
RACHEL A.
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PROMOTING POLICING AT ITS BEST

RACHEL HARMON arrived at Virginia in 2006, following eight years of service with the U.S. Department of Justice. Her scholarship, which focuses on the relationship between the law and police governance, is deeply informed by her real-world experience as a federal prosecutor. Harmon is also known as a dynamo in the classroom, a thoughtful mentor to students, an admired leader of the faculty, and a public servant who remains deeply involved in the community.

Harmon's scholarship stems from a very practical problem. As a federal civil rights prosecutor, Harmon won convictions against white supremacists who assaulted young African-American men in Los Angeles, a halfway house director who forced probationers to have sex with him in Memphis, and others who violently assaulted those who are less powerful. One type of case, however, proved to be the most challenging and most troubling: charges against police officers who abused their positions, often by using excessive force.

Harmon prosecuted a police chief in Mississippi who beat a Latino man in the head with a baton after arresting him for public drunkenness. She tried an officer in Texas who punched and seriously injured an elderly man at a convenience store. She pursued Tennessee police officers who conspired to rob drug dealers. But she found proving these cases difficult. The victims were unsympathetic, there were few independent eyewitnesses, and the defendant police officers were experts at testifying in court. Even when she was successful, Harmon discovered that convicting individual

police officers for misconduct hardly seemed to help prevent future violence. It removed some bad officers from the streets, it vindicated the rights of the victims, and it reminded the public that no one is above the law. But more misconduct followed, often in the same departments. Broken departments ignored complaints, inadequately trained and disciplined officers, or rewarded overly aggressive policing, and criminal prosecution failed to inspire reform. In some cases, the Justice Department could even be accused of doing more damage than good. A police chief could use a criminal conviction to claim that the problem of misconduct was solved without being forced to implement structural reforms that would effectively prevent future misconduct.

Harmon turned from practice to academia not to escape her frustration, but to do something about it. In her six years at Virginia, she has sought answers to the questions her criminal cases raised: Can criminal prosecutions be more effective? Are other legal remedies likely to work better to prevent misconduct? And ultimately, what can law do to promote policing at its best?

In her first article, "When is Police Violence Justified?," 102 *Nw. U. L. Rev.* 1119 (2008), Harmon critiqued legal doctrine governing police uses of force and proposed refinements intended to help identify and prevent illegal police uses of force. Civil plaintiffs and federal prosecutors who challenge a police officer's use of force during an arrest must establish that the violence violates the Fourth Amendment guarantee against unreasonable seizures. In 1985, in *Tennessee v. Garner*, the Supreme Court provided a relatively easy-to-apply legal test for one context in which police face the decision to use force: when deadly force is necessary to subdue a fleeing suspect. The Court permitted deadly force "if 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." In subsequent cases, however, the Court addressed the force used by police officers more generally. Harmon argues that in doing so, the Court failed to provide precise rules for lower courts to use, or guidance on basic questions

about why police uses of force may be justified or when they are excessive. In *Graham v. Connor*, for example, the Supreme Court instructed courts to balance the police officer's intrusion on the individual's Fourth Amendment interests against the government interests at stake, carefully attending to facts and circumstances such as the severity of the crime at issue and whether the suspect poses an immediate threat to the safety of officers. However, the Court neglected to say when, why, or to what extent these circumstances were important. And more recently, in *Scott v. Harris*, the Court has eschewed providing even this limited guidance, instead announcing that "all that matters is whether [the officer's] actions were reasonable."

Harmon shows that *Garner*, *Graham*, and *Scott* provide vague, unprincipled, and sometimes misleading instruction to lower courts and juries about how to assess uses of force by the police. For example, in *Graham*, the Court suggests that the severity of a suspect's crime is always relevant to whether force can be legally used against him. Harmon demonstrates that the severity of a suspect's crime pertains to some decisions to use force because it can be used to predict the strength of the state's interest in subduing the suspect or how dangerous he might be if he were to escape. But in other circumstances, she argues, the nature of the crime is entirely irrelevant. As she explains in the article, "an officer may use force to prevent an attacking suspect from injuring him, no matter what the crime—whether the suspect is being arrested for jaywalking or assassinating the President," and conversely, "[w]hen a suspect is fully under control, the seriousness of the suspect's alleged crime is no longer relevant to the use of force on the suspect," since no force can be justified.

