
NOTES

RETREAT: THE SUPREME COURT AND THE NEW POLICE

On a fall evening a few years ago, New York City police officer Edward Conlon found himself conducting surveillance alone on the rooftop of a walkup apartment building in the South Bronx. He knew there were drug dealers in the building, and as he heard a dog barking angrily, he peered through the darkness at the staircase leading below, wondering if the dog had been released on him. As the barks of the dog grew closer, Conlon began measuring the distance between himself and the stairs, between himself and the edge of the roof. He took out his gun, and as the pit bull mix burst from the stairs, he thought about firing.¹

The encounter, thankfully, did not end as dramatically as it had begun. A shouting Conlon established communication with residents in the building below, and within a few moments the dog was under control, the gun was holstered, and Conlon was back on the ground below, safe and sound.² Yet the story Conlon tells is a nightmare for any police officer. As he was making those life-and-death calculations, he thought about the myriad rules governing police officers today. He thought about the criminal investigation the department would open into his actions were he to fire, and he thought about the excessive force inquiry he might face from Internal Affairs. Conlon would later describe how he was “troubled by how the white noise of politics had impinged on [his] thoughts for the four or five seconds of the confrontation.”³

It is a powerful story, as it lays bare the central issue in policing today — how much regulation do the police require? The incident on the rooftop might at first blush seem to counsel for a relaxation of the rules governing police work. The rules are supposed to make police, suspects, and the general public safer, but these restrictions were, for Conlon, an unwelcome intrusion in a moment of uncertainty and fear. This was a good officer who, according to his own account, was distracted by external limits on his discretion to the point of exposing himself and others to extreme danger.

Viewed in the light of a sizable literature on the evolution of modern police, however, the incident tells a different tale. Conlon is a good

¹ EDWARD CONLON, *BLUE BLOOD* 268–69 (2004).

² *Id.* at 269.

³ *Id.*

police officer in large part because he was made to be one.⁴ He has, like many modern officers, received extensive training from a reinvigorated police brass. He has gained an understanding of constitutional norms governing his line of work, and he has learned to solve problems creatively and cooperatively. Eager and bright, empathetic and firm, he is the consummation of the tectonic forces that have shaped modern policing. Though Conlon bemoans the role that “politics” plays in policing, his story demonstrates that, whether on the mean streets or on the rooftops high above them, the rules work.

The question is: What should the Supreme Court do about good officers like Conlon? Historically, the Supreme Court has vacillated on the question of police oversight. Sometimes the Court has told the police what to do, or, more specifically, what *not* to do. But the Justices have just as often expressed a reluctance to intervene, declining to limit police ability “to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving.”⁵ In other words, the Justices sometimes fear to encroach on police discretion.

The Court has recently recognized that today’s police are better than ever, and it has pulled back judicial regulation of them on account. The Court has begun its retreat. This approach is not good enough, as it fails to fully appreciate the role that the Court itself has played in the evolution of the modern police. The Supreme Court should instead take advantage of the developments in policing, not by shying away from regulation, but by embracing oversight of law enforcement. We have arrived at a moment in our history when, in the face of legislative indifference, the executive power is waxing. Should the judiciary acquiesce now, the powers afforded to the police by the legislature might never recede, and the improvements enjoyed by law enforcement might begin to erode. Yet the Supreme Court can stop this. It should not, satisfied with its work, turn away from regulation of the police. Instead, it should embrace unabashedly the idea that the courts play a crucial role in managing — and improving — police behavior. The time is right for the Court to ensure that the gains made in policing today do not become the tired policing fads of tomorrow.

This Note proceeds in four parts. Part I describes the institutional culture of the police and charts the transformation that has occurred in policing over the past forty years. Part II considers the theoretical challenge posed by judicial intervention and argues that criminal procedure is a field in which the Supreme Court is uniquely equipped to produce change — positive change. Part III presents two case studies

⁴ See *id.* at 13–14 (describing Compstat, a program which requires commanding officers to account for crime statistics, and the reshaping of the modern officer).

⁵ See *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

demonstrating the Court's current attitude toward modern police. The first examines *Hudson v. Michigan*⁶ and the exclusionary rule, focusing on both the express and implied attitudes toward the police found in *Hudson*'s three opinions. The second looks at the law of deadly force, tracing the evolution of the doctrine and offering up *Scott v. Harris*,⁷ a 2007 case that all but obliterated judicial restrictions on police use of deadly force, as a prime example of the Court's current and mistaken policing jurisprudence. In concluding, Part IV warns against the dangers of reconciliation between the police and the judiciary.

I. POLICE, THEN AND NOW

More than forty years have passed since Professor Jerome Skolnick began writing about the police, and his 1966 book *Justice Without Trial*⁸ is still the standard in policing studies. In it he introduced the idea of the police officer as "craftsman."⁹ Much like a furniture maker, the police officer combines a rough apprenticeship with a sense of instinct and artistry. The craft that police practice, Skolnick argues, is discretion: "impossible to eliminate," it permeates police work, infiltrating even the most quotidian and seemingly straightforward tasks.¹⁰ Whether deciding when to issue a parking ticket or when to question a passerby, police must always rely on their discretion. And it is precisely this discretion which gives police officers legal power.¹¹

This Part first discusses the traditional working personality of the police officer, and then, focusing on changes in demographics, training, and culture, considers how the police have changed.

A. Professionalism and Violence

Policing is very different from furniture making, and the working personality of the police officer is different on account. Police work, according to Skolnick, is dangerous, and officers must exercise authority in order to do it well. On account of these twin characteristics — danger and authority — many police officers feel a sense of isolation from the community.¹² This sense of isolation feeds "an unusually high

⁶ 126 S. Ct. 2159 (2006).

⁷ 127 S. Ct. 1769 (2007).

⁸ JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966).

⁹ *Id.* at 231.

¹⁰ JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 72 (3d ed. 1994); *see also id.* at 71–72 (on giving parking tickets); *id.* at 103–06 (on dealing with prostitutes).

¹¹ *See id.* at 233 ("[P]olice in a democracy are not merely bureaucrats. They are also, or can be conceived of as, legal officials, that is, people belonging to an institution charged with strengthening the rule of law in society.").

¹² *See id.* at 43, 47–50, 53–60.

degree of occupational solidarity.”¹³ Resentful of liberals, suspicious of reformers, and downright hostile toward the judiciary, police maintain a “guildlike affirmation of worker autonomy.”¹⁴

Yet police do not simply believe that they are unique; they also believe that they are uniquely good at their jobs. Police officers, Skolnick argues, “believe that as specialists in crime, they have the *ability to distinguish between guilt and innocence*.”¹⁵ This belief, moreover, is transcendent. Consider race. Skolnick claims that the average officer “does not like African Americans.”¹⁶ Yet, he argues, these officers will rarely “admit to being racially biased or prejudiced,” because they believe that their professionalism transcends personal beliefs.¹⁷ This belief in the ability to overcome one’s own personal peculiarities in the interest of justice further marks the job; this too is part of the craft.

