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ARTICLES

CRITICAL LEGAL STUDIES AND CRIMINAL PROCEDURE

Mark Tushnet *
and *Jennifer Jaff* **

As many people have commented, the critical legal studies movement is the heir to the tradition of legal realism.¹ Conventionally, one distinguishes between two branches of legal realism: one branch called “rule-skepticism” and another called “fact-skepticism.”² Rule-skepticism claimed that, in a reasonably well developed system of legal rules, talented lawyers could produce arguments, resting on accepted premises of the system, that supported both a result and its opposite, and that those arguments would satisfy any demands that might be made for internal coherence or consistency with prior decisions. Fact-skepticism claimed that it was impossible for an analyst, be it a judge, jury, or legal sociologist, to recapture what had happened in the past in sufficient detail to allow confident decisions about what had happened or what ought to happen in the future. Using a case study in criminal procedure, this article will identify two strands of critical legal thought that we regard as the descendants of these branches.

In Part I we develop the critique of all versions of legal formalism, which we consider to be the descendant of rule-skepticism. We define legal formalism as the position which claims that results in any particular case are in some nontrivial sense determined by a set of general principles.³ This Part discusses four types of legal formalism. Each is a formalism in that it claims that results follow from general principles, but the types differ in the nature of the principles they espouse. (1) *Classical doctrinal formalism* draws the principles from rules of law as announced in controlling legal documents such as the precedents relevant to the problem at hand. For example, a

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1. See, e.g., Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984).

2. See J. FRANK, *LAW AND THE MODERN MIND* x-xi (6th printing 1949).

3. See Hutchinson & Monahan, *supra* note 1, at 206-07.

doctrinal formalist may claim that a lawyer-like examination of the Constitution and the precedents requires that a conviction be affirmed. (2) The formalism of *moral philosophy* draws its principles from some relatively systematic discussion of fundamental principles of morality. For example, a moral philosophical formalist may argue that appropriate principles of punishment require that a conviction be affirmed. (3) The formalism of *law and economics* draws its principles from what it claims are the logical consequences of assumptions about human rationality and strategic behavior in situations where resources are not unlimited. For example, a law and economics formalist may argue that the efficient allocation of prosecutorial resources requires that a conviction be affirmed. (4) The formalism of the *sociology of professions* draws its principles from a systematic observation of the behavior of participants in the legal system. For example, a legal sociologist may argue that the demands for performance placed on prosecutors, defense attorneys, and judges make it entirely understandable that a conviction will be affirmed.

*Bordenkircher v. Hayes*⁴ is used here as the framework for examining these formalisms. The case involved Paul Hayes, who was indicted for passing a bad check for \$88.30. Over a decade earlier he had been convicted of committing a sexual assault, and he had committed a robbery several years before his bad check indictment. These prior felonies made Hayes subject to the state's habitual criminal statute, which imposed a mandatory life sentence on third-time felons.⁵ The prosecutor offered to recommend a five-year sentence if Hayes pleaded guilty to the indictment. Otherwise, he said, he would ask the grand jury to indict Hayes as a habitual criminal. Hayes pleaded not guilty, the habitual criminal indictment was obtained, and Hayes was convicted. He claimed that the prosecutor's behavior violated his constitutional rights. The Supreme Court rejected Hayes' claim, over four dissents. As will be shown in Part I, it accepted the argument that the prosecutor's behavior was a constitutionally permissible side effect of a system in which plea bargaining played a large role. But Part I argues that no version of legal formalism can determine a particular result in *Bordenkircher*. We suggest that it is plausible from our analysis to generalize that the same is true for other cases, as well as for other versions of formalism.

4. 434 U.S. 357 (1978).

5. 434 U.S. at 358-59 & n.3. The statute had been repealed by the time the Court decided the case. Under the new statute the sexual assault would not have been the basis for an enhanced sentence because Hayes committed it when he was 17. *Id.* at 359 n.2. Justice Powell, in dissent, noted that Hayes might be eligible for parole after serving 15 years. *Id.* at 370 n.1 (Powell, J., dissenting). Under the new statute, Hayes' enhanced sentence would have been at most a 10-20 year indeterminate term. *Id.* at 359 n.2.

In Part II we discuss the descendant of fact-skepticism. Here, the critical approach is less well-developed; our critical perspective concentrates on the law-in-action in a broad frame, thereby considering factors which are not usually taken into account in discussions of criminal procedure.⁶ We argue that the wide scope of this perspective is likely to lead to a more realistic and thoughtful response to the problems of law enforcement, and to useful insights into the operation of law more generally.

I. CRITIQUE OF LEGAL FORMALISM IN CRIMINAL PROCEDURE

A. Classical Doctrinal Formalism

Hayes' claim had powerful intuitive appeal. He had a constitutional right to insist on a trial, but as a result of his exercise of that right, his sentence escalated from five-years to life in prison. It is not difficult to see that the penalty imposed derived at least as much from Hayes' insistence on his constitutional rights as it did from his three prior felonies, a fact that the prosecutor knew when he offered the five-year sentence. Further, the Court had previously recognized that similar penalties were unconstitutional. In *North Carolina v. Pearce*,⁷ the Court held that on retrial following a successful appeal, a defendant's sentence could not constitutionally be increased absent new evidence.⁸ *Blackledge v. Perry*⁹ extended this principle to prohibit a prosecutor from reindicting a convicted misdemeanor on a felony charge after the defendant had invoked his or her statutory right to a trial de novo. In these cases the Court argued that the constitutional vice lay in the possibility that the sentencing judge or the prosecutor might vindictively enhance the defendant's risks in retaliation for invoking the right to appeal or to a trial de novo.

Retaliation might be wrong for at least two reasons. It might place a burden on the defendant's choice to exercise the statutory right to appeal. Such a judicial burden might impermissibly take away with one hand what the legislature had offered with the other. But the Court in *Bordenkircher* relied on earlier cases showing that the principle was not one of nondeterrence.¹⁰ Thus, retaliation must be wrong for some other reason. Presumably, although the Court did not say so, the fact that a vindictive judge or prose-

6. *But see* Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

7. 395 U.S. 711 (1969).

8. On what constitutes new evidence, see *Wasman v. United States*, 104 S. Ct. 3217 (1984).

9. 417 U.S. 21 (1974).

10. 434 U.S. at 363 (citing *Colten v. Kentucky*, 407 U.S. 104 (1972); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973)).

cutor simply has an unattractive state of mind would be insufficient to grant relief unless that state of mind had some unattractive consequences as well. The Court in *Bordenkircher* used "punishment" as a synonym for "retaliation."¹¹ Punishment has a deterrence dimension, but considering that alone would reduce this rationale to the one which the Court rejected. Thus, the Court appears to have meant that retaliating for the exercise of statutory rights is impermissible because it serves *no* appropriate penological goals.

