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Teaching a Course on Regulation of Police Investigation—A Multi-Perspective, Problem-Oriented Course

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TEACHING A COURSE ON REGULATION OF POLICE INVESTIGATION—A MULTI-PERSPECTIVE, PROBLEM-ORIENTED COURSE

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The subject of criminal procedure is typically divided into two courses. The first is often called "Police Practices" or "Investigation," and focuses on the rules governing police use of searches and seizures, interrogation, identification procedures, and undercover activities. The second is usually called "Adversary Process" or, colloquially, "Bail to Jail," and is the criminal analogue to civil procedure. This Article is about teaching the first course. It describes my casebook, *Criminal Procedure—Regulation of Police Investigation: Legal, Historical, Empirical and Comparative Materials*, the fifth edition of which was published in 2012.[1]

As the first part of its subtitle makes clears, *Regulation of Police Investigation* focuses on the rules governing police investigative procedures. Like every other book of this type, it covers constitutional jurisprudence interpreting how the Fourth, Fifth, Sixth, and Fourteenth Amendments govern the police. But *Regulation of Police Investigation* is also aimed at accomplishing several other objectives, many of which call for different types of materials than those found in the usual text addressing the investigative stage of the criminal process.[2] First, the book seeks to acquaint the student with the world of the police. Second, it devotes attention to the various mechanisms that could be used to regulate the police other than judicial interpretation of the Constitution. The book's subtitle describes three other objectives of the book: providing historical background to the rules governing police investigation, reporting empirical work investigating their impact, and giving students some idea of how other countries regulate the police.

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1. CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE—REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS (5th ed. 2012).

2. Some of the following discussion is taken from the *Teacher's Manual*. CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE—REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS: TEACHER'S MANUAL (5th ed. 2012) [hereinafter TEACHER'S MANUAL].

A sixth, and perhaps the most important, goal of *Regulation of Police Investigation* is to promote the lawyering skills of students. The primary method of doing so is through inclusion of problems, of which there are 123 in the fifth edition. Other practice-oriented materials include a negotiation exercise and documents from an actual case that allow review of many of the issues discussed in the course.

The rest of this Article briefly provides examples of how the book tries to achieve each of these six objectives.

I. THE WORLD OF THE POLICE

Many criminal procedure texts contain little or nothing about this topic, apparently on the assumption that information about police habits and attitudes is common knowledge, or is unimportant for legal purposes. *Regulation of Police Investigation* assumes to the contrary that the law enforcement ethos is complex and occasionally mysterious to those who are not police and that, without some understanding of this environment, discussion about regulatory approaches may verge on the irrelevant. Thus, the first forty-plus pages of the book are devoted entirely to historical and sociological materials concerning the police and their practices, and additional materials on this subject are scattered throughout the book where appropriate.

The first part of Chapter One, for instance, includes a description of how the decentralized American police system (today touting over 17,000 separate police agencies) grew out of concern about the centralized French "spy" system. This development may have reduced overall government power but also helps explain why this country has had to rely on federal constitutional jurisprudence for uniform rules governing the police. This section also reminds students that organized police forces did not come into being in this country until the middle of the nineteenth century,[3] a fact that has significant implications for originalist interpretations of the Fourth, Fifth, and Sixth Amendments. The section continues with information about the scope of police training (particularly on legal matters), the demographics and salary structures of the police forces, and the typical police officer's day. It ends with excerpts from sociological literature on police attitudes, police use of violence and deception, and the police and race. The overarching themes of these materials focus on why we might need to regulate the police and why it might be hard to do so.

3. *See generally* Wesley M. Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 447–48 (2010) ("Professional police departments did not exist in the eighteenth century, and Framing Era constables did not investigate crimes.").

