Milton Heumann, ***Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys.*** Chicago: University of Chicago Press, 1978. 220 + viii pp. $15.00.

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> *"Law" is primarily a great reservoir of emotionally important social symbols. . . . Though the notion of a "rule of Law" may be the moral background of revolt, it ordinarily operates to induce acceptance of things as they are. It does this by creating a realm somewhere within the mystical haze beyond the courts, where all our dreams of justice in an unjust world come true.* [Arnold, 1962: 34][1]

BARGAIN JUSTICE IN AN UNJUST WORLD: GOOD DEALS IN THE CRIMINAL COURTS?

Plea bargaining is an appropriate criminal justice symbol for the 1970s. The attention lavished upon it suggests how far we have moved from the idealism of earlier times toward a more pragmatic approach in which we frankly acknowledge that "wicked people exist" (Wilson, 1975:209) and get down to the brass-tacks, hard-nosed, bottom-line problem of how best to dispose of them. We abandon profound philosophical questions about the nature of justice in the criminal system and suspend painful debates about the real causes of crime in order to deal, instead, with more technical questions about such internal practices as plea bargaining: Has it always been with us? Is it the result of caseload pressure? Is it more efficient than trials? Should judges play a more active role in negotiations? Should the negotiations become a part of the court record? How do attorneys learn to plea bargain? Of course, focusing attention on these questions guarantees that the more profound ones will not be asked and the basic problems remain unsolved.

Not that plea bargaining is unimportant. Its ubiquity ensures that it cannot be ignored. But the real significance of the practice lies in what it tells us about the values of a criminal justice system that created plea bargaining and now cannot do without it, rather than in the narrower issues that seem to dominate current debate.

Can plea bargaining be abolished? Of course not—not in a

[1] See also Edelman (1964) for a discussion of the way in which the symbolic language of law mediates between myth and reality.

system in which it has come to play so central a role. *Should* it be abolished? This question can only be answered with an understanding of the social context in which plea bargaining operates and a consideration of the available alternatives. But such understanding will not come from lawyerly analyses that strive to appear neutral, nor can it be limited to merely technical discussions. Rather, it must reflect one's image of what the entire criminal justice system should be. Should it be a system in which defendants and citizens participate fully in decisions that profoundly affect their lives, or one in which these decisions are made for them by trained legal professionals? A system that provides a forum for community education about the causes of crime and patterns of law enforcement, or one in which these issues become the exclusive domain of lawyers, to be discussed privately in their offices rather than in open court? A system that scrupulously protects the rights of accused persons and subjects the behavior of its own members to constitutional standards, or one in which the efficient disposition of cases is emphasized and the apparent guilt of defendants used as a justification for expediency? Should it be a system that carefully and openly examines the causes of crime and attempts to develop fundamental solutions, or one that locates criminality exclusively within individual defendants, deciding privately what should be done with them and then offering incentives to encourage acceptance of such unilaterally determined solutions?

These are the kinds of questions that must frame an evaluation of plea bargaining. Milton Heumann's book fails to ask or answer them.

I. The Criminal Court as Marketplace

Plea bargaining is an especially appropriate symbol of contemporary criminal justice. The term itself (along with its accompanying rhetoric) conjures up the free market imagery that has become such a fashionable rationalization in law. The economic analysis of law, able to cloak fictions and mask bias beneath the mantle of neutrality in other contexts (cf. Leff, 1974; Baker, 1975), now makes its presence felt in the language of criminal justice.[2] Criminal lawyers ask, "What's this case

[2] Although economists have turned their "analysis" to other areas of criminal justice (see Becker, 1968; Posner, 1972), they have been slow to focus directly on plea bargaining. We anxiously await painstaking studies of the indifference curves of typical defendants faced with various plea bargaining

worth?" Researchers investigate how the lawyers learned to arrive at a "fair price." And the Supreme Court has said that it will not examine the terms of these "contracts" when entered knowingly and voluntarily by defendants, after the "give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power" (*Parker* v. *North Carolina*, 397 U.S. 790, 809, 1970).

Like so many economic metaphors in law, however, the suggested image of plea bargaining fails to comport with the underlying reality. Consider, for example, the "give and take" approved by the Supreme Court in one of its latest proclamations on plea bargaining. The defendant in *Bordenkircher* v. *Hayes* (98 S. Ct. 663, 1978) was indicted for passing a bad check of $88.30. The prosecutor offered Hayes a five-year prison sentence if he would plead guilty but threatened to invoke a habitual criminal statute (that mandated life imprisonment) if he did not. Hayes refused, was convicted in a jury trial, and received a life sentence.

