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Conviction: the Determination of Guilt or Innocence Without Trial. By Donald J Newman. Little, Brown & Company. 1966. Pp. XVII, 259. $8.50.

H. Elliot Wales

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BOOK REVIEWS

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

This volume is the second in the series of a survey of the administration of criminal justice in the United States conducted by the American Bar Foundation. The pilot study on police behavior* is now followed by a report on counsel's behavior in and out of the courtroom in disposing of criminal cases, without the formality of a trial. The emphasis is on the informal practices to which the court and counsel subscribe, which result in the administrative termination of most cases, to the relative satisfaction of all concerned.

It is not surprising that the author of this study is a sociologist, and not an attorney His task is to study the role of lawyers as they perform their designated tasks, and not the study of rule of law Nor are there any specific rules to guide the attorneys as they interact with one another to strive for a goal satisfactory to their respective clients, and in compliance with the standards of the system. Professional behavior involves more than a knowledge of the appropriate statutes and cases. It also involves a know how and a committment to the mores of the Bar as the members have learned to live professionally with one another

As the Judicial Process in completing a criminal case is in two steps—first ascertaining guilt or innocence; then fashioning the appropriate sanction, if guilt is determined—a considerable amount of leverage is generated into the system so that in the main, one party to the controversy becomes more concerned with the first stage, while the other party is more oriented toward the second step. Ultimately most defendants concede their guilt to the charge, and are concerned with minimizing the possible punishment. Most prosecutors are concerned only with securing a plea or verdict of guilt, and are content to allow the imposition of sentence to be a matter solely between the court and the defense. Thus the prose-

* Arrest. The Decision To Take A Suspect Into Custody, By Wayne P LaFave (1965). See Book Review, 18 Maine Law Review 127, by this reviewer.

cution is generally prepared to reduce or minimize the criminal charge, in order to induce a guilty plea, while the defense in most instances will yield the right to trial, in order to secure a lower sentence.

As this process is more or less informal, and does not have societal rules as a guide line, there is legitimate public concern that perhaps the goals of the criminal law and the criminal process are not being achieved. One thing is sure—until this study was published, we were in the dark to know what in fact was occurring outside the courtroom to effect the ultimate disposition of the case itself. Basically we subscribe to the notion of the public trial, to the verbatim recording of court proceedings, and to society's right to know each and every aspect of the judicial procedure. Our abhorrence of star chamber procedures involves a committment to the highest visibility of court proceedings. Yet the process leading to pleas of guilt have been conducted *sub rosa,* and have involved fictions which are themselves derogatory of the judicial process.

Agreements between the prosecution and the defense which result in the decision of the defendant to plead guilty to some charges usually require as quid pro quo a concession and a commitment on the part of the prosecution to do any or all of these three possibilities—accept a plea to a lower charge; dismiss other counts or other charges; and make a sentence recommendation to the Trial Judge. The first two possibilities involve the area traditionally within the discretion of the prosecution as to what charges, if any, should be brought against a defendant, and present a problem only to those who believe that a society entitled to its pound of flesh should not accept one ounce less. The third area—sentencing—has always been the exclusive province of the Trial Judge, subject only to legislative limits, and it is here that there is a concern that the public interest may not be served by the infringement of the parties upon the role of the sentencing judge.

Newman's study reveals that the judges are well aware of the plea agreements concluded by the attorneys, and generally respect them. At times the judge participates in the conference which results in such agreements. Yet at the time of the entering of the plea of guilty, and before sentencing, the courts will regularly ask defendants, in order to determine the voluntary nature of the plea if any promises were made to them to induce them to plead guilty, and, like good actors, the defendants are expected to answer in the negative. This fiction and this false pretense has no justification, and should be eliminated. If pleas of guilt and plea agreements serve legitimate goals, as they well do, they should be regulated by legitimate rules which provide the necessary visibility

The sentencing judge should not participate in the discussions of counsel leading to the plea agreements, for it is obvious he represents an overpowering figure to the defendant, whose commitment to prison is within his judicial power The terms of the plea agreement should be stated in full in open court to the judge, and recorded in the court's proceedings. When the agreement encompasses a prosecution recommendation as to the sentence, the full basis of that recommendation should be revealed to the court. While this recommendation cannot bind the court, for we do have a deep commitment to an independent judiciary, and to a recognition that ultimately the judge alone represents the public, the sentence recommendation and the plea agreement itself should be respected, if possible, by the court, if the judge allows the plea to be entered. If the plea sentence report shows that there are other factors to be considered in imposing sentence which were not considered by the attorneys in agreeing to a specific plea, and not brought to the court's attention at the time the plea was entered, then the judge should state for the record why he does not feel obligated to follow the recommended sentence. However if the pre-sentence report does not present a picture at variance with the earlier presentation of counsel, then the court should feel committed to executing in toto the plea agreement. These suggestions are in accord with the recently released recommendations of the American Bar Association Committee on Minimum Standards for the Administration of Criminal Justice.

Fortunately we now have the benefit of Newman's study of what in fact occurs, and the American Bar Association Committee's recommendation as to what in law should occur For the first time we are out of the dark ages as to the practices and procedures which result in the disposition of ninety percent of all criminal charges. We can now breathe easier that the public will continue to be protected by the criminal law process, and our commitment to the rule of law will be respected.

H. ELLIOTT WALES
Member of the New York Bar