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Criminal Procedure Under the Federal Rules - Vols. i & II, by Lester B. Orfield

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BOOK REVIEWS

CRIMINAL PROCEDURE UNDER THE FEDERAL RULES — VOLS. I & II. By Lester B. Orfield. Rochester, N.Y.: The Lawyers Co-Operative Publishing Company. 1966.

The first two volumes of Lester B. Orfield's six-volume work entitled *Criminal Procedure Under the Federal Rules* give promise of a scholarly achievement of the first rank. Mr. Orfield is remarkably well equipped, both in knowledge and experience, to attempt a work on this subject. He was a member of the committee which drafted the original Federal Rules of Criminal Procedure adopted by the Supreme Court in 1946, and he was a member of the committee which proposed the amended Federal Rules. His previous books, *Criminal Procedure From Arrest to Appeal* (1947) and *Criminal Appeals in America* (1939), are standard American texts on criminal procedure.

In his present venture, Mr. Orfield devoted the equivalent of seven years of full time work to a task that had never been done before. He has produced a comprehensive study of federal criminal procedure. In the present context of criminal law, this work will be of value to those engaged in criminal work in the state courts as well as in the federal courts because there has been an increasing trend toward making state and federal practices more nearly similar. The United States Supreme Court has created most of the impetus in this area through its increasing supervision of state criminal procedures. For this reason, the state courts, in turn, will often look to federal practices as a standard or guide for their own decisions and will read federal court decisions with an eye to the trends in in federal court thinking.

After the first chapter, entitled "Early Federal Criminal Procedure," each Federal Rule is covered in a separate chapter in numerical order throughout the volumes. Volume I goes through Rule 9, and Volume II covers Rules 10-22. Each chapter contains the history of the drafting of the particular rule, a comprehensive discussion of the law prior to the adoption of the Federal Rules, a discussion of the English practice when pertinent, a discussion of American constitutional guarantees where they affect the rule in question, a thorough discussion of the rule, model codes and rules where applicable, and the Advisory Committee proposed amendment to the rule with its report on the proposal. Any doubts

about the completeness of these volumes should be dispelled merely by this listing of the extent of their coverage, even without regard to the depth with which each subject is covered.

The sections dealing with the background and history of each rule will be thoroughly enjoyed by the legal scholar. The author has been meticulous in his attention to detail. For example, in the section on the drafting of Rule 4, we are informed that Raymond E. Thomason, United States Marshal for the Northern District of Alabama, suggested a change in the form of the warrant, that the committee for the District of Colorado suggested that summons to corporations be dealt with as in the Federal Rules of Civil Procedure, that Judge John E. Miller of the Western District of Arkansas pointed out that summons had been successfully used in Arkansas for nine years, and so on for seventeen pages. Thus, the vastness of the original undertaking of drafting the Federal Rules is conveyed to the reader.

With equal attention to detail, the law prior to the Federal Rules and the interpretation of the Federal Rules is expounded. However, the real meat for the practicing attorney is in the sections dealing with interpretation of the Federal Rules. In these sections the author has presented every aspect of each rule. He has presented the problems that have arisen under the rules to date and has extensively analyzed the case decisions interpreting them. The author has collated cases on all varying interpretations of the legal points raised by the rules, and he has criticised a decision when he thought it erroneous.

An idea of the kind of work the author has done throughout the volumes is exemplified by his handling of Rule 17(c), which provides for the production of documentary evidence and objects. In this section he states the purpose of the rule and relates it to discovery procedures under Rule 16 and under 26 U.S.C. section 7602, telling how each complements the other. Then he deals with the technical aspects of filing motions under the rule, its effect on the attorney-client privilege, quashing subpoenas issued under the rule, what items can be subpoenaed, showing of good cause, and other facets of the rule too numerous to list here.

The organization and detail with which the author has handled the material is impressive. Despite the wealth of minutiae in which the book abounds, these volumes are so well organized that it is a relatively simple matter to find the material for which one is look-

ing. All of the foregoing factors add up to a most impressive set of law books.

