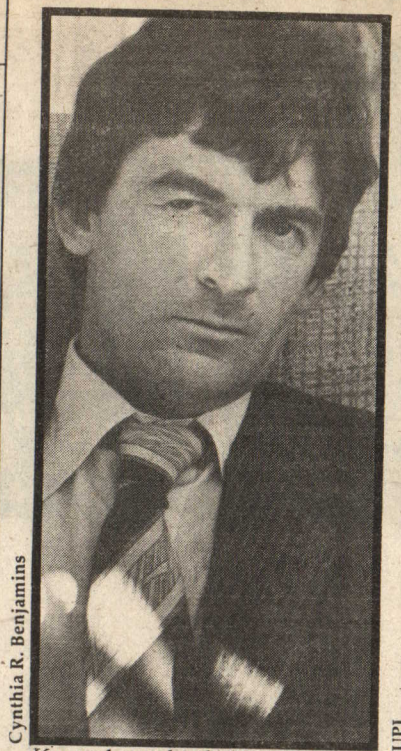
Briefcases



Cynthia R. Benjamins

UPI

Krutschewski (left) and Locke: "law-and-order" sentences

A matter of time: 'Sentence shopping' in federal court

by Harvey A. Silverglate

The seven-to-10-year prison sentence imposed recently on former Secretary of Transportation Barry Locke by Massachusetts Superior Court Judge Rudolph Pierce has ignited a long-simmering philosophical dispute among the judges sitting on the United States District Court for Massachusetts. Boston's normally staid federal bench is now wrestling with the question of what constitutes an appropriate range of sentences to be meted out in a variety of criminal cases, notably political-corruption "white-collar," and

nothing new, of course; we've had them for as long as we've had judges. In the *state* trial system, such differences have long been the rule, rather than the exception. However, the state system has built into it a number of devices that over the years have ameliorated the discrepancies in sentences meted out.

Thus, sentences imposed by judges in the lowest rung of the state criminal-court system, the District Court Division of the Trial Court, have never been final, since a defendant could

This rancorous debate, moreover, is taking place as the court is implementing a revolutionary plan for assigning criminal cases to judges. Under this plan, the long-used and highly regarded system of assignment by the luck of a draw has been abolished; instead, cases are assigned by a single judge. Many observers have pointed out that this system would be abused if a particular case were assigned to a particular judge in the hope of achieving a particular result.

The issue of judicial assignment has become particularly acute in recent months because of the increasing inclination of some judges, including some federal judges, to "follow the election returns" and become more vocal advocates of the prevailing "law and order" mentality, frequently at the expense of common sense. More and more lawyers have been saying privately that the Locke sentence, which is far stiffer than in just about any political-corruption case in recent memory, will give added impetus to the judges who believe that sentences in the Federal District of Massachusetts have generally been too low. This would likely increase the already appreciable gap in sentences meted out by members of the two opposing camps of federal judges, and may also exacerbate the debate that now splits the federal bench.

In this context William Weld, the new United States attorney, has just taken office. For the past few weeks he's been busy putting together a virtually all-new prosecutorial team, which is expected to adopt policies that will emphasize political corruption, white-collar crimes, and large-scale and profitable illicit drug-importation and -distribution operations — precisely the areas in which the sentencing debate has grown the most bitter.

Differing sentencing philosophies among judges are satisfied with the result of the first one. Even a particularly harsh sentence imposed by a Superior Court judge has been subject to appeal, in the Appellate Division of the Superior Court, which consists of three-judge panels that review only sentences. Such sentence review — which is absent from the federal judiciary — has tended to even out the disparities one would inevitably find in a system where those who impose the sentences are human beings. Finally, under the leadership of Superior Court Chief Justice James P. Lynch Jr., efforts have been made to establish sentencing guidelines based upon the sentencing patterns established by the court over recent years. As a result, sentencing disparities appear to have been shrinking.

