Law vs Equity

In the late Middle Ages, two distinct legal systems developed in England: the Common Law Courts and the Court of Chancery (Equity). In the Common Law Courts, which heard all manner of legal disputes, the only remedy available to a victorious party was an award of money ("damages"). The Court of Chancery was presided over by the Lord Chancellor, normally a member of the clergy, and it originally dealt exclusively with legal questions concerning the clergy. Gradually Chancery expanded its jurisdiction to encompass conflicts where the Common Law Courts' award of money damages was either inadequate or irrelevant. In order to craft a non-monetary remedy that was fair and equitable the Court of Chancery avoided iron-clad rules, took both the position of the parties and all the facts and circumstances of the case into consideration, and sought to temper justice with mercy. A legal instruction book of the early sixteenth century emphasized the flexibility and leniency that was available in equity but not at law:

> Equity is righteousness that considers all the particular circumstances of the deed and which is also tempered with the sweetness of mercy . . . And the wise man says: be not overmuch righteous for extreme righteousness is extreme wrong. . . . It is not possible to make any general rule of law but that it shall fail in some case . . . and to that intent equity is ordained to temper and mitigate the rigor of the law.

Since its inception, the Court of Chancery found itself in conflict with the Courts of Common Law. Proceedings in the Common Law Courts, which strictly applied the letter of the law and often dismissed lawsuits on technicalities, periodically resulted in unfair outcomes. On the other hand, the common law had the virtue of being regular, predictable, and expeditious. The Chancery Court, in contrast, sought to balance the competing interests (the "equities") in a particular case and craft a resolution that did justice to both parties. Proceeding as it did on a sometimes subjective assessment of what was just, the Chancery Court was vulnerable to criticism that its decisional standard was as variable as the size of the "chancellor's foot" making for protracted proceedings with unpredictable outcomes. In the rare instance when it wasn't clear if a suit should be brought in the Common Law Courts or in the Chancery Court the decision would usually depend whether a litigant would benefit more from strict enforcement of the law or from equitable flexibility.

The United States inherited from Great Britain the bifurcated system of Courts of Equity and Courts of Law. As was traditional, U.S. law courts dealt mostly with commercial matters where a monetary award was the only judgement available to the victorious plaintiff. Courts of Equity had jurisdiction over suits where non-monetary awards were

sought, such as rescission of a contract, an injunction (a court order to do something or stop doing something), and, originally, a decree of divorce. In all such equitable proceedings the goal was to do what was fair, not merely what met the letter of the law.

Although the federal government and most states have now combined the courts of law and equity, the underlying concept of equity as an approach that can soften and adjust the process of law in order to render justice in a particular case lives on in both civil and criminal courts and, more generally, in the application and enforcement of the law by government.

The contrast in approaches is illuminated when Portia's evocation of the equity:

> The quality of mercy is not strain'd,
> It droppeth as the gentle rain from heaven
> Upon the place beneath: it is twice blest;
> It blesseth him that gives and him that takes:
> 'Tis mightiest in the mightiest: it becomes
> The throned monarch better than his crown;
> His sceptre shows the force of temporal power,
> The attribute to awe and majesty,
> Wherein doth sit the dread and fear of kings;
> But mercy is above this sceptred sway;
> It is enthroned in the hearts of kings,
>
> It is an attribute to God himself;

Is met by Shylock's insistence on the letter of the law:

> I crave the law,
> The penalty and forfeit of my bond.

When it quickly eventuates that seeking a pound of flesh makes Shylock guilty of a capital crime, the Duke intervenes and in the spirit of mercy removes the threat of execution by hanging:

> That thou shalt see the difference of our spirits,
> I pardon thee thy life before thou ask it . . .

The play clearly dramatizes the competing interests and considerations that underlie these distinct approaches to achieving justice. And the conflict between the "letter of the law" and a more flexible "equitable" way of doing justice continues to this day.

US Sentencing Guidelines and Mandatory Minimum Sentences

The federal sentencing guidelines were created by the Sentencing Reform Act of 1984 and had as their primary goal the alleviation of sentencing disparities that were

prevalent in the existing sentencing system The Guidelines reform was specifically intended to provide for determinate sentencing where the limits of the sentence are set at the time the sentence is imposed, in contrast to indeterminate sentencing, in which a sentence with a maximum (and, sometimes, a minimum) is imposed by the court but the actual amount of time served in prison is determined by a parole commission after the person has started serving his or her sentence. As part of this reform, parole on the federal level was abolished. As for the states, nearly half of them presently employ sentencing guidelines, although significant variations exist among them.

The Federal Sentencing Guidelines were intended to be mandatory, but the Supreme Court's 2005 decision in *United States v. Booker* found that mandatory Guidelines violated the Sixth Amendment right to trial by jury. As a result, the Guidelines are now considered advisory only. Federal judges (state judges are not affected by the federal Guidelines) must consider the Guidelines when determining a sentence but are not required to impose the sentences the Guidelines call for.

