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Conviction: The Determination of Guilt or Innocence Without Trial, by Donald J. Newman

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

Conviction is the second volume to be published in the American Bar Association's series on the administration of criminal justice. Based on data collected ten years ago in Michigan, Kansas, and Wisconsin, this book is an analysis of the non-adjudicatory criminal law. In the main, *Conviction* is concerned with the practice of, and the policies underlying, pre-trial negotiations, charge reduction, and the guilty plea. Through a comparative analysis of the procedures employed in the three states surveyed, Professor Newman, if he does not answer, at least sheds some light on, such problems as: how the trial court can insure accuracy of the guilty plea;[1] whether plea negotiations are desirable or even proper in the criminal law;[2] and to what extent the court should act as an overseer and administrator of the criminal law through charge reduction, sentencing, and "acquittal of the guilty."[3]

Perhaps the major contribution of Professor Newman's work is his

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15. JAFFA, CRISIS OF THE HOUSE DIVIDED (1959).

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1. Pp. 9-31.

2. See, *e.g.*, Judge Rives dissenting in Shelton v. United States, 246 F.2d 571, 579 (5th Cir. 1957): "Justice and liberty are not the subjects of bargaining and barter."

3. Pp. 134-72.

analysis of defense counsel's role in the guilty plea process. "The functions which a defense attorney performs for a guilty plea client fall into two broad categories: expert evaluation of the appropriateness of the guilty plea and aid in obtaining charge and sentence leniency by plea negotiation."[4]

Counsel's importance to the defendant is obvious. An accused represented by an attorney is more likely to enter an accurate guilty plea and to have full knowledge of the consequences.[5] Furthermore, representation is the *sine qua non* to effective and equitable negotiations. Only the attorney, with his knowledge of the pattern of discretion and charge reduction in a particular criminal court, can obtain the *quid pro quo* for a guilty plea.[6] And it is defense counsel who can present and argue the circumstances surrounding the crime and the defendant in an effort to individualize justice. Professor Newman cogently observes that, "the full-blown negotiated plea is not merely an appeal for mercy; it is an adversary process and the lawyer serves the function of the guilty defendant's advocate."[7]

What is not so obvious is the service that counsel in the guilty plea process performs in the rehabilitation and correctional treatment of the defendant. "[P]rofessional leaders in corrections support widespread participation of lawyers in the early stages of the criminal process not so much because there is something intrinsically valuable in representation of the accused as because representation gives a stronger sense of fairness to the offender, which makes treatment easier once he is received in the prison or on probation."[8]

The criminal law "typically comes to focus on the helpless and ill-informed who are incapable of representing themselves and who are at a disadvantage in seeking equitable and consistent treatment. The lawyer in such cases is the equalizer; the factor that balances opportunity between the most fortunate and the least skilled among the accused."[9] This observation, *Conviction* illustrates, is as true in the guilty plea process as it is in an adjudicatory setting.[10]

Since the *Brown* decision thirteen years ago, the Warren Court has been increasingly concerned with achieving substantial equality in Ameri-

4. P. 198.
5. Pp. 200-06.
6. P. 185.
7. P. 216.
8. P. 224.
9. P. 217.
10. See Williams v. Kaiser, 323 U.S. 471, 475 (1945).

can institutions.[11] In the area of criminal law, this philosophy is evidenced by the recent decisions that focus on the role of defense counsel for the accused. Convictions do not pass constitutional muster if the accused was without counsel either at trial or on appeal, and in some instances, at pre-trial or investigatory stages.

It is somewhat ironic that the Court's concern for fairness in the criminal law has touched only the smallest percentage of those charged with crimes, that is, those who actually go to trial. The right-to-counsel cases and the Court's evidentiary decisions, such as *Mapp*[12] and *Malloy*,[13] all arise in an adjudicatory setting.[14] But nearly ninety-five percent of all criminal cases are disposed of by a guilty plea.[15] For most who come into contact with the criminal law, whether as prosecutor, defendant, or defense counsel, the administration of criminal justice embraces the period from arrest to entry of a guilty plea.

