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Search and Seizure: A Treatise on the Fourth Amendment

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RECENT BOOKS

Book Review

SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT. By *Wayne R. LaFave*. St. Paul: West Publishing Co. 1978. Pp. xxv, 716; xv, 778; xiii, 804. \$180.00.

The exclusionary rule cannot succeed "if the law it is designed to enforce is tentative, flexible, and self-consciously oriented to facts."¹

For the first time, search and seizure has been reviewed, analytically dissected, and exhaustively annotated with both state and federal decisions. In the preface to his masterful treatise, *Search and Seizure: A Treatise on the Fourth Amendment*, Professor LaFave leaves it for others to judge how well he has succeeded in fashioning a "systematic and comprehensive analysis of the entire range of contemporary Fourth Amendment issues."² Now, more than a year after the book's publication, we can begin to review LaFave's contribution to the fourth amendment analysis "in the round rather than the flat [in order to] gain some understanding of the whole in action."³ With this review, I hope to convince the reader that LaFave's three-volume treatise is an invaluable aid for confronting the myriad legal problems raised under the fourth amendment.

That there is a need for a single comprehensive treatise on the fourth amendment cannot be seriously doubted. During the two decades since the Supreme Court's decision in *Mapp v. Ohio*,⁴ we have witnessed a virtual flood of decisions and commentary on search and seizure. In *Mapp*, of course, the Supreme Court rendered its landmark ruling that the fourth amendment, applicable to the states through the due process clause of the fourteenth amendment,⁵ must

1. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 162 (citing Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 365 (1973)).

2. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT vii (1978) [hereinafter cited without cross-reference as SEARCH AND SEIZURE].

3. K. LLEWELLYN, THE COMMON LAW TRADITION — DECIDING APPEALS 263 (1960), cited in 1 SEARCH AND SEIZURE at viii, and LaFave, *Probable Cause from Informants: The Effect of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1, 1.

4. 367 U.S. 643 (1961).

5. The fourteenth amendment to the United States Constitution provides "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

be enforced by state courts through the same sanction applied in the federal courts: the exclusion of illegally seized evidence. Following *Mapp* and its Supreme Court progeny,⁶ however, the host of state and lower federal court decisions addressing the fourth amendment⁷ has been more than matched by a profusion of critical commentary.⁸ Since *Mapp*, as LaFave has aptly observed, "[t]he confirmed Fourth Amendment buff is never in want of grist for his mill."⁹

As the sole author of *Search and Seizure*,¹⁰ LaFave brings a wealth of experience to his task. Beginning his legal career shortly after the Supreme Court issued its opinion in *Mapp v. Ohio*, LaFave first taught criminal law at Villanova University and later moved to the University of Illinois, where he is now a full professor. During these years, he has written extensively on general topics in the field of criminal law,¹¹ including the highly respected casebook that he coauthored with Professors Yale Kamisar and Jerold Israel.¹² In ad-

6. For some of the Supreme Court's more recent decisions addressing the substantive elements of the fourth amendment, see, e.g., *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Dunaway v. New York*, 442 U.S. 200 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Massachusetts v. White*, 439 U.S. 280 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Chimel v. California*, 395 U.S. 752 (1969); *Sibron v. New York*, 392 U.S. 40 (1968); *Bumper v. North Carolina*, 391 U.S. 543 (1968); *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Superior Court*, 387 U.S. 523 (1967).

7. Any attempt to cite all of the numerous state and federal court opinions dealing with search and seizure would be unproductive, if not unwieldy. In Colorado alone, at least 125 appellate opinions addressing the fourth amendment have been issued since 1972.

It should be noted, however, that recent Supreme Court opinions have sharply limited the reach of the fourth amendment. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Miller*, 425 U.S. 435 (1976); *United States v. Calandra*, 414 U.S. 338 (1974); *Alderman v. United States*, 394 U.S. 165 (1969).

