Book Review (reviewing Charles L. Silberman, Criminal Violence, Criminal Justice (1978))

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REVIEW


Albert W. Alschuler†

The Honest Politician's Guide to Crime Control¹ by Norval Morris and Gordon Hawkins was published in 1970; *Criminal Violence, Criminal Justice*² by Charles E. Silberman appeared in 1978. The two books are in many ways similar, offering their readers non-technical, highly readable tours of crime and criminal justice. Both books examine such topics as the fear of crime, the unreliability of crime statistics, and demographic explanations of crime patterns;³ both also explore reform of police, sentencing and parole, juvenile justice, and corrections.⁴ Both studies, moreover, distill the finest thinking of their times on the issues that they address, capturing in a single volume what criminal justice scholars would view mostly as "the conventional wisdom" and what some of them might indeed disparage as "little that is really new."⁵ But the eight years that

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† Professor of Law, University of Colorado. The author wishes to express his gratitude to Marianne Wesson for her suggestion that a review of Silberman's book might profitably contrast it with a book by Norval Morris and Gordon Hawkins published a number of years ago.


³ Silberman's portrait of crime in America is, however, far more frightening than that of Morris and Hawkins. At the time that Morris and Hawkins wrote, it was possible to take seriously the idea that apparent increases in crime rates could be attributed primarily to the better reporting of crime; and although Morris and Hawkins ultimately rejected this view, they did seem to believe that increased crime rates could be attributed largely to better reporting coupled with simple demographic changes such as increased urbanization and the increased proportion of young people in American society. Silberman's description of the changing quantity and the changing quality of crime dispells this illusion and forces sharper recognition of the seriousness of "the crime problem."

⁴ The topical overlap is not, however, complete. Except for some observations about sentencing, Morris and Hawkins did not consider the work of the criminal courts, and they did not confront the relationship between race and crime. Although Silberman addresses these topics, he does not, to any significant extent, consider the problems of organized crime, victimless crime, and the role of the psychiatrist in the administration of criminal justice, all of which were treated by Morris and Hawkins.

It should be noted in addition that Silberman's book is longer and much more thoroughly documented than the work by Morris and Hawkins, which was intended only to provide a brief overview of some significant criminal justice issues.

⁵ Parts of each study do, however, make valuable original contributions. This is certainly true of the most noted and the most worthwhile chapter of Silberman's book, "‘Beware the
elapsed between the books have made a difference, and the difference in retrospect seems dramatic.

I. A REASSESSMENT OF The Honest Politician's Guide to Crime Control

Upon its appearance, the Morris-Hawkins volume was properly hailed as "one of the most fascinating and useful books written on the subject of crime control," as "an intelligent, effective and humane prescription of precisely what we must do," and as "a unique contribution . . . up-to-date, broad in view, and certainly objective, even in the areas where one might disagree with it." Even after nearly a decade, moreover, most of the book remains fresh, insightful and worthwhile. Occasionally, however, a reader comes upon passages that seem somewhat quaint. In some measure, the provocative salt-and-pepper style of Professors Morris and Hawkins may contribute to this current perception: which other scholars before or since have labeled their fifty-two prescriptions for reform "ukases"? In the main, however, it is the buoyant ideas, not the flamboyant style, that seem out of place in 1979.

Morris and Hawkins began their book by saying, "We offer a cure for crime," and a large portion of their proposals were unblushingly justified, in the book's title and thereafter, as "crime control" measures. The honest politician was directed initially to confront "overcriminalization" or "victimless crime," a phenomenon that most law school academics probably would have listed as the principal defect of the criminal justice system in the late 1960s. On the subject of public drunkenness, Morris and Hawkins announced: "For the police and paddy wagons we would substitute minibuses, each with a woman driver and two men knowledgeable of the local community in which the minibus will move." They also reported

Day They Change Their Minds': Race, Culture, and Crime." It is also true of many of the observations in the Morris and Hawkins chapter on "Crime and the Psychiatrist" and of their brilliant deflation of a massive body of scatterbrained literature in "Organized Crime and God."

9 MORRIS & HAWKINS at ix.
10 Id. at 7. The authors explained that "[a] woman is preferred to a man as the driver-radio-operator because it is our experience that the presence of a woman has an ameliorative effect on the behavior of males, even drunken males." Id. Presumably the reason the other occupants of the minibus should be males was too obvious for mention, although Morris and Hawkins did say: "If there be a protest or resistance by a drunk, cowardice and withdrawal must control our team's actions . . . ." Id. at 7-8.
that "the British approach to [the problem of narcotics addiction] . . . has resulted in a situation where no serious drug problem exists" and that "[t]he principal lesson to be learned from Nevada is that gambling can be kept clean and does not have to be run by criminals." On police reform, although Morris and Hawkins favored the review of police conduct by ombudsmen and civilian review boards, their primary hope seemed to lie in the development of a different breed of cop: "We, too, have a dream. It is that the social conscience of the current generation of young people which has led them to Peace Corps and protest will learn to express itself in police service." Morris and Hawkins proposed that officers be encouraged to study their social-service function in college-level courses—a proposal that has since been largely implemented through LEAA grants, with the result that the newest "department of mickey-mouse" at numerous institutions of higher learning has become that of criminal justice studies. Morris and Hawkins also proposed to replace current police uniforms with "dark blazer[s] edged and pocketed in a sharply contrasted color," and they suggested a program to remedy what they viewed as a lack of progress "in introducing technology into the police world."

The two authors plainly did not anticipate the neo-retributionism of today, a fact that emerged in their discussion of a variety of topics. Although they recognized that "[h]istorically the defense of insanity made good sense," they proclaimed that the time had come for its abolition. This defense would be an anachronism in "a future in which moral outrage and name-calling will not so significantly influence our reaction to the behavior of others." Morris and Hawkins assured us, too, that "the prison or penitentiary as we know it will almost certainly have followed the death penalty, banishment, and transportation into desuetude before the
end of the century."\textsuperscript{20} Because "institutional confinement in some form [would] remain necessary for some offenders,"\textsuperscript{21} however, Morris and Hawkins described how a model institution to treat "the hardest and most troublesome cases" might be structured.\textsuperscript{22} "It must be stressed," they said, "that ultimate responsibility [for the administration of this institution] resides in the medical director, since everything that occurs in the institution is 'treatment.' There is no problem of custody, of discipline, or of maintenance that is not also a treatment issue."\textsuperscript{23}

On capital punishment, the authors declared: "The conclusion which emerges . . . from all the literature and research reports on the death penalty is, to the point of monotony: the existence or nonexistence of capital punishment is irrelevant to the murder, or attempted murder, rate. This is as well established as any other proposition in social science."\textsuperscript{24} And later: "[W]hen one looks at the pattern of capital punishment for murder in the world, it becomes clear that this is a rapidly declining sanction. We can reasonably exclude it from our consideration of the future."\textsuperscript{25}

Of course, even in 1970, faith in society's ability to achieve the redemption of criminals had dimmed. Morris and Hawkins quoted Leslie Wilkins: "'The major achievement of research in the field of social pathology and treatment has been negative, resulting in the undermining of nearly all the current mythology regarding the effectiveness of treatment in any form.'"\textsuperscript{26} Still, Morris and Hawkins, like the participants in another long and discouraging battle of the late 1960s, saw light at the end of the tunnel. They encouraged correctional authorities to "develop community treatment programs for offenders, providing special intensive treatment as an alternative to institutionalization.'"\textsuperscript{27} Even within institutions, moreover,

\begin{itemize}
  \item \textsuperscript{20} Id. at 124.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id. at 197-200.
  \item \textsuperscript{23} Id. at 198.
  \item \textsuperscript{24} Id. at 75-76.
  \item \textsuperscript{25} Id. at 183.
  \item \textsuperscript{26} Id. at 120 (quoting Wilkins, A Survey of the Field from the Standpoint of Facts and Figures, in The Effectiveness of Punishment and Other Measures of Treatment 90 app. (Council of Europe 1967)).
  \item \textsuperscript{27} Morris & Hawkins at 112. At four separate points in a short book, Morris and Hawkins offered their special praise for the California Youth Authority Community Treatment Project. Id. at 121, 144, 169, 249. An "unusually rigorous . . . evaluative design" had revealed that probation revocation was only about half as frequent for a group of juvenile delinquents who had been "returned to the community [to] receive . . . such treatments as intensive individual counseling, group counseling, group therapy, family counseling, school tutoring services, and involvement in various other group activities" than for a control group.
\end{itemize}
they reported that successful treatment was possible:

Through group counseling, group therapy, guided group interaction, unstructured group discussions—whatever the nomenclature—groups of prisoners in many correctional systems are being brought together in relatively free verbal association to discuss their adjustment to society. . . . It is being found that from such peer clashes, from the interaction between the group and the individual, some prisoners are being led to sufficient insight and motivation to avoid crime in the future.28

With a decade's hindsight, the discussion of sentencing and parole in the Morris-Hawkins volume seems especially passé. Although Norval Morris has since favored the abolition of parole, at least in "the long run,"29 and although he has endorsed the creation of a commission to channel the sentencing discretion of federal judges,30 in 1970 he and his coauthor favored the sentencing provisions of the Model Penal Code, provisions designed to insure that judges would have substantial sentencing discretion and that the minimum and maximum terms of incarceration would be kept far apart:

[W]ithin the limits set by prescribed maximum and minimum the correctional administration should be free to decide how long the prisoners ought to be held . . . . The correctional

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28 Assigned to California's regular institutional treatment program." Id. at 121-22. Nevertheless, this empirical conclusion soon followed the path of most other optimistic findings in the area of corrections—it was one more of the practical jokes that God plays on those who undertake His work. As James Q. Wilson, noting research that appeared shortly after the Morris-Hawkins study, explained:

[T]he experimental group not only did not commit fewer offenses, they committed more. Probation officers assigned to the experimental group were not revoking probation when young people in that group committed new offenses, while probation officers assigned to the regular youth (the "control group") were revoking probation in the normal way whenever a new offense was committed. In short, the "treatment" program did not alter the behavior of the delinquents, it only altered the behavior of the probation officers.

