

Michigan Law Review

Volume 77 | Issue 3

1979

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Recommended Citation

Lynn M. Mather, *Plea Bargaining Reexamined*, 77 MICH. L. REV. 884 (1979).

Available at: <https://repository.law.umich.edu/mlr/vol77/iss3/40>

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PLEA BARGAINING REEXAMINED

Lynn M. Mather*†

PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS. By Milton Heumann. Chicago: University of Chicago Press. 1978. Pp. vii, 220. \$15.00.

That relatively few criminal cases in this country are resolved by full Perry Mason-style trials is fairly common knowledge. Most cases are settled by a guilty plea after some form of negotiation over the charge or sentence. But why? The standard explanation is case pressure: the enormous volume of criminal cases, to be processed with limited staff, time, and resources, forces prosecutors and defense attorneys to abandon full-scale adversary trials in favor of rapid, expedient plea negotiations. Abraham Blumberg expressed the conventional wisdom in 1967 in his widely read book, *Criminal Justice*. Blumberg argued that a "bureaucratic due process" has emerged to cope with the "onerously large case loads" that overwhelm the cumbersome and time-consuming adversary process.¹ This case-pressure explanation has dominated the literature on plea bargaining.

But a large body of new empirical research now demands that we re-examine plea negotiation.² Milton Heumann's book, *Plea Bargaining*, strongly and explicitly attacks the case-pressure argument and suggests an alternative explanation for plea bargaining based on the adaptation of attorneys and judges to the local criminal court. The book is a significant and welcome addition to the literature. Heumann's investigation of case pressure and plea negotiation demonstrates solid research and careful analysis. The book's focus on adaptation also provides original data on the socialization of lawyers and judges, and introduces

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† Because Professor Heumann's book brings the tools of political science to bear on a question of legal process, the Editors of the *Michigan Law Review* sought Professor Mather, as a political scientist, to review it.—Ed.

1. A. BLUMBERG, *CRIMINAL JUSTICE* 21 (1967).

2. See A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* (1976); J. EISENSTEIN & H. JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977); M. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* (1977); L. MATHER, *PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE DISPOSITION* (1979); M. Feeley, *The Effects of Heavy Caseloads* (1975) (paper delivered at the 1975 Annual Meeting of the American Political Science Association, San Francisco). These studies, as well as the book under review, provide explanations for plea bargaining which are not based on case pressure.

important considerations for further research on local criminal courts.

Heumann studied plea bargaining in three cities in Connecticut. He did field research (extensive interviewing and observation) at both the circuit court and superior court in each city, and he collected historical data on criminal case disposition for the Connecticut superior courts. Heumann first tests the case-pressure argument by examining the rate of trials over time. He found that, at least as far back as 1880, adversary trial was not the dominant mode of felony case disposition in Connecticut; the mean percentage of cases resolved by trial over a seventy-five-year period was 8.7%. Further, there was little difference in the trial rates of the most and least busy courts, especially after 1910. These findings comport with other recent research on the history of the guilty plea.³ Moley's 1929 study also detailed the decrease in jury trials and noted as well that "[t]he tendency to plead guilty . . . is not a condition peculiar to large urban communities. It is just as evident in rural counties."⁴

Heumann further tests the relationship between case pressure and plea bargaining by looking at the rate of trials after Connecticut's recent jurisdictional change, which shifted a large portion of the case load of the superior courts to lower courts. In Connecticut's three busiest superior courts between 1970-1971 and 1972-1973, "case pressure was roughly halved and personnel levels remained constant, but the rate of trials stayed the same; it did not increase appreciably as the decreased case pressure-increased trials relationship would have predicted" (p. 30).

If heavy case load is not the main impetus behind plea bargaining, then what is? Why are criminal cases typically settled by guilty pleas, instead of full trials? Heumann's answer lies in his study of the transformation of "idealistic newcomers" to the criminal court into "seasoned plea bargainers." What happens to the newcomer during his first year of experience with criminal cases?

He learns that the reality of the local criminal court differs from what he expected, and that compelling reasons to negotiate cases are often a product of this "reality"; he also is taught by rewards

3. See L. Friedman, *Plea Bargaining in Historical Perspective*; A. Alschuler, *Plea Bargaining and its History* (both papers presented at the Special National Workshop on Plea Bargaining, French Lick, Indiana, June 15-17, 1978) (revised versions of these papers forthcoming in *LAW & SOC. REV.* (Winter 1979)).

