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# Book Reviews

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# BOOK REVIEWS

## Arrest—The Decision to Take a Suspect into Custody

WAYNE R. LAFAVE

*Little, Brown and Company. Pp. 525. $10.00*

It is commonly assumed that the police can, or at least should, fully enforce the criminal law by arresting all violators. The author of *Arrest,* Wayne R. LaFave, points out that this is clearly not possible under current practices which often leave the local law enforcement agency undermanned and overworked. As a result, one of the major objectives of the criminal process is a determination of what criminal conduct is sufficiently serious to justify the use of limited enforcement resources against it.

Often this determination requires the exercise of discretion by police officers in making arrests. To analyze this discretion, Professor LaFave has chosen three states* with differing criminal statutes and social and economic conditions. He examined the local law enforcement practices of each in the light of legislative restrictions and judicial pronouncements. The examination reveals recurring problems in achieving effective law enforcement while maintaining the constitutional rights of the accused parties.

The author indicates that too often the local law officer, prosecutor, or magistrate mechanically applies antiquated criminal procedures and overlooks the basic social or legal problems involved. Arrests are made, warrants are issued, and charges are filed—not with reference to any comprehensive plan of law enforcement, but based on what the individual officer, precinct, or department conceives as the practical answer to the immediate problem. Such haphazard practices result in many inequities. Minority groups are often held to a different standard of conduct than the general public. For example, in Negro districts of larger cities, a family quarrel culminating in a stabbing is often handled as a mere domestic disturbance. Similar conduct in another part of the city would result in a criminal prosecution. This "double standard" encourages criminal activity in the minority group and lowers respect for law and order in the entire community.

Professor LaFave recommends that law enforcement agencies should strive to achieve a system that is logically consistent, not only within individual departments, but also consistent with other departments and agencies charged with criminal law enforcement. At the same time, those charged with enforcing the law should be made more aware of the constitutional problems involved in the criminal processes in order that they might seek to effect the spirit rather than the letter of the law, and seek

*Kansas, Michigan, and Wisconsin.



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to support rather than conflict with the judicial branches of government.

*Arrest* is the first volume of what will eventually be a five volume study sponsored by the American Bar Foundation dealing with the administration of criminal processes. In his work, LaFave poses more problems than he solves and reveals more deficiencies than successes. In so doing he accomplishes his stated purpose of giving an over-all view of current police practices, in the belief that the understanding of problems is a major step toward their solution.

LAWRENCE F. DALY.

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**Vignettes of Legal History**

JULIUS J. MARKE

*South Hackensack, N. J.: Fred B. Rothman & Co. 1965.*

*Pp. 357 $6.50*

In 1692, Giles Cory refused to plead to an indictment of witchcraft in Salem. For his silence, Cory received the English penalty *peine forte et dure* and consequently became distinguished as the only American to be crushed to death for failing to answer an indictment. The history of this legal atrocity in American criminal procedure is just one of many intriguing anecdotes collected in Julius J. Marke's series of essays.

The first half of the book is composed of analyses of eleven landmark Supreme Court decisions. Trenchant and candid in his approach, Marke makes the reader well aware of the drama and excitement which must have existed at the time the decisions were handed down. For example, in his discussion of *McCulloch v. Maryland,* Marke describes the potential nation-splitting conflict between the Hamiltonian Federalists who favored the Federal Bank and the Jeffersonian Democratic-Republicans who feared an additional encroachment of centralized government power. Of no less significance than the conflict itself were the characters involved: Chief Justice Marshall and a young lawyer named Daniel Webster.

In the second half, Marke presents essays on various legal principles and institutions, taken for granted now, but most of which extend far back into the common law in England. As examples of some of the legal oddities which are mentioned, the writ of Habeas Corpus was originally used to put people into prisons rather than free them; Aaron Burr presided over the trial of Justice Samuel Chase while Burr himself was under indictment for murder; and the first law dictionary in English was ordered by parliament to be burned by the public hangman in 1610. Of particular interest was the essay on "The Trial of William Penn," including discussion on the development of the jury system. One wonders

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at the situation which existed in England in 1670 when a judge was able to charge the jury: "Gentlemen, you shall not be dismissed till you bring in a verdict which the court will accept. You shall be locked up, without meat, drink, fire, and tobacco. You shall not think thus to abuse the court. We will have a verdict by the help of God or you shall starve for it."

The writing is engaging and free-flowing. The book will be attractive not only to the lawyer curious about the background of famous American cases and legal institutions, but to laymen and students as well.

BRENT R. CROMLEY.

