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BOOK REVIEWS

DETECTION OF CRIME. By *Lawrence P. Tiffany*,* *Donald M. McIntyre, Jr.*,† and *Daniel L. Rotenberg*.‡ Boston: Little, Brown & Co., 1967. Pp. xxx, 286. \$10.00.

This is the first of a series of reports on studies sponsored by the American Bar Foundation into the administration of criminal justice in the United States. The full series which will consist of five volumes is intended to cover the "major stages in criminal justice administration from the commission of a crime to the offender's discharge from parole supervision."¹

The volume entitled *Detection of Crime* consists of three essentially independent reports, the first covering police practices in the area of interrogation before arrest, the second covering search and seizure, and the third covering what is designated as police "encouragement" of crime—a term used to describe the use of pretext investigations in which the police or their agents falsely pretend to be willing prospective participants in so-called "victimless crimes," namely, those involving prostitution, homosexuality and illegal traffic in narcotics and liquor. In each section, the author makes an analysis of existing police practices which will provide the legal profession and the public with an opportunity to evaluate the usefulness of these techniques for law enforcement purposes, their compatibility with other social interests, and the appropriateness and effectiveness of existing legal requirements which affect their use. The study reported in Part 1 is based largely on field research conducted in the City of Chicago; Parts 2 and 3 are based largely upon investigations and studies made of police practices in the City of Detroit, but all sections are supplemented by data collected through investigations and inquiries made in other communities throughout the United States.

The title of the book *Detection of Crime* is a somewhat misleading description of the contents. The scope of the study is at once broader and narrower than the title suggests. The study does not concern itself *generally* with police techniques used to solve crimes or to bring criminals to justice, as the title may suggest. Many aspects of police practices in the field of crime detection have been excluded from the scope of the study, as is clearly stated in the Editor's Foreword:

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1. L. TIFFANY, D. MCINTYRE, JR., D. ROTENBERG, *DETECTION OF CRIME*, xv (1967).

This volume discusses three important, current law enforcement detection practices: field interrogation, search and seizure, and encouragement and entrapment. Obviously, there are other significant methods of detection, such as surveillance, eavesdropping, infiltration of criminal enterprises by undercover agents, use of informants, and interviewing victims and complainants. Some of these are given attention in the *Arrest* volume. Others are not dealt with at all in the series. As to some, electronic eavesdropping, for example, the omission results from lack of data sufficient to support a meaningful contribution. As to others, interviewing victims and complainants, for example, the omission results from the effort to focus on those detection methods that give rise to more sharply conflicting value questions. Because field interrogation, search and seizure and encouragement do give rise to important and sensitive value questions, they are given priority of treatment.²

The scope of the study is thus confined to police practices in the three areas indicated. Further, it is somewhat misleading to characterize techniques in these areas as crime "detection" practices. As the authors stress, these techniques—especially field interrogations and search and seizures—may be pursued as much to prevent criminal conduct as to effect the arrest and conviction of persons responsible for crimes already committed. In this sense, police practices in the *prevention* of crime are as much within the purview of the study as those related to its *detection*.

These comments are not intended critically, but rather to emphasize one of the features of the study which may contribute much to its usefulness to the legal profession, *viz.*, police practices in the three fields covered are examined not from the narrow viewpoint of the lawyer or judge concerned only with criminal prosecutions but rather from the broader perspective of the policeman concerned broadly with maintaining an acceptable level of public peace and decency in the community. The arrest and conviction of persons responsible for crimes is but a part—and perhaps a relatively small part—of the total area of police responsibility.

In his analysis of field interrogation, Professor Tiffany points out that in a great many cases the police do not expect or intend to make arrests or to initiate prosecutions as a result of their interrogations, but rather desire to discourage or inhibit criminal activity by making the police "presence" felt. Similarly, as Mr. McIntyre's report shows, frequently the police will conduct searches or seizures—not with the purpose of seizing evidence or making arrests—but to discourage criminal enterprises by the paralegal measures of seizing weapons or contraband or by

2. *Id.*

making the illegal activity unprofitable. Such police techniques become a direct mode of law enforcement through crime prevention and are not pursued as part of an effort to bring about the identification, arrest and conviction of persons guilty of crimes.

