Kentucky Law Journal

Volume 68 | Issue 1 Article 8

1979

Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys by Milton Heumann

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BOOK REVIEW

THE LEGAL EDUCATION OF PLEA BARGAINING PARTICIPANTS

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

For *Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys,* Milton Heumann sets a goal modest enough, at least in its potential impact on the legal system: "to explore the postrecruitment adaptation of new prosecutors, defense attorneys, and judges to the 'plea bargain court.' "[1] He gathers material which will be valuable both to those who participate daily in the plea bargaining process and to non-participants who continue to critically evaluate the process. Not only does Heumann present information which indicates that plea bargaining is not a function of case pressure, a view which challenges accepted notions of the source and the process of plea bargaining; he also presents information which challenges the prevailing mode of legal education as preparation for the practice of law. He reports that beginning prosecutors and defense attorneys are surprised at what they discover upon entering the practice of law, and that because their legal education does not prepare them adequately for what they encounter, a reeducation is essential in adjusting to the realities of the profession.

Although in places *Plea Bargaining* could be read to imply a critique of the criminal justice system or an indictment of legal education, it is, in addition, a much needed description of the reality of criminal courts. Heumann's focus is the criminal courts of Connecticut in 1972, yet his description probably is equally accurate for the entire criminal justice system even today. A close reading of this book will disclose the dichotomy

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[1] M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 1 (1978) [hereinafter cited as M. HEUMANN].

between the theory and the practice of law as seen through the eyes of lawyers who work in the courts.

RESEARCH AND THE ADAPTATION PROCESS

Heumann's research spanned a period of eight months, beginning in July, 1972, while he was a graduate student at Yale University. *Plea Bargaining* is derived essentially from interviews conducted during this period with seventy-one prosecutors, defense attorneys and judges of Connecticut courts, focusing upon the topic of plea bargaining. The numerous interview excerpts, ranging from fascinating to tedious, are necessary steps in the documentation of what actually happens in the adaptation process.

The real substance of *Plea Bargaining* is contained in four chapters on "adaptation," including a chapter in which Heumann considers adaptation in a general context and one chapter each in which he explores the specific adaptation processes for defense attorneys, prosecutors and judges. For purposes of this study of the adaptation of newcomers—people with less than one year of experience—to the criminal justice system, Heumann defines "adaptation" as "the process in which a newcomer in the criminal justice system learns and is taught about his role obligations, and the related process in which he translates these obligations into a perspective on plea bargaining."[2]

Heumann develops two components which determine the process of adaptation: "teaching," which refers to "the use of rewards and sanctions by others in the court system to direct newcomer behavior down a particular path,"[3] and "learning," which refers to "the newcomer's discovery that the reality of the local criminal court differs from what he expected."[4] He views "learning," the developing perception of the contrast between the theory and the practice of law, as being at the heart of newcomer adaptation. Believing that many people who have critiqued the plea bargaining system have failed to consider the "learning" component, he concludes, not unexpect-

[2] *Id.* at 2.
[3] *Id.* at 3.
[4] *Id.* at 2-3.

edly, that they also have failed to fully understand the motivations of the plea bargainers. His research will be a valuable aid to a better understanding of how people are functioning in the plea bargaining process and for formulating and evaluating policy recommendations about plea bargaining.[5]

Heumann's study dovetails with and completes the picture of all participants in Connecticut's criminal courts begun by Jonathan Casper in 1972.[6] Casper's research, which concentrates on information derived from interviews conducted with defendants in the Connecticut criminal justice system,[7] provides an instructive complement to Heumann's analysis. Although Heumann intentionally excluded from his study defendants' impressions of the plea bargaining system, input from defendants would have been useful as a reference point from which to judge the subjectivity of the comments of his subject participants. Subsequent researchers may combine and compare Heumann's and Casper's findings for a complete picture of the adaptation process as it existed in Connecticut in 1972. However, it is important to warn that the attorneys and judges studied by Heumann seemed to de-emphasize the defendant as a participant in the plea bargaining process. "It's simply a matter that three reasonable men—the judge, the prosecutor, and the defense attorney—concur," said one judge.[8] The defense attorneys shared this personal perspective, reporting that they felt lost, confused, uneasy, surprised, distressed and ineffective, but making no comments about what happened to their first clients or the quality of representation provided such clients. This perspective may qualify Heumann's conclusion

[5] The potential impact of this study of newcomers can be placed in perspective by realizing that America's criminal justice system is controlled by lawyers with two or less years of experience. *Plea Bargaining Is Rarely Eliminated,* 64 A.B.A. J. 1334, 1335 (1978).