II. SOURCES OF LEGAL REGULATION

In this country, we tend to assume that the federal courts should be the source of most rules governing law enforcement. Yet state courts, legislatures, police departments, and even international organizations provide alternative, or at least supplemental, sources of law. Accordingly, Chapter One devotes space not only to the incorporation doctrine (which is often the only issue in this area covered by other books) but also provides material on the revolution in state constitutional law, the possibility of relying on domestic legislation and international treaties as regulatory sources, and police promulgation of rules. Later chapters occasionally note legislative and police enactments that attempt to implement or compete with court decisions. For instance, the FBI guidelines on use of stings and informants are described in some detail in the chapter on undercover operations.

The principle vehicle for acquainting the students with this plethora of regulatory sources is the case of *Tennessee v. Garner*,[4] set out as a "Problem" in Chapter One. After first exploring whether the Supreme Court should have the authority to impose its rule governing police use of deadly force on the police departments of all fifty states (the incorporation issue), the materials ask the students to assume that Mr. Garner lost at the Supreme Court level. That twist allows discussion of whether he could have pursued the same claim in state court under the Tennessee State Constitution or under international law (specifically, the International Convention on Political and Civil Rights), and also triggers debates about whether legislation, at either the federal or state level, or administrative rulemaking is a better way to resolve the complicated issue of when police may use deadly force.

III. HISTORY

It is a major assumption of *Regulation of Police Investigation* that, for a number of reasons, students ought to appreciate the historical pedigree of current rules. Most obviously, under our constitutional system, history helps us decide whether doctrines, such as the right to remain silent and the exclusionary rule, are "fundamental." History also improves our understanding of why some rules are the way they are and occasionally provides some interesting alternative methods of regulation. While many casebooks ably treat the Supreme Court's cases from the 1960s onward, many do not give students much sense of what existed before that time and thus leave the impression that these rules were created almost out of whole cloth. *Regulation of Police Investigation* tries to avoid that impression.

For instance, the beginning of Chapter Two, on searches and seizures, explores the debates about whether the framers wanted the Fourth Amendment

4. Tennessee v. Garner, 471 U.S. 1 (1985).

to regulate all searches or simply aimed at prohibiting general warrants. Chapter Three, on interrogations, describes how the privilege against self-incrimination grew out of treason and heresy proceedings, which raises the question of why the privilege should apply to the prosecution of street crimes. The chapter also explains that most interrogations during colonial times were carried out by magistrates in open court, suggesting a possible alternative to *Miranda v. Arizona*.[5] Chapter Four's treatment of the right to counsel, in the context of identification procedures, notes that the right was originally meant to provide defendants legal assistance solely on matters of law not development of the facts (which is arguably what identification procedures involve). Chapter Five, on undercover operations, provides information about the "thief-taking" practices that preceded modern-day informants, who may not be that different from their historical counterparts. Finally, Chapter Six, on remedies, offers material on colonial damages actions, and the genesis of the exclusionary rule in *Entick v. Carrington*[6] and *Boyd v. United States*.[7]

IV. EMPIRICS

Until the 1970s, very little empirical work on the impact and legitimacy of the legal rules that regulate the police was available. Now, however, there exist several studies testing various judicial assumptions about police and citizen behavior, including, for instance, research concerning societal expectations of privacy, the impact of the warrant requirement, the effect of the *Miranda* warnings, the accuracy of eyewitness identification, and the efficacy of various sanctions against the police. *Regulation of Police Investigation*, again, in contrast to many books on the topic, describes much of this work, usually in summary form, occasionally through longer excerpts. The objective here is not only to give students the benefit of information that has played an increasingly important role in both judicial and legislative decision-making but also to provide an opportunity for them to practice, at least in a superficial way, evaluating facts found in the form of "data."

