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# Newman: Conviction: The Determination of Guilt or Innocence Without Trial

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# BOOK REVIEWS

CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL. By *Donald J. Newman.* Boston: Little, Brown & Co. 1966. Pp. xxvii, 259. $8.50.

*Conviction* is the second volume to appear in The American Bar Foundation's Series on the Administration of Criminal Justice in the United States,[1] though it will be the fourth of five volumes when the series is complete. The series is the outgrowth of field studies conducted by The American Bar Foundation in 1957 in Kansas, Michigan and Wisconsin.

Professor Newman's volume, as its full title indicates, treats those cases that are disposed of through a formal judgment but without a full-scale trial on the merits. The two significant forms of disposition are the plea of guilty, either to the offense charged or to a lesser included offense, and the judicial judgment of acquittal that bars further prosecution of the matter. Both dispositions tend to be lost sight of in traditional studies of the system of criminal law administration.

As Professor Newman points out at length, the courts have cooperated in creating practical inducements to pleas of guilty. The primary inducement is toleration, and in many instances encouragement, of plea bargaining between the prosecuting attorney and the defense attorney; as a reward to the defendant for saving the state the expense of a trial, the prosecutor accepts a plea of guilty to a lesser-included offense, or sometimes to an offense that bears no legal or logical relationship to the offense originally charged.[2] Plea bargaining cannot exist without at least the tacit approval of the judge who accepts the plea tendered by the defense attorney (though technically by the defendant himself) once the prosecuting attorney indicates his agreement. The secondary inducement is the fact that in most cases the defendant who pleads guilty is more likely to receive probation, a lower minimum or maximum sentence, or both, depending on the sentence structure in the criminal code, than the defendant who is convicted following trial.[3] The high incidence of pleas of guilty bears witness to the efficacy of this free enterprise system in which admissions of guilt are traded for the time and expense of trial.

The system of plea bargaining is indispensable to the criminal law process, for reasons both practical and theoretical. The practical reasons are based on statistics.[4] The caseload on the criminal docket

1. The earlier volume is LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965), reviewed in 64 MICH. L. REV. 1181 (1966).

2. See ch. 6.

3. See pp. 99-104.

4. See pp. 3-6.

is about as heavy as the judicial system can handle; increases in the number of cases presented for adjudication will only produce additional delay in the trial of those cases. But the cases tried represent only about 10 per cent of the cases in which an indictment or information is presented. If even half of the 90 per cent of the defendants who now plead guilty should request trial, the judicial system would break down from overload. Though in the abstract a society should immediately respond to an increase in the number of cases to be tried by a corresponding increase in the numbers of judges to try them and courtrooms in which they may be tried, as a concrete matter the community responds only very slowly to these pressures. Therefore, what results is an increased delay in trying criminal cases and a more cursory trial of the cases once they reach the head of the docket. As an illustration of the process, one need only look at the strains evident in the federal court system because of the flood of habeas corpus applications from state prisoners and the counterpart strain on state appellate procedures as state prisoners endeavor to exhaust their state remedies.

The plea bargaining system is also necessary from the point of view of criminal law theory. Rigid definitions of criminal conduct and mandatory prison terms, whether achieved through mandatory minimum sentences for crimes like first-degree murder or sale of narcotics, or through exclusion of certain offenses from the list of crimes in which probation is possible, require plea bargaining, for nobody wishes to apply them in even a majority of cases that fit the legislative definitions. However, the necessity of imposing a prison sentence can be avoided[5] only through entry of a judgment for some other offense. At other times the individualization of criminal justice that flows from plea bargaining gives formal recognition to the "respectable" social status of the defendant, the "disrepute" of the victim or complainant, the need of the defendant for special hospitalization or other treatment, or the normality of the formally-prohibited conduct within the subculture to which the defendant belongs.[6] In still other instances, plea bargaining is a means of recognizing "imperfect" defenses when the substantive criminal law in form seems to offer a choice only between complete criminality and complete freedom from criminal responsibility.[7]

The function of individualizing justice is also performed in some instances through outright acquittal, when even a conviction of a lesser-included or a petty offense appears too harsh.[8] Certain acquittals, however, are motivated not by a desire to protect the individual

5. See pp. 112-17.
6. See pp. 117-25.
7. See pp. 125-30.
8. See chs. 10-12.

defendant against the harshness of the criminal law, but rather by a desire to control law enforcement practices.[9] Functionally, this use of acquittal by judicial fiat bears a close relationship to the invocation of exclusionary rules of evidence to discipline law enforcement authorities.[10] If a judge finds a constitutional or evidentiary basis for excluding evidence that is the key to a conviction of the defendant, he makes it possible, as a practical matter, for the defendant to avoid conviction. But there is not always evidence subject to suppression. In that event, if a judge believes that a criminal statute should not be invoked at all, or should not be utilized against the defendant or the group to which he belongs, or if he believes that the police have overstepped the bounds of decency in dealing with the defendant or other citizens in the same group or situation, he may enter a judgment of acquittal. If he chooses, he may state informally that this judgment is not intended primarily to benefit the defendant, but instead is directed toward the police and prosecutor. In almost every state, the trial judge may do this with impunity, for the state rarely can resort to appeal or superintending appellate control to obtain a ruling that the trial judge acted improperly, and even if it can, the individual defendant almost always has the protection of the double jeopardy concept against retrial on the pleading under which he was acquitted.[11]

