

Rough justice in America

Too many laws, too many prisoners

Never in the civilised world have so many been locked up for so little

The Economist, Jul 22nd 2010 | *Spring, Texas*

THREE pickup trucks pulled up outside George Norris's home in Spring, Texas. Six armed police in flak jackets jumped out. Thinking they must have come to the wrong place, Mr Norris opened his front door, and was startled to be shoved against a wall and frisked for weapons. He was forced into a chair for four hours while officers ransacked his house. They pulled out drawers, rifled through papers, dumped things on the floor and eventually loaded 37 boxes of Mr Norris's possessions onto their pickups. They refused to tell him what he had done wrong. "It wasn't fun, I can tell you that," he recalls.

Mr Norris was 65 years old at the time, and a collector of orchids. He eventually discovered that he was suspected of smuggling the flowers into America, an offence under the Convention on International Trade in Endangered Species. This came as a shock. He did indeed import flowers and sell them to other orchid-lovers. And it was true that his suppliers in Latin America were sometimes sloppy about their paperwork. In a shipment of many similar-looking plants, it was rare for each permit to match each orchid precisely.

In March 2004, five months after the raid, Mr Norris was indicted, handcuffed and thrown into a cell with a suspected murderer and two suspected drug-dealers. When told why he was there, "they thought it hilarious." One asked: "What do you do with these things? Smoke 'em?"

Prosecutors described Mr Norris as the "kingpin" of an international smuggling ring. He was dumbfounded: his annual profits were never more than about \$20,000. When prosecutors suggested that he should inform on other smugglers in return for a lighter sentence, he refused, insisting he knew nothing beyond hearsay.

He pleaded innocent. But an undercover federal agent had ordered some orchids from him, a few of which arrived without the correct papers. For this, he was charged with making a false statement to a government official, a federal crime punishable by up to five years in prison. Since he had communicated with his suppliers, he was charged with conspiracy, which also carries a potential five-year term.

As his legal bills exploded, Mr Norris reluctantly changed his plea to guilty, though he still protests his innocence. He was sentenced to 17 months in prison. After some time, he was released while his appeal was heard, but then put back inside. His health suffered: he has Parkinson's disease, which was not helped by the strain of imprisonment. For bringing some prescription sleeping pills into prison, he was put in

solitary confinement for 71 days. The prison was so crowded, however, that even in solitary he had two room-mates.

A long love affair with lock and key



Justice is harsher in America than in any other rich country. Between 2.3m and 2.4m Americans are behind bars, roughly one in every 100 adults. If those on parole or probation are included, one adult in 31 is under “correctional” supervision. As a proportion of its total population, America incarcerates five times more people than Britain, nine times more than Germany and 12 times more than Japan. Overcrowding is the norm. Federal prisons house 60% more inmates than they were designed for. State lock-ups are only slightly less stuffed.

The system has three big flaws, say criminologists. First, it puts too many people away for too long. Second, it criminalises acts that need not be criminalised. Third, it is unpredictable. Many laws, especially federal ones, are so vaguely written that people cannot easily tell whether they have broken them.

In 1970 the proportion of Americans behind bars was below one in 400, compared with today’s one in 100. Since then, the voters, alarmed at a surge in violent crime, have demanded fiercer sentences. Politicians have obliged. New laws have removed from judges much of their discretion to set a sentence that takes full account of the circumstances of the offence. Since no politician wants to be tarred as soft on crime, such laws, mandating minimum sentences, are seldom softened. On the contrary, they tend to get harder.



Some criminals belong behind bars. When a habitual rapist is locked up, the streets are safer. But the same is not necessarily true of petty drug-dealers, whose incarceration creates a vacancy for someone else to fill, argues Alfred Blumstein of Carnegie Mellon University. The number of drug offenders in federal and state lock-ups has increased 13-fold since 1980. Some are scary thugs; many are not.

