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Rachel Harmon

University of Virginia School of Law, rharmon@virginia.edu

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RECONSIDERING CRIMINAL PROCEDURE: TEACHING THE LAW OF THE POLICE

RACHEL HARMON*

Around the country, few legal topics seem more relevant than how to govern the police. Videos of police violence and claims of misconduct pop up on the Internet and then in the news, and debates ensue. Was the conduct legitimate? Should the officers involved be prosecuted, sued, or fired? How can we ensure this never happens again? And so on. Yet graduates from American law schools are almost entirely unprepared to participate in these discussions. They leave law school knowing next to nothing about the myriad legal rules that govern policing, the ways police can be encouraged to comply with those rules, or what legal solutions fit which problems. Worse yet, they are unaware of their ignorance. Instead, they are led to believe that courses in criminal procedure enable them to understand policing and its regulation.

Criminal procedure courses are useful for preparing students for criminal practice, and they are a wonderful way to study the Supreme Court and constitutional law. I love teaching Criminal Procedure. But a criminal procedure course doesn't teach students much about the law governing policing. If anything, it presents students with a distorted view of how the police are regulated, one that is left uncorrected by the rest of the traditional law school curriculum. In this brief Article, I describe a course I teach to fill that gap, entitled "The Law of the Police."

I. WHY CRIMINAL PROCEDURE ISN'T THE LAW OF THE POLICE

It isn't that criminal procedure courses don't talk about policing. Of course, they do. Courses that cover investigative criminal procedure teach vintage Fourth and Fifth Amendment cases like *Mapp v. Ohio*,¹ *Katz v. United States*,² and *Miranda v. Arizona*,³ and newfangled ones, such as *Kentucky v.*

* Professor of Law, University of Virginia School of Law. I am grateful to Andrew Manns and the University of Virginia Law School's research librarians for excellent research assistance, and to Bob Newman for his helpful comments.

1. *Mapp v. Ohio*, 367 U.S. 643 (1961).
2. *Katz v. United States*, 389 U.S. 347 (1967).
3. *Miranda v. Arizona*, 384 U.S. 436 (1966).

*King*⁴ and *Berghuis v. Thompkins*.⁵ All of these cases self-consciously regulate the police. But that is actually part of the problem. The constant talk about policing can persuade students and professors alike that they are considering how we do and should control the police with law when, in fact, criminal procedure can never have such reach.

Traditional investigative criminal procedure classes primarily focus on Fourth Amendment doctrine and the exclusionary remedy, Fifth Amendment law including *Miranda* doctrine, and perhaps throw in a little Due Process or Sixth Amendment law. To understand this law, students read Supreme Court cases. These cases give students the primary doctrinal tools they need to advise police departments about the constitutionality of investigative activities, and to write and respond to motions to suppress evidence arising from government searches and interrogations.⁶ They also allow students to evaluate the Court's capacity to address changing technology, to protect individual privacy, and to set functional rules for the police. And they manage these chores while addressing some of the most interesting, important, and newsworthy legal questions of the day, such as whether the Fourth Amendment applies to attaching a GPS device to a car to track its movements,⁷ or whether police officers need a warrant to search a cell phone following arrest.⁸ Criminal procedure courses engage these fascinating questions, give students working knowledge of a useful area of law, and convey theory, policy, and a sense of the evolution of the law over time, all by focusing mostly on one court's interpretation of a few sentences of the Constitution over little more than half a century. No wonder students love them.

As wonderful as criminal procedure is, however, it misleads students about the project of governing policing. Criminal procedure cases treat regulating the police as something largely done by the Supreme Court, mostly using constitutional law. More specifically, the heart of the course is located in Warren Court era cases, such as *Mapp*, *Katz*, and *Miranda*, and the contemporary doctrines that flow from them. These cases establish a framework in which the Supreme Court imposes and enforces conduct rules found in the Fourth and Fifth Amendments, and those rules constitute the most

4. *Kentucky v. King*, 563 U.S. 452 (2011).

5. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

6. This trait is visible in most of the major casebooks on criminal procedure. The one major exception is Wright and Miller's innovative casebook. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* (4th ed. 2011). Though it still adopts the conceptual framework of Supreme Court doctrine—an inevitability given the substantive focus of these courses—it considers a much broader range of materials and sources of regulation than traditional criminal procedure books.

7. *United States v. Jones*, 132 S. Ct. 945 (2012).

8. *Riley v. California*, 134 S. Ct. 2473 (2014).

important means of regulating the police.⁹ Though much of any criminal procedure course is about how subsequent cases have cut away at the broad gestures made by the Warren Court, the underlying enterprise looks the same when we teach recent cases. Whether the Court steps in firmly, regulates loosely, or refuses to regulate at all, the vision is one in which federal courts are the primary actors; constitutional doctrine and the exclusionary rule are their primary tools; and criminal investigation is the primary policing practice in need of regulation.

Given the regulatory architecture built into the Supreme Court's cases, even an expansive approach to the topic cannot reveal accurately the law governing the police. A professor might include a federal privacy statute to illustrate congressional action beyond constitutional law. The Right to Financial Privacy Act of 1978,¹⁰ for instance, illustrates the legislative response to *United States v. Miller*, which ruled that bank customers have no reasonable expectation of privacy in their financial records.¹¹ A course might include a state statute regulating police activities beyond constitutional protections, such as one of several that have recently mandated recording custodial interrogations.¹² But expanding the range of materials does not solve the conceptual problem that exists in a course organized around the Supreme Court's doctrines about what constitutes a search or a seizure, what exceptions exist for warrants, and whether there has been a *Miranda* waiver: these additional laws and doctrines are situated in relation to—and often are expressly a reaction to—the rulings of the Court. As a result, rather than undermine the centrality of constitutional law in regulating policing, they confirm it. The extra materials reinforce a picture of the law in which the Supreme Court monitors police to ensure that they are not overeager because states do not effectively do so. When the Court is too hesitant, other less prominent watchdogs may step in, but these second-string regulators fill local gaps in a legal scheme designed by the Court.