However, it is the obligation of these reviewers to note a few caveats for the practicing attorney reading these volumes. First, the tremendous state of flux that is characteristic of criminal law today makes it impossible for any work on that subject to be completely up to date. Therefore, it will be incumbent upon a practitioner using these volumes to check carefully the latest case decisions in the area involved. For example, there is a lengthy discussion in the chapter on Rule 5 concerning interrogation procedures before arraignment. However, the questions raised and the discussion of cases in this section are rendered practically moot by the decisions in *Escobedo v. Illinois*[1] and *Miranda v. Arizona*[2]. These two recent cases have so changed pre-arraignment procedure as to make many of the prior cases of little value. Another example is the discussion of *Jencks v. United States*[3] in connection with Rule 17(c), with no mention of the act of Congress[4] which superseded it.

Second, the timing of this book is quite awkward in relation to the promulgation of the amended Federal Rules by the Supreme Court as of July 1, 1966. The proposed amendment to each rule is, however, included at the end of the chapter, along with the Advisory Committee's report on the proposed amendment. Of the rules covered in the two volumes being reviewed here, there have been changes in Rules 4, 5, 6, 7, 11, 14, 16, 17, 18, 20, and 21, and Rule 17.1 on pre-trial conferences is a completely new rule. Footnotes alluding to the new rules have been supplied to some parts of the main text.

The reviewers have been advised of the steps being taken by the publishers to integrate material on the new Federal Rules into the volumes now in print. Beginning with Volume III, the amended rules will be integrated into the appropriate rule at the beginning of each chapter. The effect of the amendment, insofar as it can be determined at the time of publishing, will also be integrated into the main text material. The remaining material will be presented by means of supplements, probably to be published annually. The treatment proposed for the remaining volumes is a commendable

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[1] 378 U.S. 478 (1964).

[2] 384 U.S. 436 (1966).

[3] 353 U.S. 657 (1957).

[4] Witnesses and Evidence Act, 18 U.S.C. § 3500 (1964).

one. However, Volumes I and II will still maintain their stepchild status.

It is true that some of the amendments to the rules are minor ones and the decisions which Mr. Orfield has analyzed are still pertinent to the new rules; however, other rules have been changed so extensively that much of the text interpreting the decisions under those rules could be moved back to the historical background section. Rule 16, dealing with discovery and inspection, in particular, suffers from the type of handling proposed by the publishers. New Rule 16 permits considerably broader discovery than the former rule contemplated. For example, new Rule 16 specifically provides for the defendant's discovery of his own statements. However, the main text of this chapter contains a lengthy discussion of whether or not the defendant has this right. Furthermore, the text material on Rule 17(c) examines closely the relationship between Rule 16 and Rule 17(c). Obviously, if Rule 16 has been drastically changed, its relationship to Rule 17(c) will also undergo considerable alteration.

A new concept, that of permitting discovery by the government against a criminal defendant, has been introduced in new Rule 16. There is some question of the constitutionality of this section. An analysis by the author surely would have added some illumination to this area, as well as to the subject of the pre-trial conference introduced in the new Rule 17.1.

A further word of advice should be given to the practicing attorney. It is always wise to check with the particular federal court in which you will be handling your case. Often there are regional variations and practices that could affect the manner in which the attorney should proceed, and it is a good idea to fall in line with local practices where they are legally sound.

Since it is the task of a reviewer to criticize as well as to praise, the foregoing critique was required. However, the two volumes reviewed here, with their promise of more to come, are masterful works. They are thorough and detailed. The citations are extensive, and the author has analyzed them with great clarity. He has not hesitated to criticize decisions when he felt they were erroneous. Mr. Orfield has been true to the principles of great scholarship, and the reader, both student and practitioner, will reap the benefits.

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JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY. By Jerome H. Skolnick. New York: John Wiley & Sons. 1966. Pp. xii, 279. $7.95.

