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Teaching a Course on Regulation of the Police (With a Special Focus on the Sixth Amendment)

Christopher Slobogin

TEACHING A COURSE ON REGULATION OF THE POLICE (WITH A SPECIAL FOCUS ON THE SIXTH AMENDMENT)

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The organizers of this symposium gave us the choice of writing about effective assistance of counsel or about teaching criminal procedure. I've decided to do both. This article discusses teaching the criminal procedure course most often called "Police Practices," for which I write a textbook entitled *Regulation of Police Investigation: Legal, Historical, Empirical and Comparative Materials.*[1] Borrowing heavily from the Teacher's Manual for that book, the first part of this article describes my general philosophy for teaching the course. The rest of the article illustrates this philosophy by describing how I teach students about the application of the Sixth Amendment right to counsel to the interrogation process and to the conduct of identification procedures.

I. GENERAL PHILOSOPHY

Regulation of Police Investigation has several objectives, many of which call for different types of materials than those found in other texts that address the investigative stage of the criminal process. First, the book seeks to acquaint the student with the world of the police. Many criminal procedure texts contain little about this topic, apparently on the assumption that information about police habits and attitudes is common knowledge. In reality, however, 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-one pages of *Regulation of Police Investigation* 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.

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[1] CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE–REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS (LexisNexis 3d ed. 2002).

A second objective I try to meet in the police practices course 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 One of the book 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.

The subtitle to my book, referring to historical, empirical and comparative materials, describes several other objectives. 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, only a few give students much sense of colonial and post-colonial practices, and thus leave the impression that these rules were created almost out of whole cloth. In fact, as materials in the book try to demonstrate, 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, several studies testing various judicial assumptions about police and citizen behavior are available, including research about 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* 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."

Another important objective of the book is to leave students with some idea of how other countries regulate their police.[2] We 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. Thus, the book includes descriptions of various practices not only in England and Canada (which are the usual foreign reference points) but also in countries like Australia, Denmark, France, Germany and India. Additionally, Chapter One 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 *Regulation of Police Investigation* is to promote the lawyering skills of students. Most important in this regard are the problems, of which there are one hundred twenty-three. 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. I usually require each student to argue at least 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. One professor who uses the book, Bill Williamson, assigns the problems at the beginning of the semester, which he says "guaranteed students would be prepared to discuss the problems in class and often enlivened the class with the occasional hammy argument."[3] The rest of Professor Williamson's class sits "in judgment" of the arguments, with one member randomly assigned to write a one or two-page opinion resolving the issues in the problem. "It made for lively classes and occasional fun."[4]

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[2] In another article in this issue, Erik Luna makes a more elaborate case for teaching comparative criminal procedure. *See* Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277 (2004).

[3] E-mail from Bill Williamson, Associate Professor, Lewis & Clark Law School to Christopher Slobogin (February 4, 2002) (on file with author).

[4] *Id.*

A different type of practical exercise is provided by the more than one hundred pages of materials connected with *State v. Longstaff*,[5] found in the appendix. These materials (from an actual case) not only give the 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. I often require the students to draft a five- or six-page memo arguing the issues in this case, due near the end of the semester, and devote the last class to going over these issues. That class not only serves as a review, but emphasizes the reality that, contrary to the impression students get from reading appellate opinions, facts rarely come neatly packaged.

A final lawyering exercise is the Negotiation Problem. This Problem, which provides secret instructions to the defense and prosecuting attorneys, requires students 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 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 Two's discussion of warrants and Chapter Three's discussion of post-charge interrogations).

A final comment about general teaching philosophy has to do with the importance of "cases." Most other procedure "casebooks" live up to the 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 twenty judicial decisions (albeit often with less editing than is typical). My 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*, *Miranda*, and *Mapp*), 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

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[5] SLOBOGIN, *supra* note 1, at 621-724.

in each case, the problems give students access to the most important information in the Court's "secondary" decisions.[6]

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, *Regulation of Police Investigation* 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.[7] 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. Further, this mix of materials may better accommodate different learning styles (inductive v. deductive, big concept v. linear).[8]

To illustrate these various points, the following sections describe in more detail how I teach the Sixth Amendment materials in the book, specifically the materials on the Sixth Amendment and the interrogation process and the materials on the right to counsel and identification procedures.

