LETTER
THE NEGOTIATED GUILTY PLEA

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To the Editors:

To anyone who has strived to apply the dismal science of economics to the even more dismal subject of crime, Richard P. Adelstein’s Article, The Negotiated Guilty Plea: A Framework for Analysis, adds new and interesting perspectives of understanding. I found the breadth of his analysis challenging and original, although, as with all provocative papers, agreement is perhaps less important than the stimulus to further thought. By necessity, the following comments concentrate on a few central points and will not dwell on Adelstein’s use of an institutional (as opposed to a utilitarian) approach. Readers of this Review will probably find economists’ intramural methodological feuds a subject they can easily do without. In this instance, Adelstein’s institutionalist arguments could also be framed, explained, and accepted in utilitarian terms; I therefore will not dwell excessively on technical points and will instead survey some of the larger problems with his argument.

The Article deals primarily with two subjects: the criminal act and its punishment, and the disposition of cases by plea bargaining. On the first issue, Adelstein’s central thesis is that one can “describ[e] the criminal process as a price-exaction mechanism—a device for estimating the true cost of crime and for forcing the criminal to consider that cost in contemplating criminal activity.” This view, commonly denominated the “internalizing of externalities” among analysts of pollution, considers that society’s aim is not so much to stop crime as to have it pay its own way, by including the entire social cost in the punishment exacted for the crime. The criminal justice system thereby eliminates only “inefficient” crimes, those of low value to their perpetrator relative to their social cost. Efficient crimes, however, are tolerated, if not encouraged. Though intrigued by the notion, I find it problematic on several grounds. First, the conceptual difficulties in defining the “true” cost of a crime are so formidable as to make the internalization principle not only

2 Id. at 784-85.
3 Id. at 790.
4 See id. at 786-89.
5 Id. at 790.
impossible to apply in practice, but also conceptually unsound. Second, it seems to me that one cannot view the imposition of punishment as a transfer mechanism for social costs without also considering its allocative function, that is, its attempt to reduce or deter crimes beyond those that are inefficient, because deterrence and cost internalization are not separable. In the last part of these comments I will argue that criminal sentences, far from being determined by the internalization of costs or the optimization of deterrence, are the result of administrative responses designed to maintain the criminal justice system in equilibrium, and that the impersonal mechanism of plea bargaining is the vehicle to achieve that purpose.

I

As is well known to defense contractors, utilities, and nursing home operators, “cost” is a conveniently elusive term even when simple economic transactions are measured. But when the social costs of crime are considered, the issue transcends accounting. Even the most easily calculated part of this cost—the direct economic harm of a crime to its victims—presents problems. It may be either quite small ($170 for an average burglary, according to the President’s Commission on Law Enforcement and the Administration of Justice), or immeasurably large, as in the case of homicide. Murders may therefore require a punishment worthy of Tantalus, whereas a burglar would go nearly scot-free. Adelstein consequently adds “indirect” costs (such as costs of protection), and “moral” costs, defined as a “positive measure of the social outrage that results from a given crime.” The scope of those costs creates formidable conceptual problems. First, what should these categories include? The educational benefits forgone by not taking a night class? The fuel consumed in commuting from a “safe” suburb? Second, how can one determine, as one should, the indirect marginal contribution of yet another crime to the social costs of crime? Third, would the social cost of a crime be found by simply adding the costs to all individuals in the jurisdiction? The same indirect cost per capita that is caused by a gruesome murder would then add up to a much higher total cost in a big city than in a small one. Hence, punishment severity should be roughly proportional to population if all social cost is to be internalized—hardly a satisfactory conclusion. Similarly, since the offensiveness of the crime is dependent on personal tastes and prejudices, one would be forced

7 Adelstein, supra note 1, at 787.
to allow for prejudices that make the cost of the same act quite different in different places.

