democracies.

So after engaging with criminal justice issues for about forty years, Mauer is not about to see a small fall in the US prison population as heralding a more fundamental recasting of the system. “One major item that should temper our excitement is that a disproportionate amount of this decline is due to changes in California,” he notes. In a landmark case, the US Supreme Court found in May 2011 that overcrowding in California’s prisons amounted to “cruel and unusual punishment,” and was therefore a violation of the Eighth Amendment of the US Constitution. State authorities have since scrambled to reduce prison numbers and the substantial decline in California’s prison population has had a major influence on national figures. “Last year roughly half the national decline was solely due to California,” says Mauer.

It is worth noting that the overcrowding problem in California was addressed partly by transferring thousands of prisoners from state-run prisons into county-run jails. County jails are generally used to hold prisoners serving sentences of less than a year and to detain people on remand who can’t afford to post bail. In some respects, says Mauer, conditions are worse than in state prisons: “Because the length of stay is relatively short for most people, there is very little in the way of programs for prisoners.” Administrators say prisoner turnover is too high and funding too low to warrant such spending. “The only significant advantage of a local jail is that you are probably kept closer to home, so in terms of family visits or access to your attorney it’s much better than being held in a state prison which could be hundreds of miles away.”

Despite this reservation, Mauer says the Supreme Court ruling has produced a welcome reduction in the overall number of people who are behind bars. Outside California, in states like New York, New Jersey and Michigan, a combination of other factors has helped reduce prison populations, including falling crime rates and changes in law enforcement, sentencing and parole policy.

Mauer says crime rates have been declining for about fifteen years, and that is slowly translating into reduced imprisonment. “It’s also true that governors are concerned with the fiscal costs of incarceration and there have been efforts made to try to reduce prison populations.” A number of states have brought forward the consideration of parole by two or three months, resulting in the early release of many prisoners, and some jurisdictions have implemented diversion programs as an alternative to jail, particularly for drug offenders and those with mental health issues. Mauer says there is “a growing consensus among practitioners and policy-makers that we need to be looking at where to draw the line on incarceration” – to determine, in other words, who needs to be locked up for reasons of public safety and who can be better supervised and worked with in a community setting.

Yet the improvements Mauer documents are creeping and patchy. “The federal system has been very resistant to change and in large part it’s still being driven by mandatory sentencing policy, so it’s difficult to see a shift at that level.”

AND DESPITE the falling crime rates, prison sentences have been getting longer. As a recent Sentencing Project report notes, “the number of prisoners serving life sentences continues to grow even while serious, violent crime has been declining for the past twenty years and little public safety benefit has been demonstrated
to correlate with increasingly lengthy sentences."

The “lifer” population in US prisons has more than quadrupled since 1984 and is approaching 160,000 people, of whom almost 50,000 aren’t eligible for parole. “Forty or fifty years ago, someone sentenced to life in most states would have had a chance of parole,” says Mauer. “In many states it would not have been unlikely that they would get out in fifteen to eighteen years, if they’d had relatively good behaviour.”

That shift, combined with a tightening up of parole board policies, means that a life sentence now increasingly means that an inmate will die in prison. Apart from the human cost to prisoners and their families, Mauer believes that such harsh sentences make little if any policy sense, even for violent offenders, since the propensity for violent crime seems to peak in young men in their late teens and early twenties and “for whatever set of reasons, hormonal or cultural or whatever” to decline fairly quickly after that.

“The paradox,” says Mauer, “is that the typical person who goes to prison is usually around age thirty, so in many cases they would already be on the declining risks years, and whether we keep them in five years or twenty-five years, generally speaking each succeeding year we are getting less public safety benefit.”

This is a statistical average that may not hold true for any given individual, of course. But as a policy, says Mauer, life without parole “definitely becomes very costly,” particularly as the cost of incarceration rises with age. “After the age of about fifty or so, especially in prison, your health really starts to decline. The estimates are that it is three times as costly to keep an elderly person in prison as on the streets and whatever public safety effect you get is subject to diminishing returns.”

Two Supreme Court decisions have put some limited boundaries on the use of life without parole, particularly for young offenders. In 2010, in *Graham v. Florida*, the Court concluded that it was unconstitutional to impose a sentence of life without parole for a felony committed by a juvenile (that is, someone under eighteen years of age) other than homicide. Two years later, the Court went further; in *Miller v. Alabama*, it found that sentencing a youth to life without parole for any crime, including homicide, amounted to “cruel and unusual punishment” if the penalty was mandatory and failed to consider the perpetrator’s age and other relevant factors.

