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## Urban Politics and the Criminal Courts

Milton Heumann  
*University of Michigan*

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## Recent Books

### Book Review

URBAN POLITICS AND THE CRIMINAL COURTS. By *Martin A. Levin*. Chicago: The University of Chicago Press. 1977. Pp. x, 332. \$20.

Martin Levin's *Urban Politics and the Criminal Courts* is an ambitious attempt to explore the "urban political connection" to the dynamics of case disposition in the criminal courts. Levin notes that most previous studies of local courts have focused on the consideration of alternate methods of selecting judicial personnel, with little attention given to the consequences of adopting one or another selection scheme.<sup>1</sup> Newspapers and bar leaders exhort cities to "remove politics from the courts" and to adopt a "merit" method of selection to replace the venal, pernicious political-machine way of doing things. But the assumption that somehow "better justice," or, indeed, even "more efficient justice," will emerge from these changes is just that—an assumption. Levin attempts to test this assumption by comparing—in a way to be discussed below—two courts with very different methods of selection and by attempting to evaluate the consequences of these alternate schemes.

This section of Levin's book, standing alone, is a valuable contribution to the literature. Levin, however, chooses to go beyond this single important problem and address two other issues—criminal court sentencing policy and court delay. The consequences of this trifurcated approach are mixed. On the one hand, he often provides important insights, or at least new ways of thinking about these problems; on the other, he fails to develop completely the "urban connection" analysis in these latter areas and to integrate the three topics systematically. Indeed, I wonder if it was worth the effort to attempt to link these three matters at all or if it would not have made more sense simply to present the book as a series of essays on problems of the criminal courts.<sup>2</sup>

In any event, the somewhat confusing presentation does not substantially detract from the contributions of this book. Time and

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1. See R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* (1969). Watson and Downing, after reviewing the literature, do attempt to assess the impact of different methods of selection.

2. Indeed, some of the material presented in this book originally appeared as separate essays in various journals. See Levin, *Delay in Five Criminal Courts*, 4 *J. LEGAL STUD.* 83 (1975); Levin, *Policy Evaluation and Recidivism*, 6 *LAW & SOC. REV.* 17 (1971); Levin, *Urban Politics and Judicial Behavior*, 1 *J. LEGAL STUD.* 193 (1972).

again Levin sensitively and sensibly questions the conventional wisdom about criminal courts and develops interesting alternative explanations. Though I will take issue with some of his arguments, I think that by and large this book stands as a provocative series of essays about the criminal justice system.

### I. CASE DISPOSITION PROCESSES

Levin is primarily interested in contrasting the behavior of judges in two communities, Pittsburgh and Minneapolis,<sup>3</sup> which typify the political and the merit selection system, respectively. He focuses on sentencing—this is, as he indicates, the crucial task of the criminal court, since the defendant in almost all cases will either plead or be found guilty. The crucial comparative variable thus becomes the sentences meted out to the defendants, and not the conviction rate.

Before directly addressing these sentencing outcomes, Levin contrasts the underlying case disposition processes of the two cities. He argues that neither comports with the traditional view of plea bargaining in the literature. This view, Levin claims, is that 90% of all criminal cases involve a process—plea bargaining—in which the prosecutor actively negotiates charge reduction with the defense attorney. Levin argues that, since neither of his cities fits this model, a major tangential contribution of his study is to call into question the “prosecutor negotiates with defense attorney” perspective on plea bargaining.

In Pittsburgh, defendants generally do not plead guilty. They instead opt for abbreviated bench trials. In Minneapolis, most defendants plead guilty, but their plea is not a product of prior discussion with prosecutors. It would seem, then, that Levin is correct in rejecting the plea bargaining model.

I suppose that, strictly speaking, Levin’s point is well taken. In neither city do we find prosecutors auctioning off “deals” in active and ongoing negotiations with defense attorneys. However, if we expand the definition of plea bargaining beyond that used in the traditional literature, we find that the case disposition processes in both cities do involve plea bargaining—albeit in a somewhat different

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3. Levin is aware of the limits of a two-city design, M. LEVIN, URBAN POLITICS AND THE CRIMINAL COURTS 20-21 (1977), and is generally careful to avoid widespread claims of generalizability. A more serious defect of his data is that they were collected in 1966 and 1967. Given the changes that have taken place in these two cities—the political machine has lost several elections in Pittsburgh, and Minneapolis has begun to employ partisan elections in selecting public officials, *id.* at 21, 46—his analysis is not directly applicable to these two cities today. However, the hypotheses he generates from his research are nonetheless still worthy of careful consideration. It should also be noted that although he and I speak of Pittsburgh and Minneapolis, the boundaries of the judicial districts he studied do not entirely conform to city boundaries.

