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Law and Tactics in Federal Criminal Cases, edited by George W. Shadoan

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Law and Tactics in Federal Criminal Cases is a symposium of articles prepared by members of the E. Barrett Prettyman Fellowship Program in Trial Advocacy at Georgetown University in Washington, D. C. The editor frankly admits the defense orientation of the authors. However, such a bias may commend the book to its audience, which will be comprised of far more defenders than prosecutors; and those prosecutors

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5. LAPENNA at 98.
6. *Id.* at 118.

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among its readers will profit by the disclosure of arguments and tactics which they no doubt will soon be required to counter in their own bailiwicks.

If the admitted defense bias does not impair the usefulness of this volume, another limitation seriously weakens its utility to the general practitioner of criminal law in the federal courts. Judging by this volume, the principal practical experience of the authors has been as court appointed counsel for indigent defendants in the federal district courts and inferior courts of the District of Columbia. Despite the universality of the Federal Rules of Criminal Procedure, it is a mistake to suppose that there exists a homogeneity in the practice of criminal law among the several federal district courts. Between any two other districts, the dissimilarities may be attributed to differing local rules. However, the jurisdiction of the federal courts in the District of Columbia is unique: it encompasses not only federal criminal code violations but also offenses under the District of Columbia Code which elsewhere would be tried in state courts. Thus, the "common crimes" enumerated in Part One, "Fact Investigation," include housebreaking, truck robbery, pickpocket or purse snatching, rape, and homicide—none of which offenses are subject to the jurisdiction of federal district courts elsewhere in the United States.[1]

Nor does the practice of criminal law in the District of Columbia as disclosed by this volume differ from that in other federal district courts only as to the kinds of charges brought and tried. To one familiar with the techniques used by federal investigative agencies and the integrity of the personnel who employ them, it is disconcerting to find here the recurring assumption, if not assertion, that federal officers of the authors' acquaintance are accustomed to chicanery: to the use of lies, promises, and threats to obtain statements from defendants;[2] to the falsification of official records and the fabrication of testimony;[3] to the misrepresentation to defendants' counsel of the contents of oral or written statements of the defendant.[4] It must be assumed that these problems have been encountered with sufficient regularity to justify the emphasis placed upon them. This assumption finds support in the fact that some of the most restrictive rules and far reaching sanctions governing the conduct of federal officers investigating criminal offenses have been formulated and imposed by the United States Court of Appeals for the District of Colum-

1. This statement, of course, discounts the effect of the Assimilative Crimes Act, 18 U.S.C. § 13 (1957), as well as the jurisdiction of certain territorial courts.

2. LAW AND TACTICS IN FEDERAL CRIMINAL CASES (Shadoan ed. 1963) [hereinafter cited as SHADOAN].

3. SHADOAN at 20.

4. *Id.* at 89.

bia, apparently in response to abuses by federal officers there.[5] Outside the District of Columbia, federal officers are almost exclusively investigators and not policemen. This role permits them to enjoy the luxury of reflection, denied to the policeman who must react to exigencies. That the opportunity for deliberation minimizes the instances in which judicial reproach is visited upon federal officers outside the District of Columbia is not surprising. More to the point here, one cannot validly project to other districts the assumptions of criminal defenders in the District of Columbia about the expected conduct of federal officers.

Of all the innovations in criminal law and procedure propounded and approved by the United States Court of Appeals for the District of Columbia, none has been more widely discussed than the so-called Durham rule, which holds that a person may not be held criminally responsible for acts which are the "product of a mental defect or disease." In both textual discussion and testimonial excerpts in the concluding part of this book, "Presenting the Insanity Defense," the changes which the promulgation of this rule has brought in the trial of criminal cases are clearly disclosed. Whether the Durham rule is a desireable one is not within the scope of this discussion. But a reader of this section will have a much firmer basis for the formation of his own conclusions.

Not all of the articles contained in this symposium are flawed by a District of Columbia parochialism. Most practitioners will find the section entitled "Pretrial Motions" of considerable assistance, especially in the forms for motions which are included. The part entitled "Trial Discovery Devices" contains a comprehensive discussion of the operation of the Jencks Act,[6] including some very useful and perceptive suggestions about the tactics of establishing a foundation for the production of witnesses' statements.

While the authors of this volume exhibit commendable zeal as defense trial lawyers, their symposium omits entirely any consideration of the ways in which a defense attorney can assist his client after a plea or finding of guilty. During the fiscal year 1963, the most recent period for which figures are available, only about twelve percent of the adult defendants charged in the federal district courts actually stood trial; the conviction rate for offenders whose cases were disposed of in the district courts was better than eighty-five percent.[7] Even the most accomplished tactician following the lead of these authors is unlikely to affect these figures significantly. In that light, the failure to consider the procedures

5. Refer to Part Three of this volume, "Confession Suppression."
6. 18 U.S.C. § 3500 (1957).
7. ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS (1963).

incident to sentencing constitutes a serious omission. For example, what steps must a lawyer take to assure that favorable factors in a defendant's background or matters mitigating the offense are included in the presentence report or otherwise brought to the sentencing court's attention? What are the advantages and disadvantages of the alternative sentencing procedures open to the court and which may be urged upon it by a defendant's counsel? These questions and others like them confront a defense attorney with far greater regularity than others considered here.

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