With that established, the Court turned to the problem in *Bordenkircher*. The test it applied was whether reindictment in these circumstances served some appropriate penological goals. Here the Court was quite firm. Hayes was reindicted as a result of the choices he made in the course of the bilateral "give-and-take" of plea bargaining. Prior cases had established the constitutionality of plea bargaining, a process in which a defendant relinquishes a variety of constitutional rights in exchange for a reduced charge or sentence.¹² But if plea bargaining is to succeed, the prosecutor must have some negotiating room. In Hayes' case the prosecutor's hand included the habitual criminal statute. Hayes could have been charged initially under that statute, with the prosecutor offering a reduction in exchange. The prosecutor's actual methods were functionally indistinguishable.¹³

What might a critic of doctrinal formalism say about *Bordenkircher*? Plainly the goal is to establish that the available doctrines could be deployed in favor of or against Hayes' claim. The easiest way to do that is to note that the doctrines operate on two levels, which we call the individual and the systemic levels. On the individual level, one hears claims that the result in a particular case is appropriate or unfair; on the systemic level one hears claims that the result is an integral part, or an unnecessary distortion, of some larger scheme. Doctrinal formalism fails both because it cannot tell us when to operate on which level and because, on both levels, either result is fairly defensible.

We begin with the individual level, where Hayes' claims seem most appealing. His argument is that the Constitution promises him the right to a trial, and yet when he sought to make good on that promise he ended up much worse than he would have, had he understood that the promise was hollow. Thus, his situation is just like that of the defendants in *Pearce* and *Blackledge*. Yet the Court could respond that the prosecutor did no more than expose Hayes to a liability for which he was "properly chargeable"¹⁴ and for which there was sufficient evidence. So long as Hayes knew of the

11. *Id.*

12. *See, e.g.,* *Brady v. United States*, 397 U.S. 742, 751-53 (1970).

13. 434 U.S. at 360-61.

14. *Id.* at 364.

risks he ran¹⁵ and was convicted and sentenced “[w]ithin the limits set by the legislature’s constitutionally valid definition of chargeable offenses”¹⁶ and sentences,¹⁷ Hayes’ claim of unfairness is unpersuasive.

In addition, Hayes’ complaint is fundamentally identical to a challenge to all plea bargaining. The only difference is that when a plea bargain is accepted the defendant simultaneously relinquishes his or her constitutional rights and gains a benefit, whereas Hayes rejected the plea bargain offer and thereafter suffered a burden. If the former is acceptable, as the plea bargaining cases hold, surely the latter, its mirror image, must be acceptable as well.

Although the Court used language consistent with an individual level response to Hayes, most of its discussion operated on the systemic level. Bargaining necessarily involves one party offering something attractive to the other, coupled with threats that if the offers are rejected, the other party’s position will worsen. If a system of bargaining is to survive, the prosecutor must be allowed to carry through on the threats made in the bargaining process.¹⁸ According to the Court, this is precisely what distinguished *Bordenkircher* from *Pearce*. The latter involved “the State’s unilateral imposition of a penalty”;¹⁹ the former involved the bilateral give-and-take of a bargaining system. On this view, the result in *Bordenkircher* follows from the prior approval of plea bargaining.

Yet Hayes has a number of systemic-level responses. First, the Court’s effort to distinguish *Pearce* is unavailing if we take systemic concerns seriously. The system surely must include the applicable legal rules. But then the state’s action in *Pearce* is no longer unilateral in any meaningful sense: the defendant chooses to appeal knowing that if the appeal succeeds and there is a new conviction after retrial, the sentence may be enhanced. The rule of law that requires this communicates the threat to the defendant no

15. *Id.* at 360.

16. *Id.* at 364.

17. Pizzi, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court’s Opinion in Bordenkircher v. Hayes*, 6 HASTINGS CONST. L.Q. 269, 293-96 (1978), suggests that the mandatory life sentence in *Bordenkircher* should have played a greater role than this in the Court’s analysis. Yet if the sentence is not itself unconstitutional, compare *Rummel v. Estelle*, 445 U.S. 263 (1980), with *Solem v. Helm*, 463 U.S. 277 (1983), it is unclear why it should affect the analysis of the procedures that lead up to its imposition. Pizzi properly notes that the sentencing scheme in *Bordenkircher* gave the prosecutor no more control over disposition than do other mandatory or determinate sentencing schemes. See also Note, *Criminal Law—Plea Bargaining—Due Process Not Violated when Prosecutor Carries Out Threat To Reindict Accused on More Serious Charges After Plea Bargain on Original Charge Is Refused*, *Bordenkircher v. Hayes*, 10 ST. MARY’S L.J. 329, 338 (1978).

18. See Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 479 (1980).

19. *Bordenkircher*, 434 U.S. at 362 (emphasis added).

less effectively than the prosecutor in *Bordenkircher* did when he communicated his threat. That is, the existing rules of law, not just the face-to-face exchange, constitute the state's mode of bargaining behavior.

Second, one can characterize the bargaining system as bilateral only by adopting what from Hayes' point of view is an arbitrary time frame. In labor-management relations, a party who makes a "take it or leave it" offer risks a strike or a lockout. But the defendant who rejects such an offer from a prosecutor cannot threaten to do as much damage to the prosecutor as management can do to a union. The risk the defendant runs—an almost certain conviction—is much greater than the risk the prosecutor runs—increased costs. Thus, at the moment the prosecutor decides to make a final offer, the bilateral exchange becomes unilateral: the defendant can do almost nothing to change the prosecutor's position.²⁰

Third, the Court in *Bordenkircher* believed that its result was necessary to make plea bargaining work. That concern is not obviously legitimate. Had Hayes prevailed, prosecutors could have preserved plea bargaining by adjusting their charging practices. For example, Hayes could have been charged initially as a habitual criminal, and the charge could have been bargained down. More generally, prosecutors could select charges that they believe to be penologically appropriate, then make an upward adjustment in order to be able to bargain.²¹ "Overcharging" in this manner has several advantages. It makes the prosecutor's charging practices "visible to the general public" rather than concealing them in "unrecorded verbal warnings,"²² and it lets the defendant know from the outset, rather than at some later point in the bargaining, the consequences of a bargaining breakdown.²³

The result in *Bordenkircher* is therefore less consistent with the precedents than it might have first appeared to be. But it may be somewhat easier to

20. See Note, *Prosecutorial Vindictiveness and Plea Bargaining: What are the Limits?*—*Bordenkircher v. Hayes*, 27 DE PAUL L. REV. 1241, 1254 (1978). This reflects the actual power positions of the parties. Given the assumption that almost all defendants are factually guilty, the entire bargaining process exists at the prosecutor's discretion. In a sense, then, plea bargaining cannot be bilateral.

21. Justice Blackmun's dissent called this "cynical," *Bordenkircher*, 434 U.S. at 368 n.2 (Blackmun, J., dissenting), but it is hard to see why it is anything other than a rational calculation given a set of legal rules. Compare Note, *supra* note 20, at 1250 (initial charge represents judgment on appropriate penological goals).

22. *Bordenkircher*, 434 U.S. at 369.

