
RESPONSE

WHY DO COURTS DEFER TO COPS?†

Barry Friedman

In *The Judicial Presumption of Police Expertise*,¹ Anna Lvovsky has given us an important and edifying window into the much-contested phenomenon of judicial deference to the police. As Lvovsky notes, scholars and commentators have long complained about what seems to be the judiciary's undue willingness to accept what the police say — both as fact witnesses and with regard to policy needs — as the gospel truth. Lvovsky documents this deference and its history in deep detail. She then offers a sharp critique of what the courts have done.

The breadth of Lvovsky's narrative is remarkable; one takes nothing from it by noting what are nonetheless some problems with the causal story she tells, and the fit between her descriptive and normative conclusions. To get the takeaway up front: Lvovsky and I both agree the courts have tumbled over themselves in their eagerness to endorse police actions and viewpoints, often with slim basis for doing so. The harder question is whether this conclusion, and the critique Lvovsky offers of it, necessarily follows from the narrative she offers. And in fact, whether the causal story Lvovsky relates at great length as to why judges defer in the first place holds up under close scrutiny.

LVOVSKY'S STORY AND WHERE IT LEADS HER

Lvovsky's narrative floats a bit erratically back-and-forth among the first seven decades of the twentieth century — history is messy that way — but her central story for how courts came to defer to cops is simple enough. Police had long testified as lay witnesses in court.² Eventually, judges began to accept them as expert witnesses as well.³ Then, from their expert role in trials on the merits (often involving narcotics or sex workers), judges started to take that same supposed expertise into account in resolving motions to suppress evidence on the grounds of alleged police misconduct.⁴ Finally, the vaunted expertise

† Responding to Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

¹ Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

² *Id.* at 2018.

³ *Id.* at 2017–20.

⁴ *Id.* at 2018–19, 2028–29.

of the police, patently on display in suppression hearings, became the basis even for blessing statutes and ordinances involving loitering that otherwise might have been tossed out as vague.⁵

All this was helped along, Lvosky tells us, by a sustained campaign by police officials to have their work seen as both professional and expert.⁶ In response to sharp critiques of perceived policing corruption and incompetence at the turn of the twentieth century, policing endeavored to professionalize itself in the 1950s.⁷ Police departments and organizations like the International Association of Chiefs of Police then engaged in a sustained campaign to advertise policing's newfound professionalism.⁸ They sought, in particular, to persuade the judiciary of policing's improvements.⁹ This involved, for example, inviting judges to view training academies and speak at graduations.¹⁰

The result of all this was what Lvovsky calls "structural spillover."¹¹ The phenomenon, as she defines it, "examines how the *structural idiosyncrasies and procedures* of discrete spheres of the judicial process spawn inadvertent biases and judicial attitudes that then also affect *other arenas*."¹² (The emphasis is all her own; Lvovsky likes italics.) In other, simpler words: judges view cops in one arena, and draw conclusions that they apply — justifiably or not — in other situations.

From describing the phenomenon, Lvovsky moves to critiquing it. In her view, judges went off the deep end in blessing what cops do or propose to do, all on the basis of supposed "expertise."¹³ As Lvovsky sees it, judges jumped from deferring to police testimony about specific facts in specific cases to deferring to police expertise generally.¹⁴ Next, judges went from deferring to the actions of police in the executive realm to deferring to their views to support legislative enactments.¹⁵ Finally, judges displayed serious analytic biases that caused them to just say yes when it comes to policing. "This expansion of police expertise undercuts a core safety net against overdeference in the Fourth Amendment context."¹⁶

⁵ *Id.* at 2037–38.

⁶ *Id.* at 2008.

⁷ *Id.* at 2009–10.

⁸ *Id.* at 2008, 2010–11.

⁹ *Id.* at 2010.

¹⁰ *Id.* at 2011.

¹¹ *Id.* at 2065–66.

¹² *Id.* at 2066.