8. As with case law, the volume of critical commentary on the fourth amendment is so large that citation is not warranted. Indeed, it may well be true that more words have been written about the fourth amendment than all of the rest of the Bill of Rights taken together. See I SEARCH AND SEIZURE at v.

9. LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, *supra* note 1, at 127.

10. Other books written by LaFave include J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL (1975); Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE (4th ed. 1974); W. LAFAVE, ARREST (1965); W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972).

11. See, e.g., J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL (1975); LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEXAS L. REV. 434 (1976); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965); LaFave, *The Police and Nonenforcement of the Law* (pts. 1-2), 1962 WIS. L. REV. 104, 179; LaFave, *Book Review*, 6 VILL. L. REV. 438 (1961) (reviewing J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960)).

12. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (4th ed. 1974).

dition, LaFave has participated actively in the American Bar Association Project on Minimum Standards for Criminal Justice,¹³ where he was the official reporter for the Advisory Committee on the Criminal Trial.¹⁴ And yet, his most significant work has been in the area of search and seizure. He has authored numerous articles addressing different aspects of the subject,¹⁵ many of which have provided a foundation for sections in his treatise.¹⁶ In this regard, it may be sufficient to note that LaFave is widely held by his colleagues to be the "reigning expert on the law of search and seizure."¹⁷

The book's three volumes provide a comprehensive review of the field.¹⁸ In volume one, LaFave offers the reader an extended discus-

13. The American Bar Association *Standards* have been revised and are now designated as the *American Bar Association Standards Relating to the Administration of Criminal Justice*.

14. See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS RELATING TO TRIAL BY JURY (1968).

15. See W. LAFAVE, ARREST (1965); LaFave, *Probable Cause from Informants: The Effect of Murphy's Law on Fourth Amendment Adjudication*, *supra* note 3; LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, *supra* note 1; LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. L. BULL. 9 (1972); LaFave, "Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond," 67 MICH. L. REV. 39 (1968); LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1; LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255; LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U. L.Q. 331.

16. Compare LaFave, *Probable Cause from Informants: The Effect of Murphy's Law on Fourth Amendment Adjudication*, *supra* note 3, with 1 SEARCH AND SEIZURE at 499; LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, *supra* note 1, with 2 SEARCH AND SEIZURE at 262; LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* *supra* note 15, with 2 SEARCH AND SEIZURE at 408; LaFave, "Street Encounters: and the Constitution: Terry, Sibron, Peters, and Beyond," *supra* note 15, with 3 SEARCH AND SEIZURE at 2; LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, *supra* note 14, with 3 SEARCH AND SEIZURE at 176.

17. See the foreword to LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* *supra* note 15, at 9. The high regard with which the appellate bench holds Professor LaFave is amply demonstrated by reference to some of the major criminal law decisions from the United States Supreme Court that cite his writings. See, e.g., *Ybarra v. Illinois*, 100 S.Ct. 348 n.3, 351 (1979); *Dunaway v. New York*, 442 U.S. 200 (1979); *Dalia v. United States*, 441 U.S. 238, 257 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978); *Michigan v. Tyler*, 436 U.S. 499, 506 (1978); *United States v. Chadwick*, 433 U.S. 1, 22 (1977); *United States v. Janis*, 428 U.S. 433, 449 (1976); *United States v. Brigoni-Ponce*, 422 U.S. 873, 888 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Goodling v. United States*, 416 U.S. 430, 464 (1974); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 438 (1971) (Burger, C.J., dissenting); *Terry v. Ohio*, 392 U.S. 1, 26 (1968); *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

18. As of this writing, Professor LaFave has published a 1980 supplement to *Search and Seizure* and has announced his intention to ensure that the treatise reflects current case law and commentary. It should be noted, however, that LaFave does not attempt to cover the particular requirements for eavesdropping and wiretapping that are imposed by Title III of the Crime Control Act of 1968, 18 U.S.C. §§ 2510-2520 (1976). This restriction is sensible, for, as LaFave points out, complete analysis on this topic would require a separate volume in and of itself. See, e.g., J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (1977); NATIONAL WIRE-TAPPING COMMISSION, *ELECTRONIC SURVEILLANCE* (1976).