Thus, for instance, the students are given the results of the study I conducted with Joseph Schumacher, ascertaining lay views on the relative intrusiveness of various police investigation techniques—many of which contradict the Court's conclusions about expectations of privacy *society* is prepared to recognize as reasonable—along with commentary on the internal and external validity of this type of study.[8] The chapter on interrogation reports

5. Miranda v. Arizona, 384 U.S. 436 (1966).

6. Entick v. Carrington, [1765] 19 Howell's State Trials 1029 (Eng.).

7. Boyd v. United States, 116 U.S. 616 (1886).

8. 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).

research on the extent to which *Miranda* reduced confession and clearance rates, and the chapter on identifications describes the differing false positive and false negative rates that result from traditional "simultaneous" lineups or photo arrays and the recently popular "sequential" identification procedure. Information is also provided on research examining the efficacy of undercover operations, and the relative deterrent effect of the exclusionary rule and a damages regime.

V. OTHER COUNTRIES

Americans tend to believe that our country leads the way in the civil rights arena. But that is clearly not true with respect to some aspects of police regulation (particularly in the interrogation context). Information about practice in other countries also reminds us that our way of doing things is not inevitable; for instance, judicial review, localized police forces, and warrants issued by a judge are not the norm. That is why, as I have explained in detail elsewhere,[9] *Regulation of Police Investigation* includes descriptions of various practices not only in England and Germany (which, to the extent other books contain comparative material, are the usual foreign reference points) but also in countries like Australia, Denmark, India, and France.

Additionally, to provide context for the comparative descriptions, Chapter One provides some background on systemic differences between our "adversarial model," the "non-adversary model" of criminal procedure (which frames the European continent's approach to criminal justice), and the "family model" of criminal procedure (which provides a very rough analogue to Asian systems but is also in some ways related to the Supreme Court's "special needs" cases).[10] One lesson here is that the tension between efficiency and protection of individual rights, although relevant to the analysis of any procedural system, is heightened by American adversarialism. The non-adversary and family models represent, in theory at least, quite different procedural systems. The students work through these differences by comparing how *Miranda*'s holding would fare under Herbert Packer's "due process model" of American criminal procedure (well), his "crime control model" of

9. Christopher Slobogin, *Transnational Law and Regulation of the Police*, 56 J. LEGAL EDUC. 451, 452–55 (2006).

10. *See* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 555–78 (1973) (examining characteristics of both adversarial and non-adversary models); John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 371–91 (1970) (describing the "family model").

American procedure (not so well), the European "non-adversary model" (not well), and the "family model" (*really* not well).[11]

VI. LAWYERING SKILLS

The most important mechanism for promoting the final objective of the book is discussion of the problems. The problem method is a deservedly popular pedagogical tool because it provides students with hands-on experience applying the materials in the course.[12] The innovation in *Regulation of Police Investigation* is that most of the problems are based on Supreme Court decisions, which reduces the verbiage students have to read at the same time it exposes them to all the important cases. A side benefit of this treatment of the Court's cases is that, despite addition of the diverse materials already described, the average assignment for a fifty-minute class is less than fifteen pages.

Some of the problems, like the *Garner* and *Miranda* problems mentioned above, are best discussed as a class. But most lend themselves well to role-playing in a manner approaching the reality of a suppression hearing. I usually require each student to argue two of these problems by the end of the semester, either as a prosecutor or as a defense attorney. If the problem assignments are made well enough in advance, the discussion is of higher quality than is typically the case, and the whole class benefits. The *Teacher's Manual* provides model arguments, which I sometimes give to the class after the relevant "suppression hearings" have taken place as one method of providing feedback. Below are three examples of problems (found in the text) and the model arguments for each (found in the *Teacher's Manual*). All three problems deal with the definition of probable cause, a topic covered in Part I of Chapter Two (which is the chapter on searches and seizures).

The three problems come after the students have read an excerpt from the National Center for State Courts' unique study of the warrant process, viewed a sample warrant, and looked at material on the Supreme Court's case law in this area (including a lightly edited reproduction of *Illinois v. Gates*[13]). The first problem following this discussion, set out below, describes the facts of the Supreme Court's decision in *Spinelli v. United States*.[14] After another problem

11. *See generally* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (describing the "due process model" and the "crime control model").

