How We Grind Out Justice

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By Leonard Downie Jr.

Downie is day city editor and a former court reporter for The Washington Post. The following is excerpted by permission from his book, "Justice Denied: The Case for Reform of the Courts," published last month by Praeger. This portion of the book appeared in a somewhat different version in the Washington Monthly last year.

THE ELDERLY LAWYER was dressed for the race track, where he intended to spend the afternoon, in an orange and green sport coat, bright green slacks, and soft white leather shoes, and his clothes were a flash of unexpected color in the drab, stuffy, downtown courtroom.

It was 10 o'clock on an August morning in Recorders Court, which is the criminal court for the city of Detroit. In many ways, the scene could have been any criminal courtroom in the United States.

"Jackson," the lawyer called out. "Sam Jackson."

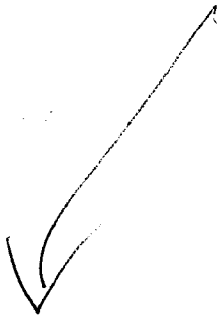
He was trying to find a client he had seen only once before, months ago, when he had been appointed to defend the man for a $100 fee paid by the State of Michigan. On that first day, he stood briefly beside his client as Jackson was arraigned and a date was set for his trial. Until this morning, when a courtroom clerk handed him a copy of the official court "paper" for the case, the lawyer had done nothing more.

"Jackson," he called again.

A slightly built black man in a polo shirt and work pants rose hesitantly a few rows back in the audience. Sam Jackson, a sometime laborer and truck driver, had, his record showed, been connected on and off with gambling and dope. He had been arrested nearly a year earlier for possession of a concealed pistol, which was found when a police detective stopped and searched his car, and he had been free on bail since then, waiting for his trial.

"Jackson?" the lawyer asked, pushing down his glasses to peer at his client. "Okay, okay. Sit back down. I'll be with you in a minute." Turning, he walked through the gate again toward a cluster of policemen, all in street clothes, standing and gossiping idly near the empty jury box on the left side of the courtroom.

In the confusion and cacophony that characterize the criminal courtroom scene, the policemen, numbering about 30, were balanced by a swirling, changing [illegible]



them. These are the criminal lawyers, most of whom work in Courtroom 8 every day. Their only clients, whose fees are usually paid by the state, are those assigned by the court. Known collectively as the "Clinton Street bar," they carry no briefcases and seldom consult lawbooks; their case preparation consists of marking trial dates in dog-eared date books and scanning court papers hurriedly on the day a case comes up. Jackson's lawyer is one of the more flamboyant Clinton Street barristers.

The Daily Bargain

BY THIS TIME, as the lawyer passed by, the judge was already seated on his perch atop a two-tiered wooden platform, surrounded by clerks, bailiffs and other functionaries shuffling through and stamping papers just below him.

"Detective Sanders," Jackson's lawyer loudly addressed a policeman in a gray suit. "You got the Jackson case?" The policeman, recognizing the attorney from past dealings, nodded. Then, ignoring the judge nearby, the lawyer shouted the question that, in Recorders Court, take the place of trials, juries, legal rules, and the rest: "Hey, Sanders, what can you do for me today?"

If convicted of the felony charge by a jury, Jackson would be given a prison sentence of several years. The law required it. The policeman suggested to the lawyer that the charge could prob[illegible]ed to "failure to present a gun for licensing," a misdemeanor carrying a penalty of only 90 days in jail, *if* Jackson agreed to plead guilty immediately. Together, the lawyer and Detective Sanders then crossed in front of the judge to join a line of attorneys and policemen that stretched to a back room occupied by the prosecutor—an official who is himself seldom seen in the courtroom.

Case by case, the prosecutor and each lawyer, usually joined by the policeman involved, hammer out a bargain for a guilty plea. If the accused agrees to admit guilt rather than insisting on a trial by jury, the government reduces the charge against him.

In Sam Jackson's case, the prosecutor readily agreed to the bargain offered by the lawyer and policeman. The lawyer came out, found Jackson again, and took him into the bustling hallway outside the courtroom.

"I got you 90 days," he told Jackson enthusiastically. He did not refer at all to the crime itself or to his client's actual guilt or innocence. "It's a good deal. You have a record. You go to trial and get convicted on the felony and you're in trouble."

