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— PROF. WILLIAM T. PIZZI —

FACT-BARGAINING: AN AMERICAN PHENOMENON

William T. Pizzi*

The Probation Officers' survey suggests that there is considerable "fact-bargaining" going in federal courts. By that it is meant that plea agreements are being drawn up for use in sentencing to provide guideline calculations that are not accurate or complete in all respects. Comments in the survey suggest that in order to protect such agreements, prosecutors sometimes limit the access of the probation officer to information about the offense or may even go so far as to instruct agents not to discuss the case with the probation officer. When a dispute over facts does occur between the version of the offense offered by the probation officer in the presentence report and that put forward by the parties in the plea agreement, the survey suggests that judges tend to uphold the plea agreement.

One obvious inference seems to be that a significant number of offenders do not receive the punishment prescribed by the guidelines because the information on which the sentence is based does not accurately reflect certain offense or offender characteristics. It is certainly possible to read the survey as suggesting that serious problems exist with the guideline system that need to be addressed. But my own view is that the problems that encourage fact-bargaining are much deeper than simply the guideline system and unless we are willing to address serious structural weaknesses in the system, the concerns raised by the survey are probably not worth worrying about.

I. Sentence Bargaining and the American Criminal Justice System

I start from the premise that the American criminal justice system in 1996 is a system of negotiation and compromise and truth is of secondary importance. Many times we see plea bargains in which the state takes "half a loaf," as murder cases are pled down to manslaughter cases and aggravated sexual assaults are pled down to improper sexual contact cases with corresponding reductions in the sentencing ranges. Does anyone really think that a defendant's rap sheet accurately describes the crimes the defendant committed on prior occasions?

Not only are convictions subject to negotiation and compromise in the United States but we know that it is not unusual to compromise cases through outright sentence bargaining in which the prosecutor promises the defendant a specific maximum sentence in order to convince him to enter a guilty plea. If the

case against the defendant is strong, the prosecutor may hold out for a sentence that she believes to be proportionate to the offense and the offender. But if there are problems in the case—perhaps a potential suppression issue or prosecution witnesses who may not be attractive to the jury—a prosecutor may have to agree to a sentence that is less—sometimes far less—than anyone believes the defendant deserves for the crime in question.

Against this background, it ought not to be surprising that the carefully graduated sentencing guideline system can lead to some manipulation by the parties to achieve a certain sentence. Admittedly, the federal system has traditionally been an island of resistance to sentence bargaining, but the survey suggests that this is eroding under the sentencing guidelines.

Viewed against the background of the entire American criminal justice system, it is hard for me to work up too much concern over manipulation of the guidelines in federal court to achieve a certain sentence. This is not to say that I like the fact that prosecutors and defense attorneys in the plea agreement may not be honest about the amount of drugs involved in the crime or that they may undervalue the amount of money defrauded from victims. Nor do I like the fact that prosecutors keep their case files close to their chests and limit the information that the probation officer receives so that certain plea agreements will be accepted by the court. If we are to have plea bargaining and sentence bargaining systems, I would prefer a system that was more honest and open about what is going on. But to condemn plea bargaining because the truth is being distorted by such actions and defendants are not receiving the full measure of punishment they deserve seems as hypocritical to me as Captain Renault's announcement in *Casablanca* that he is closing Rick's because he "is shocked, shocked to find that there is gambling going on in here."

The American criminal justice system has ceased to be a trial system in the way other western systems remain trial systems; it is a system of negotiation and compromise. That sentence bargaining is beginning to emerge in the federal system ought not surprise us.

II. The Usurpation of Judicial Power?

There is another aspect of the survey that deserves discussion: the results suggest that when there is an inconsistency between the description of the offense presented in the presentence report and the description offered by the plea agreement, judges tend to defer to the plea agreement. Why would judges defer in that way to the parties? Perhaps it is evidence of hostility to the guidelines or maybe judges do not want trials if they can be avoided. But I don't think we can limit such deference to guidelines or to the federal system. How often do state court

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judges in serious cases reject plea bargains offered by the parties? Very rarely.

I suggest that there are structural reasons that make it much harder for judges to reject bargains offered by the parties. For one thing, judges do not know cases as well as the parties do and are not in a position to easily discover why a prosecutor or defense attorney was moved to accept the bargain in question. A second reason why judges defer to the parties is that the parties have far greater control over the presentation of the case in the United States than in other western countries.

By comparison, in continental countries, judges are assigned the central responsibility for the conduct of the trial. As an initial matter, no knowledge gap exists between the judges and the parties: everyone has access to the full investigative file and all the information it contains. In addition, there is no separation between trial and sentencing—both issues are decided at trial and it is the obligation of the panel of judges to control the development of evidence at trial, to determine whether the defendant committed the crime charged and to impose an appropriate sentence if the defendant is guilty. The state's attorney and the defense attorney play roles that are supplementary and clearly secondary to that of the judges. For a judge in this system to defer to an agreement worked out by the parties would be inconsistent with his or her institutional obligations.