By my count, there are at least six significant problems with the Court-and-Constitution-centric view if one is trying to convey the nature of the interaction between policing and law.

First, the view misleads students about the regulated industry, policing. In constitutional law, police mostly investigate crime. But a more realistic description of contemporary policing would view criminal law more often as a tool for police pursuing other objectives like protecting public order and

9. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 767 (2012) [hereinafter Harmon, *The Problem of Policing*].

10. 12 U.S.C. §§ 3401–3422 (2012).

11. *United States v. Miller*, 425 U.S. 435, 442 (1976).

12. See, e.g., 705 ILL. COMP. STAT. § 405/5-401.5 (2014); 725 ILL. COMP. STAT. § 5/103-2.1 (2014); D.C. CODE §§ 5-116.01–5-11.03 (2001); N.M. STAT. ANN. § 29-1-16 (2005).

preventing crime. This is not merely a matter of how little criminal investigation police officers actually do. It is hard to make sense of most contemporary debates about policing strategies, such as broken windows policing, problem solving policing, and third party policing, if one thinks *enforcing* criminal law is the enterprise that motivates policing.

Second, this view misstates the comparative importance of state institutions and federal courts. State legislatures, especially, are secondary, if not invisible, in criminal procedure. But state statutes create police officers, determine what qualifications and training they possess, and empower and command officers to coerce citizens. State laws often regulate the structure of police departments and limit how municipalities use law enforcement to raise revenue. And states set the parameters of officer accountability by establishing criminal and civil remedies for misconduct, by determining whether officers engage in collective bargaining, by providing administrative protections through civil service law and/or a Law Enforcement Officers' Bill of Rights, and by designing the administrative schemes for certifying and decertifying officers. Even assuming state constitutional law has little bite beyond federal constitutional law, there is no question that contemporary policing is heavily influenced by state legislative action.

Third, and relatedly, the Court-and-Constitution approach obscures many kinds of law governing the police, and state legislation is not all that is missing. Procedure courses disregard other non-constitutional federal law that regulates policing, including labor and employment law, employment discrimination statutes, and statutes authorizing federal equipment and grant programs that subsidize some (but not other) kinds of policing. Criminal procedure classes rarely address federal and state common law defenses that regulate police conduct, such as entrapment and the public authority defense—which are not always enacted into statutes. Perhaps most egregiously, law school courses overlook much of the non-constitutional law that governs the limited range of police conduct actually considered in criminal procedure, that is, searches, seizures, and interrogations. For instance, at the most local level, students won't learn about city ordinances that forbid police from interrogating suspects about their immigration status or departmental general orders that restrict officers from using chokeholds to subdue suspects.¹³ At the most global

13. See, e.g., S.F., CAL., ADMIN. CODE ch. 12H (2007) (making San Francisco a refuge city and, *inter alia*, prohibiting the use of local funds to question individuals about their immigration status); CHI., ILL., CODE § 2-173-020 (2015) (prohibiting officers from asking about immigration status); PORTLAND, ME., CODE § 2-21 (2015) (same); N.Y.C., N.Y., PATROL GUIDE § 203-11 (2013), <http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-11-use-of-force.pdf> [<http://perma.cc/PR2Y-YYUK>] (prohibiting the use of chokeholds); Atlanta, Ga. Police Department Policy Manual, Use of Force, APD.SOP.3010 4.1.7. (Oct. 30, 2013) (prohibiting neck restraints or chokeholds except in limited emergency situations); Fort Worth, Tex. Police Department, General Order Revision 306.04 (June 30, 2008) (prohibiting chokeholds).

level, students walk away with no idea that the Vienna Convention on Diplomatic Relations directly prohibits police officers in the United States from handcuffing, arresting, and stopping foreign diplomatic and consular personnel, entering their residences or cars, or searching their other property, in addition to its (more) well-known provisions prohibiting the government from prosecuting them.¹⁴

Fourth, the Court-and-Constitution approach suggests that the primary measure of whether police action is problematic is whether it violates the Constitution. Taking criminal procedure, one might think that good policing and legal policing are almost synonymous, and that to the degree they are not, it is because the Court gets the doctrine wrong.¹⁵ Even if a teacher doesn't share this view, criminal procedure cases offer little in the way of other bases for evaluating police conduct, such as cost effectiveness or whether the individual and aggregate harms they induce are necessary and proportional to benefits they entail.¹⁶

Fifth, criminal procedure courses usually highlight one—or at best two—of the law's mechanisms for discouraging constitutional violations, namely, the exclusionary rule and maybe § 1983.¹⁷ Professors usually have no time to discuss other constitutional remedies, such as criminal prosecution and civil suits for equitable relief. Nor do they have the inclination to teach other law that incentivizes police conduct beyond constitutional compliance, such as state decertification laws or accreditation programs for departments. At best, they can raise their existence when they are implicated by one footnote in *Wolf v. Colorado*,¹⁸ a sentence or two and a concurrence in *Mapp v. Ohio*,¹⁹ and a controversial couple of paragraphs in *Hudson v. Michigan*.²⁰ They can hardly do much more.

Finally, even if one were willing to overlook the significant kinds of policing, laws, regulatory actors, policing problems, and remedies that criminal procedure neglects—that is, even within the limited realm of deterring Fourth

14. Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

15. For alternative views, see Harmon, *The Problem of Policing*, *supra* note 9, at 763, and Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 WM. & MARY L. REV. 1865 (2013).

16. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872–74 (2015) [hereinafter Harmon, *Federal Programs*].

17. 42 U.S.C. § 1983 (2012).

18. *Wolf v. Colorado*, 338 U.S. 25, 30 n.1 (1949).

19. *Mapp v. Ohio*, 367 U.S. 643, 651–53 (1961) (discussing other remedies); *id.* at 670–71 (Douglas, J., concurring).