4. R. MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 159 (1929).

and sanctions that benefits are attached to plea bargaining and that costs may be levied for a trial. [P. 154]

A valuable contribution of this book is its careful and detailed description of the criminal court "reality" that newcomers learn about. Inattention to this "reality" has led more than a few academic commentators (especially those in law reviews) to misunderstand and misinterpret the criminal court process. First, participants in that process learn that, contrary to their expectations, most defendants are, in fact, guilty. Perry Mason's clients may be innocent, but most real-life defendants are not. Experienced defense attorneys in Connecticut estimated that ninety percent of their clients are guilty; defense attorneys in Los Angeles used the same figure in estimating the culpability of their clients.⁵

A second lesson, one also quite different from the new attorney's expectation, is that most cases have no disputable legal issues. Newcomers learn that most defendants are legally, as well as factually, guilty. In Los Angeles, cases with a high chance of conviction are commonly called "dead bang" cases; a defense attorney in Connecticut describes them as "born dead" (p. 60). The defense attorney learns the difficulty of winning at jury trial with a "dead bang" case. This lesson is true independently of any sanctions imposed for proceeding to an adversary trial, and it helps explain the frequency of the guilty plea. Indeed, the historical increase in guilty pleas in the late nineteenth century may be partially explained by the rise of professional police and prosecutors.⁶

Third, newcomers learn that the most problematic issue in the criminal court is sentencing: what should be done with guilty offenders? Prosecutors, in particular, learn to distinguish between serious and nonserious cases and between cases with defendants who should be incarcerated and those without. Understanding the degrees of seriousness and how to evaluate "what a case is worth" is crucial to understanding the dynamics of plea bargaining. Prosecutors do not believe that all cases deserve the full prosecution and full punishment prescribed by the penal statutes. Thus, participants in the criminal process learn that, for the purpose of deciding issues of punishment, one must attend to facts other than the formal charges—facts such as the degree of

5. Attorneys in Los Angeles quoted this figure to me during my field research on felony plea bargaining there in 1970-1971. For a description of my research, see L. MATHER, *supra* note 2, at 7-10.

6. See L. Friedman, *supra* note 3, at 21-23.

harm done, the relationship between the defendant and the victim, the amount of violence, and the defendant's record.

Heumann does not develop the concept of "substantial justice," but the phrase appears in his interviews; for example, one prosecutor explained that "you need to look for justice tempered with mercy, you know, substantial justice, and that's what I do now" (p. 104).⁷ Other plea bargaining studies have suggested that plea negotiation may involve a genuine pursuit by the lawyers and the judge of "substantive justice."⁸ As Utz argues, "plea bargaining is best understood as an adaptive process in which prosecutor, defense attorney, and judge attempt to rationalize the penal code and infuse a sense of realism in the implementation of absurdly excessive rules and procedures."⁹ One way court personnel may moderate the criminal law is to reduce the statutorily prescribed penalties for particular offenders or for certain kinds of offenses. Thus, the rapid "no time" dispositions of "nonserious" cases (described by Heumann) may simply represent the judgment by courthouse professionals that harsh jail sentences are inappropriate for the problems presented in these cases. On the other hand, the pressure of scarce resources may also be at work here: the limited number of jail and prison cells demands that prosecutors and judges set priorities so that penal "time" is reserved for truly "serious" criminals.

Some of the lessons in this transformation, Heumann contends, newcomers learn on their own merely by discovering certain facts about criminal cases. Other lessons are more actively taught newcomers by other participants in the criminal justice process. Although both the lessons taught and those learned contribute to the frequency of plea bargaining, it is the latter, Heumann suggests, which lie "at the heart of newcomer adaptation" (p. 3) and which most spur plea bargaining.

Specifically, newcomers are taught, as Heumann explains, the rewards of plea bargaining and the sanctions attached to the adversarial approach. Most important, they are taught that the

7. Although Heumann does not say as much, his interviewee might have meant by "substantial justice" what Utz and others mean by "substantive justice." See note 8 *infra*.

8. The phrase "substantive justice" in the context of plea negotiation is used especially in P. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978). See also A. ROSETT & D. CRESSEY, *supra* note 2; L. MATHER, *supra* note 2.