Jackson nodded in agreement. His turn came quickly, and after a perfunctory question-and-answer session with the judge, the latter turned sideways in his overstuffed swivel chair to stare out a soot-clouded window, and wearily recited, as he had again and again already that morning: "Let the record show that counsel was present, that the defendant was advised of his rights

French judges were accused of indifference in this 1845 lithograph by Honore Daumier. Today's judges, with massive workloads, are accused of abdicating their authority to plea-bargaining lawyers.

and that he understood them, and that the defendant waived his right to trial by jury or this court, and that he freely withdrew his plea of not guilty and entered a plea of guilty."

The court stenographer took down every word. The judge swiveled around again and sentenced Sam Jackson to 90 days in jail.

Expediency Above All

PLEA BARGAINING is what the lawyers call it. No trial. No jury of peers. No exhaustive search for truth. No exacting legal rules. Only empty, sometimes dishonest words substituted for the reality of due process guaranteed by the Constitution.

A lawyer who knows next to nothing about his clent or the facts of the crime with which he is charged barters away a man's right to a trial, and, along with it, the presumption that a defendant is innocent until proven guilty—the presumption on which the American system of criminal justice rests. A prosecutor who knows little more about the case than what a policeman tells him hurriedly trades off one of American society's most important responsbilities—the responsibility for providing a full hearing for those charged with criminal acts and the levying of appropriate sanctions upon those convicted of crimes against that society. The judge, who has abdicated his authority to bartering lawyers, acquiesces to all this and sanctifies it for "the record."

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Everyone pays lip service to justice. But everyone's true faith is in expediency. And why not? An indifferent public has allowed the system to become overwhelmed with work: too many cases for too few judges, too few lawyers, too few clerks. An uncaring legal community has failed to modernize the system to cope with the inundation. How else can the system survive, except by trying to dispose of cases as fast as it can?

Plea bargaining instead of trials is the answer in crowded criminal courts across the nation. Everyone in the system, including the judge and the defendant's own lawyer, offers inducement or exerts pressure for a guilty plea, to save the time and trouble of a trial. If the prosecutor is not empowered to reduce the charge, the judge makes it clear that his sentence will be lighter for a guilty plea. Those who insist on a trial, the most basic of constitutional rights, are openly punished by prosecutors and judges with maximum charges and harsh sentences.

Most often, a prosecutor starts off the plea-bargaining process charging defendants in ways designed to produce compromises. In Cleveland and Washington, for instance, a defendant is regularly charged with a slew of offenses covering a single crime: a bank robber is indicted for armed robbery, theft, one charge of assault with a deadly weapon for every customer and teller he pointed his gun at, possession of an illegal weapon, and so on.

In Cleveland, if a defendant insists on a trial and is convicted, the judge often metes out for each charge separate sentences that must be served one after the other. Under Ohio's law for minimum-maximum sentences, this practice leads to such absurdities as a sentence of 12 to 240 years in prison (one to 20 years for each of 12 charges) given a woman convicted of embezzling union funds.

In places where the prosecutor habitually levies only one charge for a crime, usually the strongest suitable for the circumstances, prosecutors and defense attorneys — especially public defenders who are also paid by the government and work alongside the prosecutor in court every day—operate on informal understandings that certain charges will always be reduced to certain lesser offenses. In California, for instance, according to a recent study by the University of California Center for Legal Studies, "burglary" is usually reduced to "petty theft," "assault with a deadly weapon" to "assault without a weapon," and "molesting children" to "loitering at a school playground." (In cities like Detroit and Chicago, where a charge of armed robbery frequently becomes one of unarmed robbery if the defendant pleads guilty, the decision to plead is called "swallowing the gun.")

"We are running a machine," a Los Angeles prosecutor has told one researcher. "We know we have to grind them out fast."

Freedom by Default

BUT PLEA BARGAINING is not the only shortcut to justice practiced regularly in criminal courts today. Many thousands of cases—in many places, half the court's serious criminal cases—never even get as far as the plea-bargaining stage. The defendants charged in them—innocent and guilty alike—are arbitrarily set free before a trial, in effect acquitted by default, because the overburdened system cannot accommodate them.

Under pressure to keep the judge's case calendar as light as possible, overworked prosecutors toss out cases that seem too "weak"; cases involving charges, such as a husband's beating his wife, that seem too tawdry for the court to consider; those involving, as defendants, neat-looking, middle-class people who seem "respectable" and not likely to get into trouble again.