Participants in the American legal system are today embroiled in a raging controversy over the primacy of an accused's constitutional rights as opposed to the preservation of societal order. Encouraged by recent Supreme Court decisions, such as *Mapp v. Ohio*,[1] *Gideon v. Wainwright*,[2] *Escobedo v. Illinois*,[3] and the decisions popularly known as the *Miranda* cases,[4] civil libertarians are claiming that the courts are finally recognizing what the "law" ought always to have been. Contrasted against this are the cries of many "prominent" elements of the citizenry, as evidenced by recent grand jury reports throughout the nation, for stricter law enforcement and more stringent protections for society as a whole. A primary element in this controversy is the role of the police and other law enforcement agencies in the administration of justice.

In *Justice Without Trial*, Professor Jerome Skolnick analyzes that role. Skolnick's work begins immediately with its primary thesis — are the police an instrument exclusively of "order" and "social control" or are they rather a component part of a system based upon the concept that legality prevails as a value over order. The battle is joined with a suggestion that the phrase "law and order" is a misleading one because of the substantial incompatabilities existing between the two ideas. The author professes that his main purpose in the work is to point out how value conflicts in American society undermine the capacity of police to follow the rule of law, forcing them into preoccupation with the ideas of order, efficiency, and "initiative." Indeed, the work is convincing in its showing of how community pressures, as manifested by the grand jury and local papers, assist in the maintenance of the present-day police attitudes that order should prevail over the concepts of legality and due process. Thus, the ultimate indictment for the existing state of affairs falls upon the public and the political community.

This preoccupation with efficiency, believes Skolnick, leads police into viewing themselves as production-line workers or craftsmen: "The policeman views criminal procedure with the *adminis-*

[1] 367 U.S. 643 (1961).
[2] 372 U.S. 335 (1963).
[3] 378 U.S. 478 (1964).
[4] Miranda v. Arizona, 384 U.S. 436 (1966).

trative bias of the craftsman, a prejudice contradictory to due process of law."[5] This view is not without its realistic aspect. It is obvious that the "production pressures" upon police do affect their conduct, as revealed in the need to make a "good pinch" or "crack a big case." Nowhere is this more convincingly shown than in the discussion of the "clearance rate," the percentage of known crimes which the department believes have been solved.[6] By devices such as listing various complaints as "suspicious circumstances," which will not be counted in the total number of offenses, police are able to manipulate the clearance rate. Thus, the "production quota," initially developed to aid in the administration of justice, serves only as a means of harrying police officials and making their task more difficult.

While Skolnick's idea of the police as craftsmen has some bearing upon the dichotomy between law and order, he is, in this reviewer's opinion, too prone to analogize police actions to the "spirit of the worker." For example, notice his statement that police "are legal officials whose tendencies to be arbitrary have roots in a *conception of the freedom of the worker* inherent in the non-totalitarian ideology of the relation between work and authority, a conception carried out in the context of police work."[7]

Another theme of the work deals with the idea of the administration of the legal system without formal adjudicative procedures, or "justice without trial." Initially, we see that the normal course of events in a criminal matter is a plea of guilty. Skolnick's belief is that such pleas, which numbered about eighty-two percent of all convictions in the jurisdictions studied, serve to cover up certain police practices which would be regarded as illegal under present-day constitutional standards. In reality and practice, however, the idea of justice without trial is concerned primarily with the employment of police discretion in the early stages of criminal investigation, thus deterring certain criminal conduct from resulting in "full-fledged" trials. Examples include police failures to arrest for fear of a lack of substantial evidence to convict and the non-prosecution of certain individuals in exchange for their services as police informants and "special agents."

Skolnick is least convincing in his constant flirtation with the

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[5] SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 196 (1966).

[6] *Id.* at 164-81.

[7] *Id.* at 235. (Emphasis added.)

thesis that it is danger which has transformed the average policeman into a "hardened" participant in the criminal process. In further developing this idea, he estimates that police see certain categories of malefactors as "symbolic assailants," and thus react harshly toward them. It is my estimate that Professor Skolnick overvalues this concept in his determination of police treatment accorded specific groups of the criminally accused. However, his discussion of the element of danger in police work as a cause of group solidarity is more convincing.