Professor Tiffany, in a thoughtful analysis of actual police practices in the field, emphasizes the broad spectrum of activity which his subject encompasses. Thus, the police may question persons merely to let them know the police have an eye on them, as a means of discouraging vice practices, to control gangs and juveniles, to control public drinking or brawling or otherwise to prevent public disturbances, or even incidental to traffic control. Such interrogation is so far removed from the area of crime detection as such that Professor Tiffany suggests that it not even be classified as "field interrogation"—preferring to restrict that term to questioning employed as an aid to investigation of whether or not to arrest. Questioning which is calculated primarily to prevent crime or other undesirable activity, Professor Tiffany labels as "preventive patrol practices."³

Professor Tiffany makes another useful distinction at the other end of the spectrum and suggests that the term "field interrogation" should be further confined to *investigative* interrogation pursued *before* the interrogating officer has decided to arrest. Thus, he defines field interrogation as "an investigative device, a stage in the criminal justice system designed to separate innocent persons from those who should be subjected to the next step in the process, an arrest."⁴ It seems clear that the reasonableness and lawfulness of a field interrogation should be governed by different standards than preventive patrol practices on the one hand, or interrogation incident to an arrest, on the other. The analysis also points up the fact that the actual criteria are those formulated by the police; they vary widely and they have seldom been subjected to scrutiny by the courts. In the closing chapter of his study, Professor Tiffany comments on the need for the development of effective standards for police field interrogation practices and charts a number of inquiries to be pursued in determining how such standards should be defined and enforced.

Like the rest of the volume, the study of field interrogation does not purport to be either an exhaustive study of present practices or an evaluation of their propriety. Its principal objective—which it well accomplishes—is to analyze the subject searchingly in order to find—and thus to permit a start to be made on the solution of—the problems in this area in which present police practices have been fashioned primarily through trial and error, without guidance from the courts, the legislatures, or, in most instances, even from top police officials.

3. *Id.* at 10.

4. *Id.*

The formulation of standards for determining the lawfulness of search and seizure is not a critical need. However, as Part II of the study emphasizes, the problems in this field are not adequately met by standards directed only to the use of the products of search and seizure in trials of persons accused of crimes. As Mr. McIntyre points out, the techniques of search and seizure have many police uses, not all of which are related to the filing and prosecution of criminal charges.

As with interrogations, the police do not always intend to arrest or prosecute when a search is made of a person or a place or when contraband is seized. Sometimes the search or seizure is employed as a crime-preventive or crime deterrent technique pursued as an end in itself. Especially with such crimes as illegal traffic in liquor or drugs, the seizure of contraband may inflict substantial economic loss on the enterprise; it directly prevents further traffic in the illegal commodity, and sometimes requires relocation of the center of operations. In the study, most police indicated the not unreasonable belief that the seizure of illegally possessed weapons would reduce crimes of violence. One official reported an amusing practice of "leaking" to suspected gambling or vice centers false reports of imminent raids in the expectation that the inconvenience and loss of income caused by the temporary cessation of activities or the removal of the operation to another location were deterrents of at least equal force to the modest fines imposed by the courts on conviction—which had the further advantage of requiring only a very modest expenditure of police effort and manpower. The study points up that when the police seize contraband or conduct aggressive crime-preventive type searches, as ends in themselves, serious questions may arise concerning the applicability or effectiveness of present judicial standards which are ordinarily couched in terms of the inadmissibility of evidence seized unlawfully.

Mr. McIntyre's analysis of the matter of search and seizure also makes clear that there are a variety of circumstances and factors which may affect the lawfulness of police action in a given case. The sections of his report in which he classifies the subject of search and seizure into various subdivisions and discusses separately the legal considerations applicable to each make this middle section of the book a highly useful aid to the trial practitioner. The section also contains a thoughtful analysis of the problems surrounding the conduct of searches incident to arrests and of so-called consent searches.

Because the field of search and seizure is one in which the courts have already taken an active interest, this section of the book will be more useful as a statement of the law than its companions; but it also will be helpful to those concerned with the needs for improvement in practices in these areas.

Professor Rotenberg's report on police "encouragement" of crime is, in a sense, the most academic treatment in the book—and, at the same time (perhaps for this reason) the most thought-provoking. The study focuses primarily on the special problems of law enforcement in crimes such as prostitution, homosexuality, and illegal traffic in narcotics or liquor—the so-called "victimless" crimes which are rarely reported by a "victim" and which ordinarily must be uncovered and prosecuted by the police without much outside assistance.