form. Levin himself refers to "functional equivalents" of plea bargaining,<sup>4</sup> and he recognizes that the disposition processes of Pittsburgh and Minneapolis are really variants on the plea bargaining theme. He chooses, however, to emphasize the imperfect fit between his data and what he sees as the classic model in the plea bargaining literature rather than to develop the commonalities across these two cities and other cities in which plea bargaining processes have been scrutinized.

I think that a definition of plea bargaining that limits the process to prosecutorial negotiation about charge reduction is too narrow. Instead, "plea bargaining" ought to include any negotiation—implicit or explicit—over sentence reduction, whether undertaken by a prosecutor or a judge. What defendants are really interested in when they plea bargain is not a charge reduction granted by the prosecutor; rather, they are interested in the *sentence*. The primary role of the criminal court is to impose sentences; the primary goal of defendants in "plea bargaining" is to obtain a prior agreement on the most favorable sentence. If they negotiate with prosecutors in some systems, this is plea bargaining; if they negotiate with judges in other systems, this is also plea bargaining. Even if their negotiations are not explicit—*e.g.*, if they plead guilty because they have good reason to expect that such a plea will be rewarded with a more lenient sentence—this can be seen as "implicit plea bargaining."<sup>5</sup> Who is negotiating and how they are negotiating involve differences in degree, not kind. Whether we call the process plea bargaining, sentence bargaining, negotiated dispositions, or case reevaluation, we are seeing defendants across most communities trying to obtain a more favorable sentence by some variant of bargaining. The processes in Pittsburgh and Minneapolis are interesting not because they do not comport with a narrow definition of plea bargaining, but because of the particular form that plea bargaining takes in these communities.

Pittsburgh, which ostensibly has a low guilty plea rate, relies on bench trials that are striking in their resemblance to sentence bargaining in the prosecutor's office. They are, in essence, "slow pleas of guilty."<sup>6</sup> The difference is that judges, rather than prosecutors, hear the defense attorney's recounting of "what a wonderful young man the defendant is," how "he loves his mother, fears God, works hard," or how "his involvement in this offense was an aberrant incident atypical of such an outstanding individual." Levin's own

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4. M. LEVIN, *supra* note 3, at 86.

5. Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC. REV. 515, 526 (1975).

6. For a more detailed discussion of "slow pleas of guilty," see Mather, *Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles*, 8 LAW & SOC. REV. 187 (1973).

discussion of the Pittsburgh bench "trials" makes this clear:

Such "trials" usually last less than fifteen minutes, though they may take thirty minutes. The defense presentation is not concerned with guilt or innocence since it usually is implicitly assumed by all parties involved in the process that the defendant is guilty of at least some wrongdoing. It is hoped that these statements will mitigate the judge's sentence. As one defense attorney told an interviewer in explaining his strategy in "slow pleas," "Everyone has a mother, and if he doesn't, well, then I try to use this in his favor also."<sup>7</sup>

The defense attorney argues mitigation, not innocence. He knows which chords to strike, which themes to embellish, and probably what kind of sentence will emerge. At a minimum he knows that penitence at these hearings will stand the defendant in good stead when the judge sentences him; more likely, the defense attorney knows the routine "price" for the offense and has apprised the defendant of the likely sentence. Though an analysis of the disposition statistics of the Pittsburgh courts suggests a high trial rate, careful scrutiny of these trials reveals that they are nothing more than sentence negotiations carried out in front of a judge.

Minneapolis presents a very different picture. There the guilty plea rate is high, but with little prior negotiation with prosecutors. Again this does not mean—using our broader perspective of plea bargaining—that there is no plea bargaining in Minneapolis. I would argue that where defendants know (or believe) that they receive a more lenient sentence for a guilty plea and thus plead to avail themselves of this judicial largesse, they are engaging in a form of implicit plea bargaining. The judges Levin interviewed and the data he analyzed support this conclusion. For a variety of reasons, judges in Minneapolis feel justified in meting out more severe sentences to defendants who go to trial. The high guilty plea rate itself suggests that plea bargaining is flourishing. Furthermore, Levin reports that defendants in Minneapolis are not simply gambling on a reward for pleading guilty: ten of the seventeen judges on the Minneapolis court will indicate specific sentences to be imposed before accepting a guilty plea.<sup>8</sup>

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7. M. LEVIN, *supra* note 3, at 80.