The Court approved this "bargain" because the defendant was "free to accept or reject the prosecution's offer" (98 S. Ct. at 668). Milton Heumann tells us that the "[o]ne thing that stands out above all else . . . is that plea bargaining benefits most defendants" (p. 84). In the context of a system that consistently punishes those who resort to trials, how could it be otherwise? Cases like *Hayes* reveal the extent to which plea bargaining affords defendants the freedom to make only Hobson's choices, beneficial and benign only in comparison to the draconian alternatives.

Milton Heumann's book makes painfully clear that the Supreme Court's rhetoric about "free choice" is totally inapplicable to defendants in this setting. Here is a carefully researched and written book about plea bargaining whose author appears never to have talked to a defendant. Heumann talks about the "collective cultivation of figures" and assures us that he even "established rapport with many 'low visibility' actors" (p. 17), but still there is no mention of defendants.[3] If

choices (so that prosecutors can make their deals more scientifically and efficiently) and theoretical debates about whether a specific form of plea bargaining is Pareto optimal. For beginning steps in this direction, see Nagel and Neef (1976).

[3] We do not wish to condemn Heumann for failing at something he did not set out to do. He was studying the way in which neophyte lawyers become "eager beaver plea bargainers" and it is understandable that he did not *concentrate* on defendants. But not even to talk to them? This "oversight" suggests

there is arm's length bargaining going on in the offices of criminal lawyers, it does not appear to involve defendants.

Decisions that have profound consequences for defendants are made by legal professionals who are largely unaffected by them (or affected in ways counter to the interests of their clients). Lawyers are trained to reduce complex human situations to their merely legal dimensions (cf. Noonan, 1976). Clients are abstracted from their social context, "commodified," rendered "juridic subjects" (Pashukanis, 1951) without differentiated individuality. Their cases are objectified in terms of normative categories that signify their worth in this marketplace (Sudnow, 1965). Each case becomes part of a docket that must be "moved." The more bargains the legal worker strikes, the more productive he has been.

Indeed, Heumann's book makes clear that if there is one dominant force in this marketplace, it is the prosecutor, albeit with the judge's blessing (cf. Levin, 1977). The "balance of advantage" that Goldstein (1960) wrote about nearly a generation ago still favors the prosecutor and is augmented by plea bargaining. Prosecutors wield enormous power in this system, power they are not prepared, trained, socialized, or taught to use in fair and humane ways. Some may do so in spite of the court system in which they work, but not because of it.

Heumann captures the attitude of prosecutors confronting defense attorneys who are young, brash, or naïve enough to file motions and request the constitutional protections supposedly afforded all defendants. One defense attorney reported that attitude as: "Don't you get near us with a motion or we're going to flex our muscles" (p. 63). Another was told by a judge when he introduced himself on his first day in court: "Just play along with everybody else. Don't file a lot of motions . . . and don't make a lot of noise" (p. 63). Not surprisingly, one defense attorney later bragged: "I've been here eight years and never filed a motion" (p. 63).

Are these arm's length transactions between shrewd bargainers with equal power? Justice Stewart has described for us "the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty" (*Bordenkircher* v. *Hayes*, 98 S. Ct. 663, 668, 1978). The structure of the criminal process ensures that prosecutors will be very persuasive in pursuit of this interest and

how insubstantial was the shadow that defendants cast over these bargaining tables.

that defendants will relinquish more than their right to plead not guilty.

Heumann confirms, as others have suggested, that the criminal court system is actually less adversarial than most marketplaces. Rather, a friendly, working consensus is constructed by a group of professionals, typically white males, who share middle-class values, stereotypic perceptions of defendants, ignorance about the rest of the criminal justice system, and law school socialization.[4] Platt and Pollock (1974) have shown what happens to those public defenders, who, by reason of their activism and political beliefs, fail to "fit in." Defendants are "processed" by this system rather than defended, pawns in a "confidence game" that is often poorly played.

The ease with which Heumann gained access to the plea bargaining sessions is also revealing. None of the attorneys expressed reluctance at having him sit in, no special precautions appear to have been required to guard the defendant's privacy, and at least one attorney actually asked Heumann's advice about a case. Like most social scientists who study this process, Heumann did not seem to think it necessary to get the defendant's permission, even though the matters discussed were highly personal. Like the patients and inmates of other public institutions, the private lives of defendants become the public business of insiders and their confidants when they are processed here.