Intense belief in their own professionalism, and the accompanying disdain for those who question them, has long fueled an environment in which violence plays a central role. Professor Paul Chevigny writes that police in America have a lengthy history as society’s “delegated vigilantes.”¹⁸ He reports that police of the early decades of the twentieth century continued a tradition of vigilante justice practiced in communities during the nineteenth century,¹⁹ and that the rank and file continues to view brutality and intimidation as a means to power and control today.²⁰ It is a legacy of violence.²¹

Yet tradition is only one explanation for the violence. Chevigny asserts that many police brass share a “familiar and powerful hidden belief that violent police tactics decrease the amount of crime by terrorizing and deterring criminals.”²² The Los Angeles Police Department, which has had for years a prevailing “subculture condoning brutality,”

¹³ *Id.* at 50.

¹⁴ *Id.* at 228; *see also id.* at 60 (on liberals); *id.* at 191, 203 (on reformers); *id.* at 228 (“The police . . . view the judiciary, especially the appellate courts, as saboteurs . . .”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 383 (expressing police frustration with the courts).

¹⁵ SKOLNICK, *supra* note 10, at 192.

¹⁶ *Id.* at 79. For discussion of Skolnick’s descriptive claim, please see *infra* section I.B.3.

¹⁷ SKOLNICK, *supra* note 10, at 79.

¹⁸ PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 19 (1995) (internal quotation marks omitted).

¹⁹ *See id.* at 125–27.

²⁰ *See id.* at 78, 86.

²¹ *See* Maurice Punch, *Preface* to *CONTROL IN THE POLICE ORGANIZATION*, at xi, xii (Maurice Punch ed., 1983) (asserting that policing is defined by a “deeply entrenched informal culture of occupational deviance”).

²² CHEVIGNY, *supra* note 18, at 54; *see also id.* at 24 (discussing former Los Angeles Police Chief Daryl Gates); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 515–16 (2004) (describing the “double message” many departments send to police about violence).

presents a particularly stark example.²³ Others theorize that police brutality persists in part because the public approves of it.²⁴ According to these accounts, society wants tough police.

Skolnick, working years later with Professor James Fyfe, reinforces his view of police as intensely defensive of their own superiority, while simultaneously pairing his theory of isolation with theories of violence. Writing specifically about the 1991 beating of Rodney King, he and Fyfe argue that violence is not only used by police as a way to dominate the populace, but also as a means to assert their own professional expertise over the rest of the legal community: "Like lynching, such brutality is employed to control a population thought to be undesirable, undeserving, and *underpunished* by established law. Such beatings do not merely violate the law. They go beyond and above the law to achieve a fantasized social order."²⁵ The argument is that police, through violence, send a twofold message. First, they inform the brutalized that their behavior is unacceptable. Second, they remind the judiciary that the police will fill the punishment gap left by the courts. In other words, because some officers do not trust others within the legal system to achieve moral order, they will do it themselves.

B. *Developments in Discretion*

Professor David Bayley writes that, "There is nothing inherent in policing that makes it ill-disciplined, unreflective, short-sighted, and irrational."²⁶ Others too have rejected the idea that the police must inherit the sins of their violent past. The idea that discretion has bounds, and that subtle but firm pressure can shape police behavior, has spurred the police reform movement over the past forty years, and has wrought innumerable changes in policing. The most significant of these changes have been demographic, pedagogic, and cultural.

1. *Demography.* — Many commentators have shined a light on the significant shifts in police demography. Professor David Sklansky notes that "[m]inority officers, female officers, and openly gay and lesbian officers are slowly but dramatically transforming a profession that thirty-five years ago was virtually all white, virtually all male,

²³ JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 13 (1993).

²⁴ See *id.* at 189 ("[T]here is considerable support among the public for an aggressive, kick-ass style of policing."); Armacost, *supra* note 22, at 468 (describing "a widely held public view that a little bit of police brutality is simply the price we pay for crime control"); see also CHEVIGNY, *supra* note 18, at 254 (noting "the ambivalence of public attitudes toward police violence and corruption"). For further discussion of the causes of brutality, see POLICE VIOLENCE (William A. Geller & Hans Toch eds., 1996).

²⁵ SKOLNICK & FYFE, *supra* note 23, at 24 (emphasis added).

²⁶ David H. Bayley, *Knowledge of the Police*, in CONTROL IN THE POLICE ORGANIZATION, *supra* note 21, at 18, 30.

and uniformly homophobic.”²⁷ Such compositional changes, he argues, inject new skill sets into police forces, alter the inner workings of police departments, and transform the relationship of the police and the community.²⁸ Professor Susan Miller agrees. In a study of one city’s experience with community policing, she concludes that the prevalence of women on its police force helped redefine law enforcement there.²⁹

2. *Training.* — Advances in training have helped recast the policing role, too. Police officers in this country have long regarded training as largely irrelevant.³⁰ Yet perspectives are changing. Policing is difficult to teach, but as Professor Egon Bittner argues, that should not stop us from trying: “Teachers, clerics, and social workers are prepared for what are regarded as complex, important and serious tasks, making high demands on their knowledge, skill, and judgment. The opposite assumption is commonly made about persons who go into policing.”³¹

The training Bittner calls for has proven effective. By instituting policies designed to curb violence, many police departments have been able to reduce “the chance of spontaneous brutality during such high-risk activities as car chases and use of force.”³² For example, police training played a crucial role in a 1970s initiative to reduce gun crime in New York. Through use of realistic simulation exercises, officers were trained to balance the danger to themselves, the dictates of the applicable law, the possibilities of backup, and the protection of human life.³³ Similar improvements have been reported in Kansas City and Atlanta, where policies governing use of deadly force have had a “substantial impact on police gun use.”³⁴ These success stories show that proper training saves lives. The examples have also borne out the theory of Skolnick and Fyfe that police use of unnecessary force is “usually a training problem.”³⁵

²⁷ DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 142 (2008).

²⁸ See *id.* at 143–51.

²⁹ See SUSAN L. MILLER, *GENDER AND COMMUNITY POLICING* (1999).

³⁰ See, e.g., Armacost, *supra* note 22, at 514 & n.376 (“Field Training Officers advise their new recruits to ‘forget everything you learned at the police academy.’” *Id.* at 514); see also CONLON, *supra* note 1, at 1 (“[A]lthough I was done at the Academy, my education had barely begun.”).

³¹ Egon Bittner, *Legality and Workmanship: Introduction to Control in the Police Organization*, in *CONTROL IN THE POLICE ORGANIZATION*, *supra* note 21, at 1, 6.

³² SKOLNICK & FYFE, *supra* note 23, at 203. Car chases are particularly dangerous because police consider “fleeing motorists . . . prime candidates for painful lessons.” *Id.* at 11.

³³ See CHEVIGNY, *supra* note 18, at 67 (“Officers are trained in simulations to react to dangerous situations; they learn to take cover and call for backup. A shooting may be justifiable as a matter of law, they learn, but it might be avoided if the officer called for help. . . . [T]hey are taught that the preservation of life is a central value.”).

³⁴ Lawrence W. Sherman, *Reducing Police Gun Use*, in *CONTROL IN THE POLICE ORGANIZATION*, *supra* note 21, at 98, 111 (also discussing New York).

³⁵ SKOLNICK & FYFE, *supra* note 23, at 20.

