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WAYNE R. LAFAVE: SEARCH & SEIZURE COMMENTATOR AT WORK AND PLAY

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Starting in 1969,¹ we have had the honor and pleasure of co-authoring a goodly number of casebooks, texts, treatises, pocket parts, and annual supplements (more than twenty) with Wayne LaFave.² On each occasion we have been impressed by the quality of his mind and the judiciousness of his temperament, and impressed as well (and sometimes amazed) by his speed and efficiency.

Every time we have worked on a joint project, Wayne has completed his assigned portions of the work first. Indeed, one time, before we could get around to producing an outline of a book we had talked about, Wayne finished *the entire book* by himself.

In the early and middle 1970s, the three of us had talked about publishing a casebook on substantive criminal law. Several times Wayne declared he was “ready to go” on that book, but each time we begged off, claiming that other commitments prevented us from turning our attention to that project. After a while Wayne stopped nagging us about the matter. Then one day we each received a package in the mail from West Publishing Co.—a package containing LaFave’s new casebook on substantive criminal law.³

In the early and middle 1980s the three of us talked about another possible joint project—preparing teaching materials for a short introduc-

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1. LIVINGSTON HALL, YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS* (3d ed. 1969).

2. *See, e.g.*, JEROLD H. ISRAEL & WAYNE R. LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL: CONSTITUTIONAL LIMITATIONS* (4th ed. 1988); JEROLD H. ISRAEL, YALE KAMISAR & WAYNE R. LAFAVE, *CRIMINAL PROCEDURE AND THE CONSTITUTION* (1988) (revised annually); YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS* (7th ed. 1990); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* (1984) (three-volume treatise); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* (2d ed. 1992) (one-volume text).

3. WAYNE R. LAFAVE, *MODERN CRIMINAL LAW: CASES, COMMENTS & QUESTIONS* (1st ed. 1978, 2d ed. 1988).

tory course on criminal procedure, a book suitable for undergraduate criminal justice and political science courses as well as for combined criminal law/criminal procedure first-year law courses. Once again, we were slow getting around to this project. Then, in a January 1988 letter to us, Wayne expressed the hope that "given the fact that we have talked about doing this book for a number of years now . . . we could put aside other matters and deliver the manuscript to West within the next six months." This time, Wayne did get our full attention. We were not going to be "preempted" a second time.⁴ We had come to realize that Wayne spoke softly but carried a big word processor (at least a very fast one).

Although we are proud of the many volumes we have co-authored with Wayne, we readily admit that his most notable achievement—and a great achievement indeed—is a work he produced "solo"—his monumental treatise on search and seizure.⁵

"For most of my life in academe," Wayne once said, "I have staked out as my favorite intellectual sandbox the fourth amendment—that is, the law governing constitutional limitations upon search and seizure."⁶ That's a bit like saying John Henry Wigmore's "favorite intellectual sandbox" was the law of evidence.⁷

Wayne always likes to state the arguments against his position fairly and succinctly. Thus, he recalls that one of his students once asked him: "If [the Fourth Amendment] is so damn important, how come it's only fourth?"⁸ Wayne responded: "[T]he fourth amendment really *isn't* fourth, and I take as my authority Justice Felix Frankfurter, who declared that the fourth amendment occupies 'a place second to none in the Bill of Rights.' . . . To any free speech buffs in the crowd, my apologies."⁹

4. The book was published later that year. See JEROLD H. ISRAEL, YALE KAMISAR & WAYNE R. LAFAYE, *CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT* (1988) (revised annually).

5. WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2d ed. 1987). The first edition of this treatise consisted of three volumes; the second edition, as a treatise on this subject should, was expanded to four volumes.

6. Wayne R. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases,"* 85 MICH. L. REV. 427, 429 (1986).

7. Wigmore is probably the most cited author of all time, but U.S. Supreme Court citations to LaFave compare favorably with those to Wigmore—when one considers that Wigmore had a sixty-one-year head start. A computer check reveals that, starting in 1905, the Supreme Court has quoted or cited Wigmore in 296 cases and that, starting in 1966, it has quoted or cited LaFave in 91 cases. Thus, LaFave's rate of citations per year is about the same as Wigmore's.

8. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 308 (1982).