Furthermore, the Massachusetts state parole system has a tendency to reduce sentencing disparities sharply. The state parole board has the power to release prisoners after they've served one-third of their sentence, minus a further reduction for good behavior. Even in cases of violent crime, where prisoners aren't ordinarily granted statute parole until they've served two-thirds of their sentence, most prisoners with unusually high sentences may with some hope of success try to take advantage of a procedure that allows, by special dispensation, eligibility after they've served one-third of their sentence.

The federal parole system, on the other hand, is straitjacketed by a series of guidelines that purport to set parole dates in accordance with a number of factors related to the type and the degree of the crime and to the prisoner's background and current life situation. The purpose of the guidelines is to try to ensure

Continued on page 18

Briefcases

Continued from page 10

that prisoners who have committed similar offenses end up serving similar sentences. However, the minimum sentences these guidelines set are very high — higher, in fact, than the sentences most prisoners receive in the first place. They end up, therefore, serving their entire sentence before they become eligible for parole. In short, this arrangement renders parole irrelevent. This system is hailed by proponents of "fixed" sentences (in contrast to the relatively "indeterminate" sentences that result from the liberal use of parole to achieve early release), but, ironically, it maintains disparities in sentencing.

On the federal side, then, the disparities have been growing in the District of Massachusetts. Efforts to get the nine fiercely independent district judges to conciliate their different approaches have been conspicuous failures, largely because Federal Chief Judge Andrew A. Caffrey lacks Superior Court Chief Justice Lynch's administrative skill and diplomacy. Even recent efforts to get the judges to agree merely to consolidate their jury pools have not been completely successful. If such simple administrative reforms have proved elusive, then it's unlikely that any effort to bring the judges' sentencing philosophies more into line will succeed.

The sentencing battle has flared in recent months in a number of highly visible cases in the federal court.

In one case, United States District Judge Walter Jay Skinner, who is known more for an unpredictable approach to sentencing than for adherence to one camp or another, early last year imposed a 10-year prison sentence on convicted marijuana smuggler Peter L. Krutschewski of Michigan (see *Phoenix,* April 14, 1981, and January 19, 1982) in spite of a unique proposal by the defense. Under Krutschewski's proposal, he would have contributed $1.7 million over four years to Michigan programs designed to rehabilitate released convicts and worked 30 hours a week for four years in a mental-health facility in Lansing. Skinner, citing "the level of marijuana-smuggling activity along the New England coast," concluded that Krutschewski's proposal would not sufficiently deter other smugglers.

At the time, many eyebrows were raised at the prospect of a 10-year sentence being imposed on a smuggler of a drug generally agreed to have a very low abuse potential, especially when the sentencing judge was the very same judge who not much earlier had imposed one-year prison sentences on convicted extortionists — or bribe-takers, in a less legalistic sense — former Senators Joseph DiCarlo and Ronald MacKenzie. It seemed to many that Judge Skinner was sending the wrong message, for while the DiCarlo/MacKenzie sentence was perhaps only a bit more lenient than the typical political-corruption sentence imposed in those days, the Krutschewski sentence was widely seen as particularly Draconian and out-of-step with the typical practice in the Federal District of Massachusetts, where even a large-scale marijuana-smuggling operation rarely would draw a sentence of more than three or four years. (Interestingly, Federal District Judge W. Arthur Garrity, who has a reputation for extremely harsh sentencing in drug cases in this district, some years ago reduced a marijuana-trafficking sentence from six to three years, admitting in his order that he had overestimated the abuse-potential of marijuana by believing that it was responsible for progressive addiction to opiates. Judge Garrity has since then typically imposed sentences of between three and five years in such cases).

