

Florida State University Law Review

Volume 23 | Issue 4

Article 7

1996

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Recommended Citation

Daniel Yeager, *Searches, Seizures, Confessions and Some Thoughts on Criminal Procedure: Regulation of Police Investigation—Legal, Historical, Empirical, and Comparative Materials*, 23 Fla. St. U. L. Rev. 1043 (1996).

<https://ir.law.fsu.edu/lr/vol23/iss4/7>

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FLORIDA STATE UNIVERSITY LAW REVIEW



SEARCHES, SEIZURES, CONFESSIONS, AND
SOME THOUGHTS ON *CRIMINAL PROCEDURE*:
REGULATION OF POLICE INVESTIGATION—
LEGAL, HISTORICAL, EMPIRICAL, AND COMPARITIVE MATERIALS

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VOLUME 23

SPRING 1996

NUMBER 4

Recommended citation: Daniel Yeager, Essay, *Searches, Seizures, Confessions, and Some Thoughts on Criminal Procedure: Regulation of Police Investigation—Legal, Historical, Empirical, and Comparitive Materials*, 23 FLA. ST. U. L. REV. 1043 (1996) (book review).

SEARCHES, SEIZURES, CONFESSIONS, AND SOME
THOUGHTS ON *CRIMINAL PROCEDURE: REGULATION
OF POLICE INVESTIGATION—LEGAL, HISTORICAL,
EMPIRICAL, AND COMPARATIVE MATERIALS*

DANIEL YEAGER*

Criminal procedure casebooks densely populate the market but rarely are reviewed.¹ This may be because they are all the same (which makes them unremarkable), or because of the unalterable dominance of Kamisar, LaFare, and Israel's *Modern Criminal Procedure*² (which makes them irrelevant). In *Criminal Procedure: Regulation of Police Investigation—Legal, Historical, Empirical, and Comparative Materials*,³ Christopher Slobogin copes with the anxiety of influence by writing a different sort of text. In 564 pages dedicated in large part to the usual topics,⁴ Slobogin offers only twenty edited Supreme Court opinions, although he does compress the facts of 120 others into problems. Throughout the text, he emphasizes alternative methods of regulation and, as an accomplished empiricist,⁵ repeatedly gives us data that supplements abstract accounts of the culture and practices of police. Comparative law also gets attention, though somewhat unevenly—perhaps due to the highly factualized rules of American constitutional law, which have no counterpart in other legal systems.

The publisher, The Michie Company, is earning a reputation as a publisher of *avant garde* law books,⁶ but Michie has yet to design books so elegantly as the three primary presses (Foundation, Little Brown, and West). For example, the index lists cases but not secondary sources, and

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1. See Andrew E. Taslitz, Essay, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143 (1991) (reviewing WELSH S. WHITE & JAMES J. TOMKOVICZ, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF* (1990)); Robert Batey, Book Review, 48 TENN. L. REV. 805 (1981) (reviewing JOSEPH G. COOK & PAUL MARCUS, *CRIMINAL PROCEDURE* (1981)).

2. YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* (8th ed. 1994).

3. CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION—LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS* (The Michie Company 1993).

4. Those are searches and seizures (223 pp.), interrogation (95 pp.), identification procedures (35 pp.), entrapment and undercover practices (26 pp.), and remedies (81 pp.).

5. See, e.g., Norman Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 LAW & HUM. BEH. 447 (1995); Christopher Slobogin et al., *The Feasibility of a Brief Evaluation of Mental State at the Time of the Offense*, 8 LAW & HUM. BEH. 305 (1984).

6. See STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (1995); ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* (2d ed. 1993).

it punishes readers for reversing case captions. And, at times, where court opinions end and commentary begins is indecipherable.⁷ Simply put, the book is outwardly somewhat homely. Aesthetics aside, the book is mostly excellent and astonishingly so for a first edition. As the subtitle promises, the book has something for everyone: historians, empiricists, comparativists, theoreticians, case-crunchers, and practitioners. This review essay tracks the book's crowning achievement—the refreshing and inventive “perspectives” chapter that opens the book. The essay then reflects on the few aspects of the chapters on search and seizure, confessions, and remedies that I believe are slightly flawed or incomplete.

I. PERSPECTIVES ON REGULATING THE POLICE

Slobogin's book begins with a hefty sermon on the police culture, which the more law-heavy texts tend to ignore. He depicts a jarringly undereducated police force whose intelligence (I.Q.'s as low as 70) and character (disobedience, criminal activity) are “frightening” (8-10). It is a culture where biased hiring practices are rampant (10-13); where academies are “dangerously inadequate” (15) and formal, in-service training is “a joke”; and where as little as two percent of training is dedicated to constitutional law, which is mostly rejected by the recruits (17-18). It is a police force that usually arrives late to the crime scene, which sometimes is no scene at all. When they are not misbehaving, officers respond mostly to trivial offenses and low-level squabbles. As for detectives, Slobogin takes away their television glamour by calling most of their cases “easy” investigations of “known” perpetrators (18-24).

Police stick together, Slobogin goes on to say, not so much because of their shared fear of danger but their shared distrust of “fickle” civilians (25). Evidently “street wise” cops outnumber “management” cops. Street-wise cops are fraternal, tough, cynical, corner-cutting, self-styled “craftsmen” who throw their weight around. Management cops are innovative, rational, rule-oriented, and legalistic and, as such, are more receptive to progressive methods of policing (25-26). Naturally, crime-control values trump criminal-coddling—even, I gather, if that means ghastly win-loss records at suppression hearings (26-27).

When police are needlessly violent, we are told it is a combination of their poor social skills, their desire to be shown respect, and flexible procedural rules that are to blame (28-30). Police prefer firmness to courtesy and consistently understate what it means to suspects to save face in front of witnesses who may be suspects' family members. Suspects are more likely to take a beating if they are agitated or drunk, just as they are if they encounter police in front of other civilians or police. Mamet-esque

7. SLOBOGIN, *supra* note 3, at 445.

tough-talk, telling lies, and abuses of discretion directed toward blacks are regular modes of police behavior (30-35).