II. THE SIXTH AMENDMENT AND INTERROGATION

This section of *Regulation of Police Investigation* immediately follows materials on *Miranda*.[9] It begins with the majority and dissenting opinions in *Massiah v. United States*,[10] the case that first applied the Sixth Amendment to interrogation. It then provides the students with three "Notes." The first, entitled "Note on Sixth Amendment Analysis," lays out the caselaw on the

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[6] For a contrary view, see Arnold H. Loewy, *Building a Better Casebook*, 42 BRANDEIS L. J. 267 (2004).

[7] This is in contrast to Professor Loewy, who avoids including excerpts from law reviews. *Id.* On the other hand, I agree with Professor Loewy that most casebooks are too lengthy. *Id.* The average assignment in my class is fifteen pages per day.

[8] For a description of learning styles, see David Champagne, *Improving Your Teaching: How Do Students Learn?*, 83 Law Library J. 85 (1991).

[9] See SLOBOGIN, *supra* note 1, at 433-48.

[10] 377 U.S. 201 (1964).

three issues that must be addressed in determining whether a *Massiah* violation has occurred: (1) whether the "criminal prosecution" to which the Sixth Amendment refers has begun at the time the government elicits incriminating information; (2) if so, whether the elicitation is deliberate; and (3) if so, whether the defendant's actions indicate a waiver of Sixth Amendment rights. The next part of the materials, entitled "Note on the Rationale for the Sixth Amendment Approach," provides excerpts from an article by Professor Tomkovicz contending that *Massiah's* application of the Sixth Amendment to interrogation makes sense[11] and an article by Professor Uviller arguing to the contrary.[12] These excerpts, which take up four pages of the book, are included because neither *Massiah* or the Court's subsequent cases provide a clear rationale for the law in this area. Next there is a note entitled "Note on Justice Department Policy" which describes the Department's administrative rules governing prosecutor participation in interrogation.[13]

To provide some idea of how these materials might be integrated, excerpted below are two pages from the Teacher's Manual (bracketed language and footnotes were added for this article):

> The teacher might start discussion of the Sixth Amendment by contrasting it with *Miranda* analysis: Why wasn't *Miranda* violated in *Massiah*? Is there a difference between interrogation and deliberate elicitation (cf. Stevens' opinion in [*Rhode Island v.*] *Innis*[14])? And how does waiver analysis differ in the two contexts with respect to deception (see *Patterson* [*v. Illinois*][15])? Or the teacher can begin with a series of questions based on [*Moran v.*] *Burbine*[16] [which is the subject of the problem that immediately precedes *Massiah* and that ends the section discussing the Fifth Amendment approach to interrogation under *Miranda*]:
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> (1) Could Burbine have raised a Sixth Amendment argument against the admissibility of his statements about the murder? The answer, of course, is

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[11] James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. Davis L. Rev. 1 (1988).

[12] H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum. L. Rev. 1137 (1987).

[13] *See* 54 Crim. L. Rep. 2191, 2193 (March 9, 1994).

[14] 446 U.S. 291 (1980).

[15] 487 U.S. 285 (1988).

[16] 475 U.S. 412 (1986) (holding that incriminating statements about a murder made by a burglary suspect who was given *Miranda* warnings were not rendered involuntary by a failure to tell him his attorney had called, and also holding that lying to the defense attorney about police plans to interrogate the suspect did not violate due process).

no, because the Sixth Amendment right does not attach until "criminal prosecution" begins, and Burbine had not yet been formally charged for the murder.