Michelle Collette of Hanover, Massachusetts, sold Percocet, a prescription painkiller. “I was planning to do it just once,” she says, “but the money was so easy. And I thought: it’s not heroin.” Then she became addicted to her own wares. She was unhappy with her boyfriend, she explains, but did not want to split up with him, because she did not want their child to grow up fatherless, as she had. So she popped pills to numb the misery. Before long, she was taking 20-30 a day.

When Ms Collette and her boyfriend, who also sold drugs, were arrested in a dawn raid, the police found 607 pills and \$901 in cash. The boyfriend fought the charges and got 15 years in prison. In a plea bargain Ms Collette was sentenced to seven years, of which she served six.

“I don’t think this is fair,” said the judge. “I don’t think this is what our laws are meant to do. It’s going to cost upwards of \$50,000 a year to have you in state prison. Had I the authority, I would send you to jail for no more than one year...and a [treatment] programme after that.” But mandatory sentencing laws gave him no choice.

Massachusetts is a liberal state, but its drug laws are anything but. It treats opium-derived painkillers such as Percocet like hard drugs, if illicitly sold. Possession of a tiny amount (14-28 grams, or ½-1 ounce) yields a minimum sentence of three years. For 200 grams, it is 15 years, more than the minimum for armed rape. And the weight of the other substances with which a dealer mixes his drugs is included in the total, so 10 grams of opiates mixed with 190 grams of flour gets you 15 years.

Ms Collette underwent drug treatment before being locked up, and is now clean. But in prison she found she was pregnant. After going through labour shackled to a hospital bed, she was allowed only 48 hours to bond with her newborn son. She was released in

March, found a job in a shop, and is hoping that her son will get used to having her around.

Rigid sentencing laws shift power from judges to prosecutors, complains Barbara Dougan of Families Against Mandatory Minimums, a pressure-group. Even the smallest dealer often has enough to trigger a colossal sentence. Prosecutors may charge him with selling a smaller amount if he agrees to “reel some other poor slob in”, as Ms Dougan puts it. He is told to persuade another dealer to sell him just enough drugs to trigger a 15-year sentence, and perhaps to do the deal near a school, which adds another two years.

Severe drug laws have unintended consequences. Less than half of American cancer patients receive adequate painkillers, according to the American Pain Foundation, another pressure-group. One reason is that doctors are terrified of being accused of drug-trafficking if they over-prescribe. In 2004 William Hurwitz, a doctor specialising in the control of pain, was sentenced to 25 years in prison for prescribing pills that a few patients then resold on the black market. Virginia’s board of medicine ruled that he had acted in good faith, but he still served nearly four years.

Half the states have laws that lock up habitual offenders for life. In some states this applies only to violent criminals, but in others it applies even to petty ones. Some 3,700 people who committed neither violent nor serious crimes are serving life sentences under California’s “three strikes and you’re out” law. In Alabama a petty thief called Jerald Sanders was given a life term for pinching a bicycle. Alabama’s judges are elected, as are those in 32 other states. This makes them mindful of public opinion: some appear in campaign advertisements waving guns and bragging about how tough they are.

Many Americans assume that white-collar criminals get off lightly, but many do not. Granted, they may be hard to catch and can often afford good lawyers. But federal prosecutors can file many charges for what is essentially one offence. For example, they can count each e-mail sent by a white-collar criminal in the course of his criminal activity as a separate case of wire fraud, each of which carries a maximum sentence of 20 years. The decades soon add up. Sentences depend partly on the size of the loss and the number of people affected, so if you work for a big, publicly traded company, you break a rule and the share-price drops, watch out.

Eternal punishment

Jim Felman, a defence lawyer in Tampa, Florida, says America is conducting “an experiment in imprisoning first-time non-violent offenders for periods of time previously reserved only for those who had killed someone”. One of Mr Felman’s clients, a fraudster called Sholam Weiss, was sentenced to 845 years. “I got it reduced to 835,” sighs Mr Felman. Faced with such penalties, he says, the incentive to co-operate, which means to say things that are helpful to the prosecution, is overwhelming. And this, he believes, “warps the truth-seeking function” of justice.