8. Levin's analysis is somewhat confusing on the issue of sentence negotiation in Minneapolis. Such negotiations seem to run counter to the asserted formalistic preferences of Minneapolis judges. At one point, Levin reports the comments of one judge in Minneapolis whose views are close to what we would anticipate in an ostensibly formal, legalistic court: "Now, these kinds of arrangements [*i.e.*, negotiations] can be the basis of the postconviction reversal. So I won't talk to [the attorneys] before they enter a plea." *Id.* at 107. Yet Levin's statement that "only ten of the seventeen Minneapolis judges are willing to participate in such discussions," *Id.* at 68 (emphasis added), provides quantitative support for the belief that a majority of the Minneapolis judges do not subscribe to this particular judge's views.

Levin's analysis suggests that, when we observe a system that seemingly does not rely on explicit negotiations between prosecutors and defense attorneys, we ought not to reject too quickly the possibility that plea bargaining takes place. Rather, we ought to search carefully for "functional equivalents" of plea bargaining. It seems likely that in most systems in the United States, and perhaps elsewhere, these "functional equivalents" account for the disposition of most criminal cases. Perry Mason, *The Defenders*, and Owen Marshall notwithstanding, negotiations—and not trials—are what the criminal justice system is all about.

## II. CASE OUTCOMES AND THE URBAN POLITICAL CONNECTION

I have argued that the differences between the way cases are resolved in Pittsburgh and Minneapolis are more matters of style than substance. The machinery creaks a bit differently in each, but the result is either a slow or a fast plea of guilty. The significant differences between these two cities are in the sentences handed down by the judges. Pittsburgh judges are much more lenient than Minneapolis judges. For comparable crimes committed by defendants of the same race with similar prior records, Pittsburgh judges are more likely to grant probation and more likely to sentence defendants to shorter periods of imprisonment. The "going rate" for a crime seems to be much higher in Minneapolis. In addition, Minneapolis judges are much less willing to take individual mitigating circumstances into account in sentencing. Minneapolis judges are more legalistic and formal—they are guided primarily by the statutory penalties for particular crimes and only marginally influenced by the defendant's background or the particular facts of the case. They tend to view their jobs in terms of protecting society. In contrast, the Pittsburgh judges are much more particularistic in their sentencing behavior. They accord considerable weight to possible mitigating circumstances in the offense or in the defendant's background. Rather than feeling themselves tightly bound by the formal statutory provisions, they view it as their task to consider all aspects of the case and to arrive at a sentencing decision in which "substantial justice"<sup>9</sup> is done. The consistency and harshness of the Minneapolis judges' sentencing pattern is replaced in Pittsburgh with a highly individualistic and relatively mild sentencing scheme.

It is in his attempt to account for these differences in sentencing outcomes that Levin makes his most important contribution. He argues that the radically different procedures for selecting judges in Pittsburgh and Minneapolis significantly, albeit indirectly, affect

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9. *Id.* at 128.

sentencing. In Pittsburgh, judges are nominated primarily because of their activity in the Democratic Party, and they run on a partisan ballot in the election. Their election is generally assured. The selection system, then, typifies the party machine-dominated model. In Minneapolis, on the other hand, the judicial selection procedure is "reformed." The bar associations are the crucial organizations which determine nominations, elections are nonpartisan, and the political parties have little input.

The political machinery in Pittsburgh draws its candidates disproportionately from the ranks of local ethnic groups whose members have been active in Pittsburgh politics. These candidates have had experience in resolving particularistic disputes. They have developed some empathy for the concerns of defendants as well as victims. They understand what life is like "out on the streets"; their prior jobs have stressed the ability to achieve equitable resolutions to conflicts in which both parties have somewhat credible claims. This sort of ethnic and experiential background has obvious relationships to the sentencing decisions described above.

In contrast, Minneapolis judges come primarily from white Anglo-Saxon families, have had very little experience in politics, and generally have worked in a traditional law firm. Their backgrounds are more middle-class oriented, and their prior experience is geared more toward the interests of "society." This background is manifested, when they are elected to the bench, in their legalistic orientation and in their relative lack of empathy for mitigating circumstances.

