EDELMAN, Murray (1964) *The Symbolic Uses of Politics.* Urbana, Ill.: University of Illinois Press.
GALANTER, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Review* 95.
GOLDSTEIN, Abraham (1960) "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 *Yale Law Journal* 1149.
HANEY, Craig (1979) "Social Psychology and the Criminal Law," in Patricia Middlebrook, *Social Psychology and Modern Life.* New York: Random House.
HANEY, Craig and Philip ZIMBARDO (1977) "The Socialization into Criminality: On Becoming a Prisoner and a Guard," in June Tapp and Felice Levine (eds.) *Law, Justice and the Individual in Society: Psychological and Legal Issues.* New York: Holt, Rinehart, & Winston.
HOGARTH, John (1971) *Sentencing as a Human Process.* Toronto: University of Toronto Press.
LEFF, Arthur (1974) "Economic Analysis of Law: Some Realism about Nominalism," 60 *Virginia Law Review* 451.
LEVIN, Martin A. (1977) *Urban Politics and the Criminal Courts.* Chicago: University of Chicago Press.
NAGEL, Stuart S. and Marian NEEF (1976) "Plea Bargaining, Decision Theory, and Equilibrium Models," 51 *Indiana Law Journal* 957.
NOONAN, John (1976) *Persons and Masks of the Law.* New York: Farrar, Straus and Giroux.
O'BRIEN, Stewart, Steven PHETERSON, Michael WRIGHT and Carl HOSTICA (1977) "The Criminal Lawyer: The Defendant's Perspective," 5 *American Journal of Criminal Law* 283.
PASHUKANIS, E. B. (1951) "The General Theory of Law and Marxism," in Hugh Babb (trans. and ed.) *Soviet Legal Philosophy.* Cambridge, Mass.: Harvard University Press.
PLATT, Anthony and Randi POLLOCK (1974) "Channeling Lawyers: The Careers of Public Defenders," 9 *Issues in Criminology* 1.
POSNER, Richard A. (1972) *Economic Analysis of Law.* Boston: Little, Brown.
SILBERMAN, Charles (1978) *Criminal Violence and Criminal Justice.* New York: Random House.
SUDNOW, David (1965) "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office," 12 *Social Problems* 255.
WILSON, James Q. (1975) *Thinking about Crime.* New York: Basic Books.
WOOCHER, Frederic, (1975) "Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification," 29 *Stanford Law Review* 969.

AUTHOR'S REPLY

Haney and Lowy argue that *Plea Bargaining* fails both to ask and to answer a number of questions they consider crucial (p. 634). I most certainly did not ask the questions they pose and, given that I did not ask them, I naturally did not answer them. They develop a passionate ideological critique of the criminal justice system urging, inter alia, "the socioeconomic restructuring required to achieve a meaningful reduction in crime" (pp. 648-49). Reasonable people may differ about the efficacy of this prescription and the effects that its realization would have, but *Plea Bargaining* does not attempt to explore these matters.[1]

[1] In the text of their article, Haney and Lowy also are critical of the absence of interviews with defendants (p. 635), although they qualify their objection by conceding that it is a bit unreasonable to expect a book to explore issues it does not purport to address (p. 635-36 n.3). In any case, Casper (1972)

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Though a substantial portion of their discussion either touches on issues that lie outside the scope of the book or is so infused with the reviewers' ideology that little can be said in response, they do raise several questions about *Plea Bargaining* that warrant brief comment here. First, their concerns about the care that should be accorded the interpretation of the historical data (pp. 638-39) are all raised in the book (pp. 28-29, 181). They fail to note, however, that in the low volume jurisdictions the absolute number of cases per year is so small that, even without controls for personnel, it is unlikely that "case pressure" could explain the miniscule number of trials.[2] Second, only by very selective pruning of the interviews can one conclude that those support a case pressure hypothesis (pp. 639-40). Furthermore, by questioning the direct relationship between case pressure and plea bargaining, I do not say that case pressure does not affect plea bargaining. Indeed, the book is explicit in pointing out that when cases per attorney, prosecutor, or judge increase beyond some point, case pressure may affect plea bargaining practices (p. 202, note 80; p. 168). Third, though they do not attach much importance to the distinction between learning and teaching (p. 640), I think it crucial to a realistic understanding of newcomer adaptation. It is easy to paint a picture of a conspiratorial group of court veterans coercing newcomers to plea bargain, and there is no gainsaying that rewards and sanctions are utilized to teach newcomers a perception that plea bargaining serves their interests. But there is also a learning component to the newcomer's adaptation, one in which s/he learns that the characteristics of the cases that must be processed differ substantially from what was expected. Notwithstanding the reviewers' personal views about case characteristics, most court personnel (regardless of ideological persuasion) will readily admit that in many cases there are simply no contestable factual or legal issues, and this realization has implications too numerous to discuss here for the processing of cases and for the use of plea bargaining. Suffice it to say that as newcomers learn about their cases their plea bargaining behavior changes, just as it changes in response to rewards and

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presents precisely these interview data, which are cited in *Plea Bargaining* at a number of places.

[2] For further support of the argument that plea bargaining is not a function of case pressure, see Feeley (1978) and Nardulli and Proch (1979). Nardulli and Proch were able to control for personnel levels in the jurisdictions for which they had data, and their findings closely parallel those presented in *Plea Bargaining*.