23. Note, *Due Process—Plea Bargaining—A State Prosecutor Does Not Violate the Due Process Clause by Carrying Out a Threat Made During Plea Negotiations To Have the Accused Reindicted on More Serious Charges If He Does Not Plead Guilty to the Offense Which Was Originally Charged*: *Bordenkircher v. Hayes*, 6 AM. J. CRIM. L. 201, 209 (1978); Note, *Bordenkircher v. Hayes: Ignoring Prosecutorial Abuses in Plea Bargaining*, 66 CALIF. L. REV. 875, 881 (1978).

reconcile with the plea bargaining cases than would a rule that induced "overcharging." The Court in *Bordenkircher* thought that the "overcharging" alternative might "invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows."²⁴ Presumably that would occur because the "overcharging" alternative would skew a prosecutor's incentives. In order to have something to bargain with, while still promoting public safety, the prosecutor must select an initial charge higher than is penologically appropriate.²⁵ Accepting a plea to a reduced charge then exposes the prosecutor to public criticism. The "overcharging" alternative, rather than making plea practices visible, actually will make them more clandestine.²⁶

There are equally valid doctrinal arguments on both the individual and the systemic levels, though perhaps the Court has a slightly stronger position on the systemic level and Hayes the better stance on the individual level. Nothing within the doctrinal framework tells us which level to choose. Thus, resolving *Bordenkircher* requires looking beyond the common doctrine articulated in prior cases.

B. Moral Philosophy

We next address moral philosophy as a source for resolving doctrinal problems. The basic idea here is that the analyst chooses some brand of contemporary moral philosophy—for example, a theory of free will, the value of the adversary system, retributivism—and describes how the problem of *Bordenkircher* should be solved within that brand of philosophy. By selecting a version of moral philosophy on which the analyst expects general agreement, he or she hopes to develop an analysis that provides results that must be accepted, despite their apparently controversial nature.²⁷ The critique of this version of formalism shows that the purported deduction does not really work. The same set of moral principles can lead to opposite results in *Bordenkircher*.

24. *Bordenkircher*, 434 U.S. at 364-65 & n.2.

25. Prosecutors might still engage in "evidence" bargaining; that is, they might expose their evidentiary hands and say, "This is what we think we can get on this evidence." Later stages in the process would be propelled by different estimates of the outcome and of the prosecutor's honesty. We doubt that this is what the Court had in mind when it defended the process of plea bargaining.

26. In addition, a rule that allowed prosecutors only to bargain charges down might make prosecutors too cautious in offering concessions, out of concern that a concession, once offered, could not be retracted without violating the prohibition on bargaining upward.

27. Cf. J. FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970) (discussing various rationales for punishment).

1. *Voluntariness and Theories of Free Will*

At the center of the majority's decision in *Bordenkircher* is the assertion that plea bargaining is constitutional "so long as the accused is free to accept or reject the prosecution's offer."²⁸ The prosecution is entitled to structure the defendant's choices, so long as the defendant is left with some choice.²⁹

In its abstract form, a theory of free will that centers on the existence of a choice would find many adherents.³⁰ Hayes was fully informed of the consequences of his choice; he was "free" to choose another alternative. As numerous commentators have demonstrated, however, this kind of free-will-in-the-abstract is far from the freedom the defendant actually feels when faced with a plea bargaining decision.³¹ Studies confirm that "[t]he undeniable fact is that defendants convicted after trial receive longer sentences than those who plead guilty."³² Other forms of plea bargains, such as charge reduction or dismissal, only serve to strengthen the institutional bias toward plea bargaining.³³ That is, the choice occurs within a structure that makes the decision to plead guilty more attractive than the merits of the trade-off between risk of conviction and length of sentence actually warrants. Defendants, especially recidivists like Hayes, as well as experienced defense attorneys, know this. Thus, the prosecutor may offer the defendant a choice that appears to be real when presented without regard to its social surroundings, while in practice the defendant knows that his choice is limited by the systemic bias towards inducing guilty pleas.³⁴

In a system that allows the prosecutor to limit the defendant's choices in these ways—a system in which the prosecutor can engage in *Bordenkircher*-type bargaining—the defendant's choice is considered free. This is so because of the institutional norm against which one's freedom of choice is evaluated. However, if the institutional norm were different, if the system did not allow the prosecutor to threaten prosecution under a habitual criminal

28. 434 U.S. at 363.

29. *Id.* at 364.

30. The *Bordenkircher* Court rather explicitly accepts this theory when it states that the prosecutor in this case "no more than openly presented the defendant with the unpleasant alternatives" available to him. *Id.* at 365. For a popular version of free will based on choice, see Stace, *The Problem of Free Will*, REASON AND RESPONSIBILITY 347-51 (J. Feinberg, ed. 1981) ("Acts freely done are those whose immediate causes are psychological states in the agent. Acts not freely done are those whose immediate causes are states of affairs external to the agents," *id.* at 350).

31. See, e.g., M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 156-57 (1978).

32. J. BOND, PLEA BARGAINING AND GUILTY PLEAS 2-19 (1982).

33. *Id.* at 1-16.

34. See A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 29 (1976).

statute as a means of inducing a guilty plea, a defendant's choice could also be considered free when so limited. Prosecutors could adjust their practices so that the range of resolutions available to defendants would not be less attractive than the range available under alternative institutional norms. What is operative, then, is a theory of criminal procedure, of what the institutional norm ought to be, and not a theory of free will.

2. *Voluntariness and the Adversary System*

Professor Alschuler has persuasively argued that the Court did not have free will in mind at all when talking about voluntariness.³⁵ Instead, "the critical issue in each case was the effectiveness of the legal representation that the defendant had received."³⁶ So long as the defendant had been represented by competent counsel throughout the proceedings against him or her, the plea would be treated as "voluntary."³⁷

According to this view, the version of moral philosophy that determines the result in a particular case is not a theory of free will, but is instead a theory about the effectiveness of an adversary system in securing rights. The moral judgment being made is that so long as the adversary system operates effectively, decisions made within that system are acceptable and can be said, somewhat misleadingly, to be voluntary.³⁸

Again, though, the operative notions are really those relating to criminal procedure, and not those relating to the adversary ideal. The issue for criminal procedure in this context is whether plea bargaining occurs within the adversary system at all, or whether it represents a departure from that system. If the norm is an adversary system with all of the vigor one associates with a trial-type disposition, one will find that most plea bargaining falls short of that norm.³⁹ On the other hand, if the norm is one that accepts relaxation of the adversary nature of relations between prosecutor and defense counsel for the purpose of arriving at a bargain, plea bargaining will fall within the ambit of this norm. Thus, one's conception of the degree of adversariness that is appropriate in the context of plea bargaining—a judgment made in the context of discussions of criminal procedure, not of the adversary ideal—is what matters.

35. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

36. *Id.* at 1.

37. *Id.* at 26. The reasoning here demonstrates the tendency of courts to collapse the standard of intelligence into the standard of voluntariness. J. BOND, *supra* note 32, at 3-7.