9. *Id.* at 309 (quoting from Justice Frankfurter's opinion in *Harris v. United States*, 331 U.S. 145, 157 (1947)); see also Wayne R. LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291 (1986) [hereinafter *The Forgotten Motto*]:

[W]hether you can stomach this Fourth-is-first anteriority or instead are a literalist who believes the Fourth is only fourth, I hope you will concede that the fourth amendment's protections are not at all trivial and that, as no less a personage than Erwin Griswold once put it, they largely determine "the kind of society in which we live."

Id. at 292.

"The bare words" chosen by the framers of the Fourth Amendment, Wayne is quick to concede, "do not carry us very far."¹⁰ But Wayne has done his best (and his best is very good indeed) to do something about that. Indeed, it would be fair to say nobody in American history has done more. As Wayne recently noted, putting aside the many articles he has published on the subject and counting only his four-volume treatise, he has written "well over twenty-five thousand words for *each* of the fifty-four words in the . . . Amendment."¹¹

How can Wayne LaFave write so much so well? Why has he been so influential? He has great powers of analysis, and he writes quickly, crisply and easily (at least he is easy to read). But so do others. His secret may be that he always keeps a certain distance from the never-ending developments and changes in search and seizure law that he never ceases to evaluate and to explain.

Wayne never becomes too involved or intense or emotive; he always keeps his balance—and his sense of humor. He turns out an enormous amount of insightful and illuminating commentary—he is an awesome "writing machine"—but he is also a warm-blooded human being. He must get a great sense of satisfaction from his work, but he also has a good deal of fun along the way—and he *is* funny.¹²

When, in *New York v. Belton*,¹³ the Court adopted a "bright-line" rule that significantly broadened the "search incident to arrest" exception in automobile settings, a development that Wayne did not applaud, the majority quoted at some length from a LaFave article underscoring the need to express search and seizure doctrine "in terms that are readily applicable by the police."¹⁴ Shortly thereafter, Wayne commented:

The Court has—quite unintentionally [sic], I am sure—placed me in a most awkward position. Every red-blooded American boy hopes to grow up and some day be quoted by the United States Supreme Court, and even those of us with tired blood take some pleasure in such recognition. How, then, can I possibly do anything less than express my unbounded enthusiasm for the Court's decision in *Belton*? But on the other hand, who ever heard of a law professor, anywhere or anytime, doing something like that? "Nice job, Supreme Court!" What kind of speech, or what kind of a law review article would that make? Certainly not one which is likely to get a person in my profession a moment's notice, to say nothing of tenure

10. LaFave, *supra* note 8, at 309.

11. Wayne R. LaFave, *The Fourth Amendment: A Bicentennial "Checkup"*, 26 VAL. U.L. REV. 223, 224 (1991).

12. As a humorist, he is perhaps at his best in the "one-liners" that often come at the end of his personal notes on our continuing projects, but because those are not for publication (though always fit for public consumption), we will limit our illustrations (somewhat reluctantly) to his published comments.

13. 453 U.S. 454 (1981).

14. *Id.* at 458 (quoting from Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141).

... Thus, true to my spots, I shall proceed with a criticism of the *Belton* decision. For those of you offended by such acerbity, I would only note that I am by no means sure that the Court has treated me any more kindly. I could not help but recall in this context the late Robert Benchley's comment that "the surest way to make a monkey of a man is to quote him."¹⁵

In a notable 1984 case, *United States v. Leon*,¹⁶ the Burger Court culminated its "cost-benefit" or "balancing" approach to the Fourth Amendment exclusionary rule by adopting a so-called good faith (actually, a "reasonable mistake") exception to the rule (at least in search-warrant cases). As he had made plain two years earlier, this was not a development awaited eagerly by Wayne:

To admit, at criminal trials, evidence supposedly obtained by the police in an innocent and relatively slight failure to toe the fourth amendment line, necessitating revision of the old quip that "close only counts in horseshoes and grenades" to include "and also in search and seizure," seems to me an unwise step to take. Even putting aside the concern which some have expressed that such a recasting of the exclusionary rule would be unfaithful to the other reasons underlying the rule, I am convinced that in the long run a "good faith" exception would produce many unfortunate consequences and would do a disservice to even the deterrence objective. The acclaimed legal philosopher Woody Allen once wrote: "The lion and the calf shall lie down together, but the calf won't get much sleep." The chances of the deterrence objective under such a reformulated exclusionary rule, it seems to me, are about those of Allen's calf.¹⁷