J. Wilson, Thinking About Crime 168 (1975).

29 Morris & Hawkins at 133.


administration is in the best position to judge when the release of the prisoner will be safe, and here it can take advantage of any improved methods developed by the behavioral sciences for predicting behavior and identifying dangerous offenders.\textsuperscript{31}

A view of sentencing that would have the trial judge act "merely as a channel through which the law expresses its predetermined and impartial decision" seemed hopelessly outdated in 1970:

For such a purpose the classic figure of Justitia was an apt symbol, with her covered eyes, her scales to weigh the moral and social gravity of the crime, and her sword swift to execute the customary capital punishment. Time has not dealt kindly with her. . . .

For the particular task of sentencing convicted criminals Justitia would be well advised to change her equipment. From her left hand she should drop the scales and put in its place the case history, the symbol of the full psychological, sociological, and criminological investigation of the individual criminal. Her right hand will find very little use for a sword in the modern penal system; she needs to have at the fingertips of that hand a grasp of the increasing range of penal techniques. Around her knees she would be well advised to gather the adolescent social sciences, who though they have not her tradition or established place in the community are vigorous and rapidly growing children of some ability. Finally, it is essential that she remove that anachronistic bandage from her eyes and look about at the developments in society generally and the demands on her for the imposition of rational sentences on those aberrant members of the community who break the rules of the criminal law.\textsuperscript{32}

This metaphor was expressed in a striking cover that the University of Chicago Press provided for the Morris-Hawkins book. It depicted Justitia grasping her scales, but lifting the bandage from one eye and boldly peering forth. This imagery seemed appropriate, not only for Morris's and Hawkins's discussion of sentencing, but for their final recommendation, a large-scale research program. Although they recognized that extensive research into the causes of crime had proven unproductive, they had greater hope for other forms of social science investigation:


\textsuperscript{32} Id. at 138-39.
In every appropriation for any agency or institution connected with the criminal justice system at least 5 percent of the total shall be allocated for research purposes.

All new crime prevention or correctional methods and practices shall be subject to critical evaluation.

The federal government shall establish a National Foundation for Criminal Research charged with the responsibility of stimulating and coordinating research, development, test, and evaluation projects in the field of crime and its control. Primary components of the research program shall be: (a) systems analysis studies; (b) field experimentation in police and correctional areas; (c) prediction research; (d) evaluative research in both police and correctional areas; (e) deterrence research; and (f) equipment system research and development. 3

This proposal, too, has been largely implemented at the federal level, and the principal result of the outpouring of social science research during the past decade has been the widespread disillusionment that today makes much of the Morris-Hawkins study seem dated.

II. THE LESS BRAVE NEW WORLD OF CHARLES E. SILBERMAN

Morris and Hawkins—as wise, respected and knowledgeable a pair as have labored in the field of criminal justice—spoke for almost all of us a short decade ago. One wonders, therefore, to what extent the current wisdom encapsulated by Charles E. Silberman will seem out of date ten years from now. Although it is safe to predict that today’s dominant viewpoints will not remain in fashion indefinitely, my guess is that the Silberman volume will exhibit at least somewhat greater staying power than the Morris-Hawkins tract. I hasten to add that this prediction does not necessarily reflect Silberman’s unusual perspicacity. Rather, we may have hunkered down so low as to leave very little for the scholars of 1989 to shoot at.

Silberman gives us no “ukases” and no “cure for crime”:

[I]f the past teaches us anything, it is that there are no quick and easy solutions to the enduring problem of criminal violence—not through social reform, and not through “law and order.” On the contrary, the search for panaceas has often

3 Id. at 239.
made matters worse. For one thing, the institutions of the criminal justice system are inordinately complex... Hence attempts to change the police, courts, and prisons often backfire.

In trying to increase the effectiveness of our law enforcement machinery... we would do well to keep in mind the ancient and fundamental principle of medical practice: *Primum non nocere*—"First, do no harm." For the most part, the history of national and local "wars on crime" is a record of impotence and failure—of unintended consequences being larger than, and often in the opposite direction from, those that were intended.34

This restatement of the political philosophy of Edmund Burke35 provides the central theme of *Criminal Violence, Criminal Justice*, but it constantly does battle with Silberman’s latent liberalism. In this respect Silberman’s book reflects not simply the current state of criminal justice scholarship, but America’s post-Watergate, double-digit-inflation, energy-crisis blues. Emotionally repelled by the nay-sayers who view most problems as intractable, and intellectually unpersuaded by the yea-sayers who believe that many of them might be solved, Silberman attempts to preserve both hope and realism in an era in which these concepts seem to be in tension—greater tension even than in the not-so-distant and far-from-halcyon days of *The Honest Politician’s Guide to Crime Control*.

The resulting accommodation lies mainly in the manipulation of symbols. The appearance of justice is important, Silberman assures us repeatedly, even if we cannot hope to change the substance. Of course we need reform—things like guidelines to make the actual explicit. And greater human kindness at any stage of the criminal justice system would surely have value even if it led to nothing more. Besides, even when reforms amount merely to symbolism, they have their uses; man does not live by bread alone. In general, it seems to me, Silberman’s advocacy of "moderate" reform has a hollow and rather desperate quality.

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34 Silberman at 173.

35 Burke, for example, in language very much like Silberman’s, described "the ceasing to do ill" as "the surest of all reforms, perhaps the only sure reform." He urged the people "to tolerate a condition which none of their efforts can render much more than tolerable." And he described "a blind and furious spirit of innovation" as "the greatest of all evils." E. Burke, *A Letter to William Elliot, Esq.*, in 5 Works of the Right Honorable Edmund Burke 123-24 (rev. ed. Boston 1866). For a discussion of Burke’s influence on the "new conservative" movement exemplified by such writers as Irving Kristol and Nathan Glazer, see I. Kramnick, *The Rage of Edmund Burke* 48-51 (1977).
A. The Cult of Complexity

It is the Burkean side of Silberman that academic readers, at least, will probably find most convincing. Where Morris and Hawkins described British-style heroin maintenance as "the one certain way totally to abolish" the serious crime committed by addicts, 36 Silberman concludes that the American methadone maintenance programs of subsequent years probably have had the opposite effect. The studies that purport to show a reduction in crime by participants in these programs are methodologically defective. "More carefully controlled studies" yield very different results:

Among addicts thirty years of age or younger . . . arrests for robbery, burglary, and other street crimes actually increased. By freeing young addicts of the need to spend most of their time "chasing the bag," methadone apparently gave them more time and energy to commit predatory crimes. In April, 1974, the Drug Enforcement Agency's statistical division reported that compared with heroin addicts, "methadone addicts are equally prone to arrest, are more prone to commit property crimes or crimes of assault, and they are equally unemployed." . . . Other studies have shown a decline in criminal activity while addicts are enrolled in a methadone program, but an increase after they leave it. 37

In their discussion of the police function, Morris and Hawkins urged that the "technology explosion" be brought to bear on law enforcement. They reported, for example, that "[s]tudies by the President's Crime Commission demonstrated the importance of reducing police response time as a means of increasing the ability of the police to detect and apprehend criminals." 38 Unlearned observers might be surprised that "studies" were necessary to demonstrate this proposition, but it seems that not only were the studies necessary, they were wrong. Silberman debunks the myth:

New technology does not help, either. Since the mid-1960s, police departments have invested huge sums in computerized telecommunication systems designed to cut the period that elapses between the time a citizen calls the police to report a crime and the time a patrol car arrives at the scene. But cutting a police department's response time does little good when, as

36 MORRIS & HAWKINS at 9.
37 SILBERMAN at 181 (footnote omitted) (emphasis in original).
38 MORRIS & HAWKINS at 103.
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researchers recently discovered, crime victims wait twenty to sixty minutes before they call the police. By keeping police officers locked up inside their patrol cars, the emphasis on mobility and rapid response time has reduced person-to-person contact between the police and the people being policed, thereby hampering policemen’s ability to prevent or solve crimes.39