Levin downplays socioeconomic background as an explanation for judicial sentencing behavior and accords greater weight to the influence of the jobs judges held before coming to the bench. There is a high correlation between background and pre-judicial work experience, however, and separating the two becomes difficult. Levin does note that the few "atypical" judges in each city (WASPS in Pittsburgh, ethnics in Minneapolis) are like their fellow judges in the same city notwithstanding their different socioeconomic backgrounds. His explanation is the similarity in job experience.

The partisan selection process of Pittsburgh, then, maximizes the probability that individuals with a particularistic bent will be chosen as judges, while the power of bar committees in Minneapolis ensures that most candidates will emerge from the more formal, legalistic mold. Levin's point is that changing the selection machinery changes the type of individual who becomes a judge and thus is likely to influence the sentencing patterns that emerge.

Two caveats need to be placed on Levin's discussion. First, as he is well aware, he does not have the formal "control" cities necessary to make his case more convincingly.<sup>10</sup> To test the effect of

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10. *Id.* at 19.

selection processes on the probability of certain types of individuals being chosen, one would like to control for other differences by having examples both of a partisan plan in a community like Minneapolis and of a nonpartisan plan in a community like Pittsburgh. Presumably, sentences would become milder in the former and harsher in the latter. But Levin leaves open the possibility that this pattern might not necessarily emerge. He notes that something more general—a political culture—may be simultaneously influencing the local court as well as the local political system.<sup>11</sup> Thus the differences he found between Pittsburgh and Minneapolis may say less about the selection procedure itself—other than the fact that the selection of the selection procedure says something about the community's political culture—than it does about the political culture of the two respective communities. These differ substantially, and it may be the case that, even if the selection procedures were reversed, the pool of eligible judges, and more generally the community's values as translated into cues to the local court, would still yield a judiciary that was particularistic in Pittsburgh and legalistic and formal in Minneapolis. Coming to grips with the possible confounding influence of political culture is not an easy task. Clearly it requires examining many more cities and establishing some objective measures of what precisely is meant by "political culture." Levin takes the first step; subsequent research ought to expand his study to include more communities and to gauge systematically the effects of the selection process when "political culture" is held constant.

The second caveat regarding Levin's explanation of the differences across the two courts is based on the suggestion in his data that on-the-bench socialization accounts for the intra-court consistency and inter-court differences he finds. Levin quotes one judge who remarked: "Like everyone else I am the product of my background, but nothing in my experience prepared me for making sentencing decisions. So after I got on the bench I had to do a lot of reading on sentencing because I really knew nothing about it."<sup>12</sup> Judges assume their roles relatively uninformed about sentencing and receive very little guidance on what the appropriate sentences ought to be. The rates they eventually establish for particular crimes may be a product less of their backgrounds, their pre-judicial careers, or the political culture than of their learning from their fellow judges the "going rates" for particular crimes. These going rates—the standard operating procedures—in part are "the way things have always been done." Courts have their habits of disposition just as other

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11. *Id.* at 153. For another discussion of the relationship between "political culture" and a legal organization, see J. WILSON, *VARIETIES OF POLICE BEHAVIOR* 233-36 (1970).

12. M. LEVIN, *supra* note 3, at 141.

organizations do. Thus, going rates would not directly reflect such factors as judicial background or political culture. At least some of the differences Levin discerned between Pittsburgh and Minneapolis may reflect the influence of these court norms. Again, this would be a fruitful area for further research.

### III. SENTENCING POLICY AND COURT DELAY: SOME COMMENTS

As indicated at the outset of this review, Levin supplements his comparative analysis of Pittsburgh and Minneapolis with two additional studies—evaluations of sentencing policy and of court delay. Space constraints preclude a systematic critique of these discussions; thus, I will limit my remarks to some general comments on Levin's ideas.

As Levin reminds us, the criminal court operates under the conflicting pressures of several different goals. We expect the court to rehabilitate and to deter, to provide equitable treatment and to reduce the probability of recidivism, to reflect the community's sense of the just punishment for a crime and to provide justice for the defendants who come before it. These goals may all be admirable, but, as Levin demonstrates, there are tradeoffs involved—an attempt to implement any particular one may reduce the ability to implement others. It is precisely his sensitivity to these tradeoffs that makes his section on court sentencing so interesting.