Shortly after accepting an invitation to give a talk on the Fourth Amendment at the University of Arizona College of Law in the fall of 1986, a talk celebrating the bicentennial of the U.S. Constitution, Wayne had second thoughts. For a colleague of his insisted that Wayne had selected the wrong subject, "as that youngster the fourth amendment has only been around since 1791."¹⁸ As Wayne tells the story:

The irrefragability of [my colleague's] objection, I must confess, was such that I seriously contemplated shifting to some other topic having legitimate bicentennial credentials (such as: Is the "necessary and proper" clause more necessary than proper, or vice-versa?). But my infatuation with the fourth amendment proved to be too intense, so the fourth amendment it is!

But that was only the beginning of my troubles. A bicentennial speech, it seems to me, ought to take the long view of things; it

15. LaFave, *supra* note 8, at 325 (citations omitted).

16. 468 U.S. 897 (1984).

17. LaFave, *supra* note 8, at 340-41 (citations omitted); see also Wayne R. LaFave, "The Seductive Call of Expediency": *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895.

18. *The Forgotten Motto*, *supra* note 9, at 292.

should look at some trend in our constitutional jurisprudence as it has developed over this span of 200 years. But when I looked back into the earlier Supreme Court decisions what did I find concerning the fourth amendment? Nothing! Absolutely nothing—zip, cipher, zero, aught, nil, or however you want to put it. To ensure that this was not just an instance of my WESTLAW terminal being unable to penetrate the veil of antiquity, I checked with fourth amendment historian Jacob Landynski, who informs that the fourth amendment “remained for almost a century largely unexplored territory.” (This must be what Attorney General Meese means by the “good old days.”)¹⁹

Wayne did deliver a bicentennial speech on the Fourth Amendment in 1986, in the course of which he had a few unkind words to say about *California v. Ciraolo*,²⁰ a case that gave the landmark decision of *Katz v. United States*²¹ a very narrow reading—so much so, Wayne remarked, that “[w]ere it not for the anticipated groans, I would be inclined to say that *Katz* has gone to the dogs.”²² Wayne described the *Ciraolo* facts as follows:

Santa Clara police received an anonymous tip that marijuana was growing in respondent’s backyard. An effort at ground-level surveillance went for naught, as respondent had decided to conceal his gardening and other curtilage-based deportment from passersby with a solid 6-foot outer fence and 10-foot inner fence. Undaunted, the officer assigned to this investigation then secured a private plane and flew over respondent’s house at an altitude of 1,000 feet. He and the officer with him, both trained in marijuana identification, readily identified in a 15 by 25 foot plot in respondent’s backyard marijuana plants growing 8 to 10 feet high. (Those sound like exceptionally healthy plants to me, which explains why, when I first read this case, my mind’s eye conjured up the grinning visage of actor James Whitmore, as in the ubiquitous TV commercials, extolling Stern’s Plant Food and displaying the bounteous harvest of that fecundator.)²³

In the course of his opinion for the Court holding that the aerial surveillance of defendant’s fenced-in backyard was not a “search” within the meaning of the Fourth Amendment, Chief Justice Burger observed that although “[i]t can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views[,] . . . a 10-foot fence might not shield these plants from the eyes of a citizen

19. *Id.*

20. 476 U.S. 207 (1986).

21. 389 U.S. 347 (1967) (declaring that in ascertaining whether a “search” has taken place the question is not whether the police invaded a “constitutionally protected area,” but whether they infringed upon a “constitutionally protected reasonable expectation of privacy”).

22. *The Forgotten Motto*, *supra* note 9, at 297.

