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# Lawrence P. Tiffany, Donald M. McIntyere, Jr., & Daniel L. Rotenberg, Detection of Crime

Thomas J. Faulconer

DETECTION OF CRIME. By Lawrence P. Tiffany, Donald M. McIntyre, Jr. and Daniel L. Rotenberg, Boston: Little, Brown and Company. 1967. Pp. xxx, 286. $10.00.

*Detection of Crime* is one volume of a series of field studies sponsored by the American Bar Foundation dealing with the administration of criminal justice. The book relates the police practices and policies in the detection of crime as revealed by field observations in metropolitan areas. Although the studies were confined generally to police practices in Chicago and Detroit, supplemented in the urban areas of Kansas and Wisconsin, they appear to present a general representation of such practices in the United States. The authors' references to court decisions in these states and the Federal Courts add to the value of the book. Therefore, it should appeal not only to the sociologist and criminologist but also to the practicing attorney. The publication should be valuable to all police, both in the field and in the administration, not so much in the revelations of police practices observed, but in the attitudes of courts as revealed therein, and the conclusions and recommendations of the authors.

The first section concerns "on the street" questioning of suspects—commonly referred to by police as field interrogations. This treatment, by Lawrence P. Tiffany, Assistant Professor of Law and Assistant Dean at the University of Denver College of Law, is based largely on field studies in Chicago. Professor Tiffany points out that a large part of the daily routine of the police officer is not designed to result in arrest, prosecution and conviction of suspected offenders; rather, much of their time is spent in rendering aid, controlling use of public ways, confiscating weapons and other active preventive patrol practices. It is to the preventive practices that the author devotes most of his attention.

Of interest to both the laymen and the attorney is the discussion of "frisking" by police officers. Apparently, to many officers the term "frisk" means the same as search.

Professor Tiffany points out that "until recently, on the street interrogation practices were ignored by legislatures, courts, and the largely inarticulate police profession, although they were used daily by individual police officers."[1] The whole subject of field interrogations has been receiving more and more attention by the courts, legislatures, sociologists and members of the Bar. This is due, in no small measure, to the growing awareness by these bodies of individual rights as they

1. L. TIFFANY, D. MCINTYRE, JR. & D. ROTENBERG, DETECTION OF CRIME 87 (1967) [hereinafter cited as DETECTION].

relate to minority and poverty groups. The field interrogation process becomes even more pertinent when the number of occurrences is compared with the actual arrests made of those questioned.

The author relates the many reasons police conduct such interrogations, their relation to an "arrest," and the so-called "frisk" conducted so frequently by the policeman on the beat. He finds much conflict and lack of clarity in the decisions of appellate courts on these subjects. He also conludes that the police administrators are not clear as to this procedure, and that the patrolman is confused. This uncertainty has not led to a curtailing of the practices.

There have been a number of legislative attempts to clarify this subject. Paramount in the legislative action is the famous New York "stop and frisk" law to which reference is made by Professor Tiffany. Other attempts are found in the Uniform Arrest Act, the Model Penal Code of the American Bar Association, and the Model Code of Pre-Arraignment Procedure of the American Law Institute.

Although Professor Tiffany fails to present any definite recommendations, he concludes that "ways must be devised to involve law enforcement agencies in the development and enforcement of appropriate policies on field interrogation, and effective methods of review of these policies must be found which will not unduly restrict the flexibility needed by the enforcement agency."[2] The task is not easy, however, and if the police fail to develop standards and administrative controls for field interrogations, the author feels that the legislature and courts will step in "as they have with search and in custody interrogation."[3]

In Part II on "Search and Seizure," the author, Professor Donald M. McIntyre, Jr., presently serving as the Supervisor of Research of the American Bar Foundation, has the benefit of a historically established and more litigated subject. Consequently, this section deals with many court decisions although, as the author points out, these have resulted in the formulation of "complex and sometimes confusing rules."[4] The author, unfortunately, covers the whole gamut of this subject in 106 pages.

Police "practices do not reflect the theoretical preference for the search warrant which courts express,"[5] and in practice the search warrant is seldom used. In the overwhelming instances the police rely on alternatives such as search incidental to arrest and by consent. This is mainly due to the fact that more effort and time is required to obtain a search

2. DETECTION 93.
3. *Id.*
4. *Id.* at 97.
5. *Id.* at 101.

warrant and in some instances more evidence is needed than in the alternatives.

The author states that "although normal police practice may be not to search a person arrested for traffic offense, police may frisk or search if individual characteristics of the offender, the neighborhood or place where arrest takes place lead the officer to conclude that the person may be armed or may have committed a more serious crime."[6] The fact that courts are increasingly holding violation of traffic laws not grounds for searches for evidence of other crimes has little effect, and the practice continues where confiscation of weapons or contraband, rather than prosecution, is the object of the search.

In many instances the police search first and, if the search produces evidence of a serious crime, "do not hesitate to testify in court that the arrest was made first and the search followed."[7]

Professor McIntyre discusses the issue of how far a police officer can go in making a search incident to a lawful arrest. This issue involves the area he may search, as well as the extent of the person searched. It covers the search of body cavities and the recovery of evidence swallowed, blood tests, and the administering of emetics or laxatives. The decisions studied, as well as the police practices, are not uniform on the legality or methods of performing these steps. He points out, however:

> [T]he consent search is frequently relied upon by police because it involves no time consuming paper work and it offers an opportunity to search where probable cause, either for a search warrant or an arrest warrant, is lacking. There are, however, disadvantages in the use of the consent search since courts often view a waiver of the constitutional right with a certain amount of disfavor.[8]

The major difficulty facing the courts in ruling on this method of searching is in knowing what constitutes a valid consent. Police practices found in gaining consent to search are varied, and in some instances deception is used. Police were rarely found to notify a suspect that he has a right to refuse consent to a search.

