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LaFave: Arrest: The decision To Take a Suspect Into Custody

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RECENT BOOKS

ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY. By *Wayne R. LaFave.* Boston: Little, Brown & Co. 1965. Pp. xxxiv, 540. $10.00.

Courts and law review authors promulgate and analyze at length case law concerning the theories of the law of arrest. The obstacle which all face, however, is the lack of any adequate factual data on which to rest their frameworks of legal theory. They cite summaries of fact in appellate decisions, which are themselves remote from the actual occurrences which they describe and are often almost complete distortions of what took place, newspaper accounts of unproven accuracy, and various crime surveys of the 1920's and 1930's, of which the underlying methodology is primitive by today's standards.

In part to cure this deficiency in data, the American Bar Foundation undertook in 1953 a pilot survey of the administration of criminal justice, which culminated in field studies in 1957 in Kansas, Michigan, and Wisconsin, covering almost every phase of the criminal proceeding. Although it was originally contemplated that the survey might be extended into other jurisdictions, the decision was subsequently made to draw conclusions on the basis of the material obtained in those three states, in the thought that the additional material gathered would not promote enough additional insights into the underlying problem to justify the large expense of obtaining it.

For some years the multilithed reports by Professor Frank Remington, the actual supervisor of the survey, and his colleagues were the only record of its results. They were severely restricted and not generally available to teachers or practitioners, in part to guarantee the anonymity which had been promised to the various informants from whom data had been received. Formal publication, however, was promised as soon as feasible. The first portion of that promise has been fulfilled through the welcome appearance of Professor Wayne R. LaFave's volume, *Arrest: The Decision To Take a Suspect Into Custody.* For the first time one has contemporary material in hand, in the light of which he can evaluate current legislation and judicial decisions setting the standards for arrest.

Arrest contains five major subdivisions. The first treats the process of obtaining and serving arrest warrants, and the apparent reasons for a police decision to invoke the warrant process. The second opens up the broader question of why police may decide not to start the criminal law machinery into motion even though they have information sufficient to sustain action on their part. Professor LaFave makes it clear that discretion of this sort is both taken for granted and legally sustainable in most states; the cases of non-invocation of the criminal process are usually supported by a police judgment that criminal

legislation is inadequate or outmoded, that there are insufficient police resources to enforce it, or that a prosecution would be inappropriate or excessively harmful to the citizen. The third concerns itself with the decision to take the suspect into immediate custody without prior judicial authorization; factors material to this decision include the alternatives to arrest which are available to the officer, the need for custody prior to trial, and the extent to which delay rather than renunciation of custody serves a preventive or investigative function. The fourth examines in detail the process of arrest, both legal and illegal, without warrant for felony or misdemeanor. It also considers legal and practical controls on the arrest and detention process and the sanctions which the law provides, at least in form, to prevent unlawful police activity. The fifth considers police action intended either to protect, as in the case of protective custody of an intoxicated person, or to harass, as in the case of arrests of prostitutes, transvestites, and petty gamblers.

Arrest not only surveys completely the legal doctrines purporting to govern police practices, but illustrates each problem area with one or more examples of actual police or judicial practice. It also reflects transition in ideas, either as new legislation comes into being, public pressures require changes in police policies, or judicial statements come to the attention of police.

Professor LaFave's conclusions offer a healthy antidote to the abstract assumptions of many judges and writers about the effect of judicial decisions. Police discretion must continue to exist; the judiciary will not and cannot provide adequate guidelines for individual police decisions made under pressure. Neither case law nor legislation adequately provides for a transition from informal police investigation, in which police act on the basis of hearsay and their knowledge of crime conditions in the community, to a judicial proceeding where at least some limits are placed on the material on which a judicial determination may be based. There is ambivalence concerning the role which police investigation, and particularly interrogation of suspects, plays in the preparation of the case. A judicial prohibition against police interrogation is unenforceable; some of the recent cases in the area of the privilege against self-incrimination[1] suggest that the United States Supreme Court may have closed off the avenue of judicial participation in investigation, probably without being aware of it. An attorney's role in investigation is as yet unclear; the desirability of his participation is assumed despite a real question of what in fact we expect him to do. The American procedural system does not effectively cope with the problem of the degree to which there is a need to identify and safeguard evidentiary material before trial, whether

1. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964).

it be for the ultimate benefit of the defendant or the state, so that there may be a truly impartial adjudication. These, in short, are a few of the serious questions which *Arrest* puts in focus, questions which superficial judicial activity does little to answer.

Arrest, therefore, is a welcome aid to those who want to discover what police practices are before committing themselves to any one or more legislative or judicial panaceas for "police abuses." It sets a high standard also for the companion volumes on later stages of the criminal proceeding, to be forthcoming during 1966 and 1967 as part of the American Bar Foundation's *Series on the Administration of Criminal Justice in the United States*, under Professor Remington's editorship.

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