

Crime, Punishment, and the American Criminal Justice System

Martin Blinder, MD

J Am Acad Psychiatry Law 43:2–4, 2015

When the law gets something wrong, it can do so in a way that adversely affects many lives, often profoundly. Specifically, to society's great detriment, the corrections arm of the American criminal justice system appears to have the distribution and administration of punishment exactly backward. We typically sentence young men who have committed their first violent felony—that group of offenders most likely to go on to commit further violent crimes over the next decade or two—to but a brief period of incarceration and sometimes to just probation, while meting out the most severe punishment, typically 25 years to life, to middle-aged, three-strike offenders who for a variety of demographic, psychological, and biological reasons are least likely to reoffend. Thus, there is conversion of maximum security prisons into fantastically expensive homes for the aged.¹ In short, basing the length of incarceration primarily on the number of felonies committed is irrational, as well as wasteful of correctional resources. It stuffs our prisons with elderly, debilitated men whose criminal careers have come to an end.

In my experience, the system generally works in the following way. A juvenile is convicted of a series of misdemeanors and is confined to juvenile hall for several months. Then, in his early 20s, he goes on to commit his first felony. Since he has not yet accumulated much of a criminal record, he can expect to be treated with judicial benevolence: say, a year in the

county jail followed by 12 months of probation. Then in his mid-20s he goes on to commit his second felony, for which he might receive perhaps 5 to 10 years in state prison.² He serves his time and finally, several years later, commits his third violent felony. At long last he has the book thrown at him: 25 years to life.³

What renders this system so manifestly topsyturvy is that approximately three-quarters of all violent crimes in this country are committed by men under the age of 30, and more than 90 percent of all felonies are committed by men under the age of 50. (For example, in California, the average age for the third felony conviction is 43.) Rephrased in the inverse, men in their 50s and older are likely to be relatively law-abiding citizens, however antisocial their previous conduct.⁴

The forbearance with which we respond to youthful offenders has resulted in neighborhoods where violent gangs and assorted other predators make an evening stroll potentially lethal. Meanwhile, our prisons are bursting with now toothless, diabetic, increasingly demented old men whose maintenance costs taxpayers three to four times what it would to house them in a pleasant retirement home. A maximum security system can ill afford mistakes and so provides these enfeebled individuals with close, costly 24/7 supervision. Of course, even if we wanted to, we are unable to transfer these prisoners to homes for the aged because of constraints imposed by their sentences of mandatory imprisonment without parole.⁵

This is not a concern that is limited to the occasional institution. The United States contains less

Dr. Blinder is Past Clinical Professor of Psychiatry, University of California San Francisco, and Past Adjunct Professor of Law, University of California Hastings College of the Law, San Francisco, CA. Address correspondence to: Martin Blinder, MD, 50 Idalia Road, San Anselmo, CA 94960. E-mail: drmartinblinder@yahoo.com.

Disclosure of financial or other conflicts of interest: None.

than 5 percent of the world's population but 25 percent of all those behind bars, with a *per capita* incarceration rate 7 times that of France, 14 times that of Japan, and 24 times greater than that of India. No less disconcerting is the severity of sentencing: one of every nine American prisoners is serving a sentence of life with little chance of parole.⁴ As a consequence, the U. S. prison population has sharply increased year by year, primarily because of these longer sentences. These numbers reflect an exacerbation of the inequity created by the distorted demography of our prison population as detailed above.

In short, from a practical, demographic perspective, it is the young offender who should receive the longest prison term, ensuring that he is not released back into the community until he approaches at least middle-age. In contrast, most elderly offenders hardly warrant any further imprisonment at all.

There is a rather straightforward explanation for why most older prisoners thoroughly relinquish their criminality: biological maturity comes to almost everyone, even to sociopaths, bringing a decline in stamina and physical health, a precipitous drop in testosterone levels, and less tolerance of and substantially reduced access to recreational substances.

