

The Caging of America. Why do we lock up so many people?

By Adam Gopnik (Edited)
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Six million people are under correctional supervision in the U.S.— more than were in Stalin's gulags.

"Sometimes I think this whole world is one big prison yard. Some of us are prisoners, some of us are guards," [Bob] Dylan sings, and while it isn't strictly true, it contains a truth: the guards are doing time, too. For American prisoners, huge numbers of whom are serving sentences much longer than those given for similar crimes anywhere else in the civilized world—Texas alone has sentenced more than four hundred teen-agers to life imprisonment—time becomes in every sense this thing you serve.

For a great many poor people, particularly poor black men—(editor's note: brown men too) prison is a destination that braids through an ordinary life, much as high school and college do for rich white ones. More than half of all black men without a high-school diploma go to prison at some time in their lives. Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps *the* fundamental fact, as slavery was the fundamental fact of 1850. In truth, there are more black men in the grip of the criminal-justice system—in prison, on probation, or on parole—than were in slavery then. Over all, there are now more people under "correctional supervision" in America—more than six million—than were in the Gulag Archipelago under Stalin at its height. That city of the confined and the controlled, Lockuptown, is now the

second largest in the United States.

In 1980, there were about two hundred and twenty people incarcerated for every hundred thousand people; by 2010, the number had more than tripled, to seven hundred and thirty-one. No other country even approaches that. In the past two decades, the money that states spend on prisons has risen at six times the rate of spending on higher education.

The scale and the brutality of our prisons are the moral scandal of American life. Every day, at least fifty thousand men—a full house at Yankee Stadium—wake in solitary confinement, often in "supermax" prisons or prison wings, in which men are locked in small cells, where they see no one, cannot freely read and write, and are allowed out just once a day for an hour's solo "exercise." (Lock yourself in your bathroom and then imagine you have to stay there for the next ten years, and you will have some sense of the experience.)

How is it that our civilization, which rejects hanging and flogging and disembowelling, came to believe that caging vast numbers of people for decades is an acceptably humane sanction?

William J. Stuntz, a professor at Harvard Law School says that his search for the ultimate cause of the scandal of our prisons leads all the way to the Bill of Rights. The trouble with the Bill of Rights, he argues, is that it emphasizes process and procedure rather than principles. The Declaration of the Rights of Man says, Be just! The Bill of Rights says, Be fair! Instead of announcing general principles—no one should be accused of something that wasn't a crime when he did it; cruel punishments are always wrong; the goal of justice is, above all, that justice be done—it talks procedurally. You can't search someone without a reason; you can't accuse him without allowing him to see the evidence; and so on. This emphasis, Stuntz thinks, has led to the current mess, where accused criminals get laboriously articulated protection against procedural errors and no

protection at all against outrageous and obvious violations of simple justice. You can get off if the cops looked in the wrong car with the wrong warrant when they found your joint, but you have no recourse if owning the joint gets you locked up for life. (Editor's note: we see that in appellate decisions where the Court will write at length about some esoteric point of law while glossing over entirely the harshness of the sentence the defendant received.) You may be spared the death penalty if you can show a problem with your appointed defender, but it is much harder if there is merely enormous accumulated evidence that you weren't guilty in the first place and the jury got it wrong. Even clauses that Americans are taught to revere are unworthy of reverence: the ban on "cruel and unusual punishment" was designed, when it was created, to *protect* cruel punishments—flogging and branding—that were not at that time unusual.

The more professionalized and procedural a system is, the more insulated we become from its real effects on real people. That's why America is famous both for its process-driven judicial system ("The bastard got off on a technicality," the cop-show detective fumes) and for the harshness and inhumanity of its prisons.

Once the procedure ends, the penalty begins, and, as long as the cruelty is routine, our civil responsibility toward the punished is over. We lock men up and forget about their existence. "Don't take it personally!"—that remains the slogan.

