

Chicago Daily Law Bulletin®

Volume 163, No. 64

Serving Chicago's legal community for 162 years

New book brings new solution to solving prison overcrowding issue

The United States not only has the most prisoners of any country in the world, but the highest incarceration rate as well. With 5 percent of the world's population, the U.S. has 25 percent of all prisoners, somewhere around 2.2 million.

There are three widely accepted reasons for this situation.

First, the War on Drugs has imprisoned far too many people. We could drastically reduce our national prison population by simply releasing hundreds of thousands of low-level drug offenders.

Second, the dramatic increase in the length of sentences has driven the prison population to new highs.

Third, both of these trends have been driven by the rise of private prisons in America. These profit-driven prisons comprise a "prison industrial complex" that views more prisoners as simply more corporate earnings.

Right?

John F. Pfaff, a law professor at Fordham, says "Wrong." He refers to these three reasons as "The Standard Story," and he argues that by erroneously attributing the prison crisis to them we are failing to confront the problems that actually need to be addressed. He discusses this in his new book "Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform" (Basic, 2017).

First, Pfaff looks at prisoners serving time for drugs. What percentage of prisoners do you think are serving time for drug offenses? 30 percent? 40 percent? 50 percent? Actually it's more like 16 percent. Fully five out of six prisoners are in for nondrug offenses; over half of all state inmates are in prison for violent crimes.

But of the 200,000 state prisoners serving time for drug offenses, aren't most of them low level, nonviolent, first — or second — time drug offenders who could safely be released? Pfaff notes a study of state prisoners that concluded that only about 6 percent of drug prisoners fit this definition. Many of the others were more than mere users and had

records indicating that they were not as nonviolent as their drug offense suggested.

And even if we released every person in prison on a drug charge, the state prison population would merely be back to the 1997 level, which was well into the "mass incarceration" period. Pfaff concludes that the effect of drug incarcerations, although not trivial, is nonetheless vastly overstated.

Pfaff then contends that the argument that the increase in draconian sentences is driving the incarceration rate is likewise overstated. Although conceding some increase in long sentences in the federal system, he notes that "In many states, half of all inmates admitted in a given year are released in one to two years, and three-fourths of them are out within about three."

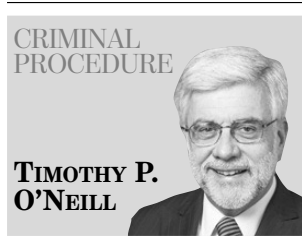
He concedes that legislators like to approve longer and longer sentences as an easy way to show they are "tough on crime." But the primary result of this has been to make it easier for prosecutors to obtain plea bargains for lesser sentences. Reduced to a nutshell, Pfaff says statistics show that "people aren't really spending more time in prison, just that more people are spending [some] time in prison."

Pfaff adds that the "graying" of the prison population is less a result of longer sentences than of an increase of older people being convicted of crimes.

Pfaff finally asserts that the power of the private prison industry has been blown out of proportion. Nationally, private prisons house only about 8 percent of the prisoner population. He points to the public sector as the real source of power behind prison policy.

Increasing the number of prisons and staffing is something sought by correctional officer organizations, impoverished rural communities and legislators who do not want to appear soft on crime.

After downplaying the three strands of the "Standard Story," Pfaff then turns to what he considers the major cause of the



Timothy P. O'Neill is the Edward T. and Noble W. Lee Chair in Constitutional Law for 2014-15 at The John Marshall Law School in Chicago. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

national shame of mass incarceration in America. He says that the people we should be looking at are "almost completely ignored by reformers ... They are essentially invisible." They are America's county prosecutors.

He offers a few statistics. From 1990 to 2007, violent and property crime rates both fell by 35 percent; yet during this time the number of line prosecutors increased by almost 50 percent. Even though the number of arrests declined, the number of felony filings rose. If you think that more prosecutors would probably result in more prosecutions, you would be right.

Pfaff identifies one of the major problems as economic: "There's

probation and jail come from the county budget. But since the state pays for felony jail time, "severity is practically free."

Pfaff contends that to effectively cut prison populations we need to regulate prosecutorial power. And this is difficult because prosecutorial decisions have traditionally been made within a "black box."

Pfaff notes that New Jersey has attempted to deal with this situation in a unique fashion. Over concern that county prosecutors appeared to be acting arbitrarily in pleading out serious drug cases, the state Supreme Court ordered the state attorney general to issue guidelines for prosecutors. This resulted in the issuance of a manual more than 100 pages long that brings structure and uniformity to this area of plea bargaining.

Another example is a program that has been adopted in similar forms in both California and Indiana. It addresses the "free riding" problem of county prosecutors expecting the state to pay for the prison costs of every convicted felon they produce.

This program forces the counties not the states to house and pay for certain categories of low-level felons. The expectation is that county prosecutors might think twice about bringing felony charges when misdemeanor terms or fines might suffice.

Yet another suggestion Pfaff makes deals with the importance of an elected prosecutor being perceived as a real part of the community she serves.

Where a county has a large urban area ringed by suburbs, Pfaff floats the concept of a county having separate prosecutors elected to serve the city and suburbs, respectively.

Pfaff makes many more recommendations, well beyond the scope of a single column.

"Locked In" is a provocative book that will attract critics as well as admirers. It is a solid contribution to a serious national debate.

(Author and law professor John F.) Pfaff contends that to effectively cut prison populations we need to regulate prosecutorial power.

no real financial limit on prosecutors' ability to send people to prison." Prosecutors are county employees. Yet law enforcement is primarily funded by cities and prisons are funded by states.

Thus, a prosecutor's decision to approve felony charges is essentially cost-free because prison beds are provided "free" by the state. In fact, Pfaff notes the irony that a prosecutor's choosing leniency actually does come with a cost because funds for misdemeanor