The Supreme Court has embraced this view as well. It has recognized that the failure of a city to properly train a police officer can give rise to municipal liability,³⁶ and its decisions sometimes “serve as initial guidelines for law enforcement authorities” seeking to revise their policies;³⁷ sometimes they form the policies themselves.³⁸ *Tennessee v. Garner*,³⁹ a case that was quickly incorporated into police policy on deadly force nationwide, resulted in an immediate and “significant reduction” in the number of police homicides.⁴⁰ Thus, when the Supreme Court speaks clearly and decisively, its words are incorporated immediately and substantially into police training.

3. *Culture*. — The biggest, and perhaps most penetrative, changes to occur in policing over the past forty years have been cultural. One particularly thorny challenge facing policing is what Professor Barbara Armacost calls the “double message”: management tells the rank and file to respect legal norms, but does little to ensure that those precepts are respected.⁴¹ Such dissonance can be deadly. The LAPD, for instance, has long had deadly force policies consistent with national standards, yet a study from the early 1990s found that the police there still killed a disproportionately high number of civilians.⁴² The roots of this problem arise from a culture that has always tolerated violence.⁴³ Chicago faces a similar problem: it too has restrictive policies on use of force, but that did not stop police officers from torturing dozens of suspects over many years in an Area Two police station. There was still, according to Armacost, “an official policy of having unofficial policies promoting torture.”⁴⁴

The Los Angeles and Chicago examples illustrate the scope and seriousness of the cultural problems facing policing. They ought not, however, suggest that those problems are insuperable. The cases show

³⁶ See *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). At least some in the military agree. Mark Martins, a lieutenant colonel in the Army, argues that proper training can “produce a conditioned response” that accords with relevant legal restrictions. Mark S. Martins, *Deadly Force Is Authorized, but Also Trained*, ARMY LAW., Sept.–Oct. 2001, at 1, 2; see also *id.* at 15 (“[T]raining rather than legal drafting is the key.”).

³⁷ *Terry v. Ohio*, 392 U.S. 1, 31 (1968) (Harlan, J., concurring).

³⁸ See Karen M. Blum, Scott v. Harris: *Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45, 57–58 & nn.67–72 (2007).

³⁹ 471 U.S. 1 (1985).

⁴⁰ Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 241 (1994) (noting a reduction of approximately sixteen percent).

⁴¹ See Armacost, *supra* note 22, at 515–16; see also SKOLNICK & FYFE, *supra* note 23, at 139 (noting that the beating of Rodney King was treated by most officers of the LAPD “as an understandable response to provocative conduct on the part of an *asshole* badly in need of reeducation”).

⁴² See CHEVIGNY, *supra* note 18, at 46.

⁴³ See *id.* at 37.

⁴⁴ Armacost, *supra* note 22, at 490.

only that change without commitment is impossible. The departments that have committed themselves to cultural change have, thankfully, seen a real and positive impact in their policing practices.

One significant cultural change has been a renewed commitment from management to implement new initiatives. For instance, officers in New York, Kansas City, and Atlanta were not initially receptive to the post-*Garner* policies on deadly force. But a determined middle and upper management forced them to comply, and the relevant metrics improved accordingly.⁴⁵ Such persistence is necessary in order to avoid the double-message problem. Skolnick tells a similar tale. Returning years later to the Western city he first wrote about in 1966, he reports that police officers there have begrudgingly begun to accept the reforms pushed by a management “committed to higher standards of police training, conduct, and organization.”⁴⁶

Another penetrative cultural change has been the recognition that police work is often problem solving, and that talk can be an officer’s most powerful tool. This development has recast the personality profile of the typical police officer. The idea of “professional” policing, and with it images of violent, incident-driven responses, has been devastated.⁴⁷ Whereas the emphasis was once placed on coercion and violence, today police officers seem to be learning that, to some extent, talking and creative problem solving can save lives.⁴⁸

The Supreme Court has also influenced the culture of the police. As discussed above, changes on paper do not necessarily lead to changes in practice. There was once a time when the Court’s opinions were to police officers just that — opinions, specifically opinions not to be accorded too much respect.⁴⁹ But that too has changed. The legal standards enunciated by the Court produce real change when they are integrated into policy backed vigorously by leadership. When management takes the opinions seriously, the cases become a part of the police culture.⁵⁰

⁴⁵ See Sherman, *supra* note 34, at 124–25.

⁴⁶ SKOLNICK, *supra* note 10, at 263–64; see also David H. Bayley, *Police Reform: Who Done It?*, 18 POLICING & SOC’Y 7 (2008) (noting that almost every significant modern reform in policing has been met by resistance from the rank and file).

⁴⁷ See SKOLNICK, *supra* note 10, at 298.

⁴⁸ See CONLON, *supra* note 1; MILLER, *supra* note 29.

⁴⁹ See, e.g., SKOLNICK, *supra* note 10, at 203 (quoting a police officer as saying “These goddam search-and-seizure rules are our enemy. . . . I mean, sometimes you’ve got to do something on your own.”).

⁵⁰ See *id.* at 279; SKOLNICK & FYFE, *supra* note 23, at 66; see also William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 851 (2001) (discussing the integration of *Garner* into police policy).

Of course some elements of police culture have not changed. Not all police are as open as those described by Miller,⁵¹ and certainly it is a rare officer who has the compassion, conscientiousness, and self-awareness of Conlon.⁵² Many officers bristle at the thought that their actions are subject to legal limitations.⁵³ Certainly the frustration over legal restrictions on the police is understandable, as sometimes heroic police officers do get caught up in the nasty business of police brutality.⁵⁴

Less understandable are the charges of racism that persist. Though Professors Dan Kahan and Tracey Meares maintain that racism in law enforcement is no longer institutionalized, and that criminal law should shift its focus on account,⁵⁵ they are outnumbered. The majority of police-watchers today agree that racism remains a preeminent concern. Professor Dorothy Roberts contends that “race-based suspicions” continue to influence decision making,⁵⁶ and Professor Randall Kennedy posits that one must confront “complex and ferocious racial politics” in order to understand criminal law at all.⁵⁷ Furthermore, when Skolnick released the third (and most recent) edition of *Justice*

⁵¹ For a sterling example of a modern (and transformed) police officer, see the discussion of a police officer named William in MILLER, *supra* note 29, at 23.

⁵² Cf. SKOLNICK, *supra* note 10, at 265 (“The problem, however, continues to be whether the average officer possesses the interpersonal street skills . . . and the judgment to back off when appropriate . . .”).

⁵³ Michael Douglas Owens, a former deputy sheriff in South Carolina, argues that the focus ought not shift “away from the law violator’s actions and conduct.” Michael Douglas Owens, Comment, *The Inherent Constitutionality of the Police Use of Deadly Force To Stop Dangerous Pursuits*, 52 MERCER L. REV. 1599, 1600 (2001); see also CONLON, *supra* note 1, at 269 (“When you make a decision about self-defense, the only thing that should concern you is self-defense — tactics and cover, the possibilities and necessities of threat and response.”); LARRY MCSHANE, COPS UNDER FIRE: THE REIGN OF TERROR AGAINST HERO COPS 19 (1999) (describing the “private Hades” of the accused officer).