Indeed, one wonders upon reading Silberman whether the police make any difference at all. Apparently patrol officers cannot do much to prevent crime, and detectives cannot do much to solve it. The much publicized Kansas City Patrol Experiment revealed that, whether the amount of preventive patrol was doubled, left the same, or eliminated entirely, there was no measurable effect on crime rates, on citizens’ fear of crime, or even on citizens’ satisfaction with the police.40 And recent studies emphasizing very low arrest rates in cases in which victims cannot name particular suspects lead Silberman to conclude: “To exaggerate just a bit, the police can solve a crime if someone tells them who committed it; if no one tells them, they do not know what to do.”41

Morris’s and Hawkins’s statement that the failure of the death penalty as a deterrent is “as well established as any other proposition in social science” may remain true in 1979, but the intervening years have taught us how very little it says. Only one proposition seems reasonably well established in social science—that we do not know how well any social institution works. Although Silberman persuasively criticizes Isaac Ehrlich’s attempted empirical demonstration of the deterrent effect of capital punishment,42 the hopeless morass of both bad social science and good leads him to agnosticism:

39 Silberman at 201.
40 Id. at 215-16.
41 Id. at 204.

What, then, should be done to improve police performance? Resisting that obvious answer—“Why bother? It won’t work”—Silberman joints Morris and Hawkins in advocating a better breed of officer: “The police . . . must change their conception of their role from that of a law enforcement agency, dedicated to catching robbers, to that of a public service agency, devoted to close relationships with, and assistance to, the people and communities being policed.” Id. at 243. In this connection, “neighborhood team policing,” involving administrative decentralization and sometimes a greater use of foot patrol, seems a “promising innovation”; yet Silberman recognizes that the empirical evaluations of this technique so far have been “disappointing,” indicating only that this form of policing is no worse than other police practices in terms of controlling crime and improving police-community relations. Id. at 248-49.

42 Id. at 193.
Scholars have written impressive-looking papers on the subject, filled with mathematical equations unintelligible to anyone save mathematicians and econometricians. Some purport to prove that the death penalty does deter murder more effectively than existing penalties; others, that it does not. The National Research Council's Panel on Research on Deterrent and Incapacitative Effects took a long and searching look at these papers. After analyzing each scholar's assumptions and methodology, the panel concluded that the results "provide no useful evidence" on which a conclusion can be drawn. Indeed, the panel pronounced itself "skeptical that the death penalty . . . can ever be subjected to the kind of statistical analyses" needed to draw conclusions with confidence.1

The field of corrections may well supply as much ammunition for a modern Burkean triumph as any other area of governmental activity. Silberman reports that the trend toward deinstitutionalization that led Morris and Hawkins to predict the rapid demise of the megaprong has since been reversed dramatically4 and that the term "community-based" as applied to corrections has become "a 'buzz word' for 'urban.' "5 As to the group therapy and other treatment programs of which Morris and Hawkins spoke so hopefully, Silberman reports:

The last ten years have seen a flood of scholarly literature documenting the failure of one approach after another. "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism," the criminologist Robert Martinson wrote in 1974, summing up the conclusion he and two colleagues had reached after evaluating some 231 research studies. Whether incarcerated or placed on probation, whether given psychotherapy, group counseling, job training, or no assistance at all, the proportion of offenders who return to crime seems to be about the same—roughly one in three.6

Even if rehabilitation now seems a will-o'-'the-wisp, and even

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4 Id. at 192-93 (footnote omitted).
5 Id. at 378-75.
6 Id. at 330 n*.
7 Id. at 373 (footnote omitted). Even the simplest reforms in correctional administration are apparently likely to backfire. Judicial orders designed to reduce inhuman overcrowding in state prisons cause more offenders to be sent to local jails where conditions are worse. Id. at 375. And rulings that prevent correctional authorities from simply clapping troublemakers into the "hole" cause their victims to ask to be sent there for protection. Id. at 416-17.
if, as Silberman also indicates, we cannot determine the extent to which different levels of imprisonment deter crime, one might suppose that the incapacitative function of correctional institutions could withstand today’s powerful skepticism. What could be more obvious than that keeping some criminals off the streets for a time does serve a social function? Yet, as Silberman reports, modern social science challenges even this viewpoint: “If the supply of criminals is reduced through incapacitation while the number of criminal opportunities remains the same, economic theory tells us that the return from crime should increase, thereby attracting new people into the criminal labor market.”

B. Silberman’s Symbolic Efforts to Avoid Status Quo-ism

When Silberman simply cannot stand it anymore—when he allows his latent belief in mankind’s ability to solve its problems to rise to the surface—he probably loses credibility with a large number of his most knowledgeable readers. For Silberman yields less than most—at least than most criminal justice academics—to the gloomy dysphoria of 1979. Every so often, he casts about for something hopeful and describes a program that somehow has captured his faith. The probable reaction of a large portion of his audience can be anticipated: Sure, the correctional institution at Vienna, Illinois, sounds like a well-run prison; but the administration there is allowed to select its population of prisoners from other institutions in the state. Plainly, we cannot know whether this prison’s seemingly humane ambiance is the product of what it does, of the special group of prisoners whom it houses, or of a combination of both circumstances that could not be duplicated elsewhere. Why, then, has Silberman ignored the lesson that his book has taught us repeatedly? Things that seem appealing on the surface usually turn to ashes once we touch them. And yes, it’s very nice that the residents of a juvenile group home in the Bronx seem inspired by their housemother. But, good heavens, let’s not put too much faith in that; we won’t know anything about the results until we can measure them. When virtually none of the programs that Silberman finds hopeful have been subjected to the kind of empirical testing that he uses to devastate past efforts, his advocacy of reform seems

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47 Id. at 196.
48 Id.
49 Id. at 417-23.
50 Id. at 421.
51 Id. at 327.
pale—more the product of existential commitment than of hardheaded good sense.

C. Charles in Bargainland—An Extended Look at Silberman’s Least Successful Chapter

Silberman’s chapter on the criminal courts, “Perry Mason in Wonderland,” probably holds the greatest interest for lawyers, and it supplies a vehicle for analyzing in greater detail the uneasy balance between realism and idealism that Silberman strives to maintain. In this chapter at least, Silberman reveals that what passes for moderation in 1979 can be as silly as the unabashed optimism of the past, and he offers some “conventional learning” that one may hope will, before too very long, go the way of Morris’s and Hawkins’s most naive, flamboyant, and empirically unverifiable ukase.

1. The Central Thesis—that the Courts Do Justice. Silberman tells us that the criminal courts have taken a “bum rap” and that their principal problem is one of cosmetics:

When one examines what actually happens . . . what is remarkable is not how badly, but how well, most criminal courts work. Inefficient and unjust as they appear to be, criminal courts generally do an effective job of separating the innocent from the guilty; most of those who should be convicted are convicted, and most of those who should be punished are punished. . . .

This is not to suggest that we live in the best of all possible worlds; far from it. It is to argue that what is wrong with the judicial process is less the results that it produces than the means by which it produces them. As the old maxim has it, the appearance of justice is as important as justice itself. Most criminal courts do do justice; almost none of them appears to do justice. . . .

. . . .

Most criminal courts undermine respect for law—not by their results, but by the shabby, haphazard way in which they are run. . . . [T]he whole atmosphere makes it difficult for anyone—defendants, judges, prosecutors, defense attorneys, victims, and witnesses alike—to avoid developing a protective veneer of cynicism and boredom.

Indeed, it is impossible to spend time in criminal court without being appalled by the churlishness of the physical and social environment; the peeling paint and scuffed linoleum
floors, the noise and movement, the general surliness and lack of decorum. . . . Officials who may be models of civility, sensitivity, and concern in their private lives display a public face of callousness and indifference . . . .

. . . .

Those who [are] affected by the decisions . . . take it for granted that nothing [will] be explained to them, and that . . . judges, prosecutors, defense attorneys, and clerks [will] fail to say "please" or "thank you" or otherwise observe the most elementary rules of civilized human discourse.52

Before evaluating this thesis, some remarks about the appropriate framework for evaluation seem in order. If the appropriate question is whether the criminal courts achieve rough justice in most cases, the answer, as Silberman suggests, may very well be yes. But when that question becomes debatable, as it has in our own criminal justice system, it seems probable that the criminal courts have failed badly in their mission. After all, rough justice is not so very difficult to achieve; almost anyone can do it in only five minutes a day.

Imagine, if you will, a system of criminal procedure that is about as repugnant as any—one in which some designated bureaucrat, even a police officer, is empowered to decide whom to imprison for criminal activity and for how long. This official is restricted by no sentencing limitations, he need observe no rules of evidence, and he need conduct no more elaborate a hearing on guilt or punishment than he happens to find useful for the purpose. In practice, the official with these unthinkable powers would probably turn out to be about as decent a person as the rest of us, and most of the people brought before him would probably turn out to be guilty. We would probably find that in most cases the official would take his task fairly seriously, that he would send only a small number of innocent people to prison, that he would not act vindictively in determining the length of imprisonment very often, and that he would, indeed, achieve rough justice in most cases. In that sense, all of the additions to our own system of procedure—the law, the lawyers, the trial judges, the juries, the officials who conduct presentence investigations, the appellate courts, and all the rest—exist for the exceptional case. Our elaborate adjudicative machinery was created because we hope (or used to) for something better than "rough jus-

52 Id. at 255-57 (emphasis in original).
tice." We do care (or we should) about the one case in fifty or one hundred in which the defendant may be innocent, and we believe (or we should) that it is worth examining all fifty or one hundred of those cases if necessary in an effort to find this one. Moreover, although we recognize that we have very little knowledge of what constitutes a just sentence, we think it important to do the best that we can. With years of human liberty at stake, sentencing should at least be the product of carefully focused consideration—something more than a ballpark guess. And measured in terms of these objectives—foolish as they apparently seem to many of the lawyers who work in our criminal courts and to many of the social scientists who study them—there is a great deal more wrong with the courts than that the paint is peeling and that lawyers and judges do not say "please" and "thank you" often enough.