The fact remains that the police do engage systematically in many enforcement practices that are illegal. These practices include the "tip-over" in gambling and liquor violations, the on the street "shakedown" of suspects and the confiscation of autombobiles used in connection with criminal enterprises. The motives of police in conducting illegal raids and

6. *Id.* at 127.
7. *Id.* at 128.
8. *Id.* at 156.

unlawful searches include, as in the case of gambling, an attempt to overcome the difficulty of conviction and the belief that the sentences obtained contribute little to the effectiveness of the enforcement program, thus leaving the police no other alternative to control vice crimes in their respective districts. The so-called "shakedown" of individuals is generally designed to discover weapons and other small items of contraband in order to confiscate them. Although police manuals discourage the routine search of ex-convicts and parolees, this was found to be a general practice with law enforcement officers. Illegal practices of this nature are also prevalent in high crime areas during odd hours and under any cricumstances appearing suspicious to the officer. These motives, among others, coupled with the public demand that crime not be allowed to flourish, often result in a "what's the use?" attitude among policemen, and cause them to abandon legal means to suppress gambling and vice. Since conviction is not the prime objective of the police, the exclusionary rule of evidence does not constitute an effective deterrent in these situations.

The author questions the net gain of such a crime preventive program to the cause of law enforcement and those engaged therein. The traditional commitment in this country has been in the direction of maximum legislative and judicial control over criminal law policy issues, leaving to police the task of carrying out the proscribed policy. However, there remain uncharted areas within which the policy-making function is left to the law enforcement agencies. In these areas the agencies have largely failed to accept the responsibility for controlling their own policies and practices.

At this point, Professor McIntyre discusses the different alternatives to the traditional approach. This discussion, however, is too brief and no conclusion or recommendations are made.

Part III covers the subject of "Encouragement and Entrapment," written by Daniel L. Rotenberg, Professor of Law at the University of Houston College of Law. This section is limited generally to encouragement in the detection of vice crimes. Chapters are devoted to prostitution, homosexuality, narcotics and liquor laws. Professor Rotenberg's field study, as well as his references to statutory and judicial authorities, are confined almost entirely to the states of Michigan, Wisconsin and Kansas. As in the other parts of this volume, most of the interesting and valuable information to attorneys, and law enforcement officers, and nearly all of the law, is contained in the footnotes.

The author points out that the terms "encouragement" and "entrapment" are not synonymous. Entrapment is that part of the practice of encouragement that is improper. Most of the attention given to the field

of encouragement relates to the definition of entrapment. Indeed, so little attention has been given to encouragement that the author concludes, "not only is there no consensus as to what the practice includes but there is no agreement even as to what it is called."[9]

Encouragement practices are used by law enforcement officers in detecting those crimes committed privately or with willing victims, thus requiring police officers to gain firsthand knowledge of the crime. "It is a common police detection practice and an important weapon in the law enforcement arsenal."[10]

Professor Rotenberg discusses the reasons for using encouragement practices, the methods used and the difficulties encountered in relation to the crimes considered, the limitations upon the right to engage in encouragement and the police reaction to these limitations. In regard to crimes other than those involving narcotics, the limitations are due to ambiguity in statutes, the narrowness of statutory interpretation, and the apparent disapproval of some trial judges of the encouragement tactics used by police officers. The light punishment often imposed cause police to resort to harassment and other methods which do not require conviction to control crimes such as prostitution. However, the police do not consider harassment of narcotic sellers an adequate control, and here they strive for a prosecution and conviction. The attitude of the community concerning detection of some vice crimes, about which many people have ambivalent feelings, also affects the intensity of enforcement of these laws.

Although Professor Rotenberg reaches no conclusion nor advances any recommendations, he does pose some interesting and thought-provoking questions and observations concerning the field of encouragement. Who should have the responsibility of formulating standards for this practice? Thus far, he observes, enforcement agencies have had wide lattitude to develop encouragement practices, subject only to the limitation that their methods not constitute entrapment. It is interesting that the entrapment decisions do not significantly limit the police practice of encouragement. This was found to be true partly because of the lack of articulate reasons in decisions, lack of communication of reasons to others in law enforcement than the officer in court, or the feeling of most law enforcement officers that his conduct does not amount to an entrapment.

The most interesting question posed by the author goes to the very foundation of the issue, "[i]s encouragement a proper police practice in a democratic society?"[11] Although he does not answer this directly, he does

9. *Id.* at 273.
10. *Id.*
11. *Id.* at 213.

set forth the different alternatives and the aspects of encouragement that have caused some to question its propriety.

The reader, if an attorney, would have hoped that the author could have set forth the law more clearly and in greater detail. Although the leading decision of the Supreme Court (*Sorrell v. United States*) is discussed along with a few decisions of state appellate courts, these are brief and inadequate. One has but to read the decisions available concerning this subject to conclude that the definition contained in the *Sorrell* case and state decisions generally leaves much "elbow room" to judges when applying the definition to the facts of individual cases.

If one could conclude from the reading of "Detection of Crime" any single recommendation in this field, it would be a plea for more articulate rules in sufficient detail, so that through education and supervision all law enforcement officers could know what the standards are. These can be supplied by all or any of those having the responsibility. In addition to the possibility that much could be done by police agencies themselves, some experts suggest specific legislation covering many of the practices in this field.[12]

THOMAS J. FAULCONER*

12. President's Commission on Law Enforcement, The Challenge of Crime in a Free Society 92 (1967).

* Judge, Appellate Court of Indiana.