While the court's tough-sentencing contingent is generally thought to be led by Judge Garrity and Chief Judge Caffrey, the more moderate camp is thought to be headed by Judges David S. Nelson and Joseph L. Tauro. It would not be accurate to say that either judge is a "soft touch," but generally, they have shown considerable flexibility both in the length of prison sentences and with respect to the concept of alternative sentencing —the concept Judge Skinner had rejected in the Krutschewski case. Judge Tauro has sentenced a number of bookies to work nearly full-time for a number of months or years in such financially hard-pressed state institutions as the Fernald School for retarded children, where the experience and expertise of some of these convicts have been put to good use. Judge Nelson has likewise sentenced a number of smaller fish to such public service, although in at least one highly visible political-corruption case — that of former Boston School Committeeman Gerald

O'Leary, who was convicted of attempted extortion of $650,000 — Nelson imposed an 10-month prison sentence, arguing that if he had imposed an alternative, non-custodial sentence in such a visible case, "the symbol would have been misunderstood, and perhaps it would take longer for alternative sentencing to be accepted by the public."

The heavy sentence imposed on Barry Locke has given psychological impetus to the hard-nosed school exemplified by Judge Garrity and Chief Judge Caffrey. That sentence is widely seen as especially significant because it was imposed by Judge Rudolph Pierce, a highly regarded and in many ways moderate Superior Court judge. Judge Pierce's joining the ranks of the hard-nosed sentencers in political-corruption cases suggests an analogy between him and Judge Garrity, who is also highly regarded and seen as generally fair on many matters. It is likely that the federal bench will become more highly polarized than ever, with some of the moderates likely to be pushed over to the harsher end of the spectrum, at least in corruption and white-collar cases, although this trend would likely spill over into other areas as well. Other moderates, however, may resist what is seen as a trend among judges to be too responsive to fickle public opinion and public pressure, or even move more into the Nelson/Tauro camp, which emphasizes flexible and creative alternative sentencing. (Federal judges are, after all, given life tenure with protection against salary reductions, and so they certainly have the abillity to resist the tides of popular opinion and prejudice.)

The growing chasm between these two camps has become a far more serious issue in recent weeks because of the implementation of the so-called "Massa-

of federal cases, outlined above. Although the random-assignment system did produce disparities in how similarly situated defendants were treated, it did offer a measure of fairness and integrity, since everyone had an equal chance of drawing a fair or favorable judge. A defendant might get a good break or a bad one, but at least his fate was governed by the laws of chance.

Now, however, even this scant comfort has disappeared. Under the new plan, announced by Chief Judge Caffrey late last year without any real consultation with members of the bar, criminal cases in each three-month period will be heard by members of a three-judge panel whose membership will change every three months. As mentioned above, one judge on the panel will make case assignments to himself and other panel members, and this position of "assignment judge" will rotate each month.

Under this new system, a prosecutor who wants his case tried by a harsh judge (or at least by a judge selected by a harsh assignment judge) simply has to time the filing of the charge to coincide with the "right" panel. Either side in a criminal case will have an incentive to dodge a particular judge or panel it so desires, simply because it's possible, by getting the trial postponed into the next three-month period. This system will inevitably produce increased opportunities — especially for prosecutors — to funnel "pet" cases to harsh judges. An unseemly scramble to "shop" for the "right" judge is likely to become more and more commonplace. Defendants will be less likely to accept the results with any degree of equanimity, since the aura of fairness previously provided by the element of chance will be missing. The system will become less a

Continued on page 20

Briefcases

Continued from page 19

systems of laws, and more a system of men.

Of course, attempts to judge-shop, even under the random-assignment system, are not new. However, under the old system, it was virtually impossible to bounce a case from one judge to another. One celebrated attempt, which was made in the months before Chief Judge Caffrey announced the implementation of the new plan, involved efforts by Edward F. Harrington, who was then the United States attorney, to take away from Judge Tauro the trial of former state Senator James A. Kelly, accused of extorting $34,000 from a Worcester architectural firm. Kelly's first trial, presided over by Tauro, ended in a mistrial, with one juror having dissented from the guilty vote of the other eleven. Harrington was very unhappy with many of Tauro's trial rulings and asked the judge to disqualify himself from presiding over the retrial. Harrington based his unusual recusal motion on evidence that he had allegedly uncovered by reading the *Boston Globe*, to the effect that in his days as legal adviser to Governor John A. Volpe, Tauro had solicited some political favors from Kelly and hence was indebted to him. Many observers at the time believed that Harrington's more immediate motive was to prevent Tauro from being the judge to sentence Kelly in the event of a conviction at the retrial, partly because his hostility was compounded by the perception that Tauro had treated some of Harrington's assistants harshly over the years (*Phoenix*, June 9, 1981).

