

ORDINARY INJUSTICE

Beyond Guantanamo, Rendition, and Torture, the US Criminal (In) Justice System Is a National Disgrace

James S. Henry

© SubmergingMarkets, 2010

In 1840, **Tocqueville**, otherwise usually an astute observer of American society, proclaimed that “there is no country where criminal justice is administered with *more kindness* than in the US.”

In the modern-day “Law and Order”/ Perry Mason made-for-TV version of this story, the US is still viewed by many as having, in author [Amy Bach](#)’s words, “*the world’s finest criminal justice system.*”

Certainly this is the preferred self-image when, as it is wont to do, the US criticizes the quality of criminal justice in *other* countries.

In this sanguine view, US prosecutors, police, investigators, and judges leave no stones unturned to see that crimes are punished, justice is done and the US Constitution is respected.

Juries take their independence very seriously and fight tooth and claw for the truth. Parole officers and prison wardens are all deeply committed to “correction.”



Public defenders are thoroughly informed about the latest nuances of criminal law, and work tirelessly and selflessly to insure that each and every defendant has his day in court.

Fortunately, Ms. Bach, a young New York attorney and law professor, has recently provided a compelling, well-researched **antidote** to this conventional **fairy tale**.

Her [new book](#), the product of seven years of first-hand research in the bowels of the state and local court systems of New York, George, Mississippi, and Chicago, focuses on “**ordinary injustice**” -- the routine failure of judges, prosecutors, and defense attorneys *as a community* to deliver on the US Constitution’s basic promises.



EXPECTATIONS

Tocqueville was not alone in his naiveté. Initially, the sheer amount of attention given to criminal justice in the US Constitution as well as state constitutions led many observers to expect that the US really might be distinctive in its approach to criminal justice.

.Indeed, criminal rights are the subject of Article I's section on *habeas corpus*, plus four of the first ten Amendments (known collectively as the "Bill of Rights,") and their extension to states and non-citizens by way of the XIVth Amendment.

Of course legal scholars have long been aware of serious gaps between theory and practice with respect to such rights. But the gaps have usually been regarded as **exceptions**.



Many of the exceptions have occurred in times of wars or perceived security threats – for example, [the Sedition Acts of 1798](#) and [1918](#), the World War II internment of Japanese-Americans, the persecution of Left wing dissidents and civil rights activists during the 1920s-1970s, the 2001 Patriot Act, [the NSA's illegal spying program](#), and the [mistreatment of "enemy combatants"](#) at Guantanamo and elsewhere.

Other exceptions have involved the application of "Jim Crow justice" to native Americans, African Americans, and other minorities.

Overall, however, many legal scholars have treated these episodes as *abnormal deviations*. In the long run, the system as whole is supposedly always trying to improve, always sincerely trying to do the right thing.

On this theory, the US Constitution and the courts that interpret it function as a kind of homeostatic machine, with built-in stabilizers that *eventually* prevent any serious rights violations from becoming permanent.

THE REALITY: FAST-FOOD JUSTICE

Many critics on the Left have long argued that **in practice**, no such automatic stabilizers exist. From this perspective, securing human rights is not something that is ever accomplished once and for all, but a constant, repetitive struggle.

It is also conceivable that "path dependency" and "feedback loops" in the legal system may be destabilizing. The erosion of rights in one period may *increase* the chances that rights will continue to erode later on.

Critics of the conventional view have also argued that rich people and poor people -- including the indigent defendants who now account for [about 70 to 90 percent](#) of all felony cases in the US – essentially confront *two very different criminal justice systems*, *especially* in state and local courts.

Only a fraction of mainly affluent criminal defendants ever receive full-blown Perry Mason/ Alan Dershowitz-type adversarial trials – and even there, as Harvey Silverglate’s recent book emphasizes, even the affluent face the hazards of vague statutes and prosecutorial zeal.

Meanwhile, 90 percent of criminal defendants learn the hard way that their nominal “rights” consist of one brief collect call from a jail cell, followed by a tango with an odd alliance of police, prosecutors, and public defenders whose shared objective is to talk them into pleading guilty.

As Clarence Darrow said in his 1902 address to the inmates at the Cook County Jail, “First and foremost, people are sent to jail *because they are poor.*” And as the American Bar Association -- not usually aligned with wild-eyed radicals – admitted in **2004**, “The indigent defense system in the US remains in a state of crisis.”



This pervasive “fast food”/ assembly-line plea-bargaining system is hardly new, although it has recently become a much greater problem because of soaring rates of incarceration in the US, as we’ll see below.

DETAILS FROM THE FRONT

The special merit of Ms. Bach’s new book is that she takes such pat generalizations about “ordinary injustice” down from the shelf and **brings them to life** with a series of extraordinary case studies.

In doing so, she tackles one of the main obstacles that confronts any investigator who seeks to understand how the criminal justice system really works. This is the fact that “ordinary injustice,” while pervasive, is very

hard to observe without detailed, painstaking field work.

As Ms. Bach emphasizes, this lack of transparency prevents the public at large from ever being able to tell just what they are getting for the hundreds of billions of tax dollars spent on criminal justice -- and how well the courts are doing in delivering what is supposed to be their key product – justice.