But just as the reform of crack cocaine laws fails to offer any redress for those imprisoned under the old legal regime, it isn’t clear that the Supreme Court ruling in Miller and Graham will benefit prisoners already sentenced to live without parole for crimes they committed as juveniles. “It’s surprising to those of us who are not lawyers that the court should be silent on the issue of retroactivity,” says Mauer, “and it would not be unlikely that this issue will come back to the Supreme Court.”

While the question is batted back and forth between jurisdictions in different states, 2600 people are serving sentences of life without parole for crimes committed as a juvenile. “If you look at the entire rest of the world there is not a single identified case of anybody serving a sentence like that,” says Mauer. “So either we have the worst kids in the whole world, or else our policies are way out of line with those of any other nation.”

TO MAUER, it is abundantly clear that mandatory sentencing and life without parole are failed experiments, just like the reform-through-solitude experiment that so shocked Charles Dickens 160 years ago. In the end, the implementation of solitary confinement at Eastern State Penitentiary was short-lived, collapsing under the weight of its own contradictions – not just because it failed to reduce recidivism, as Dickens foresaw, but also because a rapid rise in the prison population resulted in escalating and ultimately unsustainable costs. By the early twentieth century, a penitentiary originally designed for 250 inmates was attempting to accommodate close to 2000, not least because of the impact of prohibition laws. (Al Capone was one of Eastern State’s most famous inmates.) No longer a tool for rehabilitation, isolation became a punishment for misbehaviour.

Perhaps the unsustainable fiscal impact of mandatory detention and mass incarceration on state and federal budgets will eventually lead to a policy overhaul in the twenty-first century. But resistance to change is entrenched and powerful, and significant vested interests stand to benefit from the continuation of the prison–industrial complex – not just the private corrections companies that benefit from keeping inmate numbers high, but also the various contractors servicing state and federal prison facilities, and the unions who represent staff. When the decline in inmate numbers made it possible to close some state prisons in New York, a backlash came
from nearby communities that feared a loss of local jobs and a decline in economic activity. These protests prompted governor Andrew Cuomo to point out in his 2011 address to the state legislature that “an incarceration program is not an employment program.”

“The fundamental problem,” writes Marc Mauer in his introduction to Sabrina Jones’s retelling of Race to Incarcerate, “is that we have come to rely on the criminal justice system as our primary approach to social problems, particularly in low-income communities of colour.”

“How do you change this?” I ask him. “What would a decent criminal justice system look like?”

“It would start with a more balanced approach to public safety,” responds Mauer. “How do we solve problems at home and in the schools rather than referring kids to the juvenile justice system, which is sort of an automatic ticket to adult prison for many kids? By increasing economic opportunity, increasing educational attainment. Those are really excellent crime-prevention tools.”

He talks about restorative justice and justice reinvestment, about giving the criminal justice system a more problem-solving orientation. “How do we use the opportunity when someone is charged with an offence, to try to get at the underlying dynamics or the contributing factors that have produced this criminal event?” he asks. “Imprisonment should come as a last resort and not as a first option.”

Sabrina Jones agrees. Her most recent publication, Radical Jesus, is another graphic retelling, using images to convey core messages from the Gospel. “It challenges us with questions about who is one of us,” she says, “and this is also the core issue behind our high rate of incarceration.”

“Harsh, punitive attitudes always come into play when we think of the criminal as someone from another race or culture. Only when we expand our notion of who we are, are we going to extend the same forgiveness and compassion to others that we would want for those closest to us.”

At the end of our tour of Eastern State, our guide Dan sits us down in the small penitentiary synagogue, the first dedicated place of Jewish worship in an American prison. He then hands around some laminated sheets, detailing the hard facts of the contemporary corrections system, including the dramatic increase in inmate numbers and the dramatic explosion in costs since the 1970s. “To understand what is going on in the US prison system today we need to understand what has gone on before,” he says. “We can learn from this building.”

As we walk back towards the exit, Dan tells me that he often puts a question to his American visitors. “Why do you think it is,” he asks them, “that we imprison so many more people per head of population than comparable countries like Canada or the United Kingdom or Australia?” The most frequent response he hears is that it is because Americans have more freedom than the citizens of other countries. Dan shakes his head sadly. “It just does not make sense” he says, “but they can’t see it.” •