[6] *See* J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972) [hereinafter cited as J. CASPER].

[7] Both Heumann and Casper conducted 71 interviews in Connecticut courts for their respective studies; both were at Yale University at the time; both thanked each other for assistance in the introductions to their respective books. Casper has conducted another study of 900 defendants in Pheonix, Baltimore and Detroit. *See* J. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE (1978).

[8] M. HEUMANN, *supra* note 1, at 151.

"that plea bargaining benefits most defendants,"[9] and lend credence to the sentiment of defendants interviewed by Casper that, at best, they "lose less."[10]

Critical to evaluating Heumann's research, or any analytic project relying in part on first-hand interview material, are two questions: (1) whether the interviewer asked the right questions, and (2) whether the interviewer developed a coherent and meaningful interpretation of the assembled answers. Since the reader of *Plea Bargaining* is not presented with all the answers to the interviewer's questions, it is impossible to answer the latter question. The first question, however, can be answered with a general "yes" because the reader knows what Heumann was seeking[11] through the topics covered in the interviews: adaptation to the job, court operations, career goals and rewards and sanctions.[12] The only significant defect is the failure to ask more directly about the relationship between case pressure and plea bargaining.[13]

As a true social scientist, Heumann expressed concern over the validity of his conclusions due to problems in data collection and in the uniqueness of the particular jurisdiction tested. For example, since only fifteen of the seventy-one people interviewed were actually "newcomers," most of his information was provided by experienced veterans. Although the use of so many veterans raises the question of whether they recall their adaptation process objectively,[14] the subjective perceptions of these participants are extremely important. Furthermore, it should be kept in mind that Connecticut is somewhat unique

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[9] *Id.* at 84.

[10] J. CASPER, *supra* note 6, at 78.

[11] Heumann's research "tips" may be useful to others who undertake similar studies. M. HEUMANN, *supra* note 1, at 14-17.

[12] *Id.* at 18.

[13] Only the prosecutors seem to have been asked directly about this relationship. *Id.* at 114-16. The question is not raised in the chapter on defense attorneys. It is treated obliquely in the chapter on judges. *Id.* at 144-48.

Other subjects that might affect plea bargaining are ignored. For example, in a set of case files for 88 defendants, Heumann found that 76 of them had more than one charge against them, the average being four charges, but he never asked prosecutors or defense attorneys about over-charging as an inducement to plea bargaining. *Id.* at 42.

[14] "The reality of the system presumably varies from perspective to perspective." J. CASPER, *supra* note 6, at 72.

because trial judges rotate among circuits and appoint the prosecutors and public defenders. While such factors may raise questions as to whether the study is statistically significant for social science purposes or is typical of court patterns in other jurisdictions, the results are probably no less (and perhaps more) accurate than the generalizations and gestalt impression that the legally-trained audience has been accustomed to receiving in legal journalism.[15] Heumann's study clearly supports the growing and important tradition of ground-floor level analysis,[16] which focuses on practice at its root, or bottom operational level, as contrasted with the image derived from theory. This ground-floor approach is a prerequisite to a full understanding of the legal system.

Case Pressure Hypothesis

A considerable portion of *Plea Bargaining* is devoted to refuting the widely accepted notion that plea bargaining is a function of case pressure. Empirical analysis, not the interview, is the principal tool used for this task. After collecting and analyzing data reflecting the percentage of trials in relation to total dispositions in Connecticut's Superior Courts from 1800 to 1954 and 1966 to 1973 (the absence of data from 1954 to 1966 is never explained), Heumann concludes that the small percentage of trials "is not a recent phenomenon." Trials very seldom exceeded ten percent of total dispositions. This constant historical pattern, while perhaps not startling, is one seldom mentioned in plea bargaining literature. Heumann's analysis is excellent to this point, but then he leaps forward and makes unwarranted assumptions about case pressure, based on his knowledge of case volume. These assumptions, while necessary to prove the point that plea bargaining is *not* a function of case pressure, leave his empirical analysis on precarious ground, even for those lawyers who are likely to apply less

[15] "My interviews did not follow a set format, and the resulting study is not a scientific survey; it is a kind of legal journalism." Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968).

