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Book Review

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BOOK REVIEW

A review of a 1964 book in 1967—one on criminal procedure at that—may seem patently absurd. And *Law and Tactics in Federal Criminal Cases*, edited by George W. Shadoan, is a handbook on federal criminal procedure. But even if this book were only a compilation or digest of leading, key and trend cases in such areas of the criminal law as search and seizure and confession, it would be important as indicative of the “racial revolution” in judicial prescriptions culminating in the notable or infamous (depending on to whom you talk) *Miranda v. Arizona*.

One who is uninitiated in the intricacy and sophistry of our criminal procedure perhaps will be appalled by the welter of rules and by the explicit necessity for competent counsel to twist, distinguish, and extrapolate to give them relevancy and efficacy in his particular case. Without highlighting the cases enumerated, suffice it to say that the “law” is laid out clearly and precisely with intelligent but generally short elucidation in penumbral areas. A pocket part is due this summer; if it is handled as well as the instant material, the book will be at least adequate and instructive to counsel looking for fast answers as to what is the law or at least what the federal courts seem to indicate is the law.

But if a pocket part is due soon, why not wait for its publication and then review the up-to-date product? The answer, in which lies the point of this review, is that there is no need to wait. The case digesting in 1964 was competent and it will certainly be so in 1967. With all the hue and cry over the impact of *Miranda* on police operations the case, like all criminal procedure cases, is merely symbolic.¹ Shadoan has edited a “how to do it” book which meets its purpose: it will inform competent counsel on how to do it. It is apposite to quote from the work’s own *raison d’être*: “The practice of criminal law is no longer the simple matter of presenting a factual defense, and contrary to the unspoken dictum of many law schools, every lawyer is not qualified to try a criminal case. Indeed even an expert civil trial lawyer may well tremble at the prospect of entering the dark domain of a criminal court. The purpose of this book is to expose some of the modern complexities of a federal criminal trial. We have tried to make the volume basic enough to be a guide to the novice and so authoritative as to be a valued reference to the experienced.”²

¹ For an incisive elucidation of symbolic values see, T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

² Preface to *LAW AND TACTICS IN FEDERAL CRIMINAL CASES* iii (G. SHADOAN ed. 1964). [hereinafter cited as *LAW AND TACTICS*].

The book has accomplished what it attempted. Were I to play true to the form of critical review, I might disdainfully and with some asperity inveigh against the initial nine pages of the book. The simplistic checklist for handling a criminal case from its inception ridicules, by its handholding and leading phraseology, the competency of the bulwarks and even the lesser guns of our criminal bar (if we still have to distinguish the "criminal" specialist from the not-so-criminal specialist). "There are certain standard steps and principles of investigation appropriate to every criminal case regardless of court or jurisdiction." The next sentence states, "*It would be beneficial to provide to attorneys in every federal district the particulars of how and where they can most effectively gather the facts of their case.*"³ (Emphasis indeed added.) In appropriate paragraph form we are then told the hows, whens, and wheres of: 1) inspecting the file of the case, 2) inspecting the search warrant, 3) inspecting the arrest warrant, 4) inspecting the criminal conviction record of government witnesses, 5) obtaining a copy of the defendant's criminal conviction record, 6) inspecting various police forms, *inter alia*.

On one such checklist item we are told to "interview the Assistant United States Attorney assigned to prosecute the case. His name will be found in the criminal jacket or can be obtained by calling the United States Attorney's Office. Such an interview can be *mutually* advantageous if the prosecutor discloses sufficient information to enable defense counsel to accurately evaluate the desirability of a disposition of the case in advance of trial."⁴ The next section breaks down various crimes into appropriate checklist headings in much the same mode.

