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Defending and Prosecuting Federal Criminal Cases (Book Review)

Boris Kostelanetz

be justified. Dr. Cohn has stated that justification, with forthright vigor and an appraisal of the alternatives as unequivocal as it is incisive.

PHILLIPS BRADLEY.*

DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES. By Theodore W. Housel and Guy O. Walser. Buffalo: Dennis & Co., Inc., 1938, pp. xciv, 1213.

The authors set out to combine into one undertaking the principles and details of federal criminal substantive and adjective law. They then supplemented this combination by annexing to the various sections of the volume suggestions which are in effect "practical aids" to lawyers in the field of federal criminal law. In view of the task's magnitude, the scope of which might well encompass several volumes with annual supplements, it is surprising to see the degree of success achieved by the authors.

The volume begins with a somewhat discordant note in the form of an introduction which includes, in part, the general subject of judicial obligations in the enforcement of criminal law. The authors then properly and capably proceed to the topics of jurisdiction, criminal responsibility, prosecutive agencies and the federal courts system.

The book contains an excellent dissertation on the physical requirements of the form and substance of an indictment and a somewhat smaller review of prosecution by information. It must be noted that the latter form of prosecutive procedure is increasing in importance in view of the enlarged area of conduct regulated by criminal law.[1]

A rather unusual appendage to a law text may be found in two interesting chapters, "United States Attorney's Preparation for Trial" and "Defendant's Preparation for Trial". The utility of such chapters cannot be over-emphasized for they contain the practical hints of the authors' experiences. It is interesting to view the approach recommended by the authors in the preparation of a defense in a criminal case. "Experience indicates that it is useless to pose the categorical question to the defendant as to whether he is guilty or not," state Housel and Walser. "Defendant's counsel will for the practical purposes of trial preparation assume the technical guilt of the defendant and prepare accordingly." [2]

In short, within the confines of one cover may be found a close review of federal criminal procedure from the moment a prosecution is initiated till such time as twelve persons who are strangers to each other agree on something so controversial as the liberty of a person. In addition, the volume contains an adequate explanation of appeals, writs of *certiorari,* and those alliterative hopes of every prisoner at the federal dock, pardon, probation and parole. An ade-

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* Professor of Political Sciences, Queens College.

[1] Hall, *The Substantive Law of Crimes* (1937) 50 HARV. L. REV. 616.
[2] At p. 431.

quate and authoritative compilation of forms is a part of the book.

That doubtful doctrine in the law which permits a dog to have at least one bite before condemnation may well be applied to an authoritative text. In view of the general excellence of the volume, we should overlook what may otherwise be an unforgivable recital of bad law. The statement that a prospective defendant cannot be subpoenaed by nor sworn before the Grand Jury unless he waives the constitutional privilege against self-incrimination,[3] can be classified generously as being inexact. To learn the contrary, it is only necessary to glance at the authorities.[4] The further statement that "His testimony otherwise constitutes illegal evidence, invalidates the indictment, and is sufficient ground upon which to set the indictment aside," [5] can be answered fully by a quotation from *Kaplan* v. *United States.* Said the court through Judge Learned Hand: [6]

> "The next question is the directed verdict in favor of Smythe. This was the act of the judge at trial *sua sponte,* on the ground that Smythe had testified before the grand jury. This was clear error, not, as the defendants seem to suppose, because Smythe had in fact 'waived immunity', but because there is not the slightest warrant of law for saying that in the absence of statute anyone may be quit of his crimes by testifying either before a grand jury or anywhere else. How such a notion should have got its apparent currency it is impossible to see. A man has, of course, the right to stand mute, if he will; but, if he speaks, he does not by that purge himself of his crime. He may be indicted, tried, and convicted, quite as though he had stood on his privilege. The contrary notion is a thorough perversion of the whole principle of self-incrimination, perhaps arising from a misunderstanding of those statutes which, in order to compel persons to testify at all, give them plenary absolution."

If it be one of the purposes of a book review to make suggestions for future revised editions, it is submitted that the very few difficulties which this reviewer found in the use of the book have been caused by omissions to note the particular district or circuit in which cited cases are decided. The law of conspiracy and the attendant problems of evidence are deserving of greater attention when considered in the light of the crime's frequent appearance upon the trial of federal criminal cases.

Experienced practitioners at the federal criminal bar will find relatively little unfamiliar matter in this volume. However, for the lawyer who has infrequent occasion to visit the offices of the United States Attorneys and to participate in subsequent proceedings, the study of this book may save many an indecisive, if not an embarrassing moment. In all, the book has in it much practical information. It should be well received.

BORIS KOSTELANETZ.*

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[3] At p. 275.

[4] United States v. Pleva, 66 F. (2d) 529 (C. C. A. 2d, 1933); Kaplan v. United States, 7 F. (2d) 594 (C. C. A. 2d, 1925), *cert. denied,* 269 U. S. 582; O'Connell v. United States, 40 F. (2d) 201 (C. C. A. 2d, 1930).

[5] At p. 275.

[6] *Supra,* at p. 597.

* Member of the N. Y. Bar; Book Review Editor, St. John's Law Review, 1936.