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**Computers and the Law**

*Chicago: Commerce Clearing House, Inc., 1966. Pp. 150. $5.00*

This handbook was written to introduce the legal profession to data processing systems, and to assess their impact upon the practice of law. It is a collation of articles by twenty authors who have worked in the field of computers and the law, and is edited by the Special Committee on Electronic Data Retrieval of the American Bar Association.

A full one-third of the substantive material in the book consists of a technical and tedious discussion of the physical and operating characteristics of various computer systems. These systems range from simple manually operated devices to complex data and image storage and retrieval systems. This material is of little practical use to the lawyer. It does, however, list specific manufacturers and machines available. Of these, devices for reproducing typed documents from stored information may interest lawyers whose volume of repetitive office typing will justify the cost.

The balance of the handbook may excite transitory flashes of interest. The discussion ranges over applications in statutory and case law searching, recodification, legislative drafting, and techniques for redistricting by methods which preclude gerrymandering. One section deals briefly with analysis and prediction of judicial decisions as a means of insight into the judicial process, and as a practical means of calculating the odds in favor of a case at hand.

Other highlights include a convincing illustration of the use of symbolic logic in translating the "legalese" of the Internal Revenue Code into readable syntax, and the reduction of court congestion through computerized docketing and processing operations.

A discussion of the effect of computers on the substantive law compresses notes on corporate law, patent and trademark law, labor law,

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insurance, torts, evidence, taxation, administrative law, real property and banking into twenty-six pages. The fleeting glimpses of these fields thereby afforded cannot inform, but may tittilate the reader.

This book has two shortcomings. It tends to emphasize computers as machines, rather than as viable elements of the legal process. The legal topics considered are treated in abbreviated, speculative and occasionally cryptic fashion. These weaknesses make the book less valuable than either a more comprehensive or a more law-oriented publication. The editor confesses to the use of a "ruthless blue pencil," and the uniformly uninteresting style thus imposed on the authors does nothing to redeem the book from its basic faults.

WILLIAM J. CARL.

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**The Fundamentals of Legal Drafting**

REED DICKERSON

*Boston: Little, Brown and Company, 1965. Pp. 203. $7.50*

The major function of a lawyer in modern society has changed from representing a client in a specific legal controversy to that of attempting to keep his client completely out of litigation. The emphasis in his work has changed from the preparation of briefs and pleadings to the drafting of contracts, wills and conveyances.

Since it has become important that an attorney be skilled in legal drafting, the American Bar Foundation felt it desirable to have a volume published setting forth the fundamentals. To write this book, they selected Professor Reed Dickerson of the Indiana University School of Law, a noted authority on the principles of legislative drafting.

Professor Dickerson presents the basic principles common to the drafting of various legal instruments, giving major consideration to substantive policy, architecture, clarity and readability. He treats the problems of ambiguity extensively, including a chapter on definitions. In an amusing section on "Humpty Dumpty" definitions, the author cites a group of federal bills that stated that for their purposes the term "September 16, 1940" meant "June 27, 1950."

The book is most valuable for its suggestions on improvement of specific wording. The author levies a vigorous attack on "gobbledygook," by which he means those words which contribute nothing to an instrument, other than making it sound legal in nature. Included are many examples of objectionable words (afore-granted, witnesseth, wheresoever) and redundancies (covenant and agree, known and described as).

The book should be useful to anyone desiring skill in drafting precise, clear, and readable instruments.

JOSEPH T. SWINDLEHURST.

## Law and Psychology in Conflict

James Marshall

*Indianapolis: The Bobbs-Merrill Company, Inc., 1966. Pp. 119. $5.95*

*Law and Psychology in Conflict* contends that testimony of witnesses within the framework of the adversary system is not an effective way for the law to recall the facts of an event. The author, a member of the New York bar, analyzes his profession in terms of the behavioral sciences. He finds the proceedings in the courtroom are in many ways a game of "make-believe" based on invalid historical premises. Justice and truth are sought by the use of a series of fictions, each of which the law gives a pretense of reality. Some of these such as the reasonable man, the negligent man, and the quasi-contract may be necessary. Other and more basic fictions, such as the reliable witness, may be intolerable. The author maintains that since the "law has not developed its own experimental discipline, it has the responsibility to test its 'make-believe' doctrine by whatever scientific methods are available and to adjust those doctrines insofar as it can to reality."

To show that faith in the inherent accuracy of witnesses is "make-believe," Mr. Marshall subjects the reliability of testimony to scientific analysis. The jury and the adversary system are also placed under the social science microscope. He finds that according to the present knowledge of the behavioral sciences, the perception, recollection, and articulation of witnesses are *very* unreliable, because initially the senses provide the mind with an inaccurate and incomplete image of a given occurrence. The mind then adjusts this image to fit prior experience. As the time span between the event and the recall is increased, a loss of memory increases the need for adjustment of distortion. Finally the image must be converted to words, and much is lost in this translation.

