

# THE LAW OF CRIMINAL INVESTIGATION

A Book for  
Law Enforcement  
Personnel



LLOYD L. WEINREB



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( A Book for  
Law Enforcement Personnel )

**LLOYD L. WEINREB**

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# PREFACE

This book is intended to fill the need of police officers and law enforcement personnel for a clear, accurate guide to the law of criminal investigation. It presents the principles of constitutional law in the context of actual, day-to-day police work, from the point of view of the officer who must decide what to do. Throughout, the emphasis is on the situations confronting the officer rather than technicalities interesting primarily to lawyers who become involved later on.

The constant stream of decisions affecting criminal investigation from the Supreme Court and other federal and state courts has convinced many people that it is impossible to keep abreast of and understand the law. Police officers in particular, whose professional conduct is most directly affected, conclude that the rules are more relevant to legal battles in the courtroom than to the practical realities of law enforcement. The result is that there may seem to be two bodies of law, one for the courts and one for the police, in uneasy coexistence.

There is some justification for this attitude of the police. Many of the Supreme Court's decisions seem to rest on fine distinctions that are hard to discern under the pressure of police duties. Rules defining the authority of the police often are embedded among rules having to do with judicial proceedings, which are of secondary importance to the police but make the answers to the questions that concern them obscure and uncertain. The process of formulating rules in the course of deciding concrete cases

makes it inevitable that the hard cases will be more prominent than the much larger number of those falling easily under an established rule.

Nevertheless, there are general principles of constitutional law that apply to crime prevention and criminal investigation. The principles and the reasoning behind them can be stated clearly and simply. They command the assent of a large majority of people in this country. They furnish adequate guidance for the police. And they are adequate to explain the result in most cases. If the facts of a case are too close to the line for a clear decision either way, resort to agreed principles will ordinarily provide a basis for understanding how fair-minded, responsible persons may disagree.

The law of criminal investigation is presented here as much as possible as a set of reasonable, agreed principles, compliance with which police officers should regard as a standard of professional competence. Without disregarding detail when it is important, the book provides a general approach to criminal investigation that will help an officer to act correctly if he is faced with unusual and uncertain circumstances. Every effort is made to show that conscientious adherence to legal principles is not an impediment to effective law enforcement but a part of it.

Topics are arranged according to their place in police work rather than legal rubrics. They include the authority to arrest, stop, or detain a person; the use of force; interference with the movement of a motor vehicle; all aspects of search and seizure; electronic or surreptitious surveillance; booking and investigation at the police station; lineups; and questioning of suspects. A separate chapter discusses the exclusionary rule. Excerpts from or summaries of the facts in leading cases are used to illustrate the impact of a rule in a concrete situation. Aspects of a case that do not affect the choice confronting a police officer are largely left aside. At the end of each chapter, questions and problem cases provide an opportunity for review and further discussion.

I am grateful to the Boston Police Department for permission to include the forms on pp. 24, 50, 134, 138, and 139.

March 1982

L.L.W.

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# INTRODUCTION

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## The Police Profession

There are more than 438,000 full-time law enforcement officers in the United States. Together with an additional 121,000 civilian employees, they work in almost 12,000 different agencies of the federal, state, and local governments, which range from a one-officer village police force to the vast, complex bureaucracy of a large city.<sup>1</sup> Some of the details of their work and the manner of its performance vary as much as the setting; an effective officer assigned to a downtown beat relies on skills and experience that would be of little use to an officer responsible for a sparsely populated rural area. For all that diversity, police are united by a common sense of professional identity and purpose.

Like other professional persons, police define their work by the functions they perform. They are responsible for a wide and unpredictable variety of public tasks, loosely held together by a general connection with the peace and order of the community. Much of the work consists of routine operations, like traffic control, on which public safety and well-being depend. Another large aspect of the work is not routine, except insofar as it is always the police who perform it. The police are our public agency of last resort, and often of first resort, for an emergency that calls for swift, forceful, and decisive action.