What are we to make of all this? That for Slobogin, who offers almost no counter examples, American policing is highly unprofessional. Even if policing were a lofty art, no one suggests we leave our guardians unregulated. To unify his discussion of regulating police, Slobogin looks to *Tennessee v. Garner*⁸ (where the United States Supreme Court decided when police may shoot fleeing felons), which he weaves through his survey of judicial, legislative, and administrative rulemaking. With *Garner* in mind, Slobogin first considers whether the Supreme Court should meddle in the business of local law enforcement (44-54). He explains how much-needed uniformity, centralization, and accountability in federal, state, and local law enforcement, coupled with some localities' persistent mistreatment of blacks, led to the Court's governance of police. Something had to be done; if not by the Supreme Court, then by whom?

States, Slobogin observes, are free to develop their own procedural mechanisms to enforce their criminal laws.⁹ He relies on one of his articles that delineates four evolutionary stages of state constitutionalism: 1) pre-incorporation dual federalism, where states did whatever they wanted, short of conscience-shocking transgressions of fundamental fairness; 2) co-option of states' autonomy by the later Warren Court's revolution of criminal processes; 3) a new federalism by which states counterrevolted against the Burger Court's counterrevolution against the Warren Court's revolution; and 4) linkage or lockstep, yet another counterrevolution by state judges and legislatures who wanted no more than minimal protections for suspects.¹⁰ Slobogin offers three arguments against new federalism, which left me uncertain as to his position (57-58). Having read his excerpted article, I happen to know he endorses a strain of new federalism.¹¹

Although he leaves state constitutionalism in the air, Slobogin expresses his skepticism about a Supreme Court-dominated world of police practices. The Court is too remote, its rules too naive, and certiorari too infrequent to have much influence on police practices and state court proceedings (59-61). Plus, the Court is hampered by gray areas, majority opinions that carry the signatures of nonbelievers, the fetters of precedent, and a case-and-controversy limitation (62-64).

Consequently, when the Court must speak, Slobogin says, it should articulate bright-line rules that can be applied on the street, not compli-

8. 471 U.S. 1 (1985).

9. SLOBOGIN, *supra* note 3, at 55-8.

10. Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 FLA. L. REV. 653, 658-66 (1987).

11. *Id.* at 674-82, 685 (advocating a regime of "presumptive linkage" as modified by a "cautious version" of new federalism).

cated, multifactored tests that smell of the lamp. If the Court is better suited to reviewing laws than to making them, Slobogin continues, then legislatures or police themselves should be the origin of procedural laws (66-74). Indeed, citizens would be relieved to know that police *want* to constrain themselves formally, although Slobogin is lukewarm toward community participation in the development and enforcement of those constraints (74-75, 511-13). If police govern themselves under more than a crude oral tradition, then formalized, internal rulemaking would improve their morale, professionalism, obedience, and probably the wisdom of the rules themselves (70-73). This is not to say that Supreme Court supervision is entirely replaceable by internal regulation, legislation, or state constitutionalism. All three alternative sources of regulation tend to sink protections to the Court's established minimums. Nonetheless, this section of Slobogin's text reflects his belief that the Court should play a backup role reviewing police policy, not originating it.

Slobogin then turns from who should regulate the police to the organizing principles for an ideal procedural regime. He systematically presents three models of procedure, each in theory and then in practice.

Slobogin presents Herbert Packer's familiar crime-control and due-process models as opposing conceptions of an adversarial model. Then he juxtaposes that model against a Continental and nonadversarial, or inquisitorial, model (76-80, 85-93). Slobogin then presents a third, and less familiar model, John Griffiths's naive "family model." Griffiths describes the adversarial "battle" as a reconciliation among loved ones (94-96). He asks us to see the criminal not as a deviant or outsider but as one of our own who has lost his way in a momentary lapse of restraint. To so view the criminal demands that we presuppose the fairness of public officials. Because Griffiths recognizes that nothing could be more un-American, our resistance to his model must be, to him, itself peculiarly American.

Slobogin uses David Bayley's excerpt to consider the practical consequences of the family model. Bayley begins with the dubious assumption that people refrain from committing crimes because they have fully integrated cultural norms into their belief systems, not because they are afraid of getting caught. However, before Bayley asks us to accept his view of law-abidingness, he limits his view to "tightly knit primary groups," such as those found in Japan and China. In those groups, informal responses to deviance are the norm, and formal criminal processes are reserved for the incorrigible whom the family, community, and schools cannot reform (96-97). A successful family model therefore presupposes stable families, few people living alone, little mobility, great loyalty to employers, and *intense* pressures from family, school, colleagues, and neighbors. This, Bayley confesses, is hardly the world in which Americans live (97-98). Yet Bayley goes on to imply that America could improve the character of

its public actors by leaving them alone—by relying on their internal (moral) restraint rather than on our external (legal) constraint. But is not our becoming tightly knit a necessary condition to our yielding to informal pressures? Bayley's tail-chasing solution is to improve the character of public actors in a disconnected, atomistic culture by pretending we are something we are not.

Slobogin's careful attention to family, nonadversarial, and crime-control regimes is *not* meant to increase our faith in the integrity of executive officials. Instead, he means to demonstrate that adversariness and its advantage-balancing orientation is *symptomatic* of nations that are, or should be, suspicious of authority.

II. SEARCHES, SEIZURES, CONFESSIONS, AND REMEDIES

A. Searches and Seizures

Slobogin introduces the chapters on constitutional constraints on police practices with the Fourth Amendment (99). Throughout the text he embellishes cases and commentary with clear and methodical doses of hom-book law.¹² Thankfully, he dispenses with needless, numerous, and lengthy reproductions of the Court's warrant cases. In their place is an empirical study covering seven cities and canvassing how warrant applications there are prepared, screened, presented to magistrates, granted, executed, returned, and challenged.¹³ The study validates three chronic suspicions of indigents, minorities, liberals, and academics: 1) warrant affidavits are plagued by an inverse relationship between the apparent reliability of a source and the officer's reliance on that source; 2) magistrates are rubberstamps for police; and 3) the criminal rarely goes free because the constable blunders.