Thus Professor Newman's study shows that plea bargaining and judicial acquittals exist because without them our present system of criminal law administration could not operate justly, if, indeed, it could function at all. It is futile to talk of abolishing either procedure unless we prefer the alternative of complete breakdown of the system. There are, however, lessons here for those who would draft a modern criminal code. Mandatory minimum sentences for any crime should be eliminated entirely. No class of offenders should be declared by the legislature ineligible for probation or parole. "Imperfect" defenses should be recognized formally as mitigating the degree of the offense that has been committed in form. The court should be permitted to reduce the punishment classification for the offense, or in some instances dismiss the proceedings because the offense is trivial in comparison with the hardship that will result from conviction and punishment. The possibility should exist at any stage of the proceeding to substitute civil commitment for criminal prosecution. To the degree that revisions of this nature are made, the need for plea bargaining and judicial acquittal will diminish and the institutions themselves atrophy.

9. Professor Newman covers this in Part V, pp. 172-96.

10. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure); Mallory v. United States, 354 U.S. 449 (1957) (confessions obtained during unlawful detention); Nardone v. United States, 302 U.S. 379 (1937) (wiretap evidence).

11. See pp. 141-48.

Professor Newman's background in sociology[12] has been especially conducive to a presentation that places the techniques of procedure against a backdrop of social reality. No traditional presentation by a lawyer committed to the methodology of case analysis could serve so well to challenge legislator, judge and attorney. I hope that this work will be closely read, indeed used as a handbook, by those who are interested in reform both of substantive and adjective criminal law.

I am troubled, however, by one aspect of this work and its companion volumes: the material that they present as if it were current is in fact rapidly becoming obsolete.[13] This was true to a degree in Professor LaFave's book; it is even more evident here. That these books were not produced and published in 1960 rather than from 1965 to 1967 is regrettable. Criminal procedure has changed dramatically within the last five years; one may say that the "half-life" of cases decided and materials gathered before 1960 has already elapsed. True, Professor Newman has endeavored to compensate for one major development after The American Bar Foundation study was completed, that is, the decision of *Gideon v. Wainwright*[14] and its aftermath. Plea bargaining in the past often could and did take place in the absence of counsel, though the unfairness of this in at least some cases was recognized by the Supreme Court years before *Gideon* was decided.[15] After *Gideon* this is not proper in any felony case unless the defendant has waived his right to counsel —and waiver ought to be restrictively viewed. The *Gideon* rule probably is also applicable by now to any case tried in a court of record, and may be applicable in the near future to any case pleaded to in any court. The required participation by counsel in the plea bargaining process, and the appearances entered by lawyers who have not heretofore taken criminal cases, must certainly affect the plea bargaining process. Plea bargaining will no doubt continue, but both in externals and in content it may vary markedly from the practices described by Professor Newman on the basis of the 1957 survey.

One other significant development since Professor Newman's manuscript was written may also spell the demise or impairment of the plea bargaining system. As a result of the many Supreme Court decisions governing details of state procedure under the aegis of the fourteenth amendment due process clause, and especially

12. He is professor of social work at the University of Wisconsin and holds a joint appointment in the Law School of that University.

13. I am also bothered by the relatively small number of illustrations and the frequency with which the ones which are used reappear without significant reinterpretation. The repetition diminishes their impact.

14. 372 U.S. 335 (1963).

15. *E.g.*, DeMeerleer v. Michigan, 329 U.S. 663 (1947).

*Miranda v. Arizona*[16] and the expansion of its holding which one may expect in future terms of the Court,[17] it is no longer, in one sense, the defendant who is on trial, but rather the state and its employees, particularly the police. Because what has been done improperly by the police cannot be redone correctly, there is an increasing possibility that errors by policemen, and perhaps by prosecutors or judges, will in fact immunize a defendant against successful prosecution. If so, defense counsel probably will, and granted the existence of this growing body of constitutional law, should insist on a trial of the case so that he may present issues that would be foreclosed by a guilty plea. In this event, the percentage of cases disposed of through pleas will decline rapidly from the present 90 per cent. In short, Supreme Court activity may impel a breakdown of the system that the practices described in *Conviction* have come into being to prevent. Therefore, within a very few years we may perforce have to treat Professor Newman's study as only history, the history of an institution as thoroughly outmoded as other procedural traditions scrapped through judicially-created fourteenth amendment common law.

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16. 384 U.S. 436 (1966).

17. For example, creating a derivative rule of evidence applicable to whatever is discovered as a result of leads in the defendant's otherwise inadmissible confession.