

Reviews

Equality. By *John Wilson*. London: Hutchinson & Co. Pp. 216. \$4.75 (1966).

1

"Is there still such a subject," Isaiah Berlin has asked, "as Political Theory?"¹ John Wilson's newest book, the sixth to come from this relatively young (thirty-eight) English moral philosopher, will not settle the issue. If anything, it is evidence on both sides of the question.

If we think of political theory as any attempt to examine the great public issues of the day in the light of universal ethical principles, Mr. Wilson's book certainly qualifies for library classification on the same shelves as all the major and minor works of political thought referred to in college courses "from Plato to the present." But if we think of it as an effort to champion a great public cause by marshalling all the arguments in favor and refuting the arguments against—in the sense that Plato and Aristotle championed the cause of the just *polis*, or Hobbes of absolutism and Locke of Whiggery, or even as Sartre and Camus have spoken for the idealistic but alienated man of our time—then Wilson's book is not political theory but something else and something less.

Style is one index to the difference. Wilson's treatise will surely not be read with pleasure or enthusiasm or even great benefit by those who do not share the intellectual outlook and interests of the school of philosophy in which he has chosen to swim. For Wilson is one of the new breed of "analytic philosophers" or, as they are also known, "linguistic philosophers." And that is a rather different kettle of fish from what most of us are accustomed to in political theory. Isaiah Berlin, by contrast, while he is sympathetic toward the newer mode, is himself a representative of an older tradition that may be said to have been begun by Hegel early in the nineteenth century. In this tradition the philosopher works as an historian of ideas, taking his bearings from what has been thought before and offering his own reflections in an effort to extend the dialogue into the present.²

1. Berlin, *Does Political Theory Still Exist?* in *PHILOSOPHY, POLITICS AND SOCIETY* 1 (Laslett & Runciman eds., 2d series, 1962). See Cobban, *The Decline of Political Theory*, 68 *POL. SCI. Q.* 321 (1953), for a similar inquiry.

2. See, e.g., CAMUS, *THE REBEL* (1957); MARCUSE, *REASON AND REVOLUTION* (1954); MARCUSE, *EROS AND CIVILIZATION* (1955); and WOLIN, *POLITICS AND VISION* (1960).

The older perspective is likely to make the philosopher supremely conscious of the obdurate character of conflicting political values and intellectual systems. Berlin, for example, maintains almost as a matter of course that the differences among atheists and theists, mechanistic determinists and Christians, Hegelians and empiricists, romantic irrationalists and Marxists "are not, at least *prima facie*, either logical or empirical, and have usually and rightly been classified as irreducibly philosophical."³ Wilson, on the other hand, while he would acknowledge the existence of these differences, thinks it the job of the philosopher to cut through such disagreements to reach the truth—insofar as the truth can be ascertained by reason. Like J. L. Austin and R. M. Hare, the only other philosophers he cites with a sense of affinity, Wilson makes it quite clear that he means to try to interdict such controversy, to cry a halt to the babble of opinion, "to stop people using words just anyhow," as he puts it (p. 11) with a rare show of indignation. Social scientists are invited to play their part in impeding the volume of untruth by discovering the facts and showing up deviations from them. But the philosopher's responsibility is to examine the arguments over the significance of facts, so as to distinguish proper from unwarranted inference, and, in the sphere of morals, to separate sense from nonsense in order, hopefully, to put a final grinding halt to the tumult and shouting of propagandists and ideologists.

Unlike Berlin, therefore, Wilson has little patience with the sometimes paralyzing experience of ineluctable diversity that has struck students of political thought so forcibly in this century.⁴ He is rather crisp, even to the point of flippancy, in renouncing a good portion of the intellectual inheritance of almost 2500 years of recorded Western history. "Different political philosophies," he asserts almost in passing, "were in the past little more than the strong feelings of certain groups of people who wanted certain specific things, and who dressed up their feelings in philosophical guise to make them look impressive" (p. 13).

Rather strong words, these, when we consider that they amount to a kind of wholesale dismissal of the entire history of Western political thought, including not only the output of the classical philosophers but also that of the moderns—the Liberals, Conservatives, Socialists, Pluralists, and so forth, with all their neo-orthodox and revisionist

3. Berlin, *supra* note 1, at 8.

4. See, e.g., the work of Karl Mannheim. Even as he calls for a "synthesis of perspectives," Mannheim recognizes that "today there are too many points of view of equal value and prestige, each showing the relativity of the other, to permit us to take any one position and to regard it as impregnable and absolute." MANNHEIM, *IDEOLOGY AND UTOPIA* 75 (1936).

progeny thrown in for good measure. All of them, it seems, have not really been philosophers but only misguided amateurs with strong feelings, weak minds, and insecure positions. How secure in his own mental fortress must a contemporary philosopher feel to be capable of such hauteur!

We must ourselves nevertheless try to exercise more forbearance toward Wilson than he does toward his predecessors. Iconoclasm is after all the stock-in-trade of new movements in moral philosophy. We might expect Wilson to engage in even more polemical debunking than he actually goes in for. What is really important, after all, is that at a time when the subject of equality inflames passions everywhere and arouses confusion in such practical matters as apportionment, voting, and taxation, a book has finally been written with the intention of setting forth a universal principle of equality on rational grounds alone.⁵ This in itself would be enough to warrant earnest consideration. The fact that this long-deferred task has been undertaken by a representative of a major new tendency in philosophy only makes it even more imperative that we examine the result both for its intrinsic value and for its historic significance.

2

For the purposes of such an examination it is arresting and interesting that although Wilson has little use for most prior movements in social thought, he should be very respectful toward at least one such movement, namely psychoanalysis. The psychoanalyst, according to Wilson, has raised a standard to which the wise and honest philosopher ought to repair. To understand his own role, the philosopher too must see himself as "a liberator rather than a moralist" (p. 11). To understand the spread and swell of the demand for equality he must view it in the light of a cardinal psychoanalytic metaphor—the evolution of humanity from a state of childish dependence toward one of psychic and cultural maturity (p. 36). Even to understand what equality itself means he is well advised to refer to what Freud called the "transference," or the relationship that develops between the analyst and his patient. "The context of psychoanalysis," Wilson writes,

stands as a model case, not because of any truth or falsity in the

5. LAKOFF, *EQUALITY IN POLITICAL PHILOSOPHY* (1964). My book is intended only as a study in the history of egalitarian ideas. A forthcoming edition of *Nomos*, the journal of the American Society for Political and Legal Philosophy, to be issued in 1967 as volume nine in the series, will examine equality from a number of points of view, including the philosophical, religious, and legal. It is being edited by J. Roland Pennock and John Chapman and published by the Atherton Press.

claims of psychoanalytical theory, but because it is at least intended to be a context designed specifically for the improvement of the ability to communicate and the ability to love. There is an important sense in which the patient, even though he is mentally ill, is treated as an equal: his desires and the expression of his desires are not crushed: he is not subject to force, threats, emotional pressure or even advice on the part of the analyst: he is not made to feel guilty, wicked, ashamed, or frightened. He is encouraged to be himself and to become aware of himself. He is educated, but not indoctrinated (pp. 161-62).

Finally, as the psychoanalyst tries to make the contents of his patient's *id* accessible to the conscious control of his *ego*, so the philosopher must try to help people learn what it is they really want and how they may expect to fulfill their true desires (p. 117).

In drawing this last parallel, Wilson must make the rather crucial assumption that everyone has the capacity to direct his own will and, that given a choice, he would prefer to exercise his own judgment. The capacity may be crippled by psychic illness, Wilson acknowledges, but the more common affliction is of another sort. Most people are "bewitched" (a favorite word of analytic philosophers) by illusions. The job of the philosopher is to bring them to confront reality. Like the psychoanalyst, the philosopher can consider himself successful only to the extent that the man he is trying to help not only becomes aware of his own desires but is enabled to "accept himself for what he is and hence choose more rationally. . . . The rational person would be the person whose values would remain the same even after the most exhaustive analysis: the irrational person would come to see that his moral views were based on distortions of desires which he had not fully faced" (p. 148).

In these respects Wilson deliberately patterns his approach upon that ideally pursued by the psychoanalyst. In others, a similarity is evident though not explicitly recognized. Whereas the psychoanalyst works with dream material and the patient's free associations, the analytic philosopher works with conversations he imagines and with ordinary language. Wilson might object to this description of his method. "Words," he contends, are not the philosopher's "subject-matter but his method. He works by continual cross-reference, moving from a situation in real life to the words we might use to describe it, back again to the situation, then back again to the words, and so forth" (p. 7). But the fact is that the situations referred to are often word-games. And even when they are not, what is important about them to the analytic philosopher is not the direct bearing they have on the substantive issue

he is considering, but the indirect help they give in clarifying the statements he is examining for their logical meaning. Thus Wilson heads one small chapter "the power élite" and another "class distinctions." In neither of them does he explore the subjects indicated by the titles in any depth. Although he never bothers to define the term, for example, he readily asserts that "a ruling class or power élite is inevitable" (p. 173). But it is not his intention to decide what a power élite is or whether it exists. His concern is only to define an egalitarian attitude toward what he takes to be a situation in real life. It is the logic of the egalitarian position, rather than the real-life situation, that occupies his attention.

Still another way in which the analytic philosopher resembles the psychoanalyst is in his preference for the commonplace as against what most of us are likely to take as more significant realms of experience. Since politics is an affair of statesmen and administrators, he contends, it should be treated only when we become familiar enough with principles derived from our own more immediate experience. We all have neighbors and bosses. Before we try to look behind the newspaper headlines we should first come to grips with our own environment. By referring to these everyday experiences the philosopher tries "to make us feel at home" with subjects customarily examined in more remote contexts (p. 8). True to his announced intentions, Wilson tells us very little about such burning issues as *apartheid* or even such merely smoldering ones as progressive taxation. But we hear a great deal about hypothetical husbands scolding or caressing their wives, doctors treating patients, zookeepers tending animals, children playing Monopoly or dividing chocolate, and adults (what up-to-date English philosopher could do without these exhibitionists?) playing tennis, chess, and poker. Unlike the psychoanalyst, however, the analytic philosopher does not maintain that all public relationships are simply family affairs writ large. He merely assumes that principles found relevant in one context will likely prove relevant in others.

In this relatively minor respect, as in the more important ones, the analytic philosopher resembles the psychoanalyst only in the most superficial way. Hell may be a city much like London, as a poet once suggested, but it will still apparently take a Viennese rather than a native Londoner to draw an adequate map of it. For the analytic philosopher recognizes no separate realms of conscious and unconscious; he prefers to speak of reason and confusion, as though psychology had taught us nothing since Condillac. He does not deal with the powerful instinctual forces that Freud saw expressed in part in the *id*, but instead discusses

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our “desires,” as though these never amounted to more than our preferences for chocolate over vanilla. Since he is concerned only with logical argument, he does not bother to consider whether the human mind has rules of its own, rules that Freud thought indispensable to an understanding of what he called mental functioning. He has only the most simple-minded view of the psychoanalytic transference, in which the analyst is called upon to play the role of authority, educator, reformer, and, as Freud described him, “doctor of the soul.” It does not occur to him that however egalitarian the situation may appear, the theoretical context in which it proceeds and the therapeutic end it serves may well bring about an entirely different result in actuality. He cannot imagine, as Freud could, to his constant sorrow, that the price of gratifying our wishes might be the collapse of society. Instead he casually assumes—as Freud wanted to believe but never quite could—that civilization is a progressive march toward universal autonomy, blocked only by the last vestiges of prejudice and error. How could he possibly perceive, as Freud did, that social order might require both the illusion of equality and a political structure based upon hierarchy and dependence?⁶

It would be charitable to say that in psychoanalysis Wilson has chosen a model whose complexity he does not fully appreciate. But the interpretation he offers and the parallels he pursues give us a rather good idea of what he takes to be his own task as a philosopher. We might guess from what he says about psychoanalysis and what he takes to be the role for philosophy that his approach to the subject of his treatise, the concept of equality, will be more direct and less ambivalent than that of Freud, but also less powerful, less insightful, and less supple. And so, alas, it is.

“An egalitarian would hold that if everyone has an equal need of food then everyone should have an equal right to it. . . .” Wilson does not assert that there is in fact such a need or such a right, but he does assume that there is such a person as “an” or “the” egalitarian. In the history of western thought a great many different ideas have found expression that can be labeled egalitarian. Locke argued that although the earth had been given to mankind in common, the conventional division into private holdings was a legitimate recognition of the natural disparity of talent and effort. The radical French revolutionary (and co-author of the *Manifesto of the Equals*), François-Noël (Gracchus)

6. For Freud's views on equality, see FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* (Strachey trans. 1951); LAKOFF, *op. cit. supra* note 5, at 183-93. For a thorough and properly subtle view of Freudian theory and practice, see RIEFF, *FREUD: THE MIND OF THE MORALIST* (1959).

Babeuf, thought otherwise. He bitterly attacked the idea of the moderates that some inequalities of income could be justified along the lines that Locke had laid out. It was, Babeuf held, "absurd and unjust" to award greater compensation to those whose work required a "higher degree of intelligence and more application and tension of the spirit." For "that does not extend the capacity of the stomach at all."⁷

3

Wilson is of course quite unconcerned with the record of conflicting interpretations. For him the history of ideas is little more than the pre-history of philosophy. He would rather wipe the slate clean and engage the reader in a game of words, with the objective of arriving, by the use of reason alone, at some universal idea of equality that would express a kind of common sense of mankind. "I hope to show," Wilson writes,

by a careful analysis of what people have meant by "equality" and of the way in which it interlocks with other concepts such as justice and liberty, that there is at least one sort of equality which has been, as it were, latent in our thinking and which has great importance not only for politics in the narrow sense but for all personal relationships (p. 11).

When people speak of equality, he contends, they do not ordinarily use the term as a word of praise but rather in a purely descriptive sense: "It would be natural to demand justice or equity as a right: whereas 'Justice, O King!' is natural, 'Equality, O King!' is not" (p. 17). Popular usage, however, is only a partial guide. To form a comprehensive view of what "statements" concerning equality convey we must deposit them in a number of categories: political principle, assertions of fact, formal principle (by which Wilson means the general notion of impartiality), an ideal, and particular examples of practical application.

The statements about equality that arise in all of these categories, Wilson argues, express the same latent idea. This he defines as the liberal idea: "The way of life most egalitarians wish to advocate . . . might be fairly described as the liberal way of life" (p. 128). The question to be answered becomes: "What is it that believers in equality, and liberals in general, really have to sell?" (P. 21.)

The liberal's bill of goods, he replies, is an "ideal and a metaphysical truth which can be rationally defended by reference to human nature . . ." (p. 22). But in examining the liberal view of human nature Wilson admits that whenever we refer to the subject we all manage to

7. *Advielle, 2 HISTOIRE DE GRACCHUS BABEUF ET DUE BABOUVISM 41 (1884).*

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select those elements that support our point of view and ignore others (p. 45). He also acknowledges that any view of human nature must recognize that people differ not only in intelligence and talents but even in intention, capacity for effort, and ability to exercise choice. Human nature, moreover, is commonly influenced by factors outside human control (p. 71). The entire subject, he finally confesses, is muddled (p. 88).