After exploring some nuances of the warrant process, Slobogin takes up the so-called "pretext doctrine" (152-62). Pretextual police action occurs when police do the right thing for the wrong reasons. Slobogin correctly addresses this doctrine early in the text, but he drops it too soon and after too little explanation. A thicker explanation would note, for example, that the Court has held that a search of an arrestee follows automatically from a lawful arrest.¹⁴ This bright-line rule is meant to prevent the destruction of evidence and to protect the arresting officer from weapons within the arrestee's reach. But what happens if an officer arrests and

12. In a rare lapse, Slobogin departs from the sequence set forth in his four-step "Structure of Fourth Amendment Analysis," which states that the first step is an inquiry into whether the Fourth Amendment is implicated but then begins with the components of a valid warrant. SLOBOGIN, *supra* note 3, at 102-04.

13. *Id.* at 105-13.

14. *Chimel v. California*, 395 U.S. 752, 763 (1969).

searches someone who has violated a law against, say, public drunkenness, when the officer's sole purpose is to look for obscene materials in the arrestee's satchel?

Defense attorneys, aided by the reasoning of Professor Burkoff,¹⁵ plausibly insist that obscene materials or other evidence of crime found on the arrestee or in the satchel should be suppressed on the grounds of "pretext," "sham," or "bad faith" (158). The suppression hearing, their argument runs, should demand from the arresting officer an account of his motives or reasons for his actions. The trial judge, in turn, should decide whether the officer did the right thing (arrest a lawbreaker) for the wrong reason (to search the arrestee, not to enforce the drunk-in-public law).

Slobogin relegates to a single sentence the most sensible and sophisticated thinking on pretexts—that of Professor Haddad.¹⁶ Haddad makes the officer's motives irrelevant to an assessment of the propriety of the officer's actions. The officer's intent, on the other hand, matters a great deal. If the officer demonstrates an intent to search the suspect but not to arrest him, then, according to Haddad, the officer has committed an *unlawful* search, not a *pretextual* search incident to arrest. A search incident to arrest requires that the officer first demonstrate the intent to arrest—to take the suspect into custody. If the officer demonstrates that intent, then we should forget about *why* and uphold the arrest and the subsequent search.

While motives or reasons for human action typically are mysterious, intentions are not—they are wrapped up in the actions themselves.¹⁷ For instance, Haddad believes that if an officer searches a house under authority of a defective search warrant and claims later that his intent in entering was to make a warrantless emergency arrest, then any evidence obtained in the residence or on the arrestee's person should be excluded.¹⁸ The officer's lack of intent to execute a warrantless emergency arrest is demonstrated by the fact that the officer applied for a search warrant, took it to the residence, produced it before entering, and searched the house *after* locating the suspect. Again, this is not a case of a pretextual, warrantless entry to arrest—it is an unlawful warrantless entry to search.

Yet, to require only that the officer have the intent to rely on the doctrine in question may not sufficiently protect against pretexts. Haddad suggests that when a doctrine is intolerably susceptible to abuse, the doctrine should be fashioned to defend against that susceptibility.¹⁹ The Su-

15. SLOBOGIN, *supra* note 3, at 158 (citing John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. Rev. 70, 72-84 (1982)).

16. *Id.* at 158 (citing James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985)).

17. See Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 70-88 (1991).

18. Haddad, *supra* note 16, at 655-57.

19. *Id.* at 651-53.

preme Court recognized as much in *Chimel v. California*²⁰ by putting a stop to searches of residences incident to the arrests of occupants (265). Before *Chimel*, officers were converting at-home arrests into exploratory searches of residences without seeking or obtaining a search warrant. Unhappy with the hazards posed by that doctrine, the Court limited the permissible scope of a search incident to arrest to the arrestee and the area within his immediate reach.

Far more often than not, the availability of that type of doctrinal move for keeping pretexts at bay escapes the Court and its observers.²¹ Slobogin's brief overview of pretexts follows *Horton v. California*.²² *Horton* arguably subjects the plain-view doctrine to pretext by permitting officers to execute a search warrant and seize evidence they fully expected to find but failed to name in their warrant affidavit (154). *Horton* may be a clear and high example of the pretext problem, but that case begins and ends what should have been pressed throughout the book. For example, Slobogin gives us *Washington v. Chrisman*,²³ where an officer entered his arrestee's dorm room and seized evidence of drug use. Although the officer claimed the right to stay at the arrestee's elbow, he abandoned that position only to rejoin it after spotting drugs from the hall. Was the entry to search the room? Does the greater right (to stay at the arrestee's elbow) include the lesser (the right not to)? If the greater does include the lesser, is the potentiality for abuse of the doctrine excessive? These questions are the office of pretexts and should be so described. So, too, cases such as *Chambers v. Maroney*,²⁴ *United States v. Robinson*,²⁵ *Rawlings v. Kentucky*,²⁶ *Florida v. Wells*,²⁷ *New York v. Harris*,²⁸ and *Maryland v. Buie*²⁹ show up in Slobogin's notes and problems. Each case at least nominally exposes a particular constitutional doctrine to pretext. If we do not like what police are doing in those cases, then we should ask, as Haddad would, whether police demonstrated the intent to rely on the doctrine in question, and if their having done so does not dispel our concerns about abuse of the doctrine, then we should consider altering the doctrine.

Shortly after the note on pretexts is a section on governmental surveillance of oral communication, which provides pieces of *Olmstead v.*

20. 395 U.S. 752 (1969).

21. *E.g.*, *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980) (a search "incident to" arrest may precede the arrest if there is probable cause for the arrest prior to the search; that is, the search is valid even without the officer's first demonstrating the intent to arrest).

22. 496 U.S. 128 (1990).