¹³ *Id.* at 2067–68 (noting both the troubling scope and foundations of judicial deference to police expertise).

¹⁴ *Id.* at 2070–71.

¹⁵ *Id.* at 2072.

¹⁶ *Id.* at 2071.

As I'm about to argue, Lvovsky's narrative and where it leads is not without its problems. Before I turn to critique, though, I want to pause to acknowledge Lvovsky's great accomplishment. Although scholars do frequently discuss judicial deference to the police, I know of no account that is anywhere close to this capable or comprehensive. Revealing her historian's chops, Lvovsky digested and assembled a daunting amount of material; she writes lucidly and compellingly. Her piece instantly becomes part of the canon on judicial deference to police expertise. It's hard to ignore the phenomenon after Lvovsky documents it as meticulously as she does.

CHALLENGES OF CAUSATION

The first question one wants to ask about Lvovsky's narrative, though, is whether its deep causal story is true. Surely she documents the extent of deference. And it seems plain, as she says, that this deference is present in a variety of different contexts.

But is "structural spillover" the cause? Put differently, do things simply move ("tumble" might be more apt) without advertence from accepting police lay testimony, to recognizing them as experts, to relying on that supposed expertise in suppression hearings, and ultimately doing the same in statutes — and more importantly, is this all facilitated by the exposure that judges are getting to police expertise, both judicially and extrajudicially? In short, were judges' biases "inadvertent" because of their exposure to all this supposed expertise, as Lvovsky claims, or was something else going on.¹⁷

There's an alternative story that can be told, and Lvovsky is well aware of this because she lays it out. In a section devoted to the "strategic rationale," Lvovsky explores this alternative, which one might call the "politics" of judging the police.¹⁸ The heart of this alternative story is that — for whatever reasons — judges (especially elected judges) want to appear "tough on crime" and a key way to do that is by buying hook, line, and sinker into what the police say.¹⁹

There is a lot going for the strategic story. Although the sole focus of Lvovsky's expansive work is hardly the Supreme Court, the story of the nation's highest court is familiar enough that it bears focus. The Warren Court, in decisions like *Mapp v. Ohio*²⁰ and *Miranda v. Arizona*,²¹ had sought to curtail troubling police practices in the realm of search and seizure, and interrogation. But when crime rates shot up

¹⁷ *Id.* at 2066.

¹⁸ *Id.* at 2053–58.

¹⁹ *Id.* at 2053.

²⁰ 367 U.S. 643 (1961).

²¹ 384 U.S. 436 (1966).

in the 1960s, the judiciary — especially the Supreme Court — came under attack. Richard Nixon ran in 1968 against the Court (and the Vietnam War) and won.²² *Terry v. Ohio*,²³ which blessed stop and frisk,²⁴ was decided in this period and may well simply represent judicial caving to popular pressure. Then, when Nixon won the 1968 election, he quickly got to appoint a bunch of justices who were tough on crime, just like Nixon promised.²⁵ No surprise, then, that these folks were all about deferring to the police. And if expertise was a handy trope, why not grab it?

In other words, maybe judicial deference to police is *not* grounded in a misguided view of police expertise grounded in exposure to the police in other areas, but instead reflects a conscious desire not to buck what the police say — for any of a number of reasons, from thinking that the defendants they see are guilty as hell, to wanting to appease the public's desire to be tough on criminals — and thus deeming the police to be experts.