Clearly there are abuses in plea negotiation (in individual cases or even in the bargaining patterns for an entire court) such that other factors (*e.g.*, administrative expediency, an attorney's fee interest, gamesmanship) may outweigh a concern for substantive justice. The point is that substantive justice must also be considered.

9. P. Utz, *supra* note 8, at 139.

defendant who pleads guilty will be rewarded by a more lenient sentence or reduced charges, and, conversely, that the defendant who insists on a trial and is convicted will be penalized by a harsher sentence. This differential sentencing occurs primarily where defendants (or their lawyers) insist on motions or trials in the absence of realistically contestable issues of fact or law. Judges and prosecutors in Connecticut consider formal, adversarial tactics on behalf of obviously guilty defendants unacceptable behavior. Such behavior is sanctioned by the sentencing penalty for defendants and by the prosecutor's denial of information ("closing the files") and refusal to negotiate with attorneys who take formal, adversary positions.

Heumann's book provides a thoughtful, well-supported analysis of the adaptation of newcomers to plea bargaining in one area. The book is not without its shortcomings, however. One problem is the combining of material on the adaptation to circuit courts and superior courts. Heumann virtually ignores the differences between the adaptation of defense attorneys, prosecutors, and judges in the two courts. And yet, in chapter 3, he distinguishes plea bargaining in the two courts both in style and substance. The *process* of adaptation may be the same in both courts, but Heumann should have attended more closely to differences in the *content* of the learning process (that is, what newcomers learned and were taught) that produced the different plea bargaining systems of the lower and higher courts.

Additionally, the differences between circuit and superior court plea bargaining are themselves not very clear. Defense attorneys in the circuit court (which handles misdemeanors and felonies punishable by up to five years in prison) sometimes use extensive "hustling" and gamesmanship to arrange case dispositions. But in the superior court,

[p]ure hustling, slaps on the back, and so on, do not lead to an appreciably different result in sentencing. Certainly, a good rapport with the state's attorney does not inhibit the resolution process, but the facts of the case and the legal questions outstanding cannot be treated lightly, no matter how close the personal relationship. [P. 43].

Nevertheless, after detailing these differences, Heumann concludes the chapter by saying that "[t]he pandemonium of the circuit court suggests that justice is meted out whimsically; the calm of the superior court does not necessarily mean that the process is different there" (p. 46). Is the process different, then,

or not? I wish that Heumann had addressed this issue more forthrightly.¹⁰

Another weakness in the book is Heumann's insufficient attention to organizational and structural variables which might influence newcomers' adaptation. To understand the social learning of newcomers in the criminal court, one should have more information on the recruitment process and the constraints on particular jobs. Heumann mentions Connecticut's unusual system, in which judges appoint all prosecutors and public defenders. How does this recruitment operate and what are the criteria for selection? What are the typical career patterns for prosecutors and public defenders? How are questions of salary, promotion, and staffing resolved? On the last page of the book, Heumann offers one very interesting footnote (p. 206 n.38) about the political nature of recruitment for circuit court jobs. This could have been incorporated into the text and greatly expanded. More material on the organizational and political context of the courts would have enriched Heumann's discussion of adaptation, as well as laid a stronger foundation for others to do comparative research on plea bargaining.

Plea bargaining is not the same in all criminal courts, and social scientists must attend to, and explain, this variation. Heumann's findings are, at once, similar to and yet somewhat different from my own findings on the dynamics of felony plea bargaining in Los Angeles.¹¹ Newcomers to the superior court in Los Angeles, just as in Connecticut, learn that the characteristics of criminal cases are contrary to their expectations. They learn about the culpability of most defendants, the infrequency of disputable legal issues, and the need to sort cases according to seriousness. They also learn about the importance of sentencing, the value of certainty in disposition, and the unpredictability of juries. However, differences in the rewards and sanctions and differences in structural variables between Los Angeles and Connecticut have led to different plea bargaining systems.

10. Any attempt to pursue these differences is further frustrated by the fact that the attorneys and judges quoted in later chapters are generally not identified by their association with either the circuit or the superior court.