This partial list of objections is made not in order to split methodological hairs, but rather to point out the subjectivity of the concept of social cost. It is also not possible in reality to separate cost internalization from deterrence because crimes are not independent of each other. One of the effects of a crime is the generation or encouragement of additional offenses. It is safe to assume, comparing small jurisdictions with large ones, that the marginal probability of arrest and conviction becomes lower with an increased number of crimes, and that additional offenses tend to reduce the overall deterrent effect of the criminal justice system, thereby encouraging additional offenses. Should the cost of this increased amount of crime be included? If it is, an offender must internalize not only the costs of his own act, but also those of crimes that he has encouraged. He has to pay for others’ future sins. At this point, issues of deterrence become inseparable from the concept of cost internalization. By establishing a cost schedule for the primary offense that accounts for the secondary crimes it encourages, society charges a price that includes a deterrence premium. If the primary crime is not committed because the punishment price charged is high, the secondary crimes are also prevented; deterrence has taken place. The magnitude of the deterrent effect will be reflected in the punishment: the more secondary crimes that could be prevented by suppressing the primary one, the higher the sentence should be to include its social cost.

But suppose that one could somehow overcome these problems and determine the true social cost of a crime. Adelstein’s model still leaves a significant second step: giving the punishment a value. Just what punishment will internalize the cost of a given crime? The problem is relatively easy when we are concerned with monetary penalties, though even these raise potentially difficult questions of equity. But for nonmonetary sanctions, the prevalent form of punishment, an “exchange rate” of imprisonment to social cost must be established before punishment can be calculated. This rate would differ for different people, according, for example, to the value of their time. Because his time is worth less, an unemployed offender would have to be confined for a longer time than would a middle-class professional for the same offense. Even overlooking the patent inequity of this result, the translation of social cost into punishment units brings us back to the question of how sentences are determined, or what the price for a crime should be. Essentially, then, the internalization of social cost involves the equalization of two entirely subjective variables: social cost and the value of punishment.
To be fair, however, it is possible that by hunch or rough approximation such a determination might have been made in a given case. Let us therefore make a back-of-the-envelope check on one such hypothetical finding of parity. The direct cost of an average burglary is, as mentioned, $170. If committed in a high-crime jurisdiction, its marginal indirect cost is fairly low. To calculate the moral cost (Adelstein’s “social outrage” that results from an average burglary), I will use the following method of approximation. In a classic study, the perception of the population about the seriousness of different crimes was surveyed. The results were used to construct the Wolfgang-Sellin index of offense severity. In the same survey subjects were asked to rate the severity of a hypothetical crime consisting of the nonviolent “taking” of different amounts of money. Because the taking of a larger amount was perceived as more severe than the taking of a smaller sum, an index relating severity to amounts of money was constructed. And because the “severity index” number of the taking of a particular sum of money could be directly compared to the severity index numbers of the crimes in the first part of the survey, the perceived severity of any of a widely disparate range of crimes could be stated in terms of a number of dollars. For example, to determine how seriously people view burglary, one would find the severity index number for burglary, and then look for the amount of money whose nonviolent taking has the same severity. The result in this case is that burglary is considered equally serious as the taking of $248. This figure may be taken as the moral cost of a burglary.

Altogether, then, the social cost of a burglary, including both direct and moral costs, is a few hundred dollars. It is difficult to explain how social costs of such magnitude will be internalized by a prison term for the offense that averages, in the federal courts, forty-four months. Clearly, then, either the courts are dramatically miscalculating the social cost of burglary and its internalization, or something else must be involved here.

Thus we return to the question of deterrence. Adelstein is correct in pointing out that sanctions are not set so high as to deter all crime. But this observation hardly compels the conclusion that sanctions are not set to deter some crimes from being committed.