[16] For a further explanation of ground-floor level analysis, *see* Barkai, *Lower Criminal Courts: The Perils of Procedure*, 69 J. CRIM. L. 270, 278 nn. 41 & 42 (1978) and accompanying text. An example of this tradition is Mileski, *Courtroom Encounters: An Observational Study of a Lower Criminal Court*, 5 LAW & SOC. REV. 473 (1971).

severe empirical standards than his fellow social scientists. Heumann simply equates case volume with case pressure and then continues his analysis. However, he does pause to admit that the equivalency is at best "rough" and that he "cannot be sure that volume reflects pressure."[17] The caveat, while perceptive, is largely understated. His assumption cuts deeply into the support for his conclusion. Case pressure, in my mind, is case volume in relationship to court personnel, including prosecutors, defense attorneys and judges, and the time available for processing the cases.[18] Volume and pressure simply are not equivalent.

Heumann posits a second theory to explain the relationship between case pressure and trials. Because of a change in the circuit court's jurisdiction, the annual case volume was reduced by nearly one-half between July 1970 and June 1973. Since the percentage of trials remained relatively constant while personnel levels remained unchanged, Heumann concludes that case pressure is irrelevant. However, he does not consider that during this relatively short period of time the personnel might have continued to seek plea bargains at their old frequency for other reasons, such as a desire for more leisure time or a continuation of behavioral custom. Heumann's reported interviews do not seem to explore possible behavioral reasons as to why the frequency might have remained the same during the short run.

A REAL LEGAL EDUCATION

Heumann's study of newcomer adaptation indicates that the newcomer's expectations do not survive well in the criminal justice system when confronted with its reality. New prosecutors and defense attorneys begin their jobs with a "presumption of trial"—expecting many trials with legally and factually disputed issues.[19] Heumann traces their adaptation to

[17] M. HEUMANN, *supra* note 1, at 28.

[18] For example, if Court *A* had 20 cases and two prosecutors, and Court *B* had 40 cases and 10 prosecutors, Court *B* has greater case volume, but the prosecutors in Court *A* would feel greater case pressure because they are responsible for more cases per person.

[19] For an explanation of the difference between "legal" and "factual" guilt, *see* Barkai, *Accuracy Inquiries For All Felony and Misdemeanor Pleas: Voluntary Pleas*

a point where they are functioning with a "presumption of plea bargaining." He eventually concludes that they learn that approximately ninety percent of defendants are actually guilty, that a sizable percentage of these have no substantial ground for contesting their guilt, and that the defendant is likely to be rewarded for a plea.[20]

Both prosecutors and defense attorneys learn how to plea bargain. Prosecutors learn to dispose of the less serious cases quickly and to stress certainty of incarceration rather than the term of incarceration in the more serious cases. They learn to look "beyond the defendant's guilt when evaluating a case," and learn "that most defendants are factually and legally guilty."[21] Defense attorneys experience similar changes, learning that penalties are attached for being an adversary, both for their clients and for themselves personally. As defense attorneys learn how to evaluate a case for plea bargaining purposes, they develop an "impressionistic multiple regression model"[22] in their minds. They are surprised by the client's willingness to plead guilty[23] and the lenient dispositions offered by the prosecutors, thus learning to focus their plea bargaining in serious cases on sentence bargaining so as to lessen prison time.

Heumann's information about the judges' adaptation is much less concerned with their initial expectations, perhaps because typically they do not bring fixed expectations to their new jobs. Lawyers are more likely to become criminal court judges based on their experience in the political system rather than on actual experience in the criminal justice system; rather than choosing their profession, they are chosen for it.[24] Judges are reactive, usually approving the plea bargain previously agreed to by the prosecutors. During the judges' adaptation,

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But Innocent Defendants? 126 U. PA. L. REV. 88, 98-99 (1977).

[20] M. HEUMANN, *supra* note 1, at 156.

[21] *Id.* at 109.

