Arthur I. Rosett and Donald R. Cressey, ***Justice by Consent: Plea Bargains in the American Courthouse.*** Philadelphia: J.B. Lippincott Company, 1976. 227 + xvi pp. $10.00 (cloth), $4.50 (paper).

Lynn M. Mather, ***Plea Bargaining or Trial? The Process of Criminal Case Disposition.*** Lexington, Mass.: Lexington Books, 1979. 171 + xi pp. $16.95.

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It is appropriate that these two books be reviewed together. Not only do they both deal with plea bargaining, but they also share key concepts and reach similar conclusions, in part because each work influences the other. Mather did her study in Los Angeles County in 1970, published two articles from it (1974a, 1974b), and completed her doctoral dissertation on the subject in 1975. Rosett and Cressey apparently were working in and observing the California courts during the same period. Mather cites Rosett and Cressey and they cite one of her articles (1974a). In most respects, however, these are very different books.

Rosett and Cressey wrote their book "to give nonexperts an idea of how the guilty plea system operates and why it is so important" (p. v.). It both criticizes and praises the practice of plea bargaining in an analysis that examines negotiated justice from every relevant perspective. Most of the book follows the felony case of a fictitious and typical defendant through the many stages in the criminal justice process. A typical judge, public defender, and prosecutor are introduced also. The process of American criminal justice is then unfolded one step at a time by imputing to each courthouse actor the average perspectives that, according to the authors' experiences and readings, exist in the real world. Then Rosett and Cressey examine, through the eyes of each character, ordinary court procedures and interactions between participants. The narrative periodically examines how society's interests, perceptions, and needs influence court processes. In this way, Rosett and Cressey are able to present a side of plea bargaining that escapes both public scrutiny and superficial research endeavors.

All the standard criticisms of plea bargaining are restated and some new ones are added. This is not a polite analysis of negotiated justice. The negative underside of the process is exposed to as much condemnation and indignation as can be

found in most highly critical treatises on the subject. At every stage, the authors show why plea bargaining is a part of the system and what damages and dangers are inherent in dispensing justice this way.

There is just too much discretion in the system for Rosett and Cressey. But though this is the cause of plea bargaining, the frequent suggestion to eliminate discretion is seen as overly simplistic. Discretion, they contend, is necessary because justice is not done unless individual circumstances are taken into account and community values considered. So the problem is not that court officials are granted discretion but that their discretion is too broad, with the result that it tends to become routinized. When discretion is applied to classes of cases rather than individuals, justice is not achieved.

Why is discretion so broad that court officials perform routinely and thus wrongly? The answer is not fully developed but the major villain is the state legislature. State lawmakers are forever escalating punishments for offense categories or setting mandatory sentencing structures in an effort to curb crime rates. But the officials who see offenders on a daily basis and must administer the law know that all robbers and all burglars are not alike. Some do not deserve long prison sentences. So court officials, who probably are more committed to doing justice than simply to following the specific mandates of the law, are inevitably left with the need to use their discretion to make sure offenders get no more punishment than they deserve. This is why court officials negotiate reductions in charges and lenient sentences. They are responding to the higher principle of justice.

Rosett and Cressey build their argument on two observations. First, it is their perception that court officials are good and hard-working people who are dedicated to doing justice. They are not basically oriented to conviction, win-loss records, or reelection, and they are not puppets marching to a single beat drummed by an overarching organization that pursues the simple goal of efficiency.

The public defender's office, the prosecutor's office, and the judiciary are depicted as separate organizations with distinct and largely incompatible missions. When they come together in the court's work, however, a "group sense of justice" is hammered out (p. 85). This is not done in spite of plea bargaining practices but through them. Indeed, a "subculture of the criminal court" emerges in which all participants simultaneously perform their constitutional tasks and strive for justice. Rosett

and Cressey believe that court officials generally retain the integrity of their positions even when negotiating pleas. They cooperate with each other but only in the development and application of a "group sense of justice."

This book will torment the reader who needs to pigeonhole authors. Rosett and Cressey are severely critical of plea bargaining yet they do not advocate eliminating the discretion that makes it possible or necessary. They acknowledge the subcultural dimensions of court decisions but argue that they serve important values.