Heumann's book is especially valuable because it gives us another well-documented look at the criminal justice "marketplace" in which pleas are bargained and deals struck, confirming the pandemonium and confusion that exist in the lower criminal courts. This is not a system that encourages personal or professional reflection or permits systematic study by the participants. This book, as well as personal experience, suggests that the system is largely out of the control of the participants, who instead are "muddling through," trying not to appear incompetent or unreasonable, long since having lost hope of accomplishing anything important or innovative.

It certainly gives lie to recent claims that the criminal courts really "do justice," failing only to make the right impression (Silberman, 1978). This system inflicts its justice on the same group it always has, the poor and powerless, and it is the

[4] Actually, the alignment of actors frequently will shift over the course of a case. At some times, prosecutor and defense attorney may be aligned against the defendant, at others the "traditional" adversarial stance may be adopted.

same brand of justice it has dispensed for more than a century—imprisonment—a remedy never proven effective, let alone just.

II. Losing the Battle to Win the Bargain

Two basic and quite related explanations have been offered for the existence of plea bargaining. First, many scholars have suggested that it results from heavy caseloads or "case pressure" in the criminal courts. In response to this pressure, attorneys employ methods of case disposition more expeditious than the trial. Foremost among these is the plea bargain. Second, it has been suggested that the plea bargain is essentially a bureaucratic phenomenon. The organizational structure of the criminal court system, in which "adversaries" have far more in common with each other than with their clients, produces a working relationship much more conducive to a "bargain" than a "battle." Heumann purports to disconfirm both of these standard explanations and the sweeping nature of his arguments requires extended treatment.

A. Time Has No Sympathy

Unfortunately, in support of his first claim—that case pressure plays an *in*significant part in plea bargaining—he presents only data that are either irrelevant or highly equivocal. To begin with, we are given historical data to the effect that as far back as 1880 trials have never been a "particularly popular" means of case disposition (p. 28). Of what significance is this? Heumann seems to be assuming that since case pressure *must* have been lower in the earlier time period, the absence of a higher trial rate is telling. But the assumption of significantly lower case pressure needs to be documented rather than merely asserted, especially since there is reason to question it. Indeed, by 1880 the American criminal justice system had already undergone rapid growth, the per capita rate of incarceration had increased several fold over previous decades, and it is not unreasonable to assume that pressures on court personnel had greatly intensified.

Second, Heumann presents a comparison of trial ratios between high and low *volume* courts for the years 1880-1954. He prefaces these data by noting that "[t]his test is at best 'rough' because without data on the number of prosecutors and judges working in the court, we cannot be sure that volume reflects pressure" (p. 28). Indeed we cannot, and in the absence of such data this test is not "rough" but no test at all. The case

pressure hypothesis is fundamentally psychological and has little to do with gross volume levels. It seems fair to speculate that higher volume courts may have had greater numbers of people working in them and thus did not necessarily experience greater case pressures. Without the crucial missing data, his numbers tell us little. We are indebted to Heumann as one of the first to bring a historical perspective to bear on this topic, but we need more data before we can interpret his finding.

Finally, however, Heumann does provide a comparison that corrects for personnel. When the criminal jurisdiction of lower courts in Connecticut was increased in 1971, fewer cases were bound over to Superior Court. Case volume was roughly halved in the latter while personnel levels remained the same. Still, the rate of trials remained approximately unchanged—suggestive evidence against the case-pressure hypothesis, but certainly not conclusive.

For one thing, Heumann ignores the possibility that attorneys and judges had adjusted to the earlier caseloads, developing personal justifications and procedural norms that were based on plea bargaining. When the pressures that had produced plea bargaining subsided, the norms may have persisted. Large institutions are characterized by high inertia and the social realities created within them resist change.

More importantly, perhaps, note that the original hypothesis does not specify the *level* of case pressure necessary to render plea bargaining inevitable or even functional. It may be that even at the "reduced" level in Connecticut, Superior Court attorneys were too pressed to try many cases. The percentage of trials may reflect a fairly constant number of unique cases refractory to most shifts in total caseload. There is a threshold question here and Heumann and others have not addressed it. How *many* cases can an attorney handle adequately? Should "adequate representation" be defined as that obtained by corporate clients or very wealthy individual criminal defendants? It is not uncommon for some attorneys to be preoccupied with a single case for weeks or even months. How many such cases could a public defender's office with fixed resources and a relatively constant supply of clients absorb before plea bargaining became necessary?