But any laughs which may be derived from such a handling of checklist materials is indeed on those of us committed to any legal process, be it criminal or civil. Much the same treatment could and I am sure has been accorded to the civil law, which, although perhaps not so dramatic, can be equally significant to the client either wealthy or poor in counsel or material goods. The authors of this book have patted us on the back and assured us the criminal law is complex for the average attorney and even for the criminal law specialist. They have offered to lead us through the *Alice in Wonderland* world of the criminal law equivalents of the old common law surrebuttor. Too few of us really know where the appropriate forms are, or, often, of the very existence of forms which are relevant and essential to adequate representation. We

³ LAW AND TACTICS, *supra* note 2, at 1.

⁴ *Id.* at 6.

have all heard the old rubric that cases are won through preparation. But preparation implies something more than versing or reversing one's self with the litany from appropriate cases. Here at least we have a sourcebook which says, "Look, go down and check this form, and it will give you such and such information which is relevant for the following purposes." This information is not available in the average or probably the better than average criminal law course. Nor am I implying any deficiency in such courses; they are generally good; they teach the criminal law—whatever that may be in 1964 or 1967. An attack on such courses would be a declaration against interest which in this case I am not about to make. The average criminal law course has little time to grapple with such "irrelevancies" as the existence or contents of police reports. This information is useful, certainly, but not so appropriate as to displace the more significant dialectical analyses of *mens rea*, of what constitutes an act, of posited philosophical alternatives of responsibility, and of disposition.

Where then can the law student or the lawyer who is called, requested or in some other way moved to defend an accused find this information? Seminar courses may be offered in specific criminal procedural details but often these are involved with policy considerations of more interest and significance than dull detail. Some schools, through foundation monies, have instituted field work in areas of the criminal law, e.g., cruising with working police officers. These programs provide viable material for classroom discourse and feed back into the respective seminar to the benefit of nonparticipating students. These courses are generally by their nature limited to a few interested students. The young lawyer can learn his trade, and acquire familiarity with the necessary tools for mere adequate craftsmanship, in district attorneys' offices and, in some geographical areas, public defenders offices. But again these are but a small part of the bar.

We assume the right to counsel; the United States Supreme Court and lesser tribunals have fleshed out the bare concept and are continuing to provide the necessary "magical" words to ensure adequate counsel. And saying does make it so on one important level: the symbolic level again using Arnold's term. The appropriate formal obeisance to the righteous demand for counsel has been presented, and so much the better if the criminally accused (whom we "know" is probably guilty) is still caught by the process and made to pay his just penalty after having had his due process.⁵

⁵ See Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions*, 54 CALIF. L. REV. 357

Still, we can all cry "cheater's proof." That is, if the counsel provided was incompetent, the conviction "proves" nothing. Is the formal obeisance then any more than a facade for an unfair trial?

On the other hand, should we even question the concept of right to counsel as anything more than a symbol? Should the pronouncement from the courts guaranteeing this right suffice in itself if we can show that the mere presence of a body called counsel satisfies the "symbolic need" of the individual. Moreover, very often even the individual who has had ineffective counsel will vent his rage or his aggression toward the figure of incompetency (*i.e.*, his lawyer) and neither at the symbolic idea of counsel nor, indeed, at the system itself.

Arnold has decried such showings of inefficiencies, illogicalities and lags in the process as off point to the analytical examination of a functioning order. "It is," he says, "child's play for the realist to show that law is not what it pretends to be and that its theories are sonorous, rather than sound; that its definitions run in circles; that applied by skillful attorneys in the forum of the court it can only be an argumentative technique; that it constantly seeks escape from reality through alternate reliance on ceremony and verbal confusion. Yet the legal realist falls into grave error when he believes this to be a defect in the law. From any objective point of view the escape of the law from reality constitutes not its weakness but its greatest strength. Legal institutions must constantly reconcile ideological conflicts, just as individuals reconcile them by shoving inconsistencies back into a sort of institutional subconscious mind."⁶

Admitting of the multiple conflicting values sought to be appeased by the legal process, of the need for elasticity from rigid though aesthetically pleasing logic, of the factual lag between norms and ideals, there comes a point where such sophistry breaks down, where "symbols" lose their luminosity and the system thereby falls into disrepute until new symbols can be rearticulated through a mass emotional process (if a conscious process at all). Movement toward reform can for a time preserve the efficacy of the symbol, but if the movement goes on too long and is still unavailing, it would seem that the symbol must be modified to preserve a modicum of certainty, of freedom from the frustration and anxiety

(1966) where the author, a psychiatrist, speculates on the reason for our ambivalent attitudes concerning the "non-person," the category including the criminal and too often the accused criminal in addition to the poor.