One thing that bothers me about the book is that the authors are overly modest. Many readers will see this book as a collection of offhand and considered opinions by two scholars knowledgeable about plea bargaining. And except for some subtle allusions to their direct involvement in or observation of criminal courts, the authors never claim more. Certainly they never go so far as to call it an empirical work. But is it? Well, each author had intimate contact with criminal justice agencies as participant, observer, or both. The book is based on years of observation, experience, and reading. During their involvement with the criminal justice system and their association with each other, they tested their ideas and the presuppositions of their respective disciplines (hypotheses?) against the empirical world. Cressey's (1955) important work on embezzlers employed the principle of analytic induction: a search for negative cases to test the limits of a hypothesis or a theory, which stands so long as no negative cases are left unexplained. Although only implicit in this work, analytic induction is being employed when presuppositions are stated and then tested against the everyday reality of criminal court processing. Rosett has been a prosecutor, and one may assume that he went through the same scrupulous procedures in testing his preconceptions as did Cressey. The method that may have been employed by Rosett is what Thomas Cottle (1978) has called "observant participation," which stresses participation (in contrast with participant observation) because the observer is fully immersed in the work being done. It also means that the observer intends to do more with the experiences than passively watch them. In a real sense, then, this work may be considered an empirical study.

If there is something wrong with the book (and a reviewer can always find something) it is that Rosett and Cressey did not formally address the macrostructure of American criminal

justice. Courts, we are told, respond to their own sense of justice and that of the community, and to particular features of criminal cases. Legislatures, in their infinite lack of wisdom, also respond to the community according to the authors. But community pressure is also the reason why legislatures get tough on crime. How does the community transmit a message that spurs the legislature to stiffen penalties and emphasize retaliatory justice and yet simultaneously prompt local courts to seek leniency through negotiated justice? This question could be answered in a number of different ways. One might be that legislatures are responding to a distinct community comprised of powerful interest groups or ruling elites threatened by street crime. But Rosett and Cressey stop their analysis just short of examining the source of legislative wrongmindedness.

Overall, this is a splendid book, offering something to the classroom teacher, the student, and the professional scholar. It has good sociology in it. For example, the authors argue that in ambiguous cases (where guilt of the defendant is in doubt), prosecutors seek a guilty plea not to secure another conviction but in order to legitimate authority.

Mather's work is an ethnography of Los Angeles County Superior Court. She used an ethnographic method to study the culture of the court because it reveals the shared knowledge and understandings of court participants and identifies organizing principles underlying their behavior. Attention is focused on the prosecutors, public defenders, judges, and private attorneys who frequently appear in court: the "courtroom regulars." Through a combination of unstructured interviews with these regulars and observation of court decision processes, Mather discovers an implicit set of rules that govern case disposition.

Court officials share the view that their major task is to dispose of cases fairly. In order to do this they make a "snap" decision that types a case as "light" or "serious" with an eye to the sentence most likely to be imposed. A light case is one that has a high probability of probation and no real likelihood of a prison sentence. Serious cases are those in which the offender is likely to be sentenced to state prison. Typing is based on the strength of the prosecutor's case and predictions of sentence and is the most important consideration in determining the disposition track a case will follow. Whether a case will be resolved by an ordinary plea bargain, a slow plea of guilty, a negotiated acquittal (through submission on the transcript of the preliminary hearing—a procedure available in Los Angeles), a full adversary trial, or whatever, the decision begins with

typing. Mather notes that in the ideal model of justice, sentence is not considered until after guilt has been established formally. Courtroom regulars in Los Angeles County presume guilt; they agree with the Queen of Hearts in *Alice in Wonderland*: "Sentence first—verdict afterwards" (Carroll, 1946:132).

Both light and serious cases are broken down further into "dead bang" cases (those with a high chance of conviction), "overfiled reasonable doubt" cases (those where there is a chance of acquittal on the original charge but a high likelihood of conviction on a lesser offense), and "reasonable doubt" cases (those where evidence does not clearly connect the defendant to the crime or show that a crime has been committed). In the last instance there is a chance of complete acquittal.

If there is a convergence of opinion between the prosecutor and defense attorney on a case, bargaining is usually straightforward. In light cases the prosecutor is not strongly interested in sentencing and judges usually follow a predictable sentencing pattern. However, when attorneys do not reach agreement between themselves or when the sentence is not predictable, the court officers often "chamberize." That is, the attorneys visit the judge in chambers and seek clarification, statements about the probability of different outcomes, or assurances on sentencing. This process may be explicit (when a judge forthrightly agrees to a sentence) or implicit (when the judge hints that if things are as they seem the attorneys might expect a certain sentence).

Actual discussions of cases between attorneys and between attorneys and judges involve more factors than probable sentence and strength of evidence. The circumstances of the offense and the defendant's prior record are also considered. Sometimes when prosecutor and defense attorney agree that a case charged as, say, a burglary is not a "real burglary," the prosecutor might "strike the priors" (i.e., agree not to introduce evidence of prior record) and get the case on a short cause court docket. This way the attorneys increase the prospect for a lenient sentence and one fitting the individual offender. Judges may be recruited in such bargaining in the interest of justice. Sometimes (on "optional" felonies) judges have discretion to give a misdemeanor sentence following a felony conviction. This is done often when an assistant prosecutor agrees with the defense that a technical felony is not a "real felony" but lacks the authority to reduce the charge. The prosecutor's

office had formal rules regulating what kinds of bargains assistant prosecutors could negotiate on their own and which required approval from higher up. Mather believes that her observations of the accommodations reached by court regulars empirically demonstrate the notion of a "subculture of justice" advanced by Rosett and Cressey.