20. *Hudson v. Michigan*, 547 U.S. 586, 597–99 (2006) (suggesting that civil suits for damages and internal disciplinary mechanisms make evidentiary exclusion unnecessary to prevent knock-and-announce violations).

and Fifth Amendment violations using the exclusionary rule—criminal procedure cases hide the most significant fact of policing for those interested in accountability: police operate only in departments. Criminal procedure cases imagine police officers like characters in a massive multiplayer online game who appear fully formed and alone each day in a virtual world and wander around interacting with others—albeit engaged in criminal investigation and traffic patrol rather than exploration and warfare. In the Court’s artificial environment, constitutional wrongs are simple things: police officers avoid them by simply refraining from committing them. All an officer need do is give *Miranda* warnings when he should, have probable cause when it is demanded, and avoid hack and slash play (as close combat games are sometimes called).

In the real world, however, there are no free-roaming police officers. Police exist only in departments with politically accountable chiefs, which are themselves agencies of governments made up of politically accountable elected officials. Police departments govern in minute detail what police do each day, what they learn, what rules they follow (or violate), what records they keep, and what incentives they receive, both positive and negative. Ambiguous policies, weak training, double messaging about what police are expected to do, and other conditions in departments have enormous influence over what law enforcement looks like on the street.²¹ Moreover, almost every effort to prevent police misconduct—except perhaps for throwing a police officer in prison—requires going through departments to influence officers. Police departments are the real engines for police-citizen encounters, something the inevitably incident- and officer-specific approach of constitutional criminal procedure cannot capture.

Students should take criminal procedure. But they shouldn’t walk away believing they understand how to think about regulating the police. Such courses are simply an insufficient lens into policing, and they do not give students the basis for answering basic questions about governing the police, about comparative institutional competence, about political responsiveness, or about how law should be used to influence police practice. Instead, these matters should be the subject of their own course.

II. THE CONTENT OF THE LAW OF THE POLICE

If this reasoning describes why I teach *The Law of the Police*, it also suggests how. The goal of the course is to evaluate the many ways we regulate police conduct and the tradeoffs among them. To that end, I emphasize four

21. See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004) (discussing the role of police departments in shaping police conduct).

questions: (1) What is policing like? (2) What are the comparative advantages and disadvantages of the various institutions and forms of law that can influence police conduct? (3) How do different legal remedies and other accountability mechanisms influence different kinds of police conduct? (4) What are the preconditions for effective regulation of the police? Correspondingly, the course has four parts. The first is an introduction to the institution we are studying, local policing, including the legal and political structures that underlie it. The second looks at the rules that constrain and empower police conduct. The third looks at legal remedies and other mechanisms for inducing socially desirable police conduct. And the last considers the role of information in regulating the police, and how law influences what kinds of information and data about policing are produced and distributed.

A. Introductory Materials

My class starts with several sessions introducing policing to the students and giving them some ways to think about how we govern it. These introductory materials and lectures are designed to answer some basic questions: What is a police officer? How is policing created by law? What does the contemporary enterprise of policing look like in the United States? Why is it a subject for so much law? By starting with these questions, I hope to build from scratch an idea of policing and its relationship to law that replaces the one embedded in criminal procedure.

In some significant part, these basic questions originate in my own experience studying the law governing the police. I entered the legal academy after nearly a decade in practice, most of which was spent prosecuting civil rights crimes. Many of my cases involved investigating and prosecuting police officers for excessive force or sexual assault, and I intended my scholarship to focus on the police. Yet, as much as I thought I knew from practice, I discovered I had little idea why police officers exist or where their powers come from. Maybe I am especially slow, but it took me some time to figure out how the law creates contemporary policing, and longer still to develop the conceptual basis for thinking critically about regulating the police. I try to make that process a little faster for my students.

Towards this end, I start with a series of state statutes that authorize the existence of local police departments, provide police power, and set qualifications and certification requirements for officers.²² In discussion, I draw out the legal story of policing: the Constitution reserves public safety to the states; states largely delegate the creation and governance of the police to

22. See VA. CODE ANN. §§ 15.2-700, 15.2-1701, 15.2-1704, 15.2-1705, 15.2-1706, 15.2-1718, 15.2-1722 (2014).

local municipalities; municipalities create and fund departments and hold them politically accountable through the chief.²³ This discussion sets up two early themes of the course. One is that state actors are key to shaping police conduct, especially during an era of permissive constitutional regulation of the police.²⁴ The second is a more general legal principle: legal authority isn't some gestalt kind of thing. It has rule, reason, and limits. Police—with their coercive authority to arrest and even to kill—don't just exist, free to act save constitutional constraints. Though states vary in their approaches to giving police power, police officers have (and have to have) some kind of legal origin and authority. Otherwise, they would be kidnappers and killers, not public officials performing essential public duties.

Finally, these statutes allow me to draw out what I suggested above is the most important fact about public policing for those interested in influencing police behavior: police officers don't exist outside of departments. Talking about police conduct means taking departments seriously because departments are the principal determinant of police conduct. As a result, there are two targets of legal regulation of law enforcement: officers and departments.

The hardest part of my early materials is an old essay by Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*.²⁵ It is dated, dense, and slow going, as I note in the course materials. It also has the downside of misleading students about the nature of future course materials since most of the rest are more expressly legal, primarily cases and statutes. I assign it every year anyway because it is the best thing I have ever read on policing, and I find myself returning to its themes again and again during the rest of the course. Bittner argues that “police are empowered and required to impose or, as the case may be, coerce a provisional solution upon emergent problems without having to brook or defer to opposition of any kind, and that further, their competence to intervene extends to every kind of emergency, without any exceptions whatever.”²⁶

If students take the time to parse the article, Bittner's theory nicely sets up my way of framing the special predicament policing poses. We cannot easily forgo an institution capable of imposing solutions to problems that threaten personal safety or public order. But, once such an institution exists, coercion is an almost inescapable consequence. That is, there is an inexorable link

23. Harmon, *Federal Programs*, *supra* note 16, at 876–77. Although I touch on sheriffs' offices, and federal and state law enforcement agencies, the focus of my course is on local police departments.

24. For additional thoughts about the role of the state in regulating the police, see Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363 (2016).

25. Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in 1 POLICING: COPS, CRIME AND CONTROL: ANALYZING THE POLICE FUNCTION 155 (Robert Reiner ed., 1996).