(2) Why should that matter? Why shouldn't the right be triggered at the time of arrest, for instance? Stewart (who wrote the majority opinion in *Massiah*) might respond by saying the true adversarial process, where counsel is need to help prepare a "defendant's" case, has not started until the point at which the state has indicated it plans to prosecute. From the viewpoint of the suspect, this line of demarcation seems a bit artificial, since interrogation is interrogation, regardless of when it occurs. Uviller suggests that the time of questioning shouldn't matter (albeit in an attempt to expose the emptiness of the Sixth Amendment approach to regulating confessions). He argues that, if a right to counsel is really needed during "adversarial" questioning, it is always needed. The real reason arrest is not the trigger point, Uviller suggests, is that an ambivalent Court wants to give the police a crack at the suspect, but only a minimal one (i.e., between arrest and charging). In "Lawyers, Deception, and Evidence Gathering," 79 Va. L.Rev. 1903 (1993), Stuntz has elaborated on this point, arguing that criminal procedure rules should not just attempt to regulate the police and prosecutors but also "facilitat[e] the central mission of the criminal process–the separation of the innocent from the guilty." Id. at 1956. As he notes, current Sixth Amendment law "makes no sense if one sees the right to counsel as aiming to benefit defendants as a whole, or even poor defendants as a whole. It does make sense if the right aims to benefit innocent defendants primarily," because it gives the government "a window for additional evidence gathering after arrest without the presence of a lawyer." Id. at 1947. Put another way, "Sixth Amendment doctrine seems to guarantee a lawyer as late as possible: early enough to engage in productive bargaining, but too late to prevent incriminating disclosures in the police station." Id. at 1948. (Stuntz also notes that the same rationale justifies the current rules allowing easy waiver of counsel under *Miranda*). Id. at 1948-49.

(3) Assume that, during his second interrogation, Burbine had also made incriminating statements about the burglary. Would they have been obtained in violation of the Sixth Amendment? Here, the answer is yes, because he had been charged with the burglary (just as Massiah had been indicted on the drug charges), and the Court has held, in *Patterson*, that deception about one's attorney after prosecution is initiated infringes the Sixth Amendment right (just as *Massiah* held that post-charge deception about whether one is being questioned by the police violates the Sixth Amendment).

(4) Why does deception make a difference in Sixth Amendment cases and not in Fifth Amendment cases? Because the Fifth Amendment focuses on

preventing coercion (which, as the previous materials demonstrated, is not the same as deception), whereas the Sixth Amendment flatly guarantees the assistance of counsel in all criminal prosecutions. Further, Tomkovicz argues, since deception is not permitted at trial, it should not be permitted at earlier stages of the process where the Sixth Amendment is implicated; to say otherwise would permit the prosecution "to exploit the temporal expansion of the battle to regain the advantages of adversarial imbalance." Uviller, on the other hand, doesn't agree with this equation of the trial and pretrial processes. To him, trial counsel makes the prosecutor's job harder not by obscuring evidence, but by forcing him to prove his case. The role of counsel envisioned in *Massiah* fulfills no such salutary goal (see, in particular, pp. 441-442 of the text). Uviller agrees with Justice White that *Massiah* "is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use of evidence of voluntary out-of-court admissions and confessions made by the accused."

(5) If there had been no deception concerning Burbine's attorney, but otherwise the facts were the same (i.e., he still waived his right to an attorney), would his subsequent statements be admissible under the Sixth Amendment? Under *Patterson*, the answer would be yes, since he had received the warnings. In other words, a valid waiver after *Miranda* warnings waives fifth *and* Sixth Amendment rights. Uviller would agree with this result; to him, counsel during interrogation, if necessary at all, is necessary only to prevent coercion, and a valid waiver indicates that no coercion is present. The presence of an attorney will not ensure accuracy (at least any better than an audiotape), is not justifiable as a way of offsetting the prosecutor's advantage (as noted above), and is not ethically compelled, given the special context of criminal investigations. (On the latter issue, see the DOJ regs on p. 444). Stevens, dissenting in *Patterson*, disagrees, believing that the attorney can help the suspect make better "legal" decisions in the quasi-plea bargaining atmosphere of interrogation (cf. p. 381 on the results of the New Haven project; recall also Professor White's comments about "offers" of leniency in exchange for a confession at pp. 416-417). Stevens further argues that there is no reason to exempt prosecutors from the general prohibition against lawyers contacting the other party without their attorney's consent. In addition to Uviller's response to this point, consider Stuntz' argument (in the article noted above) that applying the ethical rule in the civil context with its wide-ranging discovery rules is not as likely to lead to evidence suppression as in the criminal context, and thus the current failure to apply it to criminal cases makes sense.

