Pamela J. Utz, ***Settling the Facts: Discretion and Negotiation in Criminal Court.*** Lexington, Mass.: Lexington Books (D.C. Heath & Co.), 1978. 193 + xiv pp. $17.00.

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This doctoral dissertation mines still more valuable nuggets from that rich field—criminal case dispositions in California. The book bears the stamp of its author's association with the Center for the Study of Law and Society at Berkeley. She poses the right question. Wisely rejecting the assumption that dispositions without trial are inherently unjust, she asks instead: In what circumstances does the negotiation process succeed or fail to achieve substantive justice?

Her answer is provocative. She compares disposition processes in San Diego and Alameda counties and concludes that the vestiges of adversarial norms in San Diego impair the quality of its justice, whereas the informal, discretionary, and often cooperative processes for "settling the facts" in Alameda achieve more just results. The author's confidence in the high degree of fairness that informal processes can achieve, and her feel for the kind of institutional arrangements that produce them, so closely coincide with my own conclusions from studying another California county (1974) that I cannot help but like this book and agree with the plausibility of its premises.

Between March of 1974 and June, 1975, Utz observed case processing, primarily of felonies, in the two jurisdictions. She conducted 90 interviews, the bulk of them with prosecutors and judges. Her access appears better in Alameda.

Although the two are similar in size and party affiliation (both are Republican), they differ in percentages of minorities, degree of urbanization, and mix of cases, with drug cases substantially more numerous in San Diego. The San Diego prosecutor's office is tightly structured, responding to meet public expectations that it be tough on crime by adhering to the traditional adversary model and requiring hierarchical approval of felony negotiations. The San Diego Superior Court operates on a principle of "friendly anarchy" (in which respect Alameda is not very different). Unlike Alameda, San Diego provides defense service for the indigent through private counsel rather than a public defender's office that would have the organizational capacity to respond to prosecutorial maneuvers with pressures of its own.

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The important differences, of course, involve the patterns of case disposition. San Diego rejects a lower percentage of police complaints than does Alameda and disposes of a higher ratio of felonies in Superior rather than Municipal Court. Inspired by their professional self-image as traditional prosecutors, the San Diego Assistant District Attorneys react "defensively" to the accommodations they must make. Thus "cooperation is alien to the ethos of bargaining in San Diego" (p. 51). It is this "imperfect commitment to negotiated dispositions" (p. 5) that produces the main injustices in San Diego: overcharging, unrealistically stiff positions on less serious offenses and offenders, and inappropriate sentencing. Alameda, having made an institutional commitment to the propriety of negotiated settlement, avoids these injustices more successfully.

All of this I find plausible, and I hope the following criticisms are not an overcompensation for my originally favorable bias. After all, as Paul Freund reminds us, a "bias against bias against bias" is our wisest frame of mind. Nevertheless I must report that the author failed to do some much needed untangling of variables and defining and defending of normative assumptions. The book therefore states a position but does not prove it; skeptics will not be converted.

Let us temporarily assume that dispositions in Alameda are more "just" than those in San Diego. The issue becomes one of explaining the differences, of identifying changes in San Diego that would make it more like Alameda. This task requires discriminating among a potpourri of possible causes, if only speculatively, but Utz chooses to avoid the task. She does not attempt answers to these policy questions: (1) What is the independent effect of having a government funded public defender's office in Alameda? (2) To what extent have quantum jumps in the effective exercise of political power by minorities in Alameda, especially Oakland, produced the pattern of dispositions we find there? (For that matter, what of Alameda's constant exposure to Berkeley students and professors?) (3) Are there substantial differences in caseloads per actor between the two jurisdictions? (4) What are the relative strengths of (a) the philosophical commitment to adversariness and (b) the choice of a hierarchical management style as causes of the San Diego pattern? (5) To what extent does San Diego cope with a "newer" crime problem so that its institutions have simply not had time to follow the adaptive course found in Alameda?