Ironically, the data that most strongly *support* the case pressure hypothesis—or a variation of it—are Heumann's own

interviews. Indeed, once he begins to quote the attorneys, almost every few pages contain one or another comment affirming that too many cases create pressure to engage in plea bargaining.[5] But the "case pressure" notion is ambiguous and Heumann's data do suggest a refinement. His quotations make it clear that *time* rather than case pressure seems to dominate the attorney's life. Lawyers lack the time to "have a romance" (p. 49) with each case, to take on the added work that filing motions and going to trial would entail. (Indeed, the major sanctions attorneys employ against one another are temporal—refusals to cooperate that increase the time required to handle a particular case.) It is also possible to have only a few cases of exceptional complexity and still feel the time pressure to plea bargain on some of them. Such pressure gives attorneys an incentive to simplify their cases, to conclude, along with Heumann, that most cases are "devoid of any legally disputable issue. These cases, as one defense attorney phrased it, are 'born dead' . . . [having] few avenues for legal challenge" (p. 60).

B. Facing Reality

Heumann is even less convincing in challenging the second standard explanation for plea bargaining—that it represents a bureaucratic modus vivendi between persons closely related by institutional role as well as background. The major focus of his study is the way in which the "novice becomes an eager beaver plea bargainer" (p. 1). He prefers to describe this process as "adaptation" rather than "socialization" in order to deemphasize the role played by "agents" employing rewards and sanctions.

He claims that newcomers, rather than being taught about the organizational context of the criminal court, "simply learn about an environment that differs from what they expected" (p. 2). This distinction is crucial to his argument: "The learning component refers to the newcomer's discovery that the reality of the local criminal court differs from what he expected" (pp. 2-3). The prevalence of plea bargaining does not "reflect the 'success' of the court's reward and sanction mechanism," but rather "the associated constraints that the 'realities' of the case characteristics impose" on attorneys (p. 3).

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[5] One defense attorney told Heumann: "I don't particularly want to try cases. You always got so damn much to do, we've got so much work. Why, every time a trial starts and collapses, why, it's almost a sense of release. I can get back here and get my head a little bit above water . . ." (p. 86; see also p. 55, 56, 62, 64, 70, 73, 83).

The significance of this rather confused point becomes clearer when Heumann specifies the "case characteristics" he has in mind. Attorneys do not plea bargain because of case pressure, or the reward structure of the courts, or peer socialization. No, plea bargaining has become the "preferred, ubiquitous, and inevitable form of justice in this country" (as his dust jacket declares) because nearly all defendants are guilty! How does he know? Because the lawyers he interviewed told him so.

The lawyers, it seems, have come to this conclusion for a number of different reasons. Often the defendants "confess." Even in a system where "admitting" guilt is made to seem highly advantageous, the lawyers apparently believe these confessions, although they believe little else the defendants say. In part, this seems to bespeak a middle class concern for "reputation" and an ultimate faith in the law—a confidence in the ability of established institutions to vindicate the innocent combined with the notion that the last thing any "respectable" or "normal" person would do is admit to a crime he did not commit.

But defendants are unlikely to share these beliefs. For many the question is not whether they will do time but rather when and under what circumstances. We simply do not know how many of them cop a plea to a crime they did not commit because they were offered an attractive deal, or because they had no faith in the capacity of the defense attorney to secure an acquittal at trial. The point is, however, Heumann does not know this either, nor do the lawyers he uncritically cites. The rest of his book and our own experience offer ample grounds to suspect that the number is not small.

A prosecutor tells Heumann how he "knows" that most defendants are guilty. In a typical case, he says, after some inconclusive preliminary negotiations:

> . . . you come back and say "Well, we'll take a suspended sentence and probation," suddenly [the defendant] says, "Yes, I'm guilty." So it leads you to conclude that, well, all these people who are proclaiming innocence really are not innocent . . . [M]ost people who are in court don't want a trial. I'm not the person who seeks them out . . . they come to us, so, you know the conclusion I think is there that any reasonable person could draw, that these people are guilty, that they are just looking for the best disposition possible. [P. 101]

Such "evidence" might have been enough for the prosecutor, but it should not have satisfied Heumann.[6]

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[6] Heumann's primary data are based entirely on self-reports. He asks his subjects to recollect their "adaptation" experiences, and also contrasts the comments made by attorneys and judges at different "stages" of their careers. But self-reported data are most susceptible to the kind of psychological distortion,

