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

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BOOK REVIEW

HEUMANN—PLEA BARGAINING: The Experiences of Prosecutors, Judges, and Defense Attorneys. Chicago, Ill. The University of Chicago Press, 1978. Pp. 220.

Although Milton Heumann's study of plea bargaining adds nothing to our knowledge about how the plea bargaining process works,¹ it poignantly describes how the new prosecutor, defense attorney, and judge adjust to their roles in the process. Specifically, Mr. Heumann explains how and why the "novice to the criminal court is transformed into the 'eager-beaver' plea bargainer."² In brief, each concludes after a while that he best can discharge his professional responsibilities through the plea bargaining process.³ For most the journey to that conclusion, though short, is troubled; Heumann's study, which is based on extensive and repeated interviews with his subjects, sheds much light on a rite of professional passage little discussed in the existing literature.⁴

Fresh out of law school, the young Clarence Darrow wants to fight for his innocent client. As one subject admitted with some embarrassment:

The Defenders were on when I was in law school. . . . I suppose you have this feeling . . . that you are going to have the jury say not guilty, and walk your client out.⁵

The naiveté is understandable. Their criminal law and procedure teachers taught them how to analyze legal issues and—if the teachers were practical — what motions to file, thus reinforcing their belief that defense work involved researching the law, filing motions, and trying cases.

The neophyte is quickly disabused of this belief, however. He learns, first, that "the law" is largely irrelevant — in part because the defendant's guilt is usually quite clear and in part because he is so swamped with clients that he has no time to research the law.

I just didn't have the time to keep up and research this volume of cases that I had. You try and interview these people. You just try and keep

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1. See, e.g., S. BUCKLE, *BARGAINING FOR JUSTICE* (1977); J. BALDWIN & M. MCCONVILLE, *NEGOTIATED JUSTICE* (1977).

2. M. HEUMANN, *PLEA BARGAINING* 1 (1978).

3. *Id.* at 156.

4. *But see* Mills, "Brilliant and Cynical, a Legal Aid Lawyer Wins Freedom for Thousands of Muggers, Rapists, and Thieves," *LIFE*, Mar. 12, 1971.

5. M. HEUMANN, *supra* note 2, at 50.

those files straight. Appointments were being made, and the public defender was appointed when you weren't even there and you didn't even know you had a case. You'd have to run down to the clerk's office at the end of the day, go through all those cases to find out what cases you had. They would appoint a public defender when you weren't even there; they do it today sometimes. I'd go nuts just trying to find out who I was representing, never mind studying the law.⁶

Why bother reading all your Supreme Court decisions? It's good to have a couple of them handy, so that you can throw them out and intimidate somebody, but there is no point in being a constitutional law scholar to play this kind of game.⁷

Second, he learns that filing motions only irritates the prosecutor or judge, both of whom can and do "punish" defense counsel for the zealous assertion of his client's rights.

This young fellow I was telling you about. I sat down one day. I'm old enough to be his father. I met him socially, a personable young man. This occurred to me one morning. I came in and found motions this high, literally, and I knew I didn't have the time nor the interest to read them, and so I sat him down and said to him: "If you want to make money in the practice of criminal law, you're never going to do it by filing motions. If you have a reasonable defense in a case, you tell me what it is; you don't have to file a single motion with me. I'll dispose of the case. And if you don't have a reasonable defense, but it's a question of penalty, then I'm perfectly willing to talk to you about that, too. All you do when you file motions like that is that you get my back up. I'm immediately antagonistic, and the reason for that is self-preservation, because if every lawyer who handles criminal cases in this court were to do this to me I could never get my job done, so I have to do everything I can to discourage you from doing this."⁸

Third and most importantly, he realizes that threatening but foregoing trial benefits his client.

They [the prosecutor] are always doing most everything to dispose of cases. "You want to plead to this, we'll give you that. We'll drop this, we'll drop that. Plead so that we can move the file." This kind of thing . . . I don't like plea bargaining, but unfortunately it helps someone who's guilty. Everything is done to encourage someone to plead guilty. And if someone is guilty, or is just willing to plead guilty, they'll give him the courthouse.⁹

The lesson thus learned is painful. Since the young attorney was not taught to plea bargain while in law school, he has no idea what to do.

