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AUTHORS' REPLY

Austin Sarat's thoughtful and balanced critique of our book presents an interesting perspective on the debate about the nature of plea bargaining and reform in the lower courts. Indeed, there is much in his article with which we agree. It is our sense, however, that at several points he is implicitly evaluating our book through intellectual lenses that are very different from those we used in writing it. We think that some of the criticisms he makes of *Bargaining for Justice* arise from these differences in approach, rather than from inconsistencies within our own perspective.

In the following paragraphs we discuss first the three implicit differences between Sarat's notion of *Bargaining for Justice* and our own. We then address the explicit concerns he identifies in his conclusions. Finally, we would like to recast our discussion in a framework we hope will permit a useful interchange about the nature of justice in the lower courts and, more importantly, the prospects for reform that have been evolving since we wrote *Bargaining for Justice*—in particular, the Neighborhood Justice Center movement.

Our sense—drawn indirectly from the assumptions that underlie his description of our empirical findings—is that Sarat reads our book in a way we did not intend in at least three respects: its purpose, the intellectual paradigm into which it fits (or perhaps out of which it grows), and the general stance we took toward the concepts of truth and justice. We will look at these in turn.

First, Sarat attributes to us a goal more ambitious than we claimed or would have hoped to achieve. He sees *Bargaining for Justice* as a general essay on reform of the plea bargaining process and the lower criminal courts. We were much more modest. We claimed only that we would use an ethnography of several courts to criticize two particular models of reform, each directed at limiting or formalizing the bargaining process. We had insufficient evidence to make general comments about the quality of justice in the lower courts or to make grand proposals for its enhancement. Sarat seems to feel that we fell short of his expectations for the book. We are, if anything, of the opinion that we took an excessive leap from our data in offering general prescriptions for building a due process of bargaining (pp. 157 ff.).

His second disagreement with us is the paradigm within which our book should be placed. We agree with him emphatically that we were attempting to break Packer's paradigm of two models. We proposed to replace it with a model built on the notion of social exchange. In the first two pages of *Bargaining for Justice* we set out the broad outlines of social exchange theory and concluded that "the concept of social exchange seems useful for trying to understand the courts" (p. 2). We then used this paradigm to organize our generalizations from the ethnography we conducted. As we stated in the introduction to the chapter describing our findings:

> It is clear from our case study that bargaining exists in the courts, not only in the form of the classic plea bargain, but also as the principal mode of interaction among the people of the court. As a result of its widespread use to determine the course a case will follow, it becomes, in effect, the underlying decision-making structure of the courts. Moreover bargaining appears to be the glue that holds together their social organization. . . . Bargaining as a system of human interchange creates the culture of the court. [P. 144]

Sarat ignores this paradigm in his review and, instead, introduces Braybrooke and Lindblom's theory of disjointed incrementalism. He then asserts that the behavior we describe in our ethnography of the courts "conforms quite nicely to the incremental paradigm." His discussion of our book thereafter appears to be built on the assumption that we were arguing from

an incrementalist position. Since his approach focuses on bargaining as a decisionmaking process only and ours sees it as the paradigm for an entire social system, including construction of values, structure, roles, and interaction, there are several important differences between the implications of the two paradigms—differences that strongly affect how one evaluates *Bargaining for Justice*.

Finally, there is the difference of epistemological stance. For Sarat there appears to be an absolute objective "truth" which could be found if only the court personnel would (or, possibly, could) employ adequate methods and resources for discovering it. He implies that actors in the court have chosen to adopt a strategy of compromise in which "it is less important that the problem be accurately understood and described than that those who have to deal with it be able to agree on a mutually acceptable construction" (p. 614). Participants "acquire information *so that* they can agree [emphasis added]" and should "have a say in order to elicit assent . . . and minimize the chance that anyone will be caught by surprise." Only in a world in which there is another way to know "truth" can people bargain as a matter of choice. It seems that for Sarat, it is possible that the facts of a criminal case could be perfectly understood. For us, as Sarat himself notes, "the reality of criminal events is constructed by legal officials. . ." (p. 617). "Truth" is relative, subjective, a socially constructed reality at best.

In a very similar vein, Sarat appears to hold to the notion that there is also an absolute—and presumably substantive—"justice" that could be objectively rendered and which therefore should be the highest concern of one who observes the courts. Our observation of the courts provides us with the opposite sense of the situation—that "justice," too, is a relative, socially constructed reality. We appear, at least, to disagree deeply about the nature of the reality of "truth" and "justice" in the lower courts.

These three points seem to us to influence Sarat's reading and assessment of *Bargaining for Justice*. After his positive assessment of our methodology and empirical presentation he takes us to task for what he sees as three errors: first, for being overly sympathetic to the problems of court personnel and thus too "comfortable with the way they do business"; second, for lacking sufficient concern for justice and hence failing to attend to an agenda for enhancing justice in the lower courts; and finally, for endangering the reform movement by risking the

diffusion of energy to initiate change, thus creating an attitude of resignation.