It is interesting that the estimates of guilt offered by Heumann and others—about 90 percent—coincide almost exactly with the percentage of cases plea bargained in the criminal courts. There is a rather obvious social psychological explanation for this "coincidence," but one curiously ignored by those who report these data. Accurate or not, a belief in the guilt of most defendants is clearly a *functional* attitude for plea bargainers to maintain. If most defendants are guilty, then the guilty pleas they enter seem much more appropriate and fair, and it is unlikely that many will receive a truly "bad" deal. If the organizational realities of criminal courts require most defendants to plead guilty, then such a belief eases the psychic conflict of those attorneys who convinced their clients to enter a plea rather than go to trial. Of course, if most defendants plead guilty, there is also less opportunity and little incentive to check on whether the original assumption of guilt was correct.[7]

Sudnow suggests that attorneys are greatly influenced in their bargaining not only by their estimates of guilt but also by the apparent turpitude of the defendant: "Both P.D. and D.A. are concerned to obtain a guilty plea wherever possible and thereby avoid a trial. At the same time, each party is concerned that the defendant 'receive his due'" (1965:262). According to Sudnow, the major socialization experience of new public defenders is learning to recognize the features of a "normal crime" so that they can readily evaluate the proper punishment for the "obviously" guilty defendant.[8]

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self-justification, and dissonance reduction that would account for his major findings. Heumann fails to deal adequately with this methodological limitation or with the possibility that comments by "seasoned" plea bargainers were highly biased through self-selection (i.e., attorneys who were unable to adopt such a comfortable perspective on plea bargaining left this kind of criminal law practice before becoming "seasoned").

[7] Heumann is in no position to evaluate the factual guilt of defendants in the cases he examined, and the attorneys who provided him with the "facts" are obviously not objective analysts. Anyone who works on a legal case knows that evidence means different things to different people, and much of it can be interpreted in many ways. Indeed, whole categories of evidence, once perceived as credible and trustworthy, are now regarded as questionable by many attorneys and judges. A suspect picked out of a line-up by an eyewitness was once viewed as factually guilty; in light of much recent research, we are no longer so sure (see, e.g., Woocher, 1975; see generally, Haney, 1979.)

Moreover, legal guilt in criminal cases turns as much on the elusive concept of mens rea as it does on factual involvement in any "criminal" behavior. Even some of the "obvious" cases of guilt cited by Heumann—in which the defendant is apprehended "in the act"—leave open the complex question of the state of mind with which the act was committed. See, e.g., *United States* v. *Freed* (401 U.S. 601, 612, 1970, Brennan, J., concurring); American Law Institute (1955: 123-32).

[8] Compare Heumann: "For most of the cases in the circuit court, 'plea bargaining' simply means the rapid determination by consensual agreement

III. After the Bargain Is Over: The Consequences of Plea Bargaining

In a system they cannot change, it is especially functional for lawyers to adopt stereotypic and uncharitable views of their clients. If the machinery of the criminal justice system begins to move on a presumption of guilt, if the "balance of advantage" constantly tilts beliefs in that direction, how does one resist? The wearing down process is inexorable.

Attorney frustration is enhanced because of the inherent limitations of that role—lawyers can do very little even when they do their best. They learn quite early that effective legal argument precludes any basic critique of the social and legal systems. Even pleas for mercy or limited forms of social justice are regarded as "pitches" by their jaded coworkers. When they do win acquittal, they have only succeeded in returning their clients to the environments from which they came, secure in the knowledge that they will soon see most of them again.

Many defense attorneys become cynical and angry that their clients show so little gratitude. Besides, trials are time consuming and draining. Such expenditure of time and energy in a system that does not reward it, on behalf of clients who do not appreciate it, begins to seem senseless. Plea bargaining is not only easier, it is "safer." In a trial the lawyer may be bested or out-maneuvered by his adversary. The privacy of plea bargaining means that one's performance cannot easily be examined.

On the other hand, such "advantages" do not accrue to plea bargainers without cost. One attorney tells Heumann, "[s]ometimes I call myself a criminal case adjuster. We are not lawyers" (p. 81).[9] Although easier and safer, plea bargaining is less challenging, makes less use of legal skills, and provides fewer clear standards against which to measure performance. Lawyers may talk of "sharpening plea bargaining skills" but they seem to be rationalizing choices imposed upon them by a system they are powerless to change. Many feel compromised by their complicity in a system where they spend less time defending clients than disposing of them.