Lvovsky lays out a version of this “strategic” story, then seeks to point out its “limitations.”²⁶ Conceding that the strategic story “helped drive the judicial embrace of police discretion in the midcentury,” she claims that her broader history shows the “gaps in this instrumental narrative.”²⁷ In support, she offers three arguments: (1) that the strategic story doesn't explain the judiciary's initial willingness to recognize police officers as expert witnesses at trial;²⁸ (2) that even if the strategic story is true it doesn't mean the judges would have had to rely on the idea of “expertise” as their basis for deferring to cops;²⁹ and (3) reliance on the expertise rationale was questionable anyway given that “the police professionalization movement and its promise of police knowledge were deeply controversial in these years.”³⁰

Lvovsky's own narrative undercuts her first two arguments. As she points out, courts came to defer to expertise generally — not just police expertise — regularly in the first decades of the twentieth century.³¹ It may have been entirely natural for courts to deem lay police witnesses as experts during this period, and to recur to expertise as the rhetorical line when they were falling over themselves to approve the actions the police took. This isn't inconsistent with her general story

²² BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 276–77 (2009).

²³ 392 U.S. 1 (1968).

²⁴ *Id.* at 30.

²⁵ FRIEDMAN, *supra* note 22, at 279.

²⁶ Lvovsky, *supra* note 1, at 2056.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 2057.

³⁰ *Id.* at 2058.

³¹ *Id.* at 2016–17.

of structural spillover; it is just that the spill was much broader than the police themselves — so broad a spill that it offers little basis for refuting the strategic story.

On the other hand, Lvovsky's third argument has real potential to gut her entire spillover narrative. It deserves especial focus. She's right: there *was* huge skepticism about the police in this era, and deep critique of the notion of police professionalism.³² *Mapp*, *Miranda*, and the like hardly were based on the judiciary's great trust for the police, let alone their expertise. And courts were not alone. Presidential commissions and pundits alike thought policing was running amok. Whether it was their conduct at the Democratic Convention of 1968 in Chicago, or in the South during sit-ins, or whatever else (and there were plenty of whatever elses), the police were hardly the heroes of the 1960s era of protests and social change.

But if that's true, it's hard to see how we can be sure a slow roll of genuine judicial deference to police expertise, rather than just using expertise as rhetoric in some cases, was what was driving the judges. Indeed, as Lvovsky's rich narrative and pregnant footnotes make quite clear — and one wishes she had done a whole lot more work to pursue the fault lines here — courts were not all of one mind on the subject. Some blessed the police;³³ others chastised them.³⁴ Some thought expertise justified judicial deference;³⁵ others would have none of it.³⁶ That's how the messiness of history goes, and Lvovsky's narrative about expertise thus is simply overdetermined based on her own evidence. Rather, when judges wanted to sign on to what the police were doing, expertise provided (for some judges) a fine and easily available rationale, whatever their real motivations. Others thought the notion altogether fanciful, and said so. It's certainly hard to conceive of how the same justices who expressed so much skepticism about policing in cases like *Mapp* and *Miranda* — and many others — really believed “expertise” is what justified approving of stop-and-frisk in *Terry*. (Lvovsky refers repeatedly to the expertise rationale in *Terry*, and ex-

³² *Id.* at 2013, 2058.

³³ *See, e.g., id.* at 2040–41 & n.333 (citing *People v. Pagnotta*, 253 N.E.2d 202, 204–05 (N.Y. 1969) (upholding a conviction of loitering for the purpose of using drugs based on the police officer's expert testimony that the defendants possessed materials — a bottle cap, eyedropper, and hypodermic needle — commonly used for cooking heroin)).

³⁴ *See, e.g., id.* at 2046 & n.377 (citing, among others, *People v. Bambino*, 329 N.Y.S.2d 922, 930–31 (Cty. Ct. 1972) (decrying police officers' supposed clairvoyance as “nothing more than a guess or a whim”)).

³⁵ *See, e.g., Lvovsky, supra* note 1, at 2015 & n.124 (citing *Pennsylvania ex rel. Ford v. Hendrick*, 257 A.2d 657, 669 (Pa. Super. Ct. 1969) (Hoffman, J., dissenting) (emphasizing the recognition of police officers as professionals and their competence)).