Silberman's view that the courts "do do justice" rests primarily on an analysis of their overall output—the same sort of analysis that might "justify" the work of our dictatorial bureaucrat. Silberman tells us that the courts convict and punish many more people than their conservative critics think they do. Indeed, they are no more lenient than the criminal courts of the 1920s (although it is not entirely clear what comfort a conservative critic is supposed to derive from the fact that our courts are no "worse" than the corrupt, thoroughly politicized criminal courts of the Roaring Twenties, a period when for a variety of reasons the crime rate apparently increased substantially). Moreover, the exclusionary rule does not lead to many lost convictions except in cases of victimless crime (again a fact that may not offer much comfort to people who favor the enforcement of narcotics laws). Finally, when officials do "wash out" a case or reduce a very serious charge to a minor one in exchange for a plea of guilty, they usually have a good reason.

As Silberman explains this last point, "By and large, prosecutors distinguish between 'real crimes'—crimes committed by strangers—and 'junk (or garbage) cases,' i.e., those which grow out of a dispute between people who know one another." Of course one can agree that "stranger crime" is usually more threatening than crime that grows out of "anger between two or more people who know each other," but does it truly follow that nonstranger crime is the

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54 See Silberman at 28-30.
55 Id. at 265.
56 Id. (quoting Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York City's Courts xv (1977)).
“junk” that criminal court bureaucrats think it is? Silberman says:

For the most part, the low priority attached to prior-relationship crimes is a realistic response to the nature of the offense and the frequency of reconciliation. But the downgrading may also reflect strong and unconscious bias of gender or race—a tendency to treat crimes lightly if they involve blacks assaulting other blacks, or husbands beating wives.57

Indeed it may; from the perspective of those who administer our criminal courts, the junkiest case of all may be the “domestic disturbance.” Percy Foreman illustrated this fact when he described a policy that he had established as a prosecutor in Houston a long time ago:

Like most prosecutors, I thought I was the law, and I inaugurated a bad policy. When a wife complained that her husband had beaten her, I would not file an assault charge until she had appeared at the District Attorney’s office on three separate occasions. The “law” that I established is still the law forty years later. It has resulted in two or three murders that I know of.58

As Silberman observes, it is not only “victimless” crime and “prior relationship” crime that criminal court officials regard as garbage: “In New York City, nighttime commercial burglaries are almost routinely reduced to misdemeanors; since stores, offices, and warehouses normally are not occupied at night, prosecutors, judges, and even policemen view such offenses as nuisance crimes. Residential burglaries, on the other hand, are considered ‘real’ crimes.”59

Again, the distinction between commercial and residential burglaries seems sound, but how far should it be pressed? When I undertook an investigation of plea bargaining more than a decade ago, I was far from favorably disposed to the practice; but leaning a bit toward Silberman’s liberal side, I was prepared to dismiss the claim that plea bargaining resulted in unwarranted leniency. One of the first cases that I observed in a Cook County courtroom caused me to reassess this viewpoint, and I soon discovered that this case was not exceptional. A burglar had been caught red-handed as he emerged from a store at night with about four hundred dollars that he had taken. Despite the fact that he had a long record of similar

57 Silberman at 268.
58 Interview with Percy Foreman, private defense attorney, in Houston (Feb. 21, 1968).
59 Silberman at 269.
crimes, he was—without a blink or a sideways glance—permitted to plead guilty to a misdemeanor and was sentenced to a thirty-day term. This sentence seemed to reflect the kind of sanction that I had previously associated with victimless offenses like prostitution; a prostitute, I had been told, could expect to serve a short jail sentence every now and then as a cost of doing business. I was surprised to find, however, that this was also society’s response to the professional predator. It seemed to me time for this professional burglar to learn what the term felony meant. Was I being hopelessly naive? Although the chimes of cognitive dissonance were ringing in my ears, I could not talk myself out of my initial reaction. The result of the case did not correspond to my sense of “rough justice,” and I suspect that few other Americans who were not enmeshed in the routine of the criminal courts would have regarded it as “rough justice” either. As I quickly learned, to the people who run our criminal courts almost every case seems to be trash; a criminal must be very, very bad to capture their serious attention. In short, the “protective veneer of cynicism and boredom” that Silberman discovered is not a veneer; it affects the substance of justice, not merely the style.

Prior-relationship cases are viewed lightly for two reasons, Silberman explains: first, because they seem relatively unimportant and, second, because the victim and the alleged victimizer frequently become reconciled so that the victim refuses to cooperate in the prosecution. Even in cases of “stranger” crime, moreover, victims sometimes refuse to do their part. Silberman therefore tells us, “No single factor has so large an impact on what happens to felons after they have been arrested: ‘complainant noncooperation’ accounted for more than two-thirds of the dismissals of ‘victim felonies’ in New York, and well over half in Washington, D.C.”

Again, prosecutors seem to have good reasons for their actions. Today’s social science is as changeable as the New England weather, however; if you don’t like what it’s doing now, just wait a minute. In this instance, Silberman reported findings by a research institute that later conducted a study calling those findings into question. In the more recent study, the victims were approached directly to learn the reasons for their reticence; the overwhelming majority were quite surprised to learn that they had been uncooperative.

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40 Id. at 266.
41 Id.
42 F. CANNAVALE & W. FALCON, WITNESS COOPERATION 75-84 (1976). Although 202 of the 215 witnesses labeled “noncooperative” by prosecutors gave responses that were inconsistent
Even when “complainant noncooperation” is real, moreover, the criminal courts themselves may often be to blame. As Silberman recognizes,

[v]ictims are frustrated and angered when they have to repeat their story three, four, or even five times as their case is passed from one assistant district attorney to another. And witnesses understandably lose interest when they spend a whole day in court, waiting for the case to be called, only to find that the judge has rescheduled it to suit an attorney’s convenience.63

Once again, the sloppy style of American criminal justice ultimately seems to affect its substance.

2. Judicial Sentencing Practices. Silberman’s criticisms of “presumptive sentencing” proposals and his suggestions of what should be done to improve judicial sentencing are not very far from my own,64 but I am far from persuaded by his claim that the underlying problem of judicial sentencing disparity has been seriously exaggerated. On this issue, at least, Silberman bucks the current tide of “informed opinion.” He maintains that “[w]ithin any single court system, the overwhelming majority of sentences—on the order of 85 percent—can be predicted if one knows the nature of the offense and of the offender’s prior record.”65

The excellent study upon which Silberman relied does not really go so far. What the study attempted to predict in cases of imprisonment was not an exact sentence but rather a range of sentences; moreover, the authors “counted” a sentence as within the range if it fell outside this range by no more than one year.66 To hit the target most of the time is not too difficult when the target is big enough, but the difference between even a one-year sentence and a three-year sentence can be substantial, from the viewpoint of a defendant. Following this study, moreover, the predictive devices

with this designation, id. at 76, it was of course possible that some of these witnesses had forgotten the facts or were attempting to “save face” with the interviewers. Nevertheless, the study reported that “in cases where the witnesses knew the defendants, prosecutors were observed labeling witnesses as noncooperative not on the basis of observed noncooperation . . . but in anticipation of it” and that “[s]ome prosecutors . . . acknowledged overusing the noncooperator label because such a designation reduced the probability of a challenge from the supervising attorney who reviewed case-screening decisions.” Id. at 87, 88.

63 Silberman at 277.


65 Silberman at 254-55.

that it employed were converted into "sentencing guidelines" for judges in several jurisdictions. Judges are currently using these guidelines to determine the "normal" range of sentences in their courts for each case that comes before them. The judges are generally enthusiastic about the project and believe that it has enabled them to reduce prior disparity in their sentencing practices. But more than twenty-five percent of the sentences that the judges impose are "outside the guidelines," a larger number, apparently, than before the disparity-reducing guidelines were implemented. The most plausible explanation for this troublesome fact is simply that the initial eighty-five percent success rate was, alas, somewhat aberrational.

To the extent that most criminal sentences can be predicted on the basis of the characteristics of the offense and the offender, Silberman gives us the reason:

Critics of sentencing policy . . . fail to make the critical distinction between disparities in the sentences judges give and the sentences defendants receive. Every court has its hanging judges and its soft touches. . . . But the same kind of discretion that enables individual judges to act capriciously makes it possible for prosecutors and defense attorneys to limit those judges' impact. What happens, quite simply, is that in large court systems hanging judges impose far fewer sentences than do judges who follow court norms. . . .