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9 See id. at 236-91.
10 E. Noam, The Optimal Scale of Court Operations (June 1978) (Research Paper No. 104A, Columbia University, Graduate School of Business).
11 Director of the Administrative Office of the United States Courts, 1977 Annual Report 374 (Table D5AD) [hereinafter Annual Report].
12 Adelstein, supra note 1, at 791-92.
complex relationship obtains between the level of crime considered tolerable and the level of sanctions. Rather than assume with Adelstein that punishment is a "cost-plus" price for an offense, such a punishment price could be seen as an allocational device designed to keep the frequency of certain crimes within what are considered appropriate limits. That the imposition of such a punishment price may succeed only partially is another story. Offenders may be undeterred by the range of socially acceptable punishments because they are risk preferrers, compulsive, uninformed, hungry, bored, or simply mean. It is not to deny their basic rationality to suggest that criminal offenders, as a group, may not be what Adam Smith had primarily in mind when describing the economically rational man. One must charge some people a high price to restrict their criminal activity, while others may be quite easily deterred. An efficient punishment schedule would therefore have to be extremely discriminating, or extremely harsh; and either result would create, in Adelstein's terminology, an unacceptably high moral transaction costs.

II

Based on his analysis of punishment as society's way to exact the social cost of a criminal activity, Adelstein explains the mechanism of plea bargaining in the second part of his Article. A defendant will plead guilty "if he perceives the cost of the sentence received upon the plea as less than the expected disutility of the trial prospect and its associated sentence." As an institution, Adelstein argues, plea bargaining reduces transaction costs and increases efficiency. The argument is elaborated and refined in interesting ways, and is tied together with perceptive comments on the impact of cases protecting defendants' rights in the bargaining process. Santobello v. New York, for example, assumes that a prosecutor must keep his promises or "face withdrawal of the plea," which serves "to reduce informational asymmetry arising from prosecutorial failure to adhere to bargained agreements." With or without the Supreme Court's blessing, of course, a prosecutor will have to adhere to his promises if he wants to remain effective with the courts and the defense bar—

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13 See id. at 799-807.
14 Id. at 809.
16 Adelstein, supra note 1, at 815, see 404 U.S. at 263.
17 Adelstein, supra note 1, at 815. Such informational asymmetry increases moral transaction costs. Id. at 810.
that is, if he wants to keep doing business. The courts will thus have to check prosecutorial behavior only rarely.

The existence of such built-in checks suggests that a system-wide analysis of plea bargaining that looks at averages and aggregates is more useful than a case-by-case approach if we want to understand the institution of plea bargaining in context. Adelstein’s discussion of negotiating strategies based on probabilities and expected sentences is useful, but it cannot explain enough. The probability of acquittal in a jury trial is quite low, approximately twenty-four percent in federal court. There is not very much to gain, then, by going to trial, but a great deal to lose. The sentences imposed after jury trials tend to be much stiffer than those available on a plea. In the federal courts in 1970, for example, the average sentence following a jury trial was nearly twice that imposed following a plea. Furthermore, many of those who plead guilty probably have a weaker case than those who go to trial. On the whole, therefore, guilty pleas seem to be an excellent bargain, if one compares the plea sentence with the jury sentence multiplied by its probability. But unless nearly all defendants are enthusiastic risk takers, who would prefer to go to trial unless they are offered an exceptionally good plea bargain—an unreasonable assumption—why should plea sentences be so much more lenient than trial sentences? The answer lies not in the individual bargain transaction between prosecutor and defendant, but rather in the aggregate of the transactions. Adelstein’s analysis, perceptive as it is, confines itself to individual bargaining while attempting to explain plea-bargained sentences generally. Yet plea bargaining does more than settle individual cases; one of its main functions is to keep the criminal justice system in equilibrium, able to process its case load. While the constitutional right to a jury trial exists in theory, courts would cease to function if many defendants exercised this right. Despite the guilty plea rate of ninety percent noted by Adelstein, most urban criminal court systems are severely congested. Faced with a limited supply of trial time, a prosecutor must dispose of the bulk of his cases through guilty pleas. The more defendants that must be induced to plead guilty in order to clear the docket, the better the deal that the prosecutor, on the average, must offer. The more congested a court, the lower the plea-bargained sentence. This is what

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18 Id. at 809-10.
19 See ANNUAL REPORT, supra note 11, at 370 (Table D4AD).
20 See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 59 (Table 16) (1970).
21 Adelstein, supra note 1, at 784.
economic theory predicts, and what empirical evidence confirms.\textsuperscript{22} The sentences in the majority of criminal cases are therefore directly related to the state of the criminal justice system itself and to the resources at its disposal. They are, to a considerable degree, system-generated. Prosecutorial and judicial discretion in sentencing exists, but it may be no more than a fluctuation around a system-generated mean sentence. These effective levels of plea-bargained sentences are far lower than the statutory norms, not because of a reassessment of their social costs by "soft" judges or legislators, but rather because they are the impersonal product of pressures within the system.

