Sentencing: Government by judges, not laws

(EDITOR'S NOTE: This is the 12th of 15 articles on crime and justice in America. It forms the text for an Oakland Univeristy course taught by Prof. Jesse Pitts. The series was written for Courses by Newspaper, an extension program of the University of California, San Diego.)

By ALAN M. DERSHOWITZ

"The imposition of sentence is probably the most critical point in our system of administering criminal justice," observed Marvin Frankel, a distinguished jurist, in 1973.

It may, literally, mean the difference between life and death, freedom or confinement, short- or long-term imprisonment.

The power of the sentencing judge, in many jurisdictions, is awesome. Without giving—or even having—reasons, a judge may decide to sentence one robber to probation and another, different in no relevant respect, to 20 years in prison. Nor can these sentences generally be reviewed by a higher court.

Despite the enormous power of the sentencing judge, the process of imposing sentence is essentially lawless. There are few guidelines and virtually no accountability.

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BOTH OBSERVERS of, and participants in, the American criminal justice system are almost unanimous in viewing the process of imposing sentences as a dismal failure by any standard.

Yet the imposition of sentence is "crucial" because, for many defendants, it may be the only point in the criminal justice system—other than bail determination—where a judicial decision is made.

Despite popular fascination with the drama of the courtroom trial, the vast majority of criminal cases are disposed of without any trial. The defendant agrees to plead guilty to a given crime, in exchange for some concession by the prosecutor—a reduced charge or a promise to recommend a reduced sentence.

In some jurisdictions, judges participate overtly in this bargaining. In most jurisdictions, however, judges remain aloof from the negotiation. They retain the power—at least in theory—to accept or reject the prosecutor's recommendation and to impose any sentence within the statutory range.

THE UNFAIRNESS and uncertainty of this sentencing system has been amply documented.

The discretionary power of a judge such as William (Bill) M. Hatten, Texas district judge in Houston, is often virtually unlimited. Here he hears the extradition case of former mental patient Gary A. Taylor (in white), wanted in Seattle for murder.

In one recent study, 50 federal judges were given 20 identical files, drawn from actual cases, and asked to indicate the sentence they would have imposed on each defendant.

In a case of possession of barbituates with intent to distribute, one judge gave the defendant five years in prison, while another put him on probation.

One judge sentenced a defendant convicted of securities fraud to two years imprisonment; another fined him $2,500.

This study, commissioned by a group of judges, concluded there were "glaring disparities" in sentencing. Similarly, a recent study of sentences imposed during a two-year period in Montgomery County, Ohio disclosed that certain judges imprison defendants four times as often as other judges for the same offense.

Disparities of this kind cannot be explained by differences among criminals. They are, as one judge recently observed, a function "of the wide spectrum of character, bias, neurosis and daily vagary encountered among occupants of the trial bench."

THERE IS ALSO evidence that some of the disparity is a function of prejudice: social, economic and cultural.

An exhaustive study of state and federal sentences for larceny and assault disclosed that blacks have a 1½ times greater chance of being imprisoned than whites with similar records.

Other studies have shown that defendants appearing in low status dress are significantly more likely to receive prison sentences than comparable defendants wearing higher status clothing.

Two centuries ago, Blackstone, the great English legal commentator, observed that the sentences handed down by judges are not "their" sentences, but the sentences of the "law."

Today, it is the judge, as an individual, who decides who shall be imprisoned; and it is the judge and the members of the parole board—not the "law" as an abstraction—who decide how long an imprisoned defendant shall serve.

RECENTLY, THERE has been mounting criticism, from the political left and right alike, of a sentencing system that depends so much on the idiosyncrasies of individual sentencing judges.

Liberal critics believye sentencing system discriminates against poor and minority criminals and in favor of white-collar and privileged criminals.

Conservatives critics argue that current sentencing practices result in the early release of dangerous, violent people.

The specific focus of much of this criticism has been the so-called "indeterminate sentence"—a mechanism by which the amount of time a convicted criminal will actually serve is decided by the "parole board" or "adult authority," while the prisoner is serving his sentence.