26. *Id.* at 156.

between police and violence, even if officers rarely use force. The potential for facing and having to use violence explains why police will view their job as risky, even if few get killed in a given year. A cab driver might get mugged, but for an officer, risk of harm is implicit in the nature of the task. The potential for violence also explains why no amount of community engagement with Officer Friendly can ease all unease about the police. And it starts to move students away from a criminal-system-centric view of regulating law enforcement.

This year, I expanded this lesson and introduced race into the course early by following Bittner with a recent article by Ta-Nehisi Coates.²⁷ Coates argues policing largely works for the public in general because people believe in the authority of officers and follow their commands. The implication is that the police therefore use limited force against most members of the public, and most members of the public assume that police use mostly acceptable force. By contrast, the African American community's historical experience with policing leads to a deep skepticism about police legitimacy, one that contributes to resistance to police commands. That in turn leads police to use force, which in turn sustains views about the failure of police legitimacy. This reading enabled my students to see that police violence depends not only on what individual officers do when confronted with resistance, but also on what problems are left to the police to solve.

Since the Bittner article is old, it naturally encourages me to talk about how policing has changed over time. For example, in Bittner's view, a key characteristic of policing is that it is largely unobserved and unobservable. Though some aspects of policing retain this quality, it is far less true today in the world of car radios, computer assisted dispatch, GPS, and ubiquitous cameras than when Bittner wrote in the early 1970s. More generally, I use this opportunity to argue that making policing visible is only one of the many consequences of changing technology: Tasers and other new non-deadly weapons allow officers to be less injurious at a distance; in-car computers and fingerprint scanners allow officers to identify individuals more quickly; early intervention systems increase accountability; and body armor makes officers safer, just to name a few examples. And pushing up one more level of generality still, technology is only one of several features of the world outside of the project of policing that dictates its characteristics. I try to show that human physiology and geography, for example, also inevitably shape the nature of policing: force becomes necessary in part due to the fact that police

27. Ta-Nehisi Coates, *The Myth of Police Reform*, ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-myth-of-police-reform/390057/> [<http://perma.cc/6PAB-AHFM>].

are human beings vulnerable to injury and limited in speed and strength;²⁸ frisks are an issue in New York, but not in Los Angeles, because so many more people are walking the streets.

All this is to say Bittner is well worth the slog. I supplement the Bittner article with a set of factual and statistical materials about police departments and the contemporary characteristics of policing as a project that helps me talk about the demographics of policing, the variations in police departments, the fragmented nature of American policing, and other characteristics of the project of policing, its officers, and its departments.

I end my introduction to policing with materials on the economic analysis of public goods and public provision of services. Though not policing specific, these materials enable a conversation about the degree to which policing really is non-rivalrous and non-excludable, and why it is organized locally and along political boundaries. Charles Wolf's theory of non-market failures provides a vocabulary for talking about policing's problems as predictable consequences of government action. In light of those failures, it is easier to understand how local governments might get policing wrong in ways state and federal regulation and subsidies might mitigate. I like these economic materials for two reasons. First, because they are not about policing, they allow students to see that even if policing is a singular enterprise in some ways, it is closely analogous to and connected with other public services, like education or public health, in others. Second, by the end of the introductory materials, the students have thought through a legal account of policing, Bittner's more sociological theory, and this economic approach to the police. Doing this helps students studying law see that the world offers many alternate lenses to analyze any complex phenomenon. These alternative approaches become tools we return to throughout the course.

B. Legal Standards for Policing

The rest of the course is perhaps more easily summarized. The largest unit is on the law that tells police what to do and not to do. It works through some illustrative constitutional law on the First, Fourth, Fifth, and Fourteenth Amendments; and then veers towards state statutes, federal programs, and internal departmental policies. My primary goal is to start students thinking about the limits of using courts and constitutional law for regulating the police and considering some alternative forms of and institutional loci for legal

28. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 3–4 nn.2–3 (1985) (“I couldn’t get to him because of the fence here. I couldn’t have jumped this fence and come up, consequently jumped this fence and caught him before he got away because he was already up on the fence, just one leap and he was already over the fence, and so there is no way that I could have caught him.”) (quoting the officer who shot Garner, an unarmed, fleeing eighth grader); *id.* at 4 n.3. (noting that the officer testified that “Garner, being younger and more energetic, could have outrun him”).

regulation. Clearly, this section—like the rest of the course—reflects my own writing on and interests in policing. In *The Problem of Policing*²⁹ in 2012, I argued that constitutional law has been too prominent in academic conversation about policing and is an inevitably limited tool for regulating the police, and in other articles, such as a recent one on federal public safety programs, I have considered some of the alternative approaches.³⁰

It is ironic to start with constitutional law in a course designed to decenter it. But it works well to have students reread canonical cases from criminal procedure with a new agenda, that is, to see what these cases reveal about the role of the courts and constitutional law in governing the police. Thus, our discussion in class is much less on the rules the Court imposes than on what the Court's reasoning and rules say about what risks the Court views policing as posing, and whether and how the Court thinks the police should be constrained.

For example, though I do not teach them together, I use *Katz*,³¹ *Mapp v. Ohio* (which comes up a little later),³² and *Miranda*³³ to demonstrate the dominant Warren Court approach to policing. In these cases, the problem that policing poses is the risk that individual officers, motivated by professional commitment, may sometimes overeagerly enforce criminal law. This view is perhaps best represented by the oft-repeated argument that judicial oversight is necessary to monitor “the officer engaged in the often competitive enterprise of ferreting out crime.”³⁴ All three cases also explain the Court's view of why federal intervention is justified to address this problem, since they portray states as failed regulators of the police. This is hardest to show in *Katz* in which the rhetoric highlights the *advantages* of judges and magistrates as neutral arbiters who can check police behavior. But I argue to the students that the Court strongly emphasizes pre-clearing searches through warrants only because it views state courts as unable or unwilling to disbelieve police officers and exclude relevant, probative evidence obtained in illegal searches after the searches have taken place. Thus, together these cases show the Warren Court's belief that federally generated procedural solutions could effectively ameliorate policing's substantive problems better than other regulators could. The Court as a regulator interacting with other potential regulators might come up in criminal procedure, but, here, it is a focal point of the discussion. Finally, these cases illustrate some problems with the Court's

29. Harmon, *The Problem of Policing*, *supra* note 9, at 763.

30. Harmon, *Federal Programs*, *supra* note 16, at 875–76.

31. *Katz v. United States*, 389 U.S. 347 (1967).