Harmon contends the Court has failed to answer the most basic questions about police uses of force, such as why a police officer may use force, when he can do so, and how much force he may use. As a result, courts and juries come to mistaken conclusions about the constitutionality of particular uses of force, leaving some unconstitutional acts by officers uncompensated and undeterred. Moreover, because judicial guidance is so limited, police officers cannot predict

how a court will assess the constitutionality of a particular type of force. This unpredictability reduces the specificity of officer training about what force is permissible. It also further undermines the deterrent effect of prosecutions and civil suits, because police officers can only be held liable for illegal uses of force when they should have clearly understood at the time that their conduct was unlawful.

Harmon addresses the problems of existing Fourth Amendment doctrine by first exploring why and when police violence is permissible, and then by turning to substantive criminal law defenses, such as self-defense, to provide more content to the Fourth Amendment legal standard. Self-defense addresses a social problem similar to that regulated by the Fourth Amendment: It distinguishes legitimate from illegitimate uses of force by individuals. Self-defense and other criminal law justification defenses have a well-established structure: Force is permissible only if it is a necessary and proportional response to an imminent threat to an interest weighty enough to justify the risk of harm the force entails. Harmon argues that, analogously, the Fourth Amendment should be understood to permit police uses of force only to serve the state's interests in enabling lawful arrests, protecting public order, and protecting officers from harm. Even if one of these interests is at stake, the officer's use of force should be a response to an imminent threat, reasonable in degree and in kind to protect the interest, and not substantially disproportionate to the interest it protects. This answer to the weakness of Fourth Amendment doctrine seems straightforward, but it would provide much more guidance to officers, courts, juries, and the public than the Court's limited advice that the force used by police officers must be "reasonable."

While Harmon's analysis offers new insight into the nature of police violence and shows a way toward more reasoned, predictable, and just results in civil and criminal cases, it is only the first step. As she recognized in practice, punishing officers' criminal conduct and holding officers and departments civilly liable cannot solve the problem of police misconduct. Individual remedies are inevitably limited

in ways described by Harmon's colleague Barbara Armacost in a 2004 article, "Organizational Culture and Police Misconduct": They are "focused too much on notorious incidents and misbehaving individuals" and too little on "the organizational norms and policies" that drive misconduct in the first place.[1]

Realizing that improving civil suits and criminal prosecutions is not enough to change police conduct around the nation, Harmon began to think about federal remedies that might better facilitate institutional change. That, in turn, became the subject of her next article, "Promoting Civil Rights Through Proactive Policing Reform," 62 *Stan. L. Rev.* 1 (2009). In this article, Harmon considers how to best use a promising but so far unsatisfying federal legal remedy for police misconduct. Title 42 U.S.C. § 14141 authorizes the Justice Department to bring civil suits for equitable remedies against police departments that engage in a pattern or practice of unconstitutional police misconduct. The statute was originally hailed by scholars and activists as a crucial means of driving systemic reform in police departments. But over time, enthusiasm waned: Section 14141 has had a limited effect in the almost twenty years since it was passed, driving reform in just a handful of American police departments. Many have suggested that the Justice Department should simply investigate more departments and bring more cases under the statute. But Harmon points out that while such a strategy might change a few more departments, it cannot promote nationwide reform in pathological law enforcement agencies. Because § 14141 investigations and suits are extremely resource-intensive, the Justice Department is unlikely ever to have sufficient resources to pursue every—or even many—problematic police departments. Even if the Justice Department's budget for investigating and suing police departments were doubled or tripled, the department's § 14141 efforts would force reform in only a few more police departments, hardly the kind of widespread change many want.