Both the legislature and the sentencing judge still play important roles; the legislature sets the outer limits of the permissible punishment for the type of crime, while the judge decides on the desirable range for the crime and criminal. But these limits are often broad, and the parole agency thus becomes responsible for deciding what really counts: when the defendant will be released.

The indeterminate sentence is merely one manifestation of the existing disparity in sentencing. The underlying cause is the unchanneled discretion exercised by all the sentencing decision-makers—judges, prosecutors, parole boards and adult authorities.

IN AN EFFORT to impose some uniformity of sentencing, a number of legislatures, including the U.S. Congress, are now considering significant reforms. Some of these reforms, however, address only a small part of the problem.

For example, mandatory minimum sentencing for certain offenses deals only with discretion at the low end of the sentencing spectrum.

It "requires" judges to impose a certain minimum sentence (perhaps a year) upon everyone convicted of a specific offense (for example, illegal possession of a handgun, as in Massachusetts).

Flat-time sentencing retains "judicial" discretion by allowing the judge to select the "appropriate" sentence from a wide range of alternatives; but it eliminates "parole board" discretion py requiring the inmate to serve his entire term (minus "good time").

THE APPROACH that seems to be attracting the most attention is a compromise solution called "presumptive sentencing."

Under this approach, or its many variants, the legislature decides not only on the minimum and maximum sentences for a given crime, as it does today, but also on the "presumptive" sentence for a "typical" first offender convicted of a "typical" instance of q crime.

The legislature might thus decide that the typical burglar—an unmarried, unemployed, uneducated male in his early 20s who broke into an inhabited house late at night without a weapon and took several hundred dollars worth of valuables—should generally serve one year. One year would thus become the presumptive sentence for this crime.

In the absence of legislatively specified aggravating or mitigating circumstances, the sentencing judge would be expected to impose that sentence on all first offenders convicted of that crime.

If the judge departed from the presumptive sentence, he would have to detail in writing the reasons for his decision. All sentences departing from the presumptive one by more than a specified percentage—for example, 25 per cent,—would automatically be appealable.

The sentence would be reversed unless the appealate court concluded that the judge's reasons had overcome the presumption in favor of uniformity.

UNDER THIS approach, the parole board would retain only limited power under unusual circumstances to release the inmate before the expiration of a statutorily fixed percentage of his sentence—for example, 75 per cent.

In the end, neither this nor any other proposed solution to the dilemma of sentencing will be a panacea. The elusive quest for the fitting punishment has occupied the collective widsom of mankind since the beginning of recorded history.

The pendulum appears now to have swung in the direction of greater certainty and uniformity in sentencing. Undoubtedly some reform will be forthcoming, and we will see not the demise of individualization in sentencing, but its waning influence.

Perhaps a decade from now a reaction will again set in and the pendulum will swing back in the direction of increased flexibility.

Prof. Pitts comments:

Few trials, lawyers show

By JESSE PITTS
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The original title of Prof. Dershowitz's article ("Plea Bargaining") is a bit misleading because he does not really discuss plea bargaining, which is the core of our real judicial process.

The ideal core of our judicial process is the right to a trial by our peers, through procedures which give the accused more protection than any other system in the world.

But because of these guarantees, a trial is so costly and time-consuming that, if every defendant demanded his rights to a trial by jury, the system would collapse. It would take three years for the average burglar to come to trial.

Otherwise, we would have to simplify our procedures (lawyers would not like that) or multiply the number of judges by a factor of seven. Judges would not like since it would reduce the power and prestige of each individual judge, and taxpayers would not like it either, although it would be a better investment than increasing the number of police on patrol.

SO THE AMERICAN "Trial by Jury" remains a sort of expensive showcase, used by defense attorneys as a means of blackmail:

"If you don't allow my client to plead guilty to a misdemeanor, I will tie you up in knots and run up a bill for the county. Don't provoke me or I will request injunctive relief, aratory relief, I will start a federal civil rights action (routine in a pornography case), and I will petition for removal to the federal court.