(6) Finally, what if . . . Burbine had asked for counsel at his arraignment on the burglary charges, and the police [had subsequently] obtained statements about the burglary . . .? The request for counsel [at arraignment] would not

> trigger *Edwards* [*v. Arizona*][17] and Fifth Amendment protection (see *McNeil* [*v. Wisconsin*][18]), but it would trigger [*Michigan v.*] *Jackson*,[19] at least in connection with the *burglary* charges. (The statements about the murder would still be admissible, despite the initiation by the police, because the Sixth Amendment right hadn't yet attached with respect to that charge). Does this result make sense? The dissent in *Jackson*, like the majority in *McNeil*, didn't see how a suspect who has asked for counsel at a preliminary hearing could feel "badgered" at a subsequent interrogation preceded by warnings, and thus saw no need to import *Edwards* into this situation. Uviller would agree; where there is no coercion, there is no need for an attorney. But Tomkovicz might say that a request for counsel at arraignment, even if technically only a request for trial counsel, means that the defendant wants a champion to equalize the trial encounter, and the prosecutor should not be able to avoid that champion merely by moving the confrontation with the suspect further back in the process.[20]

The final part of this section (all of which I usually teach in one class) consists of three problems based on Supreme Court cases that parallel the three-step Sixth Amendment analysis described above.[21] The first problem, *Maine v. Moulton*,[22] permits discussion of the definition of "criminal prosecution," the second, *Kuhlmann v. Wilson*,[23] facilitates analysis of the "deliberate elicitation" concept, and the third, *Brewer v. Williams*,[24] focuses on the waiver issue. Each of these problems gives a detailed description of the facts and then provides a one-sentence description of the Court's holding, occasionally adding information about other cases as well. For instance, the problem based on *Wilson* describes the facts of the case (involving planting an undercover informant in the suspect's cell), asks the question "A violation of *Massiah*?," and then states "The Court held, 6-3, in an opinion by Justice Powell, that it was not."[25] It ends with a "compare" cite to the Court's decision in *United*

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[17] 451 U.S. 477 (1981).

[18] 501 U.S. 171 (1991).

[19] 475 U.S. 625 (1986).

[20] CHRISTOPHER SLOBOGIN, TEACHER'S MANUAL FOR CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION—LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS 106-7 (3d ed. 2002).

[21] SLOBOGIN, *supra* note 1, at 445-48.

[22] 474 U.S. 159 (1985).

[23] 477 U.S. 436 (1986).

[24] 430 U.S. 387 (1977).

[25] SLOBOGIN, *supra* note1, at 445-46.

States v. Henry[26] (also a case involving planting an informant in the suspect's cell) and describes the facts and holding of that case.

To provide some notion of how a problem might be argued by the students, here is the passage from the Teacher's Manual pertaining to the *Wilson* Problem:

Problem 92

Wilson

Prosecution: Unlike the undercover agent in *Henry*, Lee was not paid for his information, and therefore had less incentive to elicit information from the suspect. Furthermore, the facts indicate he was instructed to be, and was, merely a passive listener. And even if he wasn't, if there was a "trigger" to Wilson's incriminating comments it was the visit from his brother, not Lee. Finally, if the police and Lee were after anything, it was not self-incriminating comments, but information about accomplices, thus further distinguishing this case from *Henry*.