This sense of powerlessness is experienced far more acutely by defendants. Prosecutors "punish" defense attorneys

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that the facts of a case dictate a certain disposition" (p. 38). It is difficult to understand why Heumann does not take account of Sudnow's pioneering ethnography of the public defender's approach to plea bargaining.

[9] According to O'Brien *et al.* (1977), defendants believe that a good lawyer is one who "speaks up in court." Lawyers who plea bargain forego the opportunity to do so, and may also lose some of the respect of their clients.

by punishing their clients.[10] Defendants are often pawns in strategic maneuvering whose dimensions reach beyond the immediate case. For many defendants, the situation is all too familiar: making least worst choices between alternatives that have been structured by an elite class of decisionmakers with whom they have little in common and from whom they receive little sympathy.

Although Heumann's book unintentionally makes clear how little defendants participate in this process, he devotes no attention to the consequences of plea bargaining for them. Fortunately, Jonathan Casper's (1978) work fills this gap. Not surprinsingly, Casper finds that defendants whose cases are decided by plea bargain are *less satisfied* with their attorneys than are those whose cases go to trial and are convicted. However, Casper also finds that defendants who plea bargain also believe they have been treated *more fairly* by the system than those convicted at trial. Of course, it may be that plea bargaining seems "fair" only in comparison to terribly unfair trials.[11] Moreover, plea bargains only occur because the dispositions they offer seem less threatening than the likely outcome of a trial. Conversely, defendants convicted at trial may well have been offered a more lenient disposition earlier in the bargaining process. The harsher sentence surely feels less fair to someone who could have done "better" had he bargained.

Casper's data also suggest that the high levels of satisfaction with the fairness of plea bargaining come primarily from defendants who receive probation rather than jail time. But such dispositions may end up being less "fair" than they first appear. First- and second-time offenders in particular may not realize that an apparently "good deal"—one with no jail time—can return to haunt them later. A person with past convictions is a prime suspect in similar crimes, increasing the probability of future arrests. Once arrested, his prior convictions will be seen as confirmation of his criminal propensities and he will be prosecuted more vigorously. The option of choosing a jury trial

[10] Irrationalities abound. Prosecutors punish defendants when their attorneys raise "frivolous" objections. However, when the objections are caused by the rare "uncontrollable" defendant who insists on them, the prosecutor understands and does not "blame" the attorney by punishing his client (p. 25).

[11] Criticism of plea bargaining does not imply an endorsement of criminal trials. Indeed, plea bargaining flourishes only in a system in which trials are—or are made to appear—less attractive than bargaining. But comparative advantage does not necessarily mean that either alternative is laudable. For a general discussion of more promising methods of dispute resolution, see Danzig and Lowy (1975).

will be seriously compromised, since his "priors" can be introduced as evidence to impeach his credibility if he takes the stand. Whether he settles his case through plea bargaining or trial, his sentence will undoubtedly be longer. The determinate sentencing acts of most states require that each prior conviction (including those obtained through plea bargains) account for one or several additional years of incarceration.

The criminal justice system itself adapts in many ways to the prevalence of plea bargaining. Perhaps the most obvious is in demands for resources. The courts begin to rely on the fact that only a small percentage of cases will go to trial. Resource allocations are made on this basis, turning a statistical norm into a practical limit.

There are other adjustments as well. The Supreme Court has held that defendants who have entered guilty pleas "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" (*Tollett* v. *Henderson*, 411 U.S. 258, 267, 1973). In a system where upwards of 90 percent of the cases are disposed of via plea bargaining, the police come to expect that their arrest and search and seizure practices will not be carefully scrutinized in court.

To maintain a high rate of bargained cases, prosecutors must provide defendants with strong incentives to forego trials. This may take the form of systematic overcharging so that peripheral charges can later be dropped in order to make the deal appear "sweeter". Judges must contribute, too, by maintaining large sentencing disparities—the difference between a sentence arrived at through plea bargaining and that which would follow trial. But sentence disparity is relative rather than absolute. It does not necessarily serve to keep sentences down for defendants who plead. Indeed, judges may begin to assume that every guilty plea has been bargained down from some more serious charge and sentence with that initial offense in mind. As long as the defendant can expect more severe treatment if he goes to trial and is convicted, the incentive to plead is preserved.