23. 455 U.S. 1 (1982); SLOBOGIN, *supra* note 3, at 273.

24. 399 U.S. 42 (1970); SLOBOGIN, *supra* note 3, at 279.

25. 414 U.S. 218 (1973); SLOBOGIN, *supra* note 3, at 276.

26. 448 U.S. 98 (1980); SLOBOGIN, *supra* note 3, at 547.

27. 495 U.S. 1 (1990); SLOBOGIN, *supra* note 3, at 285.

28. 494 U.S. 14 (1990); SLOBOGIN, *supra* note 3, at 554.

29. 494 U.S. 325 (1990); SLOBOGIN, *supra* note 3, at 271.

United States,³⁰ the Federal Communications Act of 1934 (FCA), *Nardone v. United States*,³¹ *Berger v. New York*,³² *Katz v. United States*,³³ and Title III and its amendments (173-76). This is fine, but the relationship between Congress, the Court, and state enforcers could be clearer, as could the answer to what seems an inevitable question—why *Katz* was not protected by the FCA. To have noted the fact that *Katz* involved a listening device that was an “interception” (and proscribed as such by Title III but not its predecessor, the FCA), but not a “wiretapping,” might have made this discussion of the law’s growth more complete.

As does a previous section on profiles (law enforcement’s stereotypes that make suspects out of anyone who shares traits with known criminals), the section on electronic surveillance peppers us with uninterpreted data (143-47, 177). Slobogin tells us wiretaps are both expensive and productive. Yet, he fails to tell us whether a 29% conviction rate is good enough; whether 107 people are too many to be intercepted by a single intercept order; and whether \$57,643 is too much money for the return it yields. And how accurate should a profile be to recommend its use? If half of Baltimore’s black males between eighteen and thirty-five are “under some form of criminal justice restriction,”³⁴ does that mean the other half is law-abiding? That they are criminals? Or does it tell us nothing at all about them? The numbers are interesting, but what do they mean?

Next, Slobogin offers thoughtful, definitive sections on what it means to “search” and “seize.” To embellish Supreme Court pronouncements on the grammar of searches, Slobogin reproduces a portion of his published empirical study.³⁵ In that study, he argued that if a search occurs when governmental observation invades the movant’s reasonable expectation of privacy, then deciding whether a search occurs is an empirical question whose answer should serve as “social authority” (read, “law”) (205-6). In other words, if the Court is going to reflect rather than dictate our expectations, then we should identify systematically what we expect. With that insight in mind, Slobogin asked a group—mostly students—to rate the intrusiveness of various governmental quests for evidence. While he admits to picking the subjects in a way that may have excessively tilted the results, still his study provides a far more accurate reflection of privacy ex-

30. 277 U.S. 438 (1928).

31. 308 U.S. 338 (1939).

32. 388 U.S. 41 (1967).

33. 389 U.S. 347 (1967).

34. SLOBOGIN, *supra* note 3, at 145 (quoting William Raspberry, *Rules Different for Young Blacks*, WASH. POST, Dec. 30, 1992, at A19).

35. SLOBOGIN, *supra* note 3, at 201-05 (reproducing Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727 (1993)).

pectations than the unidentified sources on which the Court relies. Specific examples which offend the public far more than the Court are the government's use of informers and government's perusal of bank records (203).

Slobogin is definitely onto something, but surveys are not the only source of public opinion on our expectations of privacy. The positive law is the other source I have in mind.

At its inception, I believe, *Katz*³⁶ was meant to supplement, not supplant, property law; and to the extent that pre-*Katz* cases such as *Jones v. United States*,³⁷ *Silverman v. United States*,³⁸ *Chapman v. United States*,³⁹ and *Warden v. Hayden*⁴⁰ made any other reading of *Katz* possible, then those cases, or those interpreting them, were wrong.⁴¹ *Katz* solved the narrow problem posed by modes of eavesdropping that the law of trespass could not adequately regulate. *Katz*'s solution was that proof of a governmental trespass into a constitutionally protected area no longer would be a necessary condition to Fourth Amendment protection against quests for evidence.⁴² *Necessary, no; sufficient, yes.*⁴³ It follows that the positive laws not only of property, but of crime, tort, and contract should control the lion's share of cases that address when a search occurs, whose interest it invades, and who may privately authorize such a search.

The Court purports to recognize this when it says that our expectations of privacy "must have a source outside of the Fourth Amendment."⁴⁴ That dictum notwithstanding, the positive law remains relevant, but dilute—mentioned for unstated reasons and with inconsistency from case to case and justice to justice.⁴⁵ Property law's status, for example, slides awkwardly between "weighty" and "principal,"⁴⁶ and no status at all.⁴⁷ A more formal and less erratic acknowledgment of "expressed expectations of privacy before resorting to unexpressed ones would not only make

36. 389 U.S. 347 (1967).

37. 362 U.S. 257 (1960).

38. 365 U.S. 505 (1961).

39. 365 U.S. 610 (1961).

40. 387 U.S. 294 (1967).

41. See Daniel B. Yeager, *Search, Seizure, and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993).

42. *Katz*, 389 U.S. at 352-53.

43. It is not that property rights are "only marginally relevant" to Fourth Amendment cases, the Court recently explained; rather, as *Hayden* and *Katz* recognized that "protection of privacy" is the "'principal' object of the Amendment," property no longer is "the sole measure" of protection. But this is not to say, added the Court, that "this shift in emphasis had snuffed out" the relevance of property law to Fourth Amendment cases. *Soldal v. Cook County*, 113 S. Ct. 538, 544-45 (1992).

44. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

45. Yeager, *supra* note 41, at 253.

46. *Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring).

47. *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984) ("[T]he common law of trespass furthers a range of interests that have nothing to do with privacy . . .").