The Detroit Recorder's Court . . . provides a case in point. At the time a member of my research staff visited the court, one judge was notorious for the harsh sentences she imposed—"some of her sentences make us shudder," a senior prosecutor confessed. . . . [I]t was the rare felony defendant who entered a guilty plea in her court; in 1972, the judge received only sixty-three pleas in felony cases. (By comparison, a colleague, whom prosecutors and defense lawyers considered a "capable and conscientious quality judge," received 1,567 guilty pleas in the same period.) With almost every defendant demanding a jury trial, the judge always had a huge backlog of cases waiting to be tried. Periodically, therefore, cases were removed from her docket and assigned to other judges; this, in turn, gave lawyers a strong incentive to delay their cases—often with the prosecutor's cooperation—in the hope of

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Interview with Arthur M. Gelman, Associate Director of the Sentencing Guidelines Project, in Boulder, Colorado (July 18, 1979).
getting a reprieve. All told, the tough sentencer disposed of only 152 cases in 1972, compared to 2,176 dispositions for the “quality judge” referred to above, and an average of 800 dispositions for the eleven other judges on the court.68

Apparently, then, Detroit's most lenient judge has about fifteen times more power to resolve criminal cases than does that city's "toughest" jurist. To the extent that the disparity in "the sentences judges give" does not lead to a disparity in "the sentences that defendants receive," it leads to a disparity in the power of judges—a disparity that no view of democratic theory can justify. The seemingly severe judge was presumably elected by as many voters as her more lenient counterpart, yet she has been largely dis-elected by the criminal court bureaucracy. Surely the Gresham's Law of this bureaucracy ("lenient judges drive out severe judges") gives the courts' conservative critics a legitimate grievance. The tendency of the courts to reduce themselves to the lowest common denominator is no virtue, and rather than defend judge shopping as "one of the most important checks on arbitrariness in large criminal courts," as Silberman later does,69 one ought to condemn it as the discriminatory and wasteful practice that it is.70

Silberman describes the most lenient judges—those who "move" the cases—as following "court norms," and the more severe judges—those who are largely ousted from office—as acting "capriciously"; yet one surely cannot assume without further examination that the sentences imposed by the lenient judges are more appropriate than the sentences imposed by the severe judges. The "soft" judges of course will be the favorites of the criminal court bureaucracy; the jovial "quality judges" who move cases rapidly make life a lot easier for everyone. In the absence of any information about the sentences imposed by any judge, however, my personal sympathies lie hesitantly with the judge whom Silberman seems to deprecate. At least she is willing to pay a heavy price—ostracism and disparagement by co-workers, a large backlog of cases, and probably the loss of any prospect of judicial advancement—for adhering to her own concept of justice.

If one cannot simply cheer the "soft" judges and boo the "hard"
judges—if one must remain somewhat more neutral in the absence of any relevant information—should one nevertheless take comfort in the fact that the “soft” judges impose substantially more sentences? This disparity in judicial power does reduce disparity in “the sentences defendants receive.” Yet why should we be concerned only about disparities in “the sentences defendants receive” and not about “disparities in the sentences judges give”?

To most of us, the statement that defendants are sentenced twice as severely in the courtroom of Judge A than in the courtroom of Judge B describes a serious injustice. Silberman, however, seems to believe that, from a social science perspective, this criticism is simplistic and involves a methodological fallacy; we overlook the fact that Judge B, the lenient judge, imposes fifteen times more sentences than Judge A. Surely we are entitled to respond simply, “Huh?”

Of course, if we knew that Judge B’s sentences were more appropriate than Judge A’s, we could take comfort in the fact that Judge B had more power. Even then, however, our initial perception of a serious injustice would be accurate. The accident of which judge a defendant drew would be likely to make a tremendous difference in his sentence; this disparity in “the sentences judges give” should indeed concern us even if only 152 defendants each year draw the judge who is “wrong.” In the absence of any information concerning the appropriateness of the sentences imposed by either judge, moreover, the number of cases that each judge resolves seems meaningless.

Or perhaps not quite meaningless. From the perspective of some criminal defendants—those very few defendants whose lawyers are not good enough at criminal-court game playing to lead them from the clutches of the more severe judges—the practices that Silberman describes may make the problem of sentencing disparity worse. In his concurring opinion in Furman v. Georgia, Justice Stewart concluded that the death penalty, as it was then administered, was “so wantonly and so freakishly imposed” as to be unconstitutional. “These death sentences are cruel and unusual,” he said, “in the same way that being struck by lightning is cruel and unusual.” Much the same thing could be said of the sentences imposed by the ostracized “hanging judge” in Detroit: the defendants who receive her sentences can feel especially victimized.

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72 408 U.S. 238 (1972).
73 Id. at 310 (Stewart, J., concurring).
74 Id. at 309 (Stewart, J., concurring).
because their bad luck is so rare. Like a good social scientist, however, Silberman "measures" justice by looking to a collectivist "bottom line"—the sentences that defendants receive. Silberman continues:

In good measure, the amount of sentencing disparity in any court is a function of the caseload pressure under which judges operate; the greater the pressure on judges to "move" cases rapidly, the less opportunity they have to indulge their personal preferences and biases. "We are slaves to the system," the trial judge to whom Willard Gaylin gives the pseudonym "Judge Garfield" declares. "While I have the appearance of great discretion, I don't have the reality of it. I work under the constant awareness of the burden of cases in this court which demand resolution."

As it happens, I spent time in the court presided over by "Judge Garfield"; knowing his background and views, it was easy to recognize the man behind the pseudonym Gaylin used. The judge had forty-seven cases on his docket on a representative day in which I sat next to him on the bench; he had disposed of thirty-one of them by the time the day ended. Judges can "move" cases that rapidly, Garfield explained, only if they have "realistic orientation as to what a case is worth," which is to say, only if they conform to the norms of the court.

This, apparently, is how the courts "do do justice"—at a rate of thirty-one cases a day. Judges concede that, because of the pressure to "move" cases, they do not have "the reality of discretion." They cannot indulge their personal biases—which is to say that they cannot impose the sentences that they themselves think warranted. The dominant consideration must always be clearing the docket. One wonders of Silberman: Why isn't this man screaming? Why does he tell us only that the problem of sentencing disparity has been greatly exaggerated?

3. Prosecutorial Plea Bargaining. The movement toward sentencing reform is apparently the only lively reform movement in

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* Silberman at 289 (footnotes omitted). Silberman adds in a footnote:
Judges in Garfield's court have a strong incentive to conform to court norms. The chief judge sends every judge a weekly "report card," listing the number of cases on each judge's calendar for the preceding week, the number of dispositions, and each judge's "batting average," i.e., the percentage of cases disposed of during the week. The message is abundantly clear: judges who want to be reappointed or promoted to a higher court had better dispose of cases quickly . . . .

Id. at 289 n.*.
the area of criminal justice today, and this movement itself may reflect our weariness in the post-Vietnam, post-Watergate, post-Martinson era. It represents a clear-cut retreat from the excessive rehabilitative ambitions of our recent past. As I have argued elsewhere, however, there is hardly any objection to the sentencing discretion of judges and parole boards that does not apply in full measure to the sentencing discretion that prosecutors and defense attorneys exercise in plea bargaining. In addition, a number of forceful objections to the discretion exercised in plea bargaining have little or no application to judicial sentencing discretion and parole. Proposals to prohibit plea bargaining certainly have not captured the fancy of criminal justice scholars in the same manner as proposals for "presumptive" or "determinate" sentencing. To the contrary, many of these scholars insist that plea bargaining is both inevitable and desirable.

Some of the reasons for the current approbation of plea bargaining in legal and social science circles are clear. Prohibiting plea bargaining would represent a very significant effort to change the ways in which our criminal courts operate, and lawyers who have mastered the old ways (and who of course have little difficulty persuading themselves that they "do do justice" in their own cases) are reluctant to set forth on a new course. The social scientists, moreover, have become skeptical of any major reform. They have decided that major reform hardly ever works, that it may backfire, and that it may have unforeseeable consequences. Perhaps more importantly, plea bargaining, unlike the discretion of parole boards and sentencing judges, has never reflected our excessive aspirations. In-

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76 That is, if one does not count the Supreme Court's retreat from Mapp v. Ohio, 367 U.S. 643 (1961), Miranda v. Arizona, 384 U.S. 436 (1966), and other criminal procedure rulings of the 1960s as a current reform movement.
77 See text at note 46 supra.
78 See Alschuler, supra note 64, at 557-58.
79 Id. at 564.
81 A prohibition of plea bargaining might indeed have collateral consequences, as the experience of Alaska, which has implemented a plea bargaining prohibition with notable success, seems to indicate. Justice Robert C. Erwin of the Alaska Supreme Court explained:

A no-plea-bargaining policy forces the police to investigate their cases more thoroughly. It forces prosecutors to screen their cases more rigorously and to prepare them more carefully. It forces the courts to face the problem of the lazy judge who comes to court late and leaves early, to search out a good presiding judge, and to adopt a sensible calendaring system. All of these things have in fact happened here.