1. Barbara E. Armacost, "Organizational Culture and Police Misconduct," 72 *Geo. Wash. L. Rev.* 453 (2004).

To improve upon the expensive strategy of compelling structural changes in police departments one at a time, Harmon advocates enforcing § 14141 strategically to induce departments to adopt recommended measures to prevent misconduct before the Justice Department investigates or sues them. To spur reform, Harmon proposes a three-pronged regulatory and litigation approach. The first prong requires the Justice Department to collect nationwide data sufficient to estimate police misconduct by departments and adopt a "worst-first" policy that prioritizes suing the worst large departments. The Justice Department's approach to § 14141 has been largely reactive, spreading the risk of such suits among a vast number of departments—large and small—and therefore drastically reducing the incentive felt by each department to reform. In contrast, Harmon's approach concentrates fear of § 14141 among those departments most in need of reform—the largest of the "worst" departments. The second prong of the strategy is to create a "safe harbor" program in which departments that implement an array of reforms developed by the Justice Department are shielded from a § 14141 investigation or suit. Such a policy would make reforms more rewarding to police departments and encourage problematic departments to act proactively without an expensive investigation or suit. The third prong of Harmon's strategy is to develop and disseminate information to police chiefs and departments about the causes of misconduct and cost-effective measures for preventing it. By providing technical assistance to those considering reform, the Justice Department can lower the costs of change, making it more attractive to police departments. Together, Harmon argues, these efforts would leverage the Justice Department's inevitably limited § 14141 enforcement efforts to spur more reform in the nation's worst police departments than a traditional enforcement strategy permits.

Harmon's proposal for using existing legal tools to induce reform strikes a delicate balance informed by her experience at the Justice Department. Many academics invent solutions to social problems that are untethered from institutional realities. And many policymakers propose only incremental

and ineffectual reform, because they fail to transcend existing legal practices. Harmon brings practical experience to the academy, combining institutional knowledge with analytic rigor in order to articulate a vision that is both ambitious and—she believes—attainable.

Harmon recently expanded on her idea that police misconduct is a regulatory problem to be managed rather than an individual wrong to be remedied. This framework sets her work apart from traditional legal scholarship, which overwhelmingly considers policing through the lens of constitutional criminal procedure. In a new article, "The Problem of Policing," 110 *Mich. L. Rev.* 761 (2012), Harmon outlines an agenda for future scholarship on the law governing the police. She contends that while the 1960s Warren Court improved policing by imposing concrete constitutional standards on the police, it also established a conventional paradigm in which the courts use the Constitution as the primary means of balancing law enforcement goals with protecting liberty. This paradigm is unavoidably flawed both because constitutional law alone cannot protect important individual interests or the distributional effects of law enforcement activities and because the judiciary cannot by itself adequately define or enforce limits on police conduct. Although others have noted some of the limits of constitutional law as a regulatory mechanism and the judiciary as a regulator, Harmon demonstrates that legal scholars nevertheless almost exclusively analyze aspects of policing subject to constitutional law using constitutional methodologies.

Because the conventional constitutional paradigm has dominated legal assessments of policing, Harmon argues, scholars have neglected essential preconditions for effective governance of the police. One of those conditions is a normative framework for evaluating policing policy. As Harmon points out, police officers may engage in an excessive number of stops and frisks, for example, substantially undermining a community's quality of life but still technically complying with the constitutional rules governing these actions. If constitutional doctrine does not adequately protect the interests at stake, then regulators must measure a policy encouraging

stops and frisks by some other metric. To fill this gap, Harmon advocates policing that is harm-efficient—that is, policing should impose harms only when the law enforcement benefits of those harms outweigh their costs to individuals and communities. But for regulators to promote harm efficiency, they need access to information about the comparative costs and benefits of policing techniques. And that is a subject scholars have all but ignored.

Similarly, Harmon notes that governing the police effectively requires understanding what influences police behavior, so regulators can implement reforms that are likely to work. Scholars have neglected to explore the full range of laws that significantly influence police work in favor of almost exclusive focus on constitutional limits. Even now, Harmon argues, this neglect inhibits law governing the police. She uses the example of 18 U.S.C. § 1983 to illustrate her point. This long-standing federal statute permits individuals to sue police officers and departments for damages and other forms of relief. The Supreme Court has made clear that Congress intended § 1983 to deter misconduct as well as to compensate victims, and it tailors its interpretation of § 1983 to require constitutionally adequate screening, training, and discipline by police departments. But neither scholars nor courts seem to have noticed that other laws, including civil service law, collective bargaining law, and federal and state employment discrimination law, simultaneously discourage precisely the same reforms § 1983 encourages by making them much more costly for police departments to adopt. The result appears to be that § 1983 imposes significant costs on municipalities without preventing constitutional misconduct effectively.

