Judicial Process as a Game of Poker

In the prison in which I used to work as a doctor, I would ask prisoners in confidence who were held pending trial whether they intended to plead guilty or not guilty.

“It depends,” they replied.

“On whether or not you did it?”

“On what my counsel says.”

In other words, their decision was contingent on whether there was a realistic possibility of acquittal. If not, it was better to plead guilty and have done with it. In Britain, the official body that issues guidance to judges on the sentencing of convicted criminals has proposed that those who plead guilty at the first opportunity should receive a prison sentence one third shorter than it would have been had they been found guilty at trial.

The proposal does have some appeal. In the first place, it will speed up the administration of justice, and swiftness is, or ought be, part of that administration. The law’s delay is an injustice in itself, as Hamlet implied. In the second place, and as advocates have emphasized, it would spare the victims of crimes from having to testify in court, which some of them find disturbing or even traumatic. In the third place, it would save the expense of a full trial and imprisonment costs due to the resultant shorter sentences. Finally, it seems there must be some inducement for criminals to plead guilty—otherwise most would try for acquittal, even though the odds of it are low.

On the other hand, there are disadvantages, albeit some of a less tangible kind. For example, if a criminal were normally

to receive a sentence of 18 months' imprisonment for a particular crime, under the new dispensation he would receive 12 months thanks to his immediate admission. That means that a third of the sentence of a man who committed the same crime but did not confess would be served for failure to confess, not for having committed the crime. This non-confession tax, if you will, seems excessive. After all, it is the commission of the crime, not denial of it (which is his right), that is to be punished.

There is no reason to suppose that a swift admission under strong inducement to make it is indicative of a more contrite heart, only of a more realistic estimate of the chances of acquittal. An admission made when there are no advantages to making it can alone be taken as evidence of anything, and perhaps not always even then. I have known criminals who have admitted and even exaggerated their crimes from bravado. And false confession is by no means unknown.

While there are undoubtedly some victims who fear to testify and find the process of going to trial intimidating (they may also be under threat outside the court), others find relief in the public airing of the full circumstances of a crime that a trial allows. I have known victims who felt that, the whole affair having been disposed of in a quasi-administrative fashion, justice had been denied them. With no trial, justice may indeed have been done, but it has not been seen to be done.

Most of those charged with a crime are guilty—which is, of course, as it should be. Indeed, almost all of the prisoners whom I treated confessed to me in confidence that they had committed many more crimes than those with which they had been charged and found guilty. According to the statistics, 20 per cent of those charged are acquitted, either because the prosecution's evidence is insufficient or because they are genuinely innocent.

And inevitably—given Man's fallen state—some of the innocent are convicted.

Very few of the innocent who are acquitted, however, get off because there is no evidence against them. Often there is quite strong evidence against them, and where the police have made some of it up (as sometimes happens, for the police are not saints), it is usually more in the nature of gilding the lily than manufacturing it wholesale. Having evidence that they believe is strong, but not quite strong enough, and morally certain that their suspect is guilty, they want to make conviction doubly sure.

So an accused person can rarely feel completely assured of acquittal however innocent he knows himself to be. He might therefore be tempted (or advised by his counsel) to cut his losses and plead guilty. This is all the more so where he is of low intelligence or weak character.

Where in addition there is the possibility of plea-bargaining, the effect of the proposal is doubly vicious. It turns criminal justice into a kind of game, a little like a Nigerian census in which the various states of the country haggle over the size of their populations, the allocation of central funds being according to size of population. The prosecutor overcharges, the defense agrees to plead guilty to a lesser charge. This is poker, not justice.

The efficiency of the game might be urged in its favor; efficiency, that is, in numbers of cases disposed of. But, as Bishop Butler famously said, everything is what it is and not another thing: and that includes justice. Abandoning the presumption of innocence would, perhaps, be even more efficient.

What is not mentioned in the proposal is the underlying reason why such alleged efficiency is so important: that the criminal justice system has been overwhelmed by the sheer number of

cases, themselves a tiny proportion of the cases that would have to be brought if detection rates were higher. And this situation has been brought about in the first place, at least in part, by sentencing policy.

One can see in all this cause both for optimism and pessimism. First, the vast majority of prisoners received into prison for a new offense—about 97 per cent of them—are under the age of 39. In other words, after that age they either desist from the commission of further crimes or become more adept at avoiding detection—I believe the former. This suggests a biological, possibly endocrinological, influence on the commission of crime, though it would not explain variations in the crime rate between societies or across time. But, whatever the explanation, criminality seems to be self-limiting in most cases.

The imprisoned criminal will often admit that he has committed many times more crimes than he has ever been convicted of. Since he may have 10 or 20 convictions, this means that (assuming his confession to be true, in circumstances in which he has nothing to gain and nothing to lose by it) he has committed hundreds of crimes.

The fact, then, that criminality is a self-limiting condition and that, even now, it is probable that a large proportion of crime is committed by a small proportion of the population, is a ground for optimism.

What is less encouraging is that, in Britain at least, penologists have consistently refused to take these facts seriously. They have preferred to weaken the rule of law, undermining the right to silence and downright nullifying the law against double jeopardy. And now they want to turn the judicial process into a game of poker to extract swift admissions.

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