Nevertheless, I am not here arguing for the use of demography as the sole basis for determining length of sentence. Rather, the salient point is this: should a young man commit even a single violent felony, he is likely to demonstrate several predictive criteria that together could well provide a sound, evidence-based clinical justification for a more extended period of confinement.¹ Such criteria include, for example, extensive exposure to violence in both his childhood home and neighborhood; several men moving in and out of his home during his childhood; an extensive family history of conflict with the law and repeated incarcerations; withdrawal or expulsion from school; little or no legitimate work history; no serviceable licit skills; early substance use; fathering of children out of wedlock; and a marked lack of empathy, coupled with narcissistic and paranoid traits. These individuals are significantly predisposed to future violence.⁶ It would be cost-effective to identify and confine these young psychopaths before they are launched on a long life of crime.⁴

Since the longest sentences are being served by the oldest inmates, it is evident that the length of sentence (as opposed to its certainty) has little deterrent effect. Yet ironically, the most frequently voiced ar-

gument for the *status quo* is that the threat of later severe punishment will give pause to at least some criminals, perhaps inducing them to cease and desist early in their otherwise lifelong career. This viewpoint presumes that sociopaths engage in a cost-benefit assessment before they break the law. Unfortunately, in my experience career criminals rarely give any thought at all to what they are about to do. They don't think. They act. Thus, not even the prospects of draconian punishment can be expected to alter the course of a sociopath's behavior.

Our avidity for internment costs taxpayers billions of dollars a year, enough to provide every young adult in the country with an Ivy League education, including room, board, and books. As Ivy League graduates only occasionally join the criminal underclass, it is not unreasonable to suppose that were revenues so redirected, many of these prisons would soon be abandoned for lack of residents.

One might ask whether there are some first-felony offenders who manage to straighten out without going on to commit other violent crimes? Would not preventive detention for them be both gratuitous and cruel, to say nothing of unconstitutional?

Of course, the answer to both questions is yes. Would that we knew in advance who these individuals are. The number of these admittedly harshly treated offenders would be small compared with the huge, prison-clogging numbers of middle-age and elderly felons for whom many more decades behind bars is also unnecessary and cruelly unfair. Following the principle of aspiring to do the least harm, does it not make sense to incarcerate unnecessarily for a couple of decades that relatively small number of young felons who might benefit from rehabilitation, instead of the exponential number of older felons who are now permanent captors of an irrational system of corrections?

The wrongful jailing of that minority of young felons who might well have pulled themselves together and, once released, would never have been heard from again, may be a small price to pay for sparing the community both repeated inimical contact with the far greater number of intractably dangerous young men and the utterly pointless, exorbitant imprisonment of harmless older ones. These suggested reforms, though imperfect, are far more constructive than the system currently in place.⁷ Locking people up because of what they might do at some indefinite time in the future is contrary to the rule of law and should be repugnant to us. Acknowledging that even career criminals reach a retirement age

should offend no one and be viewed as both reasonable and humane.

References

1. Blinder M: *Psychiatry In the Everyday Practice of Law* (ed 4). Eagan, MN: Thomson Reuters, 2006
2. Cooper AD, Duroce MR, Snyder HN: Recidivism of prisoners released in 30 states: patterns from 2005 to 2010. *Bureau of Justice Statistics Bulletin*. Washington DC: Bureau of Justice Statistics, US Department of Justice, Publication NCJ 249250, April 24, 2014
3. Grattet R, Hayes J: *California's Changing Prison Population, Just the Facts*. San Francisco: Public Policy Institute of California, June 2013
4. *Correctional Populations in the United States*: Bureau of Justice Statistics, US Department of Justice, December 2013
5. Greenberg D, West V: State prison populations and their growth: 1971–1991. *Criminology* 39:615–54, 2001
6. Stemen D: *Incarceration and Crime: A Complex Relationship*. The Sentencing Project. New York: Vera Institute for Justice, January 2007
7. Henry C, Zimbrero P: The past and future of U. S. prison policy. *Am Psychol* 53:727, 1998