⁵⁴ See, e.g., SKOLNICK & FYFE, *supra* note 23, at 89 (telling the story of New York City Transit Police Officer Peter Marsala).

⁵⁵ Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

⁵⁶ Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 789 (1999); see also Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1272–73 (1998) (concluding that black men effectively confront the same racial prejudice from the police that they did thirty years before, when *Terry* was decided); Christopher Stone, *Tracing Police Accountability in Theory and Practice: From Philadelphia to Abuja and Sao Paulo*, 11 THEORETICAL CRIMINOLOGY 245, 257 (2007) (“Improvements in accountability have not cured the problems of racism or excessive force that plague police work everywhere . . .”).

⁵⁷ RANDALL KENNEDY, RACE, CRIME, AND THE LAW 3 (1997); see also RHODRI JEFFREYS-JONES, THE FBI: A HISTORY 1–16 (2007) (on race and federal law enforcement); Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003) (arguing that police racism deserves our continued attention).

Without Trial in 1994, he left untouched his statement, first committed to print in 1966, that most police officers do not like black people.⁵⁸

Though many racist officers believe that they are able to police fairly despite their personal beliefs,⁵⁹ the evidence demonstrates that uneven policing has a corrosive effect on those in its crosshairs. Police continue to focus their attention, resources, and patrols on neighborhoods populated largely by minorities,⁶⁰ and these law enforcement sojourns bring with them myriad social meanings. At the most obvious level, there is the direct affront posed by officers who continue to harass black youth simply because they are young and black.⁶¹ On a less direct level, the mere presence of officers in minority neighborhoods exerts a subtle yet palpable force on the minority population,⁶² akin perhaps to the deflating effects of an occupying army.

The problems of brutality and racism in law enforcement are dramatic and continuing. Yet law enforcement's collective failure to rid itself of these elements should not obscure its widespread achievements in other important areas. Real change has taken place. Police today are more diverse and better trained than ever before. They are more attentive to administrative policymaking, and more receptive to judicial intervention. They are also more communicative and less violent toward the public. These transformations began about forty years ago and continue today; it is a history that is unfolding, but it is not new.

II. A PARADOX IN POLICING

There are two approaches the Supreme Court can take to these recent improvements in policing. On one hand, the Court can step back from aggressive regulation of law enforcement, acknowledging that police officers today are less violent, more communicative, better aware of constitutional norms, and more responsive to limitations placed on them from above. On the other hand, the Court can continue its practice of oversight, recognizing the gains wrought in part by its own hand, and further take the lead in police reform. While the first option

⁵⁸ SKOLNICK, *supra* note 10, at 79; *see also* SKOLNICK, *supra* note 8, at 81.

⁵⁹ SKOLNICK, *supra* note 10, at 79–81.

⁶⁰ *See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1193 (2000) (noting an “asymmetric distribution of beat cops in [minority] neighborhoods”).

⁶¹ *See* Roberts, *supra* note 56, at 799–801 (“Even my relatively privileged son had become acculturated to one of the salient social norms of contemporary America: Black children, as well as adults, are presumed to be lawless and that status is enforced by the police.” *Id.* at 800.); *see also* JAY-Z, *99 Problems*, on THE BLACK ALBUM (Roc-A-Fella 2003) (Officer: “Son, do you know what I’m stopping you for?” Jay-Z: “‘Cause I’m young and I’m black and my hat’s real low.”).

⁶² *See* Luna, *supra* note 60, at 1192 (“What matters are the *perceptions* of those people most directly affected by drug enforcement policy — the poor, urban, largely minority community members who witness the mostly white police force arresting mostly black or Hispanic individuals.”).

has undeniable intuitive appeal, a close examination of the issues reveals that it is the second course that is most prudent: the police have improved, yet the courts should regulate them all the same.

The judiciary exists in part to defend the populace from the constitutional exuberance of the political branches. Yet, if “courts interfere too much with the work of the executive and the legislature, democratic values will suffer.”⁶³ Kahan and Meares have championed the view that when the executive acts with greater respect toward constitutional limits, the need for countermajoritarian intervention is less. Positing that the racial situation in America has improved considerably, they contend that it is now time to completely rethink Fourth Amendment doctrine.⁶⁴ The role of courts is not to cobble together case law better suited for the 1960s, they say, but to defer to the newly invigorated political processes.⁶⁵

The argument for a reduced judicial role rests on the assumption that the police, having improved, need fewer incentives to maintain high levels of professionalism. Yet the history of policing suggests just the opposite: the police tend to occupy as much legal space as they are permitted.⁶⁶ As discussed above, officers begrudgingly incorporate legal rules into their operational culture if such rules are sufficiently backed by police management. Rather than give officers helpful space, a judicial retreat would significantly alter the balance of interests concerned with the police. It would also send a message to the rank and file — who are listening — that this is an area with which the Constitution and the courts are not particularly concerned.

Professor Gerald Rosenberg is one of the Court’s great skeptics. He thinks that too often we fall prey to an “implicit and unexamined” assumption: that “court decisions produce change.”⁶⁷ Rosenberg argues that we too often presume that the Supreme Court is capable of bringing about social change, and that we ought to adopt a more constrained view of its social role.⁶⁸ Yet even he acknowledges the impact

⁶³ Michael L. Wells, *The “Order-of-Battle” in Constitutional Litigation*, 60 SMU L. REV. 1539, 1549 (2007).

⁶⁴ See Kahan & Meares, *supra* note 55, at 1155–71.

⁶⁵ See *id.* at 1171–83; *cf. also* *City of Chicago v. Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting) (“Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they once enjoyed.”); *id.* at 101 (Thomas, J., dissenting) (“It is the product of this democratic process — the council’s attempt to address these social ills — that we are asked to pass judgment upon today.”).

⁶⁶ *Cf., e.g.*, Blum, *supra* note 38, at 54–55 (“Removing ‘deadly force’ from a special category of force that triggers certain preconditions will encourage police agencies to rewrite policies that currently treat deadly force as different, placing clear restraints on its use.”).

⁶⁷ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 1 (2d ed. 2008).

⁶⁸ See *id.* at 10–21.

that the Supreme Court has had on policing. He writes that police management often successfully leverages the words of the Court to achieve its own reforms.⁶⁹ Without the support of the Court, Rosenberg argues, reform suffers. In other words, it is a two-way street: to maximize reform, the Court needs the support of the brass, and the brass need the support of the Court.