What then is the natural condition that gives rise to the latent idea of equality that is in turn put forward by liberal theorists and politicians? The answer Wilson offers comes as rather a let-down. It is simply the human capacity for free will—the fact that people “have wills of their own, and can choose and create their own values” (p. 22). This capacity, it would seem, is what gives rise to the belief in human equality and what sustains the belief as a perfectly rational conclusion. Wilson does not regard “this fact alone” as sufficient justification for the liberal position. But it is fair to say that his elaboration of free will into the capacity for rational discussion does not greatly enhance the original assertion. Philosophically defined, it would appear, egalitarianism is a belief in fraternal communication inspired and justified by the common human capacity for the exercise of choice in the sphere of values.

If the conclusion is disappointing, it is at least partly because the chain of reasoning that leads to it is weak at so many points. To begin with, is it really so uncommon for people to demand equality as well as justice?⁸ Asking it of the king is another matter. Nowadays all that people ask of kings is that they pose for postage stamps and stay within their household allowances. If in the past subjects demanded justice from kings rather than equality, surely it was largely because a demand for equality would have been looked upon as an act of high treason. It would have been taken, and rightly, as a subversive indictment of the very basis of royal authority. Why else was the famous medieval couplet, “When Adam delved and Eve did span/Who was then the gentleman?” so popular yet so anonymous?

The identification of the demand for equality with liberalism may be acceptable if what is meant is that it arose in the context of what is often broadly referred to as “the rise of liberalism,” although even this is a misleading interpretation. But surely it is far more misleading to ignore the fact that the liberal notion of equality does not represent or

8. What are we to make, for example, of the civil rights slogans which explicitly demand equality and “one man, one vote” or of books like: TAWNEY, *EQUALITY* (1931); GRIMES, *EQUALITY IN AMERICA* (1964); HENTOFF, *THE NEW EQUALITY* (1964).

include the conception of equality that socialists and conservatives are likely to entertain. The conservative view may perhaps be put aside on grounds that conservatives are hostile to equality as an ideal. But what of the socialist view? Are we to suppose that when Marx issued his *Critique of the Gotha Program* in order to draw a distinction between the ideals of bourgeois liberalism and those of socialism (and also to distinguish socialism from communism), he was bewitching himself and his followers? The historical fact is, of course, that a rather important conflict has developed between liberals and socialists (and between the societies that subscribe to the two sets of values they advocate) over the meaning of such ideals as equality. Even Wilson's fundamental assumption that all men share a capacity for free will is not one that an orthodox Marxist could accept as a starting point for a definition of equality. Unless we define mankind to exclude Marxists (a perilous definition in view of the birth rate in certain Communist countries), of what value is Wilson's allegedly universal principle?

Most important of all, is it not a form of delusion to *assume* that all men are capable of creating their own values? Nietzsche thought that to achieve such a condition it would be necessary to rear a new species of man, an "overman." He was scarcely confident that civilization would succeed in the effort. It behooves us at least to be skeptical toward the view that the task has already been performed. If ideals are not to be illusory and if they are not to promote certain disappointment, surely we ought to ground them on what we have reason to think is true rather than purely on what we hope will someday be the case.

4

It is easy enough, but unsatisfying, to demonstrate that Wilson has failed in his effort. We must also ask why it is that such an investigation as he has made has yielded such a frail and dubious result. It is not that he is himself incapable of the task. Despite the shortcomings of the work, Wilson's reasoning is often deft and his expression—if we give him the benefit of our doubts about his method—can be clear and precise. The real trouble is that although in his own way he too has discovered the hard fact that political values are diverse—the fact that there are disagreements which, in Berlin's words, are "irreducibly philosophical"—he has refused to accept the only logical consequence of the discovery. That would be of course to admit that the effort to prescribe a single ideal of equality with serious political bearing (as distinct from a merely ethical ideal with more limited application) is inherently impossible.

In the face of this implacable diversity of values, the only universally acceptable egalitarian ideal that anyone could possibly arrive at would inevitably be as vague and as pragmatically inconsequential as the one Wilson advances. He could just as easily have used the same sort of reasoning to arrive at a belief in "human dignity" or in the "essential rights of man as man" or some other such popular piety with about the same relevance to political life. It is not as though the problem of diversity eludes him. "If two people differ in their ultimate criteria of values or rules for behaviour," he declares, "then—precisely because these criteria and rules are ultimate—they have no higher criteria or rules by which to settle their differences" (p. 97). Having had the good sense and the courage to state this obvious but threatening truism, he should have realized that the word-game was over.

Instead he pronounces a sermon from the lofty heights of Mount Non-Sequitur: since there may well be conflicts of value which may not be amenable to philosophic resolution, he argues, the task of the liberal is to persuade others to abandon their points of view and accept his own! The liberal must show that "it is ultimately irrational" to prefer relations of domination to relations of equality (p. 154)—even, presumably, if his antagonist values hierarchy as an indispensable condition of culture, order, and good taste or if the sort of equality he would accept (in property ownership, for example) would violate a liberal canon.

The difficulty, not to say the absurdity, of this position is evident in an example that Wilson offers. He imagines a dialogue with a dictator in which (not unexpectedly) the subject of language plays a vital part. The dictator maintains that since his language does not include a word for pain, he will not take the capacity of people to feel pain into account in his social system. If he is reproached on the ground that by allowing some people to torture others he presides over an unfair society, he could logically reply that the question of fairness depends upon criteria: since the feeling of pain is not one of his criteria, the system cannot be judged with reference to it. The egalitarian, Wilson suggests, may claim the dictator is only pretending not to recognize this aspect of human nature. But this would not necessarily convince him. In order to convince the dictator, the egalitarian must show that by recognizing the human capacity to feel pain he would gain better control over reality. Wilson comments:

It is often the case that tyrants and dictators *pretend to forget*, or perhaps actually do forget, natural similarities which exist even within their own language, and criteria which are part of the

common human heritage. The egalitarian has to jog their memory, or accuse them of dishonesty. Secondly, if we discover new similarities, or produce new criteria, the egalitarian can reasonably say that the authorities ought to attend to them. For if they are genuine they can be shown to give us more control and greater predictive powers, and this is universally accepted to be desirable.

There is of course something so unrealistic about the idea of carrying on such an argument with a dictator (would a Gestapo agent serve as parliamentarian?) that we may well be tempted to dismiss the entire hypothesis as too much of a strain on our credulity. But we can at least concede that if Wilson's final point is correct, *i.e.*, that truth will out because truth improves the ability to control reality, then the truth may occur to the dictator without anyone telling him.

But the real weakness of the suggestion is in what the substantive point reveals of Wilson's political naiveté. Reading this passage brings to mind Pierre Boulle's story of *The Bridge on the River Kwai* and especially the confrontation between a liberal and a dictator so well portrayed in the film version of the novel by Alec Guinness and Sessue Hayakawa. It will be recalled that Guinness, as the captive British officer, first tries to persuade the tyrannical Japanese prison camp commander that his brutal treatment of prisoners and his unwillingness to respect the Geneva Convention are unfair and illegal. Hayakawa responds with contempt and proceeds to make an example of Guinness by putting him in solitary confinement. Guinness finally succeeds in changing Hayakawa's mind when he demonstrates by his determined resistance that if the Japanese officer intends to build his bridge on time he must have the cooperation of his prisoners and that to win this cooperation he must take a more liberal attitude toward the rights of prisoners of war.

At first recall, the example seems to be an apt illustration of what Wilson has in mind. In fact, the lesson is actually quite a different one from the one Wilson draws from his hypothetical confrontation. Clearly Guinness' success does not depend upon his ability to "jog the dictator's memory," for Hayakawa can only remember the code of Bushido, according to which prisoners are cowardly soldiers who have brought unspeakable disgrace upon themselves by surrendering and therefore do not deserve honorable treatment. Nor does it depend upon Guinness' ability to persuade Hayakawa by argument that it would better serve his interest to change the rules of the game. For Guinness to win the point, he has to display extraordinary personal heroism. Had Guinness been a lesser man, or perhaps not an actor portraying a role, he

might well have knuckled under and lost the game. Faced with the alternative of continual persecution and perhaps of certain death, he and his men might have given up their resistance and done what was demanded of them in order to survive. It is conceivable that the slave laborers whom Hitler and his henchmen treated as members of a lower race of men could have gained better treatment by resisting their overseers. But how many actually did? And is it not likely that individual or even group resistance would have been utterly futile?

In any case the point is that it would not necessarily pay a dictator to observe ethical rules or liberal political values. On the contrary, his interest may require just the opposite. The survival of a dictatorial regime may well depend upon the dictator's success in destroying the dignity of his subjects, in brutalizing them to the point at which they become unwilling and unable to resist. If Wilson had only been less concerned with word-games and more alive to the realities of political life he might have gained some insight into the tragic quality of life under a totalitarian regime. Instead, he reduces the confrontation to the dimensions of an Oxford debate, and concludes that it should be possible to persuade a dictator to become a liberal by appealing to his self-interest on rational grounds.

But it is no use asking the historically impossible. It took the French resistance to produce modern Existentialism. The cold war and England's withdrawal from a leading political role have in a sense produced analytic philosophy. To those who specialize in the examination of language but have no commitment to some political reform or defense, the highest ideal is bound to appear to be "communication." And this ideal, needless to say, is Wilson's final word. It is celebrated as the very matrix of morality and justice and as the essence of the act of love. (Epilogue, pp. 208-216.)

However unsatisfactory we may find such an ideal, its emergence is understandable given the present historical context. In the last century the older more substantive political philosophies became frozen into political ideologies. This century has experienced what has been called the "end of ideology"—in the sense that all the old ideologies have come to seem stale and irrelevant. In the advanced societies a new pragmatic spirit has arisen out of a skepticism toward the old ideas and a willingness to experiment. Soviet economists now dare advise the Party leadership that certain instruments of the bourgeois capitalist economy, such as competition among firms, are valuable instruments even in a socialist system. A demand has even arisen in the communist bloc for free elections, on the ground that they would promote stability, eliminate the

need for occasional destabilizing purges, and make the succession of leadership regular and acceptable. In the "capitalist" countries the sort of comprehensive economic planning that was once anathema gains more and more popularity. And even the most Spencerian liberals are coming to recognize, by deeds if not by words, that a society cannot degrade the life of the poor without creating a social climate unbearable for all.

In this vacuum of positive commitment, the belief of the analytic philosopher in communication is perhaps the only appropriate ideal. It is in a real sense the ideology of political and social co-existence. The age of the analytical philosopher is also the age in which Lyndon Johnson asks, "come, let us reason together," and his critics complain of a credibility gap. It is the age in which a leading cultural critic declares that "the medium is the message." It is the age of summit conferences and seemingly endless debates in the Security Council. It is the age in which we seek, above all else, the pragmatic consensus, domestic and international, that comes from successful communication.

Under the circumstances, communication is not an ideal to be dismissed lightly. But neither is it sufficient to our needs. Survival is not a way of life but only a necessary condition of political creativity. Here analytic philosophy can no longer help us. What is disquieting is that we do need help. For the future poses an extraordinary challenge to those concerned with the problem of equality. Wilson rightly notes that "as our powers over nature increase, we are bound to become less interested in what men are, and more interested in what we make them to be" (p. 49). As the problems of scarcity are increasingly overcome, the older conceptions of the egalitarian ideal become increasingly obsolete. But as we try to come to grips with the medical and genetic revolutions of our time we will be compelled to make social decisions far in advance of what we have so far been able to decide about these ideals. Instead of asking ourselves whether and in what respects men *are* created equal, we may soon have to ask whether and in what respects they *ought* to be created equal. When that happens we shall need an understanding of human values well beyond what the analytic philosopher apparently can provide.

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Rush to Judgment. By *Mark Lane*. New York: Holt, Rinehart & Winston, Inc. Pp. 478. \$5.95 (1966).

The twin murders of President Kennedy and his alleged assassin, coming thirteen months after the Cuban missile crisis, sent shudders of fear through the country. It seemed that the American system was again on the brink of instability, if not destruction. Lyndon B. Johnson, among others, suspected a mass conspiracy. Later, to create the appearance of stability and credibility, he used an old method.

On November 29, 1963, the President's Commission on the Assassination of President Kennedy was "created" . . . "in recognition of the right of people everywhere to full and truthful knowledge concerning these events."¹ In its Report, the President's Commission stated that it endeavored "to fulfill that right and to appraise this tragedy by the light of reason and the standard of fairness. [The Report] has been prepared with a deep awareness of the Commission's responsibility to present to the American people an objective report of the facts relating to the assassination."²

The political reasons for the appointment of the President's Commission were obvious: to quiet the doubts of the nation and the world by securing the unanimous agreement of the most irreproachable members of the society—men whose political views were respectively different but whose reputations for veracity and *gravitas* were beyond reproach. If these men, neither jurors nor peers of Oswald, validated the investigation, the public would believe and the ship of state would continue to sail. The President chose members of Congress and the judiciary to employ and coopt the other branches of government in the executive's investigation.

The President's Commission was intended to foreclose any Congressional investigation, grand jury proceedings in Texas, or any other national criminal investigative proceedings. It was granted a monopoly charter to find out what happened in Dallas. Monopolies enjoy power, but they must expect scrutiny.

The Commission's objective, or pretense as some would have it, has come under attack by a group of "independent entrepreneurs" and amateur watchdogs who emerged to write articles and books and advance

1. U.S. PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY, REPORT 1 (1964) [hereinafter cited as PRESIDENT'S COMM'N REP.]. The members of the Commission were Earl Warren, Richard Russell, Hale Boggs, John S. Cooper, Gerald Ford, Allen Dulles, and John McCloy.

2. *Ibid.*

theories about the murder itself,³ the operation of the Commission and its purposes.⁴

A special sort of advocate-entrepreneur of the case was Mark Lane, a New York lawyer and former State Assemblyman. He was approached by Mrs. Marguerite Oswald, the mother of the alleged assassin, to represent the interests of Lee Oswald before the President's Commission.⁵ Prior to the publication of his best selling book *Rush to Judgment*, Lane was viewed in the press as a lawyer who sought publicity for himself at the expense of good and honorable men at a time of deep national tragedy. The director of the FBI, while attempting to discredit Mrs. Marguerite Oswald as emotionally unstable, used as "indication of her emotional instability 'the retaining of a lawyer that anyone would not have retained if they were serious in trying to get down to the facts.'"⁶

There are flaws in Mark Lane's book, some of them disturbing⁷ because they cast doubt on Lane's entire effort. Yet it is a book with which proponents of the Commission must reckon. It raises questions which go to the heart of the case, questions never answered by the Commission Report.⁸

Reading through the Commission Report and its record gives one

3. "Independent entrepreneurs" is a term used by Tom Adler to describe those who by independent investigation want to break down the monopoly of information and viewpoint which is given out by official organs of the society.