Guilty pleas can also be encouraged by raising the "price" for the alternative, the sentence after a jury trial. This interrelation provides the focus for the last part of Adelstein's Article, in which the Supreme Court's recent decision in Bordenkircher v. Hayes\textsuperscript{23} is discussed.\textsuperscript{24} In that case, the defendant, accused of passing a forged check for $88.30, refused to accept an offer of five years' imprisonment for a guilty plea, despite the prosecutor's threat to re-indict him under the state's recidivist statute if he rejected the offer. After refusing to plead, he was found guilty under that statute and sentenced to mandatory life imprisonment.\textsuperscript{25} The Sixth Circuit granted the defendant habeas corpus relief on the ground that the prosecutor's behavior was vindictive.\textsuperscript{26} The Supreme Court reversed this judgment in a five-to-four decision.\textsuperscript{27} The majority felt that the prosecutor acted within the bounds of discretion in the "give-and-take" of plea bargaining,\textsuperscript{28} and Adelstein agrees with the efficiency aspect of its decision.\textsuperscript{29} The problem with the court's conclusion is that it presupposes a case-by-case system of adjudication, and focuses on the abuse of discretion in an individual case rather than on the general underlying policy that leads a prosecutor to drive such hard bargains. One suspects that, beyond the facts of the case, a general policy to discourage trials must have been an important prosecutorial motive, and that the alternative of a jury trial was intentionally made unpalatable. In my empirical study of sentencing,\textsuperscript{30} the severity of jury trial sentences, too, was

\textsuperscript{22} E. Noam, A Cost-Benefit Analysis of the Criminal Court (Feb. 1979) (Research Paper No. 181A, Columbia University, Graduate School of Business) [hereinafter E. Noam, Cost-Benefit Analysis].
\textsuperscript{23} 434 U.S. 357 (1978).
\textsuperscript{24} Adelstein, supra note 1, at 827-31.
\textsuperscript{25} 434 U.S. at 358-59.
\textsuperscript{26} Id. at 360.
\textsuperscript{27} Id. at 365.
\textsuperscript{28} Id. at 363-64.
\textsuperscript{29} Adelstein, supra note 1, at 830-31.
\textsuperscript{30} E. Noam, Cost-Benefit Analysis, supra note 22.
found to be a function of court congestion. The more congested the court, the higher the average sentence. The Bordenkircher case, as well as the related Brady v. United States, United States v. Jackson, and Blackledge v. Perry touch only the excesses of the disparity between trial sentences and plea sentences; they do not deal with the structural issues. A trial sentence has become not only a deterrent to crime, but also a deterrent to other trials. In terms of Adelstein’s cost-internalization model, a defendant sentenced in a trial must internalize not only the cost of his own exercise of the constitutional right to trial, but must also bear part of the cost of the exercise of the right by others.

While Hayes may be internalizing something, it is doubtful that his life sentence reflects the social cost of passing a forged check for $88.30. If any cost is internalized by him, it is the cost of other trials that the prosecutor does not wish to conduct and part of the enforcement cost of crimes committed by other defendants, who would otherwise get a more advantageous bargain for their guilty pleas. As long as urban courts are as congested as they usually are, the concept of the sentence as cost internalizer, even if one could accept it, is superseded by the pressures of reality. Both trial sentences and plea sentences have become mechanisms of administrative accommodation in the effort to keep the criminal court system operating, and both use statutory sentences merely as a convenient reference point.

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