Interview with the Honorable Robert C. Erwin, Associate Justice of the Alaska Supreme Court, in Anchorage (June 14, 1976).
stead, it has been a forthright manifestation of our cynicism. Few institutions could be more congenial to the times than one that says: "Our elaborate adjudicative machinery is a waste. Very few of the issues that it is designed to resolve are worth our serious attention. We can probably achieve similar results—or at least do 'rough justice'—without the bother. So why don't we just split the difference?"

On this issue, Silberman adheres to the conventional academic wisdom. He says, "It is not true that plea bargaining distorts the judicial process. Contrary to popular impression, plea bargaining is not a recent innovation, nor is it the product of heavy caseloads . . . ." Silberman is correct that plea bargaining does not represent a recent "fall from grace," but a more important point—one that I have developed at length in a recent article—is that the Anglo-American legal system managed to survive without plea bargaining for about seven-eighths of its history. Our historical experience, like the current experience of most other nations of the world, offers little comfort to the lawyers and social scientists who join Silberman in the view that plea bargaining is inevitable, an unavoidable by-product of bureaucratic interaction in any criminal justice system.

To many social scientists it seems that the "inevitable bureaucratic interaction hypothesis" can be advanced by debunking the "caseload myth." Silberman tells us:

If trials were the norm and plea bargaining simply a device by which big-city courts dispose of their heavy caseloads, one would expect to find relatively little plea bargaining in smaller cities and rural areas, where caseloads are light. But the overwhelming majority of criminal cases are disposed of by negotiated pleas in every part of the United States, rural as well as urban, small cities as well as large.

In examining the extent to which caseload pressures lead to plea bargaining, however, the relevant independent variable is neither the size of various jurisdictions nor even the overall size of their caseloads. The relevant variable is the ratio in each jurisdiction between caseload and resources—the number of hours or minutes that prosecutors and other officials have to spend on each case.

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82 Silberman at 255 (emphasis in original).
83 Id. at 279.
84 Alschuler, supra note 53.
85 Silberman at 278.
Because this ratio can be as unfavorable in small-city and rural jurisdictions as in large cities, Silberman's analysis sheds very little light on the issue that he addresses. Outside the large cities, moreover, prosecutors commonly are employed on a part-time basis. They regularly devote a large share of their time to private law practice, and their salaries as prosecutors do not vary with the amount of time they devote to their public duties. As a result, every hour that these prosecutors take from private practice involves a financial sacrifice, and they may experience as much pressure to "move" criminal cases as their full-time, large-city counterparts. In both large jurisdictions and small, the bargaining process seems laden with conflicts of interest that can easily lead lawyers to consider more than the merits of criminal cases in deciding how best to "get rid of them." Nevertheless, I agree with Silberman's view that caseload pressure probably is not the primary reason for the current dominance of plea negotiation. The primary reason instead is probably that criminal court lawyers and judges, like the rest of us, are lazy. As Malcolm Feeley has observed, there will always be too many cases in the sense that prosecutors and defense attorneys would rather be somewhere else.

Silberman, however, does not view laziness as a significant reason why prosecutors bargain. "For the most part," he says, "prosecutors drop felony charges or reduce them to a misdemeanor because they doubt the defendant's guilt, because they lack the evidence needed to prove his guilt, or because they feel . . . the defendant not sufficiently culpable to warrant the stigma and punishment that a felony conviction would bring." When a prosecutor doubts a defendant's guilt or lacks the evidence to prove it, he certainly has a good reason for dismissing the prosecution, but it is a very different question whether he should reduce the charge against the defendant in exchange for a plea of guilty. As I have written elsewhere, "the practice of bargaining hardest when the case is weakest leads to grossly disparate treatment for identical offenders—assuming for the moment that they are offenders. . . . [Moreover,] the greatest pressures to plead guilty are brought to

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47 See Alschuler, supra note 53, at 34 (statement of Judge Arthur L. Alarcon).
45 SILBERMAN at 265.
bear on defendants who may be innocent."

When Silberman writes, "In general, prosecutors care less about winning than about not losing; to lose any significant number of cases weakens their sense of self and undermines their credibility in the courtroom and in the larger community," he describes one way in which the personal interests of prosecutors are likely to differ from the public interests that they have been hired to serve. When a prosecutor's evidence seems weak, the "safest" course is usually to offer the defendant whatever concessions seem necessary to ensure that he will "not lose." This practice subordinates sentencing considerations to the prosecutor's "batting average" and has terrifying implications for defendants who probably could not be convicted at trial.

Moreover, when a prosecutor concludes that "the defendant [is] not sufficiently culpable to warrant the stigma and punishment that a felony conviction would bring," it indeed may be appropriate for him to reduce the charge against the defendant to a misdemeanor. It does not follow that the prosecutor should exact a plea of guilty as the "price" of this charge reduction. Silberman does not advert to the possibility that the prosecutor could extend the same equitable consideration to all "insufficiently culpable" defendants, even those who exercise the right to trial. To say that mercy may be given is not to say that mercy should be sold.

Whatever the merits of these reasons for prosecutorial bargaining, the weaknesses of prosecutors' cases and their sympathy for deserving defendants probably cannot explain most of their plea bargaining decisions. "More than ninety percent of our felony cases end in bargained pleas," a New York prosecutor told me. "I certainly hope that they are not all weak cases." In view of the relatively small number of felony arrests that lead to felony prosecutions in New York City, the prosecutor's hope is probably justified; the cases that reach the felony court already have been carefully screened. And unless one accepts the view that the overwhelming majority of cases in the felony courts are "trash," it seems doubtful that equitable circumstances go far toward explaining the ninety

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90 Alschuler, supra note 86, at 60.
91 Silberman at 272.
93 This statement appears in Alschuler, supra note 86, at 58 n.27.
94 See Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York's Courts 15 (1977) ("only 23% of the felony arrests disposed of in the criminal process reached their disposition in the Supreme Court [the court in which felony charges are filed]"); Kuh, Plea Coping, 24 Bar Bull. 160 (1966-1967).
percent figure either. As Silberman observes, "Even when evidence of guilt is overwhelming and the case involves a 'bad guy' who has committed a serious crime, prosecutors prefer to settle the case through a guilty plea to a lesser felony, so long as the lesser charge carries an appropriate sentence." 5

What, then, is the appropriate sentence to which Silberman refers? Is it the same sentence that the "bad guy" would have received following a conviction at trial? If so, his bargain is apparently no bargain; he may well have been defrauded into sacrificing his right to trial for nothing. And if the sentence is less severe than the sentence that would have followed a conviction at trial, either this sentence or the "post trial" sentence seems at least somewhat inappropriate. Whether the "guilty plea" sentence is inadequate to achieve fully the purposes for which criminal punishment is imposed or the "post trial" sentence inflicts gratuitous suffering, the impropriety of determining the defendant's punishment partly on the basis of his choice of plea (rather than on either the circumstances of his crime or his personal circumstances) seems apparent. 6

Although Silberman maintains that prosecutors usually have good reasons for entering plea agreements, he has few kind words for the motivation and the competence of defense attorneys. Many public defenders, he says, "see themselves as production workers whose job is to move cases along the assembly line as rapidly as possible." 7 Private defense attorneys, moreover, are commonly worse:

The economics of private practice tend to militate against real concern for any but affluent clients. . . . Most lawyers in private practice try to offset low fees through large volume; successful "wholesalers," as they are called, may handle five to ten cases a day, for fees ranging anywhere from $50 per case to $200, $300, or even $500 per case. The only way to handle that kind of volume is to plead everyone guilty . . . .

Many defense lawyers with active practices have not tried a single case in years. . . .

Lawyers of this sort use all their advantages of position, style, and verbal skill to browbeat clients into pleading guilty. Since they usually receive a flat fee per case, payable in ad-

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5 Silberman at 272.
6 Contra, American Bar Association Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty § 1.8 (1968).
7 Silberman at 305.
vance, rather than billing on an hourly basis, defense lawyers have a strong incentive to persuade clients to plead guilty whether they maintain their innocence or not.98

Although Silberman recognizes that “there are many lawyers of unquestioned integrity and ability,” he notes that “even these lawyers concede that the pressure of their caseload sometimes influences their judgment.”99 Silberman’s description of criminal defense practice is essentially accurate. How it fits in with his earlier assurance, “It is not true that plea bargaining distorts the judicial process,”100 is beyond my comprehension.

“In any case,” Silberman informs us, “abolishing plea bargaining is more easily said than done.”101 He offers two pieces of empirical evidence to support this thesis. In one Midwestern county, the chief prosecutor forbade charge bargaining in drug-sale cases. The prosecutor’s prohibition was apparently effective, but sentence bargaining increased. The study that Silberman cited thus demonstrated that, when a prosecutor changes only the form of plea bargaining, plea bargaining in some form is very likely to continue. Similarly, if one refuses to sell on an international market for pesos but continues to sell for yen, he may still make sales—perhaps almost as many as before.