32. *Mapp v. Ohio*, 367 U.S. 643 (1961).

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

34. *Johnson v. United States*, 333 U.S. 10, 14 (1948). One of my students, Eric Hintz, gave us a label for this approach—the “competitive ferrets” theory of the problem of policing.

approach, including the almost ineluctable erosion of procedural protections intended to deter misconduct when judges apply them, as they must, one criminal defendant at a time. Of course, as *Terry* shows, the Court itself recognized that this view of the problems with policing is partial. Still, it is nevertheless the one that dominates criminal procedure cases, and it is one that is deeply embedded in contemporary understanding of how police are and should be regulated.

In most of my constitutional law assignments, I also pair traditional cases with contemporary ones, sometimes ones decided by lower courts. I match *Katz v. United States*³⁵ with *Kentucky v. King*,³⁶ for example; *Terry v. Ohio*³⁷ with *Floyd v. City of New York*,³⁸ and *Miranda v. Arizona*³⁹ with a less well-known case, *People v. Smith*.⁴⁰ These newer cases illustrate the changing views of courts about police over time. *King*, for instance, bespeaks much more concern about courts interfering with effective law enforcement than with states as inadequate police regulators. The newer cases also reveal some of the unintended consequences of constitutional regulation. *Floyd* is especially helpful for this point because the police practice that is its subject—New York City’s stop, question, and frisk policy—demonstrates how the *Terry* Court’s reluctant acceptance of frisks transforms over time into an affirmative strategy that generates a mind-boggling number of coercive police interactions with citizens, the overwhelming majority of which were legal by any measure.⁴¹

Each year, I also add contemporary examples of policing problems to this part of the course. Most recently, for example, I used the transcript and video of the Sandra Bland arrest in Texas⁴² and, right after teaching the use of force cases, the video of tennis star James Blake’s arrest in New York⁴³ to test the lessons we draw from the constitutional case law, to evaluate the law, and to illustrate its ambiguities. I ask students: How does the law apply? Is it clear?

35. *Katz*, 389 U.S. at 347.

36. *Kentucky v. King*, 131 S. Ct. 1849 (2011).

37. *Terry v. Ohio*, 392 U.S. 1 (1968).

38. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

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

40. *People v. Smith*, 150 P.3d 1224 (Cal. 2007).

41. *Floyd*, 959 F. Supp. 2d at 582.

42. *Full Sandra Bland Arrest Video*, WALL ST. J. (July 22, 2015), <http://www.wsj.com/video/full-sandra-bland-arrest-video/824DEC23-4137-453B-83AC-0AC636C91683.html> [<http://perma.cc/D2DC-WGYR>] (including the transcript).

43. Benjamin Mueller & Nate Schweber, *Officer Who Arrested James Blake Has History of Force Complaints*, N.Y. TIMES (Sept. 11, 2015), <http://www.nytimes.com/2015/09/12/nyregion/video-captures-new-york-officer-manhandling-tennis-star-during-arrest.html> [<http://perma.cc/6D38-HBRK>] (describing arrest and providing embedded video); N.Y.C. Police Dep’t., *Surveillance Video of James Blake Arrest*, N.Y. TIMES: TIMES VIDEO (Sept. 11, 2015), <http://www.nytimes.com/video/nyregion/100000003905322/surveillance-video-of-james-blake-arrest.html> [<http://perma.cc/XAS6-B9J8>].

Does the law get the answer right? If a given arrest, whether legal or not, is not an example of good police practice, how else could you prevent it? I tell them to imagine the facts tweaked slightly and I ask again. The contemporary illustrations show students that they can develop a means of analyzing police action and its legal structure, one that they can use in the future. It is a significant reward of teaching the course that students feel empowered as consumers of and participants in contemporary debates about policing.

This part of the course includes other Fourth and Fifth Amendment cases, and some First and Fourteenth Amendment cases, most commonly *Colten v. Kentucky*,⁴⁴ *Houston v. Hill*,⁴⁵ and *City of Chicago v. Morales*.⁴⁶ Still, I try not to get too bogged down in constitutional law so that I have time to turn to other sources of regulation. I do this horizontally by showing how Congress and federal courts interact with one another over policing. Excerpts from *Berger v. New York*⁴⁷ and Title III (the Wiretap Act),⁴⁸ and from *Smith v. Maryland*⁴⁹ and the Pen Register Act⁵⁰ and the Stored Communications Act of the Electronic Communications Privacy Act⁵¹ provide easily digestible examples, and I add some academic excerpts about the relative advantages and disadvantages of courts and legislators as regulators. Then, I teach more vertically, showing interactions among federal, state, and local actors trying to influence the police. I wrote on this recently in *Federal Programs and the Real Costs of Policing*,⁵² an article that developed from teaching the course. In the course, I teach an expanded version of some of the examples in the article, such as the problems of policing domestic violence and immigration, to illustrate how various government institutions interact in attempting to influence policing.

Immigration policing provides an especially fun example. Each year, it seems, I add another little chapter. Though it could start earlier, I begin the story with section 287(g), a statute permitting federal officials to delegate federal civil immigration enforcement power to state and local police. The program that arose demonstrates one way that federal actors can expand the power of local police officers and encourage them to pursue federal ends.⁵³

44. *Colten v. Kentucky*, 407 U.S. 104 (1972).

45. *City of Houston v. Hill*, 482 U.S. 451 (1987).

46. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

47. *Berger v. New York*, 388 U.S. 41 (1967).

48. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510–2522 (2002)).

49. *Smith v. Maryland*, 442 U.S. 735 (1979).