6. *Id.* at 55.

7. *Id.* at 88.

8. *Id.* at 64.

9. *Id.* at 72.

Scared, anxious, uncertain, he tries his best, fares poorly, and learns slowly — by experience. When asked how he learned to bargain, one attorney sighed:

Well, there are no courses given on it. It's like. . . Well, I guess you could analogize it to making love. You know, it's something you can't teach; you can't put it in a book; you can't give a lecture on it. But, like making love, you do it enough times, you learn to like it, and you'll get good at it.¹⁰

Convinced that plea bargaining serves his client's interests better than would a trial and proud of his ability to get that client a "good deal," the attorney who initially had dismissed plea bargaining as a disreputable practice embraces it enthusiastically.

The young prosecutor is as idealistic as the young public defender. He believes cases should be tried, and he dislikes plea bargaining. Inexperienced as well, he typically adopts a hard line which reflects his convictions and also masks his fears.

[A] new prosecutor is more likely to be less flexible in changing charges. He's afraid. He's cautious. He doesn't know his business. He doesn't know the liars. He can't tell when he's lying or exaggerating. He doesn't know all the ramifications. He doesn't know how tough it is sometimes to prove the case to juries. He hasn't got the experience, so that more likely than not he will be less flexible.¹¹

He, too, comes around. First, the prosecutor loses his sense of horror and outrage as he deals with case after case; dispositions that once would have seemed inexcusably lenient eventually strike him as wholly appropriate. Second, he learns that the only open question in most cases is the appropriate sentence, since the defendant's factual and legal guilt is clear. Gradually, the prosecutor comes to see his job as evaluating the seriousness of a defendant's guilt rather than the establishing of it.

After a matter of time you just see so much that you really. . . You must always remember there are always two sides to the story, even though somebody might've gotten belted with a pipe, and it is a serious offense, but there might be something in mitigation to that. You know, there are some statutes that are mandatory minimum time. Assault in the third degree with a dangerous weapon is mandatory time of one year. Now if we stuck to that statute and subsection, if we stuck to that, we'd be trying everything out there; there'd be a lot of people going away for a minimum of one year. But a lot of times we allow a little flexibility; we give them assault in the third but not with a dangerous weapon, and then we or the judge look at the facts. This kid today was an example, the kid who hit the guy on the wrist with a pipe. Now technically he was guilty of assault with a dangerous weapon; he could have been charged

10. *Id.* at 78.

11. *Id.* at 97.

with assault in the third with a dangerous weapon, and the mandatory minimum one year in jail. But the kid had a clean record, the fight was no big thing, so I gave him assault in the third, under subsection one, which is not with a dangerous weapon, and we were looking for a suspended sentence. That's what the judge did, thirty days suspended.¹²

And once a prosecutor is "burned" — that is, once he has lost a "sure" jury case — he seriously considers any plea offer.

Now, any case, particularly a jury case, can be lost. Or, you can try a case, and try it for several weeks, and very often not get any result in terms of punishment for the defendant that you couldn't have plea bargained for in the beginning, and I just feel that to try cases for the sake of trying cases, and for the sake of giving the judge the say in what the individual is going to get, I just think, that from a practical point of view, it is absurd. What is the sense, from the state's point of view, in going to trial in a serious criminal case; of bringing in witnesses; tying up a judge for two weeks; bringing in twelve angry men, or fourteen, because you need two alternatives; paying them; feeding them for a couple of weeks; tying up the sheriffs; transporting the guy back and forth from the jail — all of this for a trial, when the same result, or just about the same result, or just as good a result from everybody's point of view could have been worked out here at the desk. I just don't see it. The only reason I could see for doing it is, well, you could say, "It's the judge's prerogative to decide what an individual is going to get." Well, I just don't buy that.¹³

Judges come to bench with varying degrees of experience, particularly in criminal law. Those who have practiced in the criminal courts adopt a policy toward plea bargaining almost immediately. Those who have not practiced in the criminal courts soon adopt a policy. Both groups invariably conclude that bargained pleas make good sense. Like defense counsel and prosecutors, judges learn quickly that most defendants are factually and legally guilty. Although judges continue to believe that trial is appropriate where the issues are "really" contestable, they dismiss the trial as a time-consuming, expensive ritual in most cases. As one judge said:

I don't think that a trial necessarily represents a failure in the plea bargaining system. I really believe that the trial is a necessary adjunct of the system.¹⁴

What all this means to Mr. Heumann is that plea bargaining is here to stay — not because it is an inevitable consequence of crowded dockets but because it is a rational response to the realities of the criminal justice system. Most defendants are factually and legally guilty, and the elaborate adversary machinery dictated by the Constitution for the determination

12. *Id.* at 105.