While the Sentencing Guidelines are now advisory, Mandatory Sentencing, which requires that offenders serve a predefined term for certain crimes, is still in effect. Mandatory sentences were instituted to expedite the sentencing process and limit the possibility of irregularity of outcomes due to judicial discretion. Mandatory sentences are typically given to people convicted of certain serious and/or violent crimes, and require a prison sentence. Judges are bound to impose these sentences, which are the product of the legislature, not the judicial system.

Although the stated rationale for both the Sentencing Guidelines and Mandatory Sentencing is to create consistency in sentencing, the impetus to take sentencing discretion away from judges has been mostly the result of demands for “law and order” in the face of rising crime rates and the attractiveness to politicians of being seen as tough on crime and criminals.

Mandatory minimum sentencing in both the federal courts and state courts (such as California’s “three strikes and you’re out” law) has resulted in higher rates of incarceration with a disparate impact on minorities. Between 1980 and 2015, the number of people incarcerated in the United States America increased from roughly 500,000 to over 2.2 million and as a result the U.S., with only 5% of the world’s population, has 21% of the world’s prisoners. And the higher incarceration has disproportionately affected African Americans and Hispanics, who make up 32% of the population, but in 2015 comprised 56% of all incarcerated people.

The burgeoning prison population and its negative impact on racial and ethnic minorities has led politicians, including members of both political parties, to call for decriminalizing certain drug violations, ending “stop and frisk” police practices, and a return to more equitable sentencing where the punishment not only fits the crime but also fits the

individual criminal as well. In the meantime, those within the criminal justice system continue to speak out in favor of reform.

> E.g., Denouncing mandatory minimum sentences, Kevin Sharp, a US District Court judge in Tennessee resigned in April 2107 after five years on the federal bench. Particularly upsetting to Sharp was his being forced by the mandatory federal guidelines to sentence Chris Young, a twenty-five-year-old, to life imprisonment because it was the third time the defendant had been convicted on a drug offence. Sharp stated: "If there was any way I could have not given him life in prison I would have done it. What he did was wrong and he deserved some time in prison, but not life."

On the other hand, in May 2017, Attorney General Jeff Sessions ordered federal prosecutors to crack down on drug offenders, making it clear he wants the Justice Department to turn the clock back to an earlier, tougher era in the four-decades-long war on drugs. In a memo, Sessions said federal prosecutors should "charge and pursue the most serious, readily provable offense" in drug cases, even when that would trigger mandatory minimum sentencing.

The new Justice Department policy cancels the Obama administration's attempts to pull back on harsh sentencing strategies, which had produced a huge growth in prison populations. Sessions rescinded policy memos signed in 2013 and 2014 by then Attorney General Eric H. Holder Jr. that instructed prosecutors to reserve the toughest charges for high-level traffickers and violent criminals. Since then, the number of drug offenders given mandatory minimum sentences has dropped dramatically, contributing to a 14% decline in the total federal prison population.

Although Minimum Sentencing has taken discretion out of the hands of judges, discretion as what crime to charge ("prosecutorial discretion') remains in the hand of prosecutors. Consequently, they have the freedom to charge a defendant with a crime that carries a draconian minimum sentence as an inducement for the accused to plead guilty to a charge that falls outside Minimum Sentencing. Prosecutors' habit of charging the maximum as a matter of course, presents defendants with the threat of a lengthy minimum sentence and often induces them to plead guilty when otherwise they might not. It also helps to quickly dispose of cases and enhances a prosecutor's "winning" record. Of course, whether it is equitable and serves the interests of justice is another story.

Finally, the influence of equity on both prosecuting and sentencing often depends on the nature of the crime and the identity of the criminal. Shylock, a member of a despised religious minority, initially saw the clear and non-subjective application of the letter of the law, rather than equity with its subjectivity and inherent cultural and religious biases, as his best chance for justice. However, when Shylock's recourse to the law was undone by an unforeseen legal technicality (the bond called for flesh but no blood), he was saved from the gallows by the Duke's equitable intervention, but at a high price - - his daughter, his fortune, and his religion. In contemporary America, defendants who are poor or are members of a racial or ethnic minority are less likely to benefit from the equitable considerations that are foundational to prosecutorial and judicial discretion.

In the recently published *The Chickenshit Club, Why the Justice Department Fails to Prosecute Executives* (Simon & Schuster 2017), the author recounts how judges and prosecutors have often gone to the same universities, live in the same communities, socialize in the same circles, and are employed before and after their government service in the same businesses as the white collar law breakers about whom they must make decisions on whether to prosecute, make findings of guilt or innocence, or sentence. Owing to social, cultural and educational affinities, they frequently view such defendants differently from and more sympathetically than the common run of accused felons like drug offenders or bank robbers. This can result in dramatically different applications of equitable leniency in decisions to prosecute, to convict, and to send to prison. After the Great Recession, not only were large banks thought "too big to fail" and saved by government bailouts, but virtually all the immensely rich and well-connected bankers who presided over the near destruction of the U.S. and world economies were considered "too big to jail" and were spared government prosecution.