Of course, Rosenberg maintains a level of skepticism. He discusses the Warren Court's so-called criminal procedure revolution, calling it a "[r]evolution [t]hat [w]asn't."⁷⁰ He says that the rulings that defined a legal generation failed to gain traction in police departments because they were never sufficiently backed by popular will. The entire exercise was, according to Rosenberg, a failure.⁷¹ He identifies many reasons for the failure. Relying on studies from the 1960s and 1970s, he argues that police training is poor, and knowledge among the police of legal standards is lacking.⁷² He also claims that there are insufficient incentives at the stationhouse to encourage constitutional behavior.⁷³

When Rosenberg released *The Hollow Hope*, he felt that, by and large, the police were not professional enough to integrate judicial rules into their day-to-day operations. Yet the negative qualities Rosenberg identifies have changed quite a bit since the 1960s. Training has improved, and with the imprimatur of management, legal decisions have penetrated the culture of the rank and file.⁷⁴ This commitment to change has not cured the police of their ills, but it has resulted in significant progress, and has laid the foundation for even more. Even Rosenberg concedes this point.⁷⁵

Judicial oversight has also become increasingly necessary because the legislature has in recent years loosened its own reins on policing. In the wake of the attacks of September 11, 2001, the legislature granted law enforcement the broad authority it thought was necessary to combat terrorism, at home and abroad.⁷⁶ Yet these grants of power

⁶⁹ See *id.* at 323 ("[I]f police administrators are willing to use court decisions as leverage, to professionalize their departments, for example . . . , there is evidence that they can shape incentives to increase the likelihood of compliance.").

⁷⁰ *Id.* at 334.

⁷¹ See *id.* at 334–35. But see *id.* at 270 (saying his conclusions regarding criminal procedure "can only be tentative"); Samuel Walker, Op-Ed., *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5 (arguing that the Warren Court played a "pivotal role" in police reform).

⁷² See ROSENBERG, *supra* note 67, at 322.

⁷³ See *id.* at 322–23. This argument resembles Professor Armacost's "double message" theory.

⁷⁴ See, e.g., Stuntz, *supra* note 50, at 851 (on *Garner*).

⁷⁵ See ROSENBERG, *supra* note 67, at 323 ("[L]eadership in police departments can make a difference. Where incentives or penalties are imposed from within the police organization, police respond.").

⁷⁶ For example, the USA PATRIOT Act makes it easier for law enforcement to obtain search warrants relating to terrorism. See, e.g., Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1573 (2008). Likewise, the "constant drumbeat of the 'war on crime,' louder than ever since the

will also reach more quotidian policing practices.⁷⁷ Likewise, support for racial profiling has increased since 9/11: while people once considered profiling primarily a means to harass black people, now it is viewed more as a legitimate method to prevent domestic attacks on a massive scale.⁷⁸ The balance of interests is currently bringing to law enforcement more discretion and less oversight. While such grants of authority might help the executive prosecute the war on terror, the history of policing indicates that such an approach is the exact opposite of everything that has been most successful in police reform. The judiciary is a necessary check on this legislative exuberance, and it must at this moment safeguard constitutional limits on policing, as other interest groups with a stake in policing increasingly acquiesce.

Because police organizations are more receptive to external input than ever before, the proper blend of circumstances and attitudes is in place for the Supreme Court to promote the type of transformation that even Rosenberg says is possible. But rather than take advantage of a policing climate that makes improvement more possible, the Court has dismantled the mechanisms it created to control the police. Where entrenchment is possible, the Court has retreated.

III. CASE STUDIES

Policing assumes a prominent role in *Hudson*, yet shifts into the background in *Scott*. By examining *Scott* in light of *Hudson*, and by considering both cases in light of the literature, one can discern clues about what the Court is doing, where it is going, and why.

A. Exclusion

The exclusionary rule should be simple. As explained by the Supreme Court at the time of the rule's adoption in 1914, in order to give "force and effect" to constitutional protections, the courts must bar evidence acquired in violation of them.⁷⁹ It sounds so simple, but in

terrorist attack on September 11, has drowned out calls for greater control over technological surveillance of the streets." Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *MISS. L.J.* 213, 215 (2002).

⁷⁷ See William J. Stuntz, Essay, *Local Policing After the Terror*, 111 *YALE L.J.* 2137, 2160 (2002) ("Like the war on drugs before it, the war on terrorism is likely to leave us with a different law of criminal procedure than we had before. Though some of the differences will be limited to antiterrorism police work, most will be general; they will affect the way local police deal with ordinary crimes.").

⁷⁸ See Samuel R. Gross & Debra Livingston, Essay, *Racial Profiling Under Attack*, 102 *COLUM. L. REV.* 1413, 1430 (2002). A Gallup poll found that black Americans were, in the days after 9/11, "more likely than any other ethnic group to support racial profiling and tighter security checks at airports for Americans of Middle Eastern descent." JOHN TEHRANIAN, *WHITE-WASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY* 124 (2009).

⁷⁹ *Weeks v. United States*, 232 U.S. 383, 392 (1914).

practice, operation of the rule has been anything but. The history of exclusion, ever since its application to the states in 1961 in *Mapp v. Ohio*,⁸⁰ has been one of slow and steady erosion.⁸¹ As the Supreme Court has bored further and further into the theoretical justifications underlying the rule, it has found more and more examples of police misconduct that, it reasons, simply cannot be deterred via exclusion.⁸² This narrowing has been cause for celebration⁸³ and controversy.⁸⁴ In 2006, the Supreme Court took up the issue again.

On an August afternoon in 1998, Booker T. Hudson was sitting in a chair in his Michigan home, crack in his pocket and a loaded gun by his side, when he heard the police call from outside his door. Three to five seconds later, they stepped through the unlocked door and arrested him.⁸⁵ That entry, Michigan would later concede, violated the knock-and-announce rule,⁸⁶ which requires that police executing a search warrant on a home first announce their presence outside the door, and then wait a reasonable amount of time before coming through it.⁸⁷ The entry was a constitutional violation, but the Court nonetheless held that suppression was inappropriate.⁸⁸ The Court reasoned that the exclusionary rule is intended to deter police misconduct; where deterrence is not possible, the need for exclusion is nil.⁸⁹

Yet the case stands for much more than its holding. Within the greater debate over the scope of the exclusionary rule took root a small but significant skirmish over the police. The participants were Jus-

⁸⁰ 367 U.S. 643 (1961).

⁸¹ See, e.g., James P. Fleissner, *Glide Path to an "Inclusionary Rule": How Expansion of the Good Faith Exception Threatens To Fundamentally Change the Exclusionary Rule*, 48 MERCER L. REV. 1023 (1997). Professor Craig Bradley told the *New York Times* that the exclusionary rule might already be dead. Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1.

⁸² See, e.g., *Herring v. United States*, 129 S. Ct. 695 (2009). In *Herring*, the Court reasoned that the exclusion inquiry "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* at 698. In its celebration of deterrence as the justification for exclusion, *Herring* represents a significant departure from *Terry v. Ohio*, 392 U.S. 1 (1968). In addition to discussing deterrence, *Terry* described "another vital function" of the exclusionary rule, *id.* at 12, namely, "the imperative of judicial integrity," *id.* at 12-13 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)) (internal quotation marks omitted). The *Herring* dissenters trumpeted this second justification, see *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting); the majority ignored it.

⁸³ See, e.g., Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001); Slobogin, *supra* note 14.

⁸⁴ See, e.g., David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes On the Fourth Amendment*, 2005-2006 CATO SUP. CT. REV. 283; Editorial, *The Fourth Amendment Diluted*, N.Y. TIMES, Jan. 16, 2009, at A26 (on *Herring*).

⁸⁵ *Hudson v. Michigan*, 126 S. Ct. 2159, 2162 (2006).

⁸⁶ *Id.* at 2163.

⁸⁷ See *United States v. Banks*, 540 U.S. 31, 41 (2003).