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sanctions. Ignoring either component yields a neater picture of the adaptation process, but one that ignores reality.

More generally, the review rests on two significant assumptions about trial courts. The reviewers believe that defendants are coerced into pleading, and they believe that trials necessarily would better serve the defendants' interests. An interesting example of the operation of these two assumptions can be found in their rather involved scenario about the costs that a first- or second-time offender bears in accepting a "good deal" (p. 645). Essentially they argue that the defendant is tempted by the plea bargaining offer, accepts it, but, alas, suffers later when he is rearrested and now has a record of a prior conviction. True enough, but why do Haney and Lowy assume that: (1) the defendant cannot make his/her own choices about what is in his/her own best interests—ought a defendant be denied a right to plead, and to obtain what s/he perceives to be a more lenient sentence?;[3] (2) the defendant would have fared better at trial and such a trial necessarily better serves the defendants' interests? Attorneys who engage in plea bargaining can be criticized for "reduc[ing] complex human situations to their merely legal dimensions" (p. 636) but cannot the same be said for the behavior of attorneys in trials? The cause of criminal justice reform is not aided by conjuring up false hopes for the benefits yielded by trials. There is an extensive literature on the problems of trials, just as there is an extensive literature on the problems and abuses of plea bargaining. Neither trials nor plea bargains guarantee a fair process or a just outcome. It is easy to share the reviewers' antipathy toward many real and potential dangers of the plea bargaining process but it is misleading to believe the trial to be a panacea.[4]

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[3] Indeed, new defense attorneys, eager to file motions and try cases, are often urged by the defendant to negotiate a disposition (see, e.g., pp. 70-71). Relatedly, Haney and Lowy credit *Plea Bargaining* because it "gives lie to recent claims that the criminal courts really 'do justice' " and shows that the system accords "the same brand of justice it has dispensed for more than a century—imprisonment" (p. 638). This interpretation is simply wrong, and perhaps, in part, explains their failure to accept the fact that defendants might choose to plead. For example, with regard to the question of "imprisonment," 10 percent of the Circuit Court defendants received a jail sentence and 49 percent of the Superior Court defendants were sentenced to jail or prison (pp. 187-88, n. 17). One can argue about whether these rates are high or low, but they certainly fall far short of supporting a view of a "lock them up" system.

[4] There is not much new in their indictment of the plea bargaining process. As explicitly noted in the book (though not in their essay), I was well aware of the often discussed coercive aspects of the process (p. 160). Nowhere in the book do I champion plea bargaining as an ideal. I do, however, argue that it is inevitable. Because of its inevitability, and because of the well known problems associated with trials, I urge further consideration of alternatives—such as arbitration—to both the trial and the plea bargain (pp. 167-68).

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Where does one go from here? Haney and Lowy, I suppose, opt for an outright abolition of plea bargaining and then some. It is plain that no matter how you approach plea bargaining they view it as a rotten process. Thus, they condemn its "invisibility" (p. 648) and they attack it because it "submerges decisionmaking in the back rooms of the criminal justice system" (p. 647), yet they also imply that efforts to bring it out in the open, to study plea bargaining sessions, to ask respondents to explain their reasons for plea bargaining, merely legitimate the process and create the possibility that we will "come to value and respect it" (p. 649). It is to be condemned when it is secret and the mythology suggests that cases are tried, and it is to be condemned when it is recognized and we try to come to grips with the reasons for its centrality.

Interestingly, Haney and Lowy concur with a major argument of *Plea Bargaining*—namely, that in our current criminal justice system plea bargaining is inevitable. But they argue that though it is inevitable we ought not "tolerate" (p. 648) a system that makes it so. But simply refusing to "tolerate" a system does not help us deal with the issue at hand. My preference was—and is—to understand and explain the way things are and to offer realistic policy suggestions to ameliorate abuses of the system. I think it is a healthy and significant development that we now address plea bargaining forthrightly, that deals are increasingly being made a part of the written record in the court, that we experiment with bringing defendants and victims into the plea negotiations (Kerstetter and Heinz, 1979), and that, in general, a process that historically was "shrouded in secrecy and deliberately concealed by participating defendants, defense attorneys, prosecutors and even judges" (*Blackledge* v. *Allison*, 431 U.S. 63, 76, 1977) is now becoming more visible and open to close public scrutiny.

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REFERENCES

CASPER, Jonathan D. (1972) *American Criminal Justice: The Defendant's Perspective*. Englewood Cliffs, N.J.: Prentice-Hall.

FEELEY, Malcolm (1978) "The Effects of Heavy Caseloads," in S. Goldman and A. Sarat (eds.) *American Court Systems: Readings in Judicial Process and Behavior*. San Francisco: W. H. Freeman.

HEUMANN, Milton (1978) *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*. Chicago: University of Chicago Press.

NARDULLI, Peter and Kathleen PROCH (1979) "The Caseload Controversy and the Study of Criminal Courts," *Journal of Criminal Law and Criminology* (forthcoming, Fall).

KERSTETTER, Wayne A. and Anne M. HEINZ (1979) *Pretrial Settlement Conference: An Evaluation*. Washington, D.C.: Government Printing Office.

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