Innocent defendants may plead guilty in return for a shorter sentence to avoid the risk of a much longer one. A prosecutor can credibly threaten a middle-aged man that he will die in a cell unless he gives evidence against his boss. This is unfair, complains Harvey

Silverglate, the author of “Three Felonies a Day: How the Feds Target the Innocent”. If a defence lawyer offers a witness money to testify that his client is innocent, that is bribery. But a prosecutor can legally offer something of far greater value—his freedom—to a witness who says the opposite. The potential for wrongful convictions is obvious.

Badly drafted laws create traps for the unwary. In 2006 Georgia Thompson, a civil servant in Wisconsin, was sentenced to 18 months in prison for depriving the public of “the intangible right of honest services”. Her crime was to award a contract (for travel services) to the best bidder. A firm called Adelman Travel scored the most points (on an official scale) for price and quality, so Ms Thompson picked it. She ignored a rule that required her to penalise Adelman for a slapdash presentation when bidding. For this act of common sense, she served four months. (An appeals court freed her.)

The “honest services” statute, if taken seriously, “would seemingly cover a salaried employee’s phoning in sick to go to a ball game,” fumes Antonin Scalia, a Supreme Court justice. The Supreme Court ruled recently that the statute was so vague as to be unconstitutional. It did not strike it down completely, but said it should be applied only in cases involving bribery or kickbacks. The challenge was brought by Enron’s former boss, Jeff Skilling, who will not go free despite his victory, and Conrad Black, a media magnate released this week on bail pending an appeal, who may.

There are over 4,000 federal crimes, and many times that number of regulations that carry criminal penalties. When analysts at the Congressional Research Service tried to count the number of separate offences on the books, they were forced to give up, exhausted. Rules concerning corporate governance or the environment are often impossible to understand, yet breaking them can land you in prison. In many criminal cases, the common-law requirement that a defendant must have a *mens rea* (ie, he must or should know that he is doing wrong) has been weakened or erased.

“The founders viewed the criminal sanction as a last resort, reserved for serious offences, clearly defined, so ordinary citizens would know whether they were violating the law. Yet over the last 40 years, an unholy alliance of big-business-hating liberals and tough-on-crime conservatives has made criminalisation the first line of attack—a way to demonstrate seriousness about the social problem of the month, whether it’s corporate scandals or e-mail spam,” writes Gene Healy, a libertarian scholar. “You can serve federal time for interstate transport of water hyacinths, trafficking in unlicensed dentures, or misappropriating the likeness of Woodsy Owl.”

“You’re (probably) a federal criminal,” declares Alex Kozinski, an appeals-court judge, in a provocative essay of that title. Making a false statement to a federal official is an offence. So is lying to someone who then repeats your lie to a federal official. Failing to prevent your employees from breaking regulations you have never heard of can be a crime. A boss got six months in prison because one of his workers accidentally broke a pipe, causing oil to spill into a river. “It didn’t matter that he had no reason to learn about the [Clean Water Act’s] labyrinth of regulations, since he was merely a railroad-construction supervisor,” laments Judge Kozinski.

Such cases account for only a tiny share of the Americans behind bars, but they still matter. When so many people are technically breaking the law, it is up to prosecutors to

decide whom to pursue. No doubt most prosecutors choose wisely. But members of unpopular groups may not find that reassuring. Ms Thompson, for example, was prosecuted just before an election, at a time when allegations of public corruption in Wisconsin were in the news. Some prosecutors, such as Eliot Spitzer, the disgraced ex-governor of New York, have built political careers by nailing people whom voters don't like, such as financiers.

Prison deters? Not much, not the worst

Some people argue that the system works: that crime has fallen in the past two decades because the bad guys are either in prison or scared of being sent there. Caged thugs cannot break into your home. Bernie Madoff's 150-year sentence for running a Ponzi scam should deter imitators. And indeed the crime rate continues to drop, despite the recession, as Michael Rushford of the Criminal Justice Legal Foundation, an advocacy group, points out. This, he says, is because habitual criminals face serious consequences. Some research supports him: after raking through decades of historical data, John Donohue of Yale Law School estimates that a 10% increase in imprisonment brings a 2% reduction in crime.