⁸⁸ See *Hudson*, 126 S. Ct. at 2170.

⁸⁹ *Id.* at 2163.

tices Scalia, Kennedy, and Breyer; the issues were police improvement and the appropriate judicial response.

Justice Scalia, writing a majority opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, took the view that the modern police should be accorded greater judicial respect. He lauded “the increasing professionalism of police forces, including a new emphasis on internal police discipline,” and noted the “increasing evidence that police forces across the United States take the constitutional rights of citizens seriously.”⁹⁰ Justice Scalia’s thinking here accords with much of the current scholarship on the police. His analysis fails, however, to address the litany of accounts suggesting that the police have struggled to free themselves of their racial past.

Justice Scalia did not stop there. He took his argument one step further, reasoning that, in light of improved police training, supervision, respect for constitutional guarantees, internal discipline, civil remedies, professionalism, advancement structures, and citizen review, there is less of a need for courts to intervene in police affairs today than there was when *Mapp* was decided.⁹¹ While Kahan and Meares have put forth a similar argument, few others maintain that the courts should dial back regulation on account of improvement. It was, in a way, judicial sleight of hand. Justice Scalia, by drawing on the police literature, assembled an impressive troop around him. Yet it was he alone who took the final step.⁹²

Justice Kennedy, writing in concurrence, echoed Justice Scalia: “Our system . . . has developed procedures for training police officers and imposing discipline for failures to act competently and lawfully.”⁹³ The solution, he reasoned, is to yield to these developments.

Justice Breyer, writing a dissent joined by Justices Stevens, Souter, and Ginsburg, disagreed. He scoffed at the notion that the police will respect constitutional norms absent judicial oversight. He noted that, in the fifty years before *Mapp*, states “failed to produce any meaningful alternative to the exclusionary rule,” and that they have continued to drag their feet on the question of constitutional protections thereafter.⁹⁴ He further argued that state efforts to deter unconstitutional behavior by law enforcement officials have been at times “worthless and fu-

⁹⁰ *Id.* at 2168.

⁹¹ *See id.*

⁹² *Cf., e.g.,* Walker, *supra* note 71 (arguing that Justice Scalia “twisted my main argument to reach a conclusion the exact opposite of what I spelled out”).

⁹³ *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring).

⁹⁴ *Id.* at 2174 (Breyer, J., dissenting) (quoting Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 126–29 (2003)).

tile.”⁹⁵ Justice Breyer went on to argue that relaxation of judicial regulation of the police will spur an uptick in police mischief.⁹⁶

Justice Breyer failed to address the contention put forth by Justices Scalia and Kennedy that the police have improved and should be afforded more room. Much of the evidence he cited dates to the years before *Mapp*, and while he contended that state legislatures have failed to take appropriate steps to safeguard constitutional norms, he did not consider the new attitudes of police administrators themselves. However, insofar as Justice Breyer’s dissent recognized the dangers posed by judicial retreat, it soared. His view that the police will expand to fill whatever vacuum left to them by the courts accords with the sizable literature demonstrating that only *external* pressure has been able to restrain the rank and file.

The debate between the Justices was short-circuited by a dearth of direct engagement. Justice Breyer avoided the ample literature documenting improvements in the police. And though Justices Scalia and Kennedy did an excellent job of receiving this literature, they extrapolated lessons about the appropriate levels of judicial regulation of the police that have little support. Furthermore, they failed to counter Justice Breyer’s contention that the act of judicial retreat itself threatens to erode constitutional norms.

Yet the back-and-forth is helpful nonetheless. It laid bare the basic issues at play, namely improvements in policing and the appropriate judicial response. It broadcast the core attitudes of the Court toward the police. And the majority was “sufficiently dismissive of the exclusionary rule” as to signal that the Court is retreating from its regulation of the police.⁹⁷ While subsequent Supreme Court policing decisions have not explicitly grappled with the matters contemplated in *Hudson*, the views uncovered there should nevertheless inform our reading of the Court’s evolving policing jurisprudence.

B. *Deadly Force*

An examination of the law of deadly force provides another window into this troubling development. In the United States, there is little legal doctrine governing police use of excessive force.⁹⁸ As brutality remains a problem and law enforcement challenges continue to grow,

⁹⁵ *Id.* (quoting *Mapp v. Ohio*, 367 U.S. 643, 652 (1961)) (internal quotation marks omitted).

⁹⁶ *Id.*

⁹⁷ See Linda Greenhouse, *Court Limits Protection Against Improper Entry*, N.Y. TIMES, June 16, 2006, at A28.

⁹⁸ See William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043–44 & nn.92–94 (1995); see also Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008) (“The Supreme Court’s Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished.”).

there has never been a better time to add flesh to the skeletal understandings of force found in the text of the Fourth Amendment. Rather than toss out cases that might help define the bounds of constitutional force, the Court should allow them to work their way through the lower courts, so that perhaps a doctrine of force might develop. But the Court has turned away from this challenge.

1. *Reasonableness.* — All police uses of force must be reconciled with the requirement that all seizures be reasonable.⁹⁹ The obvious question, however, is what makes the use of force reasonable. The Court first approached this question in 1985. In *Tennessee v. Garner*, the Court took up the case of a man who had been shot in the back of the head as he tried to flee from the scene of a burglary.¹⁰⁰ The Court ultimately decided that the police could handle another limitation on their discretion, even in the most dangerous of circumstances.¹⁰¹ It found the Tennessee statute authorizing the use of deadly force to be unconstitutional,¹⁰² and held that:

[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.¹⁰³

Thus, under *Garner*, deadly force is permitted when three conditions are met: (1) it is necessary to prevent escape, (2) warning has been given, if feasible, and (3) one of the following has occurred: (a) an armed threat against an officer, (b) the officer has probable cause to believe that the suspect has already committed serious physical harm, or (c) the officer has probable cause to believe that the suspect has threatened to commit serious physical harm. Failure to demonstrate any of the three prongs (necessity, warning, and one of the qualifying triggers) means that deadly force is unreasonable.

Garner did not, however, reach police use of nonlethal force, and a few years later the Court addressed this issue in *Graham v. Connor*.¹⁰⁴ In *Graham*, police officers in Charlotte, North Carolina, shoved a man's face into the hood of a squad car as they arrested him, and denied him sugar to combat what he claimed was an insulin reaction.¹⁰⁵ Making explicit what it claimed was implicit in *Garner*, the Court held

⁹⁹ See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

¹⁰⁰ See *Tennessee v. Garner*, 471 U.S. 1, 3-4 (1985).

¹⁰¹ See *id.* at 20 ("[S]imilarly difficult judgments must be made by the police in equally uncertain circumstances." (citing *Terry v. Ohio*, 392 U.S. 1, 20, 27 (1968))).

¹⁰² *Id.* at 22.

¹⁰³ *Id.* at 11-12.

¹⁰⁴ 490 U.S. 386 (1989).