Fourth Amendment litigation more predictable, but more protective as well—at least where the positive law identifies an interest that a reviewing court could otherwise . . . ignore.”⁴⁸

My point here is not to undermine the value of Slobogin’s survey. Indeed, I would rather depend on his empirical account of how the public assesses various intrusions than wait for the Court’s pronouncements, which have come from out of nowhere (though I admit that the Justices, no less than those surveyed by Slobogin, are native speakers of English whose utterances are evidence of what we mean by, and how we use, the word “privacy”). My point is that the positive law, too, is a source of hard data about expectations, many of which relate to the right to exclude others.

When Slobogin turns from defining searches to defining seizures, he hedges about whether a seizure occurs when the government removes contraband from a defendant’s possession. He says that the word “seizure”—which covers a “meaningful interference with an individual’s possessory interests”⁴⁹—arguably is inapposite when possession itself is unlawful.

I disagree. One might argue the inapplicability of the word “seizure” to contraband, but not very well. Only the most crabbed understanding of “possession” would hold that the government’s use of contraband to which it *can* obtain title is severable from the manner in which that claim is asserted. A defendant

who obtains suppression but not return of the property has obtained a remedy *despite* the government’s superior interest in the property. The reason the government cannot use the evidence in such a case is that it went about asserting its interest unlawfully, much as a victim of trespass must pay damages to her intruder if the victim’s manner of ejection exceeds those legally prescribed. When government acts unlawfully, one incident of rightful possession—admissibility—is lost. There, the prior wrongful possessor . . . can rely on prior possession to effect exclusion. So too, when government lawfully searches for and seizes evidence in the defendant’s possession, it receives the full panoply of rights that a superior, even if temporary, possessory interest confers, including admissibility at trial.⁵⁰

Under any other view, police could, for example, trespass onto a property owner’s “open field” (à la *Oliver v. United States*⁵¹ or *United States v. Dunn*⁵²) and, after seizing plants on a wild, uninformed guess as to their identity, or after seizing the plants simply because they are unpleasant to

48. Yeager, *supra* note 41, at 251-52.

49. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

50. Yeager, *supra* note 41, at 275 (citations omitted).

51. 466 U.S. 170 (1984).

52. 480 U.S. 294 (1987).

look at or smell, admit them at the property owner's trial. That cannot be the law. The fact that the seized plants turn out to be contraband means only that the property owner is denied the remedy of replevin.

In the same passage, Slobogin goes on to say that the Court "appears" to have held or "assumed" otherwise in *United States v. Jacobsen*,⁵³ where DEA agents destroyed a trace amount of cocaine in a test to determine whether it was cocaine. Despite Slobogin's ambivalence, the Court clearly held that the DEA "seized" the cocaine. What is nonsense is the Court's explanation of that holding. The powder's illegitimate character did not make the DEA's action something other than a seizure, given that the Court called Jacobsen's right to the cocaine a "protected property interest."⁵⁴ True, the tiny, "unnoticed" quantity of powder destroyed made the infringement on that interest "de minimis."⁵⁵ That was enough to degrade or trivialize the seizure into scare quotes, but not enough to crowd out the seizure altogether.⁵⁶ Accordingly, any evidence taken or destroyed without a sufficient antecedent justification has been "seized" (though not necessarily unreasonably), even a tiny amount of contraband. And nothing in the Fourth Amendment, its plain-view doctrine, or *Jacobsen* implies otherwise.

Slobogin ends this passage by telling us that "finding that a 'seizure' of property has occurred is seldom of much use to the defendant" (195). Empirically, I take this as true, but the fact that none of the cases in which this issue arises involve seizures unsupported by probable cause or reasonable suspicion makes no difference to what it means to "seize." Certainly the Court's few cases on seizures of "things" could be clearer. Not only do those cases fail to instruct on what it means to "possess" something, but also, as Slobogin points out, the definition they employ is inadequate to deal with conversations.⁵⁷ We do not "possess" conversations; and they may be intercepted without interfering with the speakers' freedom of movement. Yet, it is *because of* the inadequacies of the Court's opinions that this slippery area of Fourth Amendment law deserves more than the single page it gets here from Slobogin.⁵⁸

Another minor difficulty with Slobogin's search-and-seizure chapter is his view on the *Terry v. Ohio*⁵⁹ line of cases. In addition to his failure to offer specific illustrations of what *Terry* would allow that Professor Sundby's theory would not, I wonder whether Slobogin's decoupling of the right to seize from the right to search is the soundest approach (232-

53. 466 U.S. 109 (1984).

54. *Id.* at 125.

55. *Id.*

56. *Id.* at 125 n.28.

57. SLOBOGIN, *supra* note 3, at 195 n.10.

58. See also SLOBOGIN, *supra* note 3, at 314-21 (more on seizures of property, especially the law of forfeitures).

59. 392 U.S. 1 (1988).

33). I lift this from Justice Harlan, who wrote separately in *Terry* to express his view that the right to frisk follows automatically from the right to stop.⁶⁰ Indeed, the behaviors are so intertwined that often, as it was in *Terry*, it is the frisk that alerts us to the fact that a stop has taken place. These two behaviors converge because we apparently have dispensed with “field interrogation”⁶¹ as a prerequisite to the frisk. To be sure, students appreciate the nice separation of seizure issues from search issues. But, just as criminal law texts that approach *mens rea* by separating intentions from actions⁶² use a strategy that is false to what it means to act, so too is a text that separates stops from frisks false to the context of *Terry*, which, despite its explicit narrowness, ultimately authorized police to make two types of intrusions at once.

Later in his chapter on search and seizure, Slobogin posits that *United States v. Chadwick*⁶³ includes the “open question” of whether Chadwick could have been arrested and his footlocker searched incident to his arrest (278). I disagree. Were the footlocker unlocked (which it was not) and the search contemporaneous with the arrest (which it was not), then both the search and the arrest would be authorized by *Chimel*,⁶⁴ so long as Chadwick possessed the drug-packed footlocker (which he did). What is an open question—or what Justice Scalia has urged us to see as one⁶⁵—is whether opaque containers can be searched on probable cause *without* reference to the power to arrest (281).