Defense: There is no difference between this case and *Henry*; if anything there was more "deliberate" elicitation here. It is naive to believe that Lee didn't expect some consideration from the police if he reported the information. And the combination of putting Wilson in a cell overlooking the scene of the crime and placing Lee in it with him could only have been designed to acquire information from him. Even assuming Lee never asked any direct questions, he obviously worked his way into Wilson's confidence, and let Wilson know that he needed to explain himself better. By the time of the brother's visit, Lee had made himself a person in whom Wilson would confide.

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[26] 447 U.S. 264 (1980).

Comment: The students might be asked whether we should do away with the *Massiah* doctrine and hold instead that use of informants be regulated by the fourth amendment, as Uviller suggests in another part of his article. The students can be reminded that, because of *Lewis*, *Hoffa*, and so on, this type of government action is not a search or seizure. But it *could* be considered an invasion of privacy. If so, what showing would police need for a warrant to authorize placing Lee in Wilson's cell? Arguably, because the revelations Lee may discover are likely to be intimate, a high level of probable cause is required, analogous to electronic surveillance cases where the government must show that other methods have been tried and failed.[27]

III. THE SIXTH AMENDMENT AND IDENTIFICATION PROCEDURES

This section of the book[28] begins with a short history of the right to counsel. It first describes the development of the right in England, canvassing the virtual non-existence of professional help in medieval times. It then makes note of the seventeenth century rule that counsel could represent defendants on matters of law but not fact and Parliament's extension of the right to counsel in treason cases, and finally, in 1836, to most criminal cases. It then discusses related developments in colonial America (in particular, the need to have defense counsel as a means of combating the professional prosecutor, who did not exist in England at the time) and in more modern times. After describing *Powell v. Alabama*[29] (the first modern right to counsel case) and well-known Warren Court counsel cases, it excerpts parts of *United States v. Wade*,[30] including its footnote describing the fact that several European countries require counsel or judicial supervision during lineups.[31] *United States v. Ash*[32] is then excerpted almost in full, and is followed by two Problems, derived from two lower court cases. The first case, *McMillian v. State*, held that police did not violate the Sixth Amendment when they showed an eyewitness, post-charge, a video-audio tape of a lineup in the absence of notification to either the defendant or defense counsel.[33] This Problem allows discussion of whether *Wade* (which held there is a right to counsel at lineups) or *Ash* (which held there is no right to counsel at photo arrays) makes the most sense. Reproduced below is the second Problem,

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[27] Excerpted from SLOBOGIN, *supra* note 20, at 108-09.
[28] SLOBOGIN, *supra* note 1, at 487-99.
[29] 287 U.S. 45 (1932).
[30] 388 U.S. 218 (1967).
[31] *Id.* at 238 n.29.
[32] 413 U.S. 300 (1973).
[33] 265 N.W.2d 553, 558 (Wis. 1978).

along with the note that follows it and an excerpt from the Teacher's Manual as to how it might be taught:

Problem 98

United States v. Bierey

588 F.2d 620 (8th Cir. 1978)

Bierey, formally charged with committing two armed bank robberies, was placed in a lineup with four other males between eight and nine months after the robberies. Bierey was the shortest of the five, and the distracter who most closely resembled him had a mustache and sideburns, unlike Bierey either at the time of the robberies or at the lineup. Four witnesses to the robberies, positioned from 10 to 15 feet from each other, and instructed not to say anything or point during the procedure, observed the lineup; three of them later identified Bierey as one of the perpetrators. Bierey's attorney was present and observed the procedure, but he was not permitted to: (1) interview the witnesses prior to the lineup; (2) review their descriptions of the robbers prior to the lineup (although he was entitled to these descriptions, as a matter of discovery law, prior to the witnesses' testimony at trial); (3) be present when the witnesses made the identification after the lineup.