¹⁰⁵ See *id.* at 388-89.

that “all claims that law enforcement officers have used excessive force — deadly or not” are to be measured against a Fourth Amendment reasonableness standard.¹⁰⁶ As the Fourth Amendment explicitly requires that all seizures be reasonable, the modest contribution of *Graham* seems to be a reminder that police applications of force are seizures. Nevertheless, *Graham* has been influential as the only Supreme Court case — other than *Garner* — to deal with police use of excessive force. That is, until *Scott v. Harris*.

2. *The Double Message*. — Victor Harris was running from the law. Clocked driving seventy-three miles per hour in a fifty-five mile-per-hour zone one night in March 2001, and with police lights flashing in his rearview mirror, he decided to drive on. At times he drove in excess of eighty-five miles per hour, weaving in and out of traffic, running red lights, and even, on a brief detour through a parking lot, bumping the police cruiser of Timothy Scott, a Georgia police officer who had by then joined the pursuit. Back on the highway, after Harris had covered about ten miles in about six minutes, Scott rammed the back of Harris’s car with the front of his own. The impact forced Harris’s car off the road, and he was paralyzed in the resulting crash.¹⁰⁷

In an 8–1 decision, the Supreme Court held that Harris’s excessive force claim should have been dismissed at summary judgment.¹⁰⁸ Writing for the majority, Justice Scalia focused on what he described as “an added wrinkle”: a video camera installed in Scott’s squad car had taped the entire episode.¹⁰⁹ Justice Scalia saw on that tape “a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.”¹¹⁰ He concluded that Harris’s theory was “so utterly discredited by the record that no reasonable jury could have believed him.”¹¹¹

Scott has been received by the legal community largely as a case about summary judgment.¹¹² And as it concerns the highly unusual situation in which a video camera recorded almost the entire incident, its applicability as a summary judgment case will be limited.¹¹³ That should have been it; *Scott* should have been a simple case about sum-

¹⁰⁶ *Id.* at 395.

¹⁰⁷ *See* *Scott v. Harris*, 127 S. Ct. 1769, 1772–73 (2007).

¹⁰⁸ *See id.* at 1773–74.

¹⁰⁹ *Id.* at 1775.

¹¹⁰ *Id.* at 1775–76.

¹¹¹ *Id.* at 1776.

¹¹² *See, e.g.*, *CarePartners LLC v. Lashway*, 545 F.3d 867, 875 n.3 (9th Cir. 2008); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

¹¹³ *Cf.* *Landis v. Phalen*, 297 F. App’x 400, 404 (6th Cir. 2008) (calling it a “rare” case at the “outer limit” (quoting *Wysong v. City of Heath*, 260 F. App’x 848, 853 (6th Cir. 2008))).

mary judgment. But then the Court included a curious dictum, which it described as a “rule: A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”¹¹⁴ *Garner* did not say that, of course, which raises the question: where did the new rule come from?

Garner presented a problem in *Scott*. To show that the use of deadly force was reasonable under *Garner*, the government would have had to show the jury that the maneuver employed by Scott was “necessary to prevent escape,” that Harris had threatened the officers or had inflicted or threatened to inflict serious physical harm on someone else, and that a warning was given, if feasible. Perhaps the jury would have found for the government on each issue; perhaps not.

Justice Scalia knew all this; in order to rule in favor of Scott, he had to take the case out of the purview of *Garner*. So he did. Justice Scalia offered an impossibly narrow construction of *Garner*, suggesting that it applies only to “young, slight, and unarmed” burglary suspects fleeing on foot who are subdued by police gunfire to the back of the head.¹¹⁵ Because *Scott* had “vastly different facts” from *Garner*, Justice Scalia concluded simply that *Garner* had “scant applicability” to *Scott*.¹¹⁶ Instead of relying on *Garner*, Justice Scalia leaned on the core holding of *Graham*: “all that matters is whether Scott’s actions were reasonable.”¹¹⁷

Justice Scalia’s reading largely subsumes *Garner* to *Graham*. Whereas courts once applied the *Garner* test, with all its preconditions and questions of fact, to police uses of deadly force, *Scott* directs courts to bypass the structured *Garner* inquiry and “slosh . . . through the factbound morass of ‘reasonableness.’”¹¹⁸ With *Garner* effectively neutralized, the primary case left to govern police use of force is *Graham*, which, with all its focus on reasonableness, does not stray far from the text of the Constitution itself. In this way, *Scott* represents a

¹¹⁴ *Scott*, 127 S. Ct. at 1779; see also *id.* at 1781 (Breyer, J., concurring) (calling the majority’s dictum “a *per se* rule”); *id.* at 1785 (Stevens, J., dissenting) (same). But see *id.* at 1779 (Ginsburg, J., concurring) (“I do not read today’s decision as articulating a mechanical, *per se* rule.”).

¹¹⁵ See *id.* at 1777 (majority opinion) (quoting *Tennessee v. Garner*, 471 U.S. 1, 21 (1985)). This is a view explicitly rejected in *Garner* — by the question presented, see *Garner*, 471 U.S. at 3, the holding, see *id.* at 11, and the dissenting opinion, see *id.* at 31 (O’Connor, J., dissenting).

¹¹⁶ *Scott*, 127 S. Ct. at 1777.

¹¹⁷ *Id.* at 1778. Justice Stevens was unimpressed by this reasoning. Writing in dissent, he mocked his “colleagues on the jury,” *id.* at 1782 (Stevens, J., dissenting), arguing that the case presented a valid question under *Garner* about police use of deadly force, see *id.* at 1784.

¹¹⁸ *Id.* at 1778 (majority opinion).

stealth overturning of *Garner*,¹¹⁹ and renders the doctrine of excessive force even leaner than before.¹²⁰

In a way, the summary judgment posture provided cover for a Court that was working real change in the world of policing. Rather than give *Garner* a full-dress argument, the Court undercut the civil damages regime on which it had come to rely,¹²¹ and inserted a new rule on police chases masquerading as dicta. By the end of an opinion purporting to be about summary judgment, the Court had remade the law of deadly force. It said that Fourth Amendment norms are to be respected, but it diluted the ability of courts to enforce them. This is the double message.

3. *A Page of History.* — So how did this happen? How did *Garner*, which was well understood to govern police use of deadly force,¹²² and to do so effectively,¹²³ slip into the ether? Presumably the five Justices comprising the majority in *Hudson* — Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito — were just fine with the erosion of *Garner*. As they made very clear in *Hudson*, they feel that the police, having improved, have less need for judicial regulation. Their indifference toward *Garner* is, therefore, understandable.

Professor William Stuntz has attempted to explain the Court's vacillations using a historical model. He argues that criminal procedure protections decline as crime rates rise.¹²⁴ His suspicion is that the

¹¹⁹ Cf. *Mapp v. Ohio*, 367 U.S. 643, 676–77 (1961) (Harlan, J., dissenting) (discussing the “unwisdom” of overturning a recent precedent “without full-dress argument”). Consider how, for example, in a recent case regarding police use of deadly force, the Tenth Circuit did not even cite *Garner*. See *Weigel v. Broad*, 544 F.3d 1143, 1151–52 (10th Cir. 2008). Equally telling is that Judge O’Brien, writing in dissent, treated *Garner* like an afterthought to *Graham* and *Scott*. See *id.* at 1158–59 (O’Brien, J., dissenting). Similarly, in a recent terrorism case before an en banc panel of the Fourth Circuit, Judge Motz’s concurring opinion cited only *Scott* on the law of deadly force. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 251 (4th Cir. 2008) (en banc) (Motz, J., concurring), *vacated and remanded sub nom.*, *Al-Marri v. Spagone*, No. 08-368 (08A755), 2009 WL 564940 (U.S. Mar. 6, 2009).