12. *See* Myron Moskovitz, *Beyond the Case Method: It's Time to Teach With Problems*, 42 J. LEGAL EDUC. 241, 241–42 (1992).

13. Illinois v. Gates, 462 U.S. 213, 233 (1983) (reversing *Spinelli*'s holding that the government must demonstrate sufficiency with respect to both the basis of the informant's information and the informant's veracity, and instead holding that "a *deficiency* in one [prong] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability") (emphasis added).

14. Spinelli v. United States, 393 U.S. 410 (1969).

concerning informants (based on *Alabama v. White*[15]), the book turns to the meaning of probable cause, reasonable suspicion, and other Fourth Amendment justification standards. One of the problems following this discussion is derived from *People v. Quintero*,[16] a lesser known Supreme Court case; that problem is also set out below. Following a note on police use of profiling, another problem in this section, and the final one presented here, is based on data from a Drug Enforcement Administration courier interception program. Pay special attention to how the discussion can build on previous materials.

PROBLEM 3[17]

SPINELLI v. UNITED STATES

393 U.S. 410 (1969)

The affidavit attached to the search warrant read as follows:

> I, Robert L. Bender, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation, and as such am authorized to make searches and seizures. [In the next 13 paragraphs, the affidavit alleged that William Spinelli had been observed driving to, parking near and/or entering the apartment in the southwest corner of The Chieftain Manor Apartments located at 1108 Indian Circle Drive on August 6, August 11, August 12, August 13, and August 16, 1965.]
>
> The records of the Southwestern Bell Telephone Company reflect that there are two telephones located in the southwest corner apartment on the second floor of the apartment building located at 1108 Indian Circle Drive under the name of Grace P. Hagen. The numbers listed in the Southwestern Bell Telephone Company records for the aforesaid telephones are WYdown 4-0029 and WYdown 4-0136.
>
> William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.
>
> The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones, which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136.
>
> /s/Robert L. Bender,
>
> Special Agent, Federal Bureau of Investigation.

15. Alabama v. White, 496 U.S. 325 (1990).
16. People v. Quintero, 657 P.2d 948 (Colo. 1983).
17. SLOBOGIN, *supra* note 1, at 143–44.

Subscribed and sworn to before me this 18th day of August, 1965, at St. Louis, Missouri.

/s/William R. O'Toole

Should a warrant be issued? [The Supreme Court held 5–3 (Justice Marshall not participating) that *Aguilar*'s two-prong test was not met. *Gates* affirmed *Spinelli*'s result under its totality of the circumstances test, although somewhat reluctantly.]

MODEL ARGUMENTS AND COMMENT (FROM THE *TEACHER'S MANUAL*)[18]

Prosecution: With respect to the basis of the information prong, the confidential informant would have had to have obtained the phone numbers from Spinelli or a source close to him because, given the name they were under, the numbers could not have been obtained from the phone book. As to the veracity prong, the FBI verified that the numbers belonged to an apartment frequented by Spinelli; this corroborated more than innocent activity, since it is unusual (or at least was at that time) for an apartment to have two phone numbers. Combined with the informant's implicit admission he had played the numbers and the FBI's knowledge of Spinelli's reputation, the veracity prong is more than satisfied. At the least, these factors meet the *Gates* test, and perhaps even meet *Aguilar-Spinelli*.[19]

Defense: Starting with the veracity issue, to the extent there is any declaration against interest here it should be disregarded, since, as Skolnick points out [in an excerpt from *Justice Without Trial*[20] that preceded this problem], informants are usually promised informal immunity. Likewise, the reputation evidence is irrelevant, since the agents did not indicate how information about Spinelli's reputation was obtained; for instance, it may have come from other equally unreliable informants. Compared to the amount of corroboration in cases like *Gates* and *Draper* [*v. United States*,[21] described in *Gates*], the corroboration here was minimal. Only one fact—Spinelli's proximity to the phone number—was verified, and, as Justice Harlan pointed out for the Court, that merely showed that Spinelli *may* have used the phones for *some* purpose, not necessarily bookmaking. Finally, and most importantly, there is no way of determining how the informant came upon this information about Spinelli. This deficiency cannot be made up for by the paltry support for the informant's veracity.