In "The Problem of Policing," Harmon tasks scholars with laying the groundwork for effective law governing policing. Harmon is now pursuing the agenda she outlined, starting with a thorough examination of law governing the police and the consequences of shared federal, state, and local responsibility for regulating the police. Harmon engages students in her efforts as well. She now teaches The Law of the Police, a course that analyzes the web of interacting laws

that govern police and police departments. The Law of the Police explores a variety of legal doctrines, statutes, and administrative regulations to understand policing as the subject of regulation. Students explore the variety of conduct rules governing police behavior, drawing on sources as diverse as internal administrative orders and international conventions. Students then compare remedies for police misconduct, from the traditional to the informal and innovative. The course briefly considers some of the laws constraining how police officers are hired and managed, and it ends with several class sessions on the sundry laws that govern the production and dissemination of information about policing. These statutes—including state wiretap laws used to prosecute those who videotape police officers, state laws that command the police to record information in traffic stops, open records laws, and discovery rules—determine how much information citizens have about what the police do, and therefore constrain efforts to hold the police accountable. The Law of the Police course has been so successful at the University of Virginia that Harmon is developing a casebook to allow faculty at other institutions to teach similar courses.

The law plays an inevitable role in shaping police conduct. Harmon's work highlights the true complexity of governing the police, a social institution that, in her words, has "always represented both hope and harm." Through her scholarship and teaching, Harmon challenges the next generation of legal academics, students, and policymakers to move beyond traditional analysis of policing to improve police governance and the part law plays in it.

THE PROBLEM OF POLICING

110 *Mich. L. Rev.* 761 (2012)

Police officers are granted immense authority by the state to impose harm. They walk into houses and take property. They stop and detain individuals on the street. They arrest. And they kill. They do all these things in order to reduce fear, promote civil order, and pursue criminal justice. The legal problem presented by policing is how to regulate police officers and departments to protect individual liberty and minimize the social costs the police impose while promoting these ends.

While courts and commentators have written extensively on the law governing the police, they have in recent decades mostly neglected the problem of regulating them. They have largely treated the legal problem of policing as limited to preventing the violation of constitutional rights and its solution as the judicial definition and enforcement of those rights. The problem of regulating police power through law has been shoehorned into the narrow confines of constitutional criminal procedure.

This conventional paradigm is necessarily inadequate to regulate the police. Despite doctrinal rhetoric to the contrary, constitutional law cannot alone balance individual and societal interests when they conflict. Instead, constitutional rights establish only deferential minimum standards for law enforcement, without addressing the aggregate or distributional costs and benefits of law enforcement or its effects on societal quality of life. Even within constitutional law, the judiciary alone cannot undertake the problem of policing. As the Supreme Court's constitutional criminal procedure doctrine suggests, empirical and causal analysis is central to both defining and protecting constitutional rights, yet courts have limited institutional capacity to engage in that analysis. In short, the public policy problems presented by the use of police power necessarily extend beyond constitutional law and courts. Protecting rights and balancing competing indi-

vidual and social interests require a broader set of regulatory tools and institutions.

Of course, legal scholars have often been critical of aspects of the conventional paradigm, especially of its reliance on courts to protect individuals and communities from abuses of police power. Despite those criticisms, the paradigm continues to influence scholarly efforts to understand the problem and regulate the police effectively. Even scholars who have criticized the traditional approach continue to view the problem of policing principally through the lens of constitutional law. They therefore limit their analysis to constitutional methodologies and the subject matter of constitutional law. And while some recent work highlights nonconstitutional rules governing police conduct or utilizes the methodologies of social science to understand police conduct, it usually does so in service of either conclusions about constitutional doctrines or nonlegal analysis. In short, contemporary scholarship remains firmly grounded in the conventional paradigm. Scholars have yet to consider the full range of nonconstitutional legal questions at the core of the problem of policing.

The ongoing influence of the conventional paradigm has obscured some of the conceptual preconditions for effectively regulating the police. First, the paradigm limits the regulation of the police to the problem of identifying and enforcing constitutional rights. Yet the problem of regulating the police extends beyond constitutional law to ensuring that the benefits of policing are worth the harms it imposes, including harms not prohibited by the Constitution. The law should promote policing that effectively controls crime, fear, and disorder without imposing unjustifiable and avoidable costs on individuals and communities. Addressing the problem of policing therefore requires determining what harms policing produces, what kinds of policing are too harmful, and what kinds are harm efficient. Legal scholars and social scientists have yet to embrace this inquiry.