Frequently, perhaps, the prosecutor is dispensing admirable justice and saving the system from needless further congestion. But nobody ever knows for sure. The prosecutor makes no investigation of his own before acting. Most often, no judge reviews his decision. Some judges, in their turn, throw out still more cases in large lots. The judges, too, base their decisions on no more than a look at a court paper or a remark from a prosecutor or defense lawyer.

Certain defendants, usually the often convicted and knowledgeable, win freedom simply by outwaiting the courts. Patiently, they endure delay after delay arising as a natural product of the overloaded system. In the end, witnesses who have come back to court again and again stop showing up, or, as the months pass, even the most conscientious among them find their memories fading. A carefully timed request by the defense lawyer, often on a day when witnesses are not present, is enough to persuade a judge to throw the case out.

Courtroom Facade

THERE STILL ARE trials. But, when a rare criminal trial does take place before a judge, or a judge and jury, it is often a shadow drama of the real thing, played out by poorly prepared lawyers before obviously uninspired judges, who sometimes conduct their more productive guilty-plea business off to the side of the bench

while the trial is in progress. Seldom, except for the most complicated, serious, or glamorous cases, has the prosecutor or even the defense lawyer—both of whom have crowded schedules of their own—planned what he was going to do in advance.

In several cities, including Baltimore, Cleveland, and Chicago, persons charged with misdemeanors—vagrancy, disorderly conduct, simple assault, gambling, shoplifting, and other petty thievery—are usually not represented by lawyers when they are tried. In Baltimore's Muncipal Court, not even a prosecutor is present for criminal cases. The arresting policeman, who often looks uncomfortable doing it, must present the government's evidence to the judge and sometimes point out information favorable to the defendant that otherwise would be overlooked.

The assumption that anyone accused of a crime in the United States has a right to a full adversary trial of his guilt or innocence is fundamental to the American system of justice. Yet, with few exceptions, this concept has become little more than a still-celebrated myth.

Instead, everything is left up to the criminal-court bureaucracy which, like its counterparts throughout government and private commerce, is concerned first with its own day-to-day survival. Judge, prosecutor, defense attorney, policeman, and clerk are working partners struggling to keep their heads above water as the flood of cases rises.

Only a few voices from within raise any alarm. Chief Judge Harold Greene of the D.C. Superior Court complains that criminal courts have become "factories where defendants are processed like so many sausages."

Indeed, momentous Supreme Court decisions and currently fashionable public and legal debates over criminal law and the rights of the accused are simply irrelevant to what actually happens each day inside the courtroom. In many cities, judges and lawyers never bother to explain to defendants (as appellate courts have instructed them to do) those various constitutional rights they can invoke to protect them in court. Despite high court rulings on the right to a lawyer, many defendants still do not have one, or else they wind up with courthouse hangers-on of dubious ability who can get no other clients.

The admissibility at a trial of a confession obtained by police is perhaps the most debated public issue concerning criminal courts, but it is essentially a moot question in a system where 90 per cent of those convicted admit guilt, anyway, in the courtroom. Appellate court decisions and legal controversies over what evidence can be used against defendants are virtually meaningless when few defendants are even actually brought to trial.

"They are just spinning their wheels now," observes one veteran lawyer about the New York City criminal courts. As an official of the Vera Institute for Justice, a nonprofit legal-reform "think tank," he is studying and trying to devise change for the city's courts.

The volume of criminal cases in New York City's court system has more than doubled in a decade, and each judge must face as many as 200 serious criminal cases each day. One of the most respected jurists on the bench of Criminal Court in Manhattan, Simon Silver, resigned abruptly in late 1969 because he was "fed up with congestion."

"At present, I find that I cannot dispose satisfactorily of more than 15 cases a day. The rest [usually 100 to 200 or more] are adjourned [postponed to another day] and that creates a heavier backlog. I have to spend more time on [postponements] than in listening, considering and disposing."

Despite the haste with which many other criminal court judges run through cases, there are, on any given day, more than 7,000 criminal defendants in jail awaiting their turn in New York City courts. One such lockup, adjacent to the Criminal Court Building in Manhattan and known appropriately as the Tombs, was built for 900 prisoners but has held as many as 2,000. Its population was near that number in August, 1970, when 300 angry prisoners took over one floor, held several guards hostage, and vandalized what they could—all to protest the jail's crowded conditions and the long pretrial delays. "The ironic thing," Commissioner of Corrections George McGrath told reporters, "is that most of what they say I have said many times over the past months. The institution is abominably overcrowded."