sion of the origins of the exclusionary rule, its purposes and its alternatives. Of more value to the bench and bar, perhaps, is the thorough analysis of the arguments advanced by critics of the exclusionary rule¹⁹ and the responses proffered by the rule's supporters.²⁰ As a companion to the introductory chapter on the exclusionary rule, volume one also includes a lengthy chapter entitled "Protected Areas and Interests." Given the rationale advanced by the Supreme Court in *Katz v. United States*²¹ — that the fourth amendment's guarantees apply only in cases where the victim has a reasonable expectation of privacy — this chapter provides the keystone for further analysis of search and seizure law. The volume concludes with an extended discussion of the requirements for determining probable cause to arrest.

In volume two, LaFare continues with a detailed analysis of the requirements for securing search warrants. Due to the often picaresque and technical requirements applied in this area, the law surrounding the issuance of search warrants has become particularly complex and has generated much litigation.²² Volume two also includes chapters on searches of persons, premises, and vehicles, together with a chapter on consent searches.

The concluding volume of *Search and Seizure* considers administrative searches as well as the requirements for a stop and frisk, an area of search and seizure law that has generated much controversy.²³ In addition, the volume devotes several hundred pages to a detailed discussion of the administration of the exclusionary rule, including the Supreme Court's most recent pronouncements on standing and attenuation.²⁴ This last section will prove particularly useful

19. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Harlan, J., concurring); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (Burger, C.J., dissenting); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815 (1964).

20. See, e.g., Dworkin, *supra* note 1, Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319; Paulson, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. C. & P. S. 255 (1971).

21. 389 U.S. 347 (1967).

22. In Colorado there have been numerous appellate decisions focusing on the technical requirements for a warrant. See, e.g., *People v. Muniz*, — Col. —, 597 P.2d 580 (1979); *People v. Ragulsky*, 184 Colo. 86, 518 P.2d 286 (1974); *People v. Leahy*, 173 Colo. 339, 484 P.2d 778 (1970); *People v. Royse*, 173 Colo. 254, 477 P.2d 380 (1970).

23. The Supreme Court of Colorado, for example, has upheld the validity of a field investigation based on a reasonable and articulable suspicion that an individual has committed or is about to commit a crime. These stops, called *Stone* stops, after *Stone v. People*, 174 Colo. 504, 485 P.2d 495 (1971), have been the subject of much disagreement. See, e.g., *People v. Tooker*, — Colo. —, 601 P.2d 1388, 1390 (1979) (Erickson, J., dissenting); *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975) (Erickson, J., dissenting); *People v. Montoya*, 190 Colo. 111, 543 P.2d 514 (1975) (Erickson, J., dissenting).

24. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (passengers in an automobile do not have standing to contest an illegal search and seizure where no possessory interest is shown).

to both trial and appellate judges.

Although LaFave's treatise is to be commended for its breadth of coverage, it must receive more praise for its cogency of analysis. Typically, the role of the treatise has been to present the reader with the state of the law as it stands at the time of publication;²⁵ it has remained for the law reviews to wage the campaign to fill in the interstitial gaps where the law has not been settled. When dealing with the fourth amendment, however, this would be particularly inappropriate. More than any other area of the law, search and seizure law is rapidly evolving and especially in need of reasoned guidance.

For all but the most settled topics under the fourth amendment, *Search and Seizure* first provides the reader with a careful explanation of the relevant case holdings (using lower court opinions where necessary) and then offers the reader a sampling of the philosophical debate underlying the case law. In addition, LaFave usually sets forth his own viewpoint, often buttressing it with the theories of other commentators.

