University of Baltimore Law Review

Volume 8
Issue 3 *Spring 1979*

Article 13

1979

Book Reviews: Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys

Bernard F. Goldberg
Public Defender, Howard and Carroll Counties, Maryland

F. Howard Silverstein
Public Defender, Howard County, Maryland

PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS. By Milton Heumann.* University of Chicago Press, Chicago, Illinois. 1978. Pp. 219. Reviewed by Bernard F. Goldberg† and F. Howard Silverstein.‡

> More will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia.[1]

A cursory reading of Professor Heumann's book may leave the reader with the feeling that the author's intention is to present just one more book in the long line of writings castigating the plea bargaining system.[2] The preface and introductory chapters apply such terms as "expeditious but undesirable," "just a part of the system," and "part of the criminal court bureaucracy," in describing the plea bargaining system. But a closer reading of the material belies such a hasty assumption and shows that the author intends to illustrate the inevitable adaptation[3] of court personnel and its officers to the criminal justice plea bargaining system for reasons independent of these traditionally offered rationales.

With graphic illustrations, Professor Heumann sets out in the early chapters the method by which he obtained his information. His research approach, much in line with that employed for a doctoral thesis, tends, however, to force the reader to search for the meat in the book, and does little to illuminate the mechanics of the plea bargaining system for those who actually participate in it. For example, the author traces the post-recruitment period of new prosecutors, defense attorneys, and judges in order to compare what a novice believes about the criminal plea bargaining system with what a seasoned veteran knows from experiences within the system. Unfortunately, the techniques of plea bargaining as addressed do little to illuminate the plea bargaining system for those who have previously participated in it.

---

* Assistant professor of political science, University of Michigan.
† B.S., 1943, Loyola College; L.L.B., 1951, University of Baltimore; practicing attorney and member of the Maryland Bar Association; Public Defender of Howard and Carroll Counties from 1972-78.
‡ B.S., 1973, University of Maryland; J.D., 1976, University of Baltimore; practicing attorney and member of the Maryland and District of Columbia Bar Associations; Assistant Public Defender of Howard County from 1976 to the present.

1. Stewart Drygoods Company v. Lewis, 294 U.S. 550, 557 (1935) (Cardozo, J.).
2. The case of Santobello v. New York, 404 U.S. 257 (1971), affirmatively resolved the basic question of whether plea bargains are acceptable.
3. Professor Heumann defines adaptation as "the process in which a newcomer learns and is taught about his role obligations, and the related process in which he translates these obligations into a perspective on plea bargaining" (p. 2).

The input received by Professor Heumann, and used in drawing his conclusions, was taken from Connecticut's circuit courts (lower trial courts) and superior courts (higher trial courts). The author concentrated his study within only six of these courts, three each from the circuit and superior court levels. He further subdivided each set of three courts, restricting his study to two in urban areas and one in a rural environment. This served as a form of "control," enabling him to compare high and low volume courts and the prevalence of plea bargaining in them in order to see what influence case volume has on the process. Evidently, the Connecticut court system allowed him to sit in on plea negotiations between defense attorneys and prosecutors, as well as on discussions with the local judiciary. It was these sessions involving felony and misdemeanor cases that provided the basis for Professor Heumann's attempt to unravel the "mysteries" behind plea bargaining.

Although the reader may assume during the early chapters that this is no more than a sociological study written more for the private citizen interested in why plea negotiations exist at all than for those actually engaged in the practice, this notion is soon dispelled. It quickly becomes evident that Professor Heumann's intention is not only to create a picture of plea negotiations as they exist today but also to provide thought provoking insights for those who actually participate in such negotiations. Each chapter begins with quoted statements from prosecutors, defense attorneys, and judges, who appear more than willing to share their outlook on plea bargaining with the author.[4] These statements, as well as bits of humor, tend to lighten the heavy text, making it more palatable for the reader and permitting those involved in the plea bargaining process to identify readily with the study's participants.

The underlying question in the book is whether the voluminous caseload and its attendant pressure on the court system is the underlying reason for the existence of the plea bargaining process. The author ultimately determines that, although this is the prevailing rationale offered for plea bargaining, such a theory can be deflated by examining high caseload and low caseload courts. His examination of these two different areas surprisingly tends to illustrate that the method and usage of plea negotiation is almost identical no matter how large or small the caseload involved. This is indeed a startling conclusion for it contradicts the commonly supposed and tenerally unchallenged rationales for the existence of plea bargaining. Professor Heumann's development of this issue alone makes the book most worthwhile.