Second, courts have difficulty assessing the incentives affecting police officers, a task central to determining how to encourage police officers to conform their conduct to law.

Scholars have studied many determinants and correlates of police conduct, but the conventional paradigm has encouraged the belief that constitutional criminal procedure is the primary legal influence on police officers and departments. In fact, nonconstitutional law plays a much greater role in influencing police officers than has previously been appreciated. While scholars have begun to consider nonconstitutional law governing the police, their efforts have been narrow. Scholars have not yet adequately considered the full web of federal, state, and local laws that govern the police outside of the context of criminal investigations. This neglect stymies existing efforts to regulate the police. Presently, for example, courts tailor their interpretation of § 1983 and the exclusionary rule to encourage changes in police behavior, yet civil service law, collective bargaining law, and federal and state employment discrimination law simultaneously discourage the same reforms.

Finally, courts lack the institutional capacity to undertake complex empirical analysis of policing or to constrain the police beyond identifying and enforcing constitutional rights. Because regulating the police requires such capacity, it is clear that courts cannot adequately regulate the police by themselves. Thus, regulating the police requires allocating responsibility among institutional actors to ensure a regime capable of intelligently choosing and efficiently promoting the best ends of policing. Yet the focus of scholarship remains on the courts, with little attention to the comparative roles, capacities, and incentives of nonjudicial institutions that can influence police conduct.

These neglected areas of inquiry—harm efficiency, the real law of the police, and comparative institutional analysis—suggest a new scholarly agenda that asks not how the Constitution regulates the police but how law and public policy can best regulate them. In this Article, I explore the development and limitations of the conventional paradigm and elaborate on this new agenda.

PROMOTING CIVIL RIGHTS THROUGH PROACTIVE POLICING REFORM

62 *Stan. L. Rev.* 1 (2009)

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Much police misconduct is not accidental, incidental, or inevitable. Instead, it is systemic, arising out of departmental deficiencies that undermine officer adherence to legal rules. When a police department resists public feedback, provides inadequate training and policy guidance to officers, or disciplines laxly those who violate legal rules, it facilitates—even encourages—law breaking. Countering the systemic causes of police misconduct requires doing more than punishing individual officers. It requires structurally changing police departments that permit misconduct in order to create accountability for officers and supervisors and foster norms of professional integrity.

Federal law has long prohibited some kinds of police misconduct and has empowered governmental and private actors to enforce those prohibitions. Yet, unfortunately, the traditional federal legal means of regulating police officer conduct—federal criminal prosecutions, civil suits for damages under 42 U.S.C. § 1983, and the exclusionary rule—promote departmental reform only weakly. One alternative to these remedies, structural reform litigation, has been a primary legal tool for inducing public institutional change in other civil rights contexts—such as changing segregated schools or improving unconstitutional prison conditions. But litigation seeking equitable relief against police departments has frequently foundered on standing requirements and similar legal obstacles. As a result, structural reform litigation has played a marginal role in promoting reform in law enforcement agencies. In sum, traditional legal tools do not spur widespread change in pathological police departments.

In the mid-1990s, Congress passed 42 U.S.C. § 14141 in an effort to remove some of the barriers to structural reform of police departments. Section 14141 authorizes the Justice Department to bring suits for equitable remedies against police departments that engage in a pattern or practice of unconstitutional police misconduct. Initially, legal scholars

hailed § 14141 as a significant achievement in the battle against police misconduct because it expressly authorizes lawsuits that could force institutional changes on police departments. Since then, however, enthusiasm has waned. A consensus has emerged that, hampered by limited resources and inadequate political commitment, the Justice Department has brought too few cases.

The Obama Administration represents new hope for those interested in widespread policing reform. Political commitment to enforce § 14141 is likely to increase, and that commitment may produce a concomitant devotion of resources. Although this is exactly what prior scholarship implies is necessary to improve § 14141 enforcement, these changes alone are unlikely to make more than marginal improvements in the effectiveness of § 14141 at reducing police misconduct. Even with new interest, funding for § 14141 actions will unquestionably remain limited. If any significant number of the nation's large police departments are structurally deficient, the Justice Department is unlikely—under the Obama Administration or any other—to have sufficient resources to investigate and sue every problematic police department. Instead, additional resources will allow only a few more suits each year. Thus, using § 14141 to achieve direct reform is inevitably a limited enterprise. To achieve more significant reform, the Obama Administration must improve as well as enlarge the government's efforts to reduce systemic misconduct.