4. A fairly complete list of books and articles on the PRESIDENT'S COMMISSION REP. can be found in 112 CONG. REC. 23206-07 (daily ed. Sept. 28, 1966).

5. It will be noted that I do not refer to the Commission as the Warren Commission since neither is it the correct name nor does it describe adequately where the final responsibility for the government must rest.

6. Trevor-Roper, *Introduction to MARK LANE, RUSH TO JUDGMENT* 9 (1965).

7. For example, Lane refers to a Dr. Howard Bonar, who allegedly was the eye doctor for an alleged eyewitness to the man in the sixth-floor depository window. No Dr. Bonar is listed among Dallas doctors and optometrists or in the AMA Directory.

8. Regardless of the validity of Lane's criticism of the Commission's theories, he at least tried to represent Oswald's interests. But what is one supposed to say about the curious role which Walter Craig, the Commission appointed lawyer, was to play? Craig, who was President of the American Bar Association and at the time an unconfirmed judicial appointee to the Federal District bench in Arizona, was not supposed to represent anybody, although his task was to "in fairness to the alleged assassin and his family . . . [whose interests were adverse] participate in the investigation and to advise the Commission whether in his opinion the proceedings conformed to the basic principles of American justice. Mr. Craig accepted this assignment and without limitation attended Commission hearings in person or through his appointed assistants. He had the right of cross examination, recall of any witnesses prior to his appointment and the right of suggestion of witnesses. PRESIDENT'S COMM'N REP. 10. Lane states that there is no record of Craig asking the Commission to call a prospective witness, or recall a witness. LANE, *op. cit. supra* note 6, at 379. On rare occasions Craig or his associates might ask a question or two, "but such questions were either of minor importance or were asked solely for the purpose of assisting to fasten guilt more firmly onto the absent defendant." *Ibid.* In effect, Judge Craig and his associates were counsels to the Commission and its staff. They were not Oswald's counsel. Suggestions which they made were given to counsel and Commission privately. It seems to this author, therefore, that the Commission put Craig in an impossible position.

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the impression that Lane was put on continuous trial. He was followed on various occasions.⁹ In the Archive files there are a number of references to FBI reports about Lane, some still secret.¹⁰ On the other hand, Lane's account clearly suggests that he wants to "get even with" Chief Justice Warren for several reasons: for the difficulties he encountered at the hands of the Chief Justice; for Warren's doubting the truthfulness of a telephone conversation between Lane and Mrs. Helen Markham (she was a witness to the Tippit murder; Lane taped the conversation but she denied having it);¹¹ and for being charged with hampering the Commission's work.

The Commission's Methodology

Disagreement between eye witnesses to an event and those who must later reconstruct it is not unnatural. Nor is it unnatural that people will lie, assume too much, or see different "truths." Mannheim, and the classic Japanese movie, *Rashomon*, about a rape (or perhaps a seduction) teach us that our own experience influences our perception. Events in the lives of the investigators and investigated affect their judgments and actions, though they have no relation to the original cause of the investigation. This to some extent explains the bewildering cascade of opinions, emphases, and "facts" presented in this case.

Virtually all of the critics complain bitterly about the Commission's methodology. It is a method widely used in the government. No account is taken for error. When another "shop" in the department or agency receives a report it takes the conclusions of its bureaucratic colleagues as fact and uses them as the starting point for its own work. Consequently, most reports of government commissions are the result of adding up the approximations of different bureaucratic groups and then compromising between divergent interests. The result of this process is a document which steers the reader away from understanding.

The President's Commission, as Edward Jay Epstein showed in *In-*

9. Government investigators recorded Mark Lane's public statements and ran international security checks on his activities. See, e.g., Archives Files No. 440s, *Letter from James J. Rowley, Chief U.S. Secret Service forwarding a tape recording of Mark Lane's press conference held in lobby of VFW Building, 200 Maryland Ave., N.E. on February 11, 1964*; there is also a report by the FBI, withheld, prepared by Special Agent Benjamin P. McManus entitled *Mark Lane*, February 3, 1964, New York City.

10. Harold Weisberg, whose books on the case have been seminal, has pointed out that more effort seems to have been spent by the FBI in tracing critics of the President's Commission than in finding evidence concerning the events of November 22-25, 1963. WEISBERG, *WHITEWASH II* (1965).

11. LANE, *op. cit. supra* note 6, at 181.

quest, was no exception to this method.¹² The President's Commission *relied* on the agencies of the government for information. It did not examine them.¹³ The Commission Report states it had no need to employ investigators "because of the diligence, cooperation and facilities of federal investigative agencies. . . ."¹⁴ Commission members *did* ask whether deviations in FBI reconstructions mattered, but they were simply told they did not.¹⁵ They had no way of verifying this because of their lack of independent investigators and their reliance on government agencies.

Commissions are generally appointed in the area of national security, as political instruments either against other departments of the government, as punctuators of decisions and conclusions which already have made, or as window dressing. In some cases government commissions also have the high duty of not reporting or analyzing activities which might endanger the state. Thus limitations are set for reasons of state. So, for example, where there may be extensive covert government involvement bearing on an event or series of events, one may be fairly secure in surmising that the commission would be structured to avoid analyzing that series of involvements if it would endanger "national security." My conclusion is that for this reason an independent investigating staff was not employed. Such a group might have uncovered a covert operation of the CIA in the payment of funds and resources to refugee Cuban groups, some of whose members might be implicated in the assassination. Furthermore, the theory is developed by Weisberg in *Whitewash II* that the American government was involved in running guns and ammunition to Cuba with Jack Ruby acting as a point of contact. To independent investigators it would have *appeared* that the CIA was funding the President's assassins and that CIA involvement with central characters in the assassination had to be covered up. But

12. EDWARD J. EPSTEIN, *INQUEST* (1966).

13. Schwartz, *A Legal Demurrer to the Report of the Warren Commission* 11 JOURNAL OF FORENSIC SCIENCES 318, 321 (1966). Under Executive Order No. 11130, Nov. 30, 1963, the Commission was "to *examine* (emphasis added) the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by Federal or state authorities, to *make* such further investigation as the Commission finds desirable." (Emphasis added.)

14. PRESIDENT'S COMM'N REP. xiii. Oswald was interrogated for 12 hours by more than 25 officials of the FBI, the Secret Service, the Dallas Police, the Sheriff, a U.S. Marshall and Post Office Inspector and *no* record was kept. "For all of this combined effort no stenographic record was maintained, no tape recording was created and the only participant who made any notes did not submit them to the Commission." LANE, *op. cit. supra* note 6, at 187. Such sloppy investigative techniques should have encouraged the Commission to employ its own investigators.

15. U.S. PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY, 5 HEARINGS 163-64 (1964) [hereinafter cited as PRESIDENT'S COMM'N HEARINGS].

first, two minor matters which cast doubt on the reliability of the Commission's theories must be discussed.

A. *The Reconstructions*

The critics have charged that the Commission's staff and the agencies upon which they relied mishandled the evidence. The Commission counsels' methods were hardly a field day for the best evidence rule. Assume, as the case may be, that there was a disposition or even a positive direction to find that there was only a single assassin.¹⁶ And suppose, as is the case, that in the reconstruction of its parts, the Commission put together a series of approximations each of which in and of itself was not wrong, but was only approximate. The resulting error could be gross. For example, the reconstruction of the assassination by the FBI occurred early in the morning of May 24, 1964. What a person sees from a window at 6:30 of a May morning is very different from what he sees at 12:30 on a November day. On November 22, the wind was blowing very strongly. There is no indication that the same wind conditions held during the reconstruction.¹⁷ There is now some evidence to suggest that the kind of car President Kennedy sat in was significantly different from the one used in the reconstruction.¹⁸ According to Weisberg the FBI may have assumed that the President was sitting perhaps as much as 10 inches higher than he did on November 22.¹⁹ In the reconstruction, the only assumption was that the shots came from the 6th floor of the Texas Book Depository. The car was lined up in such a way that the person in the window had to see the car. "We moved the car around until he (Mr. Frazier) told us from the window, viewed through the rifle the point where he wanted the car to stop. And he was the one in

16. According to Lane, the Commission "assumed that the answer to that question would be found by those investigating Oswald's activities on November 22. The framework of the Commission's investigation appears to have precluded any conclusion other than the one that it ultimately reached." But in a telephone discussion on December 22, 1966, Mr. David Belin of the Commission staff told me that at no time did they assume that Oswald was the assassin of Kennedy and the murderer of Tippit. He also said that they "took nothing for granted" on the question of whether there were one or more assassins. This directly contradicts Lane's contention that the Commission and its staff started from the assumption of Oswald's guilt and put the entire investigation into that context. For further study of the case the 238-page Ball-Belin memorandum (The Determination of who was the Assassin of President Kennedy) should be made part of the public record since it is the single most important document (at least that I have heard of) which describes the Commission's investigation in its initial crucial stages. Furthermore, it is the one document which would show that the method of the Commission did not start from the assumption of Oswald's guilt.

17. WEISBERG, *op. cit. supra* note 10, at 175, citing 5 PRESIDENT'S COMM'N HEARINGS 132.

18. *Id.* at 178.

19. *Ibid.* See also the testimony of Mr. Shaneyfelt of the FBI. 5 PRESIDENT'S COMM'N HEARINGS 151.

the window that told us where the point 'A' was. Once we established that, we then photographed it."²⁰

Of course one could not restage the entire assassination or series of bizarre events which occurred between November 22 and November 24. But one could restage the events more convincingly than the Commission did. For example, the Commission asked some of the best riflemen in the United States to repeat the shots of Oswald in conditions far more favorable than those which Oswald would have been under on November 22. Yet, shooting at a fixed target, they were unable to repeat Oswald's shots within the allocated time, and Oswald's shots were fired at a moving target. On the other hand, it seems to me that at least one member of the Commission should have wondered why experts were used rather than average marksmen. And he should have questioned the method used by the staff in proof of the case.

As the Report says, "three FBI firearm experts tested the rifle . . . *the purpose of this experiment was not to test the rifle under conditions which prevailed at the time of the assassination but to determine the maximum speed at which it could be fired.*" (Emphasis added.)²¹ The President's Commission should have reconstructed the events by having an ex-marine of Oswald's approximate background, physical size and marksman ability see whether he could recreate Oswald's alleged feat of marksmanship. The Commission might then have asked that ex-marine to perform within a 43 minute period Oswald's supposed subsequent activities. The Commission now credits Oswald with doing extraordinary things without showing that *one man* could do them. Between 12:33 and 1:16 Oswald is alleged to have shot the President and Governor Connally, left the Book Depository, taken "a 7 block walk on Elm Street, a bus ride toward the area he had just left, another walk to his rooming house where he spent 3 or 4 minutes, a pause at a bus stop for an unspecified length of time, a walk almost a mile long to the intersection of East 10th Street and Patton Avenue, and at last, the confrontation and murder of Officer Tippit."²²

B. *The Super Bullet*

According to the President's Commission there were three shots fired and three empty cartridge cases found on the 6th floor of the Deposi-

20. Testimony of Mr. Shaneyfelt, 5 PRESIDENT'S COMM'N HEARINGS 146.

21. PRESIDENT'S COMM'N REP. 194.

22. Lane argues that only by carefully selecting the "least competent and most fanciful" testimony was it possible for the Commission to conclude that it had succeeded in reconstructing every move that Oswald made. LANE, *op. cit. supra* note 6, at 159.

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tory.²³ One bullet could have hit the street. A fragment from that bullet could have hit James T. Tague²⁴ on the cheek. Tague said that on the street "there was a mark quite obviously that was a bullet, and it was very fresh."²⁵ According to the Commission there was a second bullet which seriously wounded both the President and the Governor, and then a third bullet which killed the President.

The President's Commission report supports the single bullet theory and implies that all members were in absolute agreement with it. Yet Edward Jay Epstein in his book *Inquest* shows that there was a split of 4-3 on this question among the Commission members.²⁶ Those who supported the single bullet theory were Chief Justice Warren, Allen Dulles, John J. McCloy, and Gerald Ford while the southern members of the Commission, Senator Russell, Congressman Boggs, and Senator Cooper dissented. (It would not be a public disservice if these three Commissioners would now state publicly why they disagreed with the single bullet theory.) According to the original proponent of that theory, Arlen Specter, one does not have to accept the single bullet theory to conclude that there was only one assassin. But this can only be true if Oswald fired before the Commission assumes that he did, at a brief instant which the Commission itself ruled out. "For a fleeting instant, the President came back into view in the telescopic lens at frame 186 [of the Zapruder film] as he appeared in an opening among the leaves."²⁷ If this possibility is ruled out then the film leaves us with the conclusion that 1.8 seconds elapsed between the first moment that the President could have been hit (about frame 207) and the final moment at which Connally was hit. As *Esquire* magazine pointed out, "the bolt action of the murder rifle cannot possibly have been fired twice during the time in which both men were hit. Either both men were hit by the same bullet or there were two assassins."²⁸

According to the Commission, bullet number 399 passed "between two large muscles, produced a contusion on the upper part of the pleural cavity (without penetrating the cavity), bruised the top portion of the right lung and ripped the windpipe (trachea) in its path through the President's neck."²⁹ It then changed its direction from upward

23. PRESIDENT'S COMM'N REP. 8.

24. *Id.* at 116.

25. *Ibid.*

26. EPSTEIN, *op. cit. supra* note 12, at 149-50.

27. PRESIDENT'S COMM'N REP. 101.

28. *Esquire*, Dec. 1966, p. 205.

29. PRESIDENT'S COMM'N REP. 88.

to downward, passed through Connally's clothes, his back, "traversed the Governor's chest in a downward angle, shattering his fifth rib, and exited below the right nipple."³⁰ It had deposited some fragments in his chest, but it then entered his wrist and thigh, deposited some fragments in his wrist (about three grains worth),³¹ and finally "a small metallic fragment" which is still imbedded in the thigh.³² But the bullet which is reputed to have done all this damage lost remarkably little weight. It was found on a stretcher in the Parkland Hospital. Its weight was 158.6 grains; the FBI agent, Frazier, claimed that this kind of bullet could not have weighed more than 161 grains. Furthermore, the bullet was remarkably undeformed. Frazier pointed out the bullet was virtually clean with no marks, blood or material left on it.³³ When the Commission experts fired a bullet similar to Bullet 399, from a range equal to Oswald's and causing only one of the wounds that 399 did (in the wrist), the bullet was heavily distorted.

