CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION

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CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION

LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS

Fifth Edition

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Casebook ISBN: 978-0-7698-5964-4
Looseleaf ISBN: 978-0-7698-5963-7

Library of Congress Cataloging-in-Publication Data

Slobogin, Christopher, 1951-
Criminal procedure: regulation of police investigation : legal, historical, empirical, and comparative materials / Christopher Slobogin. — 5th ed.
p. cm. — (Legal text series)
ISBN 978-0-7698-5964-4 (case bound)
1. Criminal investigation—United States. 2. Criminal procedure—United States. 3. Police—United States. I.Title.
KF9625.S54 2012
345.73'052--dc23
2001050435

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www.lexisnexis.com

MATTHEW BENDER

(2012–Pub.3033)

PREFACE

This book is about regulation of the police and other front-line government officials engaged in the investigation of illegal activity. It focuses on four types of law enforcement techniques and practices: (1) searches and seizures; (2) interrogation; (3) procedures used to identify suspects; and (4) entrapment, and includes coverage of all significant Supreme Court decisions and many important lower court decisions through 2012. Thus the substantive scope of this book is not very different from other law textbooks that focus on police practices.

In contrast to many of those books, however, this book has several objectives beyond imparting knowledge about the substantive law. First, it seeks to acquaint the student with the world of the police. The law enforcement ethos is complex and occasionally mysterious to those who are not police. Without some understanding of this environment, discussion about regulatory approaches may verge on the irrelevant. Thus, the first forty pages of this book are devoted entirely to historical and sociological materials concerning the police and their practices (updated in this edition), and additional materials on this subject are scattered throughout the book where appropriate.

A second objective of this book is to provide the student with some idea of the various mechanisms that could be used to regulate the police. 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 1 devotes space not only to the incorporation doctrine, 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. Included, for instance, are materials on the Foreign Intelligence Surveillance Act, the Patriot Act, and other legislative provisions and executive orders that have come into being since the attacks of September 11, 2001.

The subtitle to the book, referring to historical, empirical and comparative materials, indicates several other objectives. It is a major assumption of this work 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. As the sections at the beginning of Chapters 2 through 6 illustrate, many of the issues we debate today have been around for centuries.

Until the 1970s, very little empirical work on the impact and legitimacy of legal rules regulating the police was available. Now, however, there exist several studies testing various judicial assumptions about police and citizen behavior including, for instance, investigations of 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. This book describes much of this work, usually in summary form, occasionally through longer excerpts; new with this edition, for instance, are descriptions of research on the causes of false confessions and the efficacy of different types of identification techniques. The objective here is not only to give students the benefit of information which has played an increasingly important role in both judicial and legislative decisionmaking, but also to provide an opportunity for them to practice, at least in a superficial way, evaluating facts found in the form of "data."

A fifth objective of this book is to leave students with some idea of how other countries regulate their police. 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). And, whatever its slant, information about practice in other countries 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. This book includes descriptions of various practices in England, Germany, France, Australia, India and other countries; new with this edition is information on other nations' recent approaches to the exclusionary rule. Additionally, Chapter 1 provides some background on systemic differences between various criminal justice systems so that comparisons will be made with the appropriate grain of salt.

A final objective of this book is to promote the lawyering skills of students. Most important in this regard are the problems, over 120 in number. The vast majority of these problems summarize the facts and results of Supreme Court decisions, although a few come from lower court opinions or are made up. Some of the problems are probably best used as a springboard for discussion by the full class. But most lend themselves well to role playing, in a manner approaching the reality of a suppression hearing. A different type of practical exercise is provided by the materials connected with *State v. Longstaff*, found in the appendix. These materials (from an actual case) not only give students a rich factual context for arguments, but also acquaint them with the typical documents generated during police investigation, challenges to that investigation, and the criminal process generally.

A final optional exercise, materials for which are provided to the teacher in the teacher's manual, is a Negotiation Problem, which requires students to negotiate over a possible guilty plea, against the backdrop 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

decisionmaking which prosecutors and defense attorneys daily undertake in our plea negotiation system. This problem also introduces ethical issues relevant to the subject matter of this book (ethical issues are also raised in two other places – Chapter 2's discussion of warrants and Chapter 3's discussion of post-charge interrogations).

One last introductory comment should be made about this book. 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, this book reproduces a total of 20 judicial decisions (albeit often with less editing than is typical). 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 often matters most is what courts do, not what they say. By providing all of the relevant facts, as well as the result in each case, the problems give students access to the most important information in the Court's "secondary" decisions.

Although it thus deemphasizes the language in the Court's opinions, this book tries not to slight theoretical considerations relevant to those opinions. This book lays out an analytical structure that, given the Court's "common law" treatment of the issues, would otherwise be undiscernible to the usual student. The chapter headings and introductions following those headings attempt to give students a clear picture of the legal landscape so they avoid getting mired in tracking down the black letter law and can see immediately what the "fighting issues" are. Furthermore, on many of these issues this book offers excerpts from leading articles suggesting innovative conceptual frameworks that should help students understand the often ambiguous formulations of the Court. It is hoped that this combination of approaches to theory is not only more intellectually stimulating on specific points, but also less boring generally, since it represents a break from the typical case by case analysis.

For their editorial comments on the first edition of this book, I am indebted to the late Professor William Stuntz at the University of Virginia School of Law, Professor Scott Sundby from Washington & Lee Law School, and Professor Andrew Taslitz from Howard Law School. For their suggestions, I would like to thank Professors Frank Allen, Jerold Israel, and Kenneth Nunn of Florida College of Law, and Professor Tracey Maclin of Boston University School of Law.

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November, 2012

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