In place of abstraction, Stuntz argues for the saving grace of humane discretion. Basically, he thinks, we should go into court with an understanding of what a crime is and what justice is like, and then let common sense and compassion and specific circumstance take over. There's a lovely scene in "The Castle," an Australian movie about a family fighting eminent-domain eviction, where its hapless lawyer, asked in court to point to the specific part of the Australian constitution that the eviction violates, says desperately, "It's . . . just the *vibe* of the thing." Justice ought to be just the *vibe* of the thing—not one procedural error caught or one fact worked around. The criminal law should once again be more like the common law, with judges and juries not merely finding fact but making law on the basis of universal principles of fairness, circumstance, and seriousness, and crafting penalties to the exigencies of the crime."

“The life of the law is experience.”

By David Zapp

“You’re never better than your evidence”

By David Zapp

There once was a case where a defense lawyer was incredibly aggressive, and impressively aggressive. He filed every conceivable motion available to him and he would always ask permission to file a motion to exceed the page limit letting the judge know he had plenty to say. Every motion was then argued aggressively always with a hint of snarkiness and thinly veiled suggestions that the government was not playing by the rules. The lawyer in the case did not just ask for suppression of evidence. He asked for dismissal of the indictment, a rare motion that is hardly ever granted. In federal court if you have a problem with the indictment, the response is almost always the same: take it to trial.

In researching this defense lawyer I learned from the web that his firm’s mission was to be hard-nosed like that. They were litigators. They didn’t take repeat business. They were the equivalent of legal hit men. They liked to rumble. They never talked. They snarled.

But in the end after all the lawyer’s vitriol-laced motions were denied, their man pled guilty: Why? “Because you’re never better than your evidence.” Remember that.

Question & Answer

Is it worthwhile filing motions you know you are going to lose?

David Zapp: If you find yourself against an adversary that knows he is going to have to go fifteen rounds with you before he wins, he may want to strike a deal. Even if he knows he could beat you up, he does not want to go those 15 rounds. But by in large preserving your integrity is the way to go.

So said a famous judge in the U.S. Whose experience? Your experience. My experience. The more experience the more you can predict legal outcomes. Take for example the legal requirement in a narcotics importation conspiracy that the government must prove that the defendant know—not just believe—that the drugs were going to the U.S. A defense that the drugs shipped to Guatemala were not necessarily going to the United States will probably lose absent an affirmative showing, using official reports and expert testimony that the drugs following that central American route *could* go to other countries as well. Why? Because *experience* tells us that drugs following the Central American route will end up in the U.S. If you cannot actually—not theoretically-- show otherwise you will lose. Knowledge of the route itself would be the circumstantial evidence that the defendant knew the drugs were destined for the U.S.

That said, too often defense attorneys, prosecutors, and agents assume that everyone knows that drugs shipped from Colombia are going to the U.S. and that is careless thinking. What about drugs shipped from Colombia to parts unknown? That is a different story, because there is no route allowing *experience* to conclude that the drugs were going to the U.S. Just look at the map. The drugs could just as easily go to Europe. With the submission of a few internationally recognized reports, plus expert testimony of an experienced investigator of the ex-DEA variety, a defense of ignorance could well prevail.

Prisons as a Business

By Adam Gopnik

Here’s another problem: a growing number of American prisons are now contracted out as for-profit businesses to for-profit companies. The companies are paid by the state, and their profit depends on spending as little as possible on the prisoners and the prisons. It’s hard to imagine any greater disconnect between public good and private profit: the interest of private prisons lies not in

the obvious social good of having the minimum necessary number of inmates but in having as many as possible, housed as cheaply as possible. No more chilling document exists in recent American life than the 2005 annual report of the biggest of these firms, the Corrections Corporation of America. Here the company (which spends millions lobbying legislators) is obliged to caution its investors about the risk that somehow, somewhere, someone might turn off the spigot of convicted men:

“Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. . . . The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them.”

David Zapp: Who could have imagined such a document: it belongs to a capitalist enterprise that feeds on the misery of man trying as hard as it can to be sure that nothing is done to decrease that misery.

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