³⁶ *See, e.g., id.* at 2040 & nn.325–27 (citing *People v. Harris*, 315 N.Y.S.2d 66, 70–71 (App. Term 1969) (holding police expertise could not save a statute from unconstitutional vagueness)).

plains how others describe *Terry* this way, though she recognizes that the decision “barely relied on police expertise.”³⁷)

For Lvovsky to make her structural spillover story more compelling, she’d have to do a great deal more work, and even then we might not know for sure. We’d be a lot further down the road if Lvovsky had told us how judges ruled in policing cases prior to the period in question. If they were ruling for the police both before and after — as I suspect they were — then introducing “expertise” into the equation ostensibly changed nothing. Ultimately, though, we’d have to get into judges’ heads in a way Lvovsky doesn’t know, and perhaps can’t know, that their deference to police expertise was real rather than rhetoric.

To repeat: nothing here denigrates from Lvovsky’s rich account of the pervasiveness of deference to the police. It is possible that Lvovsky is correct — at least for some judges in some places — that exposure to police testimony in some contexts, combined with law enforcement efforts to push the professionalism story, spilled over into judges’ evaluations of police expertise in different contexts. The problem is that we just don’t know, and probably can’t know, if it was structural spillover of the innocuous sort, or the quite advertent decisions of judges to rely on claims of police expertise, whether they actually believed them warranted or not.

THE END IS NOT JUSTIFIED BY THE NARRATIVE

There’s a deeper problem here, though, which relates to where Lvovsky goes with her narrative. The first roughly seventy pages of the piece are descriptive and positive history, an account of what happened and why. This is her story about how judicial deference to police expertise spread from expert testimony on the merits in trials to suppression hearings to statutes. The remainder of the piece is normative. Lvovsky thinks judges have gone way overboard in deferring to police expertise, and that the deference she observes is unjustified. Suffice to say, she is not a fan.

Lvovsky may well be right on the ultimate conclusion. However, what is less clear is how her narrative gets her there. Taking her narrative seriously, one might have reached just the opposite conclusion. It requires something more like the strategic account — or maybe just an account that rests on judicial laziness and general predisposition — to get to the place Lvovsky ends up.

³⁷ *Id.* at 2034 (“The case that finally brought investigatory stops before the Supreme Court barely relied on police expertise.”).

Lvovsky's structural spillover story is all about biases, largely inadvertent ones but biases nonetheless. Given her narrative, though, I'm not sure I'd call what she describes to us as a "bias" so much as a well-grounded appraisal by judges of the talents of the police. Biases typically are considered to be judgments contrary to fact. But Lvovsky's narrative builds a strong factual case for judicial deference. If in fact judges watched countless cases of police testifying and were led to believe there is real expertise at play, it's hard to call favoring the police a "bias." And if judges are involved in interactions with police extrajudicially, and based on that exposure come to see the truth in the professionalism story, then again it is no bias to defer.

Lvovsky's response, no doubt, is that certain steps along the path to broad deference to police expertise were in fact solidly grounded, but then the entire approach got stretched well beyond what the evidence would support. That seems to be her thrust at the end of the piece. Lvovsky says, "the history above strongly suggests that these structural biases in fact routinely pushed courts to *overdefer* to police judgment."³⁸ According to her, "judges have repeatedly embraced police judgment in scenarios that raise significant empirical or doctrinal concerns."³⁹ In other words, that judges moved too easily from the expertise of one particular officer in a given case to presuming the expertise of other officers in different cases; from recognizing expertise in one kind of case to accepting it in all cases, even those that had yet arisen, under statutes of dubious constitutionality.

As we will see in a moment, I agree. The problem is that Lvovsky's paper doesn't encompass this evidence. She describes it at the end, but it is simply not what her lengthy and well-researched paper is about. That evidence of bias, drawn from elsewhere, just gets plopped in once Lvovsky comes to critique. It's plainly peculiar to spend much of her article making the case for why judges might reasonably defer to the police, only all of the sudden to look in the opposite direction and critique that deference.