⁶ T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 44 (1935).

which must go along with the realization that the ideal which the symbol connotes cannot any longer be accorded even the lip service formerly paid it as its minimal due.

The question of competency of counsel has been raised in relationship to this book since the very function of the treatise is to make available one source whereby counsel who is competent in all respects except for immediate recall or perhaps even knowledgeability in the area of the criminal procedure can be put on notice of his minimal duties and in some cases tactical options. The authors of this work seem indeed competent manipulators and scholars of the process they are explicating. But one must wonder whether a criminal counsel reading *for the first time* how-to-do-it lists can ever hope to do it right the first couple of times. Does this mean then that an attorney handling his first criminal case must be considered *prima facie* incompetent, be he new to the bar or merely new to the criminal process? The fact that other professions, *e.g.*, medicine, have the same problem and also deal in problems vitally significant to the individual does not answer the problem. Nor can we equate competency necessarily with experience. An inexperienced attorney may intuitively or consciously using the tools he has acquired do a workmanlike and perhaps a brilliant job; the biographies and autobiographies of many renowned trial counsel so inform us.

We can indeed acknowledge a certain amount of incompetency for reasons of sheer lack of ability, lack of experience, lack of particular expertise without inveighing against the entire system. And we have recognized that there is a paucity of adequate criminal trial counsel to fulfill the constitutional symbol of right to counsel which must mean the right to reasonably knowledgeable and effective advocacy. Money is certainly not any sole solution to this problem nor to any problem inherent in the adversary system of criminal justice. Often we do not know how to employ the financial resources we do have.

Perhaps justice does not require competent counsel but merely a matching of incompetent adversaries. The theme of the treatise is to provide information to aid the defense in achieving some knowledge of the complexity of law and possible tactical employment of rules and procedures in the adversary game. We feel smug with the so-called genius of the adversary system. We are assured that despite human foible the system as it works is an effective means of procuring justice. Our experiments with a *parens patriae* limitation on adversariness in juvenile cases has certainly not convinced us of the efficacy and justice of a loosened procedure. In fact the reverse trend is becoming at least a verbal reality, *i.e.*,

the panoply of rights safeguarded to the accused adult are being increasingly demanded for youth. Justice Fortas has commented on this need: "While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults."⁷

Certain tactical problems are highlighted and explicated, suggestive of numerous others and of approaches to meet them. One such example handled well indicates the "restructuring of the case" by the prosecution through manipulation of ambiguous or out of context statements which to the jury can be decisive admissions.

To illustrate: a defendant who had told two different exculpatory stories to the police, the first indicating no knowledge of the affair and the second, post-lineup, admitting some knowledge but denying complicity, might have been asked why he had lied the first time. In response he might say, "I didn't think that the complaining witness could identify *me* because I didn't rob him and I wasn't involved although I was present. Now that he has identified me, I told you the truth." The prosecutor [in an incriminatory tone] might ask the defendant on cross-examination: "Didn't you tell the police that you lied to them because you didn't think the complaining witness could *identify* you?"⁸

Ethics exist on many levels as applied to the criminal process. Since we are playing an adversary game only certain holds are barred; moreover, often even alert defense counsel will not be in a position to cope with such prosecutorial distortion. If he is alert, prepared and otherwise competent, this book suggests certain possible approaches. At least it indicates this and related problems of which defense counsel must be aware to be even in the game. How then can such use of admissions be countered? The treatise goes into an explicit handling of discovery devices available to the defense. The issues are presented where possible in clearcut fashion; the book suggests the ambiguity or nonexistence of answers. Trial counsel is in a no man's land with limited time (after all he must have other cases to handle) to discover the statements of the accused and to attempt to obtain from the prosecution, where the rules permit, statements of witnesses as well as physical evidence or reports indicating physical indicia of the alleged crime, e.g., fingerprints or handwriting specimens.