50. Pen Register Act, 18 U.S.C. §§ 3121–3127 (2012).

51. Stored Communications Act, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2701–2712 (2012)).

52. Harmon, *Federal Programs*, *supra* note 16.

53. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 133, 110 Stat. 3009, 3009-563 (codified at 8 U.S.C. § 1357(g) (2012)). In the non-

The section 287(g) law is implemented by United States Immigration and Customs Enforcement (ICE) in section 287(g) agreements, which are represented in my materials by a short excerpt from a now-defunct “Memorandum of Agreement” between ICE and the Phoenix, Arizona Police Department.⁵⁴ We talk about why localities or states would enter into such agreements, and then consider a piece of the United States Government Accountability Office report in 2009 criticizing ICE’s management of section 287(g) on the ground that state and local agencies were implementing the agreements in ways that clearly conflicted with federal immigration priorities.⁵⁵ I have a note in the materials about how ICE revamped the section 287(g) program to induce better compliance with federal policies. At this point, they read Senate Bill 1070,⁵⁶ the Arizona statute passed in 2010, in part as a reaction to section 287(g) program changes. Because Senate Bill 1070 constituted a broad and strict anti-illegal immigrant statute and attempted to subvert the limits the federal government was imposing on local and state actors in enforcing immigration law, it, too, generated a response. That brings us to a summary of *Arizona v. United States*,⁵⁷ the Supreme Court’s review of the administration’s constitutional challenge to Senate Bill 1070, a lawsuit which one might see as the federal effort to hit the ball back over the net. I include quotes from Arizona Governor Jan Brewer and President Obama who, despite being on opposite sides of the case, both declared victory after the Court’s opinion.⁵⁸ Then comes Secure Communities,⁵⁹ the federal executive

immigration context, I use a few federal grant programs and the Justice Department’s Equitable Sharing Program, which until recently distributed money to state and local police to encourage them to seize assets under federal law, to illustrate the same point.

54. U.S. DEP’T OF HOMELAND SEC., MEMORANDUM OF AGREEMENT (Mar. 10, 2008) (agreement between United States Immigration and Customs Enforcement, and Phoenix Police Department), <http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/phoenixpolicedepartment.pdf> [<http://perma.cc/2TDA-LCJM>].

55. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009).

56. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in various sections of ARIZ. REV. STAT. ANN. titles 11, 13, 23, 28, and 41) (invalidated in part by *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

57. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

58. See Statement on the United States Supreme Court Ruling on Arizona’s Illegal Immigrant Enforcement Legislation, 2012 DAILY COMP. PRES. DOC. 00509 (June 25, 2012) (stating that the President was “pleased that the Supreme Court has struck down key provisions of Arizona’s immigration law”); Tom Cohen & Bill Mears, *Supreme Court Mostly Rejects Arizona Immigration Law; Gov Says “Heart” Remains*, CNN (June 26, 2012), <http://www.cnn.com/2012/06/25/politics/scotus-arizona-law/> [<http://perma.cc/CYU3-S3JV>] (quoting Brewer as calling the decision “a victory for the people of Arizona and for America”); *id.* (embedded video with comments by Brewer).

effort to rejigger local involvement in federal immigration enforcement and deemphasize section 287(g). The program used federal databases to identify immigration violators when they were booked into local jails and sought local help in detaining the individuals for the purpose of facilitating deportation. Next, I provide examples of the ways police departments, municipalities, and states resisted Secure Communities, including, for example, the California Trust Act.⁶⁰ Recently, I added the demise of Secure Communities in favor of yet a new executive effort to shape local participation in federal immigration enforcement, the Priority Enforcement Program. This ongoing volley over immigration demonstrates beautifully how different government actors affect what police officers do in the street and how they sometimes compete to do so. I address similar issues through other federal programs, such as the Arrest Program from the Violence Against Women Act, which I use for other purposes as well,⁶¹ but alternatives never have the same recency, concision, or oomph.

C. *Changing Police Conduct*

The third part of the course explores remedies or—as I like to think about them—legal mechanisms for encouraging police to do what we want them to do and to forgo the rest. In criminal procedure courses, almost by definition, the exclusionary rule dominates. If one starts looking at Fourth Amendment law from the perspective of the criminal process rather than as one of many constraints on police action, the exclusionary rule is central because it is the mechanism by which the criminal process sees Fourth Amendment claims. The exclusionary rule is so important that many professors—and I am one of them—start criminal procedure courses with *Mapp*, then teach about the Fourth Amendment right, before circling back to contemporary case law on explicating the exclusionary rule and its exceptions. It is not a stretch to say that criminal procedure is taught in the shadow of the exclusionary rule. This orients students to the practical question at the heart of criminal procedure—whether a given piece of evidence is permissibly introduced in the criminal trial. It also shapes a strong narrative for professors. For those sympathetic to *Mapp*, the exclusionary rule worked well for a while but has been trimmed so many times in recent cases on causation, inevitable discovery, and, most importantly, the good faith exception that the rule has lost much of its power.

59. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t, Megan Mack, Officer, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Sec’y for Intergovernmental Affairs (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<http://perma.cc/3PZR-RVNG>].

60. CAL. GOV’T CODE § 7282 (West 2015).

61. See 42 U.S.C. §§ 3796hh–3796hh-4 (2012) (authorizing the Arrest Program).

If you disfavor the rule, you can simply turn the chart upside down: despite defeat in *Mapp*, victory is now (almost) at hand.

Teaching remedies in *The Law of the Police* has a different emphasis. Before we discuss specific remedies, I ask students first to consider why police obey or break the law. We talk about officers' incentives, their understanding of law, and how they learn alternative strategies for interacting with citizens. We talk about what makes officers willing to comply with the laws and regulations that govern them, and what role departments play in generating these various conditions for officers. Only then do we consider comparatively how the exclusionary rule and other remedies fare as ways to induce constitutional conduct.

