
Preface to the Second Edition

At the beginning of 2021, when the first edition arrived on my desk, it seemed possible that policing and its law might soon be transformed. I thought I might need to rethink and rewrite broad swaths of the casebook for the second edition. Two and a half years later, less has changed than some desired and others feared.

On one hand, the public narrative about policing is fundamentally altered, even among officers. Incidents since George Floyd's death, such as Tyre Nichols' 2023 fatal encounter with Memphis police officers, have made it near impossible to doubt the deep roots or grievous consequences of policing's enduring problems. On the other hand, fear of gun violence, the impact of urban homelessness, and a recruitment and retention crisis in police departments has made many cautious about reforms they worry might compromise public order and safety.

Similarly, the law has changed in some ways, and remained constant in others. Hundreds of new state laws have restricted the use of force, expanded citizen oversight, mandated data collection and transparency, required training, and regulated the use of technology. The Biden administration has expanded civil rights enforcement, promoted less force, and worked to increase accountability in local policing. And communities have experimented with increased public participation in and alternatives to policing. But structurally, policing and the law that governs it are much as they have long been. Officers have the same state powers. Police departments are organized the same way. No major federal statutes on policing have passed. And courts have merely tweaked constitutional rights and remedies.

This new edition attempts to illustrate what is different and what is not. It incorporates new law, especially state law. It adds discussion of newly prominent issues and reforms. And it cites recent scholarship, especially by new voices. But the bones of the book are the same. Like the first edition, the second seeks to highlight what we know (and don't know) about policing; illustrate the wide-ranging sources of law that influence it; interrogate the choices the law makes; and consider the consequences those choices have. As with the first edition, I welcome readers' corrections, criticisms, and suggestions.

Whatever its flaws, this second edition starts from the same premises as the first: We turn to the government to promote public order and safety. The government organizes police departments and empowers officers towards those ends. The policing they practice inevitably harms people and risks doing so excessively, unfairly, and unaccountably. And law shapes that policing, even as policing shapes the law. Few legal subjects could be more compelling.

Rachel Harmon
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A Note for Readers

This book provides primary materials — including cases, statutes, and departmental policies — and commentary and questions designed to help readers explore the law, its context, and its consequences. Among other issues, the notes and questions encourage readers to consider the form and content of the law; who is making it; and how the law may influence the costs, benefits, fairness, and accountability of policing. They also encourage readers to consider alternative forms of regulation and how to achieve them. The book is organized in four parts.

- Part One introduces local policing — its history, goals, and problems — and its relationship to law, including the many types of law and legal actors that influence the police.
- Part Two considers the law that regulates police intrusions on members of the public during criminal investigations.
- Part Three addresses the law that governs police interactions with members of the public on patrol and on the street.
- Part Four looks at legal remedies and reforms used to encourage officers and departments to change their conduct and follow the law.

Because there is no accepted course of study on policing and the law, and different professors will offer varying seminars and black-letter courses, the book is designed to be flexible, suited for courses on the law of the police generally, on criminal procedure, on civil rights remedies, on aspects of police misconduct, and on more specific topics, such as the use of force. The materials are appropriate both for students without prior experience and for students who have taken courses in criminal procedure or civil rights litigation, as most of my students have. Some subjects, such as criminal prosecution of police officers and pattern-or-practice suits against police departments, are dealt with in special depth in recognition that other materials on these subjects are scant. Professors and students may pick and choose to suit their purposes.

Students who have studied constitutional criminal procedure or civil rights litigation will recognize some of the book's cases. They are used here toward different ends, and my students consistently tell me that they feel fresh rather than repetitive. For example, although every criminal procedure casebook includes *Miranda v. Arizona*, 384 U.S. 436 (1966), many omit the dissents or include only those parts of the dissents that highlight the debate among the Justices about proper methods of constitutional interpretation. In this book, the case is edited instead to emphasize the Justices' express debate about the role of the Court in regulating the police given limited information about interrogation practices and the consequences of regulation. Case excerpts throughout the book illustrate and emphasize the role courts play in regulating policing, a subject that other courses only touch on. If anything, familiarity with the doctrines makes it easier to focus on how and how effectively they regulate policing, as opposed to whether they are good constitutional law.

A Word About Editorial Choices

- *Race*. No chapter in this book includes *race* in its title. Race affects every aspect of policing practice and its legal regulation, and it is considered throughout the

book. Readers looking for focused discussions of race and the law of policing might find the following chapters especially interesting: Chapter 5, which considers stops and frisks; Chapter 6, which considers the law governing racially disparate traffic stops; and Chapter 8 on the use of force.