23. *Id.* at 295-96.

or a policeman perched on the top of a truck or a two-level bus."²⁴ Thus, "[w]hether [defendant] thereby manifested a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear under the circumstances."²⁵ This led Wayne to comment:

The unfortunate implication of [the Chief Justice's remarks] is that a defendant cannot even get by the first *Katz* hurdle [did he manifest a subjective expectation of privacy in the object of the challenged surveillance?] unless he has taken steps to ensure against all conceivable efforts at scrutiny; it is not enough (as the dissenters in *Ciraolo* put it) that "he had taken steps to shield those activities from the view of passersby." Actually, it is worse than that; what the majority seems to be saying is that one cannot have an expectation of privacy unless safeguards have been put in place that ensure against even purely *hypothetical* means of intrusion upon privacy. The Chief Justice's reference to double-decker buses suggests that his travels to London have had a profound effect upon his outlook, but it does not reflect knowledge of the state of affairs in Santa Clara. The truth of the matter is that there are no double-decker buses in that community.²⁶

As *Ciraolo* and a number of other cases illustrate,²⁷ in the 1970s and 1980s the Court took a grudging view of what constitutes a "search" within the meaning of the Fourth Amendment. Two years ago it took a similarly narrow view of what amounts to a "seizure." It did so in two important cases: *Florida v. Bostick*²⁸ (involving an "encounter" between drug interdiction police and a passenger aboard an interstate bus during a scheduled intermediate stop) and *California v. Hodari* (involving the police chase of a youth who fled at the sight of the officers).²⁹

In *Hodari*, a group of youths in a high-crime area "apparently panicked and took flight" on spotting an approaching police car. One of the officers left the car to give chase. He took a circuitous route that brought him face to face with Hodari. Looking behind as he ran, Hodari did not see the officer until the latter was almost upon him, whereupon Hodari tossed away a small rock, which proved to be crack cocaine. A moment later, the officer tackled Hodari and subdued him.

The California Court of Appeal held that Hodari had been "seized" when he saw the officer running toward him. Because the state conceded

24. 476 U.S. at 211.

25. *Id.* at 211-12.

26. *The Forgotten Motto*, *supra* note 9, at 298 (citations omitted).

27. *See, e.g.*, *California v. Greenwood*, 486 U.S. 35 (1988) (police examination, for evidence of crime, of contents of opaque sealed plastic trash bags left for collection not a "search"); *Oliver v. United States*, 466 U.S. 170 (1984) (expansively reading the "open fields" exception to Fourth Amendment restraints); *Smith v. Maryland*, 442 U.S. 735 (1979) (government's use of a "pen register," a device that records all numbers dialed from a given phone and the times the numbers were dialed, not a "search").

28. 111 S. Ct. 2382 (1991).

29. 111 S. Ct. 1547 (1991).

that the officer lacked the “reasonable suspicion” required to “stop” or to “seize” Hodari, it ruled that the evidence of the cocaine had to be suppressed as the fruit of the antecedent illegal “seizure.” But a seven to two majority, per Justice Scalia, held that no “seizure” had occurred *until* the officer had tackled Hodari.

Assuming that the officer’s pursuit did constitute a “show of authority” calling upon Hodari to halt, a “seizure” does not take place, the Court told us, when the subject of the police command does not submit. Because Hodari did not comply with the police injunction to halt, assuming that the confrontation with the pursuing officer was the equivalent of such an injunction, he was not “seized” until he was actually subdued.

At issue in *Bostick* was the constitutionality of a police practice often called “working the buses”—a new and increasingly common tactic in the “war on drugs.”

Bostick argued that the cramped confines of a bus—where one officer towers over a seated passenger and the same officer and/or another at least partially blocks the narrow aisle, requiring the passenger to try to squeeze past him if he wants to move away rendered the suspicionless police-citizen bus encounter an illegal “seizure.”³⁰ The majority responded that this was only “one relevant factor that should be considered in evaluating whether a passenger’s consent is voluntary,” *not* a basis for a *per se* rule prohibiting the police from randomly boarding buses as a means of drug interdiction.³¹

The *Hodari* and *Bostick* cases moved LaFave to write a short essay on “fat cops,” a group of officers who, until now at least, have been neither highly prized nor heavily recruited:³²

The conventional wisdom . . . is that police should not be fat. Rather, law enforcement officers should be slim, trim, and of athletic build—adequately prepared for the physical demands placed upon them in the routine performance of their challenging duties. . . .

It just may be, however, that all this is about to change. The law enforcement administrator of the 1990s may be moved to abandon the conventional wisdom in favor of Caesar’s exhortation.

