UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 45 | Number 1 Article 13

12-1-1966

Book Review

North Carolina Law Review

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

This is a most welcome book because of the type of research it reflects, the insights it offers, the questions it raises, and the integrity and analytical skill of the author. It is one volume in The American Bar Foundation's series entitled *Administration of Criminal Justice.* The editor is Frank J. Remington. The series is based upon field data which were obtained from a pilot study in Michigan, Wisconsin and Kansas in 1956 and 1957. The pilot survey was so productive that the national survey which had been planned has had to be postponed until the material on hand is analyzed. Fortunately, publication of the results was not postponed, and Professor Newman's book was preceded in print as it is in topical sequence by Wayne R. La Fave's book entitled *Arrest.* Other volumes are to appear soon, and ultimately we shall have available, to quote from the Preface to *Conviction,* "an analysis in depth of the process of criminal law administration from detection of crime to disposition of the convicted offender."[1]

At least nine years have passed since these data were collected, and these have been years of broadened and quickened interest in criminal justice. Many changes have occurred including some that have seemed dramatic and even alarming in certain quarters. Indeed, the release in 1957 of the seven volume summary of the material collected in the three-state field study probably accelerated the rate of change in a few aspects of criminal justice, just as *Arrest* and *Conviction* will effect changes that will make their own data obsolete to some extent. Nevertheless, although we may quarrel with the selection of the states which were studied, regret the lapse of time between the collection of the information and its publication, and feel faintly skeptical about the validity of conclusions founded upon a base of only three states, all in the Middle West, this survey is all we have as to most facets of the process. That

[1] NEWMAN, CONVICTION; THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL at ix (1966) [hereinafter cited as NEWMAN].

alone would give it substantial value, but in my opinion it is entitled to a much higher appraisal. The care, thought and experience that has formed the analysis of the data makes this study both more meaningful and more reliable than a bare recital of the circumstances of the pilot project would indicate.

Even the most astute criminal law practitioner and the most conscientious judge has no more than a limited awareness of what is going on around him as accused persons go through the processes of criminal justice. The process is too segmented, too complex, too subtle for the participants to grasp it fully. Its implications are even less understood. The various bail studies made all of this clear. It is also evident that we won't get much, if any, light from the usual types of legal research conducted mainly in our libraries. We need the bail studies, the Bar Foundation's survey of the administration of criminal justice, the University of Chicago jury project and many more continuing examinations of what is going on and what it means. The Chicago jury project served as the basis for a new book, *The American Jury*,[2] by Harry Kalven, Jr., and Hans Zeisel, which will undoubtedly be at least as notable for its insights as for its informational base, but the latter had to precede the former even for authors as sharp at catching a glimpse of truth as Kalven and Zeisel.

The reason we need these studies is persuasively stated by Geoffrey C. Hazard, Jr., Administrator of the Bar Foundation, in the Preface to *Conviction*: "At the very least, what is achieved in fact in the administration of criminal justice is a clue to what can be achieved by the instrumentality of the criminal law. This in turn establishes a factual predicate for consideration of the proper province of the criminal law as a device for social ordering."[3]

There are more immediate values. *Conviction* stresses the guilty plea process, bargaining for a plea, the discretion of the trial judge in acquitting or reducing charges against guilty defendants, the judge's use of this power to control the over-all system of criminal justice, and the role of the defense lawyer. For example, armed with *Conviction,* a lawyer should have been able to convince the state courts of the necessity of having defense counsel in all cases, for *Conviction* establishes that participation of competent defense

[2] KALVEN & ZEISEL, THE AMERICAN JURY (1966).
[3] NEWMAN at x.

lawyers benefit the judges and post-conviction agencies as well as the defendant. The conclusion is inescapable, per contra, that all three of these are prejudiced by the absence of counsel, so the contradictory and unreasonable rule that defendant must show that he was prejudiced by lack of counsel would have been satisfied and our courts would have been spared the deluge of habeas corpus proceedings.[4]

The most significant message of *Conviction* is that we know far too little about non-trial adjudication, that it is complex, although it may often appear deceptively obvious, and that it is being subjected to a kind of sporadic scrutiny in the field. For example, the accuracy of the guilty plea is being assessed by some judges,[5] and the importance of the lawyers role here is gaining recognition in other connections than as a bar to later habeas corpus proceedings. For correctional purposes, the non-trial as well as the trial adjudication can be a constructive factor if there is a lawyer who has established communication with his client, and a judge who takes time to explain the why of what he is doing. The sense of having had his day in court, of having been the object of some thought and effort, seems important to an inmate's adjustment if not also to his rehabilitation.

One section of the book deals with what is referred to as "acquittal of the guilty." The editor and author, of course, recognize the term as a legal contradiction, but they elected to use it to describe "The discharge of a defendant, by the prosecutor's decision not to charge the suspect, by judicial acquittal, or by other disposi-

[4] It is, perhaps, a touch too generous to *Conviction,* or the courts, or both, to suppose that anything less than the United States Supreme Court could have established the true stature of lawyers in criminal cases. Every state court ignored data that would convince most laymen. Pennsylvania, for example, had Commonwealth v. Gabriel, 195 Pa. Super. 411, 171 A.2d 538 (1961), where the defendant was convicted when without a lawyer, then obtained a lawyer to carry up on appeal, and the court on appeal arrested the judgment and discharged the defendant, saying, "In this case, however, the record is entirely bare of the facts necessary to convict under the most liberal construction of the definition of security." *Id.* at 415, 171 A.2d at 540. Despite this total lack of essential evidence, the accused was convicted—until he secured the services of a lawyer!

[5] A potentially useful check upon the accuracy of the guilty plea can be a pre-sentence report. Professor Newman quotes the ending of one such report: "By now the court has perused the report . . . . [W]e believe any comment by us is superfluous other than to state that the defendant has, in our opinion, violated the most important of the ten commandments, that of the seventh commandment: 'Thou shalt not kill.'" NEWMAN 15.

tion, despite the existence of evidence sufficient to convict him."[6] This is a situation the author very properly discussed at length, and some shorthand term was essential, but the one chosen is too reminiscent of the wild rantings of political and police radicals to whom it means something highly improper and dangerous. Whereas, in many of the situations where the term is applied in *Conviction* the discharge is the exercise of legal statesmanship. Even the equally ambiguous "acquittal of the convictable" would have been less offensive though perhaps no less misleading.

Conviction ends with a review of five unresolved issues. All of them are major concerns in the administration of criminal justice. They merit continuing research and analysis which obviously should begin with *Conviction.*

This book is full of good things for all who are interested in our system of criminal justice, from the professional to the layman; it is, in fact, too rich a resource to be treated adequately in a brief review. It should be read, and I hope that it will be widely read.

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[6] NEWMAN at xv.

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