18. TEACHER'S MANUAL, *supra* note 2, at 21–22.

19. The *Aguilar-Spinelli* test grew out of the Court's decisions in *Aguilar v. Texas* and *Spinelli*. Aguilar v. Texas, 378 U.S. 108, 114 (1964); *Spinelli*, 393 U.S. at 410. Notice that the students are required to make their arguments based on today's law, which means that *Gates*, not *Aguilar-Spinelli*, states the governing law.

20. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 120–27 (2d ed. 1975).

21. Draper v. United States, 358 U.S. 307 (1959).

Comment: The defense might build on this last point by asking the following questions: Why didn't the police simply get their informant to call the indicated numbers when they knew Spinelli was in the apartment, thereby obtaining first-hand information about his book-making activity? Doesn't the fact that they didn't do this suggest a lack of personal knowledge on the part of the informant, or worse, that the informant never existed (cf. note on p. 145–46 [describing cases involving non-existent informants])? Innuendo about the *Spinelli* case, never confirmed, was that the "confidential reliable informant" was an illegal wiretap. That possibility raises the issue prompted by the Note on p. 146–47 [on the Informant's Privilege]—should we force the police to produce their informants, or would that demolish the system? Arguably, the *ex parte* nature of the warrant process would protect against exposure of informants' identities, but as the NCSC study indicates, the police do not think so; they would rather lose a case than expose their C.Is. Note also the number of paragraphs in the application, which suggest [one] reason the process takes so long—police drafting warrant applications may erroneously believe they have to be lawyers.

PROBLEM 6[22]

PEOPLE v. QUINTERO

657 P.2d 948 (Colo. 1983)

While sweeping her porch on a hot day, Mrs. Bergan saw Quintero go up on the porch of the house opposite hers and stand at the front door for approximately twenty seconds, then peer in the front window for approximately the same period of time. He then left the porch and proceeded north, apparently looking at the windows on the side of the house. Occasionally looking at Mrs. Bergan, he continued walking, stopped at another house, and disappeared from Mrs. Bergan's view. She next saw Quintero about an hour later at the bus stop near her home. He was clad only in a T-shirt, having taken off his shirt and put it over a TV set. He paced nervously and tried to thumb a ride or hitchhike while waiting for the bus to arrive. Mrs. Bergan called the police station, which dispatched an officer to the location to find a possible burglary suspect. The officer arrived five minutes after Mrs. Bergan's call and asked Quintero for identification. He had none. After other officers arrived, Quintero claimed that he had bought the television set from someone in the neighborhood for $100. An officer then "frisked" Quintero for weapons, finding brown wool gloves in his back pocket. Mrs. Bergan arrived on the scene and identified herself, at which point Quintero was arrested. The television and other items found under his shirt and on his person were later found to have been stolen.

A reasonable suspicion of danger is required before the police can frisk someone. *Terry v. Ohio*, 392 U.S. 1 (1968). Did the police have such reasonable suspicion at the time Quintero was frisked? Did they have probable

22. SLOBOGIN, *supra* note 1, at 150.

cause at the time he was arrested? [The Colorado Supreme Court did not address the first question, and found, with one dissenter, that probable cause did not exist at the time of the arrest.]