Others disagree. Using more recent data, Bert Useem of Purdue University and Anne Piehl of Rutgers University estimate that a 10% increase in the number of people behind bars would reduce crime by only 0.5%. In the states that currently lock up the most people, imprisoning more would actually increase crime, they believe. Some inmates emerge from prison as more accomplished criminals. And raising the incarceration rate means locking up people who are, on average, less dangerous than the ones already behind bars. A recent study found that, over the past 13 years, the proportion of new prisoners in Florida who had committed violent crimes fell by 28%, whereas those inside for "other" crimes shot up by 189%. These "other" crimes were non-violent ones involving neither drugs nor theft, such as driving with a suspended licence.

And now the reckoning, in dollars

Crime is a young man's game. Muggers over 30 are rare. Ex-cons who go straight for a few years generally stay that way: a study of 88,000 criminals by Mr Blumstein found that if someone was arrested for aggravated assault at the age of 18 but then managed to stay out of trouble until the age of 22, the risk of his offending was no greater than that for the general population. Yet America's prisons are crammed with old folk. Nearly 200,000 prisoners are over 50. Most would pose little threat if released. And since people age faster in prison than outside, their medical costs are vast. Human Rights Watch, a lobby-group, talks of "nursing homes with razor wire".

Jail is expensive. Spending per prisoner ranges from \$18,000 a year in Mississippi to about \$50,000 in California, where the cost per pupil is but a seventh of that. "[W]e are well past the point of diminishing returns," says a report by the Pew Center on the States. In Washington state, for example, each dollar invested in new prison places in 1980 averted more than nine dollars of criminal harm (using a somewhat arbitrary scale to assign a value to not being beaten up). By 2001, as the emphasis shifted from violent criminals to drug-dealers and thieves, the cost-benefit ratio reversed. Each new dollar spent on prisons averted only 37 cents' worth of harm.

Since the recession threw their budgets into turmoil, many states have decided to imprison fewer people, largely to save money. Mississippi has reduced the proportion of their sentences that non-violent offenders are required to serve from 85% to 25%. Texas is making greater use of non-custodial penalties. New York has repealed most mandatory minimum terms for drug offences. In all, the number of prisoners in state lock-ups fell by 0.3% in 2009, the first fall since 1972. But the total number of Americans behind bars still rose slightly, because the number of federal prisoners climbed by 3.4%.

A less punitive system could work better, argues Mark Kleiman of the University of California, Los Angeles. Swift and certain penalties deter more than harsh ones. Money spent on prisons cannot be spent on more cost-effective methods of crime-prevention, such as better policing, drug treatment or probation. The pain that punishment inflicts on criminals themselves, on their families and on their communities should also be taken into account.

“Just by making effective use of things we already know how to do, we could reasonably expect to have half as much crime and half as many people behind bars ten years from now,” says Mr Kleiman. “There are a thousand excuses for failing to make that effort, but not one good reason.”

Crime and punishment in America

Rough justice

America locks up too many people, some for acts that should not even be criminal

The Economist, Jul 22nd 2010

IN 2000 four Americans were charged with importing lobster tails in plastic bags rather than cardboard boxes, in violation of a Honduran regulation that Honduras no longer enforces. They had fallen foul of the Lacey Act, which bars Americans from breaking foreign rules when hunting or fishing. The original intent was to prevent Americans from, say, poaching elephants in Kenya. But it has been interpreted to mean that they must abide by every footling wildlife regulation on Earth. The lobstermen had no idea they were breaking the law. Yet three of them got eight years apiece. Two are still in jail.

America is different from the rest of the world in lots of ways, many of them good. One of the bad ones is its willingness to lock up its citizens (see our [briefing](#)). One American adult in 100 festers behind bars (with the rate rising to one in nine for young black men). Its imprisoned population, at 2.3m, exceeds that of 15 of its states. No other rich country is nearly as punitive as the Land of the Free. The rate of incarceration is a fifth of America's level in Britain, a ninth in Germany and a twelfth in Japan.