My last quibble with Slobogin’s massive search-and-seizure chapter is the minor role he gives written departmental statements of policy in the control of police discretion. Understating the importance of a department’s having and following its own rules will increase pretextual actions. Those actions are evident in the context of vehicle searches—the subject of *New York v. Belton*,⁶⁶ *California v. Acevedo*,⁶⁷ and *Florida v. Wells*⁶⁸ (277, 281, 285). Those cases, among others, give police too much leeway in their dealings with motorists. Professor LaFave’s *oeuvre* on administrative control of discretion could have helped here,⁶⁹ particularly with Slobogin’s discussions of the impoundment and inventorying of vehicles. It

60. *Id.* at 31-34 (Harlan, J., concurring).

61. *See id.* at 7, 11, 19 n.16, 34.

62. *E.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 171, 204 (6th ed. 1995).

63. 433 U.S. 1 (1977).

64. 395 U.S. 752 (1969).

65. *See California v. Acevedo*, 500 U.S. 565, 580-85 (1991) (Scalia, J., concurring in the judgment).

66. 453 U.S. 454 (1981).

67. 500 U.S. 565 (1991).

68. 495 U.S. 1 (1990).

69. *E.g.*, Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990).

would have been instructive to have, for example, a word after *Wells* on how cases like *Colorado v. Bertine*⁷⁰ and *Illinois v. Lafayette*⁷¹ might have led to standardized, *written* departmental regulations becoming a necessary condition of the constitutionality of certain police actions (286).⁷²

B. Confessions

Slobogin superbly handles confessions, although he and the commentators he enlists overlook *Miranda v. Arizona*'s⁷³ only remaining virtue: its effect on police, not on suspects. As Professor Dripps has argued:

[T]he warnings have contributed generally to a more humane police culture, and they surely impose some limits on police tactics in specific cases. The reading of rights affects the questioner, even if it glances off the suspect. Only a corroded conscience could live with reading the *Miranda* card by the glare of the arc lamp. And the law-abiding police interrogator must tread rather lightly; too much pressure and the suspect may invoke the right to counsel.⁷⁴

Moreover, none of Slobogin's commentators adequately opposes the Court's obsession with compulsion, which, for reasons that are unclear to me, is required at every step of analysis in its confessions cases. Those cases tolerate "subtle compulsion"⁷⁵ and insist on "compelling influences"⁷⁶ and a suspect's objective experience of "coercion"⁷⁷ before *Miranda*'s presumption of compulsion kicks in.⁷⁸

Professor Stuntz, whom Slobogin quotes, also overplays the importance of compulsion in his reconciliation of the Court's corpus of decisions.⁷⁹ Stuntz endorses police deception of suspects because it poses no confess-or-lie dilemma; that is, deception and trickery are okay because they do not give suspects the impression that there is no right to silence (378). Thus a deluded suspect such as Butler, who, as a true American, apparently believed only written agreements are binding, was treated fairly be-

70. 479 U.S. 367 (1987).

71. 462 U.S. 640 (1983).

72. See LaFave, *supra* note 69, at 456-57.

73. 384 U.S. 436 (1966).

74. Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591, 632 (1990) (footnote omitted).

75. *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980).

76. *Arizona v. Mauro*, 481 U.S. 520, 529 (1987).

77. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990).

78. See Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 69-70 (1990).

79. SLOBOGIN, *supra* note 3, at 378 (citing William Stuntz, *Waiving Rights in Criminal Proceedings*, 75 VA. L. REV. 761 (1989)).

cause he felt no pressure from police. In other words, for Stuntz, Butler's ignorance was liberating, not enslaving.

*North Carolina v. Butler*⁸⁰ is a haughty decision, made no less so by Stuntz's defense of it. A misinterpreted *Miranda* warning, "without more," does not demonstrate an unpressured encounter, far from it. In fact, Butler's botching of the oral-written distinction is more likely a symptom of custody (which by definition is pressure-filled) than of a tactical move by a swaggering, but misinformed, shlub. Determined to stand up to the pressures of custody, Butler's simultaneous refusal to sign a waiver form and willingness to orally incriminate himself well may signify a desperate attempt to fend off interrogators. In other words, the clumsiness of Butler's strategy undercuts it as a knowing and intelligent relinquishment of a constitutional right and demonstrates compulsion to waive more readily than it demonstrates an unconstrained, spontaneous speech act. The fact that Butler sounds strategic to Stuntz is puzzling given the conditions under which the "strategy" was constructed.

Furthermore, Stuntz's reliance on the confess-or-lie dilemma papers over the fact that police-imposed pressure accounts only partially for *Miranda* and is not an essential component of *Miranda*'s operation. *Miranda* expresses more than a need to exclude compelled and unreliable confessions. It strikes additionally at the secrecy of police-suspect encounters, which adversarial systems can re-create in only the motliest fashion.⁸¹ And, while the values served by *Miranda* are not "necessarily divorced from the correct ascertainment of guilt"⁸² (a function that is "nowhere mentioned in the constitutional text and never articulated in the legislative history"),⁸³ *Miranda*'s "relationship to accurate fact-finding is indirect and often insubstantial."⁸⁴

Much more centrally and profoundly, *Miranda* expresses our belief in a complex of soft variables—of dignity, privacy, equality, consent, respect, adversariness, and a preference for enlightened investigative techniques that minimize pretrial punishment.⁸⁵ Pressed into service of this pastiche of values, the versatile *Miranda* starred in the 1960s' "morality play in which large-scale social forces, having little or nothing to do with criminal law, were joined in combat."⁸⁶ As Slobogin points out in an ex-

80. 441 U.S. 369 (1979).

81. Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 706 (1988); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 7-8 (1986).

82. *Withrow v. Williams*, 113 S. Ct. 1745, 1753 (1993).

83. Dripps, *supra* note 74, at 593.

84. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1775 n.233 (1991).