The only practicable means for ferreting out and effectively prosecuting such crimes is for the police (or some person acting with them) to simulate a false interest in participation in such a crime until enough evidence is gathered to make an arrest and to obtain a conviction. Professor Rotenberg's study indicates that when using these techniques, the police usually have the objective of making arrests and initiating successful prosecutions if crimes are uncovered. This reflects a police judgment, apparently, that the technique is not effective as a direct crime deterrent and the fact, in the case of narcotic violations, that the crime is so serious that it does not seem appropriate to terminate police activity short of such arrest and conviction. That the police purposes are not fully served short of successful prosecution would create special problems if the courts impose restrictions or standards in this area, as they have in interrogation after arrest and search and seizure.

However, the area of police "encouragement" of crime is one in which the courts have expressed relatively little interest, so that present police techniques are fashioned largely without judicially established norms, at least outside the field encompassed by the defense of entrapment.

The technique of "encouragement" ordinarily requires the police officer or agent falsely to indicate in some appropriate fashion to the potential accomplice the apparent interest of the officer in participating in the criminal venture and to continue the pretext far enough that sufficient evidence is obtained that a crime has been committed—usually the one "encouraged" by the police.

Professor Rotenberg points out the special problems encountered with the use of this technique against crimes such as prostitution or homosexuality where frequently the gravamen of the offense charged is the solicitation. For obvious reasons, the police in such cases must stop short of participating in the completed crime—an option open to them in the illegal purchase of drugs or liquor. The consequence is that the legal effectiveness of the technique frequently involves questions—in the parlance of the law of contracts—of whether given conduct was an offer or an acceptance—and the officer must learn to restrain his expressions of interest so that the solicitation does not travel from him to the defendant, rather than the other way.

Where the substantive crime charged is not essentially the solicitation, the technique of encouragement is considerably more effective. There the legality of the practice is usually subject to challenge only within the ambit of the rather severely limited and rarely successful defense of entrapment. Courts also manifest traditionally greater tolerance for police methods in dealing with crimes where the technique is used—such as drug traffic—a tolerance reflecting general acceptance of the belief that drug traffic is an extremely serious crime and judicial recognition of the special difficulties and dangers which the police face in gathering evidence in the case of such crimes.

Professor Rotenberg discusses the question of whether—short of entrapment—there are inherent contradictions or ethical problems in police encouragement of crime, commenting upon the fact that such practices involve varying degrees of deception by the police and sometimes even a limited involvement in the illegal enterprise itself. It seems doubtful, however, that public concern will rise sufficiently high in the near future to result in the judicial formulation of standards in this field. However, some redefinition of the doctrine of entrapment seems to be more urgently needed. As presently applied in most states, Professor Rotenberg points out it prohibits only grossly inappropriate practices.

Professor Rotenberg concludes his report with a discussion of certain aspects of “encouragement” which raise important policy issues, to which he invites the attention of both law enforcement agencies and the legal profession. He suggests, first, that further studies be made to determine whether the use of encouragement techniques should not be confined to those crimes where the technique is most needed and most effective. He suggests further the need for a more precise articulation of criteria to determine the quantity and quality of information which the police should have concerning a suspect in order to make it appropriate to use the technique upon him. Finally, he suggests that further inquiry into actual police practices should be made to determine whether there is a need for control of particular modes of encouragement.

As a whole, all of the reports in the book, *Detection of Crime*, will be useful to the legal profession primarily because of the extremely capable job of classification and definition done by the authors and because of their suggestions for further study and the better formulation of standards. There are limitations in the work which are inherent in the nature of the study and not the product of faults of workmanship. For example, the report made of the data relied upon is so limited and the time when the studies were made is now so remote that the studies have little or no utility as a primary source of what police practices in these areas actually are. Moreover—with the possible exception of the section on Search and Seizures—the book will be a disappointment to the practitioner whose

interest is confined to finding the applicable law. *Detection of Crime* is not a legal textbook nor even a study of police practices in that sense, nor, of course, was it intended as such.

As a study of the fields covered with a view to surveying the practices, seeing the problems and starting to map the path to their solutions, the book is a valuable contribution in a most important area of the administration of justice.

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LEGAL FICTIONS. By *Lon L. Fuller*.† Stanford: Stanford University Press, 1967. Pp. xiii, 142. \$4.50.