Tauro refused to step down from the Kelly case, and Harrington appealed. While the appeal was pending, Caffrey announced the demise of the system of random assignment, which had gotten the case to Tauro in the first place. This meant that any retrial case would almost certainly be assigned to another judge — one of the three members of the criminal-trial panel in existence when the case was ready for trial. This change in the assignment system therefore rendered Harrington's challenge moot.

Almost all cases that have become in this district. Since Tauro landed the case by the luck of the draw, it was his from beginning to end.

The Court of Appeals could have saved its breath, for while its opinion in the Kelly case was being written, Caffrey was preparing to undermine the entire tradition of random assignment. The results of the new system became painfully evident a few months later, when George Collatos, a suspended Boston Redevelopment Authority officer, was facing federal charges of extorting money from the owner of a concrete firm that wanted to build a plant in Dorchester and needed cooperation from local officials.

The Collatos case was sent to the three-judge panel for trial. Sitting on that panel were Chief Judge Caffrey and Judges Skinner and A. David Mazzone. Judge Skinner was sitting as the "assignment judge," and he sent the case to Caffrey for trial. Collatos sought to have the case taken away from Chief Judge Caffrey and randomly assigned. That request was denied, and Collatos faced the imminent commencement of trial (and sentencing in the event of a conviction) before the harshest judge on the entire Federal District Court.

Rather than face that unhappy prospect, Collatos announced that he would change his plea to guilty. This move had the effect of sending his case from the trial judge back to the assignment judge for sentencing after acceptance of the guilty plea. That judge was, of course, Walter Jay Skinner, who had given DiCarlo and MacKenzie one year. Erratic though Skinner could be, Collatos at least had a better chance of receiving a shorter sentence than he would have had with the consistently harsh Caffrey.

The result of the new assignment system in the Collatos case was that the defendant felt pressured into pleading guilty. Collatos was deprived of his opportunity to have his case judged by a jury of his peers, for the cost of losing was too high, in view of the Skinner alternative. Likewise, the public was deprived of the opportunity to see and hear the evidence and, possibly, to learn how corruption in city government worked. Similarly, when John M. Williams, a former city official, pleaded

because the United States Constitution gives courts jurisdiction to decide only "cases or controversies," and not to render advisory opinions on matters no longer contested. Nevertheless, the Court of Appeals took the highly unusual step in the Kelly case of rendering its decision even though Caffrey's announcement of the new assignment plan effectively mooted it. This action was widely taken by the legal community as a sign of strong support for Tauro's position by the appellate tribunal. This, in turn, was interpreted as being a clear message from the Court of Appeals to the effect that neither prosecutors nor defense lawyers should challenge a judge's right to sit unless they have clear evidence that it would be improper for the judge to hear the case. Harrington's speculations were inadequate to force Tauro off the Kelly case. This 'was a warning, in effect, that "judge-shopping" would not be tolerated attempted extortion, the public was once again deprived: the government's primary witness, developer Anthony D'Alesandro, had reportedly taped more than 60 hours' worth of conversations with city officials on behalf of the FBI. When this sort of thing happens, everyone is the loser — including the criminal-justice system, to which the public's perception of fairness and integrity is vital.

The increasing potential for manipulation of the assignment system, coupled with the increasingly divergent philosophical views among the federal district judges in Boston, has created a crisis of sorts within the federal judiciary here. It is anybody's guess whether the nine judges on that bench will be able to get together to remedy the situation. In the absence of effective leadership from Chief Judge Caffrey, it is not clear where the impetus will come from, or whether it will come at all. □

WideWorld

Collatos: choosing a plea meant choosing a judge.