85. Daniel B. Yeager, *Categorical and Individualized Rights-Ordering on Federal Habeas Corpus*, 51 WASH. & LEE L. REV. 669, 691 (1994) (citing *Withrow*, 113 S. Ct. at 1753).

86. Louis M. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 442 (1980).

cerpt from Professor Strauss, “Traditional constitutional theory calls for courts to admit that they are not very good at finding the facts that bear on large-scale social problems; *Miranda* made essentially that admission about facts of a certain category of particular cases” (351). Only by reducing *Miranda*’s thick meaning to a flat ban on compulsion-in-fact (as well as by adopting a too-narrow notion of “compulsion”) can we accept the waivers of folks such as Butler and Burbine,⁸⁷ the absence of custody in *Berkemer v. McCarty*⁸⁸ and *Oregon v. Mathiason*,⁸⁹ the absence of interrogation in *Illinois v. Perkins*,⁹⁰ the exceptions of *New York v. Quarles*⁹¹ and *Oregon v. Elstad*,⁹² and the fruits of the pesky interrogation in *Miller v. Fenton*.⁹³

C. Remedies: Limitations on the Exclusionary Rule

Slobogin’s materials on remedies are conventional and first-rate. He does a particularly fine job in setting out the operation of damages suits, although his writing there is uncharacteristically compressed (504-11). When he turns to the familiar arguments over the exclusionary rule, he identifies a strong, and to my mind, new basis on which to oppose deterrence of police misbehavior as the driving force behind the rule: police have no idea what they are doing. I doubt that anyone would seriously argue that as a matter of social policy, a police force with only a slightly better than random chance of understanding what they are allowed to do should be exempt from the exclusionary rule. Unfortunately, however, Slobogin buries that insight in a footnote, depriving it of much of its zip.⁹⁴

There is one other wrinkle in the fabric of a deterrence-based theory of exclusion that Slobogin sloughs off. I assume, *arguendo*, that remedies here—if not where procedure originates, in the substantive criminal law—are instruments for deterring would-be wrongdoers rather than for expressing indignation toward wrongdoers-in-fact. Even so, I see no reason why exclusion must *achieve* its stated purpose to justify its existence. Whether or not one is persuaded that unintentional wrongs are deterrable, the susceptibility of that proposition to proof is less important than the aspirations that the exclusionary rule—or the felony-murder rule, the death penalty, or any sanction for that matter—represents.⁹⁵ Put another

87. SLOBOGIN, *supra* note 3, at 393 (referring to defendants in *North Carolina v. Butler*, 441 U.S. 369 (1979) and *Moran v. Burbine*, 475 U.S. 412 (1986)).

88. 468 U.S. 420 (1984); SLOBOGIN, *supra* note 3, at 352.

89. 429 U.S. 492 (1977); SLOBOGIN, *supra* note 3, at 353.

90. 496 U.S. 292 (1990); SLOBOGIN, *supra* note 3, at 362.

91. 467 U.S. 649 (1985); SLOBOGIN, *supra* note 3, at 365.

92. 470 U.S. 298 (1985); SLOBOGIN, *supra* note 3, at 555.

93. 796 F.2d 598 (3d Cir. 1986); SLOBOGIN, *supra* note 3, at 383.

94. SLOBOGIN, *supra* note 3, at 498 n.4.

95. See Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of A Firmative Duties To Help Strangers*, 71 WASH. U. L.Q. 1, 54-57 (1993).

way, unless exclusion *increases* police misbehavior (which I am sure it does not), then the validity of exclusion's deterrence goal is not necessarily an empirical matter. The exclusionary rule may be defended on purely moral grounds—for its goals and symbolic value, not for its accomplishments.

The theoretical underpinnings of exclusion behind him, Slobogin's treatment of a limit on exclusion—the “fruit of the poisonous tree” doctrine—divides the exceptions to exclusion into the three groups the Court has given us: 1) evidence that was acquired independently of constitutional error; 2) evidence that inevitably would have been obtained despite constitutional error; and 3) evidence that is too loosely connected to constitutional error to justify its exclusion.

The first of the three—the independent source doctrine—is familiar from *United States v. Wade*,⁹⁶ which ruled on, *inter alia*, the propriety of an in-court identification that follows an inadmissible out-of-court identification. Here it would help were Slobogin to alert us that we are dealing with a familiar concept, the foundation for which could have been established even earlier in his text than *Wade*; that is, by including in the chapter on searches, and then alluding to here, *Silverthorne Lumber Company v. United States*⁹⁷ and *Goldman v. United States*.⁹⁸

Slobogin's version of the second limitation on the scope of the exclusionary remedy—the inevitable discovery rule—is incomplete. Without considering some of the lower court cases (an excellent account of which appears in Professor LaFave's treatises)⁹⁹ or the facts they confront, we get no feel for how the rule would cope with more problematic cases. Could *Nix v. Williams*¹⁰⁰ be read to authorize, for example, the gathering of evidence where officers apply for a warrant, then break down the search victim's door before the magistrate makes her decision? Read woodenly, I suppose it could, but we know (hope?) that is not what the Court had in mind, unless the gamble itself is seen as a sufficient deterrent. Also, an extended use of the word “inevitable” would permit spurious readings of human behavior, depending on the scope given to hard cases such as *United States v. Ceccolini*¹⁰¹ and *United States v. Crews*,¹⁰² to which Slobogin dedicates too little of his attention.

96. *United States v. Wade*, 388 U.S. 218 (1967); SLOBOGIN, *supra* note 3, at 443.

97. 251 U.S. 385 (1920); SLOBOGIN, *supra* note 3, at 485, 548.

98. 316 U.S. 129 (1942) (no exclusion of statements overheard when trespass into defendant's office did not facilitate later, nontrespassory installation of listening device on wall of adjoining office).

99. WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a), at 378-88 (2d ed. 1987 & Supp. 1995); WAYNE R. LAFAVE & JEROLD H. ISRAEL, 1 CRIMINAL PROCEDURE § 9.3, at 739-42 (1984 & Supp. 1991).

