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BOOK REVIEW

CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL, by Donald J. Newman. Little, Brown and Company, Boston (1966). Pp. ix, 259.

So much is being said today about the administration of criminal justice that the subject itself is, perhaps, a mite trite. Such was not the case, however, in 1953, when the American Bar Foundation commenced its extensive survey of the area. The fact that such a central problem was selected for study, despite its then non-glamorous and still non-lucrative aspects, is itself a tribute to the American Bar Association and its Foundation, and to the Ford Foundation which financed the project.¹ Happily, the American Bar's study of the administration of justice was not limited to traditional analysis of legislative statutes and judicial decisions. Instead of confining itself to a survey of lawyers' "law" governing crime and the administration of criminal justice, it sought to describe law as it is in fact administered on a day-to-day basis.

A field study of about a year and half (1956-1957) was conducted in Michigan, Wisconsin, and Kansas.² *Conviction* is the second of a five-volume series analyzing this data. In his "Editor's Foreword" to *Arrest*,³ the first volume of the series,

Professor Frank J. Remington appropriately states:

"From the point of view of either the individual suspect or the community as a whole, the issue is not so much whether police are efficient, or whether the correctional process is effective, but whether the system of criminal justice administration in its entirety is sensible, fair, and consistent with the concepts of a democratic society."⁴

The series is calculated to provide materials for determining whether, as presently administered, the system does what, theoretically, it is designed to do. The product of sophisticated

1. "Except for some relatively minor expenses." See Preface to LAFAVE, *ARREST* xi (1965).

2. The materials gathered in the survey were summarized in 1957 in a seven-volume mimeographed *Pilot Project Report*. For discussion of the use to which this preliminary report was put, see Preface to LAFAVE, *ARREST* x-xi (1965).

3. LAFAVE, *ARREST* (1965).

4. *Id.* at xv.

teamwork by able scholars on most timely topics, the series is necessarily of great importance to the law, the legal profession, and the public.⁵

Conviction concerns itself, in the main, with a phase of the administration of criminal justice seldom treated in the law books or the law schools: the importance of the subject, however, cannot be overemphasized. The book deals with the practice through which *approximately 90%⁶ of all criminal convictions are obtained*—plea bargaining. For too long we have tried to “take a couple of aspirin” and ignore the practice; it is there, and it should be analyzed, discussed, and studied—openly and frankly. It is good, therefore, that the current “agonizing reappraisal” of the administration of criminal justice has brought with it not only the present book, but several other provocative studies as well.⁷

Practical and theoretical problems raised by the plea bargaining practice are obvious, appropriate resolution not so much so. Let but a few of the nagging questions be enumerated. Since a threat or a promise will cause a confession to be inadmissible, should it likewise cause a guilty plea to be deemed involuntary, and inoperative? Is it right for our society, through its district attorney, to bargain with an accused to forfeit his constitutional right to his “day in court” in return for a promise of leniency or recommendation of leniency? Is it right for our society, through its judicial officer, to impose a heavier sentence on a defendant who exercises his constitutional right to his “day in court” than on one who has forfeited this right in the hope, expectation, or promise that as a result, a lighter sentence will be imposed?

If, for any number of very practical reasons, one decides that the practice of plea bargaining should be continued (most would seem to concede that it should, and this reviewer is certainly not now prepared to maintain the contrary), one may properly ask whether or not sufficient safeguards adhere to the procedure. Since a guilty plea necessarily involves a question

5. Volumes in preparation are: MCINTYRE, TIFFANY & ROTENBERG, *DETECTION OF CRIME*; MILLER, *PROSECUTION*; and DAWSON & BALL, *SENTENCING*.

6. NEWMAN, *CONVICTION* 3 (1966).

7. 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); ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* (Tentative Draft, 1967).

of law, should a layman ever be permitted to plead guilty without prior advice of counsel? (Relevantly, perhaps, the compromise of a Louisiana workmen's compensation claim may not be approved by the court until the claimant has received benefit of counsel, appointed or retained.)⁸ To promote equality of treatment, should there be some sort of check on prosecutorial discretion? Is it desirable or proper for the judge to participate in any phase of plea bargaining negotiation? Should the court, before accepting a guilty plea, "satisfy" itself "that there is a factual basis for the plea," as now required by the Federal Rules of Criminal Procedure?⁹

Conviction does not attempt to "answer" any or all of the foregoing questions about plea bargains: it does an excellent job, however, in describing and analyzing the practice in the localities studied, providing the wherewithal for reflection and evaluation.

In addition to discussing plea bargain arrangements, *Conviction* also analyzes another "touchy" problem—a court's "acquitting the guilty" without trial. The importance of this question, however, seems of much less significance than guilty plea agreements.

Our society needs to know much more about our legal institutions and practices, and how they function in actuality. Traditional methods of legal research are not adequate to the task: field research, and skills of the social scientists are needed. It is regrettable that the data analyzed is not more current, but the significance of the book, and no doubt the whole series, is great indeed.

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8. LA. R.S. 23:1271 (1950), as amended, La. Acts 1966, No. 181, § 1, and 1272, as amended, La. Acts 1966, No. 394, § 1.

9. FED. R. CRIM. P. 11, as amended February 28, 1966, effective July 1, 1966. Certain of the states have similar provisions. See NEWMAN, CONVICTION 11-12 (1966).

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