In addition, Silberman observes:

Philadelphia’s experience provides a case in point. During his tenure as district attorney (1969-73), Arlen Specter gained national acclaim for having abolished plea bargaining. The reputation was undeserved; all that Specter did was shift its locus. Instead of bargaining over the charge to which defendants would plead guilty, prosecutors and defense attorneys under Specter’s regime did their bargaining over whether or not defendants would waive their right to a jury trial and elect a bench trial instead. Since bench trials can be completed in a matter of minutes, they serve substantially the same purpose as guilty pleas; in some jurisdictions a bench trial... is referred to as “a slow plea of guilty.” To induce waivers, Specter’s ADAs [Assistant District Attorneys] offered defendants the same kind of implied sentencing concessions they previously provided to induce a guilty plea; a further inducement

98 Id. at 303-04.
99 Id. at 304.
100 See text at note 82.
101 SILBERMAN at 279.
came from the fact that bench trials were conducted by judges with reputations as soft sentencers, while the tough sentencers were assigned to jury trials. In short, plea bargaining was abolished in name only.\footnote{Id. at 279-80 (footnote omitted).}

Arlen Specter, so far as I am aware, never claimed to have abolished plea bargaining in Philadelphia, nor did he gain "national acclaim" for having done so. Specter's claim was that there was much less plea bargaining in Philadelphia than elsewhere, and this claim was apparently accurate. To be sure, one reason for Philadelphia's unusually low guilty-plea rate was the sort of "waiver bargaining" that Silberman described. Nevertheless, it is wrong to argue that because of this practice, "plea bargaining was abolished in name only." The practice that Silberman described was not bargaining for a plea of guilty; it was bargaining for one form of trial rather than another. Both practices may of course be offensive; indeed, I am convinced that they are. Our Constitution guarantees defendants a right to jury trial, and they should not pay the price of additional criminal punishment for daring to exercise it. However offensive "waiver bargaining" in Philadelphia may be, though, it seems less offensive than plea bargaining in other jurisdictions. There is at least some difference between pressing a defendant to select a particular form of trial and pressing him to forego any trial whatever.

As Silberman notes, bench trials in Philadelphia and elsewhere are sometimes called "slow pleas of guilty." The term is a misnomer, however, in two respects. First, there is nothing "slow" about the procedure; it may, in fact, require less time than the process of negotiating a guilty plea and of making the record that will justify its acceptance in the courtroom. Second, Philadelphia bench trials are not usually the "functional equivalent" of pleas of guilty. Philadelphia judges do consider the evidence presented at these trials and are not reluctant to acquit when this evidence fails to establish guilt beyond a reasonable doubt. Although serving some of the same purposes, bench trials in Philadelphia therefore differ from negotiated settlements elsewhere in several respects. A Philadelphia bench trial is a public rather than a closed-door proceeding; the defendant is able to present his side of the story to an impartial third party (a procedure that may have therapeutic value in itself); and most importantly, the defendant does not surrender his chance for an acquittal. Silberman, however, disregards these differences in
his rush to declare, "Ah ha, Arlen Specter, you flex too! We knew that you were no different from the rest of us! Indeed, in this enlightened age, we know that everybody flexes."¹⁰³

Of course Silberman favors reform of the criminal courts. "Formal rules and guidelines" are essential, he tells us,¹⁰⁴ and "simple courtesy would go a long way toward encouraging respect for law."¹⁰⁵ Perhaps most importantly, we need "to hold the 'price' of going to trial to a reasonable level—to keep the difference between the sentences meted out after trial and after a guilty plea small enough so that choosing a trial remains a viable option."¹⁰⁶ Silberman concedes, "My 'solution' is conceptually untidy, acknowledging in practice what constitutional theory denies. The argument for it is wholly pragmatic; if a practice cannot be eliminated, more is to be gained from regulating than from forbidding it."¹⁰⁷

Like most of the observers who confidently assert that prohibitions of plea bargaining would be unenforceable, however, Silberman pays no attention to problems of enforcement in advancing his own proposal for reform. Although he apparently believes that pros-

¹⁰³ Following the passage quoted in text at note 102 supra, Silberman notes:
The discrepancy between form and substance [in Philadelphia] was even more profound. For all his strictures against the exercise of prosecutorial discretion, Specter placed great emphasis on early screening and diversion. ADAs were stationed in police stations, with a mandate to get the "junk" cases out of the system at the earliest point, through dismissal, reduction of charges, or diversion. Id. at 280 n.*. I very much doubt that Arlen Specter issued "strictures against the exercise of prosecutorial discretion"; to the contrary, Specter seemed to take pride in the very screening devices that Silberman noted. See, e.g., A. SPECTER, THE 1970-1971 REPORT TO THE PEOPLE OF PHILADELPHIA 265-66 (1972). Moreover, there is a manifest difference between "discretion" and "plea bargaining"—between a unilateral judgment about whether charges should be filed and a self-serving trade.

Silberman also reports that "most of the recent proposals for doing away with plea bargaining were tried [during the 1920s] and found wanting." SILBERMAN at 278. His usually well-documented book offers no support for this proposition, however, and I know of no jurisdiction that attempted to do away with plea bargaining in the 1920s. What was tried following the "discovery" of plea bargaining by the crime commissions of the 1920s was moderate reform of the sort that lawyers and social scientists commonly advocate today. Moreover, when the state of New York required prosecutors to set forth in writing their reasons for entering charge-reduction agreements, this reform was indeed found wanting: prosecutors supplied the same empty reasons in case after case. See Weintraub & Tough, Lesser Pleas Considered, 32 J. CRIM. L. & CRIMINOLOGY 506, 521 (1942).

¹⁰⁴ SILBERMAN at 298, 301.

¹⁰⁵ Id. at 298. In addition, public defenders should not be saddled with crushing caseloads and should receive adequate salaries; they should locate their offices away from the courthouse; and they should avoid symbols of officialdom that their clients are likely to find offensive, such as state seals on their business cards. Id. at 306-07.

¹⁰⁶ Id. at 284.

¹⁰⁷ Id.
ecutors and defense attorneys have little regard for the law and would therefore seek backdoor mechanisms to evade a prohibition of plea bargaining, he seems to assume that these same lawyers would meekly comply with a rule that told them, "Don’t take more than ten percent off." Perhaps Silberman has forgotten the situations that, even in his view, prompt prosecutors and defense attorneys to bargain—for example, the case in which the evidence is weak but in which the prosecutor’s “sense of self” makes it important that he “not lose.” Would this prosecutor readily limit his offer to “ten percent off”? Surely the closed-door, “underground” mechanisms that threaten abolition efforts pose similar impediments to “moderate” reform. Silberman relies on a modern truism that simply is not true: that it is always easier to regulate a practice than to forbid it.

In fact, the opposite view may sometimes come closer to the truth. In a system in which trial judges rather than prosecutors struck bargains with defendants, it might be possible for a trial judge first to determine the defendant’s probable “posttrial” sentence and then to “discount” it. In a system of prosecutorial bargaining, however, it would be extremely difficult to give content to Silberman’s proposal. At the time that prosecutors and defense attorneys strike their bargains, they can only guess at what Silberman regards as the appropriate baseline—the “posttrial” sentence. Moreover, criminal sanctions commonly are not commensurate with one another. Under Silberman’s proposal, could a prosecutor offer any bargain to a defendant who faced a possible death penalty if convicted at trial, or would any offer that eliminated this risk be “excessive”? Could the prosecutor offer to recommend that a defendant who had been unable to secure his pretrial release be sentenced only to the time that he had already served in jail, or would this offer, even though it represented only “ten percent off,” be coercive in its assurance of an immediate release from custody? Could the prosecutor offer to reduce a felony charge to a misdemeanor when this bargain would not substantially alter the period of the defendant’s incarceration, or would the resulting difference in “stigmatizing labels” make the offer coercive? Could the prosecutor ever offer a probated sentence to a defendant who would run a risk of imprisonment if convicted at trial? Most importantly, should


109 If all of these offers of qualitative changes in punishment were prohibited, the effect would be to outlaw the overwhelming majority of bargains that prosecutors and defense attorneys currently enter in felony cases.
we make "exceptions" for all of the situations in which Silberman seems to believe that substantial charge reductions in exchange for pleas of guilty are appropriate—the "trash" case in which the victim seems as culpable as the defendant, the "weak" case in which the prosecutor may not be able to secure a conviction at trial, the case in which the defendant is "not sufficiently culpable to warrant the stigma and punishment that a felony conviction would bring," and so on? By the time that we finally had resolved these issues, we would probably have a regulatory scheme so complicated—and so thoroughly riddled with exceptions—that prosecutors and defense attorneys usually could rationalize an evasion as no evasion at all. The enforcement of a clear-cut prohibition might well be easier.

Finally, Silberman offers some jurisprudential criticism of proposals to abolish plea bargaining:

Eliminating plea bargaining would be undesirable even if it were possible. Proponents of abolition assume that the question to be resolved in a criminal case is always simple and clear-cut: Is the defendant guilty or not guilty of committing the crime with which he is charged? If the answer is Not guilty, the defendant should be freed; if it is Guilty, he should receive the "proper" punishment for the offense. To convict a defendant of any lesser charge, in this view, or to sentence him to any lesser punishment, is a perversion of justice.