⁷ *Kent v. United States*, 383 U.S. 541, 555 (1966); see *In re Gault*, 35 U.S.L. WEEK 4399 (May 15, 1967).

⁸ LAW AND TACTICS, *supra* note 2, at 109.

The treatise in no way purports to provide the philosophical or jurisprudential bases underlying where such do underlie the assorted prescriptions. We are told that the prosecution may in good faith or otherwise destroy documents which are reachable under discovery, and we are told what alternatives are open to the defense in such a case based on past case experience. No comment is made on ethical considerations; such are assumed or left to the discretion and/or conscience of the particular counsel. Nor could we expect a book of this comparatively short and compact length (331 pages counting index) to cope with abstruse ethical pitfalls. But a caveat should be indicated: the game does have some rules proscribing tactics of opposing counsel, and the answers are not that obvious in the canons.

The truly ritualistic, most pragmatic and perhaps most useful section of the treatise deals with the presentation of the insanity defense. We are told that "counsel should ask the potential witness whether he belongs to the 'dynamic' or the 'organic' school and whether he has had any additional training, such as in psychoanalysis. Unless the defendant's current symptomatology is so gross that a mere description and classification of his behaviour will convince the jury of his lack of criminal responsibility, a psychiatrist of the 'organic' school will not make an effective witness."⁹ Undoubtedly the advice is correct, and if it is, it highlights the fact that truth is not really in issue but persuasive force and plausibility carry the day. Moreover, we are informed that, "the doctors at St. Elizabeth's Hospital [the section, as indeed the entire treatise, centers on Washington, D.C., with leading cases from other jurisdiction indicated where relevant] tend to be more conservative than those in private practice."¹⁰ The net impact is that the public psychiatrist can generally be counted on to find an absence of mental illness in a criminal case. Not so surprisingly, where the symbols change, in civil commitment proceedings, the same doctors are likely to find mental illness sufficient for commitment under the criterion of "dangerous to self or to others."¹¹ The remainder of the section handles the trial preparation for the insanity defense, including interviewing of witnesses, selection and relationship with chosen psychiatrists, and examination and cross-examination of psychiatric experts. The section does not attempt to be definitive of questions of examination but provides an excellent checklist and strategic foundation in an area which is metaphysical

⁹ *Id.* at 243-44.

¹⁰ *Id.* at 245.

¹¹ See generally T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* (1963); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS AND THE LAW* (1967).

to most laymen and not a few attorneys.

The important issue is then whether the government has a right to examine the defendant and whether such examination is in conflict with the fifth amendment freedom from self-incrimination. Defense arguments for the fifth's application are indicated in the book, with the likely prosecution counter arguments. The issue is left unresolved in policy development, but true to form the advice given will at least preserve the record—not a mean feat since without proper foundation even the fifth's rights can conceivably be deemed waived.

In this respect we are told that, "if the court orders counsel not to give such advice [i.e., advice not to cooperate with the state psychiatrist] and orders the defendant to cooperate under pain of contempt, the issue is preserved for appeal and there appears to be, as yet, no appellate authority in this issue."¹² Whether counsel should ethically resort to self help, i.e., refuse even with the court order to allow his client to submit, is unanswered and falls to the increasing responsibility of counsel. The perhaps easier issue of whether the accused has the right to counsel during psychiatric examination is also unanswered.¹³ We have to answer, moreover, to the question of whether the "state's" psychiatrist can testify over the objection of accused's privilege. The function and role of psychiatrist is left to his individual ethics and those of his profession. It would seem, however, that the legal profession would have definite concern for the impact of psychiatric function and ethics as it relates to the criminal and civil commitment processes.

