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American Bar Association: American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty (Tentative Draft)

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BOOK REVIEWS

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY (TENTATIVE DRAFT). Recommended by the *Advisory Committee on the Criminal Trial*. Chicago: American Bar Association. 1967. Pp. x, 78. Paper, \$2.

At long last the lowly guilty plea is coming into its own. This slim booklet, one of a series issued as a result of the American Bar Association (ABA) Project on Minimum Standards for Criminal Justice has come to grips with many of the complex, difficult, and little understood issues in the guilty plea system of criminal justice. It does this well; it ducks no controversies, it successfully avoids both the righteousness and the naïveté which often characterize model-policy attempts to bridge gaps between ideal and real, and it attempts to maximize the administrative efficiency of the guilty-plea process while strengthening its procedures. It defines important issues and attempts to resolve such controversial matters as whether a defendant's guilty plea is an appropriate consideration in determining sentencing leniency and whether plea bargaining should be recognized as proper. Considering the operational importance of the guilty-plea process and the crucial issues hidden within it, this book is long overdue.

In legal writing, appellate court opinions, legislative attention, and public awareness, the guilty plea has always been overshadowed by its counterpart, the criminal trial, particularly the jury trial. The dominance of the trial is understandable. After all, the trial is more than a mere forum for finding fact; it is the embodiment of procedural justice in a democratic society. The trial has everything—drama, ritual, precision, visibility, balance, and, above all, transcendent meaning. Little wonder that the relatively anonymous, quick, and often drab guilty plea has been ignored by scholars, policy makers, and the public. What great constitutional issues are posed by the typical case in which a shabby burglar, caught in the act, replies "guilty" to the question of the court? Who ever heard of Perry Mason "copping out" a client?

Until recently, the guilty plea was dismissed from serious consideration because of certain presumptions about the defendant who pleads guilty and about the procedures used to effect his conviction. The defendant, often not represented by counsel but somehow secure in the knowledge of his own guilt, could "voluntarily and

understandably" confess, not to a set of facts but to the words of a formal charge in a brief court ceremony, thereby standing convicted just as surely as if he had been found guilty by judge and jury after a trial. The procedure of pleading guilty has been excluded from substantive consideration on the grounds of a number of "simples": it is "simply" a waiver of trial; it is "simply" a form of confession; it is "simply" a formal record-making device important primarily because it enables the guilty defendant to move speedily from the jail to the prison. The hypothetical guilty-plea defendant could be characterized as a "knowledgeable, guilty, and consenting man" who is also prudent because by saving the state the expense of proof he can hope for mercy from the sentencing judge.

The trouble is that in practice the guilty plea is not a simple alternative to trial. In fact, it is a complex procedure which involves subtle and difficult issues, such as the operational meaning of requiring a plea to be made "freely," "voluntarily," and "understandingly." There is also a basic question of whether the plea system really does separate the guilty from the innocent in a manner that is trustworthy and fair. Must the guilty plea be accurate? That is, must the defendant have engaged in the conduct to which he admits, and, if so, how is this determined? Is a defendant properly convicted if, although factually guilty of the crime, he is led to believe that he will be "treated" for his criminality when in fact such treatment consists solely of imprisonment? The broad range of issues related to the guilty plea itself is infinitely expanded by consideration of the very common practice of plea bargaining. Negotiation for charge or sentencing concessions in exchange for pleas of guilty raises issues of fairness and equal protection which have rarely been confronted by appellate courts and are virtually unrecognized in legislation.

The guilty-plea process, including negotiation, is of great administrative significance. Most persons convicted of crimes are convicted in this manner. In fact, court calendars, prosecutors' workloads, and even police tactics have come to rely on a high, steady percentage of guilty pleas. Among other things, the guilty plea means assured conviction, a result which cannot be predicted at trial even with the most carefully prepared prosecutorial effort. Not only is the plea certain and efficient, but from the law enforcement-prosecution point of view, it avoids some sticky questions about the admissibility and sufficiency of evidence. The guilty plea is more than a waiver of the time and effort involved in a trial; it is also a waiver of inquiry into the tactics and discretion of police and prosecutor. In daily operation such efficiency and avoidance of confrontation are worthy of the encouragement provided by sen-

tencing leniency and charge reduction, and in most jurisdictions these are forthcoming through a tradition of leniency or through bargaining, or both.

The guilty-plea does not exist and is not encouraged solely because it is efficient. It is also an important way of introducing leniency into what would otherwise be a semiautomatic process of conviction turning solely on questions of proof and the degree to which the legislature has limited the sentencing discretion of the judge. Thousands of individuals, each technically guilty of the same statutory charge, pour into the courts every year. Some jurisdictions give judges wide sentencing discretion so that the different backgrounds and potential of these individuals may be taken into account. Other jurisdictions limit this sentencing discretion or deny it altogether for persons convicted of certain offenses. When confronted by defendants who are probably guilty as charged but for whom the conviction label seems unduly harsh or the mandatory sentence excessively severe, courts can and do use accommodations in the plea process to achieve a form of equity. Thus, the other side of the efficiency coin is the individualization of criminal justice by merging the charging, adjudicatory, and sentencing decisions into a single determination that seems best to fit a particular defendant or a particular set of circumstances.