Tougher than thou

Some parts of America have long taken a tough, frontier attitude to justice. That tendency sharpened around four decades ago as rising crime became an emotive political issue and voters took to backing politicians who promised to stamp on it. This created a ratchet effect: lawmakers who wish to sound tough must propose laws tougher than the ones that the last chap who wanted to sound tough proposed. When the crime rate falls, tough sentences are hailed as the cause, even when demography or other factors may matter more; when the rate rises tough sentences are demanded to solve the problem. As a result, America's incarceration rate has quadrupled since 1970.

Similar things have happened elsewhere. The incarceration rate in Britain has more than doubled, and that in Japan increased by half, over the period. But the trend has been sharper in America than in most of the rich world, and the disparity has grown. It is explained neither by a difference in criminality (the English are slightly more criminal than Americans, though less murderous), nor by the success of the policy: America's violent-crime rate is higher than it was 40 years ago.

Conservatives and liberals will always feud about the right level of punishment. Most Americans think that dangerous criminals, which statistically usually means young men, should go to prison for long periods of time, especially for violent offences. Even by that standard, the extreme toughness of American laws, especially the ever broader classes of "criminals" affected by them, seems increasingly counterproductive.

Many states have mandatory minimum sentences, which remove judges' discretion to show mercy, even when the circumstances of a case cry out for it. "Three strikes" laws, which were at first used to put away persistently violent criminals for life, have in several states been applied to lesser offenders. The war on drugs has led to harsh sentences not just for dealing illegal drugs, but also for selling prescription drugs illegally. Peddling a handful can lead to a 15-year sentence.

Muddle plays a large role. America imprisons people for technical violations of immigration laws, environmental standards and arcane business rules. So many federal rules carry criminal penalties that experts struggle to count them. Many are incomprehensible. Few are ever repealed, though the Supreme Court recently pared back a law against depriving the public of "the intangible right of honest services", which prosecutors loved because they could use it against almost anyone. Still, they have plenty of other weapons. By counting each e-mail sent by a white-collar wrongdoer as a separate case of wire fraud, prosecutors can threaten him with a gargantuan sentence unless he confesses, or informs on his boss. The potential for injustice is obvious.

As a result American prisons are now packed not only with thugs and rapists but also with petty thieves, small-time drug dealers and criminals who, though scary when they were young and strong, are now too grey and arthritic to pose a threat. Some 200,000 inmates are over 50—roughly as many as there were prisoners of all ages in 1970. Prison is an excellent way to keep dangerous criminals off the streets, but the more people you lock up, the less dangerous each extra prisoner is likely to be. And since prison is expensive—\$50,000 per inmate per year in California—the cost of imprisoning criminals often far exceeds the benefits, in terms of crimes averted.

Less punishment, less crime

It does not have to be this way. In the Netherlands, where the use of non-custodial sentences has grown, the prison population and the crime rate have both been falling (see [article](#)). Britain's new government is proposing to replace jail for lesser offenders with community work. Some parts of America are bucking the national trend. New York cut its incarceration rate by 15% between 1997 and 2007, while reducing violent crime by 40%. This is welcome, but deeper reforms are required.

America needs fewer and clearer laws, so that citizens do not need a law degree to stay out of jail. Acts that can be regulated should not be criminalised. Prosecutors' powers should be clipped: most white-collar suspects are not Al Capone, and should not be treated as if they were. Mandatory minimum sentencing laws should be repealed, or replaced with guidelines. The most dangerous criminals must be locked up, but states could try harder to reintegrate the softer cases into society, by encouraging them to study or work and by ending the pointlessly vindictive gesture of not letting them vote.

It seems odd that a country that rejoices in limiting the power of the state should give so many draconian powers to its government, yet for the past 40 years American lawmakers have generally regarded selling to voters the idea of locking up fewer people as political suicide. An era of budgetary constraint, however, is as good a time as any to try. Sooner or later American voters will realise that their incarceration policies are unjust and inefficient; politicians who point that out to them now may, in the end, get some credit.