Dr. Alfred G. Olivier, the Chief of the Wounds Ballistics Branch at Edgewood Arsenal testified about Bullet No. 853 which was fired through a goat. "It went through the velocity screen into some cotton waste, dropped out of the bottom of that and was lying on the floor." After passing through the goat the weight of the bullet came to 158.8 grains. In other words it was almost the same weight as Bullet 399. However, Dr. Olivier indicated that the amount "of goat tissue it traversed was probably somewhat less than the Governor. . . ."³⁴ *Yet the bullet was quite flattened.* Furthermore it should be noted that Bullet No. 853 would have had to pass through two goats to approximate the alleged path of Bullet 399 since it purportedly passed through two people. Bullet 399 was not flattened.³⁵ Nowhere does the Commission explain how the bullet which tore the back of the President's skull was broken into fragments while Bullet 399, which hit bones, tissue, skin and muscle of two men, was not damaged.

30. *Id.* at 95.

31. 4 PRESIDENT'S COMM'N HEARINGS 113.

32. PRESIDENT'S COMM'N REP. 95.

33. 3 PRESIDENT'S COMM'N HEARINGS 428-29.

34. 5 PRESIDENT'S COMM'N HEARINGS 80.

35. Exhibit 399, PRESIDENT'S COMM'N REP. Colonel Fink, a leading pathologist, testified against the theory that Bullet 399 could have passed through both persons. Yet the ballistics expert stated that Bullet 399 could have passed through both the President and the Governor. Chief Justice Warren asked Dr. Olivier whether the same bullet could have "gone through the President's back as it did (sic), gone through Governor Connally's chest as it did and then through his hand as it did."

Dr. Olivier: "It was certainly capable of doing all that."

The Chairman: "It was capable?"

Dr. Olivier: "Yes."

The Chairman: "The one shot?"

Dr. Olivier: "Yes."

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Governor Connally also dissents from the Commission's single bullet theory. He stated to the Commission and in *Life* magazine that he was not shot by the same bullet which passed through President Kennedy.

Although Governor Connally does not believe that shots came from anywhere other than the Texas Book Depository, he and his wife examined the Zapruder film and said: "They talk about the 'one bullet or two bullet theory!'" he continues, "but as far as I am concerned there is no 'theory.' There is my absolute knowledge, and Nellie's, too, that one bullet caused the President's first wound and that an entirely separate shot struck me." "No one will ever convince me otherwise," added Mrs. Connally. "It's a certainty," said the Governor, "I'll never change my mind."

The Governor concluded after seeing the Zapruder films again that he was hit about one half second later than the Commission said he was which is about frame 234 in the Zapruder film.³⁶

In the final analysis the Commission experts split on the single bullet theory. The pathologists whom the Commission relied on concluded that it was "extremely unlikely" that Bullet 399 passed through both the President and the Governor. Dr. Humes could not "conceive" that the fragments found in Connally came from Bullet 399.³⁷ The ballistics team, after prodding from counsel, seemed to think it was possible.³⁸ Reviewing the theories about the number of shots, the Commission's single bullet hypothesis seems highly improbable. It is possible that a fragment, or fragments, from the bullet which hit President Kennedy's head could have hit Governor Connally's arm. Arlen Specter has pointed out that there were substantial fragmentations from the bullet which struck the President's head. If some of those fragments struck Governor Connally it would explain the bullet's path more cogently. In that case it would have then only passed through the chest and the wrist. Yet this interpretation could still not explain the fact that Bullet 399 was virtually undeformed. Given the weight of Bullet 853 and its flattened front, it is possible that Bullet 399 was fired once by the person or group which might have planted it.

The history of the whereabouts of Bullet 399 is instructive. One cannot conclude from the evidence with any degree of assurance where the bullet came from, how it got where it was, and whether it was the bullet that passed through the President and the Governor. Given the

36. *Life*, Nov. 25, 1966, pp. 43-48.

37. 2 PRESIDENT'S COMM'N HEARINGS 375-76, 382.

38. PRESIDENT'S COMM'N REP. 107-09.

alleged extraordinary exploits of that bullet, it is important to be specific about its discovery. Arlen Specter stated, however, that "the hospital attendants were not cognizant of the fact a bullet was about to drop off a stretcher, and they didn't maintain a chain of evidence such as would be highly desirable if we were to introduce matters in a Philadelphia criminal case."³⁹

The Commission Report, noting that Governor Connally was moved from a stretcher to an operating table, stated that:

*A nearly whole bullet was found on Governor Connally's stretcher at Parkland Hospital after the assassination. . . . Although Tomlinson (Parkland Hospital's senior engineer) was not certain whether the bullet came from the Connally stretcher or the adjacent one, the Commission has concluded that the bullet came from the Governor's stretcher. That conclusion is buttressed by evidence which eliminated President Kennedy's stretcher as a source of the bullet. President Kennedy remained on the stretcher on which he was carried into the hospital while the doctors tried to save his life. He was never removed from the stretcher from the time he was taken into the emergency room until his body was placed in a casket in that same room. After the President's body was removed from that stretcher, the linen was taken off and placed in a hamper and the stretcher was pushed into trauma room No. 2, a completely different location from the site where the whole bullet was found.*⁴⁰

But let us also trace the conclusion of the Commission that the bullet was found on Connally's stretcher. If we assume that Mr. Tomlinson gave the bullet to a Mr. Wright of the Parkland Hospital security staff (something which is not found in the hearings), the following report is relevant. A Secret Service agent, Special Agent Richard E. Johnson, stated on November 30, 1963,⁴¹ "[d]uring this period a Mr. Wright from the security staff [of the Parkland Hospital] came to me with an expended bullet and wished to turn it over to a Secret Service Agent. *The only information I was able to get from him prior to the departure of Mrs. Kennedy and the casket was that the bullet had been found on a stretcher which President Kennedy may have been placed on.*" He also stated that he found rubber gloves, a stethoscope, and other doctor's paraphernalia on this same stretcher. Although the Commission states that the bullet came from the stretcher that Governor

39. U.S. News & World Report, Oct. 10, 1966, p. 56 (interview with Arlen Specter).

40. PRESIDENT'S COMM'N REP. 79-81.

41. *Activities of Reporting Agent on Nov. 22, 1963*, 18 PRESIDENT'S COMM'N HEARINGS 789-99. (Emphasis added.)

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Connally was on, testimony by Darrell Tomlinson neither supports nor contradicts that conclusion. Indeed, he attempted mightily to escape being pinned down on where the bullet came from.⁴²

In the examination of R. J. Jimison, Mr. Specter asked about the stretcher which supposedly had the bullet on it. Jimison was the orderly who handled the stretcher on which Governor Connally was placed:

Mr. Specter: "Did you notice any bullets on the stretcher?"

Mr. Jimison: "I never noticed any at all."⁴³

On the other hand two nurses both testified that they did not notice any bullet or other object on the stretcher of the President. They both stated that the President's mattress was bare. The nearly undamaged Bullet 399 may have been planted on the stretcher at the Parkland Hospital. If there was a second assassin it is hard to believe that only two people were involved since it is highly unlikely that one of the assassins went to the hospital to plant the bullet on the day of the assassination. However, the FBI report on the autopsy states that the bullet simply fell out of the President's body.⁴⁴ Still, a second assassin is probable because the bolt action on the Mannlicher-Carcano rifle could not have been fired in less than two seconds. These are hard and stubborn issues that cannot be glossed over.

Those who do not accept the single bullet theory introduce as supporting evidence the large number of witnesses who claim that they thought shots came from the grassy knoll area. Lane says that 58 witnesses state that "shots came from the direction of the grassy knoll and not from the Book Depository building, while 32 disagreed."⁴⁵ *Ramparts* estimates that 64 witnesses state that they heard shots or saw smoke coming from the grassy knoll.⁴⁶ No doubt the information supplied by witnesses on the basis of sound or seeing smoke is open to question, but enough testified or deposed that that is where they thought the shots came from to leave the impression that the Commission overstated its case when it said that there was "no credible evidence that any shots were fired from anywhere else" than the Depository.⁴⁷

If any weight is to be given to contemporaneous reactions, it should be noted that the first reaction of policemen was to move toward the

42. 2 PRESIDENT'S COMM'N HEARINGS 138-40.

43. 6 PRESIDENT'S COMM'N HEARINGS 127.

44. FBI, SUMMARY REPORT pt. 2, at 18 (Dec. 9, 1963).

45. LANE, *op. cit. supra* note 6, at 37.

46. David Welsh and David Lifton, *The Third Assassin*, Ramparts, Jan. 1967, pp. 93-98.

47. PRESIDENT'S COMM'N REP. 71.

grassy knoll. Many witnesses reacted as if that was the place from which the shots were fired: "Two tried to ride their motorcycles up the incline on the knoll."⁴⁸

David Welsh and David Lifton in arguing for a *third* assassin developed the theory that the shot from the grassy knoll would explain why the President's head was thrust backward when hit by the bullet.⁴⁹ This was not explained in the Commission Report. Barring a neuromuscular reaction the head of a person will travel in the direction which the bullet hitting it is travelling. Newton's second law of motion contradicts the theory that all the shots came from the Texas Book Depository—in back of the car. That may not be evidence, but it does raise a serious question.

Was There a Conspiracy? A Hypothesis

The Commission stated that there was no credible evidence of a conspiracy. But it seems to me that it did not follow the clues which might have proved that such a conspiracy existed. Critics of the Report and the Commission staff's work state that there is enough data to advance a conspiratorial theory of the assassination. Sauvage, Popkin, Weisberg, and Lane all point to occurrences in which "Oswald" was seen where the Commission states he could not have been. But the Commission did not investigate the question of whether someone was attempting to pass himself off as Oswald. For example, Oswald was reportedly seen practicing with a rifle hitting bull's eyes, displaying uncommon skill on a rifle range on November 16, 17, 20 and 21.⁵⁰ He was seen attempting to cash a check for \$189 at a grocery store in Irving, Texas on November 13, with his wife and family in the car.⁵¹ There is also evidence that Oswald shopped for a car and drove a car with a car salesman, Albert Bogard, although the Commission pointed out Oswald did not drive. There was someone named Oswald who had three holes drilled into the rifle at a sports shop in Irving, Texas in early November.⁵² Oswald's rifle had two holes. But the most interesting evidence of another Oswald was given by Mrs. Sylvia Odio. She said that on either September 27 or 28, 1963 Oswald and two other people came to see her. They were interested in financing and advancing anti-Castro

48. Welsh and Lifton, *supra* note 46, at 88.

49. *Id.* at 89.

50. 10 PRESIDENT'S COMM'N HEARINGS 370-72, 380.

51. RICHARD H. POPKIN, *THE SECOND OSWALD* 84 (1965).

52. *Id.* at 522-23.

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operations⁵³ as part of an anti-Castro group. Weisberg quotes the Commission Report against itself⁵⁴ to establish that at that meeting there must have been another person posing as Oswald. This in itself would not be as important as some critics have thought except that Mrs. Odio was called by "Leopoldo," one of the Cubans, who asked Mrs. Odio what she thought of "the American." After Mrs. Odio replied in a guarded manner, Leopoldo said: "You know our idea is to introduce him to the underground in Cuba, because he is great, he is kind of nuts. . . . He told us we don't have any guts, you Cubans, because President Kennedy should have been assassinated after the Bay of Pigs, and some Cubans should have done that. . . . And he said, it is so easy to do it. He has told us."⁵⁵ According to the Commission Report the FBI located Loran Eugene Hall, a participant in anti-Castro activities, who said he had visited Mrs. Odio with Lawrence Howard, a Mexican-American from East Los Angeles, and one William Seymour from Arizona. "While the FBI had not yet completed its investigation into this matter at the time the report went to press, the Commission has concluded that Lee Harvey Oswald was not at Mrs. Odio's apartment in September of 1963." But Lane points out that both Seymour and Howard *deny* visiting Mrs. Odio. Of course Epstein points out that by the third week in September of 1964 the Commission wanted to get the Report out. During that September there were a number of unconfirmed rumors in Washington that the White House was very insistent that the Report be finished and presented to the public well before election day.

In the frantic wrapping-up days of the Report for the Commission there appeared to be real doubts on the part of the Commission staff, but those doubts seemed to be too easily allayed by the FBI Report that Lee Harvey Oswald did not visit Mrs. Odio. According to the Commission, at almost the same time that a group of people (one of whom used the name Oswald) were seeing Mrs. Odio, the alleged assassin Oswald was in New Orleans performing in a most extraordinary way. He was arrested for passing out literature of the Fair Play for Cuba Committee, he had a mock fight with a pro-Batistiano, Carlos Bringuier, and he established himself as an anti-Communist and anti-Castroite with Bringuier's friend.⁵⁶ Furthermore, Weisberg points out that Oswald was carrying in his wallet at the time of the arrest names

53. PRESIDENT'S COMM'N REP. 321-34; 11 PRESIDENT'S COMM'N HEARINGS 367-89.

54. WEISBERG, *WHITEWASH I* (1965).

55. POPKIN, *op. cit. supra* note 51, at 100; 11 PRESIDENT'S COMM'N HEARINGS 372.

56. 10 PRESIDENT'S COMM'N HEARINGS 34-38.

of people in the Soviet Union and other references to his residence in the Soviet Union.⁵⁷ It is possible that Oswald was confused, had a death wish, and was deranged. It is possible that Oswald did not know what he was doing. Perhaps he wanted to get caught. Yet nagging doubt persists and is supported by the fact that things went much too easily for him at the New Orleans police station. Bringuier, who was arrested with Oswald, said that Oswald received special treatment from the police and indeed the FBI. This suggests the possibility that Oswald was involved with either the New Orleans police or the FBI. To contend seriously with this possibility, the Commission should have independently cross-checked what happened in New Orleans.⁵⁸ Since the Commission's style was to rely on the police agencies, it did not cross-check Bringuier.

There is another question which perhaps relates to this series of bizarre coincidences. According to Mrs. Nancy Perrin Rich, she and her husband were at a meeting in which Jack Ruby was involved. At that meeting there was an unnamed colonel, a crewcut lad, a Dave C.—“I think it was Cole, but I wouldn't be sure. Dave came to my husband with a proposition.”⁵⁹ That proposition was to take Cuban refugees out of Cuba and run guns into that country. According to Mrs. Rich the plan was called off after she asked for \$25,000.

The reason that this issue is important is that the Commission did not try to follow up the mysterious colonel. The FBI found Mr. Dave Cherry who denied being involved. That report was a page long.⁶⁰ The examination of the police agencies in this matter seems to be lax, to say the least. Why should that be? One explanation is that they were rushed. Another is that some of the police agencies feared the political consequences of exposure of their activities.

During the period 1960-1963, the United States, through the CIA, strongly insinuated itself in the Cuban situation by financing invasion plans, cadres in exile, and miniature armies. But by November, 1963, there was a clear *démarche*—at least on the part of President Kennedy. In a speech on November 18, 1963, before the Inter-American Press

57. WEISBERG, *op. cit. supra* note 10, at 62-64.

58. But this is a long way from proving that the same group with which Oswald seemed to be involved in New Orleans was connected to the group of people which made noises about killing the President. Furthermore, it should be noted that at any one time there are probably a number of groups or individuals who talk about killing the President. That does not mean that they are involved, in fact, with either an individual or those who might actually plan and execute an assassination. The links are missing between the New Orleans and Dallas Cuban groups.