11. I conducted field research on plea bargaining in the Los Angeles Superior Court (Central District) in 1970-1971. My research, like Heumann's, concentrated on the informal norms governing plea bargaining, although I did not look specifically at the process by which those norms were learned. See L. MATHER, *supra* note 2; Mather, *Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles*, 8 *LAW & SOC. REV.* 187 (1974).

For example, at the time of my research, felony dispositions in Los Angeles were much more formal and adversarial than those Heumann describes for Connecticut. Pretrial motions were common in Los Angeles and generally occurred without regard to any plea negotiations. Defense attorneys in Los Angeles, unlike those in Connecticut, did not perceive that clients were penalized in sentencing because of these formal motions (even where no "disputable" issue existed). Additionally, prosecutors in Los Angeles did not "close the files" to attorneys who insisted on filing pretrial motions.

Also, many more cases were resolved by full adversary trial in Los Angeles Superior Court than in Connecticut. Only 3.8% of all felony cases in Connecticut Superior Courts in 1972-1973 were resolved by full trial (p. 27), compared to 11.6% of all felonies in Los Angeles Superior Court (in 1970) and over 22% of the more serious felonies (robbery, rape, other sex offenses, murder, kidnapping).¹² Under California's old indeterminate-sentencing law, the trial judge could not set the actual length of the prison term for felons committed to the state prison. In many serious cases, then, where the defense attorney could not negotiate a disposition that kept his client out of state prison, the case would go to trial. The defendant often had nothing to lose by doing so, and he just might be acquitted. Interestingly, with California's return to determinate sentencing (in 1977), we may now expect to see *fewer* full trials in Los Angeles. Where attorneys can negotiate for definite time, conviction by trial poses clear sentencing risks.

Another reason for the greater frequency of trials in Los Angeles was that defense attorneys did not believe that their clients would be penalized in sentencing for conviction by trial in a "light" case (for example, where the defendant had little or no prior record and was charged with a minor offense). Prosecutors took little interest in the sentencing of "light" cases; the presentence investigation and the judge almost wholly determined sentencing. Also, bureaucratic constraints in the District Attorney's office in Los Angeles restricted the deputy prosecutors' ability to reduce or dismiss weak cases. Thus, "light" cases, which were weak for the prosecution, were often resolved by adversary trial. In contrast, prosecutors in Connecticut had full discretion

12. Mather, *supra* note 11, at 213. One reason for the greater frequency of formal, adversarial behavior was the strength and independence of the public defender's office in Los Angeles. (*E.g.*, public defenders in Los Angeles were recruited through civil service, not by the judges.) Other reasons for the high trial rate in Los Angeles are discussed in the text below.

in plea bargaining, which allowed them to "reward" with extremely lenient bargains or even a complete *nolle prosequi* defendants against whom there was a legally defective case.

Furthermore, the results of plea bargaining in Connecticut seem to vary according to the interpersonal dynamics and strategies involved in the negotiations more than in Los Angeles. Prosecutors in Los Angeles, because they were constrained by office policies, could not respond as easily to a defense attorney's "hustling," wheeling and dealing, or threat of jury trial. Threatening to go to trial in Los Angeles did not often yield real concessions; concessions were monitored by superiors in the District Attorney's office and depended on the facts in the case. Actually, the greater emphasis on the facts of a case in felony plea negotiation in Los Angeles (on both the legal and extra-legal considerations) may contrast only with circuit court negotiation in Connecticut. Data on plea negotiations in individual cases in Connecticut would facilitate comparison on this point.

I hope that future research will concentrate on the quality of information used in bargaining and the determinants of case dispositions. Particularly, in the interest of reform, we should be less concerned with whether plea bargaining is implicit or explicit, whether it is over the charge or the sentence, and whether the judge or prosecutor dominates the process. We should care much more about the facts and criteria used in bargaining and about fairness and equality in the bargains that ensue. A discretionary justice system which routinely reduces the charge for a case with a certain set of facts has at least a common-sense fairness about it. But a system in which plea bargains depend on the bargaining skills of the defense attorney does not. Research on the variation in both process and substance of case disposition will help us identify the factors which encourage or inhibit negotiation based on substantive justice.

As we move toward comparative research on criminal case disposition, we need to examine closely the internal norms and operating assumptions which shape plea bargaining in each court. Heumann's book presents a thoughtful discussion of the underlying issues and an articulate challenge to the conventional analysis of plea bargaining.