MODEL ARGUMENTS AND COMMENT[23]

Prosecution: The police dispatcher had enough detail from Mrs. Bergan, and knew enough about her identity, to meet the minimal credibility test of *Alabama v. White* [which, as noted above, the students have already discussed]. And Bergan's information—to wit, Quintero's strangeness to the neighborhood, his initial behavior consistent with "scoping out" a house (cf. *Terry* [the facts of which have been described in previous material]), the incongruity of returning with a TV set an hour later, his nervousness at that time, and his apparently urgent desire to get out of the area—provided reasonable suspicion that Quintero had committed a burglary. Thus, police on the scene could rely on the dispatch report, as permitted by *United States v. Hensley*[24] [described in previous materials]. Since burglars are often dangerous (see *Tennessee v. Garner*, dissenting opinion [included in Chapter One]), the frisk was also justified, especially in light of his lack of identification. Upon finding the wool gloves (suspicious items on a hot day) and the other items under his shirt, and upon discovering that Mrs. Bergan was a local resident (and therefore presumptively a reliable reporter of his previous behavior), the officers had probable cause to arrest him for burglary.

Defense: Quintero's behavior, as described by Mrs. Bergan, is at least as consistent with attempts to find a friend's house and buy a TV there as it is with burglary; unlike in *Terry*, there were not repeated attempts to look in the windows and Mrs. Bergan's belief that his behavior was "suspicious" is not entitled to the same deference as the veteran officer's fears in *Terry*. Even if we assume that the police had enough suspicion to stop Quintero in connection with a burglary, the frisk was unjustified, since his story that he had bought the TV was not contradicted by anything the police had seen or heard at that point and since, in his disrobed state, the police could see he had no weapon. Thus, the wool gloves, and the items under the shirt, should not have been discovered and were fruit of the poisonous tree. Even knowing about these items, however, did not give them probable cause to arrest for burglary, since they still had made no effort to check out Quintero's story or ascertain whether there had been a burglary report.

Comment: Although putting this Problem here could be seen as premature given its partial focus on the *Terry* stop and frisk, the objective at this point is not to debate the pros and cons of that case (which is undertaken in Part III of this chapter), but to demonstrate two important points about probable cause that are useful for the students to know now, prior to studying the rest of this part [on the warrant and probable cause requirements] and Part II [on the scope

23. TEACHER'S MANUAL, *supra* note 2, at 23–24.

24. United States v. Hensley, 469 U.S. 221, 231–32 (1985).

of the Fourth Amendment]: (1) that probable cause *is* different from reasonable suspicion: the police could not have arrested Quintero when they first arrived, or even after they found he had no identification; and (2) the related point that probable cause can develop (and arguably did develop in this case, the Colorado court's opinion notwithstanding) through increasingly intrusive actions by the police (asking for ID, questions, frisk) each of which is justified by the requisite suspicion at the time it is taken. The class might be interested to know the U.S. Supreme Court accepted certiorari in this case (subsequently dismissed when Quintero died) to decide whether it should announce a "good faith" exception to the exclusionary rule in cases where the police believed they had probable cause but in fact did not. If, as is presumably the case, "good faith" probable cause is a lower level of certainty than probable cause, how would it differ from reasonable suspicion? Is the concept a coherent one?

PROBLEM 8[25]

The DEA Airport Surveillance Program:

An Analysis of Agent Activities (1984)

During an 8-week period in 1982 the Drug Enforcement Administration observed the airport investigations of its agents on a nationwide basis, involving the survey of approximately 107,000 passengers. Of this number, 146 people were approached by DEA agents; 120 of these were approached on the basis of a drug courier profile similar to those described above. Of the 146 contacts, 103 were searched either after consent or incident to arrest. The searches produced evidence of drug-related crime in 48 cases, or 34% of those originally stopped and 48% of those searched.

Based on this information, do DEA agents have "probable cause" to arrest a person who meets their "profile"? "Reasonable suspicion" to ask for identification and ticket, name, and business?