59. LANE, *op. cit. supra* note 6, at 290.

60. WEISBERG, *op. cit. supra* note 10, at 69.

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Association, President Kennedy extended the "hand of friendship and assistance" to the Cubans once they would stop being an agent of "foreign imperialism" (that is, the Soviet Union). This was the only thing, according to Theodore Sorensen, which "prevented normal relations." In a sense this speech seemed to mark the end of blatant U.S. subversion in Cuba. According to Sorensen these remarks were "little noticed. But Kennedy hoped to expand this theme in future speeches, to spell out to the Cuban people the freedoms, the hemispheric recognition and the American aid which would be forthcoming once they broke with Moscow."⁶¹

That speech must have been noticed by the Cuban exile groups and marked as the culmination of a policy toward Cuba which had been changing since the Cuban missile crisis of 1962. To the militants it must have sounded like the final blow to their chances of receiving American support for a political and military take-over of Cuba.

From the time of the Cuban missile crisis President Kennedy had agreed to a hands-off military policy against Cuba. That was part of the *quid pro quo* between the Soviet Union and the United States for ending the crisis. Indeed in 1963 the United States began cracking down on various Cuban refugee groups which got out of hand.

The assassination of the President cannot be understood unless it is tested against this political backdrop of American confrontation with Cuba and the evolution of Kennedy's policy toward the refugee groups. My surmise is that the CIA was heavily involved with a number of the individuals who are talked about in the hearings but who somehow appear only as shadowy characters. The CIA in this context is like the puppeteer without sufficient wire to control his puppets. For example, Manola (Manuel) Ray's JURE and the Cuban Revolutionary Democratic Front were funded by the CIA as were other exile groups mentioned in the report. It does not stretch the evidence to suggest that the animus against the President was very great among groups the CIA funded, *but did not control*, and that some of their minions took revenge, either using Oswald as scapegoat or including him as part of the plot. If this is true, or if the CIA thought that it *might* be true, it would explain the Commission's exclusive reliance on the official federal police agencies and its failure to cross-examine them or set up an independent investigative group. After all, the task of the Commission was "to make nice," not to dismantle the national security state apparatus, because it might have funded people over whom it had

61. THEODORE SORENSEN, *KENNEDY* 723 (1966).

no control. The involvement of larger groups such as Cuban exiles would begin to explain the incredible number of mysterious deaths of persons tangentially implicated in the assassination.⁶² It would begin to make sense of the Commission's recommendation. The Commission stated that it had "the impression that too much emphasis is placed by both [the FBI and the Secret Service] on the investigation of specific threats by individuals *and not enough on dangers from other sources.*"⁶³ It would begin to explain the Commission's recommendation that the police agencies of the American government enter into written agreements with each other and with other agencies, both federal and local, on the kinds of information they want. "This is especially necessary with regard to the FBI and CIA, which carry the major responsibility for supplying information about potential threats, *particularly those arising from organized groups, within their special jurisdiction. Since these agencies are already obliged constantly to evaluate the activities of such groups, they should be responsible for advising the Secret Service if information develops indicating the existence of an assassination plot and for reporting such events as a change in leadership or dogma which indicate that the group may represent a danger to the President.* Detailed formal agreements embodying these arrangements should be worked out between the Secret Service and both of these agencies."⁶⁴ The Commission's statement was without question a specific warning to the President which said that agencies such as the CIA had better begin reporting to the White House and the National Security Council when groups funded by them suddenly represent a danger to the President.

Should There be a New Investigation?

In 1966 the criticisms of the Commission's report have led to demands for a new investigation. Because the issue of re-opening the President's Commission may become an intense political issue in 1967 it is well to review some of the alternatives.

Alternative I. Some contend that a new investigation would uncover nothing new. The job done by the President's Commission, they argue, was fair and judicious and it is the best that can be done. Questions will always remain, just as they have remained about the assassination

62. Welsh, *The Legacy of Penn Jones, Jr.*, Ramparts, Nov., 1966, p. 39.

63. PRESIDENT'S COMM'N REP. 458. (Emphasis added.)

64. *Id.* at 463. (Emphasis added.)

of President Lincoln and other great events in American history. These questions may be interesting for the pedant and aficionado, but that is all and that is the way it should be kept.

Alternative II. Many have urged that the President's Commission should be reconvened to study the charges made by the critics and to answer those charges, if it can. Where it cannot answer them it should undertake a new investigation. Thus, it should re-examine the single bullet theory and the autopsy reports, for example, in the light of the critics' charges.

Alternative III. On September 28, 1966 Congressman Kupferman introduced a resolution (reintroduced in the 90th Session of Congress) which seeks to establish a Joint Committee to Determine the Necessity of a Congressional Investigation of the Assassination. The Committee would be a bi-partisan group comprised of 5 Congressmen and 5 Senators. If, after a preliminary review of all the documents, working papers and reports, and other data surrounding the assassination, it is found that a new investigation was necessary, it would have the power to continue its investigation "and upon completion of its investigation [shall] report its findings to the Senate and to the House of Representatives." (H. R. Cong. Res. 1023) Congressman Kupferman had in mind as precedent the Joint Congressional Committee which reviewed Pearl Harbor and the findings of the Roberts Commission four years later.

Alternative IV. Perhaps *two* investigations are called for. The first would examine the events themselves, and the second would review the work of police agencies and others connected with the case to ascertain whether there was a cover-up. The Kupferman resolution should include a provision for a Board of Inspectors to judge and oversee the Joint Committee's work. The purpose of such a Board of Inspectors implies that it should be composed of persons other than public officials since it appears that those who have lived their lives in the Establishment's womb are dubious candidates to do a creditable job when truth is at stake. I would add one other provision which would require an investigation of the activities of the CIA and the FBI as they relate to the President's assassination and the subsequent investigation. Let us hope that in any new national investigation Oswald's interests will be protected and the people's right to know who killed their leader will be held paramount.

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Conviction: The Determination of Guilt or Innocence Without Trial. By *Donald J. Newman*. Boston: Little, Brown & Co., 1966. Pp. xxvii, 259. \$8.50.

A few years ago, I represented a defendant charged with wilfully delivering his passport for use by another person, in violation of 18 U.S.C. § 1544.¹ My client was in his early twenties, married to a German girl of like age, and the father of an infant child of the marriage. Musical and bookish in a desultory way, he had been living with his wife and studying philosophy in Amsterdam, Holland. One Friday they were visited by two friends from Berlin—a private first class who played the clarinet in an Army band there, and his German fiancée. The private's leave was to expire on Sunday, and he had planned to drive on Saturday in his fiancée's Volkswagen to Helmstedt (on the East-West German border and the usual point of entry to East Germany for transit traffic to Berlin), and proceed from there to Berlin by the regular military "duty" train from Frankfurt to Berlin, scheduled to pass through Helmstedt shortly after midnight and arrive in Berlin Sunday morning. At that time, United States military personnel were forbidden to use private transport from West Germany to Berlin.

The reunion in Amsterdam was convivial and protracted, and by mid-afternoon on Saturday it became apparent that the Army private and his fiancée might not be able to reach Helmstedt in time to catch the train to Berlin. Fearful of being AWOL, the private (who was in civilian clothes) asked my client for the loan of the latter's passport, so that if the train had left Helmstedt, the private could go on to Berlin via the autobahn in his fiancée's car, using the passport to clear the military check-points at the zonal border.

Most unwisely, my client turned the passport over to his friend, who then took off eastward. Upon arrival at Helmstedt, without checking on the train (which in fact had not yet departed), the couple drove on to the East German check point, and the private displayed the passport in the hope of being passed through as a civilian. The Russian border guard readily detected the ruse and, after brief questioning, turned the travelers back to the American check point, where the passport was confiscated by the military police.

1. The relevant portion of 18 U.S.C. § 1544 (1964) provides that: Whoever wilfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed—shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

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Apprised of the fate of his passport by a letter from his friend's fiancée, my client reported the matter to the American consulate in Amsterdam. Eventually he was issued a new passport valid only for travel to the United States and, when he did return, the passport was taken from him. Shortly thereafter he was indicted under 18 U.S.C. § 1544 for knowingly and wilfully delivering his passport to and for the use of the Army clarinetist.²

It seemed clear enough that my client was guilty as charged. But his offense had no subversive aspect, and his intentions had been benevolent if misguided; a felony rap would certainly be a very stiff penalty for what he had done. In view of his youth, family responsibilities, and good record and reputation, the case appeared to be one in which a properly contrite approach to the prosecuting authorities might well win a reduction of the charge, if not its outright dismissal.

Much to my surprise, the United States Attorney was adamant, apparently because of pressure from the State Department to "make an example" of my client. I had no alternative but to prepare for trial, but took the precaution of looking for a lesser offense to which a guilty plea might be offered if opportunity arose. It was not an easy search; there seemed to be no misdemeanor in the federal penal code that bore any relation to the charge. In the end I could find nothing closer than the statute which had furnished the basis for the Japanese exclusion cases,³ and which had been lying dormant since the Second World War. This act made it a misdemeanor to enter "contrary to the restrictions applicable thereto" any "military zone" established under executive authority.⁴ Conceivably this could be stretched to cover the Army private's entry into the Russian zone of Germany contrary to the regulations requiring that he use military transportation, in which case my client would be guilty as a principal for aiding and abetting⁵ by loaning the passport.

2. The case was tried in the Eastern District of New York in 1962. My client landed at Idlewild, which is in the Eastern District; 18 U.S.C. § 3238 provides that the trial of offenses committed outside the United States shall be held in the district where the offender is found.

3. *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944).

4. 18 U.S.C. § 1383 (1964):

Whoever, contrary to the restrictions applicable thereto, enters, remains in, leaves, or commits any act in any military area or zone prescribed under the authority of an Executive order of the President, by the Secretary of the Army, or by any military commander designated by the Secretary of the Army, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

5. 18 U.S.C. § 2 (1964): "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal . . . and punishable as such."

At the trial, the prosecution called the former Army private⁶ as its first witness. As the facts emerged the judge grew noticeably impatient, and soon recessed the court and called counsel to chambers, where he sharply inquired whether the United States Attorney had nothing better to do with his time and staff than to harass a silly boy who had tried to do his friend a good turn. The Attorney spoke of State Department pressure; the judge replied that the pressure was no excuse for putting a felony conviction on the boy's record. Opportunity knocked; I produced 18 U.S.C. § 1383, and offered to plead my client guilty. The judge seized the idea almost greedily, and made it more than clear to the Attorney that this was how things ought to be. The jury was discharged, the Attorney brought in a superseding information based on 18 U.S.C. §§ 2 and 1383, my client pleaded guilty, and the judge suspended sentence and put him on probation for one day.

This little case embodied several of the problems which form the subject matter of Professor Newman's book. Plea bargaining between defense and prosecution—unsuccessful in this instance—is, as the author puts it,⁷ a "major characteristic of non-trial adjudication"; nevertheless, its propriety is by no means universally acknowledged. Despite my client's clear guilt under a statute duly enacted by Congress, the trial judge intervened to prevent the felony conviction which the law prescribed as the penalty. Is such nullification a legitimate judicial function? Joining in this process, I encouraged my client to plead guilty to an offense of which he was very likely not guilty⁸ in order to escape conviction of the offense which he had in fact committed. In this there was nothing very unusual, but accepted practice is not necessarily good.

Inasmuch as Professor Newman covers the field of criminal adjudication without trial and has included a large amount of material on judge-directed acquittals, it is a bit puzzling that he selected the word "conviction" as the main title.⁹ The book is the second in the American Bar Foundation series on the administration of criminal justice.¹⁰

6. He had, meanwhile, been court-martialed and discharged from the service and returned (married, I am happy to say, to his former fiancée) to the United States.

7. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 237 (1966) [hereinafter cited as NEWMAN].

8. It is at least questionable that East Germany is a "military area or zone" within the meaning of 18 U.S.C. § 1383, and it would be a good bet that my case is the only instance of this statute's application since the Second World War cases.

9. The Introduction (NEWMAN 3) is entitled *Conviction and Acquittal with Trial in Current Criminal Justice Administration*, which is a fair statement of the book's subject.

10. The first in the series is LAFAVE, *ARREST: THE DECISION TO TAKE A SUBJECT INTO CUSTODY* (1965), and other works in the series, according to the Editor's Foreword (NEWMAN xiii), will cover "detection of crime," "prosecution," and "sentencing."

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The author is Professor of Social Work at the University of Wisconsin; he has specialized in criminology and (in collaboration with the law faculty) taught criminal law and administration at the Law School.

The book is divided into six parts, sixteen chapters, and numerous subdivisions. Part I is concerned with the accuracy and fairness of convictions based on guilty pleas. Parts II and III deal with reduced charges and lenient sentences brought about by overt negotiations, "implicit bargains," or traditional practice in the particular court. Part IV examines the exercise of judicial discretion to acquit the guilty for compassionate or other reasons relating to the defendant, and Part V deals with judge-directed acquittals or charge reductions in furtherance of general policy objectives, such as the correction of police enforcement methods. Part VI analyzes the role of defense counsel in nontrial criminal adjudication.

Unquestionably Professor Newman and the Bar Foundation have done the legal profession a service in focusing attention upon an aspect of criminal justice which has been—to use an overworked phrase—of low visibility. Exclusive preoccupation with trial problems seems indefensible when one is reminded that over 90 per cent of all criminal convictions, and over 70 per cent of all felony convictions, are based on guilty pleas.¹¹

Despite the manifest care and scrupulous objectivity with which this study has been presented, to me it is unsatisfactory in several respects. For one thing, it is annoyingly over-organized; there are 135 headings of one or another sort in less than twice that many pages. If this were merely a surfeit of subdivisions the fault would be minor. But the author has proceeded on the basis that if a given illustration, observation, or comparison logically falls within more than one subdivision, it will be put under both or all of them. In consequence the book is maddeningly repetitive. Time and again we read that in Michigan a charge of armed robbery can be reduced by a guilty plea to one of unarmed robbery; that the sale of narcotics carries a mandatory twenty-year sentence which the judges dislike and routinely reduce to a charge of narcotics possession; that breaking and entering in the nighttime almost invariably is lowered to breaking and entering by day, even if the crime concededly occurred at night.¹² In his anxiety to drive his lesson home, the author has gone well beyond the old

11. NEWMAN 3.

12. *Id.* at 42, 53-54, 99, 177.

newspapermen's rule for writing: Tell 'em what you're going to tell 'em, then tell 'em, and then tell 'em what you've told 'em.