As important and complex as it is, the pleading process has remained almost invisible to all except those directly involved. The guilty plea, until recently, has not made law; rather, it has avoided doing so. Agonizing trial-system issues—sufficiency, relevancy, and exclusion of evidence, scope of discovery, use of the insanity or entrapment defenses, access to counsel, and the relationship of fair trial and free press—have all been avoided by resort to the quick and comparatively anonymous arraignment where the guilty plea is tendered. Many of these issues become the basis of plea negotiation, and occasionally they arise on appeal of a guilty-plea conviction, but the majority of guilty-plea defendants have proceeded through the courts to prison or probation and beyond without rocking the boat.

Things have changed rather suddenly. The trumpet of *Gideon* has sounded in cellhouses from San Quentin to Sing Sing; the leit-motif of defendants' rights, carried over in *Escobedo*, *Miranda*, and other recent decisions, has brought new visions of freedom to prisoners convicted by their own pleas as well as to those convicted after trial. The issues raised by defendants appealing convictions by plea are often the same as those alleged by defendants committed after trial, although in some cases they are unique to the guilty-plea situation. Collectively, these allegations indicate that the process of pleading guilty is indeed different from its idealized form. They

tell of quick justice, dishonored bargains, bargains made and honored but involving a plea that was "induced" and hence not voluntary, lack of awareness of plea negotiation possibilities, lack of opportunities to bargain, failure to understand the consequences of the plea, and sentence severity when leniency after a plea is the norm. Some guilty-plea appellants claim innocence; others merely raise questions concerning the relationship of conviction under trial standards to conviction by plea. The bases for these petitions, some of which are far-fetched and others difficult to document, certainly require an examination of guilty pleas as part of a process and not merely as a series of unique and unrelated acts.¹

Prisoner appeals are not the sole basis for the intensity of current interest in the guilty-plea process. Conviction by plea has been one focus of research and analysis in the ABA's recent survey of criminal justice administration.² The administrative significance of the guilty plea has been a topic of various sentencing conferences held by the federal judiciary.³ Furthermore, increased participation of the bar in criminal cases following *Gideon* has made the guilty plea of practical concern to an increasing number of lawyers. Those formulating model sentencing codes have had to face the problems of inequities which are carried over from conviction to sentencing even where great sentencing flexibility is given to the trial judge. For example, the American Law Institute's Model Penal Code contains a provision for charge reduction *after* a guilty plea if, in the opinion of the court, the prescribed sentencing limits are too harsh.⁴

Whatever combination of factors is responsible, the guilty-plea process is presently emerging from near obscurity to a position of prominence among persons interested in, responsible for, or affected by the administration of criminal justice. It is becoming increasingly apparent that a balance must be struck between the proper standards for treatment of individual defendants and the ease of what has been an informal, nearly invisible but efficient system for pro-

1. For an example of a court coping with this problem, see *Shelton v. United States*, 242 F.2d 101, *rev'd on rehearing en banc*, 246 F.2d 571 (5th Cir.), *rev'd*, 356 U.S. 26 (1957) (making no comment on confession of error by Solicitor General). See also *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966); *Anderson v. North Carolina*, 221 F. Supp. 930 (W.D.N.C. 1963); *Barber v. Gladden*, 220 F. Supp. 308 (D. Ore. 1963); *State ex rel. Burnett v. Burke*, 22 Wis. 2d 486, 126 N.W.2d 91 (1964). For cases and comments about issues raised by guilty-plea appellants and the way courts have responded to them, see Comment, *Official Inducements To Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964); Note, *Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

2. D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966).

3. Seminar and Institute on Disparity of Sentences, 30 F.R.D. 401 (1962); Pilot Institute on Sentencing, 26 F.R.D. 231 (1960). See also Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

4. Model Penal Code, § 6.12 (Proposed Official Draft, 1962).

cessing cases through conviction and sentencing. This issue is neither new nor peculiar to the adjudicatory stage of the criminal process. Recent Supreme Court directives in cases involving confessions and searches and seizures have resulted in widespread publicity about a similar problem at the investigatory stage of the process. In these areas, reactions have tended to become polarized around the anguished protests of police agencies and the applause of civil libertarians. Actually, at any stage of the criminal process, such positions are too simplistic. For example, in confronting plea bargaining or sentencing leniency for guilty-plea defendants, strong polar positions are occasionally stated which either ignore other facets of the problem or call for response in kind. Arguing that guilty pleas should not be "bartered" is righteous enough, but the position stands at odds with long-standing administrative practices. On the other hand, contending that a defendant who has pleaded guilty should be treated no differently from one who has "merely exercised his constitutional right to trial" sounds proper enough but it leads to equally proper-sounding reasons for differentiating between defendants at sentencing such as "confession is the first step on the road to reform."⁵