MODEL ARGUMENTS AND COMMENT[26]

Prosecution: The profile produced a 34% hit rate for stops and a 48% hit rate for searches; these percentages are almost identical to what we would require for reasonable suspicion and probable cause if we were to quantify those certainty levels [earlier materials on the definition of probable cause and reasonable suspicion described a study reporting how federal judges quantified these standards]. Criticisms of these profiles are misguided. They merely make explicit the types of factors police have always relied on. In *State v. Zelinske*[27] [a previous problem], for instance, it was presumably appropriate for the police to rely on the experience of previous officers who had noted (and even put in a regulation) the fact that cars with deodorizers are more suspicious than those without them. Similarly, in finding probable cause in *Gates*, the Court relied

25. SLOBOGIN, *supra* note 1, at 153.
26. TEACHER'S MANUAL, *supra* note 2, at 25–26.
27. State v. Zelinske, 779 P.2d 971, 973 (N.M. 1989).

on the "generalized" fact that people usually don't go to Florida for just one day. See also the hypothetical about Officer McFadden's burglary class [described in a footnote in previous materials]. Indeed, profiles are superior to this type of analysis, because they require the police to observe, before they can intervene, specific characteristics that have been found to be statistically predictive of drug couriers, thus reducing police discretion. Further, we can control what these factors are so that racial prejudice, etc. does not enter into the analysis.

Defense: The study is highly suspect for three reasons. First, the DEA conducted it. Second, 26 of those stopped were stopped for some reason other than meeting the profile, thus making it impossible to know whether the 34% and 48% figures represent the correct proportions of those stopped and searched on the basis of the profile (and also, by the way, rebutting the prosecution's argument that the profiles reduce discretion). Third, even if we assume the percentages are representative of the success rate for the profile, we do not know how consistent the agents were in applying it—did everyone identified as suspicious meet *all* of its characteristics? And if factors such as "nervousness" and "paleness" were included (see *Florida v. Royer*[28] [described in the note on profiling]), how were these interpreted? Assuming these methodological problems are overcome, use of profiles can still be distinguished from other situations in which the police are allowed to rely on "generalized suspicion." First, courts only allow such suspicion when the stereotype is *clearly* suspicious (compare *Gates* to *Quintero*, *Zelinske* and the kinds of factors usually incorporated in a profile). Second, unlike typical police actions, use of profiles results in the type of dragnet action described in the DEA study, where over half of the 146 people subjected to detention were innocent of crime. Such searches might be permissible when the threat is serious (e.g., hijacking, terrorism), but not here.

Comment: As the excerpt from my article indicates,[29] I believe that, in theory at least, police stops based on profiles are no different from other types of police actions. Indeed, as Professor Amsterdam has argued (see Chapter One), we should encourage police to formalize (as the Iowa State Police [in *Zelinske*] did) what they have learned from their experiences. Another reason for the courts' and the commentators' hostility toward profiles may be that they make us face up to what we mean by probable cause and reasonable suspicion: we are apparently willing to arrest or search one innocent person for every guilty one, and stop and frisk two innocent people for every guilty one. Perhaps probable cause does or should require more (as suggested by the fact that far more than 50% of those arrested are guilty and, at least for warrant-based

28. Florida v. Royer, 460 U.S. 491, 494, 507, 512 (1983).

29. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 81–82 (1991). Lest the reader is worried, based on the foregoing, that *Regulation of Police Investigation* too heavily features my scholarship, it should be noted that the references described in this Article are the only references to my work in the book.

> searches, the police are right over 75% of the time—see NCSC study, pp. 115–16; but see San Diego study [on the use of warrants], p. 117). An associated problem may be our discomfort with numbers, described so well by Professor Tribe in *Trial by Mathematics*, 84 Harv. L. Rev. 1329 (1971). But of course, Tribe was worried about use of statistics at trial; even if Tribe is right, at the investigative stage we should perhaps have a different attitude toward numbers.

The rest of the book contains similar problems. By the end of the course, students should have a pretty good understanding of how to make arguments in the suppression hearing context, using precedent and other types of information. Two other components of *Regulation of Police Investigation* further hone lawyering skills.