Most judges come to the bench totally unprepared for their new job[12] and remain unprepared. They are provided with no

[12] Although they do *not* come like *tabulae rasae*, as Heumann seems to suggest. Individual differences in attitudes and beliefs (Hogarth, 1971) and the nature of the political process that selects them (Levin, 1977) are moderate predictors of behavior on the bench. In addition to their class background, they share law school and professional socialization, all of which produces a myopic

formal training, few obtain even cursory familiarity with the living conditions of the people who pass through their courtroom as complainants or defendants, and rarely do they acquire even passing exposure to the various institutions to which they regularly sentence defendants. Instead, to allay this lack of preparation, they are offered clichés and homilies by other judges. Heumann reports the advice regularly given newcomers by one of these "veterans": "Study, study, study (the law)," "[d]on't try to treat these cases as if each case was a Supreme Court case," "[y]ou must not permit your judgment to be toned by trying to be popular," and "you will make mistakes" (p. 131).

The "mistakes" they are most concerned about are not miscarriages of justice—"justice" is so vague and elusive a concept anyway—but things like reversible error. (Indeed, an unfavorable review by an appellate court is one of the only sources of unequivocal feedback trial judges receive.) New judges worry that they do not know the intricacies of criminal procedure. They wish to avoid the embarrassment of allowing attorneys to manipulate them, or of failing to preserve decorum in the courtroom. And in this quest to appear competent they feel isolated: "Like the defense attorney and the prosecutor, the judge is thrust into the local criminal court and is expected to muddle through largely on his own" (p. 133). Such muddling through is greatly enhanced by plea bargaining. What better way to avoid the risks of a public trial? Judges need only determine that a plea was "knowingly and voluntarily" given, impose the sentence previously negotiated by the attorneys, and move on to the next deal.

"After a while," one judge tells Heumann, "you get the knack for where a sentence should fall" (p. 136). But how? No systematic follow-up is done to determine the effects of sentencing policy. No one can "learn" about the consequences of his actions without feedback. Becoming "expert" in this system means learning about the sentencing policies of other judges. Judges harmonize their own values with the norms of the court, both of which may be hopelessly out of touch with the realities of crime and prison. But for judges, as for prosecutors and public defenders, "a premium is placed on adjusting to the system as it is" (p. 134).

Heumann would have us believe that judges approach their job neutrally, presuming defendants innocent, but are confronted with the "reality" that most of them plead guilty.

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perspective on the nature of human conflict, rife with outmoded assumptions about human behavior.

Judges, rather than looking at the nature of a system that virtually guarantees this outcome or at the incentive structure they themselves maintain to ensure precisely this result, take guilty pleas as signs of actual guilt. In doing so, they act out yet another aspect of this system's participation in a "dispositional fallacy"—discounting the role of situation and instead explaining behavior in terms of individual traits or dispositions.[13]

A judge explains to Heumann the beauty and simplicity of plea bargaining (and the sentences it produces): "It's simply a matter that three reasonable men—the judge, the prosecutor, and the defense attorney—concur" (p. 151). Indeed, and in this "simple" concurrence lies the problem, for their "reason" is premised upon little knowledge and conditioned by even less accountability. As Martin Levin has pointed out, "court participants (judges, prosecutors, and defense attorneys) are allowed to pursue their own preferences almost totally unimpeded by the police, the victim, the defendant, or society as a whole" (1977: 65).[14] Plea bargaining further submerges decisionmaking in the back rooms of the criminal justice system, concentrating more power in the hands of legal professionals. But these decisionmakers do not suffer the consequences of their own inefficacy and that of the system. They are not themselves processed by the criminal justice system, of course, and as members of the middle and upper classes they are far less likely to be victimized by its failures.

IV. Guilty Pleas and the New Symbolism: A Good Deal Was Had by All

Near the end of his book, Heumann concludes that "to speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy" (p. 162). Of course. The issue is not whether we can "abolish" plea bargaining but whether we should tolerate a system that makes plea bargaining inevitable.

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[13] Indeed, the entire criminal justice system stands as a monument to this belief—the fallacy that crime can be reduced simply by treating the people who commit it rather than the circumstances under which it occurs. Cf. Haney and Zimbardo (1977).

[14] In most states a fourth legal professional—the probation officer—exerts substantial influence over case disposition. Armed with an undergraduate degree, little or no community experience, and the kind of expertise that comes with having taken several courses in abnormal psychology, the probation officer wields power far in excess of his visibility in this system. Everyone, it seems, gets a shot at the defendant except for the people who will have to live with him when the professionals are finished.