The ABA Minimum Standards Committee was confronted with strong disagreements about the propriety of current guilty-plea practices, and it had only scattered appellate court opinions and a modicum of research for guidance; nevertheless, it set out to resolve value questions in the guilty-plea process by dealing with all parts of it at once. Seeking to retain the administrative advantages of the guilty plea while correcting errors or inequities in its use, the Committee defined its basic task as an "attempt . . . to formulate procedures which will maximize the benefits of conviction without trial and minimize the risks of unfair or inaccurate results" (p. 3). The theory is that the process of negotiation can be controlled and made tolerable if procedural change can insure more accurate pleas, if all defendants can be afforded an equal opportunity to engage in plea bargaining, and if records can be kept of all guilty-plea proceedings including bargaining. The Committee's specific proposals are embodied in a series of policy statements, in the form of procedural requirements, which deal with basic questions of the propriety of plea practices as well as the techniques of registering convictions. Among the Committee's recommendations are the following:

Accuracy of the Plea. The judge is required to inquire into the factual basis of the plea whether or not a plea bargain has been made (Standard 1.6).

5. See particularly the discussion at the federal sentencing conference. Pilot Institute on Sentencing, 26 F.R.D. 231 (1960).

Plea Bargaining. Negotiation practices are recognized as proper, and an attempt is made to set guidelines for, and limits upon, the roles of the prosecutor, the defense attorney, and the trial judge in the bargaining process (Standards 3.1-3).

Quick Justice. The Committee recommends a statute or court rule to set a period of time for deliberation before a plea can be accepted in cases involving serious crimes. In addition to avoiding overly swift processing, one stated objective for this time lag is to give the defendant an opportunity for plea negotiation discussions (Standard 1.3).

Record of Bargaining. If an agreement on a plea has been reached, the Committee recommends that a record be made of this agreement. It is further suggested that if a bargain involves a promise by the prosecutor to "recommend" leniency, the defendant be warned that prosecutor's promises are not binding on the judge (Standards 1.5, 1.7).

Sentencing Leniency. The Committee approves procedures whereby the court may consider a guilty plea as a positive factor in determining whether to exercise leniency in sentencing (Standard 1.8).

Equal Protection. A requirement is imposed that "[s]imilarly situated defendants should be afforded equal plea agreement opportunities" [Standard 3.1(c)].

Withdrawal of the Plea. The Committee recommends that the defendant be permitted to withdraw his plea if the agreed-upon charge or sentence concessions have not been carried out. No allegation of innocence is required; the defendant need only prove that the bargain was not kept [Standard 2.1(a)(4)(iii)].

The commentaries in support of these proposals are well documented and carefully written. They exhibit a sophisticated awareness of current problems in both the law and practice of pleading guilty. Whether or not one agrees with each of the value judgments reached in formulating these proposals, articulating them as minimum standards represents an important step in shifting consideration of guilty-plea issues to a level of visibility where they can be given the debate and analysis they deserve. This set of standards does not encompass all of the issues inherent in the guilty plea process and is by no means the final answer to the proper nature and status of the guilty plea. However, it is a masterful beginning. It is unfortunate that the issues dealt with in this book were not also given specific and detailed analysis in the companion volumes: *Providing Defense Services*; *Post-Conviction Remedies*; *Appellate Review of Sentences*; and *Speedy Trial*. No doubt this is the price of simultaneous but segmented draftsmanship. Some of the suggestions for minimum procedural standards, while an improvement upon common practices, will require further detailed development if they are to accomplish their stated objectives. In determining the accuracy of the plea, for example, it is proposed that the court be re-

quired to make "such inquiry as may satisfy it" that there is a factual basis for the plea (Standard 1.6).⁶ Although this is a fine statement of a desired end, it leaves much unanswered as a guideline; it fails to suggest, for example, the proper scope of the inquiry, or the relationship of evidence discovered during this investigation to the standards of relevance, sufficiency, and admissibility of evidence which apply to conviction at trial. Counsel for the defendant is treated briefly: legal counsel must be offered, but can be waived; the lawyer should not strike a bargain without the consent of his client (Standards 1.3, 2.3). Reference is made to the value of counsel in plea negotiation, but the question of what new or different skills counsel may need for competence in this setting is still open. Furthermore, the ethical problems faced by counsel in plea negotiation remain uncharted. The trial lawyer can rightfully claim his duty is to provide "the best possible defense" for his client. Can this be translated to the guilty-plea situation as a duty to obtain the "best possible deal"?

There are many issues in the guilty-plea process which were beyond the scope and intent of the ABA project but which are suggested by it. These issues will eventually have to be confronted and resolved. For the present, however, the proposed set of minimum standards is provocative enough. The skill of the analysis and integration which underlies these proposals, and the fact that the book confronts and attempts to resolve important value conflicts, makes this particular ABA publication a model effort in the creation of model standards.

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6. This is consistent with the recent revision of FED. R. CRIM. P. 11.