The burden of proof is upon the prosecution to prove beyond a reasonable doubt the defendant's sanity after evidence is submitted by the defense to rebut the initial presumption of sanity. We have then one of the paradoxes of the insanity defense issue if we presuppose that defendant is insane. The state's psychiatrist approaches the accused in his capacity of doctor—a role of trust which when coupled with the expertise of the psychiatrist in effectuating a trust situation and the possibly impaired self-protecting mechanism of the defendant indicates at least confused psychiatric roles. We know that the adversary proceeding is capable of destroying psychiatric disinterest so that often the state's psychiatrist becomes committed in good faith to the state's positions. His very charge is to attempt to pierce any dissembling and possible malingering. His role is opposed to the best interests of the accused for the practical purpose of prevailing on the insanity de-

¹² LAW AND TACTICS, *supra* note 2, at 250.

¹³ See *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967).

fense. Moreover, any admissions he makes to this doctor (a figure who generally represents help qua the doctor symbol) will be effectively used by the psychiatrist at trial. It would seem that at least the psychiatrist should be charged with apprising the accused of his, the psychiatrist's, conflictual role.

The question that remains if we opt for the presence of counsel at the psychiatric examination is what function can he play to safeguard his client, short of advising noncooperation or complete silence. The presence of counsel can set the accused at ease; counsel can again advise him against the necessity for dissembling although a competent psychiatrist will be able to determine that even the process of stimulation can mask more serious symptomatology. Of most importance, however, counsel aware of psychiatric dynamics, (a necessity for competency to handle the defense) will observe the technique of the psychiatrist and will be able to challenge any assertions the psychiatrist later makes on the basis of his examination by indicating flaws or inconsistencies with the used technique as opposed to accepted tenets of the school to which the psychiatrist subscribes. This is in addition to any possible attacks on the basis for the dynamic principles being asserted.

A very practical device for influencing the jury's finding is available in Washington, D.C., as stated in *Lyles v. United States*:

unless affirmatively waived the accused has a right to the . . . instruction that the consequence of an acquittal by reason of insanity will not result in outright release of the accused, but that he will be confined in a hospital for the mentally ill until the hospital superintendent has certified and the court is satisfied that the accused has recovered his sanity and will not be dangerous to himself or to others in the reasonably foreseeable future.¹⁴

The impact of such an instruction is obvious; the jury is reassured that a not guilty by reason of insanity finding will not automatically release the accused to the potential danger of the public.

The existence of this model in the District of Columbia leads us to question why the whole criminal procedure is not fitted into this paradigm. In the general case where the insanity defense is asserted the commission of the proscribed act is almost always stipulated. Why then don't we focus immediately upon the question of immediate potential dangerousness and alternative disposition instead of playing off opposing psychiatric experts on determining sanity—a legal concept and therefore one theoretically without the psychiatric domain?¹⁵ This question would seem par-

¹⁴ 254 F.2d 725 (D.D.C. 1957), cert. denied, 356 U.S. 961 (1958), cited in *LAW AND TACTICS*, supra note 2, at 287.

¹⁵ See Goldstein & Katz, *Dangerousness and Mental Illness—Some Obser-*

ticularly relevant when we admit the difficulty (if we admit the possibility) of determining insanity. Society's present answer seems to be the play of symbols again; if not insane, the convict should go to prison assuredly for "rehabilitation" but certainly at least for punishment. If insane he should be committed to any mental institution which can "cure" his illness. We are all aware of the paradoxes that often the prisons in a particular jurisdiction do a better job of treatment on the psychotic (if we equate insanity with psychosis, whatever either is) than does the mental institution in that jurisdiction. Moreover, often the accused will serve a shorter term in the prison than the much more indefinite mental commitment invoked because of a criminal act.