To demonstrate these findings dramatically to lawyers the author set up his own experiment. A movie of a simple fact situation was presented to three separate socio-economic groups. Their ability as witnesses was analyzed and the results presented in statistical terms. The observations which they made were not only generally inaccurate, but varied predictably with the group tested.

The author further attempts to show there is additional distortion of reality caused by a fragmentation of the evidence presented. When the event is then pieced back together by the jury, it is often done in an illogical manner. For example, the jurors often make up their minds about the case before they are given the law.

Mr. Marshall contends that the legal process in an age of scientists lacks scientific validity and thus "will tend to be held in contempt" by society. The remedy proposed is joint research by lawyers and social scientists to aid in preventing the distortion of facts. The law

should then alter its precepts and techniques in light of their scientific findings.

*Law and Psychology in Conflict* effectively criticizes legal fact-finding from a behavioral science viewpoint. However, the law also acknowledges that witnesses may lie, that memories grow dim with time, and that human observation and communication are fallible. And a trial is not a mere controlled experiment for supplying scientific data; a primary function is to achieve final resolution of conflicts. Not only does "justice" require plausible legal theory, but it also requires finality of judgment. Thus, a decision is reached, not in the laboratory, but within the existing social context. The American judicial process is accepted because, as a whole, it functions well. A showing that one element of this integrated system appears to be scientifically inaccurate does not mean that change could improve the end result.

JAMES A. POORE III.

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## Of Men and Not of Law

LYMAN A. GARBER

*New York: The Devin-Adair Company, 1966. Pp. 196. $3.95*

Through an examination of recent United States Supreme Court decisions, Lyman Garber attempts to point out how the courts have exceeded their constitutional prerogatives. He contends that the judiciary is usurping the power of the legislature when it changes rules of law without following existing precedent. As a result, the nation's system of checks and balances is being eroded. The tripartite form of government derives its strength from the separation of powers. When the Judiciary usurps power, it therefore does so at the expense of the Congressional and Executive branches of government. The ultimate effect of such judicial legislation is the destruction of a government based upon law and the creation of an oligarchy based upon the ideological preferences of judges.

Mr. Garber analyzes specific provisions of the Constitution and their application in the fields of civil rights, apportionment, religion, personal liberties, and criminal law. His primary concern is that the Supreme Court exercise judicial self-restraint to the end that our system of federalism may function. The first step in destroying federalism comes in demolishing States Rights. The 1964 directive of the Supreme Court on legislative apportionment is an example of the judiciary's attack on our federal form of government.

Another example is the relatively new development of federal courts supervising state criminal law. Criminal activity in our nation is in-

creasing at an alarming rate. Yet, in combatting this deluge, the police and prosecutors are confronted with restrictive rules of evidence. For example, in *Mapp v. Ohio*, 364 U. S. 868 (1961), the Supreme Court held that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible even in state courts. The immediate consequence is that the law abiding citizen is placed in great peril by vicious criminals freed to prey again upon society.

*Of Men and Not of Law* is readable by both the layman and the lawyer. This highly provocative book offers the reader the viewpoint of the dissenter. Although it does not delve deeply into the field of constitutional law, the book is documented with leading cases and excerpts from opinions to support the author's point of view. It is a revealing analysis of possible dangers this nation faces as a result of judicial legislation.

EARL J. HANSON.

MONTANA STUDENT BAR ASSOCIATION
*SCHOOL OF LAW*
UNIVERSITY OF MONTANA
Missoula, Montana

TO: Montana Attorneys
FROM: Montana Student Bar Association
RE: Law Student Summer Employment Program
DATE: Summer, 1967

Gentlemen:

Are you interested in helping a law student learn more about the law and at the same time doing yourself a service?

Why not employ a law student this summer?

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Interested? Write for further information.

Thank you,

Summer Employment Committee
Montana Student Bar Association
University of Montana School of Law
Missoula, Montana, 59801

# IN MEMORIAM

Edward Andrew Cremer III entered the University of Montana Law School in October of 1964 as a member of the class of 1967. He quickly demonstrated his ready wit, his easy humor, and his ready charm. As time passed, it also became evident that Andy, as he was known to his classmates, was possessed of a brilliant legal mind. His powers of retention and analysis were remarkable; his perception and insight into the intricacies of legal problems were the envy of his colleagues; and he had the rare ability to reduce the most difficult situation to its basic issue. Andy died on February 26, 1967. He was awarded the degree of Juris Doctor posthumously in June of 1967. He will be missed, not only by his classmates, but by the legal profession. His outlook and attitude embodied the highest principles of ethical behavior; he would have been a credit to his class, his school, and to his profession.

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