38. This was made explicit in *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

39. Sarat, *Understanding Trial Courts: A Critique of Social Science Approaches*, 61 JUDICATURE 318, 321 (1978); P. UTZ, *SETTING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* 131 (1978).

3. *Retributivism*

A third version of moral philosophy which is popular today is retributivism. In its strong form, retributivism holds that "all wrongdoers [must] be made to suffer some penalty . . . as a requital for their wrongdoing."⁴⁰ Here, *Bordenkircher* presents a particular version of the general problem posed by all recidivist statutes. Imprisoning someone for a minor offense after he or she has committed and has been punished for a number of crimes in the past fails to ration punishment according to the offense at issue. Indeed, the offender is being punished again, and excessively, given that appropriate retributivist punishment has already been imposed. In these terms, according to a retributivist theory, all recidivist statutes should be prohibited. Further, a retributivist ought to be troubled by a system that trades the costs of assessing punishment for a reduction in an otherwise appropriately retributivist sanction.

Again, however, one's judgments about the criminal justice system come into play, for one might note the imperfection of the system of imposing punishment.⁴¹ The prosecutor in *Bordenkircher* cannot be sure that appropriate retributivist punishment has been imposed in the past.⁴² Therefore, in an imperfect world, it makes sense to give the prosecutor discretion to seek enhanced punishment when appropriate. This is a second-best solution. The retributivist would prefer that all punishments provide for appropriate retribution, but he or she knows they will not. In light of this imperfection—this judgment about the criminal justice system and not about the values of retributivism—*Bordenkircher* makes sense.

C. *Law and Economics*

The law and economics approach is probably the dominant innovation in formalism in recent years. Richard Posner has noted that "there has been very little economic analysis of criminal procedure," but adds that a recent article by Frank Easterbrook "suggests that there are many promising applications of economics to criminal procedure."⁴³ Easterbrook treats plea bargaining as a market system in which self-interested defendants and

40. J. FEINBERG, *supra* note 27, at 217.

41. Indeed, plea bargaining, since it reaches results in which the defendant is charged with and punished for some crime less onerous than the state believes he or she actually committed, contributes to this imperfection.

42. Hayes had served five years in a reformatory for sexual assault and received a sentence of five years' probation for robbery. 434 U.S. at 359 n.3.

43. Posner, *Comment on "On the Economic Theory of Crime,"* NOMOS XXVII: CRIMINAL JUSTICE 310, 312 (J. Pennock & J. Chapman eds. 1985).

prosecutors reach agreements.⁴⁴ If plea bargaining is a well-functioning market, it reaches socially optimal results by the mechanism of self-interest; external regulations such as a prohibition on certain negotiating tactics are undesirable because they impair the functioning of the market.

Easterbrook's central argument about plea bargaining is that it consists of bargains entered into after negotiation between the parties. Each has a set of preferences. For example, the defendant is likely to prefer a shorter sentence to a longer one; the prosecutor would like some information regarding the crime, and the like. Bargaining results in a deal, with the sentence as the price the defendant is willing to pay. Easterbrook shows that defendants who place a higher value on the next few years than they do on years further in the future will readily negotiate for and accept shorter sentences than they would receive after trial.⁴⁵

Easterbrook understands that markets can be flawed, and discusses a number of possible failures in the plea market, dismissing them as unsubstantiated. Yet he does not address two central problems with the plea market, both of which make plausible the idea that a regulatory prohibition on certain negotiating tactics will improve the functioning of the market.

The first problem is that the plea market has the characteristics of a classic "market for lemons."⁴⁶ In such a market, low quality goods are sold at prices that only high quality merchandise should command. Markets for lemons arise when goods vary in quality, when buyers are uncertain about the quality of a particular item they are about to purchase, and when sellers know more than buyers do about the quality of particular items. In the market for pleas, defendants and prosecutors have asymmetrical knowledge. We assume that most defendants in fact committed the crimes with which they are charged.⁴⁷ We also assume, though more questionably, that defendants tell their attorneys everything they know.⁴⁸ Thus, defendants know the

44. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

45. *Id.* at 312-13.

46. See G. AKERLOF, AN ECONOMIC THEORIST'S BOOK OF TALES 7-22 (1984).

47. We note that the existence of some innocent defendants is likely to skew the analysis further against Easterbrook, by creating a population as to which the asymmetries in knowledge are even more severe. In addition, innocent defendants are more likely to go to trial, and those who are convicted will receive longer sentences than innocent defendants who plead guilty and (perhaps) than guilty defendants who plead guilty. We take it to be obvious that this is troubling regardless of the view of plea bargaining.

48. Easterbrook treats this assumption under the heading of "agency costs," Easterbrook, *supra* note 44, at 309, and calls the problems of agency costs "trivial." *Id.* Again, he fails to identify the interesting problems, such as a regime of ethical rules and a set of psychological dispositions that give defendants incentives to withhold information from their attorneys. For a discussion, see K. MANN, DEFENDING WHITE COLLAR CRIME 40-51, 243-49 (1985).

Our concern here is that the actors on both sides of the bargain may not be equally rational.

facts about the crime. But they do not know what knowledge the prosecutor possesses, such as the number of eyewitnesses the prosecutor actually has and the strength of their identifications. Prosecutors who claim to have three eyewitnesses, all of whom have made firm identifications, may be seen by defendants as used-car salespeople describing the former owner's perfect record with the car now being sold. The result is that pleas are deals, but suboptimal ones.⁴⁹

Easterbrook outlines one possible response: if the goods are offered by a number of sellers, buyers will shop to find a seller who fully discloses what he or she knows about the goods. Similarly, then, one could argue that if prosecutors have, and advertise, an "open files" policy, potential defendants will commit their crimes in that jurisdiction.⁵⁰ But this ignores the dynamics of a market for lemons. First, defendants simply cannot know whether the prosecutor's open files are the only files.⁵¹ They will therefore treat a high-quality product as if it were low quality, and fail to accept offers that would yield optimal outcomes. Second, the "open files" prosecutor will notice an influx of criminals from other jurisdictions and will rationally respond by altering the policy. There will be a typical "race to the bottom" as prosecutors try to enhance the asymmetry in knowledge by concealing more information than do prosecutors elsewhere. The result once again is a suboptimal system.⁵²

The permanent bureaucracy of the prosecutor's office seems to us more likely to be concerned with long-term rationality than are defendants, even defendants who are repeat offenders represented by lawyers from the public defender bureaucracy. We suppose that this concern would be diminished in cases involving organized crime and high-level corporate crime. But we confine our concern to this note in order to deal with Easterbrook's analysis on its own terms.

49. Our unsystematic intuition is that the suboptimality lies in defendants' overestimates of the quality of the prosecutor's evidence, leading to the defendants' willingness to pay higher prices—accept higher sentences—than they would in a well-functioning market. But nothing turns on this intuition; suboptimally low sentences are just as objectionable.