¹²⁰ See, e.g., Harmon, *supra* note 98, at 1120 (arguing that *Scott* “left the law more incomplete and indeterminate than ever”); cf. Blum, *supra* note 38, at 54–55 (suggesting that judicial withdrawal from regulation of police discretion “will encourage police agencies to rewrite policies that currently treat deadly force as different”); *id.* at 59 (arguing that *Scott* “will lead to bad policies and bad policing”).

¹²¹ *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812–13 (1994) (noting the centrality of civil damages to Fourth Amendment protections).

¹²² See, e.g., Stuntz, *supra* note 50, at 851; see also R. Wilson Freyermuth, Comment, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 701 (“*Garner* provide[s] the federal courts with clear guidance regarding the standards for evaluating the excessive force claims of . . . persons subjected to an arrest or investigatory stop.”).

¹²³ See Tennenbaum, *supra* note 40, at 241.

¹²⁴ See Stuntz, *supra* note 77, at 2155 (“[C]rime rates have played a significant part in the ebb and flow of criminal procedure protections over the past two generations.”). He sees *Terry v.*

Court is currently in the midst of a post-9/11 relaxation of constitutional protections.¹²⁵ Though Stuntz is quick to admit that the historical model is not all-encompassing,¹²⁶ it is an attractive theory nonetheless. There have been throughout American history “powerful hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.”¹²⁷ The post-9/11 pressure might help explain how the Court in *Scott* could be so cavalier with *Garner*.¹²⁸

More confounding is the attitude of the *Hudson* dissenters in *Scott*. They spoke out so forcefully against the relaxation of regulation in *Hudson*, yet they splintered in *Scott*.¹²⁹ It cannot be that these four Justices are more concerned with violations of the knock-and-announce rule than they are with applications of deadly force. A better answer is that the three who joined the majority opinion in *Scott* simply did not realize the impact that the case would have on police policy.¹³⁰ Even though Justice Harlan once observed that Court opinions sometimes “serve as initial guidelines for law enforcement authorities” making policy,¹³¹ perhaps Justices Souter, Ginsburg, and Breyer did not realize the extent to which *Garner* had become a bedrock in law enforcement, and the extent to which tinkering with it would reverberate across the land.¹³²

Ohio, 392 U.S. 1 (1968), for example, as a result of a “decade of rising crime.” Stuntz, *supra* note 77, at 2152–53.

¹²⁵ See Stuntz, *supra* note 77, at 2156–60.

¹²⁶ See *id.* at 2155 (“[M]onocausal theories are implausible.”).

¹²⁷ *Terry*, 392 U.S. at 39 (Douglas, J., dissenting) (opining that those pressures had most likely never been greater than in 1968).

¹²⁸ Of course, the Supreme Court has ruled against law enforcement post-9/11. In *Georgia v. Randolph*, 126 S. Ct. 1515 (2006), the Court ruled that the occupant of a house standing in a doorway can refuse police entry into the home, even if another occupant has consented to entry. *Id.* at 1518–19. But this decision does little to impinge on police discretion, as there is no craft in determining whether someone is standing in a doorway. Future cases under *Randolph* will turn simply on the validity of the initial consent to enter and the subsequent denial of consent from the person in the doorway. In this way *Randolph* somewhat resembles *Miranda v. Arizona*, 384 U.S. 436 (1966). Both cases place limits on police, but not on their discretion. They both create procedural hurdles, but once clear of them, police can largely act as they see fit.

¹²⁹ Justice Stevens complained in dissent of the majority’s new “*per se* rule” regarding police chases. *Scott v. Harris*, 127 S. Ct. 1769, 1785 (2007) (Stevens, J., dissenting). Justice Breyer noticed it, too, but rather than not sign onto the majority opinion, he wrote a separate concurrence in which he expressed his understanding that the “statement is too absolute.” *Id.* at 1781 (Breyer, J., concurring). Justice Ginsburg, writing in concurrence, emphasized her view that the Court was not announcing a new rule. *Id.* at 1779 (Ginsburg, J., concurring). Justice Souter was silent.

¹³⁰ Cf. *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 145, 214–225 (2007) (discussing *Scott*, but not focusing on its effect on *Garner*).

¹³¹ *Terry*, 392 U.S. at 31 (Harlan, J., concurring).

¹³² See Blum, *supra* note 38, at 54–55, 59.

IV. CONCLUSION: AVOIDING CAPTURE

The idea that law enforcement will suffer under the weight of judicial meddling presupposes that police officers cannot thrive within tight constitutional constraints. Yet the recent history of policing disproves this theory: it has not been the officer's nose for trouble that has revolutionized policing over the past forty years, but rather the judge's pen, the public's outrage, and the administrator's verve. Given improvements in training, legal knowledge, diversity, and oversight, and the increasing recognition that talking is often the best way to resolve conflict, the police have in fact never been better equipped to heed the words of the Supreme Court. The Court, therefore, must not fear to speak.

Yet in both *Hudson* and *Scott*, the Court turned away. Instead of embracing the idea that the police are better equipped today than ever before to accept judicial opinions, the Court issued decisions that erode, rather than build up, judicial oversight of the police. As the post-9/11 legislature seeks to expand the law enforcement powers vested in the executive, and as the populace grows increasingly indifferent toward some forms of law enforcement excess, it becomes even more necessary for the courts to maintain an active role in regulating the police. Unfortunately, *Hudson* and *Scott* go the wrong way.

The Justices are right to assume that the rank and file will resent their intervention in its business. But at some level, this resentment does not matter. Skolnick suggests that police and judges are natural enemies — or at least they should be: “Indeed, when some hostility does not exist, the regulators may be assumed to have been captured by the regulated. If the police could, in this sense, ‘capture’ the judiciary, the resulting system would truly be suggestive of a police state.”¹³³ If Skolnick's concerns seem overstated, perhaps even overblown, recognize that some members of the Supreme Court have expressed similar fears.¹³⁴ If the Court is in fact trying to make life easier for law enforcement post-9/11, without regard for those governed, this itself constitutes a danger. The Supreme Court ought not forget today what it said in 1969: the Court is the only thing between the citizenry and the police, and its job is, at times, to protect one from the other.¹³⁵

¹³³ SKOLNICK, *supra* note 10, at 223.

¹³⁴ See *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (describing the Fourth Amendment “as a bulwark against police practices that prevail in totalitarian regimes”); *Terry*, 392 U.S. at 38 (Douglas, J., dissenting) (“To give the police greater power than a magistrate is to take a long step down the totalitarian path.”). Justice Stevens further argued that the Fourth Amendment's warrant requirement is “part of the price that our society must pay in order to preserve its freedom.” *Acevedo*, 500 U.S. at 601 (Stevens, J., dissenting).

¹³⁵ See *Chimel v. California*, 395 U.S. 752, 761 (1969).