It is a curious notion of justice to tie it so completely to the prosecutor's uncontrolled discretionary decision about the crime with which an offender will be charged. Opponents of plea bargaining attribute an objectivity to the charging decision that most prosecutors would be loath to claim; as Professor Arnold Enker has written, the opponents of plea bargaining seem to assume that there is "an objective truth existing in a realm of objective historical fact" that can best be ascertained through a jury trial. But the "truth" of an offense is usually neither objective nor absolute; it is embodied in the way "the facts" are interpreted and in the significance attached to them, as much as in the facts themselves.

In the great majority of criminal cases, "the facts" are not in dispute. What is at issue—what needs to be adjudicated—is the significance that should be attached to the facts. Decisions about the seriousness of the offense and the degree of an offender's culpability involve complex and often highly subjective judgments about such factors as premeditation, intent, force, credibility, negligence, threat, recklessness, and harm.
What is being adjudicated is not guilt or innocence, but the punishment the offender deserves.\textsuperscript{110}

This passage is a muddle. Certainly the opponents of plea bargaining do not attribute any special objectivity to the prosecutor's charging decision. They can fairly be accused only of attributing some objectivity to the decisions of the courts and juries whom they would entrust with the resolution of criminal cases more often than at present. Imperfect though these courts and juries undoubtedly are, they are not beset by the personal conflicts of interest that influence the judgments of prosecutors and defense attorneys in plea bargaining. To most opponents of plea bargaining, juries do indeed seem more objective than the public defenders who "see themselves as production workers whose job is to move cases along the assembly line as rapidly as possible,"\textsuperscript{111} than the private defense attorneys who "have a strong incentive to persuade clients to plead guilty whether they maintain their innocence or not,"\textsuperscript{112} and than the prosecutors who care about "not losing."\textsuperscript{113} There is no sense in which the academic opponents of plea bargaining (at least if I am representative of this seemingly small group) would tie their notions of justice "to the prosecutor's uncontrolled discretionary decision about the crime with which an offender will be charged." Apart from the fact that courts and juries can check unwarranted exercises of prosecutorial discretion, prosecutors themselves should do so. Abolishing plea bargaining certainly does not require that a prosecutor be "tied" to every charge that he has filed. Whenever evidence has emerged that makes a prosecutor's initial charge appear unjustified, he should change it; indeed, he may have a professional obligation to do so. The only issue is whether he should make his alteration of the charge contingent upon the defendant's entry of a plea of guilty.

Moreover, the opponents of plea bargaining do not "assume that the question to be resolved in a criminal case is always simple and clear-cut." To the contrary, it is when the issue is not simple and clear-cut that courts and juries seem most necessary. And yes, many of the hardest issues are not questions of historic fact; they are questions of how historic facts should be characterized as a matter of law (which, contrary to Silberman's suggestion, is not necessarily the same issue as what punishment the defendant should receive). Does it follow that these issues of characterization

\textsuperscript{110} Silberman at 280-81.
\textsuperscript{111} See text at note 97 supra.
\textsuperscript{112} See text at note 98 supra.
\textsuperscript{113} See text at note 91 supra.
are unimportant or that they can best be resolved by "splitting the difference"? How can "complex and often highly subjective judgments about such factors as premeditation, intent, force, credibility, negligence, threat, recklessness, and harm" best be made?

I have a radical answer to this question, one that will doubtless seem foreign and bizarre to a number of modern academics and criminal law practitioners. To begin with, a person who is not committed to one viewpoint or the other should listen to the evidence. Then this judge or juror should determine as best he can what happened, and finally he should focus specifically on the ultimate issue of characterization: What intent did the defendant have? What force did he use? What harm did he cause? If this view is incorrect, I do not understand what trials are for. It is surely a prerequisite of justice in troublesome, contested cases that someone listen.

Of course some cases—quite a few—do involve issues of historic fact. Silberman says, "When the facts are in dispute—when there is reasonable doubt that the defendant committed the crime with which he is charged—a jury trial is the most appropriate means of adjudication."¹⁴ One wonders what Silberman would do to implement this concept of procedural justice, for our current system of criminal justice does not do so. Prosecutors care about "not losing" even in cases in which historic facts are in dispute, and they seem about as likely to compromise these cases as any others. Perhaps an additional moderate reform is therefore in order: prosecutors should be told to compromise only issues of characterization, not issues of historic fact. If the defense witnesses say that the victim shouted, "I'll kill you," before the defendant drew his knife, and if the state's witnesses maintain that the victim shouted only, "Hello, old friend," plea bargaining is inappropriate. If, however, everyone agrees that the victim's shout was, "Here I come, you rat," the question whether this threat warranted the defendant in drawing and using his knife can properly be the subject of a bargain. Plainly, the distinction that Silberman suggests cannot be made workable in an operational system of justice. And Silberman cannot have it both ways.

Silberman frequently speaks of the law as an "educating institution," of the "flow of propaganda" that encourages respect for law, of the "symbolic" role of trials, and of the "aura of injustice" currently conveyed by our criminal courts. He maintains that

¹⁴ Silberman at 282.
"appearances count, especially where justice is concerned."\textsuperscript{15} Just as Silberman reports that violent crime has become more expressive than instrumental in recent years, he apparently views his own proposals for law reform as more expressive than instrumental as well. Even in terms of emanations, auras, propaganda messages, and symbols, however, it would be difficult to imagine a more appropriate target than today's plea bargaining practices. In the words of J. Eugene Pincham, "Plea bargaining cheapens the system. It encourages the defendant to believe that he has sold a commodity and that he has, in a sense, gotten away with something."\textsuperscript{16} Plea bargaining reinforces the view of offenders who see the world as a network of processes and connections and who assume that justice is all a matter of whom you know.

Indeed, Silberman himself seems to make the point:

[Defendants] are disillusioned by the unfairness—apparent or real—that they experience in court. From a defendant's perspective, [Jonathan] Casper writes, "outcomes do not seem to be determined by principles or careful consideration of persons, but by hustling, conning, manipulating, bargaining, luck, fortitude, waiting them out, and the like." Indeed, "the system has no real moral component in the eyes of the defendant." On the contrary, defense lawyers and judges, no less than prosecutors, policemen, and probation officers, seem to be operating on a moral level no different from the one on which criminals themselves operate.\textsuperscript{17}

It is hard to believe that Silberman is not writing about plea bargaining or that the defective moral lessons that he thinks our criminal courts teach can be corrected by anything short of the prohibition of this practice.

**CONCLUSION**

Of course my grievance on this issue is less with Silberman than with the lawyers and social scientists—"the best and the brightest" in the field of criminal justice—who seem to have led him astray. And I certainly should not close this review without offering a brief overall assessment of what is, despite my criticism, the very good book that prompts it. Charles Silberman is a super journalist; he

\textsuperscript{15} Id. at 297.

\textsuperscript{16} Interview with J. Eugene Pincham, Private Defense Attorney, in Chicago (Dec. 15, 1967).

\textsuperscript{17} SILBERMAN at 298.
has done his homework thoroughly; he writes elegantly and has rendered much difficult material readable; and although I think that he has gone wrong in the chapter that is the principal focus of this review, he is, in the main, a thoughtful and sensitive scholar. *Criminal Violence, Criminal Justice* is without any doubt the one book to read on the subject of crime and criminal justice if you are reading only one.

Nevertheless, and despite the serious defects that a decade's hindsight may suggest, *The Honest Politician's Guide to Crime Control* remains to me a more attractive volume in its approach to criminal justice reform. In the conclusion of this book, Morris and Hawkins quoted a passage from a task force report of the President's Commission on Law Enforcement and Administration of Justice:

> The criminal justice system may be compared to a blind man far down the side of a mountain. If he wants to reach the top, he must first move. And it matters little whether his first move is up or down because any movement with subsequent evaluation will tell him which way is up. A step by step process of experimenting, evaluating, and modifying must be undertaken. Both innovation and the subsequent evaluation of its consequences are essential to climbing up.  

This passage is among those that may seem naive ten years later. An intervening decade of social science research seems to have taught us only that it is not so easy to tell which way is up after all. Most moves seem to lead in circles, and more seem to lead downward than toward the heights. Moreover, few of us even hope to reach the mountaintop any longer; for most of us, it would be enough simply to get out of the woods.

And it is well that we have the knowledge that the past decade has provided, discouraging though this knowledge often is. We should recognize forthrightly the difficulty of social change that recent social science research has emphasized. Our future reform efforts may not be accompanied by the great whoops of enthusiasm that have accompanied reform efforts of the past. Even when we cannot know what works, however, we can recognize the injustice around us. And perhaps our guiding principle should not be, as Silberman suggests, "First, do no harm"—a principle that can be fulfilled most easily by doing nothing. A more appropriate first principle may be, "Do not blink injustice." We may need to rekindle the

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118 *Morris & Hawkins* at 261-62.
fires of our indignation, for some parts of our criminal justice system merit this indignation. And although we should always eschew blind faith, assess the consequences of our actions as best we can, and strive as best we can to do good rather than harm, in the end it may be necessary to give some play to our intuition—to our perceptions of injustice—and to take a chance on change. In that sense, the central perception of the passage quoted by Morris and Hawkins seems sound: If one hopes to reach the mountaintop, or even to get out of the woods, he must first move.