50. Easterbrook, *supra* note 44, at 291.

51. In *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir. 1985), the court discussed a practice in which the Chicago police maintained "street files" that were not disclosed to defendants' attorneys who requested material pursuant to the rule of *Brady v. Maryland*, 373 U.S. 83 (1963).

52. The usual law and economics response to "race to the bottom" arguments is that buyers will switch from one good to an equally acceptable substitute if all sellers offer goods of unacceptable quality. We are inclined to think that this response is unavailable in the present context. Buyers—criminals—who have chosen unlawful activity are unlikely to have equally acceptable alternatives available to them, given their preferences. If their preferences count, the outcome is suboptimal. If they do not count, because they are unlawful, the market analysis collapses entirely. Additionally, if their preferences change as a result of changes in prosecutors' policies, preferences become endogenous variables, functions of, among other things, the legal rules of the system. Once that happens, it is senseless to defend any particular regime of legal rules as socially optimal. Each regime maximizes the achievement of the values held

The second general problem with the plea market arises on the prosecutor's side. Easterbrook's analysis assumes that the prosecutor is a perfect agent for the preferences of society's law-abiding citizens. But in a different part of his article, he recognizes the problem of agency costs, that is, costs that arise because the prosecutor's incentives are not identical to those of society as a whole. Unfortunately, he discusses only half the problem, and ignores the half relevant to the plea market. Easterbrook argues that prosecutors may not "seek to maximize the deterrence available from [their] budget[s]." ⁵³ They may prosecute weak cases against "politically unpopular figures (Communists, presidents of large corporations, Reverend Moon)." ⁵⁴

We defer for a moment our discussion of Easterbrook's analysis of this point. Our present objective is to note that Easterbrook does not consider whether prosecutors may seek to achieve an undesirably *high* level of deterrence by demanding pleas at high sentences and then holding firm. Few prosecutors or judges lose their jobs because they are too severe in their plea and sentencing practices. Yet high sentences have effects elsewhere in the criminal justice system, especially in the prisons where they contribute to overcrowding. Because prosecutors do not bear the costs of those down-the-line effects, they may demand and accept suboptimal pleas. ⁵⁵

Easterbrook responds to market failure objections like these by arguing that there is no reason to think that a regulatory alternative is better. ⁵⁶ But the only regulatory alternative he considers is a case-by-case review of a prosecutor's decision by "some other public official," an official who, Easterbrook properly observes, is unlikely to have "better" incentives. Even if the reviewing official did have stronger incentives, he or she could simplify matters by restructuring the prosecutor's office to incorporate those incentives rather than creating a new office. ⁵⁷ Easterbrook mentions the possibility of regulation by a "set of internal controls," ⁵⁸ but he does not analyze the point independently, nor does he analyze the possibility of external control. Yet

by those whose values are created by that regime. This is hardly a ground upon which one could rest an evaluation of alternative sets of legal rules.

53. Easterbrook, *supra* note 44, at 300.

54. *Id.*

55. The late John Manson, Corrections Commissioner of Connecticut, suggested that prosecutors could be forced to internalize these costs by a system that allocated prison cells to prosecutors, so that a prosecutor would have to worry about using up his or her quota too early in the year. See Blumstein, Comment, 12 N.Y.U. REV. L. & SOC. CHANGE 115, 119 (1983-84). Cf. Knapp, Comment, 12 N.Y.U. REV. L. & SOC. CHANGE 121 (1983-84) (describing Minnesota's Sentencing Guidelines Commission, which is required to take prison capacity into account in formulating sentencing guidelines).

56. Easterbrook, *supra* note 44, at 301, 310.

57. *Id.* at 301.

58. *Id.* at 300.

regulation clearly can reduce the "lemons" problem and the problem of excessive deterrence. For example, one regulation that could be added, along with changes such as liberal discovery rules in criminal cases, might be a rule prohibiting the negotiating tactic of upping the ante.

Economic analysis therefore does not unequivocally show that the Court's decision in *Bordenkircher* to leave the prosecutor unregulated is socially optimal. Yet the problems of information and agency costs that we have identified are so complex that we are convinced, even without having done the formal modeling, that alternative sets of plausible assumptions about those costs, assumptions that are unverifiable by empirical investigation, would produce conclusions supporting both sides of the issue in *Bordenkircher*.⁵⁹

D. *Sociology of Professions*

The last version of legal formalism that we address is the contention that the system of rules of criminal procedure is designed to meet the concerns of the participants in a system that the participants conceive of as a system of jobs. The idea is that we can look at the system to discover what rules would make life easiest for the repeat players in the system and then explain the actual rules as consistent with what we would expect.⁶⁰ "Organization theory" tells us that the participants in the criminal justice system—prosecutors, defense attorneys, judges, and other courtroom personnel—form an "organized network of relationships."⁶¹ "[I]nteractions among these courtroom members" produce the outcomes of the criminal justice system.⁶² Attendance at plea bargaining sessions is restricted to the players who have learned to work together. Both the defendant and the victim are excluded,⁶³ thereby making the jobs of the participants easier. The ultimate disposition of a particular case reflects "patterns of cooperation and conflict between different organizations."⁶⁴ The interests of the participants in the system are the dominant forces in structuring that system.

Viewed in this context, plea bargaining can be explained as a collaboration between prosecutors and defense attorneys to process with some facility the masses of cases that other participants in the system of criminal justice hand over to them.⁶⁵ Plea bargaining offers more flexibility to the participants

59. See Peller, Book Review, 98 HARV. L. REV. 863, 871-72 (1985).

60. Cf. P. UTZ, *supra* note 39, at 18, 28.

61. J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 10 (1977).

62. *Id.* at 294.

63. Yngvesson & Mather, *Courts, Moots, and the Disputing Process*, in EMPIRICAL THEORIES ABOUT COURTS 79 (K. Boyum & L. Mather eds. 1983).

64. *Id.*

65. M. HEUMANN, *supra* note 31, at 156; S. BUCKLE & L. BUCKLE, BARGAINING FOR

because it allows them to “structure [their] time, allocate the resources available, and evaluate professional performance.”⁶⁶ *Bordenkircher* facilitates the goals of the participants in the system by inducing more pleas. It is a result that we might expect this system to produce.

Yet much of the power of this analysis comes from restrictions placed on its scope. If we treat the “work group” as extending beyond the bounds of the courtroom to include what this analysis calls external actors, different results might be expected. Similarly, if we reduce the relative weight of the desire to minimize uncertainty and increase the relative weight of desires to reach particular substantive outcomes, we might find that it would maximize a work group’s values to discourage the *Bordenkircher* negotiating tactic.⁶⁷

For example, if one began with the notion that participants in the system—prosecutors, defense attorneys, judges, prison officials—desired that defendants leave the system no more dissatisfied with the outcome than absolutely necessary, *Bordenkircher* might be seen as wrongly decided. Indeed, these participants might think that their jobs would be easier if defendants left the system with the sense that they had been treated fairly. This notion is especially true if we define the “work group” to include corrections officials who must deal with defendants once they reach the prisons, jails, or probation offices. Thus, the competing interests of participants in the system could lead to different and conflicting results in *Bordenkircher*.