One immediate benefit of Ms. Bach’s field work is a rich trove of amazing real world stories about how the justice system actually works.

✓ For example, in her book we meet a **Troy New York city judge** who routinely fails to inform defendants in his court of their rights to counsel, imposes **\$50,000**



bails for \$27 thefts and \$25,000 bails for loitering, and enters guilty pleas for defendants without even bothering to tell them.

✓ We meet a **Georgia public defender** who runs a “meet’ em, greet’em, and plead ‘em” shop that delivers just **4 trials in 1500 cases**, with guilty pleas entered **in more than half of these cases without any lawyer present** or any witnesses interviewed.

✓ We meet **Mississippi prosecutors** who are so concerned about their **win/loss records and reelections** that they simply “disappear” all the harder-to-prosecute cases from their files.

✓ We meet a **Chicago prosecutor** who allows two innocent young people to sit in jail for 19 years before he finally works up the gumption to examine the relevant DNA evidence. This new evidence not only cleared them, but it also helped to disclose a much larger police conspiracy.

✓ Ms. Bach also reminds us of the unbelievable 2001 case before the Fifth Circuit Court of Appeals (Texas) where the court labored hard to overrule a lower court decision that would have permitted a defendant on trial for his life to receive the death sentence, despite the fact that his attorney had been *fast asleep* through much of the trial.

PATTERNS

Amy Bach’s book is more than just a series of such horror stories, however. By doing painstaking legal anthropology in multiple locations, she has been able to go beyond the limits of the typical one-off journalistic expose. (See, for example, [A](#), [B](#), and [C](#).)

Bach’s focus is on identifying **recurrent patterns** of misbehavior. These patterns were unfortunately not “exceptional” at all, but routine and widespread.



Most important, her research underscores the fact that “ordinary injustice” is not just due to isolated “bad apples.” There is a whole system at work here – ordinary injustice thrives on a culture of tolerance for illegal practices that is cultivated in whole communities of lawyers, judges, and police over many years. This culture, and the “fast food” system of guilty pleas that it facilitates, are at the root of all her cases.

Unfortunately Bach offers **no real solutions** to the problem that she has documented. Indeed, the *least* satisfactory aspect of her book is that in the last few pages she apparently felt compelled to try and offer up some quick and dirty remedies. She ends up leaning rather heavily on a **fond hope** for “**new metrics**” that will measure how well individual courts actually deliver “justice” – sort of the legal equivalent of “No Child Left Behind.”

There may be something to this, but in my experience, metrics, whether in education or judicial policy, are *the last refuge of the policy wonk*. They will undoubtedly be a long time coming. This is partly because of budget constraints. It is also because if the metrics are really worth a damn, they will provoke stiff resistance from the very same bureaucratic interests that Ms. Bach had to overcome in her own research.

Pending the dawn of this brave new world of metrics, therefore, I suspect that we will just have to depend on a handful of dedicated lawyers, investigative journalists, and creative new legal scholars like Ms. Bach to keep an eye on the courts, root out what's really going on, and insist that all the rights we have on paper and take for granted are still around *when we really need them*.

ROOT CAUSES

So where does “ordinary injustice” really come from, and what can we do about it? Fundamentally, as noted above, the kind of ordinary injustice described by Ms. Bach basically exists because of the “fast food” plea bargaining system. But as she recognizes, it would be a waste of time to attempt to outlaw this directly. This is because the plea bargaining treadmill derives from an unsuccessful attempt to reconcile several deeply-inconsistent public demands.

First, 9/11, the war on terror and GWB notwithstanding, most Americans still fundamentally believe in freedom. Most of us still want to preserve the Bill of Rights -- at least on paper.



Second, we all want to save money – especially in these times. Implementing the full-blown version of the adversarial criminal justice model in each and every case would be very costly, compared to the plea pipeline. While most taxpayers value human rights, they're not eager to pay a whole lot for them. This is partly just because at any given point in time, their value is a little abstract -- like

health insurance before you become ill.

Of course the truth is that the “fast food” system is anything but cheap. The entire system – courts, prisons and police – now costs US taxpayers [over \\$250 billion a year](#). And that figure has been growing like Topsy – it is now at least **three times the 1990 level**.

Over 80 percent of these costs are born by the hard-pressed state and local governments. Most of the funds are digested by police and prisons; courts only account for a fifth. But it is far from clear that ordinary taxpayers – most of whom never expect to see the inside of a criminal court or jailhouse themselves -- really want to pay anything more to help defend the poor or curb ordinary injustice.

Third, what US taxpayers do really care about, at least up until now, is “fighting crime,” especially drug-related and *lower*-level street crime. Ever since the 1970s, these have been the fastest growing contributors to system-wide criminal justice costs.

For many taxpayers, under the influence of 30 years of campaign propaganda from the “war on drugs” industry and “tough-on-street crime” politicians, this has usually been reduced to “lock ‘em up and throw away the key, as fast as possible.”