"If that is not enough, I will bombard the court with motions to quash the indictment for formal deficiencies." (Fifteen years ago, I heard of an indictment that was quashed because the charge described the murder weapon as a Smith & Weston instead of a Smith & Wesson.)

"If the local papers have mentioned the case, I will ask for a change in venue, and when I cannot delay trial any further, I will drag out jury selection as long as I can. Now do you want to deal?"

Giacalone's lawyers, when their client was on trial for possession of a blackjack, were able to drag out jury selection for two months. The average American trial takes two to three times as long as a British trial. And though our judges can take over school systems and stop the construction of electric plants, they do not seem to be able to control the defense attorneys as well as their British counterparts.

LUCKILY ENOUGH, court-appointed lawyers get a $100 fee for each day spent in Detroit Recorder's Court. They make much more money for their time when the plea bargain.

Unless there are powerful political and/or publicity reasons (and moral reasons) to use all the resources of the American judicial system, their interests, and their client's interests, are to make a deal. So most of the time, this is what you may overhear in the elevator of the Hall of Justice:

"Hey," says the defense attorney, "how about Avocado? We plead and you recommend 45 days."

"No way," replies the assistant prosecuting attorney, "gotta have at least 90."

"Well," says the defender as he gets off at his floor, "we'll think about 60."

When the bargain is struck, the charge is reduced to one which the judge will punish with only 60 days in the county jail. The judge, at the court appearance, will make sure the plea of guilty is voluntary on the part of the defendant. It is "voluntary" like going to the dentist is voluntary.

PLEA BARGAINING is a very good deal for the defendant. It does not grind poor, innocent defendants into the dust. Only on TV are innocents persecuted by dumb cops and mean DAs because this is the easiest way the screen writer can get suspense and audience empathy.

Reality is practically never like that (I said "practically"). In addition to the ethics of his profession—and prosecuting attorneys are as moral as you and I—they want to be re-elected. They need innocents in jail like a hole in the head.

They want to be able to say to the electorate: "I won guilty verdicts in 97 per cent of the cases my office prosecuted." The safest way to accomplish this feat is to refuse warrants, or dismiss cases, or nolle pros any case which does not seem very strong; plea bargaining is at least 90 per cent of the rest.

So why prosecute some guy with a mother for something he screams he did not do? Does he want a polygraph test? Is the evidence less than airtight? Unless the newspapers are yelling bloody murder, it is wiser to let him go.

So out of 100 Class I felony arrests (homicide, rape, robbery, assault, burglary, larceny, auto theft), eight—at most— will wind up in jail or prison, usually through plea bargaining.

IN THE LAST article, I stated that one-third of the burglars "apprehended" would go to prison. That is wrong. I should have said one-third of the burglars "brought to trial" would go to prison.

But most arrested burglars do not even get to the trial stage. Their cases vanish in thin air, or are reduced to misdemeanors, on their way to the courthouse.

Everybody likes plea bargaining in the judicial process, including the felon. The great danger with plea bargaining is that, in order to remain effective for the accused, it depends upon the capacity of the defense attorney to retain a strong adversary stance within the process of bargaining with his colleague on the other side.

The day that stance vanishes under strong political pressure, our system of justice, so proud of its formal guarantees for the accused, will become a collaborative system, as in Soviet Russia.

OU Course covers courts

"Sociology of the Courts" is the title of a spring evening extension course offered by Oakland University in the Barnum Center, Birmingham.

Instructor will be Prof. Jesse R. Pitts, who currently teaches the Courses by Newspaper program on crime and justice in America. His own comments run as companion articles in the Observer & Eccentric Newspapers.

In the spring course, Soc. 437, students will study the structure of American courts and the professions which contribute to its action—judges, prosecuting attorneys, defense attorneys and police.

The role of the jury, patterns of choice of foremen, the role of the probation officer and court clerk will be examined. Films and presentations by professionals will be a major feature.

Hours will be 6:30 to 10 p.m. Mondays and Wednesdays. There will be flexibility to permit court attendance, which will be a major assignment for students.

Students may combine this course with the Internship in Social Justice and Corrections (Soc. 430) for four or eight credits.