The existence of this practice tells us something about the values of the criminal justice system, the perspectives of the people who work within it, and the quality of justice it is capable of producing. Thus, the important question becomes not whether plea bargaining is an "integral" part of our criminal justice system, as Heumann suggests, but rather whether that system should be endorsed by any society that values social justice. Heumann's book, like countless others, and even a cursory firsthand examination of the system suggest that it should not.

Plea bargaining is the way our criminal justice system presently processes the poor.[15] The poor are more likely to be driven by circumstance to commit crime and to be the targets of police suspicion and arrest. Once in custody, it is more difficult for them to make bail or to obtain release on their own recognizance. They are more likely to be represented by public defenders, who work under time pressures that compromise the threat to go to trial. If the poor do go to trial, they are more likely to be convicted and to receive longer prison sentences. Thus, the poor are at once more likely to be in the plea bargaining situation, to operate within it from a compromised bargaining position, and to have more to fear from a trial if bargaining fails.

Indeed, it is likely that the "invisibility" of plea bargaining can be explained by looking at the identity of those it affects most adversely. If Heumann is correct, for at least a hundred years American criminal justice has maintained the public image of the adversary trial while privately disposing of a substantial number of cases through plea bargains. Legal fictions die slowly when their victims are powerless. Who benefits, and who is harmed, by the discrepancy between the image of the criminal trial and the reality of bargain justice?

Bargain justice is a "good deal" for society. It is cheap and thus helps to keep down the cost of the "crime problem." If we really allocated to criminal justice and criminal defense the resources our constitutional rhetoric requires, the magnitude of the crime problem might become more apparent. But as long as practices like plea bargaining hide the problem inexpensively, we do not really have to solve it. Bargain justice helps us tolerate ineffective solutions and avoid the socioeconomic

[15] To be sure, wealthy defendants also plea bargain, but they do so from a position of greater strength. They can threaten to go to trial with greater credibility and, *ceteris paribus*, can offer a defense at trial that is more elaborate and better prepared. In this context as in so many others, wealth enhances one's capacity to bargain. Cf. Galanter (1974).

restructuring required to achieve a meaningful reduction in crime.

But plea bargaining has been controversial. It conflicts with the accepted symbols of American justice: all defendants are innocent until proven guilty; no innocent person shall be convicted; and every defendant has the right to a full and effective defense. In plea bargaining defendants are encouraged to forego trials, sentencing disparities are increased to the point that even an innocent person might find it "rational" to plead guilty, and defendants are punished, in effect, for exercising their constitutional rights.

How can we reconcile these tensions? The attempt is now being made to incorporate plea bargaining into the symbolism of American law. We are told that the practice is not only tolerable but actually desirable for all involved—a good deal for defendants as well as for the "reasonable men" of the court.[16] Books like that by Milton Heumann contribute to this mystification by claiming to document not only the inevitability of plea bargaining but also its natural superiority and fairness as a mode of criminal case resolution. Since plea bargaining will not go away, we must learn to live with it. In the process we may actually come to value and respect it.

Thurman Arnold wrote that "[f]rom any objective point of view the escape of the law from reality constitutes not its weakness but its greatest strength" (1962:41). A new image is being fashioned for the practice of plea bargaining, one that aims (in Arnold's terms) to "strengthen" rather than "weaken" the symbols of American criminal justice. We can only wonder how long empty symbols will be enough.

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[16] Even the Supreme Court has reassured us that plea bargains "can benefit all concerned" (*Blackledge* v. *Allison*, 430 U.S. 63, 71, 1976).

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AUTHOR'S REPLY

Haney and Lowy argue that *Plea Bargaining* fails both to ask and to answer a number of questions they consider crucial (p. 634). I most certainly did not ask the questions they pose and, given that I did not ask them, I naturally did not answer them. They develop a passionate ideological critique of the criminal justice system urging, inter alia, "the socioeconomic restructuring required to achieve a meaningful reduction in crime" (pp. 648-49). Reasonable people may differ about the efficacy of this prescription and the effects that its realization would have, but *Plea Bargaining* does not attempt to explore these matters.[1]

[1] In the text of their article, Haney and Lowy also are critical of the absence of interviews with defendants (p. 635), although they qualify their objection by conceding that it is a bit unreasonable to expect a book to explore issues it does not purport to address (p. 635-36 n.3). In any case, Casper (1972)