In addition, organizational theory fails to take into account the broader social factors which are at play.⁶⁸ For example, a district attorney or judge who is elected by the public, or even appointed by an elected official, must take more into account than the internal pressures to cooperate with the other members of the court group. He or she must also consider the adverse public sentiment regarding reduced and dismissed charges, as well as other forms of plea bargaining. In this context, *Bordenkircher* can be seen as a way of showing the public that prosecutors can be tough with defendants, even in the context of plea bargaining. If such a decision helps the prosecutor to do his or her political job better, *Bordenkircher* can be seen as an expected result.

However, the political arena includes many devout opponents of plea bargaining, not because they believe that it is not tough enough on defendants,

JUSTICE: CASE DISPOSITION AND REFORM IN THE CRIMINAL COURTS 144 (1977); Yngveson & Mather, *supra* note 63, at 79.

66. S. BUCKLE & L. BUCKLE, *supra* note 65, at 144.

67. See Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1041-44 (1984).

68. Jacob, *Courts as Organizations*, in EMPIRICAL THEORIES ABOUT COURTS, *supra* note 63, at 215; Schulhofer, *supra* note 67, at 1096-1100.

but because they believe that it increases the likelihood of convicting the legally innocent⁶⁹ and that it produces psychological coercion⁷⁰ aimed at encouraging defendants to trade away their constitutional rights.⁷¹ On grounds like these, *Bordenkircher* is clearly wrong in giving prosecutors additional leverage to secure guilty pleas. As such, it adds fuel to the opponents' fire, thereby making the political jobs of prosecutors and judges more difficult.

E. Conclusion

Before turning to the second branch of legal realism's critical heritage, we wish to emphasize two points. First, some versions of legal formalism, particularly the more empirically based, have contributed important insights toward our understanding of how the criminal justice system works. The reason for the critique is that too frequently those insights are presented to demonstrate that the *rules* of criminal procedure are understandable and in some nontrivial sense determined by a generalized value or system of values. The aim of the critique is to show that, even when we take those values to be important, the results that the formalists offer as in some sense already determined are, in fact, not determined at all. Second, the formalisms' difficulties have a common structure. They produce their results by insisting that we concentrate on the framework they present. If we shift the frame—from the individual to the systemic level, from abstract moral philosophy to specific institutions, and so on—we can produce alternative results. Yet neither the formalisms nor any metatheory specifies what frame we should use.

Thus, on any set of formalist premises—four have been examined, but the critique claims that if someone came up with another one, the proposition would follow as well—*Bordenkircher* was decided rightly, but it was also decided wrongly.

II. CRITIQUE OF LAW-IN-ACTION THEORIES

The second branch of legal realism is usually called fact-skepticism, which, in its initial formulations, was concerned with the difference between the way things looked to a court and the way things really were.⁷² More generally, fact-skepticism directs our attention to what can be called the law-

69. Rhodes, *Plea-Bargaining, Crime Control, and Due Process: A Quantitative Analysis*, in PLEA-BARGAINING 133 (W. McDonald & J. Cramer eds. 1980).

70. A. ROSETT & D. CRESSEY, *supra* note 34, at 29.

71. Alschuler, *supra* note 35, at 58-65.

72. See, e.g., J. FRANK, COURTS ON TRIAL, MYTH AND REALITY IN AMERICAN JUSTICE (1949).

in-action.⁷³ The second part of this article will present one version of what a critical legal studies descendant of fact-skepticism might do in the area of criminal procedure.⁷⁴

A. Controlling Discretion

Scholars of criminal procedure commonly say that the general problem of criminal procedure is controlling the discretion of what might be called the line officers, the people at the bottom of the official hierarchy of jobs that constitutes the criminal justice system.⁷⁵ The standard view holds that we have rules about searches to ensure that the discretion lodged in police officers will not be abused, rules about the provision of counsel to ensure that the discretion lodged in low-level judges will not be abused, and so on.⁷⁶ In this standard view, the reason for rules is to protect the citizenry from abuses of discretion.⁷⁷ The difficulty with this approach is that discretion is both inevitable and often a good thing.⁷⁸ Because the world is so complex, no set of rules can tell prosecutors what the appropriate plea arrangement in every drug related case should be. When district attorneys try to control the discretion of assistant prosecutors, they often produce rigidities that only serve to change the nature of plea bargaining from an explicit practice to an implicit one.⁷⁹ Responding to community pressures, some prosecutors have

73. Indeed, a perspective which focuses on process and relations may be the alternative to all versions of formalism that will alone escape the critique of formalism. Note, *Radical Pluralism: A Proposed Theoretical Framework for the Conference on Critical Legal Studies*, 72 GEO. L.J. 1143 (1984).

74. We reiterate that the critical approach here is less well-developed than the critical approach to formalism. This critical perspective is offered as one possible approach, but is not meant to represent *the* approach of critical legal studies.

75. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 550 (1978).

76. There are many examples of such rules, some statutory, some developed in case law, and some which are internal regulations promulgated by police and judicial organizations themselves. For statutory examples of rules limiting police discretion in searches, see FED. R. CRIM. P. 41 (procedures for issuance, execution, and return of search warrants); 18 U.S.C. § 3109 (1982) (limitations on when forcible entry to execute search warrant permitted). For one of many cases outlining the duty of the trial court to appoint counsel for indigent defendants, see *United States v. Martin-Trigona*, 684 F.2d 485, 491-92 (7th Cir. 1982) (duty of court to determine whether defendant is indigent and, if so, to appoint counsel). See generally *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982-1983*, 72 GEO. L.J. 249, 272-78, 525-29 (1983).

77. A. BENT & R. ROSSUM, *POLICE, CRIMINAL JUSTICE AND THE COMMUNITY* 72 (1976) (police discretion must "preserve a delicate balance between community protection and individual rights").

78. M. LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 15 (1980).

79. M. HEUMANN, *supra* note 31, at 157-58.

adopted a policy of refusing any charge reduction in drug-related cases.⁸⁰ This policy limits the discretion of the prosecutor's assistants to further goals frequently thought to be desirable. Yet now we face a new problem: the institutional pressures to plea bargain still exist. Should the assistant prosecutor allow charges to be dismissed instead of reduced? Should he or she go to trial knowing that the judge will dismiss charges or impose a sentence with the prosecutor's new policy in mind? The general point here is that by controlling discretion we simultaneously accomplish some goals that may protect the citizenry from abuse, but we also foreclose the accomplishment of others, such as the efficient handling of cases, flexibility and individual case disposition, which would protect citizens from abuse as well.