Then there is the question of the sampling base's adequacy. The text is based on "pilot fieldwork . . . undertaken in Michigan, Wisconsin, and Kansas in 1956 and 1957."¹³ Perhaps things have not changed much in the intervening decade, but why these three states? They are certainly not a distributive sample geographically or demographically. It may be that there were good and sufficient reasons for the selection (Wisconsin is Professor Newman's base of operations), but if so, they are not to be found in the book, which contains not one word of explanation or justification.

Other technical criticism might be voiced,¹⁴ but its greatest shortcomings are substantive: over-reliance on the results of the field study, insufficient range of comparison and illustration, and a disappointing stinginess of both analysis and value-judgment. In consequence the book, albeit informative, is arid.

A twelve-page conclusion is devoted to "important unresolved issues" disclosed by the preceding chapters. The author finds five such.¹⁵ Should the guilty plea procedure be made "more formal and more consistently focused on the factual basis of the plea"? Without saying so explicitly, Professor Newman suggests an affirmative answer by stressing the trend in all three of the studied states to scrutinize guilty pleas more carefully, both by questioning at the arraignment and by pre-sentence investigations. Should the trial judge have "administrative responsibility for the over-all criminal justice system"? The author points to the exclusionary rules¹⁶ as examples of attempted court control of police methods, and to charge-juggling and circumstantial acquittals of the guilty as illustrating court control of the correctional process. But he hazards no opinion on the value or legitimacy of these practices. Is "bargaining for guilty pleas . . . a proper form of criminal justice administration"? Whether proper or improper Professor Newman does not say, but he pretty clearly regards it as inevitable. To what extent should trial judges have discretion to acquit guilty defendants? The question is not answered, but between the lines one may perhaps sense a tentative approval, and he cites the American Law Institute's Model Penal Code authorizing the dismissal of crim-

13. *Id.* at ix.

14. The book lacks a bibliography, which seems to me an unfortunate omission in a primarily informative study.

15. NEWMAN 231-43.

16. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

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inal prosecutions on *de minimis* or extenuating grounds.¹⁷ To what extent can defense counsel "make significant contributions to the non-trial conviction process"? Here at last and at least Professor Newman has an answer. Defense counsel can and should contribute significantly, but most of them are preoccupied with trials and "lack the knowledge and skills" necessary to participate effectively in the "guilty plea system."

Underlying all these questions, it seems to me, is one more general and fundamental: to what extent should criminal adjudication without trial be governed by statute and court rules? The intrinsic importance of this area of the criminal process Professor Newman has abundantly demonstrated, and—assuming his three chosen states are at all representative—it is clear that in this area criminal practice has grown like Topsy, and changed in unarticulated response to strong but often submerged currents and pressures. Is this good, bad, or a mixture of both?

Rereading the book against this issue, one wishes that Professor Newman as author had stuck to his practice, as pedagogue, of collaboration with a lawyer. What have the legislatures of Kansas, Michigan and Wisconsin done to control nontrial criminal practice by statute? What have the judges done by formal opinions or court rules? Scattered through the book are a number of references to case or statutory material, but nowhere is this material brought together or synthesized. The Ford Foundation financed the field work on which the book is based;¹⁸ it would have required no such magnificent resources to turn a few law students loose in the digests and state codes, and produce a nation-wide survey of what *has* been done, by courts and legislatures, to regulate and formalize the nontrial procedures.

Against the background of what is on the books, the field study of what happens in real life would have taken on an added and significant dimension, and might have brought us measurably closer to a judgment of what, if anything, needs to be done. Everyone assumes, and probably rightly, that prosecutorial discretion to reduce or dismiss charges or recommend leniency, judicial discretion to acquit or suspend sentence, and the defendant's avenue of escape from harsher fate via a "copped plea" are the oil that lubricates the machinery of justice. The criminal process is difficult and imprecise at best, and

17. MODEL PENAL CODE § 2.12 (Proposed Official Draft, 1962).

18. NEWMAN lx.

those who conduct it need plenty of elbow room for even "rough" justice.

In all probability, accordingly, extensive regulation of nontrial proceedings, whether by statute, court rule, or appellate decision, would destroy or endanger the very values that flow from the informality of the process. It does not follow, however, that the changing nature of nontrial proceedings should remain obscure, and it is Professor Newman's awareness of and emphasis on this factor that is the most important feature of his book. It is, I think, regrettable that caution or modesty have caused him to grasp less than he could have reached, but he has given us a new and useful view of the criminal process, and that is no mean achievement.

TELFORD TAYLOR†

Conviction: The Determination of Guilt or Innocence Without Trial. By *Donald J. Newman*. Boston: Little, Brown & Co., 1966. Pp. xxvii, 259. \$8.50.

Even the prosecutor worries about convicting the innocent. Deeply ingrained in our criminal jurisprudence is the simple principle that it is better to acquit nine guilty men than to convict one innocent person. While the prosecutor would like to improve those odds by convicting more of the guilty, he still pauses with concern over fast procedures which may cut the corners of justice in the name of administrative convenience. After noting Professor Newman's conclusion on page 66 that conviction of the innocent is no more frequent on the guilty plea than after trial, this prosecutor read the final 177 pages in a more relaxed frame of mind.

The in-depth analysis of the processes of criminal law administration, undertaken by the American Bar Foundation, is obviously commendable. More attention needs to be given to what actually occurs in the pit of our trial courts as distinguished from the lofty generalizations which rise from the refinements of appellate decisions. From that point of view, Professor Newman's work is a significant step forward. His treatment of plea bargaining is sufficiently fundamental for the novice and sophisticated enough to cause the experienced prose-

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cutor to reflect on prior practices and re-examine current policies. In what is perhaps an effort to make each section stand on its own, Professor Newman has been unduly repetitive on many subjects.

While many writers de-emphasize the practical facts and concentrate only on social policy, Professor Newman has done the opposite with the unfortunate result that the policy considerations have been left almost untouched. He stopped short of the critical issue: Is plea bargaining proper? He identifies that issue as "a major unresolved question"¹ and implies that it is proper because of its prevalence, but he never comes to grips with its basic battle lines.

Before commenting on the policy issues, some differing experience on the importance of plea bargaining should be noted. I would not disagree with the elaborately footnoted statistics that, in general, roughly 90 per cent of all criminal convictions are guilty pleas,² or with Professor Newman's conclusion that plea bargaining accounts for many of those convictions.

But the Philadelphia story is much different. In Philadelphia, fewer convictions are obtained through guilty pleas, and the bargained plea is not extensively used. In 1965, slightly less than 27 per cent of convictions in Philadelphia resulted from the guilty plea.³ This smaller number of guilty pleas is probably not due to the lesser prowess of the District Attorney or to the greater skill of the Philadelphia defense lawyer, but rather to the tradition of expediting the disposition of cases by a high percentage of trials before a judge alone on waiver of the right of jury trial. In 1965 only 1.1 per cent of criminal cases were tried to a jury in Philadelphia.⁴ With jury trial waived, a judge can try as many as a dozen routine cases in a day. These procedures may eliminate the practical necessity of plea bargaining which is prevalent in some jurisdictions where a not guilty plea results in a lengthy jury trial. The Philadelphia experience, however, supports Professor Newman's conclusion that court machinery cannot accommodate a high percentage of jury trials.

The smaller percentage of guilty pleas in Philadelphia is the initial indicator that there is less plea bargaining here than in other jurisdictions. My review of the daily trial sheets for hundreds of court days shows relatively little plea bargaining. The Pennsylvania

1. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 237 (1966) [hereinafter cited as *CONVICTION*].

2. *CONVICTION* 3.

3. Statistics compiled by the Clerk of Quarter Sessions Court of Philadelphia.

4. Statistics compiled by the Office of Court Administrator of Philadelphia.

Penal Code contains few provisions on mandatory sentences. Where present in the narcotics laws, the courts have injected elasticity by findings of guilty on possession instead of sale, or sometimes the mandatory sentence provisions are simply ignored. Plea bargaining occurs occasionally where a guilty plea will be entered to operating a motor vehicle without the consent of the owner with a *nol pros* on larceny of an automobile. In such cases, the facts would support conviction on either charge with the essential difference being in the intent of the defendant to retain permanent possession of the automobile. The semblance of plea bargaining is also present where a guilty plea is entered to larceny with a *nol pros* of a burglary bill where the only evidence of burglary is the tenuous inference arising from possession of property which was recently taken from burglarized premises. Even these situations do not occur with frequency.

In Philadelphia the major use of what could be categorized as plea bargaining occurs in homicide cases. Many such cases involve a factual situation indicating "variable guilt." The dictum that "[j]ustice and liberty are not the subjects of bargaining and barter" does not fit the realities of a typical barroom killing of which there are, unfortunately, many in Philadelphia and elsewhere.⁵ Contrary to Judge Rives' statement of high principle, justice does not readily flow from a computer where the survivor of a fight and witnesses at the taproom relate stories which indicate, in variable quantities, the facts of intoxication, provocation, malice aforethought and self-defense.

There is ordinarily sufficient evidence of malice and deliberation in such cases for the jury to find the defendant guilty of murder in the first degree, which carries either life imprisonment or death in the electric chair. Or, the conceded drinking by the defendant may be sufficient to nullify specific intent or malice to make the case second degree murder, which calls for a maximum of 10 to 20 years in jail. From all the prosecutor knows by the time the cold carbon copies of the police reports reach the District Attorney's office, the defendant may have acted in "hot blood", which makes the offense only voluntary manslaughter with a maximum penalty of 6 to 12 years. And, the defense invariably produces testimony showing that the killing was pure self-defense.

When such cases are submitted to juries, a variety of verdicts are returned, which leads to the inescapable conclusion of variable guilt.

5. Judge Rives in *Shelton v. United States*, 242 F.2d 101, 113 (5th Cir. 1957).

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Most of those trials result in convictions for second degree murder or voluntary manslaughter. The judges generally impose sentences with a minimum range of 5 to 8 years and a maximum of 10 to 20 years. That distilled experience enables the assistant district attorney and the defense lawyer to bargain on the middle ground of what experience has shown to be "justice" without the defense running the risk of the occasional first degree conviction which carries a mandatory minimum of life imprisonment and without the Commonwealth tying up a jury room for 3 to 5 days and running the risk of acquittal.

Plea bargaining in Pennsylvania on such cases is explained not only because of the concept of variable guilt, but also because our statute prohibits a waiver of a jury trial on a murder bill of indictment. If our procedures permitted a waiver of a jury on a second degree murder bill in such cases, it is probable that even more of these cases would be disposed of without plea bargaining.

Based on my experience in plea bargaining and the materials in Professor Newman's book, I would answer his "major unresolved question" by unequivocally stating that plea bargaining is proper providing that the procedural standards detailed in his book are met. In reaching that conclusion, I would place relatively little emphasis on the administrative convenience of the judicial system. Our Philadelphia experience shows that our trial lists can be managed without plea bargaining. I would summarily reject the plausible but imprecise postulate that "[j]ustice and liberty are not the subjects of bargaining and barter." Professor Newman comprehensively identifies the enormous discretion at work in criminal law at all levels. That shows a spirit of "accommodation" which means much the same although it sounds more polite than "bargaining and barter." Professor Newman realistically identifies the discretion of the police officer who may decide not to take a suspect into custody. The very broad discretion of the prosecutor has been recognized by decades of judicial decisions. In one of his best sections, Professor Newman candidly convicts the courts for acquitting the guilty. But the courts have acquitted the guilty for a variety of civilized reasons just as such discretion is injected into law enforcement processes at every level. Such experience is convincing that such compromise is socially desirable.

From the defendant's view such "accommodation" frequently makes sense so long as the innocent are not convicted. An indispensable ingredient of plea bargaining is the defendant's representation by counsel who provides the practical assurance that an innocent man will not stand convicted. The strategic position of the defendant is often never

better than before the state's witnesses have been heard at trial. Police reports (unlike verbose book reviews) are often terse and frequently omit unsavory facts which are developed at trial when the police officer testifies. In the middle of trial, the prosecutor sometimes finds a previously unidentified witness who adds detail and depth to the criminal acts. Comparing a guilty plea, a non-jury trial and a jury trial, the conclusion is inescapable that judgments are ordinarily more harsh in direct proportion to the fuller disclosures involved in those proceedings. On a guilty plea, only the essentials of the offense are presented in order to be sure that there is the corpus of a crime which would warrant a conviction when the confession of guilt is added. At trial, on a waiver or before a jury, the facts are developed at much greater length. After a jury trial with lengthy summations by counsel and charge by the court, the trial judge is very likely, at least subconsciously, to consider the case more serious, when it comes time to sentence, than he would have if he had thought about it for only a few minutes on a guilty plea.

The plea of guilty also removes the temptation for the guilty defendant to perjure himself in his own defense. Prosecutors obviously cannot bring charges for perjured testimony every time it occurs without materially increasing the backlog, but the trial judge frequently takes that factor into account on the day of sentencing. And as Professor Newman has pointed out, the defendant who pleads guilty ordinarily needs less of a penalty because he has already started the process of rehabilitation after showing remorse. Without disagreeing with the conclusion of Judge Duffy that "[a] defendant in a criminal case should not be punished by a heavy sentence merely because he exercises his constitutional right to be tried before an impartial judge or jury,"⁶ these are some of the legitimate reasons for the trial judge to impose a lesser sentence on a guilty plea.

But, facing the facts squarely, prosecutors and judges have been heard to say that the state is entitled to its "full rights" when it comes to sentencing after a protracted trial with the assertion by the defendant of his "full rights." Wrong as that attitude is, some courts are influenced by it. A realistic defense lawyer knows that he may save years of time for his client by saving days of time for the court. Given the assurance that those who plead are really guilty, which can be provided by diligent defense counsel, there are sound policy considera-

6. *United States v. Wiley*, 278 F.2d 500, 504 (7th Cir. 1960), cited by Professor Newman, CONVICTION 65.

tions for the court, the state and the defense to use plea bargaining in the proper context.

A study of the general quality produced by Professor Newman should also have devoted some attention to the problems on the horizon for plea bargaining. Some recent decisions may curtail the use of the bargained plea where such convictions have been reversed because of unsuspected nuances at the time the plea was entered. Or, such decisions may merely make the prosecutor more careful in touching all of the bases, if in fact he can identify them or anticipate new ones before proceeding on the compromise plea.

Such problems are indicated by a recent opinion of Judge A. Leon Higginbotham, sitting in the United States District Court for the Eastern District of Pennsylvania.⁷ *Cuevas* has many similarities with the variable guilt homicide in Philadelphia described earlier. Cuevas and Carrasquillo, soon to be the deceased, quarrelled over a debt at a dice game. The defendant claimed the deceased attacked him with a knife. That was denied by other witnesses. After Cuevas shot Carrasquillo, Cuevas went home, told his wife that he had shot someone and called the police.