Most of the situations in which the police are summoned to help do not involve a crime. When a person is injured and regular medical assistance is unavailable, or a child is lost, or a water main bursts, and in countless other circumstances, we turn to the police simply because there is no place else to turn. Such emergencies as well as their routine duties bring the police into constant contact with the public in noncriminal settings.

The most sensational and visible emergency situations are ones involving criminal activity. Not only has someone usually been harmed or endangered. A crime is a direct challenge to public order. It fits well within the general context of their work, therefore, that the police have primary responsibility for the prevention of crime, by intervening to frustrate its success and minimize the harm if they can or by investigating and apprehending the criminal, so that the criminal law can be applied. No other task is so readily associated with them. The police encourage this image of themselves as crimefighters, public officials who wage the community's battles against crime.

Crime control differs significantly from other kinds of police work. In noncriminal emergencies and on routine patrol, the police are present mainly to give assistance. When they respond to the scene of an accident, for example, the persons there are glad to see them and willingly cooperate. That is true also, of course, of one aspect of the response to a crime. The victim of a mugging who lies injured on the street or the householder who has returned to a burgled home measures police effectiveness by the speed with which they appear and is eager for them to take charge.

The criminal, however, is anything but glad to see the police. Far from encouraging their work, his objective is precisely opposed to theirs; the more obstacles in their way, to make their work more difficult and prevent its success, the better. The criminal is sometimes described as the "client" of the police. If so, no one should be misled into believing that he is a client who seeks their services.

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## **Criminal Investigation**

This book is about the law of criminal investigation. We shall study the rules that give the police authority to investigate crime and apprehend criminals and, at the same time, set the limits of that authority. As every officer knows, investigative tasks cannot be neatly separated from direct crime prevention or ordinary peace-keeping. Often, therefore, we shall touch also on aspects of police work that are not strictly investigative. Among the topics that we shall consider are when an officer can stop a person whose behavior is suspicious and ask for an account of his actions; when it is lawful to make an arrest; when it is lawful to search a person, or his suitcase, or car, or house; how to conduct a lineup; and when and how a criminal suspect can be questioned about a crime.

We shall not be much concerned, except incidentally, with investigative technique as it is discussed in some training manuals: methods of identification or interrogation and the like that have proven to be successful. We shall be discussing technique in another, more important sense. For unless rules of law are observed, the most "successful" investigative methods may fail because their

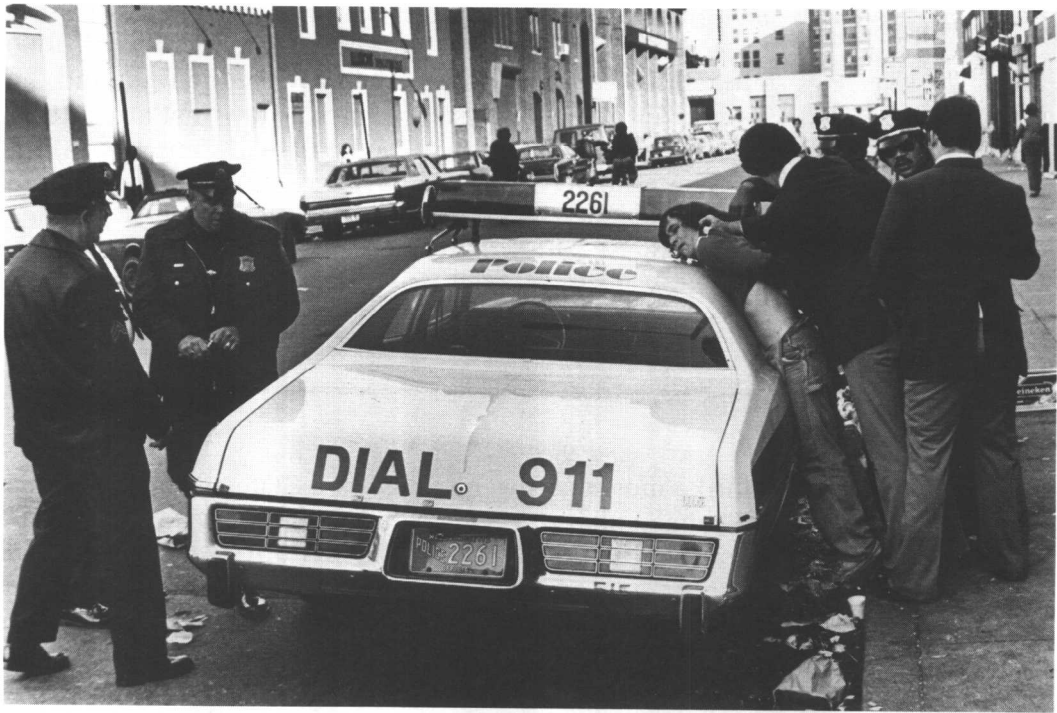
results are not admissible in evidence. Even if the admission of evidence is not a primary concern, a responsible investigator carries out his work as authorized by law—just as a good businessman is one who earns high profits within the law and not in violation of it. It is not good police work to apprehend a suspect, even if he is guilty, or to obtain evidence, even if it is highly material, by unlawful means.

