Push and pull in the search for justice
BY CARL STROCK

One of the things that has long interested me is the inducing of criminal defendants to take plea bargains by threatening them with brutally long sentences if they insist on their right to a trial.

So I'm happy to see that academics are looking at the situation also, trying to study it in a systematic way. And I refer here to a "Symposium on Crime and Justice" that will be held this week at SUNY Albany, under the auspices of the School of Criminal Justice.

Alas, it is only for professionals in the field and is not open to the public, but I do wish those professionals Godspeed. As far as I'm concerned, we can't have too much scholarly attention to the workings or our criminal justice system.

I spoke to two of the scholars who will be presenting a paper at the symposium -- Brian Forst of American University in Washington, D.C., and Shawn Bushway of SUNY Albany, whose particular interest is prosecutorial discretion in the processing of defendants.

By discretion they mean, from start to finish, whether or not to accept a case from the police, what level of charges to present to a grand jury, what kind of a plea deal to offer the defendant, how much time and resources to devote to a trial if the case goes to trial, what kind of sentence to recommend if the trial ends in conviction.

Some of these matters are public record, but the scholars point out with frustration that the most important are not, including plea negotiations.

"The bulk of discretion in the sentencing process is occurring in the prosecutor's office, and we don't know much about that," Bushway said. "It's really hard to study."

I asked the Schenectady County district attorney, Bob Carney, about this, and he pointed out the absolute necessity of plea bargaining given the number of felony cases a year (about 500 in Schenectady County) and the finite resources of the judicial system, which we all know. There are not enough judges, courtrooms, stenographers, public defenders, assistant district attorneys to take more than a small fraction of those cases to trial.

How small? About 5 percent in Schenectady County, which is typical. A couple percent more might be dismissed, and the rest are resolved with plea bargains, negotiated in secret and made public only when they are a done deal.

The problem is the potential for abuse, meaning applying the screws to a defendant so he pleads guilty to something he didn't do in order to avoid the risk of a longer sentence if he insists on his innocence.

No prosecutor but the most perverse would desire such a thing, but we know that it happens.

"It's most abusable when you can hit them with really long sentences," Bushway said, noting that a rational person will do almost anything to avoid a sentence of 25 years to life.
A defendant charged but not convicted, sitting in jail because he can't make bail, is also vulnerable. "Not being released increases the rate at which people plead guilty," Bushway says.

Why? Because a prosecutor is likely to offer him a deal he will find hard to refuse -- plead guilty to a reduced charge and get sentenced to the time he has already served, meaning, as a practical matter, go free.

"If you're a rational person, anything done is done," Bushway says. You've already served the six months, let's say, so let's get out of here, albeit with a criminal record.

One reform he would like to see is easier bail and easier release on a defendant's own recognizance, which he says have been shown not to lead to more defendants skipping out.

"The DAs of the state are taking a very hard look at these issues," Carney said, especially in light of DNA evidence that has shown some convicted defendants to be innocent, including defendants who had pleaded guilty, which is another whole area that I believe merits study.

(An excellent article on the subject appeared Sept. 13 in The New York Times, if you want to look it up.)

Part of the problem in criminal justice is popular emotion -- we all want to be safe from criminals, and the less rational among us simply insist that everyone charged with a crime be locked up forever. Tough on crime, is the ticket, a ticket that many politicians are happy to punch.

Wrongful convictions, coerced guilty pleas and false confessions are less politically explosive than being soft on crime.

One result, noted by Forst, is that while crime has dropped dramatically over the past 20 years, the number of people incarcerated has increased, from 1.3 million in 1992 to about 2.4 million today, nationwide.

The social and political pressure is always to lock criminals up, and if a few non-criminals get scooped up along the way, even Forst argues that it's not all that many.

"The best estimate is that half of a percent to 1 percent of convictions are false," which translates to 10,000 wrongful felony convictions a year out of 1 million felony convictions and 15 million felony "victimizations."

I think about 10,000 people sitting in prison for crimes they didn't commit, and I am not happy. Forst thinks about 14 million felonies committed that did not end up with someone getting convicted, and he is not happy.

"The social costs of non-conviction are greater than for wrongful conviction," he says.

What about the ancient dictum, "better that 10 guilty persons escape than that one innocent suffer," attributed to William Blackstone in the 1760s.

"I'm not sure even Blackstone would feel that way about serial rapists," Forst said.

So these things are not easy to sort out, and I'm glad we have scholars to help us do it.

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