If for the moment we forget the futility often indicated by practical considerations, what theoretical purposes will be accomplished by making findings of dangerousness as opposed to findings of insanity? We can expect a turn in the position taken by the prospective psychiatric experts; the state's psychiatrist will find dangerousness generally while the defense will present psychiatric testimony of lesser dangerousness potential. We might be able to consolidate all those considered dangerous into one institution and concentrate our efforts there, rather than diffusing efforts in arbitrarily differentiated institutions (if not arbitrary, often at least disposition to a prison or mental institution is fortuitous). Moreover, we can perhaps add a classification of treatability so as to concentrate efforts of those with the greatest potential toward coping in our society, in accordance with the general societal dictates. "Dangerousness" and "treatability" as categories, however, create definitional problems in themselves which will be subject (indeed, for "dangerousness" has already been subject) to abuse and misapplication. Of more import the shift in sequence will probably create the same dispositional process even though we change labels. This does not mean we should give up efforts to refine our procedural framework, but that we should acknowledge that we must examine underlying policy questions for a significant change as opposed to mere label modifications and manipulation. Such change may at the outset permit a liberalization of ambulatory release alternatives, but if society after weighing all conflicting values opts for security by means of some form of incarceration, this result will follow despite label change.

The treatise neglects the whole area of postconviction remedies which is in the developmental process and which is often the most

vations on the Decision to Release Persons Acquitted by Reason of Insanity, 70 YALE L.J. 225 (1960).

effective tool for accomplishing the results sought by defense counsel, but the scope of the book in its purpose is confined to pre-trial and trial procedures. In respect to the pre-trial insanity issue, the treatise does draw the distinction between the conceptualization of competency to stand trial as opposed to the presentation of the insanity defense, but little time is spent on the incompetency to stand trial issue which can be a highly relevant procedural weapon for, and too often against, the defense. Too often the prosecution can assert the incompetency to stand trial issue to effectuate a commitment without the necessity of presentation of evidence of the offense at trial, thereby avoiding losing a close or weak case. It is at this stage where the above proposed model can be particularly suitable. If a defendant is found to be incapable of either communicating in any way with his counsel or is incapable of understanding the nature of the offense with which he is charged, the prosecution should first have the burden of proving the proscribed act; if the act is proved a determination of dangerousness can be made with dispositions ranging from ambulatory care to institutionalization. The problem arises where the prosecution proves the act and the defense later discovers defenses possibly precluded to him because of the inability of defendant to communicate. At this point we can provide for a new hearing by right. Thus if the defense at the outset can show a bona fide defense, defendant is freed; if defense can show defendant to be non-dangerous, defendant is released; if defense later discovers a defense possibly precluded because of a block in communication with defendant, defendant will get a new hearing.

The treatise ends with an appendix highlighting, by actual record testimony, techniques to use in examining witnesses, and psychiatric experts, and in cross-examining psychiatric experts—all in relationship to the insanity defense. The examples are well chosen models of how to do it, and indicate dramatically plays which are open to effective counsel to substantiate or circumscribe an opposing theory by the use of deft verbal and psychological skills which often are above and beyond the merit of the question, but which must be employed if we insist that the system we have is the best way to play the game. The record excerpts suggest, by their dramatic appeal, the pertinency of all record use as a significant teaching device adding a new dimension of vitality and flesh and blood reality, something difficult to extrapolate from the courtroom to the classroom. But the treatise as a whole shows that the game is complex, substantially more complex than mere rule application and perhaps beyond the immediate capabilities of too many who are confronted with more adept and deft counsel.

The legal issues in 1964 are the same today with more emphasis today on problems of eavesdropping and increasingly more subtle distinctions in case law. But the 1967 pocket part will bring the rules up to date. The only important thing is that we are all playing the same game and playing it correctly; if not we hurt not only the individual client but the game itself which perhaps will lead to a new game. Who knows if that would be good or bad. But we lawyers know what we have and have a commitment at least to attempt to make it work.

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