30. A majority of the Court has endorsed the view, first advanced by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 557 (1980), that no “seizure” occurs when drug agents approach a person walking through an airport concourse, identify themselves, and ask to see her airline ticket and identification. See generally 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 9.2 (h) (2d ed. 1987).

31. See 111 S. Ct. at 2387.

32. See, e.g., David A. Kaplan & Todd Barrett, *The Finest or the Fattest? Chicago Cops Face a Crackdown on Flab*, NEWSWEEK, Dec. 16, 1991, at 58. According to the supervisor of a mandatory fitness program for police officers, “a belly gets in the way on the job. ‘I don’t want a fat cop coming to my house when there’s an intruder,’ he says. ‘Then you’ve got a double problem.’” *Id.* Adds the head of a Chicago Police watchdog group, “complaints of excessive force correlate to officer fitness. ‘If police were in shape, they wouldn’t have to bully people around.’” He continues by “say[ing] the ballooning of the blue uniforms leads to taunting and a poor public image. At a recent march, . . . demonstrators quickly picked up the chant ‘Bad cop, no more doughnuts.’” *Id.*

["Let me have men about me that are fat."] Obese police (or, if you prefer, corpulent cops) might well become especially valued by their departments for their unique law enforcement talents. . . .

The message which *Hodari D.* sends to the law enforcement community is clear: when police are acting merely on a hunch, a slow chase is better than a fast one, for if the cop in that case had caught up with the youth and grabbed him by the scruff of the neck *before* the cocaine was ditched, there would have been an illegal seizure requiring suppression of the subsequently discovered drugs. In short, *festina lente* is the order of the day, for it avoids a constitutional intrusion and thus ensures admissibility of the abandoned drugs. Equally apparent is the fact that in flight cases of the *Hodari D.* genre, the requisite degree of constabulary sluggishness can be assured only if the pursuing flatfoot is irrefragably fubby (to use the onomatopoeic Britishism). . . .

[*Bostick*, no less than *Hodari D.*,] raises the stock of those law enforcement officers of the endomorphic variety. . . . The *Bostick* dissenters noted that officers engaged in [on-bus drug] . . . interdiction efforts "typically plac[e] themselves in between the passenger selected for an interview and the exit of the bus," and that in the instant case "one officer stood in front of respondent's seat, partially blocking the narrow aisle through which respondent would have been required to pass to reach the exit of the bus." But such facts were deemed unimportant by the majority . . . [because *Bostick's* confinement] was nothing more than "the natural result of his decision to take the bus." Here again, the message to the law enforcement community is quite clear: because the reasonable passenger's perception of his freedom to depart is not determinative, there is no disadvantage (and seemingly considerable advantage) in filling up the narrow bus aisle with as much beef as can be mustered. In short, the police sweep of buses is another drug detection activity which is likely to be most successful when practiced by a polyphagian Falstaff.³³

Such comments, of course, contain more than unadulterated humor. Wayne himself has suggested what may be the inspiration for his humor. In a commentary on *United States v. Quartus*, his fictitious "last" (and heretofore unpublished) search and seizure decision of the Burger Court,³⁴ Wayne recalled an old Italian proverb: "Quel che pare burla, ben sovent e' vero" (What seems a joke is very often true).³⁵

Wayne, we are certain, will have a retirement more in name than in

33. Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 730-32 (citations omitted). In a footnote to the title of the article, written for the benefit of "those logomachists who pertinaciously anathematize polysyllabical sesquipedalianism as dysteleological," LaFave points out that the first four words of the title may be roughly translated "fat cops, thick-skinned suspects." *Id.* at 729.

34. Wayne R. LaFave, *A Fourth Amendment Fantasy: The Last (Heretofore Unpublished) Search and Seizure Decision of the Burger Court*, 1986 U. ILL. L. REV. 669.

35. *Id.* at 687.

fact. We fully expect that the letters, telephone calls, and drafts will go back and forth between Sanibel Island and Ann Arbor just as they have gone back and forth between Champaign and Ann Arbor. Our only concern is that, with Wayne having more time at his trusty word processor, we will be falling even further behind on our share of what has always been a wonderful long-running collaboration.