Poor Relation

THE CRIMINAL COURTS are the neglected stepchildren of already overcrowded, undermanned, niggardly financed, and hopelessly antiquated state and local systems of trial courts. In New York City, some criminal court judges must conduct court in converted clerks' offices and judges' robing rooms. In Baltimore, Cleveland, and Chicago, among other places, most misdemeanor cases are tried in makeshift courtrooms located on the upper floors of old police station houses, while the police continue doing business downstairs.

In Chicago, felony cases are tried in the deteriorating Cook County Criminal Court Building adjacent to the notoriously run-down county jail. Its badly-lit, acoustically-impossible, poorly-maintained courtrooms provide a stark contrast to the bright, well-designed, extravagantly-furnished modern courtrooms provided for the city's well-heeled civil-case lawyers and litigants in the new 30-floor, glass-and-steel Civic Center downtown.

Criminal court is where the chief judge sends rookie, hack, or senile judges who cannot be trusted with complicated civil cases. The majority of the private-practice lawyers appearing before them are counterparts of Detroit's Clinton Street bar (called "Fifth Streeters" in Washington, and the "Baxter Street bar" in New York City). They wait for judges to appoint them to cases, or they prowl the halls soliciting work from defendants and relatives of defendants who pass by. If they are not paid by the local or state government, management of their clients' cases is built around efforts to extract money from defendants or relatives. The client is told bluntly that the quality of service depends on the fee. If time is needed for the money to be raised, the lawyer has the case postponed in court. Judges knowingly cooperate in this fee-collection effort by postponing the case without reason when a lawyer gives the signal. In New York, the attorney usually tells the judge he needs time to locate a witness, a "Mr. Green."

The absence of much concern, scrutiny, or help from the outside reinforces in criminal-court bureaucrats a profound cynicism and resistance to criticism and change. Eventually, the malaise overtakes even many of the young and idealistic newcomers joining the staffs of the prosecutor, public defender, or probation office chief.

As Abraham Blumberg, a noted lawyer and sociologist, has pointed out in his book, "Criminal Justice," the client becomes a secondary figure in the court system. "He may present doubts, contingencies, and presssures which challenge or disrupt . . . but they are usually resolved in favor of the organization. Even the accused's lawyer has far greater professional, economic, and other ties to the various elements of the court system than to his own client. In short, the court is a closed

community."

Nowhere is Blumberg's analysis better documented than in New York City's Criminal Court in lower Manhattan. There, in the dingy, tomblike building teeming daily with people, can be found typical, if sometimes extreme, examples of the distortions of justice that assembly-line processing produces at every stage in the criminal court system.

The nerve center of Criminal Court is Part 1-A. Through it, during daytime and evening sessions, passes a daily procession of 200 to 500 defendants arrested that day or the night before for every kind of crime. The pace is so rapid that the judge himself often has time only to check his calendar and set dates for cases to be continued to another day. Most of the talking is done by a bailiff called the "bridgeman," who, in each courtroom of Manhattan's Criminal Court, stands just below the judge on the bottom level of the two-tiered platform.

In the tobacco-auctioneer's rapid, singsong style, the bridgeman reads the formal charge against the defendants so fast it can barely be understood.

Frequently, defendants and witnesses are rushed away by the bridgeman before they understand what has been decided about the case or when and where they are to return to court for the next hearing. In many cases, nothing more is done than the setting of a date for trial. Other cases are dismissed by the prosecutor, usually with no reason given. Occasionally, a guilty plea is arranged on the spot after a whispered conference in front of the judge. The judge passes sentence right away.

No case lasts more than five minutes. Many are over in 60 seconds.

Lithograph by Daumier, 1845

Lithograph by Daumier 1848

Fearsome Vengeance

THE SAME RUSH to dispose of cases—the same lack of concern for criminal defendants as individual human beings — carries over to the final important step in criminal courts: sentencing convicted defendants.

Usually, the prosecutor and defense lawyer have already agreed on a certain sentence in exchange for a guilty plea. In addition, the sentence for a particular charge often is dictated by state law, and thus it is the charge itself for which a guilty-plea bargain has been struck.

But, even when not prevented by law or a prosecutor's deal from tailoring his sentence to each convict's particular case, many judges decide on sentences that make little sense and result in obvious inequities. A study of [illegible] Recorders Courts

800 cases in Detroit's Recorders Courts showed that black defendants and those wearing work clothes received much harsher sentences on the average than did whites and those wearing coats and ties who were convicted of the same crimes. The most severe Recorders Court judge sent nine of every ten defendants to prison; the most lenient jailed fewer than four of ten.