At trial Cuevas entered a plea to murder generally, and the Assistant District Attorney certified that the offense rose no higher than murder in the second degree. It is obvious that the normal precautions were followed at the time the plea was entered from the following extract from Judge Higginbotham's opinion:

With utmost caution his counsel advised the court as follows: "If Your Honor, please, let the record show before the defendant pleads generally guilty that the District Attorney intends to certify with Your Honor's permission that this case does not rise higher than second degree. I would like to have for the record an examination of this defendant so that he understands fully what the situation is." The defendant was subsequently fully advised of his rights to enter a not guilty plea, and, that "under those circumstances a jury could convict you of murder even up to the first degree. Do you understand that?" Defendant: "Yes."

Defendant admitted "that there had not been any promises made to you of any kind." That "there has been no threats made to you." That "you're doing this of your own free will"; that "you understand all of the situation here"; and "you're satisfied to plead guilty under those circumstances?" His reply was that as

7. United States *ex rel.* Cuevas v. Rundle, 258 F. Supp. 647 (E.D. Pa. 1965).

a result of entering a guilty plea his only understanding was that "it can't go higher than second degree."⁸

Cuevas was convicted of murder in the second degree and sentenced to 7 to 18 years in prison.

Cuevas successfully attacked the conviction in the United States District Court on the contention that his guilty plea was induced by a statement which was obtained in violation of the United States Constitution pre-*Escobedo*. Rejecting the Commonwealth's contention that the conviction should stand because the statement was exculpatory, Judge Higginbotham found that there was psychological coercion in the obtaining of the statement because of the defendant's limited intellect, fatigue, poor emotional health and police deception. The court rejected the Commonwealth's argument that the statement was immaterial to the plea of guilty by finding that the "plea of guilty was induced by the existence of the statement."⁹ This decision requires that the prosecutor be extremely circumspect in plea bargaining where there are any conceivable constitutional infirmities underlying the plea which may later be raised.

On the facts of this case, characterized by Judge Higginbotham as "unique,"¹⁰ no appeal was taken by the Commonwealth. It was decided that it would be preferable to accommodate our practices to the problems inherent in the *Cuevas* situation rather than risk broader application through appellate review. But the case does obviously raise many problems on the compromise plea for murder in the second degree, which is the only substantial use made of this procedure in Philadelphia today.

Another troublesome consideration is the question of consent or voluntariness in the entry of the guilty plea. This subject is discussed by Professor Newman, but more attention needs to be given to the procedures for nullifying the conviction on a later contention of lack of requisite voluntariness or consent. A relatively recent celebrated case in Philadelphia raised this question in a very unusual context where the penalty was not compromised and the Assistant District Attorney had no part in any bargaining. During the course of jury selection in the case of *Commonwealth of Pennsylvania v. Scoleri*, the defendant's lawyer approached several judges, none of whom was the presiding judge, to determine their "feelings about death sen-

8. *Id.* at 659.

9. *Id.* at 656.

10. *Id.* at 660.

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tences”¹¹ as a preliminary to considering a change in plea to murder generally before a three judge panel. The history of this involved case indicated that defense counsel had good reason to believe that his client’s interests would be well served if he received life imprisonment on a guilty plea.¹² Scoleri did ultimately change his plea to guilty, and one of the judges, to whom defense counsel talked, was ultimately called to sit on a three judge panel to hear the evidence on Scoleri’s guilty plea. The proceedings show that the court and prosecutor questioned the defendant very extensively on the voluntariness of his plea and his understanding that there was no commitment as to penalty.¹³

After the three judge court imposed the death penalty, defense counsel asked leave to withdraw the plea of guilty on the ground that he had a flat promise from one judge that he would impose life imprisonment. An extensive hearing followed on the motion to withdraw the plea of guilty. The judge alleged to have made the commitment withdrew from the bench, appeared as a witness, and denied any such commitment.

Declaring the case to be “*sui generis*,” the Supreme Court of Pennsylvania permitted the withdrawal of the guilty plea, indicating that the key considerations were the belief of the defense lawyer rather than precisely what the judge said, the statements by the defense lawyer to the defendant, and the reliance of the defendant in entering the guilty plea on his lawyer’s statements. Since “*sui generis*” cases are frequently precedents for later cases, the *Scoleri* decision gives this prosecutor some concern over the finality of the guilty plea process. Despite such reversals, the guilty plea process makes sense from the state’s viewpoint, and the prosecutor cannot be unduly concerned about those appellate problems, because he has so many others.

Experience in Philadelphia corroborates Professor Newman’s conclusion that plea bargaining is here to stay. In the proper context it has a legitimate place in the administration of criminal justice. Professor Newman’s book should help project it into the proper context.

ARLEN SPECTER†

11. *Commonwealth of Pennsylvania v. Scoleri*, 415 Pa. 218, 223, 202 A.2d 521, 523 (1964).

12. On three occasions the death sentence has been pronounced. Twice the judgments have been reversed, and an appeal is now pending from the third trial.

13. 415 Pa. at 224-26, 202 A.2d at 524-25.

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Conviction: The Determination of Guilt or Innocence Without Trial. By *Donald J. Newman*. Boston: Little, Brown & Co., 1966. Pp. xxvii, 259. \$8.50.

To begin with the undeniable conclusion of this American Bar Foundation study: "Most criminal cases . . . are processed through the court stages of the criminal justice system without formal contest [T]he guilty plea, the negotiated plea . . . form one of the most important processes in day-by-day criminal justice administration, and yet one that has been largely neglected in professional literature, by researchers, and by lawmaking bodies."¹ In the same vein, the national Crime Commission's current studies, as reported by the chairman, former Attorney General Katzenbach, "sharply remind us of the informal, off-the-record and invisible nature of so much of the negotiating and adjusting process . . . [T]here are virtually no guidelines or reports or commentaries about decisions which represent more than 90 per cent of the cases which involve liberty or imprisonment for millions every year."² Chairman Katzenbach calls for research "in the spirit that organized the American Bar Foundation,"³ but does not add that this spirit has now produced an important report on plea bargaining.⁴ The present volume fails, however, to supply the needed "guidelines."

Newman's significant and to date unique contribution lies in his patient observations of what he aptly styles "the guilty plea process." His painstaking descriptions of its actual operation will furnish backdrop and stimulus for the recent wave of judicial⁵ and extrajudicial⁶

1. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 231 (1966). Newman treats another "major form of non-trial adjudication . . . summary acquittal of certain guilty defendants by the trial judge." *Ibid.* This, however, is outside the scope of the *Journal's* present symposium.

2. Katzenbach, *President's Law Enforcement Commission Urges the Legal Profession's Co-operation*, 52 A.B.A.J. 1013, 1015 (1966). The proper name for the "Crime Commission" is the President's Commission on Law Enforcement and Administration of Justice. There was a separate President's Commission on Crime in the District of Columbia. [This review went to press before publication of the national Crime Commission's report. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134-37 (1967) (dealing with negotiated pleas). Ed.]

3. *Id.* at 1016.

4. The present volume is the second published in the American Bar Foundation's Series on the Administration of Criminal Justice in the United States. See the preface by ABF Administrator Hazard, CONVICTION ix.

5. See *United States v. Cariola*, 323 F.2d 180, 189 (3d Cir. 1963); *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308 (2d Cir. 1963); *Shelton v. United States*, 242 F.2d 101, 112-13, *rev'd on rehearing*, 246 F.2d 571 (5th Cir. 1957) (*en banc*), *rev'd on confession of error*, 356 U.S. 26 (1958); *Barber v. Gladden*, 220 F. Supp. 308, 314 (D. Ore. 1963), *aff'd*, 327 F.2d 101 (9th Cir. 1964); *Commonwealth ex rel. Kerekes v. Maroney*, No. 128 (Sup. Ct. Pa., Nov. 15, 1966).

6. See Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955); Newman, *Pleading*

interest in guilty plea dispositions. The value of Newman's descriptive work overshadows his lack of meaningful statistics, the narrowness of his sampling, the general dullness of his style, and even the limited perspective from which he evaluates the adequacy and fairness of the present system.

The flaw which may account for these others, however, lies in the misconception revealed in Newman's subtitle: *The Determination of Guilt or Innocence Without Trial*. The premise of the adversary system is that guilt is a legal conclusion based upon facts found at trial. Thus when asked, as they often are, whether they would defend a guilty man, lawyers commonly reply that until verdict, guilt is undecided. Newman furnishes ample examples which show that the guilty plea is not designed to resolve the issue of factual or moral guilt. Pleas are often the result of bargaining in which the defendant foregoes trial in exchange for concessions, such as reduction of the charge, dropping of counts, or in some jurisdictions a recommendation as to sentence. The terms of the bargain are not determined by conceptions of actual guilt, but by such considerations as the strength of the government's evidence, the accused's prior record, the currency of the court's docket, and the customary concessions for a particular offense. This is not to say or suggest that many demonstrably innocent people plead guilty. Most who so plead would be found guilty if they stood trial.⁷ This fact is in the background of all bargaining. But the entry of a guilty plea in an individual case does not necessarily reflect anyone's determination, even

Guilty for Consideration: A Study of Bargain Justice, 46 J. CRIM. L.C. & P.S. 780 (1956); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964); REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 240-44, 248, 253-54, 276, 288, 384-89, 396-99 (1966).

7. Of course there is no way to determine how many of such defendants would be acquitted at trial, but there is no reason to believe that the figure would be negligible. Most convictions are on pleas of guilty; but a substantial minority of those defendants who go to trial are acquitted.

In the federal system, during fiscal year 1965, 25,757 defendants were convicted upon a plea of guilty; of those who stood trial, 3,221 were convicted and 1,319 acquitted (5,407 defendants' cases were dismissed without trial). UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' STATISTICAL REPORT, FISCAL YEAR 1965, at 1 & Table 2. The percentage of those ultimately acquitted (or dismissed) would be increased as a result of reversals on appeal.

In the United States District Court for the District of Columbia, during the fiscal years 1950 through 1966, the conviction rate of those who have stood trial for felonies has ranged between 67 and 79 per cent. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 244-45 & Table 6 (1966). During the same period between 50 and 60 per cent of all defendants indicted pleaded guilty each year compared to 20 to 26 per cent who were convicted after trial. Between 6 and 11 per cent were acquitted, and between 9 and 19 per cent dismissed. *Id.* at 242, Table 4.

the defendant's,⁸ of guilt. In effect, though not in law, the defendant pleading guilty says: *Nolo contendere*.⁹

The United States Court of Appeals for the District of Columbia Circuit recently recognized in *McCoy v. United States*¹⁰ what Professor Newman has ignored—the possibility that a guilty plea may not be a concession of actual guilt. In *McCoy*, a 19-year-old, semi-literate defendant attempted to plead guilty to a much reduced charge at the close of the government's case against him. The government had made a *prima facie* case on the felony charge of unauthorized use of a motor vehicle. But through the efforts of defense counsel and with the agreement of the prosecutor and court, the opportunity had arisen for him to plead guilty to taking property without right, a misdemeanor carrying a maximum penalty of six months. The defendant said he would like to plead and the court began the ritual, similar to that in most jurisdictions, designed to ascertain the voluntariness of the plea.

The defendant was asked whether he understood that he would have a right to continue a speedy trial by jury with the aid of counsel, but that he would have no such right if his plea were accepted; whether he knew that he would have the assistance of counsel at the time of sentencing; whether he understood the nature of the charges against him (and the charges were outlined). To all of this he made the prescribed answers, but when the court said: "Did you in fact do that?" the defendant answered: "No, Sir." At this point the court advised him that if he had not taken the property the court could not allow him to plead guilty.

The Defendant: "Your Honor, if I am willing to plead to this lesser charge, could I plead?"

The Court: "You can't plead before me to a charge to which you say you are not guilty. No sir, you cannot do that."

Whereupon the jury was called back, the trial proceeded, and the defendant was duly convicted and sentenced to eighteen months to three years in prison. On appeal he argued that the benefits of a guilty plea should not be conditioned on a confession. The Court of Appeals, although affirming the conviction, agreed that a defendant should not be required publicly to resolve against himself all doubts as to guilt.

8. The defendant may be the least competent to judge this issue since he may feel psychological guilt where he has no legal guilt, believe in his innocence when legally culpable, or entertain a deep sense of justification in the rightness of his illegal acts.

9. "I will not contest it." BLACK, *LAW DICTIONARY* 1198 (4th ed. 1951).

10. 363 F.2d 306 (D.C. Cir. 1966).

An accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty; or for other reasons he might wish to avoid further contest: . . . "the right of a defendant so to plead has never been doubted. He must be permitted to judge for himself in this respect" . . . [G]uilt or the degree of guilt, is at times uncertain and elusive. The result of trial of a particular case rests with a jury of twelve, or with a trial judge where there is no jury.

But Professor Newman engages in no search for distinctions between what is said and what is meant in pleading guilty; he proceeds to the sociologist's task of describing the process. In doing so, he leaves out many real-life variables familiar to the lawyer. His description appears limited, for example, to the bargainer who has nothing to offer but his plea. The defendant or prospective defendant from whom the prosecution can obtain desired testimony or information as part of its bargain, stands to secure a more lenient plea or sentence (if not an outright dismissal or withholding of charges). The uses and potential abuses¹¹ of this mode of bargaining are among the topics of little apparent interest to the author of *Conviction*, although they are of central importance to both the guilty plea and the trial.¹² Such omissions in Professor Newman's oversimplified model of the guilty plea "process" cause us to differ with the American Bar Foundation's opinion: "It is especially appropriate, therefore, that this volume . . . should have been the work of a criminologist rather than of a person whose training is in the law."¹³

The interaction of the guilty plea and trial processes, although acknowledged by Newman in general terms,¹⁴ is ignored when it comes to specifics. Thus the role which Newman assigns defense counsel "in the guilty plea process"¹⁵ appears to begin with the decision to plead guilty—counsel becomes part of "the conviction system . . . the conviction process."¹⁶ Newman notes that prosecutors reduce the degree

11. Widespread awareness of this problem developed during the trials of Roy Cohn, where it appeared that government witnesses who had pleaded guilty to other charges had remained unsentenced for many months pending their testimony at Cohn's trial.

12. See, e.g., *United States v. Aviles*, 274 F.2d 179, 191 (2d Cir. 1960): "It is a well understood practice for the prosecutor and the chief executive concerned to give appropriate consideration to witnesses who have assisted the government. The witnesses concerned are aware that this is so; the jurors and the general public are also aware of this practice."

13. Geoffrey C. Hazard, Administrator, American Bar Foundation, *Preface to CONVICTION* x.

14. "The philosophy, the objectives, the procedures, and the protections of the trial set standards of criminal justice administration that influence all other stages of the process from arrest to correctional treatment." *CONVICTION* 231.