My discussion of *Mapp* bypasses any consideration of whether *Mapp* is good constitutional law in favor of whether it is good regulation. Towards that end, I argue that evidentiary exclusion has a series of advantages, particularly when it is compared to damages actions. For instance, evidentiary exclusion depends on a plausible narrative about how one might influence police conduct (though the Court notably never really tells that story). In addition, as others have pointed out, it may deter without risking over-deterrence since it can only take away the value of the evidence from the officer and department. It also encourages prosecutors—who might be able to influence police practices—to care about constitutional violations by officers because they, too, share the evidentiary deprivation that comes from illegal conduct.

Of course, as a form of police regulation, exclusion has drawbacks as well. It only applies when evidence is found and used in criminal cases. It only addresses a relatively narrow range of police conduct. After all, officers broke into Dollree Mapp's house, lied to her, intimidated her, and roughed her up before finding evidence in a trunk in her basement.⁶² Excluding the mildly dirty books hardly feels like a real vindication of the interests at stake. Finally, as noted above, *Mapp* demands something of judges—excluding relevant, probative evidence and declaring police officers liars—that they are reluctant to do in order to secure the abstract benefits of deterrence. That makes it no surprise—the changing Court aside—that the exclusionary rule has been watered down over time.⁶³ Though it has been enormously consequential in shaping the culture of policing and in generating Fourth Amendment law, it could never be adequate on its own to address what we care about in policing.

62. *Mapp v. Ohio*, 367 U.S. 643, 644–45 (1961).

63. *See, e.g., Herring v. United States*, 555 U.S. 135 (2009) (holding that the exclusionary rule does not apply to constitutional violations resulting from negligence); *Hudson v. Michigan*, 547 U.S. 586 (2006) (holding that the exclusionary rule does not apply to violations of the knock-and-announce rule); *Nix v. Williams*, 467 U.S. 431 (1984) (holding that the exclusionary rule does not apply to evidence that was found as a result of a constitutional violation but would ultimately have been discovered even if the violation had not taken place).

I follow a day on the exclusionary rule with a day or two each on § 1983 suits for damages, § 1983 suits for injunctive relief, § 14141 suits by the United States Department of Justice, and criminal prosecutions of the police. The project is largely comparative. Evidentiary exclusion works better for privacy invasions that cause little in the way of damages, and § 1983 suits work better for violations that don't produce evidence. I include several district court cases that reveal that though suits for injunctive and equitable relief against police departments are limited by restrictions on standing in *City of Los Angeles v. Lyons*,⁶⁴ plaintiffs are most likely to get through *Lyons*' gates when police are engaged in high-volume activities against distinctive and innocent populations. Criminal prosecution does little to improve behavior with systemic origins, and faces considerable legal and practical obstacles, but it fares better than the exclusionary rule as a suitable remedy for intentionally illegal, violent conduct when it is employed.

As this discussion suggests, I encourage students to move beyond broad criticisms of the various remedies to consider when they might work best. In this vein, we discuss the common argument that damages actions do not easily translate into incentives for officers, and then we try to refine it. I ask students to consider the circumstances in which a financial penalty on a municipality might most influence a chief. Once we talk about the obstacles to turning economic costs into political ones, students usually suggest this might be in a small jurisdiction, where the obstacles to information transmission between municipal agencies are likely to be less serious, and in which payouts can visibly and meaningfully impose costs on voters. I confirm that this is consistent with my impression working with small departments, and they hear the same from Charlottesville's visionary and charismatic police chief, Tim Longo, when he comes to talk to my class late in the term.

The remedies section of the course also builds on my writing. Or, more accurately, the course builds on ideas that I have now published, but that I developed by teaching the course. By teaching the federal remedies one after the next and thinking about how to analyze them, it became clear to me, and now, I hope, to my students, that tweaking remedies for misconduct in the ways often proposed is unlikely to discourage bad policing much more than it does now. Several years ago, I made this argument in a short essay, *Limited Leverage: Federal Remedies and Policing Reform*,⁶⁵ comparing various legal remedies for constitutional violations. In the article, I contend that the common federal remedies for constitutional violations by the police work either by increasing the costs of misconduct or by reducing its benefits. In order to strengthen deterrence, one would need to impose greater costs (or reduce

64. *City of Los Angeles v. Lyons*, 449 U.S. 934 (1980).

65. Rachel A. Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33 (2012).

benefits more) or one would need to employ the remedy more often. As I discuss in the essay, and consider with students in class, legal and practical limitations built into the exclusionary rule, § 1983 suits for damages, § 1983 and § 14141⁶⁶ litigation against departments for structural reform, and criminal prosecutions of officers ensure that these remedies are unlikely to become either dramatically more costly or more common. This argument prepares students to imagine alternative ways to influence police conduct. We discuss several, including federal programs that lower the costs of preventing misconduct for departments or provide rewards for pursuing reform. Then, we focus on a selection of non-constitutional means of influencing police practices, including state decertification of offending officers; restrictive conditions on federal public safety grant programs; federal programs that provide monetary subsidies, equipment, or technical assistance for reform; proposals to require insurance for officers and departments; citizen complaints and review boards; and administrative discipline.

D. Information and the Police

I devote several classes at the end of the course to the role of information in regulating the police,⁶⁷ and how law determines what information about policing is generated, aggregated as data, distributed, and used. This unit is necessarily my most flexible because it gets less airtime if more is going on in policing that year or if I have a particularly conversational group. At a minimum, however, I hit several topics. The first is the range of information we care about in policing. They think immediately about proving what happened in specific police-citizen encounters, so I encourage them to articulate why regulators and voters might need aggregate data about coercion activities and research on the effectiveness and intrusiveness of various crime control techniques to make considered judgments about policing policy. Second, I use the topic of video recording by private citizens to illustrate how technology (primarily cell phones and video sharing websites) has facilitated public debate on policing. Video recording also provides a perfect example of how police sometimes resist accountability, and how law can permit (through arrests and prosecutions of those who record) or limit (through First Amendment doctrine, civil suits for injunctive relief, and departmental policies) that resistance.

I often end with materials on police-generated video. The issue of video in interrogation rooms opens a discussion of video as an accountability mechanism, a discussion that continues with materials on dash cams and, more recently, body cameras. I try to provide a realistic view of the challenges and

66. 42 U.S.C. § 14141 (2012).