The vengeance wrought against criminals in the United States shocks people in other countries. Prison sentences for most crimes average many years longer in the United States than in other politically stable nations. A committee of the American Bar Association that studied the sentencing process concluded that "sentences are in most cases much higher than is usually called for by the particular offense." The committee recommended that most sentences for serious crimes which frequently run to 10, 20, or more years' maximim imprisonment, "be sharply reduced to approximately the five-year range," except for demonstrably uncontrollable offenders.

The sentencing function in American criminal courts lies outside much of the supposed due-process system, has little appellate review, is often performed on the basis of very few facts and sometimes on the basis of much misinformation, and depends on capricious or prejuiced snap judgments by those involved.

In many large criminal courts, judges are supplied with "pre-sentence" reports on some or all of the defendants, which are supposed to present a complete picture of the defendant: his family life, schooling, job history, mental and physical health, and previous criminal record. In many jurisdictions, the report also contains a recommendation for sentencing by the person who prepared the report, usually the court probation officer.

The problem is that, like everyone else in the system, probation officers are overworked and undersupervised. Consequently, many pre-sentence reports amount to little more than recitations of the police or prosecutor's version of the crime, the defendant's past police record, dates concerning his birth, schooling, and employment, and the probation officer's impressions written after a brief interview with the defendant.

Stray derogatory remarks by policemen or prosecutors, which would never be admitted in open court, often find their way into the hastily-written reports, as do outright errors and large doses of the writer's prejudices as stimulated by the defendant's life style or the alleged crime. Many probation officers automatically recommend harsh sentences for a defendant with a history of hard drinking or deviant sexual practices or who seems aggressive or unrepentant during his brief interview.

Seldom are defendants tested psychologically. Seldom are their relatives, employers, or friends interviewed. Seldom is the defendant questioned sufficiently to reveal much about him.

In most jurisdictions, the defendant and his lawyer are not allowed to see the pre-sentence report and are therefore unable to present evidence to counter bias or incomplete information. Defendants are not even guaranteed the right to be represented by a lawyer at sentencing. Lawyers who are present seldom take the trouble to make a pre-sentence investigation of their own or to contact the court employees who prepare the one used by the judge. Appellate courts usually do not review criminal sentences or the sentencing process, no matter how bizarre or unjust a case may be.

Compounding the Trend

AVOIDING "UNNECESSARY" TRIALS, processing the sausages with the bridgeman's unremitting haste, ignoring the fates of defendants and crime victims alike, blotting them out as human beings—this, in sum, is the business of criminal courts across the country. The necessity to move cases quickly is the central need. Determining guilt or innocence, deciding on the treatment of offenders, and dealing with those in the public who are dragged into the process are all secondary matters. Means are shaped not in accordance with the constitutional ideal of justice but, rather, to satisfy the ends of the bureaucracy in its daily battle with case loads.

Plea bargaining was given the stamp of high court approval in April, 1970, when the U.S. Circuit Court of Appeals in New York upheld the conviction of a man who claimed he had pleaded guilty to a second-degree murder charge only because he was told he would be prosecuted for first-degree murder, and possibly executed, if he insisted on a trial. Then, in late 1970, the U.S. Supreme Court also upheld a guilty plea made for the same reason. Its narrow ruling, which left unanswered the broader legal questions about the propriety of plea bargaining as it is conducted in most cases in the lower courts, was that a man can knowingly decide to plead guilty only to avoid the possibility of the death penalty rather than because he philosophically admits his guilt, and that he cannot change his mind later.

The New York federal appellate court ruling went further, in that it took pains to sanction plea bargaining generally as an alternative to the chaos that it believed might result if plea

bargaining ceased and all those criminal defendants who now plead guilty (95 of every 100 New York "convictions" had to be given trials instead. Without plea bargaining, "the administration of criminal justice as we know it would be impossible," Chief Judge Edward Lumbard wrote for the unanimous three-judge panel in New York. Such a judgement elevates the courthouse bureaucracy's substitution of expediency for justice to a lofty level of respectability.

The Republic has not been consulted. The Constitution has not been amended. But someone has adopted a different standard for justice than the one that has always been a first lesson in civics for school children.