The propriety of accepting a guilty plea from an unrepresented defendant usually reaches the appellate courts in habeas corpus or coram nobis proceedings. The decisive question—whether there has been an intelligent and knowing waiver of counsel—is decided by the court after it has scrutinized the record to determine if the accused was advised of his right to counsel, "the nature of the charge, the elements of the offense, the pleas and defenses which may be available, [and] the punishments which may be exacted. . . ."[16]

The cases abound in confusion, with only the most attenuated relationship to reality. For example, an appellate court in California has held that despite an accused's "ignorance of the maximum possible sentence [life imprisonment], his waiver of counsel was supported by enough awareness and understanding to sustain it against constitutional attack."[17] And the Indiana Supreme Court has held that a defendant can intelligently waive counsel and enter a guilty plea when he is merely advised that he has a right to counsel without being "first informed regarding all matters which an attorney might assert to his advantage in defense of

11. Cox, *Constitutional Adjudication and The Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

12. Mapp v. Ohio, 367 U.S. 644 (1961).

13. Malloy v. Hogan, 378 U.S. 1 (1964).

14. To be sure, the Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), has implications far beyond the admissibility of confessions at the time of trial. "It might fairly be assumed that suspects who make incriminating statements very early in the process are much more likely to plead guilty at arraignment. If this is so, then any modification of in-custody interrogation practices or policies, suggested by the Escobedo decision for example, may well affect the percentage of guilty pleas or at least the percentage of early commitments to guilty pleas." P. 202.

15. P. 3; WALD, LAW AND POVERTY 36 (1965).

16. People v. Chesser, 29 Cal. 2d 815, 822, 178 P.2d 761, 765 (1947).

17. *In re Kelly*, 242 A.C.A. 108, 116, —— Cal. Rptr. —— (1966).

the charge, including such matters as related charges for the same offense; other included offenses, and the penalties provided by law therefor; all possible defenses to such charges, and all other matters essential to a full understanding of the services which an attorney might perform in his behalf."[18]

The miasma of the intelligent waiver-guilty plea cases is reminiscent of the voluntary confession decisions which ultimately led to *Miranda v. Arizona*.[19] As the Court expands[20] its notions of fairness and equality in criminal procedure, it seems likely that *Conviction* will be cited in an opinion holding that it is a denial of due process to accept a plea of guilty from an unrepresented defendant. There is already some movement of the law in that direction. One state supreme court has held that the right to counsel includes the right to have the advice of counsel on whether or not to plead guilty. In its opinion the court said that prior to pleading, "any defendant needs capable legal counsel in order to determine such vital questions as whether the indictment is properly drawn, whether the accused has capacity to commit crime, whether the evidence is sufficient to convict and, in the final analysis, whether the defendant should stand trial or appeal to the judge for a lighter sentence."[21] Similarly, a federal district judge in North Carolina has held that an accused is entitled to representation in negotiations leading to a guilty plea. "It is idle to speculate whether petitioner's counsel, if present, could have worked out a better deal with the Solicitor. The point is Anderson was entitled to have him *try*. For lack of effective counsel at a 'critical' stage of the proceedings against him, those proceedings are constitutionally defective."[22]

The practices and policies of the non-adjudicatory criminal law are not new and much of this book can be found scattered elsewhere in legal literature. Nevertheless, *Conviction* is a long needed comprehensive study of a neglected but "integral part of the administration of justice in the United States."[23]

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18. Carter v. State, 243 Ind. 584, 187 N.E.2d 482, 483 (1963).
19. 384 U.S. 436 (1966).
20. Cox, *supra* note 11, at 91.
21. Fair v. Balkcom, 19 S.E.2d 691, 695-96 (Ga. 1961).
22. Anderson v. North Carolina, 221 F. Supp. 930, 935 (W.D.N.C. 1963), followed in Shupe v. Sigler, 230 F. Supp. 601 (D. Neb. 1964). Some of the problems in this area are suggested by Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133 (1965), and People v. Mattson, 51 Cal. 2d 777, 793, 336 P.2d 937, 946 (1959).
23. Barber v. Gladden, 220 F. Supp. 308, 314 (D. Ore. 1963).

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