B. *Reconceptualizing the Problem of Controlling Discretion*

The problem of controlling discretion can be reconceptualized in a critical way—critical because we can rethink the nature of the system of criminal procedure as a whole.⁸¹ Instead of seeing efforts to control discretion as efforts to protect the citizenry from abuse, we can view them as efforts by bureaucratic superiors, such as police chiefs, head prosecutors, and appellate judges, to assert control over the activities of their subordinates.⁸² Sometimes this control will have the incidental effect of protecting the citizenry from abuse, but that is not the primary purpose of the effort. Viewed in this manner, criminal procedure is an exercise in the assertion of power—not the power of enforcing officials against the citizenry, but the power of bureaucratic superiors against their subordinates.

There are a number of advantages to this perspective. First, it brings into view many activities of enforcement officials that we usually do not consider part of criminal procedure.⁸³ On the most elementary level, it allows us to talk about different modes of asserting control over subordinates. Rules developed by appellate courts are not the only way to assert control, and may

80. Church, *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC. REV. 377, 378 (1976).

81. S. SCHEINGOLD, *THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY* (1984), is written from a perspective similar to that urged here, and provides a comprehensive review of the relevant law-in-action research. Scheingold also concludes by advocating a return to neighborhood methods of law enforcement, but his comments are primarily concerned with the development of neighborhood institutions to replace criminal courts, and in general he accepts the necessity of centralized and relatively bureaucratized police forces. See generally *id.* at 203-20.

82. Cf. M. CROZIER & E. FRIEDBERG, *ACTORS AND SYSTEMS: THE POLITICS OF COLLECTIVE ACTION* 32 (1977) (the "winner" is the one who makes the other's action completely predictable).

83. Jacob, *Courts as Organizations*, in *EMPIRICAL THEORIES ABOUT COURTS*, *supra* note 63, at 192.

not be the best way. Thus, we can talk about the development of rules by the enforcement agencies themselves, such as police guidelines on the conduct of line-ups or head prosecutors' guidelines on charging decisions. These internal rules are certain to be more detailed than the essentially nonexistent constraints that the courts will enforce.⁸⁴

Another example may be worth mentioning. Appellate law has almost nothing to say about the unique position of public defenders in relation to plea negotiation, even though a large percentage of criminal cases are handled by public defenders.⁸⁵ One would not be surprised to find that public defenders have internal office policies on the conduct of plea negotiations, or norms communicated through formal training or informal conversations.⁸⁶ These policies belie the theme of the superior trying to guard against adverse public reaction to the plea process in general. Once these aspects of the activities of the plea process are brought into view, appellate law can be seen as a similar effort to control the behavior of subordinates. Cases that may be an example are those in which effective assistance of counsel is the operative standard for evaluation of voluntariness.⁸⁷

Another part of enforcement activity that this perspective brings into view is the presence and influence of unions, and of the organized bar. One of the constraints that superiors face is the organized political power of their subordinates.⁸⁸ Typically, the subordinates think of themselves as the best judges

84. See Madison Wisconsin Police Department, *Manual of Policy, Regulations and Procedures* §§ 4-605-605.8, in INTRODUCTION TO CRIMINAL PROCEDURE 2-212-13 (W. Dickey, F. Remington, & E. Cappella eds. 1980) (available in University of Wisconsin Law School Library) (police guidelines for conducting line-ups); *United States Department of Justice Principles of Federal Prosecution*, 27 CRIM. L. RPTR. 3277 (1980) (prosecutorial guidelines on charging).

85. L. MATHER, PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE DISPOSITION 21 (1979). We have in mind norms of the sort, "Don't plead until the office's investigator has tried at least twice to find favorable witnesses, but it's all right to plead after that." Rigid policies applicable office-wide violate some ethical norms, but we doubt that such guidelines or rules of thumb would.

86. Though we have been unable to locate any formal (written) public defender office policies, there is reason to think that informal policies do indeed exist. For example, some public defender attorneys negotiate "package deals" relating to the caseload of the entire agency. D. JONES, CRIME WITHOUT PUNISHMENT 121 (1979). They also may practice "court busting" techniques, where "a coalition of lawyers . . . threaten to bring their entire aggregate caseloads to trial by jury unless their demands are met." *Id.* at 122. This kind of office-wide activity indicates the existence of at least informal policies dealing with the conduct of plea negotiations.

87. See Alschuler, *supra* note 35 (reviewing cases in which voluntariness is equated with effective assistance of counsel).

88. P. WESTON, SUPERVISION IN THE ADMINISTRATION OF JUSTICE: POLICE, CORRECTIONS, COURTS 8 (1978) (authority of superiors is diminished by civil service rules and police employee groups).

of how discretion should be exercised in the infinitely varying daily circumstances that they face.⁸⁹ One would suppose that line officers in police departments, prosecutors' offices, public defenders' offices, and courts routinely hold self-images that emphasize all the good things about discretion. Organized as a political force, line officers will inevitably resist efforts by their superiors to assert control over the exercise of their discretion, and they will have cogent arguments to explain why that resistance serves the goals of sound public policy.⁹⁰

This perspective could have a significant effect on many traditional doctrines. For example, if rules of criminal procedure are to be seen primarily as efforts by superiors to assert control over subordinates, then it might make sense to distinguish among enforcement agencies according to the degree to which such control is successfully asserted.⁹¹ The courts might enforce stringent rules of search and seizure against departments that provided no training or inadequate training to their officers, but might allow departments with extensive training programs to develop their own rules. The general idea is that judicially developed standards are substitutes for internally developed ones. Thus, where the goal of controlling discretion is reached by bureaucratic superiors pursuing their own goals of asserting power over subordinates, there is no special need for the internal rules to be supplemented by external ones.

One could play out this approach across the board, or at least as far as any other approach allows. For present purposes, however, it is more important to explain why this perspective may be characterized as critical. By emphasizing the role of rules of criminal procedure as devices by which bureaucratic superiors attempt to assert their power over subordinates, the approach allows us to rethink the nature of the system of criminal procedure as a whole. This approach assumes that enforcement agencies are bureau-

89. M. HEUMANN, *supra* note 31, at 85-86 (defense attorney explains how his experience allows cases to be disposed of efficiently), 104 (prosecutor talks about the value of his experience in determining appropriate sentences), 136 (judge states that his experience helps him know how to sentence defendants).

90. *Id.* at 85 (defense attorney explains how his case dispositions "reflect a pretty good effort and pretty good results," at least from the standpoint of people who are in a position to evaluate a disposition); Alschuler, *The Changing Plea Bargain Debate*, 69 CALIF. L. REV. 652, 683 n.83. (prosecutors believe that plea agreements serve the public interest).

91. We suggest that the Supreme Court has actually endorsed such an approach in the prison case *Hutto v. Finney*, 437 U.S. 678 (1978), where it approved limitations on the authority of officials in a retrograde prison that, it strongly suggested, would not have been imposed on officials in a more modern facility. See generally Tushnet, *The Constitution of the Bureaucratic State*, 86 W. VA. L. REV. 1077 (1984). Closer to the area of criminal procedure itself, this perspective would suggest that it might make sense to rethink *Ker v. California*, 374 U.S. 23 (1963), which adopted nationwide standards of criminal procedure in search cases.

cracies in which superiors need to control the discretion exercised by subordinates. It simply attempts to ascertain the implications of having bureaucratic enforcement agencies handle such important matters as law enforcement, plea bargaining, and so on. Because law enforcement agencies are, after all, just that type of bureaucracy, this is a perfectly natural way of talking about those agencies. However, since this approach brings the bureaucratic character of law enforcement to the surface, it allows us to question the necessity of using a bureaucracy to administer justice.