Levin shows, for example, that, given a goal of crime prevention through rehabilitation, one ought to opt generally for probation rather than incarceration, since the data suggest that an individual placed on probation is less likely to recidivate.<sup>13</sup> However, if the goal is crime reduction—*i.e.*, reducing opportunities for the defendant to commit further crimes—the court ought to increase the probability of imprisonment. To support this argument, Levin reviews the literature on certainty and severity of punishment and concludes that imprisonment seems to have some crime reduction effect. He is not clear—nor is the literature—on whether this result is caused by individual deterrence, general deterrence, or the inability of the defendant himself to commit crimes against society at large while he is imprisoned. Levin suggests that we should opt for probation for first-time offenders and incarceration for those who are already

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13. Levin reviews a number of major studies on this question. These include experiments in which juveniles who did not clearly require incarceration were randomly assigned to probation instead of incarceration. See M. WARREN, *THE COMMUNITY TREATMENT PROJECT AFTER FIVE YEARS* (1967). Thus, his conclusions cannot be dismissed simply by arguing that those who usually receive probation are precisely those who are less likely to recidivate in the first place. M. LEVIN, *supra* note 3, at 160-71.

recidivists. He softens his imprisonment argument with the suggestion that prison facilities ought to be improved dramatically and that much more attention ought to be given to alternative settings for incarcerating defendants.

These policy recommendations are controversial and can be debated on both empirical and normative grounds. Nevertheless, I think that Levin is to be commended for providing a careful and clear context for this debate. Reform of sentencing policy is probably the single "hottest" topic in criminal justice circles. Levin's thoughts on this problem will introduce a modicum of reason into this difficult, if not occasionally intractable, area.

Levin is similarly provocative in his discussion of court delay. Though his analysis is very preliminary and exploratory, and though he uses five courts that are not completely comparable, which creates problems in interpreting his findings,<sup>14</sup> his conclusions about delay are thought provoking because they run counter to the simplistic judgments often made in this area. Levin rejects the notion that one can explain most delay in court simply by looking at the court's case volume or its inefficient administrative apparatus. Instead, he argues that delay is often a product of actions initiated by court participants themselves in response to the basic incentive systems that guide prosecutors, judges, and defense attorneys. He is particularly persuasive in his discussion of the incentives of private attorneys to delay cases. For example, a private defense attorney will often request—and receive—a continuance in a case because he has not yet received his fee. In some courts the attorney signals the judge by asking for a continuance "pursuant to Rule 1 of this court"; in others, less subtle, the continuance is granted because a witness, "Mr. Green," has not shown up.<sup>15</sup>

The discussion of delay, both in the text and in a lengthy appendix devoted to an analysis of delay in five courts, becomes quite involved. This level of scrutiny is probably inevitable, however, if one is to scratch below the common "case volume leads to delay" argument and explore the reasons for high delay in low-volume courts, and vice versa. Quantitative data on backlog, personnel levels, and types of personnel—*e.g.*, percentage of private attorneys compared to public defenders—and qualitative data concerning court disposition processes—plea bargaining patterns, sanctions leveled against pre-trial motions, and so on—need to be collected before any

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14. The courts studied include those which screen felony cases and often dispose of minor felonies, those which resolve minor and major felonies, and those which handle major felonies after screening. M. LEVIN, *supra* note 3, at 226-34. Though I think his comparative analysis is fundamentally sound, the differences among these five courts occasionally leave the reader feeling as if apples and oranges were being contrasted.

15. *Id.* at 240.

more definitive statements about the causes of and remedies for delay can be made. Levin's analysis anticipates the issues that must be grappled with and provides a useful point of origin for the design of some broader-scale studies.

#### IV. CONCLUSIONS

The academic study of trial courts is only in its infancy. Historically, political scientists and legal scholars have been preoccupied with appellate court decisions and appellate court decisionmaking. Levin's book is an exception to these earlier preoccupations and is an important contribution to the emerging study of criminal trial courts. Though he raises as many questions as he resolves and though some of his analyses are open to criticism, he addresses the important theoretical and policy problems in an astute and refreshing fashion. My guess is that when the arguments are thrashed out in the journals, Levin will end up being more right than wrong. And, given the state of the art in the study of trial courts, that would be a more than modest achievement.

*Milton Heumann*  
*Assistant Professor of Political Science*  
*The University of Michigan*