Was Bierey's right to counsel violated? [The court held no.] Assuming the court was correct, is there anything else Bierey's attorney could have tried to do? Consider the checklist on pages 475-476.[34]

Note on Discovery

As illustrated by the above problem, the defense is often barred from access to prosecution witnesses until trial or just before trial. The traditional reasons for barring earlier defense discovery of witnesses were outlined in *State v. Eads*, 166 N.W.2d 766, 769 (Iowa 1969):

> (1) It would afford the defendant increased opportunity to produce perjured testimony and to fabricate evidence to meet the State's case; (2) witnesses would be subject to bribe, threat and intimidation; (3) since the State cannot compel the defendant to disclose . . . evidence [protected by the Fifth Amendment], disclosure by the State would afford the defendant an

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[34] This twenty-one item checklist, which is reproduced in the book at the pages cited, asks questions about what witnesses are shown before the lineup, the makeup and conduct of the lineup, and post-lineup procedure. *See* Center for Responsive Psychology, *How Fair is Your Lineup?*, 2 Soc. Action in Law 9-10 (1975).

> unreasonable advantage at trial; and (4) disclosure is unnecessary in any event because of the other sources of information which defendant has under existing law [such as cross-examination of the witnesses the prosecution chooses to present at the preliminary hearing, which is required in many states and at which the prosecution must demonstrate it has a *prima facie* case].
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> Nonetheless, some courts have permitted earlier disclosure when the defense can show that hardship would otherwise result. *Cf. United States v. Algie*, 503 F. Supp. 783 (E.D. Ky. 1980). Does *Bierey* present such a hardship?[35]

The excerpt below, from the Teacher's Manual, sets out possible arguments for the prosecution and defense in *Bierey*, as well as some other queries the teacher could pose. The excerpt is particularly pertinent given the focus of this symposium, because it raises several issues about how counsel can be "effective" in this particular context.

Problem 98

Bierey

> Prosecution: Counsel was provided the defendant and was in no way obstructed from viewing the lineup. That he was denied access to the witnesses and their descriptions is not a violation of the Sixth Amendment; both the witnesses and their descriptions will be made available to him during the discovery process, so the defendant is not prejudiced in his reconstruction of the lineup or challenge of the witnesses. Similarly, there is no need for counsel to be present during the witness identification; this latter event is like the prosecutorial interview that the *Ash* majority clearly believed did not trigger the right. Finally, as to the reliability of the identification, note that 3 of the 4 witnesses identified Bierey.
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> Defense: Without knowing the witnesses' descriptions, counsel could not determine if the distracters fit those descriptions, something research indicates is important (see p. 476). As a result, he was prevented from fulfilling the role *Wade* envisioned. Being able to interview the witnesses prior to the ID would have further enhanced his ability to ensure the distracters were appropriate. Not being able to attend the actual identification meant counsel was unable to observe any suggestions, conscious or otherwise, from the prosecutor or between witnesses. Finally, according to the *Social Action in Law* checklist (pp. 475-476), the lineup might well have been deficient in

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[35] Excerpted from SLOBOGIN, *supra* note 1, at 498-99.

various ways (see, e.g., items 1, 2, 12, and 16-21),[36] all of which could have been prevented had counsel had access to the witnesses before the lineup and during the actual identification. (Note further that this lineup definitely *was* deficient in four other ways (see items 3, 6, 8, 15),[37] although counsel had all the information he needed to point out these deficiencies.)

Comment: This problem raises the issue of how active lineup counsel should be. As *Bierey* indicates, the case law tends to hold that counsel should merely be an observer. If that is all counsel is allowed to do, than Uviller is right that videotape is just as good, or almost just as good. At the other extreme, counsel could be allowed to force changes in the lineup and the identification procedure, an approach which might prove disruptive and slant the identification process too much in the defense's favor. The ALI Model Code of Pre-Arraignment adopts a middle ground, allowing counsel to make objections for the record, but permitting the police to conduct the procedure as they see fit.[38] If the ALI procedure were combined with clear regulations requiring police to follow rules along the lines of the *Social Action in Law* checklist or the New Jersey rules,[39] then it might be the best approach, because counsel's objections that the rules aren't being followed might be heeded. But what happens if, as in *Bierey*, counsel doesn't make appropriate objections? Are they waived? Further, neither the ALI approach or the *Social Action* checklist resolve the issues actually raised in *Bierey*. As the note on discovery suggests (pp. 498-499), the courts are likely to be very reticent about letting counsel interview witnesses, either before or after the lineup. Whether the need for such interviews outweighs the first two concerns