[22] *Id.* at 76. "It is a way of sorting and weighing the sundry factors that enter into a disposition." *Id.*

[23] Law students representing clients in clinical programs also are surprised by their clients' willingness to plead guilty. Interview with Professor Marc Goldman, Wayne State University Law School, in Detroit, Michigan (Dec. 9, 1978) (interview conducted by telephone from Honolulu).

[24] M. HEUMANN, *supra* note 1, at 128.

Heumann shows that they too develop a belief that most defendants are indeed guilty.[25] The significance of this perception lies in the development of a related judicial assumption: most defendants ought to plead guilty. Through the course of implementing this assumption, many judges come to justify engaging in judicial plea bargaining, although such practice is contrary to American Bar Association standards.[26] Moreover, judges feel justified in imposing a penalty on those defendants who unsuccessfully contest their guilt on what the judges believe[27] to be a frivolous issue.

As previously stated, a major point reiterated in *Plea Bargaining* is that the reality of the practice of law in the criminal justice system does not comport with newcomer expectations. Many of the people interviewed, some of the articles quoted, and finally Heumann himself lay the blame for this apparently unperceived dichotomy between theory and practice on the law schools. "Law school," says Heumann, "simply does not engender a realistic perspective on the operations of the criminal court."[28]

To the extent that Heumann's study discovered a disenchantment with legal education among lawyers,[29] his interview process failed to inquire into the defects which our legal education suffers. Curiously, the newcomers and veterans who are so harshly critical of their legal education seem to have taken no efforts to supplement it. Their surprise with the reality of the legal system seems to indicate an absence of law-clerking experience and visits to the local courts prior to their employment

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[25] *Id.* at 138.

[26] *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty* 3.3a (App. Draft 1968).

[27] While the judge may believe a defendant is clearly guilty, this opinion fails to recognize that the defendant's perception of the situation (and the judge's too) is psychologically colored by his involvement.

The judge may hold an unrealistic expectation that the defendant can be "educated" to believe his defense is without merit by "his" defense attorney. Yet court appointed attorneys have little credibility with defendants. *See* J. CASPER, *supra* note 6, at 105, 106 (only 20 percent of defendants with court-appointed attorneys thought "their" lawyer was on their side). "A state attorney is worse than none" People v. Losinger, 50 N.W.2d 137, 140 (Mich. 1951).

[28] M. HEUMANN, *supra* note 1, at 153.

[29] I doubt this discovery is a surprise to any group of lawyers, except, perhaps, some law faculty members.

as attorneys. At any rate, most practitioners have adapted to the plea bargaining process after one year of practice in the criminal justice system,[30] although they still do not have a conceptualized and articulated framework for their behavior.[31]

Clinical Legal Education

Quality clinical legal education seems to offer a solution to some of the problems created by the dichotomy between the theory and the practice of law. It would not, of course, reduce the discrepancies between theory and practice, although it might ease the transition between the two, and provide law students with an experiential base during law school upon which to dissect more effectively the theory they are studying.

A superior clinical program is dependent upon *interpreted practical experience based upon a theoretical framework.* A primary goal of clinical training should be to develop a framework from which the student can analyze his or her behavior as an attorney,[32] and thereby develop a successful pattern for future legal behavior.[33] The "interpreted" aspect of my definition refers to the use of a supervisor who can provide critical feedback to the law student. Experience has indicated that the greatest benefits are usually derived when the supervisor is part of the law school faculty and is associated with an "in-house" clinical program. Admittedly, "farm-out" or "externship" programs do have benefits, but frequently the supervising attorneys are so close to the heat of the battle that they are unable to completely conceptualize the process that they and the student are experiencing. "In-house" clinics offer greater physical and psychological distance from practice in an atmosphere more conducive to reflection and conceptuali-

[30] M. HEUMANN, *supra* note 1, at 155.

[31] *Id.* at 84.

[32] The model is similar to the one attributed to psychiatrist Harry Stack Sullivan and known as "Participant-Observer." *See* A. CHAPMAN, HARRY STACK SULLIVAN: HIS LIFE AND HIS WORK, 111-16 (1976). The professional engages in a relationship in which he is both an active participant and an informed observer.