Man's reasoning process has baffled the profound scholars of every age. Writers in every field have endeavored to explain the process although the human mind itself can merely fathom its wonders. The problem of semantics has often tended to confuse more than clarify the subject. Therefore, it is a welcomed bit of insight that the legal community is offered in this provocative book by Professor Fuller.

A fiction may be either a statement propounded with a complete or partial consciousness of its falsity, or a false statement recognized as having utility. Current usage permits such a definition embracing two entirely discordant elements. To clarify this paradox, the author ponders the three basic questions to be faced: 1) what is a legal fiction?; 2) what motives give rise to the legal fiction?; and 3) is fiction an indispensable instrument of human thinking?

Professor Fuller first distinguishes the fiction from its relatives, the lie, the erroneous conclusion, the truth, the presumption and the expedient. The rationale of the fiction is that it serves to reconcile a legal result with some expressed or assumed premise. It is the cement that is always at hand to hold together the weak spots in our intellectual structure. In dealing with the motives for the fiction, Professor Fuller distinguishes between expository and emotive fictions; historical and non-historical fictions; apologetic and habitual fictions; general and special fictions; and the procedural and statutory fictions.

To understand the function of the legal fiction, one must undertake an examination of the processes of human thought generally. Professor Fuller has, in the course of such examination, systematically gleaned seeds of wisdom from Hans Vaihinger's book, *Die Philosophie des Als*

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Ob, which considered the fiction in all the departments of human intellectual activity. Vaihinger concluded that the mind is not merely receptive, but it is also appropriative and elaborative, and that our minds have the capacity for altering, simplifying and rearranging reality by converting new experiences into familiar terms.

The legal mind uses this process in its quest for balance. The pressure of new cases, presenting varied situations of fact, will in time compel a judge either to clarify rules previously obscure, or to draw with some precision the line at which the constraints of law leave off. The fiction forces upon our attention the relation between theory and fact, between concept and reality and reminds us of the complexity of that relation. The danger of the fiction lies in its possible misuse by the failure to eliminate it from our final reckoning, but its true mystery consists not in the fact that we can reach right results with wrong ideas, but in the fact that the human mind, in dealing with reality, is able to go so far beyond its capacity for analyzing its own processes. One of Professor Fuller's significant conclusions is that it is a legal word, the word "judgment," which has come in common speech to express precisely the sense of tact and balance for which the human mind searches.

The author claims only that *Legal Fictions* may serve as a reminder for the legal scholar that the legal fiction is a more complex phenomenon than he is ordinarily inclined to suppose and more generally, as a reminder that judges do not simply "make" law in the simple and direct way modern commentators often seem to assume. For the reader untrained in the law, *Legal Fictions* will offer useful perspectives into the nature of legal thought.

One may find the treatment of the subject matter of the book to be somewhat intellectually sophisticated, but even a cursory reading and momentary reflection will challenge the reader's preconceived notions of what is fact and what is theory under the law. Professor Fuller's book may never be listed among the top ten on the best seller fiction list, but it is certainly no misstatement to say that *Legal Fictions* will be excellent and worthwhile reading for all those interested in the law and especially for those desirous of understanding legal reasoning.

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PROPERTY LAW INDICTED! By *W. Barton Leach*.† Lawrence: The University of Kansas Press, 1967. Pp. xii, 94. \$2.25.

Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason.

Chief Justice Fortescue, Y.B. 36 Hen. VI, 25b-26 (1458).

With this age-old quote from the Year Books Professor Leach sums up that which is wrong with the present property law and sets the tone for his short work. This slim, but potent volume, is a transcript of some lectures delivered by Professor Leach at the School of Law at the University of Kansas in March, 1966. Nothing new or startling is set out in the book, but it does bring together in one place many of the problems of the current property law and some efforts to modernize that law.

Sir William Blackstone and his *Commentaries On English Law* are tabbed as one of the basic causes of the stagnation of property law development. The idea that any change in the property law would cause the whole system of property to tumble is attributed to Blackstone. Professor Leach calls this the "Medes-And-Persian Syndrome."¹ Chancellor Kent of New York, writing the first great law book in America—*Commentaries*—is accused of slavishly following Blackstone and thus further stifling property law development. Marshall, Holmes and Cardozo are all called very bad property lawyers. Professor Leach is of the opinion that "[t]here seems to be some essential antipathy between property law and greatness."²

The American Law Institute and the Restatement of Property Law are accused by Professor Leach of being another obstacle to reform, his feeling being that the Restatement should both set out the law as it is and as it should be. So far as property law is concerned, the Institute has banned criticism of the established law. The retroactive effect of the changing case law is also cited as a bar to major developments in the property law field. However, with recent Supreme Court decisions which have set out the times from which these decisions will be effective on other cases, Professor Leach feels that there has been a significant breakthrough. Judges hearing property cases can now hold that their decisions need not be applied retroactively if to do so would cause great injustice.