67. I also wrote a brief symposium paper about this topic. Rachel A. Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013).

limits of video to counter the common view that body cameras are a silver bullet that can end police misconduct. At some point in this unit, we consider the Rodney King video and its significance, though the incident is increasingly both ancient and anti-climactic for students raised in the age of iPhones and YouTube.

Though video is great fun to study, I worry that it confirms the preexisting student bias I noted earlier: it deemphasizes how the law generates broad data about policing in favor of a focus on how the law generates incident-specific information. This year, there has been so much written on the limitations of data on police killings that this bias has been easier to correct. In light of that attention, students can see more easily that if data on deaths at the hands of the police are weak, they are actually the easiest consequences of police coercion to count. Dead bodies are hard to hide. By contrast, there are not even agreed definitions about what constitutes a use of non-deadly force, much less any significant effort to collect regular data about how often it is used or what consequences it has that can be compared across departments. Once through with these aspects of the significance of information and the means of its production, if I have any additional days in the course, I add something about other laws that facilitate or discourage access to information, such as Freedom of Information laws and their exceptions, privacy laws, civil discovery rules, state racial profiling statutes, and the like. In practice, I rarely get the time.

Though these units form the core of the course, I am always adding and removing materials and subjects. I used to teach the Vienna Convention on Diplomatic Relations because I loved to show students that international law directly regulates local police.⁶⁸ But the materials were too boring and the points too thin to justify the time. I have used entrapment cases to illustrate non-constitutional regulation by the courts, and public commissions on policing to illustrate an alternative approach to accountability, but these efforts at police regulation both have so little bite in the real world that they felt marginal to the project. I have taught and dropped a day solely on state criminal procedure statutes repeatedly, and have sometimes included more specific information on citizen complaint procedures and civilian review than I do now. Every year, I hope to add materials on unions and budgets rather than just discussing them along the way, but I never find the space.

Beyond correcting (and overcorrecting) each year, I adjust the materials to contemporary events, focusing on Occupy Movement protests one year, then on the events in Ferguson last fall. I add newspaper articles and videos, sometimes liberally, in order to give the class problems to work through or to further illustrate a point. The class is not one in current events, but nor does it

68. Vienna Convention on Diplomatic Relations, *supra* note 14.

ignore the broader world. In fact, these present-day incursions are a highlight of the course for many students.

E. Assessment

Since the class is a course on law as regulation as much as doctrine, the exam necessarily looks different from most other law school exams. Here is one in full:

EXAM

1. In “Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police,” Egon Bittner asserted that police must be able to impose solutions upon the problems to which they are assigned “without having to brook or defer to opposition of any kind.” Yet granting absolute power to government officials is inconsistent with democratic self-governance. Analyze how and how well the legal doctrines and laws that govern the exercise of coercive authority by the police balance the power Bittner argues police officers must have with other concerns.
2. Presently, two executive branch entities in New York State are heavily involved in policing. The State Attorney General is the top law enforcement officer in New York State. He has the power to prosecute police officers for criminal acts and to sue departments for structural reform, though no Attorney General has brought a structural reform suit in recent years. In addition, the New York Department of Criminal Justice Services provides state grants and technical assistance to police departments, sets training, hiring, and certification standards for police officers, and carries out police decertification. To address the problems in the New York City Police Department (NYPD) and other departments in the state, a state legislator recently proposed combining the police-related activities of both the Attorney General and the Department of Criminal Justice Services into a new bureau, the New York Law Enforcement Administration (NYLEA), which would be situated within the Attorney General’s Office. NYLEA would be led by a Deputy Attorney General appointed by the Governor. The agency would have the powers of both existing agencies, including the power to prosecute officers, to sue departments, to regulate training, and to provide grants and technical assistance. It would also have new authority to recommend legislation to the state legislature and to pass regulations governing police department policies and practices. Evaluate the likely advantages and limits of such an agency, using your knowledge of the other legal mechanisms for influencing police conduct.

3. You have been asked to give a speech entitled, “How Legal Regulation of the Police Stands Today: The Power and Limits of Law and Legal Institutions.” State the thesis of your speech and describe the evidence you would use from the course to illustrate your point.

More recently, I have expanded the focus on doctrine, using a fact pattern that described several police-citizen encounters. The newer exam asked students about the legality of police conduct, about the likely success of the legal proceedings that could follow, and about possible law and policy changes that could prevent similar situations.

In both cases, the students had three hours for the exam. I have thought about alternate formats, including the same exams spread over six or twenty-four hours, but students hate the idea. Overall, the three-hour form works well enough, and students prove and sort themselves by the depth, breadth, and coherence of their arguments.⁶⁹

III. CONCLUSION

As my exam suggests, my class considers how we govern policing in the United States and how we might do it differently. It is intended to make students think about the power of law, including its possibilities and limits. The course helps law students see the ways law makes the world and the way it sometimes misrepresents it. I hope it arms students to participate intelligently in public debate and public policy about law and the police.⁷⁰ And students seem to enjoy the course.

Still, I am the course’s biggest beneficiary. Working through cases in the course—even those I have read dozens of times—has been a continuous source of insight. It is as if the light bulb never stops flashing. I test and refine new ideas and arguments with students who bring thoughtful views to the mix. I have now written a couple of articles based on ideas that grew out of the course, and I have several more in the works. However much I enjoy teaching Criminal Procedure, it can never provide students with as much understanding about law and the police, and it never offers me the same intellectual reward.

69. In my early years teaching the course, students had a lot of anxiety about what they should be learning and taking notes about. I forbid computers in the classroom because detailed note taking is less helpful than engaged participation in the classroom conversation, and that can exacerbate worry about testing. To help ease worry, I put this exam up on the course website before the first day of class.

70. I used to tell my students that the course was not practical, but I have pulled back on that claim as students from the course have gone on to draft state statutes on policing, work in the United States Department of Justice’s Civil Rights Division, and try § 1983 cases, and have said that the course helped.