If judicial deference to the police was ill-founded, what exactly were we supposed to take from the deference narrative in first place then? At best, Lvovsky's conclusion sits uncomfortably on the rest of the piece. At worst, she doesn't really have the goods to support her critique.

SELECTION BIAS

Nonetheless, Lvovsky does end up in the right place. Judges are in fact overdeferring to the police. And she hits the nail on the head.

³⁸ *Id.* at 2078.

³⁹ *Id.*

This happens because of a serious problem of “selection bias,” which causes judges to draw conclusions about police expertise from the cases they see.⁴⁰ It is a very, very serious problem. Judicial deference to police expertise has caused a soup of *societal* deference to the police, which has led to vast overpolicing.

From the perspective of judges, the police look like geniuses. They see policing most often in suppression motions. Whether what the police did was unconstitutional — thus justifying suppression — is beside the point here. The point is that the police nabbed someone with the goods. The police look like complete experts in finding bad guys. Worthy of the deference, Lvovsky describes.

What judges don’t see are all the instances in which the police searched, seized, interrogated, or worse, and came up empty-handed — the false positives. Yet if judges saw this entire picture of policing, it would become clear that judicial deference to police expertise is greatly overblown at present.

For example, all too rare is the case, like *Floyd v. City of New York*,⁴¹ in which judges get well-documented evidence of the hundreds of thousands of times each year the police stop people, run their hands over their bodies, and find nothing.⁴² Evidence that the hit rates for weapons, guns in particular — the ostensible justification for this aggressive program of stop-and-frisk — are abysmally low.⁴³ So low that if we took “reasonable suspicion” as the standard and compared it to the hit rates, the police are actually the exact opposite of experts.

In fact, as many including Lvovsky have noted, it is almost impossible to get into court (and thus before judges) all the cases in which the police guessed wrong.⁴⁴ Standing rules, the practicalities of finding a lawyer, the immunities doctrines that defeat incentives to litigate. All these conspire to ensure that what judges for the most part see are all the cases in which the police got it right, and few of the countless cases in which the police got it wrong.

This isn’t “structural spillover.” It’s a structural bias against judges seeing the full picture.

Prosecutors bring to court one case after another of seemingly guilty defendants who are begging to have the evidence against them suppressed because of police malfeasance — only serving to demonstrate to the judge and all else who see the very fact of the defendant’s guilt, and thus the expertise of the officers that brought this particular individual to justice.

⁴⁰ See *id.* at 2062, 2064–65.

⁴¹ 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁴² *Id.* at 573.

⁴³ *Id.* (“In other words, in 98.5% of the 2.3 million frisks, no weapon was found.”).

⁴⁴ See Lvovsky, *supra* note 1, at 2064.

But judges just don't see the countless instances in which police invade someone's privacy or property or sense of security, and find nothing.⁴⁵ Yet these cases are so numerous as to give the lie to any serious claim of magical ability on the part of cops to know when crime is afoot.⁴⁶

As Lvovsky says, this sort of structural selection bias "does not just benefit officers in each particular case. It also underwrites a cumulative impression of police expertise, based on the courts' aggregate exposure to the police's professional insights."⁴⁷ That's true. And it is a big, big problem.

It's just not clear that on the face of Lvovsky's exhaustive historical work, *judicial* deference is irrational. It may be entirely rational within the judicial system as now constructed, and yet deeply wrong beyond it. That is what needs fixing, but Lvovsky doesn't say much about how to fix it.

⁴⁵ See generally BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 82–83 (2017); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1626–34 (2012) (discussing the ineffectiveness of ex post monetary sanctions in deterring Fourth Amendment violations).

⁴⁶ FRIEDMAN, *supra* note 45, at 153–54 (describing this phenomenon and discussing numbers from *Floyd* litigation).

⁴⁷ Lvovsky, *supra* note 1, at 2064.