Different analytical and policy conclusions would follow

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from varying answers to these questions. I would have no quibble if Utz acknowledged these uncertainties in her research and focused instead on defending the assumption we must now abandon, that Alameda's processes produce preferred dispositions. She doesn't.

The reason the normative position does not convince lies in large part in the author's modest use of actual descriptions and observations. We get from the 90 interviews little of the richness of actual dispositions. Utz introduces us to no attorneys or judges or their views of the cases they handle. We don't actually see the Alameda system settling the facts in a way that is clearly different and preferable. Instead—and I know the state of mind all too well—we get the obligatory recitations of the standard criminal justice literature and references to California's wonderfully complete criminal justice statistics that add so little to the normative argument. Utz also neglects the consumer's perspective. Does not any argument about the fairness of dispositions need to take account of the beliefs and perceptions of police, defendants, and victims?

In short I sense that Utz has both the material and the talent to give us an essay on the justice of mercy, or an exegesis of the statement by D.H. Lawrence to the effect that anger is just and compassion is just but judgment is never just. I wish she had given it to us here and hope she will in the future. Here she relies on words like "accountability" and "legitimacy" without elevating them from their typically meaningless level. The skeptic may in the end respond that each system operates justly because it corresponds in democratic fashion to expectations of its constituency. Q.E.D.

I want to end positively, not because it is polite to do so but because Utz has given us much that is positive. Let me therefore insert here my vigorous objection to the practice by Lexington Books of bunching footnotes at the end. Many of the arguments of this author (like those of others) convince only when text and footnotes are read together. With so many notes (ten on the first page of chapter one), the reader may tire of flipping pages and get less from the book than it offers.

Now to the positive. Utz's judgment is unquestionably good. She rightly puts prosecutors front and center in the system. She is fully aware of the subtle systematic and legal nuances that so often powerfully affect case outcomes. Occasionally the organization strikes me as jerky—dictated by the order of the author's index cards, perhaps—but the language is nearly always clear and sometimes powerfully "right." If there

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is a *cri de coeur* quality in the book I certainly prefer it to the *cris* of a decade back excoriating the exercise of discretion.

In sum the discipline, no less than this author, will benefit from clearer normative argumentation and more elaborate ethnological observation in the eternal quest for an understanding of justice. I think Utz has made a promising start. Changes in California sentencing laws since her research would, I think, make it profitable to return to her research sites for follow-up studies. I hope she does.

REFERENCE

CARTER, Lief H. (1974) *The Limits of Order.* Lexington, Mass.: Lexington Books.

AUTHOR'S REPLY

Carter writes that the author "chooses to avoid the task" of discriminating among possible causes of the contrasting approaches to negotiation in Alameda and San Diego Counties and thus is unable to explain the differences. Actually, the point of a comparative study of the two counties was to ferret out the combination of variables that account for different styles of "doing justice." The case study method is particularly sensitive to the richness and interaction of variables in complex social systems. Of course it cannot, and does not mean to, measure "the independent effect of having a government-funded public defender's office." Its force is to identify sources of variation and to probe the complex dynamics by which they produce their effects.

In fact, it is hard to imagine in what sense any of the variables Carter mentions could be said to have "independent effects." The effects of any aspect of a criminal justice system are always *conditional* upon a multiplicity of other aspects. For example, the ideological predispositions of the prosecutor cannot have effect without an appropriate organizational structure to make them work. "Liberal" San Francisco produces outcomes that resemble "conservative" San Diego far more than "liberal" Alameda. The San Diego prosecutor's resistance to negotiation is not a simple translation of the conservative values of the community, but is dependent, in part, upon his external relations to the police and upon internal administrative control of the deputies' inclinations to negotiate. Similarly, the organization of the defense bar may, or then may not, constrain and transform the prosecutor's predispositions. In San Diego, a weak defender organization did little to moderate the prosecutor. In Alameda, a strong public defender helped both

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