[33] *See* Meltsner & Schrag, *Report From A CLEPR Colony,* 76 COLUM. L. REV. 581, 584-87 (1976). A new and rich source of material for this process can be found in G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978).

zation. Heumann's study supports the case for in-house clinics by observing that newcomers in practice are seldom able to form a consistent, coherent and systematic conceptualization of the legal system and their own behavior within it.[34]

When Heumann refers to a 1967 quotation from Edward Levi to support the proposition that law schools do a particularly poor job of preparing people for criminal law careers,[35] he may be using outdated information. Clinical legal education programs are becoming increasingly popular. Presently, approximately ninety percent of all American Bar Association approved law schools have such programs.[36] In addition, of 130 law schools reporting to the Council on Legal Education and Professional Responsibility, 110 schools reported having criminal clinical programs, and 18 additional schools reported clinical programs in prisoner assistance or juvenile law.[37]

CONCLUSIONS

Milton Heumann reaches the conclusion that the abolition of plea bargaining is impossible.[38] He suggests reforms in the plea bargaining system,[39] such as putting the plea bargain in the record, a practice which is already required in many jurisdictions.[40] In addition, Heumann suggests that judges explain the reasons for a given sentence and permit appellate review of sentences.[41] Some of Heumann's suggestions, most notably those of requiring defense attorneys to state why they negotiated the plea bargain and of requiring defendant participation in plea negotiations, do not seem as appropriate.

At a time when so much is being written about plea bar-

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[34] M. HEUMANN, *supra* note 1, at 75, 154-55.

[35] M. HEUMANN, *supra* note 1, at 48.

[36] *Survey and Directory of Clinical Legal Education* 1977-1978 vi (CLEPR, 1978).

[37] *Id.* at 1-20.

[38] M. HEUMANN, *supra* note 1, at 166.

[39] For a discussion of Heumann's proposal to require the presentation of a prima facie case establishing the defendant's guilt and demonstrating why possible legal challenges would be ineffective, see Barkai, *Accuracy Inquiries For All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88 (1977).

[40] All federal courts and many states, including Connecticut, require a factual basis for a plea. *See* Barkai, *supra* note 39, at 89 n.6; FED. R. CRIM. P. 11(e)(2).

[41] M. HEUMANN, *supra* note 1, at 167.

gaining,[42] it may be fair to ask whether we need to read any more about the subject. For Milton Heumann's *Plea Bargaining,* the answer is a resounding "yes." This book presents a ground-floor view of the legal system that, unfortunately, is seldom seen. *Plea Bargaining* enables the reader to understand what is popularly considered to be the adversarial trial system, but which in actuality is a negotiation system. Estimates are that eighty-five percent or more of all criminal and civil cases are processed without trials.[43]

Plea Bargaining offers a special appeal and message to particular audiences. Legal educators will be reminded that unless the teaching of theory allows for a recognition of the present state of the practice of law, graduates will feel unprepared for what they thought they were trained to practice. Judges, prosecutors and defense attorneys will be given a more conceptualized analysis and understanding of what is happening and what did happen to them when they first entered the courts. They may improve their plea bargaining skills by gaining a better understanding of what motivates their peers, their adversaries and themselves. Those who continue to evaluate the criminal justice system, and the plea bargaining system in particular, will gain greater insight into those systems by reviewing Mr. Heumann's analysis.

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[42] Other recent plea bargaining books include J. BOND, PLEA BARGAINING & GUILTY PLEAS (1975); H. MILLER, W. MCDONALD, AND J. CRAMER, PLEA BARGAINING IN THE UNITED STATES (1978), and A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT (1976); P. UTZ, SETTLING THE FACTS (1978). There are numerous articles on the subject of plea bargaining; see, *e.g.,* Langbein, *Torture and Plea Bargaining,* 46 U. CHI. L. REV. 3 (1978); Wilson, *Fifth Amendment and the Guilty Plea: An Incompatible Association,* 30 HASTINGS L.J. 545 (1979); and Comment, *New Federal Rule of Criminal Procedure 11(e): Dangers in Restricting the Judicial Role in Sentencing Agreements,* 14 AM. CRIM. L. REV. 305 (1976). An entire issue of *Law & Society Review* is devoted to plea bargaining. *See* 11 LAW & SOC'Y REV., No. 2 (1979).

[43] *See* R. FIGG, CIVIL TRIAL MANUAL 319 (1974); *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty* 1-2 (App. Draft 1968); The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967).