- *Gender*. There is no easy solution to the problem of gendered language for this book. Women serve in every role in the criminal justice system, including as police officers and as suspects, as I suspect do nonbinary people and other gender minorities, though no statistics exist for them. As in any text, using male nouns and pronouns to refer to people who might not be male is imprecise and risks reifying existing gender categories and dynamics. Nevertheless, policing remains overwhelmingly male: Only one in seven local police officers is a woman, and people suspected of serious crimes are even less often female. Moreover, police interactions with members of the public are gendered and sexualized in important ways, and ideas of masculinity affect the content and quality of policing. As a result, using a singular “they” or female pronouns for hypothetical or generic parties in the text (or alternating, as some texts do) risks being both jarring and misleading. Although the text seeks to use gender-neutral language when possible, masculine pronouns are used, with apologies, to refer to hypothetical officers and suspects unless the context requires or easily permits doing otherwise.
- *Perception and reality*. The book discusses some police activities targeted at members of particular communities, such as undercover stings focused on gay men, street stops of transgender women, and traffic enforcement targeted at Latino drivers. When officers target members of a community, they usually base their actions on their perceptions of a person’s status, which may not correlate perfectly with reality. As a result, such activities often affect not only members of the targeted community but also the penumbra of people most likely to be mistaken for members. While the text often abbreviates by referring only to effects on community members, such discussions are intended to include by implication those affected by misperception.
- *Nonofficers*. Discussions of policing are plagued by another linguistic problem: how to refer to people with whom police officers interact. In the context of criminal investigation, *suspect* or *arrestee* might appropriately describe the legal role a person plays, and these terms are used some, but this book also goes beyond the law of criminal investigation. *Subject* is broader, including more of those to whom police attention is directed, such as those involved in traffic stops, but it characterizes people by police interest in them rather than by any legal or political role they inhabit in relation to the police. Many authors use *civilians* to describe non-officers, but this word equates serving on a police force with being in the armed forces, and therefore suggests that policing is inevitably or properly militaristic, hierarchical, and armed, an assumption the book questions. I sometimes use *citizens*, which is valuable because it emphasizes the political relationship between officers and those who are policed. However, that term apparently excludes many in the country (such as noncitizen immigrants), who may be heavily policed. *Residents* is used some, but it overemphasizes where people live. I often favor *members of the public*, *community members*, or *members of the community* (although *nonofficer members* would be more accurate). Nevertheless, where the connotations are appropriate or *members of the community* is too cumbersome, the text uses other imperfect terms.

- *Scope.* The institutions and people that constitute the police are vast and diverse. In addition to local, municipal police officers, they include county sheriffs, state officers, tribal police, and a large variety of federal law enforcement officers, as well as private security guards, who significantly outnumber sworn police. As is discussed in Chapter 1, this book focuses on local police. Although much of the law discussed applies to other government officials who carry out policing activities, narrowing the scope to local policing allows readers to consider the impact of many different types of law on one (diverse) type of institution.
- *Omissions and alterations.* Footnotes, citations, internal quotation and alteration marks, and parentheticals have been eliminated from quotations without notation in the interest of readability. Some paragraph breaks and section numbers have been eliminated from quoted materials for the same reason. Some footnotes have been converted to in-line citations. Citation forms within quoted texts have also been changed for clarity. Other omissions and alterations are indicated, and footnotes that are preserved in sources are numbered as they are in the original. Editorial notes added to primary materials are indicated by *Ed. note*.
- *Other policing law.* Because the book focuses on aspects of the law that govern police intrusions on and interactions with the public, it does not consider in depth other kinds of law that significantly shape policing, including employment and labor law, civil service law, employment discrimination law, state regulations guiding police management and organization, and public records and data transparency laws. Although these laws are touched on, readers should look to other sources (or future editions) for a more complete picture.
- *Transparency.* I have worked on policing matters for more than two decades as a lawyer, consultant, and academic. As a result, I have occasionally been involved in subjects discussed in the book. In an effort to be transparent about my potential biases, I have added editorial footnotes whenever I have been personally connected with events discussed. However, to limit the number of self-referential footnotes, I have not always disclosed prior positions I have taken in writing about matters in the text, which seem less critical to evaluating the materials. I have also not disclosed any personal involvement in subjects in the book where doing so would breach a duty of confidentiality. In 2023 and 2024, I worked at the White House Domestic Policy Council. This edition of the casebook was written in my personal capacity in accordance with a publishing agreement entered into prior to my federal employment. The opinions expressed in this book are my own and do not necessarily reflect the views of the White House, the United States government, or any agency thereof.
- *Future editions.* The subject of policing and the law — even when confined to police interactions with the public — is vast and ever changing. No single volume could include all aspects of it, nor stay up to date. You will likely find mistakes I have made, omissions that grate at you, areas of the law that have changed, or opinions and implications that you cannot abide. I look forward to expanding, improving, and correcting the book in future editions, and I welcome reader reactions, suggestions, and comments toward that end.