We feel that he has misunderstood our approach to studying reform and the courts. Certainly, as he points out, there are several places in which we were less explicit than we might have been, and this may have contributed to his perceptions. We therefore want to make clear here how our intentions and perceptions influenced the construction of the book and to discuss how we view his explicit criticisms.

Sarat sees us as "sympathetic observers" of the courts and as being "comfortable with the way they do business." As any ethnomethodologist will freely admit, it is almost impossible to determine when one is "going native" and overidentifying with the subjects one is trying to observe objectively. It is possible, therefore, that Sarat is correct in his assessment of our stance. We did, however, take precautions to avoid making evaluative comments in our description of the behavior of courtroom bargainers, and believe that we presented our model in the most objective language available. Certainly, our intent in presenting it was neither to endorse the present situation nor to decry it. Our sense is that the debate about plea bargaining has so long viewed the phenomenon as deviant, perhaps even unethical, that our detached presentation of a court as a social exchange system is a bit unnerving to readers in whom the notion is deeply ingrained that an objective and highly valued justice can only be served by the adversarial ideal. In short, though we are not comfortable with the way courts do business, we hold that, empirically, it is unavoidable and must be confronted as such by reformers. It is up to those who would reform it to develop what Herbert Gans has called "subtle plans" that take account of the social reality to which they are addressed.

Sarat seems most critical, however, of our stance toward justice. He notes that "one of the deficiencies of the book is that it is not sufficiently sensitive to questions of justice." We believe, on the contrary, that the whole book is devoted to an understanding of justice. Indeed, as he points out, our book is motivated by an interest in providing empirical evidence to evaluate the leading efforts to make lower courts more just through regulation of plea bargaining. We are, however, concerned with justice in the context of the world we observed—a court culture in which justice is a socially defined entity. We do not accept the idea that "justice" is an objective reality against which to measure that culture or an external value that can be imposed from without. Had we tested the courtroom

scene we observed against some absolute notion of justice, we would have been faced with evaluating the courts as a social exchange system against what we see as a creation of that very system.

Sarat further objects that our book "devotes inadequate attention to how a more explicit concern for justice could be introduced into the social system of the courts." We are puzzled by this comment, since the burden of our recommendations is precisely that issue. We were of the opinion that, if anything, we overstepped the bounds of our data and approach by recommending "a course which should bring us closer to the realization of a due process of bargaining" (p. 167). We did not speak, of course, of "justice" in explicit terms—since we do not know what substantive justice is in a world without objective "truth." We spoke, instead, in terms of equitable treatment and due process. In a society constructed of bargained relationships, we feel there is no other way to approach "justice."

Finally, Sarat takes us to task because of the "danger in the perspective that the energy to initiate change will be diffused. . . . It may lead to timidity and skepticism." First, as we point out above, we ourselves were not intimidated by our findings. We presented the beginning outlines, admittedly sketchy, of a program for reform. But more important, we are puzzled that Sarat believes the forces of reform to be so fainthearted that they would melt in the face of reality. The courtroom we paint is certainly not the ideal setting for reform. But it is the courtroom reformers must look at. Unless they do, they will become embroiled in symbolic crusades, devising programs addressed to reforming courts that simply do not exist. We are far better off with a difficult reality than with a set of impractical reforms and naïve expectations.

Taken as a whole, we think that Sarat's article is more a new formulation of the debate about the courts than a critique of *Bargaining for Justice*. We see a movement away from the debate about crime control versus due process and toward a debate about how to interpret and respond to a recognition that the courts are social structures with social norms, roles, sanctions, and values, which must deal with numerous, complex, ambiguous individual cases, somehow seek "truth" and do "justice," and survive as social units. We think that Sarat and we are each struggling in slightly different ways with the same new formulation of what the lower courts are.

It seems important, then, for us to try to make overall sense out of the division between our reading of *Bargaining for*

Justice and his. In making statements about the nature of the courts and the prospects of reform we start from very similar perceptions about the empirical reality of the courts but reach very divergent conclusions about the correct interpretation and evaluation of that reality. Fundamentally, we suspect, we differ most over the issue of the objective reality of "truth" and "justice" and the implications for court reform.

Substantively, the issue for reform (and hence for reform-oriented researchers) is whether the courts can be made to deal with an objective truth and do absolute justice—substantive or procedural—or whether reformers must abandon absolute truth and justice and seek to build institutions capable of maintaining symbolic truth and justice while behaving as equitably and humanely as possible in a world without objective truth and faced with complexity, ambiguity, and an exchange-based society.

In light of the rise of the Neighborhood Justice Center movement and similar efforts to build nonadjudicatory alternatives to the courts, this debate probably implies two research streams. Taking Sarat's position, we would imagine that the issue for reformers now might be how to employ these new alternatives to enhance the ability of courts to discover truth and do justice and to develop a theoretical perspective on the differences in social structure between the courts and alternative justice systems. For us, the salient issue is how to build yet more informal structures for the administration of justice in such a way that they employ the best of what we observe of the courts as constructors of "truth" and "justice," avoid the problems we have identified in the courts, and—perhaps by making it manifest—create a "due process of bargaining."

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