The result is that today, in the US, the number of inmates in our local jails and state and federal prisons is at an all-time high: over 2.3 million, 6.8 times the number in 1974. This means the US has the highest per capita incarceration rate in the world. It is 754 per 100,000, higher than Russia (610), Cuba (531), Iran (223), and China (119), let alone developed countries like the UK (152), Canada (116), France (96), Germany (88), and Japan (63).

THE CRIMINALIZATION OF AMERICA, 1974-2008						
(Millions, \$MMs)						
	US PRISON SYSTEM, 1974-2008					Ave
	1974	1980	1990	2001	2008	GR%
Total Inmates	0.34	0.50	1.15	1.95	2.30	5.8%
>State and fed prisons	0.22	0.32	0.74	1.32	1.52	
>Local Jails	0.12	0.18	0.41	0.63	0.79	
All US Adults (≥ 18)	139.92	162.79	184.84	207.96	228.13	1.4%
Inmates: % of all US Adults (≥ 18)	0.2%	0.3%	0.6%	0.9%	1.0%	
Supervised X Inmates	1.29	1.61	3.31	4.83	5.29	4.2%
>Parole (S&F)	0.27	0.35	0.53	0.73	0.83	
>Probation (S&F)	0.16	0.19	0.30	0.44	0.50	
>In Local Jail (S&F)	0.06	0.08	0.11	0.17	0.19	
>On probation (Local)	0.80	0.99	2.37	3.50	3.77	
% of all US Adults (≥ 18)	0.9%	1.0%	1.8%	2.3%	2.3%	
X Inmates Not Under Supervision	1.31	1.63	2.57	3.84	4.38	3.6%
>Not supervised (S&F)	1.11	1.38	1.98	2.97	3.44	
>Not supervised (local jails!)	0.20	0.25	0.59	0.88	0.94	
% of all US Adults (≥ 18)	0.9%	1.0%	1.4%	1.8%	1.9%	
Total: Past+Present Inmates	2.87	3.66	6.92	10.46	11.78	4.2%
% of all US Adults (≥ 18)	2.1%	2.3%	3.7%	5.0%	5.2%	
Total Direct Cost (Op + Cap)	na	na	\$79,533	\$166,934	\$237,325	6.3%
>Police			\$35,923	\$72,406	\$111,994	
>Corrections			\$26,253	\$56,957	\$74,120	
>Courts			\$17,357	\$37,571	\$51,211	
Cost per Supervised Inmate	na	na	\$17,821	\$24,618	\$31,256	3.2%

Source: DOJ (Bureau of Justice Statistics), Census (data); our analysis
© JSH/ SubmergingMarkets 2010

Furthermore, US [states like Louisiana \(1138\)](#), [Georgia \(1021\)](#), [Texas \(976\)](#), [Mississippi \(955\)](#), [Oklahoma \(919\)](#), [Alabama \(890\)](#), [Florida \(835\)](#), and [South Carolina \(830\)](#) have distinguished themselves with even higher rates -- by far the highest rates of incarceration in the world. This policy appears to be driven in part by the political benefits of so-called "[prison gerrymandering](#)," which permits prisoners to be counted as residents of the places where prisons are located, rather than where they come from, for purposes of allocating legislative seats.

This alone helps to explain the fact that annual cost of all US prisons now exceeds \$80 billion a year. Indeed, the annual cost of warehousing prisoners in California and New York prisons is at least *\$50,000 per year per prisoner* – much more than the cost of providing them with full time jobs outside! In addition, in the US, there are over 9 million former prisoners who are now outside prison. More than 5.1 million others remain under supervision, on parole or probation.

All told, the US now has more than *11.3 million past and present inmates*. This is the world's largest domestic criminal population, an incredible **23.5 percent** of all current prisoners in the world. No doubt the sheer scale of our "criminal industry experience curve" gives us at least one clear national competitive advantage -- in crime.

Indeed, because of our propensity to throw people in jail regardless of what becomes of them there, we now account for *over a third* of the entire world's living past and present prisoners. Not surprisingly, this also affords us by far *the most costly judicial and corrections systems that the world has ever seen*.

For all these costly incarcerations, despite the vast sums and short-cuts associated with processing all of these millions through the pipeline as rapidly as possible, there is not one speck of evidence that this system has contributed one Greek drachma to falling crime or safer streets.

Indeed, the best evidence is just the opposite. Over **two-thirds of US offenders** who are released from prison are likely to be **re-arrested within three years**. Reactionary voices may argue that this just shows we should hold more of them longer, a sure recipe for system bankruptcy. What it really shows is the complete lack of any real "correction" or retraining in most US prisons. The system that the entire criminal justice machine works so hard to get people into as fast as possible has become **the world's largest training ground for serial offenders**.

In short, if we really want to understand the roots of "ordinary injustice," as well as the intense pressure that each and every player in the US criminal justice system feels to cut corners and slash costs each and every day, we need look no further than this self-perpetuating **failed prison state-within-a-state**.

After all, this particular "failed state" already has a total population of current inmates and former inmates under supervision that is greater than **Somalia's!**



.....
April 1, 2010 at 04:36 AM | [Permalink](#) | [Comments \(0\)](#)

© JSH/ SubmergingMarkets, 2010