The book is well-organized, beginning with a history of the metropolitan police force since the founding of the "Bobbies" by Lord Peel. The second chapter is devoted to the setting and development of the author's research and he therein discusses the environmental conditions of his study. Skolnick explains that the book is based upon a lengthy empirical study of conditions in the police departments of two cities which are designated "Westville," California, and "Eastville," New Jersey. As a day-to-day observer-participant in the affairs and working conditions of the police in these two communities, Skolnick was able to conduct a first-hand investigation of the legal process prior to trial. He discusses the problem of whether an observer's presence would alter the normal course of behavior of police officials but concluded that months-long participation accustoms the officers to an observers presence. By employing what he terms the use of an "overview," Skolnick was able to carefully observe the customary actions of all the participants in the legal system — the police, judiciary, prosecution officials, and defense counsel. The affinities and hostilities among these various classes are well portrayed, and he states, "All police have enemies, and the natural enemies of the policeman are the defense attorney and his client."[8]

The third chapter is devoted to a discussion of the policeman's "working personality," although in reality, the entire work is interspersed with consideration of this matter. Police relations with various classes of participants in the criminal process such as prostitutes, informants, and narcotic addicts are detailed. Especially excellent are the sections dealing with the racial bias of police as affecting their conduct and the interactions between the policeman and the prostitute.

In the chapter dealing with "The Informer System," the police use of informants in narcotics control, and other crimes where there

[8] *Id.* at 28.

is no complaining witness, is carefully catalogued. Skolnick demonstrates that the use of leniency in dealing with petty offenders and prostitutes in exchange for information leads to the arrest of other, more serious malefactors. In doing so, he effectively refutes the quoted statement of another author in the field that, "unlike the totalitarian practice, the informant in America serves of his own free will, fulfilling one of the citizenship obligations of our democratic form of government."[9] As to the informer's "pay-off," it generally is not in the form of monetary compensation but rather in discretionary treatment by the police, both in the reduction of sentence for presently pending offenses and in consideration for future infractions.

Skolnick manages to avoid the trap that many of his fellow legal sociologists fall victim to — an overextensive definition of terms and too much concentration with frames of reference. The result is a work which is readable, rather than half of a volume expended on the formulation of value judgments. Unfortunately, the author, who is presently a professor of sociology at Berkeley, tends to write in a textbook style. For example, each chapter has a lengthy, though excellent, summary. While this may be disconcerting to the "non-student" reader, the reviewer believes that the book would furnish valuable supplementary material for an advanced course in criminal procedure.

Although some of the information in the book relates specifically to California legal procedures, most of the work transcends state boundaries, and its concepts and conclusions apply universally to the American police-prosecution systems.

The main value of *Justice Without Trial* does not lie in its suggested solutions to the stated dichotomy between law and order, although Skolnick does seem to call for legislative reform.[10] Rather, the work's primary worth is its highly credible job of defining the existing situation, emphasizing the pressures brought to

[9] *Id.* at 122, quoting J. Edgar Hoover in LAW ENFORCEMENT BULLETIN, U.S. FEDERAL BUREAU OF INVESTIGATION (June 1955).

[10] Given the task of enforcing "unenforceable laws," it is not surprising to find police demanding working conditions from the courts to lighten their burden, and if, as is presently the trend, heavier restrictions are placed upon the police, they may well ignore these or grow even more hostile towards due process principles in their attempt to enforce legal morality. Such observations demonstrate some of the difficulties created for the police as a working organization by the attempt to achieve moral consensus in a heterogeneous society through criminal punishment. The ineffectiveness of this means as an instrument for achieving social cohesion is, of course, ultimately belied by the very term, "unenforceable law." *Id.* at 227.

bear upon the policeman in everyday criminal investigations. Skolnick states his purpose as providing "the basis for conclusions on how the working environment of police influences *law enforcement* . . . . Such conclusions should hopefully contribute to the development of a theory of law enforcement in democratic society, and to the role of police within such a system."[11] In that respect, he has succeeded admirably.

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[11] *Id.* at 22.

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