In offering a detailed description of the process of criminal case disposition, Mather also seeks to demonstrate the value of ethnography in the study of law. The following excerpt shows the ethnographer's ability to apprehend the social organization of court practices. Cases are kept moving and handled routinely. They are not much influenced by the actions of individual attorneys.

> Note that the prosecutor's role in these "dead bang" marijuana cases was a passive one. He did not care about sentencing and was content to let the judge reduce the case to a misdemeanor. The D.A. office policy specifically restricted reduction of drug charges, but allowed dismissal of other charges (in conjunction with a conviction on the marijuana charge). Thus, individual D.A.'s were limited in their discretion, and most defense attorneys knew this. In the following marijuana case the defense attorney (private) was not familiar with the norms of the court. When the case was called, the attorney announced, "Ready for jury trial." The D.A. went over to talk to the attorney and they whispered for about a minute; then the attorney and his client went outside. A few minutes later, both attorneys were chamberizing with the judge regarding the likely sentence on a change of plea. In chambers, the judge heard a brief description of the case and said, "As a matter of course, I'd made it a misdemeanor by Penal Code Section 17, and impose a small fine." The defense attorney seemed to think (and acted with his client) as if he had been able to arrange the misdemeanor disposition *because* of his "threat" of jury trial. But, in fact, the case was a typical one (young defendant with no record, employed, small quantity of marijuana) and the final disposition was quite standard (guilty plea to felony with misdemeanor sentence). This disposition depended upon the *judge's* agreement to a misdemeanor sentence; the prosecutor had conceded nothing—he simply suggested to the defense attorney that he chamberize with the judge. [P. 70]

In general, Mather accomplishes both of her purposes; there is a clear rendering of shared meanings, perspectives, and principles upon which case disposition decisions are based and ethnography is shown to be an apt methodology.

There are two minor shortcomings, however, that are worth mentioning. Mather's use of statistics to strengthen her argument is sometimes inappropriate. At one point Mather discusses the importance of attorney predictions of conviction probabilities in reaching a decision on how to categorize a case. A table of "conviction rate by offense" is offered, showing the actual conviction rates after the end of the study period. However, the attorneys Mather observes and interviews do not mention actual rates but rather categorize cases based on their *perceptions* of the conviction rate.

Second, though this ethnography is important for the reasons stated above, I was troubled by the relative unimportance of social variables in Los Angeles case dispositions. At several points during my reading of the book and after completing it I was made uneasy by its favorable evaluation of attorneys. The typification of a case by court personnel, which ultimately determines the way it is disposed, is not seen to be heavily affected by considerations of race, sex, or socioeconomic or community status. Legal factors are the routine and primary bases of negotiated justice. If bias with respect to race or class enters the process it must occur irregularly, at the police level, through the presentence report, or it must be well hidden because no persistent social biases are apparent in the negotiations among courtroom regulars. If this line of reasoning is continued, one might wonder if Mather's rapport with court officials was solid enough to elicit confessions of extralegal bias and if the ethnographer's observation of lawyer work was colored unduly by information gained from interviews. In other words, did Mather hear the company line and then "observe" it or is this an accurate in-depth ethnographic rendering of disposition practices in a criminal court? The question cannot be answered satisfactorily. But one way to address this issue is to consider where this research fits into the literature on sociology of law.

For more than fifty years, statistical studies have advanced contradictory conclusions concerning the significance of extralegal factors in sentencing. Recent research, though still controversial, tends to show that when race and class are implicated in sentencing, their impact is small or indirect. A substantial number of researchers have found no race or class effects in court disposition processes. Mather's description of the internal workings of a criminal court generally supports this latter research. It may be inferred, then, that investigators should look elsewhere for the source of social inequities found in the final dispositions of criminal courts. Major social bias does not appear to contaminate the decisions of attorneys and judges dealing with criminal cases.

The two books generally agree on what direction reform efforts should take. Neither recommends the elimination of plea bargaining. Both Rosett and Cressey and Mather endorse some plea bargaining as a reasonable means of assuring individualized justice, and both books suggest that the defendant should be more actively involved in the actual negotiations in order to

reduce the sense of injustice frequently expressed by the accused. Rosett and Cressey go well beyond these points in charting a path to reform. They recommend the elimination of the "zone defense" policy of public defender's offices (pp. 120, 173), more individualized plea bargaining, a breakup of huge downtown courthouses, greater involvement of the community, and a general reduction in the punishment schedule in American criminal statutes. Practitioners and scholars interested in the American criminal court should consider both books essential reading.

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