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## Police Authority

The law of criminal investigation reflects the peculiar antagonistic relationship between police and the criminal. While officers ordinarily rely on the willing cooperation of others, when they encounter someone who is or may be a criminal they rely on their authority to require his cooperation, whether he is willing or not. Sometimes a suspect does cooperate with an appearance of willingness, hoping not to be incriminated; if it turns out otherwise, he is likely to claim (and in retrospect, to believe) that he cooperated against his will. Whatever the appearance at the time, when the investigation of a crime involves a person who may be the criminal, it usually rests on an officer's authority to take certain actions without regard to the person's own wishes. This antagonism is the more difficult because the officer often has to assert his authority swiftly and suddenly, with enough force to make it effective, before there is time to study the situation carefully. Even if he is sensitive to the limitations on his authority, in a true emergency when innocent persons may be hurt, he cannot wait to be certain. Good police work may require him to act first and ask questions later.

It would, perhaps, be a simple solution to give officers unlimited authority and instruct them to rely on cooperation if possible but to act without it if necessary. A society in which government under law is a first, basic principle cannot allow public officials to act in that way. Even a social objective as important as controlling crime cannot be pursued without restraint. Each of us has liberties that the government protects from interference by its own officials.



When one hears of a case in which a criminal “got away” because the court concluded that an officer exceeded his authority, it is easy to think that the rules of law interfere with the functions officers are expected to perform: “On the one hand, you tell us to catch criminals. On the other hand, you won’t let us do what we need to do to catch them.” The rules that we shall examine are the source of an officer’s authority as well as the limits on it. The limits are only the boundaries of the authority that the law itself confers. The authority of the police is not limited for the purpose of giving the criminal a break. Rather, it is limited because, along with law and order, we value other features of our community life as well. In the troubling circumstances of a crime, we may not be able to satisfy them all fully.

In most circumstances, the authority of the police is well suited to the performance of their duties. Sometimes it is reasonable to argue that the law is too restrictive or that, even if the law is sound in principle, its application in a particular case was unsound and that somewhat greater authority should have been allowed. So long as one recalls that there may be an opposing view, which is

also reasonably held, it is entirely proper to discuss critically rules of law and their application. Police officers, like other public officials, have the right and the responsibility to discuss the rules of law that affect their work and to criticize rules that seem impractical or unwise. The community has need of the knowledge and experience of the experts on whom it relies for law enforcement and will listen to their views.

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## Uniform Law

Unlike most countries, the United States does not have a national police force directed and supervised from one central office. Police departments are agencies of local government, and their loyalties and responsibilities are local. There are a few national and state police agencies, like the FBI and state highway patrols, but they are exceptions and typically have a special, limited jurisdiction. Criminal investigation is mostly the work of the local departments, which have working arrangements with one another but are administered independently.