The first component is a negotiation exercise, the materials for which are found in the *Teacher's Manual*. The students are provided with the basic facts of a (made-up) case and the relevant criminal statutes, including potential sentences. Each student is also given "secret instructions" relevant to their role (prosecution or defense), which indicate what their boss and their client, respectively, would like to get out of a deal. Students are told to negotiate over a possible guilty plea, against the backdrop of a number of Fourth and Fifth Amendment issues, which, if resolved in favor of the defendant, would probably lead to dismissal of the case. The idea is to engage students in the strategic and predictive decision-making, which prosecutors and defense attorneys undertake daily in our plea negotiation system. This exercise also introduces ethical issues relevant to the subject matter of the book (i.e. do prosecutors have to reveal their knowledge—disclosed to them in their secret instructions—that their key witness has committed perjury in two similar cases? Do defense attorneys have to reveal facts disclosed to them in their instructions that challenge their argument against the validity of a third-party consent or disclose case law that undermines their argument about the invalidity of a warrant-based search?).

A different type of practical exercise is provided by the materials, 100 pages in all, connected with *State v. Longstaff*, found in the appendix to the book. These materials not only give the students a rich factual context for arguments but also provide examples of a search warrant affidavit, a search warrant, booking documents, the first appearance order, an indictment, motions, transcripts of a probable cause hearing and of a hearing on the admissibility of a confession, a court order denying a motion to suppress, a guilty plea agreement, and several other documents. I require the students to draft a five- or six-page memo arguing the issues in this case, due near the end of the semester. But the materials can also simply be assigned as reading and used as a review of the entire course.

VII. CONCLUSION

Every other criminal procedure "casebook" lives up to its name by including significant excerpts from scores of Supreme Court cases as well as from a smattering of lower court cases. In contrast, *Regulation of Police Investigation* reproduces a total of just over twenty judicial decisions (albeit often with less editing than is typical), with other important decisions turned into problems, as explained above. The assumption is that, by the time students get to this course, they have had plenty of practice deciphering appellate opinions. Furthermore, in a subject area as politically charged and result-oriented as police regulation, what matters most is what courts do, not what they say. Over the years, I have found that, after carefully discussing the leading cases in each area (e.g. *Katz v. United States*,[30] *Miranda*, and *Mapp v. Ohio*[31]), I often ended up using many of the Court's subsequent decisions merely as examples—in other words, as problems highlighting how the issues raised in the leading cases might play out. Thus, I believe that by giving the students all of the relevant facts as well as the result in each case (as illustrated in Part VI), the problems give students access to the most important information in the Court's secondary decisions.

Although it thus de-emphasizes the language in the Court's opinions, the book tries not to slight theoretical considerations relevant to those opinions. More so than some books, this book lays out an analytical structure that, given the Court's common law treatment of the issues, would otherwise be indiscernible to the usual student. The chapter headings and introductions following those headings attempt to give the students a clear picture of the legal landscape so they avoid getting mired in tracking down the black letter law and see immediately what the fighting issues are. Furthermore, on many of these issues, the book substitutes for the often ambiguous and constantly changing formulations of the Court excerpts from leading articles, suggesting innovative conceptual frameworks. The *Teacher's Manual* also provides "roadmaps" on searches and seizures, and interrogation analysis that can be reproduced and given to the students.

Compared to the traditional casebook, this combination of approaches in *Regulation of Police Investigation* is meant to be more intellectually stimulating on specific points, and also less boring generally, since it represents a break from the typical case-by-case analysis.[32] The eclectic mix of

30. Katz v. United States, 389 U.S. 347, 358 (1967).

31. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

32. One professor who has used the book had this to say:

> 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) that

materials should also better accommodate different learning styles.[33] Most importantly, the different perspectives offered in the book should produce students who are well-informed about the law of police regulation and are competent at putting that knowledge to use in practice.

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.

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, 1061 (1996).

33. *See generally* Eric A. DeGroff & Kathleen A. McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, 2006 BYU EDUC. & L.J. 499, 537, 540, 547–48.