In the United States, the role of the trial judge is much weaker. It is not the responsibility of the trial judge to present or develop evidence at trial. If there is an imbalance in the skills of the prosecutor and the defense attorney such that the defense attorney is far more experienced and capable, is it the responsibility of the judge to intervene to see that the trial is fair? If the defense attorney asks a witness a line of questions that might confuse the jury or makes an improper closing argument that misstates the law, is it the responsibility of the judge to intervene *sua sponte*? I suggest that the problems that manifested themselves at the Simpson trial and that have brought down on Judge Ito's head a raft of criticisms are to some extent structural problems that the system needs to address. Our trial system seems unable to distinguish between representing a client and becoming the client's alter ego or between putting forward arguments on a client's behalf and attempting to manipulate the jury at every turn. At the same time that advocacy has become more extreme, the authority of trial judges to influence the direction of the trial and to impose controls over the advocates in their courtrooms has been eroded, in part by a relationship between appellate courts and trial courts that encourages and even demands close appellate scrutiny of what occurred at trial to see if there may have been an error.

It may seem startling to suggest that trial judges in the United States, including federal judges, are

weak and lack the power of judges in other systems when American judges are armed with powers, such as the power to declare statutes unconstitutional, that have no analog in most other western legal systems. But when you look at the responsibility that judges have for the determination of truth, American judges are weaker than judges in other systems. To make my point from a different angle, let me offer a brief contrast between our criminal trial system and that in England.

III. Contrasting Adversary Systems

It often seems that the United States is committed to the adversary system almost as a matter of metaphysical belief. Criminal cases are conceived of as two-sided battles with the prosecutor, the victim, and any number of police agencies all aligned on one side of the case trying to convict the defendant. Consistent with that model, and this is especially true of the federal system, prosecutors are deeply involved in the investigation of the crime and often make decisions from the initial stages of the case up through trial.

By contrast, in England the prosecution barrister (like the defense barrister) is simply a barrister hired to present that particular case at trial. The prosecution barrister has not been part of the investigative team and usually has had nothing to do with the decision whether or not to prosecute the case or how to shape the charges. The adversary system is a way of providing for the orderly presentation and testing of evidence at trial rather than some overarching structure into which the trial fits. In the English system, judges have more responsibility put on them or, perhaps another way of putting it, can take more responsibility for seeing that the jury reaches a proper verdict. One manifestation of this difference is that English judges have broad power to summarize and comment on the evidence as part of their instructions at the end of trial, and to summarize the evidence even in routine criminal cases. Reinforcing the authority of English trial judges is the fact that appellate review is limited and reversals are very difficult to obtain.

The United States with its metaphysical view of the adversary system is very nervous about permitting judges to summarize the evidence. Many jurisdictions do not permit judges to do that and even in jurisdictions where it is permitted, such as federal court, judges are very reluctant to exercise that power. Judges, in short, are expected to be neutral and passive. Encouraging judicial passivity is the fact that appellate reversals are much easier to obtain in the United States and appellate courts are even willing to reverse for error that does not call into question the fairness of the trial.

Given the strong commitment to the adversary system in the United States, the worry that the

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prosecutor in plea bargaining or in sentence bargaining is usurping judicial power has much less force. If a prosecutor believes that the bargain in question is in the public interest, it is much harder for a judge to reject it. The same is true from the defense perspective. In a country where a defendant can walk into court and plead guilty even while declaring himself innocent of the underlying crime, what is the authority that suggests a judge should reject a sentence bargain that the defense believes is in the interest of the defendant?

IV. Conclusion

Every strong criminal justice system has to be built on a strong trial system. By a strong trial system, I mean a system (1) that is efficient and that makes wise use its resources and (2) that can be relied upon with confidence to convict the guilty and acquit the innocent. I think the United States lacks a reliable and efficient trial system and as a result the system struggles mightily to avoid trial. (One way the system avoids trials is to threaten defendants with harsh punishments—mandatory minimums, tough habitual offender statutes, tight guideline systems and the like—that one doesn't see in other western countries.¹)

Lacking a strong trial system, a uniquely American debate has emerged in the United States over whether sentencing should be "conviction based sentencing" or "real offense sentencing," the distinc-

tion being that under "real offense" sentencing the judge sentences based on what the defendant actually did, not what the defendant was convicted of or pled guilty to. Countries with strong trial systems don't have to worry about this issue because there is unlikely to be a significant gap. The defendant in those countries has a simple option: admit what he has done and receive a sentence discount for sparing the system a full trial, or go to trial, be assured of being convicted if guilty, and be sentenced without such discount.

The federal system has opted for real offense sentencing. However, the use of fact bargaining to reduce a defendant's sentence under the guidelines obviously undercuts real offense sentencing. I think it would prove very hard to eliminate such sentence manipulation and I doubt that the result would be worth the effort. I would prefer that the system address itself to the question of why a gap between the real offense and the conviction offense should be permitted to occur in the first place.

NOTE

¹ I have argued elsewhere that there is a synergy between punishment and procedure, such that extremes of either encourage extremes of the other. See William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 Const. Comm. 55 (1996).