Even so, it is not inaccurate to refer to a uniform national law that applies to all police agencies and establishes the main principles of criminal investigation. As one people, we are committed to a common understanding of the fundamental relationship between the government and individuals. We agree about the liberties and freedom from unnecessary official intrusions that individuals ordinarily expect and to which they are entitled, as we agree about the importance of law and order. These shared values are general enough to permit marked local variations. They have their own significance, nonetheless.

There is a still stronger source of uniformity. Starting around 1960, provisions of the Constitution affecting criminal investigation have been applied to state and federal police work, in enough detail to provide a set of rules common to both. Most of the rules have been derived from a small number of provisions contained in the Fourth, Fifth, and Sixth Amendments of the Bill of Rights, which the courts interpret and apply in criminal

cases. Those rules and their constitutional basis are the main subject of this book.

Courts do not have general authority to enact laws or make rules. For that, we rely on legislatures and administrative agencies of government. Courts do, however, apply the law when they try cases of persons accused of crime. It is a long-settled doctrine of our law that if there is a conflict between a provision of the Constitution, as the highest law in the land, and any other law, the Constitution prevails. Because the Constitution is superior to any other authority of the police or prosecutor, when a person is prosecuted in a state or federal court, any evidence against him that was obtained in violation of his constitutional rights cannot be used and is excluded from the trial.

We shall examine this "exclusionary rule" closely in the next chapter. Its effect is that whenever a criminal defendant objects to the prosecutor's use of evidence and claims that it was obtained in violation of his constitutional rights, the court conducting the trial has to decide whether the Constitution allows officers to behave as they did in that instance. If the defendant's claim is rejected, and he is convicted and appeals from the conviction, the reviewing court also has to consider his constitutional claim. So, if police search and find stolen goods, or question a suspect and he makes an incriminating admission, or in any of the other situations in which evidence is obtained, the method of investigation has to meet the constitutional standard. By ruling in thousands of cases whether a particular piece of evidence is admissible, the Supreme Court and lower courts have declared how criminal investigation is to be conducted.

There is nothing to prevent a state or city or an individual police department from giving officers *less* authority than the Constitution allows. Courts have no occasion to interfere if a proper governmental body concludes that the authority of police should be limited even further, since there is no violation of constitutional rights. In theory, therefore, even though the Constitution applies uniformly, we might have many different bodies of state law. In practice, the states and local governments have generally allowed the police the full extent of their constitutional authority. Local variations mostly concern less important matters of procedure and technical detail.



While a police officer has to know and abide by local rules, an error in this respect seldom is as serious or has as serious consequences as a violation of the Constitution.

Our reliance on case-by-case, judicial decisions for the most important rules defining police investigative authority may sometimes make it difficult to perceive general legal principles. Officers may struggle with opinions of the Supreme Court and other courts and conclude that the results depend on hair-splitting distinctions that they cannot apply meaningfully to their own work. They may wonder how they can be expected to understand and follow rules about which judges themselves often disagree.

Although it is true that some of the cases discussed in judicial opinions turn on refined analysis of small factual distinctions, these are a small fraction of the criminal cases that courts hear and adjudicate easily by straightforward application of well-known and easily understood rules. In the myriad circumstances of police work, difficult cases presenting facts close to the constitutional line cannot be avoided. Officers will find it helpful to study such a case as an application of and an aid to understanding a general rule rather than merely as the pronouncement of a narrow rule applicable only to the precise facts at issue. So, for example, if a court announces that an officer making an arrest lawfully searched a paper bag in the possession of the arrested person but that his search of a small suitcase was unlawful (see pp. 73-76 below), officers should consider that not simply as a rule about paper bags and small suitcases but as an explanation of the large general principles protective of individual privacy that are embodied in the Fourth Amendment. The many discussions of particular cases in this book will help officers to take that approach to legal material.

The case-by-case development of the law should have special attraction to police officers engaged in daily operations of great and unpredictable variety. Rules are fashioned in the context of actual, concrete circumstances, in which the needs of law enforcement and criminal investigation are vividly presented. Whether or not they approve of the result in a particular case, officers can be certain that the demands of professional police work are reflected in the law.