100. 467 U.S. 431 (1984); SLOBOGIN, *supra* note 3, at 556.

101. 435 U.S. 268 (1978); SLOBOGIN, *supra* note 3, at 553.

102. 445 U.S. 463 (1980); SLOBOGIN, *supra* note 3, at 562.

As I stated above, the third limitation on the exclusionary rule—the attenuation exception—allows in evidence acquired in violation of the defendant's constitutional rights if the connection between the violation and the discovery of the evidence is weak. As the Court and all other principal authorities before him have done, Slobogin traces the idea to *Nardone v. United States*¹⁰³ (348).

But, and I crib this from a previously uncited student work, all *Nardone* did was restate the independent-source exception established in *Silverthorne*.¹⁰⁴ The first half of the operative language from *Nardone*, which Slobogin quotes, reads: "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."¹⁰⁵ I recognize that the dictionary meanings of "attenuated" ("weakened in intensity, force, effect, or value")¹⁰⁶ and "dissipate" ("to destroy or dissolve completely, undo, annul")¹⁰⁷ describe something other than independence, which suggests total disconnection. I also admit that the use of the linking verb "become" in the above-quoted passage furnishes additional proof that *Nardone* might have a distinct exception in mind. "Become," after all, denotes a passage of time, which is in no way a condition of independence.

Unless, that is, these words are being used (however awkwardly) in a special, rather than ordinary or dictionary, sense. Put another way, in this context "attenuated," "dissipate," and "become" together may be meant to explain the operation of the independent-source exception and not to introduce anything new. So understood, an independent source attenuates or dissipates the taint of a prior constitutional violation; it weakens or annuls an otherwise uninterrupted chain between the violation and the evidence so that the law deems the evidence independent of the violation.¹⁰⁸

This plausible, but perhaps confusing, linguistic strategy is more attractive if we do not leave half-said the pertinent passage from *Nardone*, which goes on to say: "[T]he trial judge must give opportunity . . . to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."¹⁰⁹ This language appears immediately after what I quoted above. Locat-

103. 308 U.S. 338 (1939).

104. Brent D. Stratton, Comment, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139 (1984).

105. *Nardone*, 308 U.S. at 341.

106. THE OXFORD ENGLISH DICTIONARY 550 (1970).

107. *Id.* at 510.

108. Stratton, *supra* note 104, at 153-54.

109. *Nardone*, 308 U.S. at 341.

ing it there undermines any claim that “attenuation” and “independence” are distinct bases of admissibility, instead of alternative descriptions of what it means for evidence to be independent of constitutional error.

An attentive reading of the subsequent decisions on point over the next thirty-five years reveals that none said otherwise, including *Wong Sun v. United States*.¹¹⁰ In that case, the Court concluded that admissibility was not simply a question of but-for causation, but one of “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”¹¹¹ “Exploitation” went unexplained, as did how that term changed or differed from, if at all, the attenuation doctrine suggested in *Nardone*. We did learn from *Wong Sun* that a defendant’s intervening act of free will yields evidence that is attenuated,¹¹² but it was more than a decade later, in *Brown v. Illinois*,¹¹³ that the Court first told us just how this works. And though I am certain that *Brown* did finally establish a distinct basis of admissibility for attenuated evidence (evidence is attenuated if police behave *almost* constitutionally),¹¹⁴ even there the Court lapsed into using the attenuation and exploitation formulas interchangeably,¹¹⁵ without a word on their relation. Whether the doctrine of attenuation got this way through subversive or simply spurious interpretation is unclear; what is clear is that the two different meanings given “attenuation” in *Brown* and *Nardone* lack even a remote family resemblance. Thus, contrary to popular opinion, the distinct, contemporary meaning of “attenuation” originated somewhere other than in *Nardone*.

III. CONCLUSION

Much of what I have described in this review as “slightly flawed or incomplete” becomes much less so if one reads the text in conjunction with the teacher’s manual. I have not read it that way because I believe a text should convince with its own intensity and not by reference to outside sources, particularly to a manual that is by design kept from its intended audience (here, students). Solely for the sake of economy, I have spent more time on the few areas of the text with which I disagree, rather than on the many with which I do not. Indeed, none of the gripes I have raised here, alone or together, make Slobogin’s text anything less than first-rate.

110. 371 U.S. 471, 486-91 (1963); see *United States v. Wade*, 388 U.S. 218, 241-42 (1967); *Lanza v. New York*, 370 U.S. 139, 145-47 (1962); *Costello v. United States*, 365 U.S. 265, 280 (1961).

111. *Wong Sun*, 371 U.S. at 488 (quoting JOHN M. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

112. *Id.* at 486.

113. 422 U.S. 590 (1975).

114. *Id.* at 604.

115. Stratton, *supra* note 104, at 148.

My students agree. In their course evaluations, they uniformly praised Slobogin for his consistent evenhandedness and “objectivity,” despite my efforts to convince them that we were entitled to full, unobstructed views of what he really thinks. Although his 120 problems contain only unembellished conclusions, the students quite handily generated the Justices’ defenses of and attacks on those conclusions. So I suppose it is true that technical legal knowledge rarely gets us anywhere that knowledge of another kind cannot.¹¹⁶

All of us were improved by this three-credit vacation from the sometimes numbing effect of cases and the routine discussions they tend to inspire. We likewise enjoyed together the methodical, hornbook-like introductions to chapters, sections, and subsections and the unorthodox sources and intradisciplinary orientation (although there is no philosophy)¹¹⁷ that distinguish the text. *Criminal Procedure: Regulation of Police Investigation* is a serious book by a serious scholar—a true heir apparent—whose sharp break from law text conventions is as impressive as it is imaginative.

116. See Daniel Yeager, MARLOWE’S FAUSTUS: CONTRACT AS METAPHOR?, 2 U. OF CHI. LAW SCHOOL ROUNDTABLE 599, 601 (1995).

117. See Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1630-33 (1993) (mapping philosophical strategies onto a Supreme Court case on the “voluntariness” of a confession).