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[36] These items read as follows: "1. Was the witness shown any photographs of the suspect prior to the lineup? 2. Have the witnesses been shown prior lineups related to this case? 12. Do any of the participants in the lineup differ from the original description given by the witness? 16. If there is more than one witness, did they have an opportunity to discuss the events of the case? 17. If a positive identification is made, does the witness give a verbal response instead of writing down the choice on a form? 18. Does the form lack a zero choice (a number representing a non-identification)? 19. Is there anyone else in the lineup other than the one suspect who could be a suspect in this or related crime? 20. Was the witness told in any way that he or she was 'correct' or 'incorrect' in making an identification? 21. Did the officer conducting the lineup suggest or emphasize any one individual through word, gesture, tone or number?" *Id.*

[37] These items read as follows: "3. Are there less than six people in the lineup? 6. Do the participants have different amounts and styles of facial hair? 8. Do the participants differ in height? 15. Is there more than one witness present at the lineup?" *Id.*

[38] Model Code of Pre-Arraignment Proc. § 160.7 (Proposed Official Draft 1975).

[39] These rules are discussed earlier in the text. They can be found in Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (2001), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/nj_guidelines_lineup.pdf.

identified in *Eads* will probably vary considerably from case to case, and courts have been reluctant to engage in such speculation.[40]

IV. CONCLUSION

The foregoing materials from *Regulation of Police Investigation* and the accompanying Teacher's Manual illustrate several aspects of the teaching philosophy outlined in the first section of this article: the problem-oriented method, the ready provision of black letter law, and the de-emphasis of case language. The problem method requires students to engage in the type of advocacy they will employ as lawyers; teaches them the importance of facts, precedent, and organized argument; and ensures that they are heavily involved in the classroom discussion. The provision of black letter law is not meant to be spoon-feeding, but rather simply replicates information that will be available to the students as lawyers (from treatises and so on), at the same time it allows the discussion to be more efficient and sophisticated than one which starts by trying to parse the holding from several pages of case language. The emphasis on facts and holdings rather than explanatory language gets students to focus on those factors that will typically be the most important part of a case in this area of law. As the introduction emphasized, however, the book also provides materials that can support a number of other teaching methods: problems for groups or the entire class; a negotiation exercise; materials from an actual case that can be used as the basis for review or a memorandum; and the relevant text of a number of leading cases (in these sections of the book, *Massiah* and *Ash*).

This article has also illustrated how a diverse array of materials can be integrated into a course on regulation of police investigation. As the first excerpt from the Teacher's Manual indicates, the *Massiah* discussion benefits from references to the commentators (i.e., Uviller, Tomkovicz and Stuntz), empirical information (concerning the use of interrogation as a form of plea bargaining), non-judicial sources of law (the DOJ regulations), and close analysis of the facts of Supreme Court cases (e.g., *Wilson* and *Henry*). A similar array of materials enhances the discussion of *Ash*. For instance, the teacher can refer to historical information (in particular, the seventeenth century rule that counsel may only argue legal issues, which presumably supports the holding in *Ash*), descriptions of identification practices in other countries (which are provided in the footnote in *Wade* mentioned above), the law review literature (e.g., the debate about when the Sixth Amendment kicks in, excerpted

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[40] Excerpted from SLOBOGIN, *supra* note 20, at 117-18.

in the *Massiah* materials) and empirical investigations (operationalized in the Social Action checklist and the New Jersey rules).

These multiple learning methodologies and sources of information make the course on regulation of police investigation more informative, more realistic, and more interesting.