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Review of “Conviction: The Determination of Guilt or Innocence Without Trial,” By Donald J. Newman

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BOOK REVIEW

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

Until very recently, not many people seemed willing to think hard about the common practice of plea bargaining. Doubts as to its propriety, let alone legality, combined with the widespread belief that the practice is an administrative necessity, have certainly not created an atmosphere conducive to careful consideration of the practice. Just recently, for example, an eminent scholar of the criminal law privately expressed this common view. Upon being told that the National Crime Commission was devoting considerable attention to the problems of plea bargaining, he commented "What's the point; we have no choice but to live with the practice anyway."

This conspiracy of silence seems to dominate even those courts which inquire into the voluntariness of tendered guilty pleas. These judges typically ask the defendant whether he has been offered any inducements for his guilty plea. Some judges specifically inquire whether anyone has promised the defendant leniency in return for his plea. We may infer that affirmative answers would result in rejection of the plea or at least further judicial inquiry. Such further inquiry is avoided, however, by negative answers to these questions. This is true despite a background of discussions and negotiations between the prosecutor and defense counsel, sometimes even involving the judge. The judge then inquires whether the defendant is pleading guilty because he is in fact guilty, the defendant replies affirmatively, and the plea is accepted.

There is a studied ambiguity in these questions which leaves room for evasive maneuvering. After all, agreement to accept a plea to a lesser included offense which carries a much lower maximum sentence than the original charge (or does not carry a mandatory minimum sentence as does the original charge) is not quite exactly a "promise of leniency." And while a bargain may have been struck before the plea was tendered, the use of terms such as "inducement" and "because" leave the legal mind the "out" that the assurance of leniency was not the sole cause of the plea. In other words, the questions asked use legal terms of art so that they call for and beget conclusory replies which conceal the negotiations, arrangements, and understandings which lie beneath the surface. Again, the fear that we are confronted solely with the extreme alternatives of ignoring the

practice and living with it, or throwing it out and collapsing under the administrative burden, has prevented us from making a closer examination of the practice and distinguishing proper plea bargains from the unacceptable.

Normally, our system relies on the defendant's self-interest to challenge questionable practices. But in plea bargaining, the defendant's self-interest usually lies in accepting the results of the bargain. Occasionally, however, this is not so. A promise may not be kept, or what was described to the defendant as a good chance for leniency may have been innocently or cynically understood by him as a firm promise. Even when the promise is kept, the defendant may have second thoughts. Once in jail, the prospect of two years less to serve may not, after all, seem to have been worth giving up his chances of an acquittal. And that's where the trouble begins. Should the judge believe the defendant's claim after he has stated on the record that no promises were made to him? Should the judge cast doubt on the accuracy of the record underlying all those other guilty pleas? A glance through almost any volume of the Federal Reporter will disclose several cases involving attacks on bargained guilty pleas. Almost all of the cases affirm the lower courts' decisions rejecting such contentions for lack of credibility. Undoubtedly many more such lower court decisions go unappealed and therefore unreported.

Uncredited disappointment is only one potential problem. When the judge does not pierce this conspiracy of silence, who protects the public interest to make sure that the defendant receives an appropriate sentence? When the bargain results in the reduction of charges, the judge is deprived of his power to impose a heavier sentence. Even when the judge's power is not so restricted, the parties' interest in a quick disposition of the case may result in inadequate social investigation prior to sentencing and a sentence that does not meet the underlying problems which are present but undiscovered.

There is nothing terribly new in these musings. Judges who preside in courts where plea bargaining is practical must be disturbed by similar thoughts occasionally. But, fearing that to open the issue would lead to the disqualification of all guilty pleas obtained in a bargaining context, with awesome administrative consequences, discretion overcomes virtue.

The great merit of Professor Newman's volume is that it is a book whose time is ripe. In the current atmosphere of criminal law reform, the problems presented by plea bargaining can no longer be avoided. Professor Newman and the American Bar Foundation have furnished us with a thorough and detailed description of the varieties of plea bargaining. And

if there is now danger that overzealous reform may demand the abolition of all forms of plea bargaining,¹ Professor Newman has forcefully reminded us of the need for a discriminating approach to reflect the diversity in practice, that there are different types of plea bargains serving different purposes in our system, and that the problems posed and the techniques of control are similarly varied.²

On the other hand, the book has some flaws, the least significant of which is a high degree of repetition. For example, the relationship between bargaining practices and the jurisdiction's sentencing structure, no longer a novel idea,³ is pointed out at least four times.⁴ A more serious problem is the lack of clarity as to the extent to which the author's remarks report, or at least are based on, actual field observation as distinguished from speculation and impressions gained from reading reported judicial decisions. While such ambiguity occasionally inheres in the subject matter under consideration, such as in discussions of the motives of the participants in the process, it is not limited to such instances. And, finally, much of the information is simply inadequate to help us evaluate present practices.

Two examples may illustrate these remarks. The relevance of multiple offender statutes to plea bargaining is twice mentioned briefly but this reader emerged with no picture of the impact of such statutes. One reference,⁵ seemingly based on observed negotiations, does not clearly indicate whether the prosecutors used such statutes to exert pressure on defendants to plead guilty or whether the statutes were merely part of the background picture which defense counsel had to consider. The distinction may be important, for example, in arriving at a conclusion as to the extent to which we can rely on the prosecutor and defense counsel to administer the guilty plea process.⁶ In context, the impression gained is that the prosecutors did not commonly manipulate such statutes to obtain guilty pleas. On the other hand, the second reference strongly suggests that "it

1. Cf. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 17-19 (1932).

2. The book also contains a clear presentation of the central role of the trial judge in the administration of criminal justice, and an excellent discussion of the role of counsel and the problems faced by counsel assigned to the indigent.

3. E.g., Ohlin & Remington, *Sentencing Structure: Its Effects Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

4. Pp. 54-60, parts of chapters 6 and 8, and most of chapter 13. [All citations are to D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966).]

5. P. 84.

6. The matter, of course, is also of concern to the administration of multiple-offender statutes.

is not an uncommon practice”⁷ for prosecutors so to pressure defendants. But the only example given is drawn from a reported judicial decision. Similarly, with respect to the danger referred to above that bargaining may result in inadequate response to serious crimes, we are advised only in the most general terms that a practice of charge reduction that begins as a discretionary device to individualize sentences often “becomes virtually routine.”⁸

Elsewhere, with considerable assistance from this volume,⁹ I have attempted a theoretical analysis of plea bargaining, contrasting the risks and opportunities it presents, and suggesting those still unanswered questions which one must ask in evaluating the process. Perhaps one should not be surprised that initial attempts at empirical study should have emerged stronger on the theoretical side than in providing an adequate informational base for future decision-making. Still, it is important to bear in mind that we do not yet have adequate answers to the questions this volume forces us to ask. *Conviction* furnishes a firm framework for future research and discussion of the problems it explores. While such discussion will hardly end with this book, it will undoubtedly begin here.

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7. P. 58 n.3.

8. P. 182; *cf.* pp. 103-04.

9. The paper, entitled “Perspectives on Plea Bargaining,” will appear in an Appendix to the REPORT OF THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE.

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