---

4. In all, the author conducted 71 interviews with defense attorneys, prosecutors, and judges in the six courts selected for his study.

Professor Heumann, however, takes us into an equally interesting aspect of plea bargaining, centering his focus on the people involved in the negotiating process — the defense attorney, the prosecutor, and the judge. The author seems almost apologetic and entirely sympathetic toward these people when, as novices, they are cast into a system for which there is no formal learning process, no advance warning, and very little training.

In looking first at the novice defense attorney, Professor Heumann finds an individual who expects to try many of his cases and attributes the plea bargaining system to "poor motivation or overworked court personnel." The novice assumes that a sizeable percentage of his clients are innocent or that they have disputable claims in their cases. A journey through the adaptative process of experience and time, however, leaves the defense attorney, now seasoned, with a totally different outlook on the criminal justice and plea bargaining system. The defense attorney is taught to avoid trial since there can be certain court-imposed sanctions on the attorney who insists upon being an adversary. He is taught, or told, that prosecutors' files may be closed to him if he continues to file Bills of Particulars and Motions For Discovery, that certain prosecutors may refuse to plea bargain if he files legal challenges, and that the state will attempt to obtain much harsher sentences if the defendant is convicted after trial.

Eventually, the defense attorney begins to presume that a plea bargain will be obtained in every case, and only if that option fails does a trial emerge as a possible approach. The "deals" often appear excellent and irresistible. This leads Professor Heumann to contend that much of what a defense attorney learns to adapt to in relation to plea bargaining does not rest on a case pressure foundation, that the properties of the cases themselves will have the same effect on attorneys in high and low volume jurisdictions, and that there is only a minimal variation in case resolution in high and low volume courts.

Examination of the adaptation process for prosecutors leads to results similar to those found in defense attorneys. The main distinction is that the prosecutor finds that he has the power to force the negotiation of cases as well as the responsibility to expedite these negotiations. The experienced prosecutor also has learned that he should not leave the sentencing to the judge after the trial, but instead should resolve sentencing between himself and the defense attorney in their plea bargaining sessions.

Finally, Professor Heumann examines what has happened to the judge in the plea bargaining situation and what part the judge plays in this phase of the criminal justice system. It becomes apparent that neither the new judge nor the experienced judge is preoccupied with developing justifications for plea bargaining, and, in fact, is aware, almost from the outset, of the advantages of the

plea bargaining system on the handling of case volume. This is in contrast with the adaptation process for the prosecutor and defense attorney as previously developed by Professor Heumann. The judge's significance in the plea bargaining process rests basically upon his power to upset a negotiator's position. This tends to confine prosecutors and defense attorneys within certain parameters of plea bargaining, and to set out boundaries enabling them to perceive what the judicial officer will accept or reject. This acceptance or rejection by the judge is a tacit acquiescene by the judiciary to plea negotiating, and illustrates the willingness of the judiciary to delegate these powers to prosecutors and to defense attorneys.

In concluding his book, Professor Heumann suggests that new judges, prosecutors, and defense attorneys are not well prepared for the plea bargaining aspects of the criminal justice system by their law schools. Further, the author concludes that the plea bargaining process is an inevitable part of the judicial system, and that the excuse, or explanation, for plea bargaining as an outgrowth of case pressure is unfounded and that negotiations will exist no matter what size the caseload. Plea bargaining *is* an intrinsic part of our judicial system and has a very important role to fulfill. Professor Heumann, therefore, concludes that additional plea bargaining styles and negotiation methods should be considered rather than the elimination of plea bargaining itself.[5] These reforms could include putting the entire plea-bargained deal on the record as soon as it is negotiated, and resorting to arbitration in the resolution of some criminal disputes. Nevertheless, it appears that the method of plea negotiations now existing in our judicial system is one which will exist for some time to come. The impetus to negotiate is always present. It appears from our experiences in the criminal justice area that as long as prosecutors find themselves in situations where their witnesses are missing, evidence has been lost, the overall case is weak, or there is a possibility of complete exoneration, they will be willing to plea bargain. On the other hand, the defense attorney will always attempt to plea bargain, provided his client has indicated guilt or has such a past criminal record as to warrant entry into negotiations.

---

5. He states that "reform policy ought not be geared toward the abolition of plea bargaining. The reason: the abolition of plea bargaining is impossible. . . . [T]he same time and resources should be used to consider how to reduce abuse within the plea bargaining system" (p. 166).