Professor Leach takes a position that the judiciary has a duty to overrule bad case law where the reasons for continuing a line of authority have disappeared. He points to the celebrated case of *Fox v. Snow*,³ where

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1. W. B. LEACH, PROPERTY LAW INDICTED! 7 (1967) [hereinafter cited as LEACH].

2. *Id.* at 12.

3. 6 N.J. 12, 76 A.2d 877 (1950).

the New Jersey court automatically ruled that a testamentary gift of a bank account in absolute terms to a husband with the provision that a niece was to get whatever was left over on the husband's death gave nothing to the niece. The gift to the niece was stricken as being repugnant to the absolute gift to the husband. While it is apparent to most lawyers that this result is dictated by case law, Professor Leach asks, "Why should it be so?"

Some specific suggested reforms are set out in the volume. The foremost reform suggested is that probate courts should assume a greater power to reform wills and trusts which outrageously neglect the proper concern for the natural objects of bounty of the testator or settlor. This especially is so, says Professor Leach, where the instrument denies the right to invade principal, leaving the object of the donor's bounty with a dwindling income caused by inflation and taxation through the years. In this regard, he points to the situation of Lord Louis Mountbatten and Lady Mountbatten where an Act of Parliament was required to permit Lady Mountbatten and other persons similarly situated to anticipate income from a trust and to make rearrangement of the trusts to meet the practical needs of the time. Professor Leach feels that this result could have been achieved by judicial interpretation, but that the courts failed, principally on the thesis that the change was up to the legislature. This Professor Leach refers to as the "Pontius Pilate Syndrome"⁴ of the judiciary. Professor Leach advocates the courts' taking the bull by the horns to permit invasion of principal when income is not sufficient to meet the needs of the primary beneficiary. Similarly he suggests that various unreasonable prohibitions annexed to a gift should not be given effect. The adage that the court has no power to remake the testator's will is ignored.

Another bugaboo to orderly development is the existence, in greater or less degree, of various archaic principals such as the Rule in Shelly's Case and the Doctrine of Worthier Title. He points to the case of *Doctor v. Hughes*,⁵ wherein Judge Cardozo ". . . with patent misunderstandings of property law"⁶ declared that the doctrine was not a rule of law in New York but a rule of construction which resulted in the doctrine being applied to personal property, an extension of an already bad situation.

Professor Leach states that the anti-lapse statutes, while commendable in aim, can stand some revision which would more clearly cover various situations including their effect on powers of appointment. Another major stumbling block to orderly evolution of property law is held to be the rules of construction used to interpret instruments. Referring to the

4. LEACH at 35.

5. 225 N.Y. 305, 122 N.E. 221 (1919).

6. LEACH at 55.

rules of construction Professor Leach finds that "[t]he cases present a nauseating collection of judicial garbage."⁷ He points out that the phrase "die without issue" has been given four different meanings.

As to how property law can be effectively reformed, Professor Leach is not particularly positive. He suggests that each practitioner must add his weight to the reform movement, but he acknowledges that lawyers as a group are rather conservative, especially in the property law field, and are slow to embrace any sweeping changes. One great advance would be the institution of a title registration system (the Torrens system), but he points out that the institution of this system might require a great sacrifice by the legal profession in order to make it inexpensive.

Professor Leach has much to say about the Rule against Perpetuities and urges that it be made clearer and more capable of application, unshackled by the thousands of cases which have interpreted it. What he seems to suggest is the application of the doctrine of Cy Pres to private gifts where a court finds a violation of the rule.

This short volume, while not a working textbook as such, graphically brings to the reader various problems in the property law field and some suggested reforms. Some of those reform measures probably will disturb old time property lawyers but the book can serve to bring to the legal profession an understanding that property law should evolve with our social and economic cycles.

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7. *Id.* at 60.

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