For example, after first setting out the Supreme Court cases considering the constitutional validity of the police practice called "stop and frisk,"²⁶ the text reviews the question of whether probable cause, as it is construed under the warrant requirement, should be required to justify a stop and frisk.²⁷ Analysis begins with the leading case of *Terry v. Ohio*²⁸ and Chief Justice Burger's opinion suggesting that probable cause is only required in those cases where a warrant is required.²⁹ LaFave argues that the Chief Justice's point is not well founded: "This approach seems to assume that a lesser quantum of evidence may suffice when an officer is acting without a warrant *because* he is so acting and thus has escaped the reach of the probable cause half of the amendment."³⁰ To support his view, the author cites Justice Douglas's rejoinder to the Chief Justice,³¹ which attacked the position that the police have greater authority to make a search and seizure than a judge has to authorize such action.³² Tak-

25. See, e.g., W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* (2d ed. 1979), which, its preface points out, is designed to present the law as currently interpreted by the various courts with little attempt "to examine the philosophy of the changes of constitutional concept."

26. 3 *SEARCH AND SEIZURE* at 2-11.

27. *Id.* at 11-15.

28. 392 U.S. 1 (1968).

29. 3 *SEARCH AND SEIZURE* at 11.

30. *Id.* (emphasis in original).

31. *Id.*

32. LaFave states: "This round should be awarded to Justice Douglas, as it is unmistakably

ing the argument one step further, however, LaFave next considers Justice Douglas's argument that the constitutional requirement of probable cause remains the same regardless of the degree of police intrusion.³³

This, of course, amounts to a rejection of the best-reasoned analysis in support of stop and frisk. In brief, this analysis proceeds as follows: The requirement of probable cause is a compromise for accommodating the opposing interests of the public in crime prevention and detection, and of individuals in privacy and security. The same compromise is not called for in all situations, and thus this balancing process should take account of precisely what lies in the balance in a given case. Because one variable is the degree of imposition on the individual, it may be postulated that less evidence is needed to meet the probable cause test when the consequences for the individual are less serious. Thus, it may be said that a brief on-the-street seizure does not require as much evidence of probable cause as one which involves taking the individual to the station, as the former is relatively short, less conspicuous, less humiliating to the person, and offers less chance for police coercion than the latter. Similarly, it could be concluded that patting down for weapons, although it is a search, is a lesser imposition than a complete search of the person and the area within his control.³⁴

Although the reader may disagree with LaFave's analysis at this juncture, it is clear that he has successfully melded the case law with the differing philosophies that sustain the dynamic tensions in the law of search and seizure. Other examples could be readily cited.³⁵

Ultimately, the test of any treatise lies in its usefulness to a broad spectrum of readers; *Search and Seizure* scores high marks in all categories. For the bench, this treatise provides a wealth of critical information on the scope of the fourth amendment. In my view, the publication of this treatise is a service to every appellate judge who faces a fourth amendment issue. For the bar, *Search and Seizure* contains an added dimension. In addition to providing an excellent research tool, the book will also be invaluable for citation to the court as persuasive authority. Finally, the student of the law may well profit from consulting LaFave. Although the treatise is too comprehensive to serve as a classroom text, it will certainly be useful for the student who wishes to delve further into the complexities of the fourth amendment. In short, Professor LaFave's *Search and Seizure* deserves accolades from all sides.

bly clear that the Court has repeatedly held that police may not act upon less evidence merely by avoiding the magistrate." *Id.* at 11-12.

33. *Id.* at 12.

34. *Id.* (footnotes omitted).

35. The reader is particularly directed to LaFave's discussion of the criticisms made of the exclusionary rule in 1 SEARCH AND SEIZURE at 20.

My faith in the treatise is manifested by the fact that I patterned a bench book for the Colorado judiciary, which I coauthored with Judge William Neighbors, on the same outline that Professor LaFave has provided in his text. There are numerous references to *Search and Seizure* in each section of the bench book.³⁶ In my view, this treatise will be the key to research on fourth amendment issues for many years to come. No law library should be without it.

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36. W. ERICKSON & W. NEIGHBORS, *SEARCH AND SEIZURE* (1979) (copies available from the Colorado Judicial Department).