15. Part VI of *CONVICTION* is devoted to the topic of defense counsel's role.

16. *CONVICTION* 198.

of a charge because they have self-instilled doubts about the sufficiency of their evidence to convict of a more serious offense¹⁷ or even doubts derived from *ex parte* judicial advice.¹⁸ But Newman does not consider that defense counsel can also be the source of the prosecutor's dilemma: *e.g.*, by a successful motion to suppress items of evidence, or through cross-examination of witnesses at the preliminary examination. Even a denied pre-trial motion to suppress can, by preserving a substantial issue for the eventuality of an appeal, induce a better plea offer from the prosecution. The entry of the guilty plea should be defense counsel's last pre-sentence step, not his first, in "the conviction process" of an adversary system. The criminal defendant, like the civil plaintiff, other things being equal,¹⁹ is likely to receive his best settlement offer on the eve of trial.²⁰ But these are aspects of the plea bargaining process to which a lawyer would be more sensitive than a criminologist.²¹

Such criticism aside, however, the book is valuable because in simply stating the facts, opining little and offering less in the way of solutions, it gives ample evidence of the deep difficulties in the present system. From the examples offered, it is plain that plea bargaining is a pervasive process which is unequally available. In some courts only the criminal lawyers know how and where to approach the prosecutors; unrepresented defendants may have little idea of how to get the best value for giving up their trials. In most systems, customary reductions have arisen for certain charges. A Michigan narcotics violation carrying a heavy mandatory sentence is, for instance, routinely reduced to a charge without mandatory sentence in return for a plea to the lesser offense.²² This reduction is available without particular regard to the strength or weak-

17. *Id.* at 68-69.

18. *Id.* at 69-70.

19. Money is at least a more fit subject of barter than liberty, so that the analogy between criminal and civil settlement procedures is hardly perfect. But the criminal defendant who is doing dead time in jail because of inability to make bond is comparable to the impecunious disabled plaintiff, who may receive and accept an inferior offer from the insurance company because he cannot afford to wait for trial. For the federal system the Bail Reform Act of 1966, 18 U.S.C.A. § 3146 (Supp. 1966), promises to bring the indigent defendant's bargaining position nearer to equality with the better-heeled.

20. On the other hand, a criminal defendant may be under pressure to settle his case before it is reached for trial in those multi-judge courts where, by so doing, he receives the opportunity to choose a sentencing judge who has developed a reputation for relative leniency, or to avoid one whose sentencing reputation is harsh. Some court assignment systems are designed to encourage this type of forum shopping, in order to increase the number of guilty pleas and "move the calendar." See, *e.g.*, REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 386-89, 397-99 (1966); SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 88 (1966) ("Court administrators can, in the placement of judges, clearly affect the rate of guilty pleas").

21. Newman's background as a criminologist makes him more sensitive, however, to the relation between the plea and the correctional and probation processes. See, *e.g.*, CONVICTION 98, 103-04.

22. *Id.* at 79.

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ness of the government's case—available, that is, to the defendant who knows, or whose lawyer knows, that bargaining is the *modus vivendi*. In cases where there has been a lot of publicity or strong local pressure to bring the accused to trial, the prosecutor may be unwilling to make any bargain.²³ The source of some of the inequities is also documented. Professor Newman explains with examples the course of plea bargaining. The process itself is a matter of give and take. Personality, gamesmanship, and knowing the way around the courthouse are important.²⁴

The book offers evidence of the distortions of the legal system which result from plea bargaining. Defendants plead to offenses whose descriptions do not match the acts which they committed.²⁵ Because some bargain and some don't and some bargain better than others, the already appalling sentencing differentials between crimes essentially the same are further increased. Rituals which require that the defendant state that he is pleading guilty because he is guilty and for no other reason, put many bargaining defendants in the position of making misrepresentations to the court.

In short, the book raises serious questions about the fairness and adequacy of the present system of entering guilty pleas. The discussion is not furthered, however, by the author's uncritical acceptance of the basic philosophy of the "guilty plea process"; Newman seems to indulge an operating presumption of the defendant's guilt. Thus he sees the equity in allowing lesser offense pleas to narcotics possession for all Michigan defendants charged with narcotics sale, carrying a preposterous mandatory sentence of 25 years.²⁶ But not a word for the plight of the narcotics sale defendant, presumed to be innocent, who has a good faith defense of fact or law—but can litigate it only at the risk of a grossly unfair sentence. Professor Newman offers no guidance on the role of counsel in advising such a defendant, whose good faith denial or alibi may be less convincing to the jury than the officer's allegedly mistaken identification. Is it surprising if "innocent" defendants, advised of their rights and their risks, will elect to plead guilty to possession to avoid a possible conviction for sale?²⁷ Is it surprising if prosecutors will routinely charge a sale in order to induce a plea to possession? Is it the exception "where deliberate (or sometimes inadvertent) over-

23. *Id.* at 83.

24. *Id.* at 80-82.

25. *Id.* at 100. See Taylor, Book Review, 76 *YALE L.J.* 598 (1967).

26. *CONVICTION* 112-14.

27. Perhaps this falls within Newman's concept of "successful representation of the guilty." *Id.* at 198.

charging is used to force a plea"²⁸ or is that the name of the game: plea bargaining?

Risking a harsh mandatory sentence for refusing to plead guilty is the extreme situation. The more usual risk is that the judge will in the exercise of his sentencing discretion impose a greater penalty if the defendant stands trial than he would if the defendant pled guilty to the same offense, and than he could if the defendant pled guilty to a lesser offense. Newman makes clear that the risk in many instances is a real one; the system depends upon its being so. "[I]t is apparent that the overriding motivation in showing leniency to defendants who plead guilty is to encourage a steady flow of guilty pleas Realistically, the guilty plea process operates effectively only if defendants come to expect, and do receive, greater leniency in sentencing on a plea of guilty than if they demand trial."²⁹

This documented observation, even if it but confirms the expected, is the most revealing conclusion of the study. It also raises the most critical problem—a problem not resolved by styling as "differential leniency"³⁰ what is additional punishment for defendants who "demand" what the Constitution prescribes.³¹ In other contexts it has been held that the government may not condition receipt of public benefits upon the waiver of a constitutional right, nor impose penalties for its exercise.³² If the more severely sentenced defendant who stood trial could ever demonstrate, in his individual case, what Newman demonstrates for the generality of cases, his sentence might well be held invalid.³³

28. The phraseology is quoted from *id.* at 68. Unfortunately, Newman does not further discuss the practice of deliberate overcharging, or tell us whether he found it widespread.

29. *Id.* at 62, 66. *Accord*, ". . . [t]he imposition of more lenient sentences upon guilty pleas or conversely the imposition of harsher sentences on defendants after trial is often primarily motivated by calendar concerns. Lenience is the defendant's reward for his contribution to the prompt processing of criminal cases." REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 385 (1966).

30. CONVICTION 62.

31. The federal provisions are in Article III, § 2 ("The trial of all crimes, except in case of impeachment, shall be by jury"), and the Sixth Amendment ("in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury").

32. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956). See generally, Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). The Court's description in *Verner*, *supra*, at 404, of the grim choice between surrendering a First Amendment right and foregoing unemployment benefits may be applied to the choice between surrendering Sixth Amendment rights to an adversary trial by jury and foregoing "differential leniency." "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of [the right of jury trial] as would a fine imposed against [a defendant for standing trial]." See *id.* at 404.

33. For a rare example where the record affirmatively showed that the sentence was significantly influenced by defendant's standing trial instead of pleading guilty, see *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960), discussed in CONVICTION 65-66. The Hruska

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As in other areas of the law, the attorney for the accused must conscientiously seek his client's best interest within the existing system. Plea bargaining will therefore remain an integral part of counsel's "successful representation of the guilty,"³⁴ and of those who may not be guilty, so long as "differential leniency" is the accepted reward or result of copping a plea. Ultimately we believe that correctional³⁵ and constitutional considerations will overcome the arguments of administrative convenience that make plea bargaining³⁶ work, that afford "the overriding motivation . . . to encourage and maintain a steady flow of guilty pleas."³⁷ The construction of constitutional barriers to administrative convenience in pre-trial police procedures has advanced steadily in recent years. The trend should also reach the adjudicatory stage. The Supreme Court has, for instance, been reluctant to allow waiver under pressure of safeguards against pre-trial acknowledgment of guilt.³⁸ This reluctance may one day reach the courthouse "guilty plea process."

Fundamental changes in "the guilty plea process" will depend upon substantive and procedural changes in the sentencing system. Substantively, there must be legislative alteration of our severe and irrational statutory sentence pattern. Procedurally, courts might experiment with removing the sentencing function from the judge who, by trial or plea, adjudicates guilt; this would help to eliminate differential treatment of defendants who stand or who waive trial. At least, it would help the situation in which—despite a good faith defense—"a realistic defense lawyer knows that he may save years of time for his client by saving days of time for the court."³⁹ Already some courts are willing to innovate. The United States District Court for the Eastern District of Michigan

bill for appellate review of sentencing would have provided that reasons for the sentence imposed be placed upon the record. Such legislation would have the important by-product of developing appellate standards as to the factors which may be considered in sentencing.

34. CONVICTION 198.

35. The adverse effects of plea bargaining on the correctional process are noted in the REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 385-86 (1966). "The Commission is concerned with the extent to which the court sentences more leniently where offenders plead rather than go to trial If there is an optimal sentence for each offender, departing from this sentence because of the needs of judicial administration will not enhance the likelihood of rehabilitation. It is the Commission's view that the state of the criminal court calendar should not be a factor in sentencing." *Ibid.* See also SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 119 (1966).

36. Mr. Specter makes the important point that in his jurisdiction plea bargaining is not an administrative necessity, due to the widespread acceptance of judge instead of jury trial. We would value his observation as to whether any "differential leniency" is shown to convicted defendants who have waived jury trial compared to those who have not. Specter, Book Review, 76 YALE L.J. 604 (1967).

37. CONVICTION 62.

38. *Miranda v. Arizona*, 384 U.S. 436 (1966).

39. Specter, *supra* note 36.

uses a three judge panel to recommend sentences.⁴⁰ It would have been fruitful if Newman's field study of the Michigan state procedures had been extended to the federal courthouse in Detroit.

But in order adequately to determine whether the guilty plea process can or should eventually survive in any form, we believe that its present form and forum should be changed now. *Conviction* makes plain that the record of the real considerations which determine a plea bargain is not made in open court but in the prosecutor's office, on his telephone, in the court corridor or recess. We believe that the present guilty plea courtroom ritual should be supplanted by a frank statement of parties and counsel of the considerations underlying the proffered plea. Instead of a ritual affirmative response to the Court's query—

Are you pleading guilty because you are guilty and for no other reason?⁴¹

we would like to see a forthright answer by defendant and his counsel to the question: Why are you pleading guilty to this offense? If we may hypothesize an answer:

Defendant: Your Honor, I am pleading guilty to attempted house-breaking because, from what my lawyer told me, it seemed the best thing for me to do.

Defense counsel: Your Honor, I did indeed advise the defendant with respect to this plea to a misdemeanor, which the prosecutor offered yesterday. The prosecutor made available to me for interviewing the arresting officers, who claimed to have seen the defendant leave the store and to have followed him from the store to his home nearby where he was arrested. I think it is a close question whether the officers unlawfully gained entry to the home, and whether under *Wong Sun*, the motions judge erred in denying my motion to suppress the threshold admission which the officers claim—and the defendant denies—was made. The defendant has told me that he is not guilty, and that he was returning from a late walk by himself when he passed the store. The only corroborative testimony I have been able to find is from the other defendant, who has already pleaded guilty to house-breaking. He was caught in the store and says that he broke in by himself. He and my client are old friends and I therefore have considerable doubt that the jury would accept the credibility of his testimony. My own client's credibility might be impeached by

40. Parsons, *Aids in Sentencing*, 33 F.R.D. 423, 431-33 (1964). A similar procedure was later adopted for the Northern District of Illinois. Parsons, *supra*, at 433-34.

41. This particular form of the question was prescribed by Resolution of the Judges of the District of Columbia, 1959, reprinted in *Everett v. United States*, 336 F.2d 979, 980 n.3 (D.C. Cir. 1964). See *CONVICTION 7*, for a similar illustration from a Michigan state court.

two prior convictions for petit larceny. Under the circumstances I advised the defendant that it was probable, though of course not certain, that the jury would convict him; that I estimated it was about a fifty-fifty chance that the Court of Appeals would reverse his conviction because of the threshold admission, but that there was still a pretty good chance that he would be convicted at a retrial without the statement. I explained to him that the house-breaking charge was a felony for which he could get a maximum of fifteen years; and that the attempt was a misdemeanor for which the maximum is a year, and for which I thought your Honor would seriously consider placing him on probation. The defendant slept on it and told me this morning that he wanted to plead guilty.

Government counsel: Your Honor, I agree with defense counsel's assessment of the chances for a conviction here. I would not rate the chances for a reversal quite as high as he does—in fact I might not even use the statement—but I don't think that it is worth the government's while to litigate this case for two years, and conceivably have the defendant end up scot free. Anyway, I don't think that the defendant's record is bad enough so that a lengthy sentence of imprisonment would be imposed if he were convicted of house-breaking.

An expanded version of this sort of dialogue, including a careful judicial inquiry into whether the defendant understands his counsel's representations, should supplement the questions now asked at sentencing. Such a procedure would put the bargain on the table for the court to consider and for the world to see. The recently promulgated revision of Rule 11, Federal Rules of Criminal Procedure, offers a basis for the suggested procedure in federal courts. The Rule previously provided, as it still does, that the court should refuse to accept a plea unless it is made voluntarily with an understanding of the charges. But the amendment adds that "The court shall not enter a plea of guilty unless it is satisfied that there is a factual basis for the plea." Clearly the amendment envisions a fuller inquiry than is now conducted at the acceptance of a plea. The Advisory Committee Notes to the amended Rule 11 explain that the court, in determining the factual basis for the plea, may make its "inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise." In pursuing the further inquiry which the new rule provides, the court could bring out the details of the plea bargain, as we have illustrated above. The judges of the federal district courts, or the federal courts of appeals in the exercise of their supervisory power over lower courts within their circuits, could establish, by order, the

procedure outlined as standard for entering a plea of guilty. State courts could take similar action as to their own procedures. It would then be the duty of the individual judges before whom pleas were made to ensure that the new procedure did not devolve into a meaningless ritual.

The transcript of such a proceeding would be a useful record if the circumstances surrounding the plea were collaterally attacked. Defense counsel's outline of reasons for advising a plea could serve as an index to his effectiveness. (Ineffective assistance of counsel is one of the most common allegations under 28 U.S.C. § 2255.) Since counsel's representations would be made on the record in the presence of the defendant, the allegation would less often arise that the defendant was misled into entering the plea. The proposed system should not overburden the courts. Although pleading guilty would take somewhat longer than the 10 minutes or so now required, it would seldom take as much as an hour.

Greater exposure would result in greater regulation of the plea bargaining process. Bringing the considerations into the open should also furnish data for the ultimate decision as to whether plea bargaining is a fit instrument of justice or an unconstitutional device which eases its administration.

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