There are alternatives to bureaucracy. One alternative was suggested years ago by John Griffiths in his article on a "third" model of the criminal process,⁹² distinct from Herbert Packer's crime control and due process models.⁹³ Griffiths called his model the family model of criminal process. The basic idea, although not worked out in detail in the article, is that we ought to think of the relations between enforcement agents and the people with whom they interact in the same way we think of the relations between parents and children.⁹⁴ The family model assumes an ultimate reconcilability of interests,⁹⁵ using punishment to express disapproval of a particular action,⁹⁶ without severing relations with the community by expressing disapproval of the actor.⁹⁷

Although developing this concept in detail is likely to be tedious, Griffiths' model suggests the feasibility of a nonrule-based approach to criminal procedure, or at least a less rule-based approach. Indeed, when we tell our children that they cannot do something because we have a rule against it, a rule we may have just invented, surely we know that in some circumstances we have no rational justification for the prohibition. Thus, the regulation of families reveals that, first, rules are usually a second-best method of working out problems, and, second, rules of any sort may be simple assertions of power. This second and more general point, that rules may be no more than assertions of power, implies that the rules of criminal procedure may be designed, not so much to regulate the exercise of discretion in any particular way, but to demonstrate that superiors exist who have power over subordinates.⁹⁸

92. Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970). See also A. ROSETT & D. CRESSEY, *supra* note 34, at 1758 (describing a community-oriented court system in which group relationships form the basis for crime control).

93. PACKER, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

94. Griffiths, *supra* note 92, at 371-72.

95. *Id.* at 373.

96. *Id.* at 376.

97. *Id.* at 379.

98. See *supra* text accompanying notes 81-89.

Another cut at this problem can perhaps bring the concept down to earth, though it is important to emphasize that up to this point we have worked from the usual materials of criminal procedure. There is a phenomenon in today's society that is developing along the lines of Griffiths' third model. This is the growing practice of neighborhood patrols.⁹⁹ It would be interesting to research how neighborhood patrols make decisions to investigate and control the exercise of discretion by the participants in the program. One would expect a fair amount of troubling discrimination in the enforcement of the neighborhood patrol's law, although the nature of the discrimination, whether against blacks, long hairs, or any other usually stigmatized groups, will vary depending on the neighborhood. Further, one would also expect a fairly rich form of nonrule-based control of discretion through essentially political means such as gossip. One can envision factions within the neighborhood, efforts to control members of the patrol who get out of line by exerting friendly pressure, and a variety of other interesting devices. Since this type of study has not been done, one can only speculate about what a critical perspective could tell us about political, rather than bureaucratic, control of discretion.¹⁰⁰

III. CONCLUDING OBSERVATIONS

We have examined two dimensions of the critical perspective on criminal procedure, one derived from rule-skepticism and one derived from fact-skepticism. Taken together, these critiques suggest that there is something fundamentally askew in our ordinary thinking about law. The critiques make it quite difficult to view law primarily as an attempt to control police officers, prosecutors, or potential criminal defendants. This article suggests that the system of rules of criminal procedure might be viewed in a different way—as attempts by authoritative decisionmakers to express their conception of the world, rather than as attempts to improve the status of the world.

Usually, we think of rules as an effort to accomplish some social purposes—controlling discretion, allocating limited resources efficiently, and so on. Thurman Arnold thought that that was the wrong way to think about

99. G. WASHNIS, *CITIZEN INVOLVEMENT IN CRIME PREVENTION* 33-56 (1976) (existence of citizen mobile patrols in Philadelphia; Chicago; Compton, California; Mobile, Alabama; Knoxville, Tennessee; and New York); see also A. ROSETT & D. CRESSEY, *supra* note 34.

100. However, there is a final element of the research program which can be suggested. This element would attempt to compare the ways in which bureaucratic control of discretion has the incidental effect of protecting the citizenry against abuse with the incidental protections afforded by the political control expected from neighborhood patrols. One might guess that bureaucratic control reduces discrimination as compared to political control, but increases the intrusiveness of the surveillance. Again, though, that is only a guess.

rules. To him, rules did not seek to accomplish anything; they were merely ways we chose to express something about our vision of society.¹⁰¹ That view allows us to offer a critical interpretation of *McCarthy v. United States*¹⁰² and associated rules that require certain disclosures in open court before a guilty plea can be accepted.¹⁰³ The superficial view of these rules is that they are designed to insure that the plea is knowing and voluntary.¹⁰⁴ In this respect, the rules support the vision of the criminal process as a marketplace in which deals are made and honored. Whether or not that vision is accurate, it does indicate the power of a certain way of looking at things in our society.

There is more to *McCarthy* than that. If one speaks with criminal defense attorneys familiar with the plea process, they will describe what happens before the plea is taken as a rehearsal or run-through, in which they coach their clients to learn the right responses to the ritual questions that the judge is going to ask.¹⁰⁵ They see the plea process as a performance, in which the point is to produce the right words so that the audience will be satisfied. On that view, taking pleas is a ritual reaffirmation of our commitment to contractual, voluntaristic ways of thinking about social order and, simultaneously, to our view of criminals as dehumanized objects who mouth words with no meaning. What is important is that these rituals need have no connection to reality to be effective. Indeed, it may be that the more they seem to touch reality, the less effective they will be as rituals.

Finally, it is interesting to note how the plea-taking procedure looks to a judge. The Remington casebook provides transcripts of three plea-takings.¹⁰⁶ One clearly does not comply with constitutional requirements, and another is obviously a ritual that comes close to complying.¹⁰⁷ The most interesting is the third, in which the judge actively questions the defendant in a genuine effort to find out whether the defendant understands the consequences of the plea.¹⁰⁸ What is most striking about this plea-taking is the message one hears the judge communicating. It is not so much that the

101. See T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

102. 394 U.S. 459 (1969).

103. See FED. R. CRIM. P. 11 (requirements for plea-taking process). Easterbrook, *supra* note 44, at 317-18, treats rule 11 as a "statute of frauds."

104. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

105. Cf. L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* 78 (1977) (plea-taking is ritual); accord Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1115 (1976).

106. Introduction to Criminal Procedure 8-54-67 (W. Dickey, F. Remington, & E. Capella eds. 1980) (available in University of Wisconsin Law School Library).

107. *Id.* at 8-54, 8-55.

108. *Id.* at 8-59.

judge thinks it important that the defendant understands the procedure; the message that comes through is that the judge is a sincere, warm-hearted human being, who can now live with himself as he consigns this defendant to purgatory. It is another kind of ritual.