13. *Id.* at 113-14.

14. *Id.* at 150.

of guilt or innocence is simply irrelevant. One of Mr. Heumann's subjects put the point bluntly:

No, no, no. How can you outlaw plea bargaining? How can you outlaw a screw, and how can you outlaw gambling, and how can you outlaw drinking? There are three or four things that are going to be with us forever. There they are: screwing, drinking, gambling, and plea bargaining.¹⁵

The foregoing, which roughly summarizes the content and the "flavor" of the Heumann book, will raise many questions in the mind of the reader. For example, a question which naturally occurs to one who teaches criminal law is whether he should teach the course differently. The young prosecutors and defense lawyers (one of whom was, incidentally, a Wake Forest graduate) all agreed on one fact: their criminal law professors did not prepare them for practice in the criminal courts.

What I consider to be the classic fault in our legal education is that we go through law school reading appellate cases. We really don't know the first . . . thing about a guy coming in and saying, "Look, I did this" and having to go over and negotiate for him, try a case for him, select a jury for him. We never got into this.¹⁶

Any apprenticeship is a trying experience. In his frustration and anxiety, the novice naturally blames his law professor for failing him. The complaint, though understandable, is groundless as the respondents themselves unconsciously conceded.

In the first place, all the lawyers surveyed agreed that they "learned" how to bargain within their first year of practice. No law teacher I know believes that he has prepared his students to practice immediately upon graduation. All law teachers recognize that the graduate will undergo an apprenticeship following graduation during which he will learn many things that cannot be taught effectively in law school. The rapidity with which the young lawyer masters bargaining skills justifies the teacher's decision to concentrate on other skills the lawyer is less likely to acquire during his apprenticeship.

Chief among these skills is the ability to analyze facts in light of often conflicting legal principles or rules. By focusing substantively on the general theory of the criminal law and on the law of a few specific offenses such as homicide, the criminal law professor can train the student to analyze facts in order to decide whether the defendant would be found guilty of an offense and if so of what particular offense. The homicide offenses are designed to differentiate the more culpable killer from the less culpable killer. Thus, the student must examine the facts of the particular case in light of the principles or rules embodied in the categorical definitions of

15. *Id.* at 162.

16. *Id.* at 49.

homicide. In this way the student learns how to evaluate the defendant who kills as more or less culpable. The question of relative culpability is *the* question in any plea negotiation. Moreover, because the prosecutor, defense counsel, and judge all discuss the question in the formal language of the law, the student must be familiar with both the theory of the criminal law and the specifically applicable statutory language. The student who was never taught, for example, the theoretical difference between first degree murder and voluntary manslaughter and, furthermore, was never taught to analyze various fact patterns in light of those theoretical differences would be far less prepared to negotiate a plea successfully than were the young lawyers sampled by Heumann.

Even though a successful plea negotiator admittedly needs skills other than the ability to analyze facts in light of arguably applicable legal principles, many of those other skills cannot be taught. The ability to establish rapport with the other lawyer and to sense what the other lawyer is willing to give is very important, but that is not a skill easily taught — if, indeed, it can be taught at all. Some kinds of knowledge beyond that conveyed in the traditional law school course are helpful, too. The successful plea negotiator needs to know his opponent and the judge, but knowledge so particular and fleeting as that probably cannot and certainly should not be taught in law school.

The preceding is more than one criminal law professor's defense to the charge that he does not prepare his students to plea bargain. It is a warning that the reader should not accept all that is implied as fact in this interesting book. Mr. Heumann, who appears to accept as gospel whatever his interviewee tells him, should have remembered that those immersed in the practice are often its least accurate chroniclers.

JAMES E. BOND*