This Article proposes a new approach to § 14141 enforcement, one that overcomes the limits of direct reform by *inducing* departmental reform as well as *compelling* it. The Justice Department can induce reform in police departments that are engaged in substantial misconduct, even if it does not sue them, by making the proactive adoption of reforms a less costly alternative for these departments than risking suit. This strategy seeks to leverage whatever Justice Department litigation resources exist to motivate problematic departments to adopt recommended reforms without incurring the costs to the Justice Department of additional suits. Since the Justice Department can induce and monitor reform in more

departments than it could otherwise sue, incentivizing reform in this way—rather than solely by coercing it department-by-department through § 14141 litigation—is a more efficient means of attacking systemic police misconduct. Thus, this Article argues that the Justice Department can best use § 14141 to reduce police misconduct by implementing a regulatory and litigation strategy that maximizes the rate at which police departments *proactively* adopt cost effective reforms. Even if the Justice Department has resources sufficient to sue only a few departments each year, it can use those resources to create a § 14141 policy that provides sufficient incentives for many more departments to reform.

In order to induce police departments to reform prior to being sued under § 14141, the Justice Department must make the net expected cost of reform less than the net expected cost of misconduct for those departments. The Justice Department can change the calculus of police departments in three ways: (1) it can raise the expected cost of a § 14141 suit for a department by raising the probability that the department will be sued; (2) it can increase the benefits of proactive reform for a department; and (3) it can lower the costs of adopting proactive reform. To achieve these ends for departments that most need reform, the Justice Department should adopt a three-pronged § 14141 enforcement policy.

The first prong requires the Justice Department to adopt a "worst-first" policy that prioritizes suing the worst large departments. Such a policy raises the expected costs of a § 14141 suit for the worst departments in the nation by raising the probability of suit for those departments. This requires a radical change in how the Justice Department approaches enforcing § 14141. Instead of deciding which departments to target under § 14141 simply by reacting to complaints, the Justice Department itself must be proactive: it must identify the worst departments and pursue them. Doing so requires a vision of § 14141 that is more like regulation than traditional public civil rights enforcement. It also presupposes the creation of a new national database on police misconduct through which the Justice Department can identify the worst departments.

Collecting national data is no less essential for assessing and improving the efficacy of the Justice Department's current § 14141 enforcement policy than it is for implementing the proposal advanced here. Any effective effort to reduce systemic police misconduct nationwide requires data sufficient to estimate where misconduct exists, how departments compare in their levels of misconduct, and what the effects are of different departmental reforms on misconduct over time. No such data currently exist. As a result, existing § 14141 enforcement is reactive and haphazard rather than proactive and systematic. Without the most basic empirical tools, the Justice Department cannot set priorities intelligently. Rather, it necessarily chooses its targets without regard to how the misconduct in those departments compares to that of similar departments, and it therefore uses its limited resources inefficiently. For this reason, whether or not the Justice Department adopts the proactive approach this Article recommends, Congress should grant the Justice Department authority to issue regulations requiring large police departments to collect and report essential data in a uniform manner. But once such data are collected, the Justice Department can do better than merely [...] improve existing enforcement choices; it can use the data to make § 14141 enforcement significantly more effective.

The second prong requires the Justice Department to announce a "safe harbor" policy. Such a policy would shield from investigation or suit any department that officially commits itself to adopting proactively a preset array of reforms and then makes substantial, verifiable progress toward their implementation. A police department that receives the safe harbor would avoid the litigation costs associated with a § 14141 suit. In addition, the set of reforms that a department would be required to adopt in order to receive the safe harbor, though still beneficial, would be less extensive and costly than the reforms imposed as a result of a suit. The safe harbor policy would therefore raise the net expected benefit of proactively adopting reforms.

The safe harbor mechanism is critical to this three-pronged proposal because it would ensure that departments

can move quickly off the worst list. However, the safe harbor mechanism cannot work to reduce misconduct unless a standardized set of reforms exists that is both effective and cost-effective for departments that should adopt them. Presently, such a set of reforms exists only for large departments. Thus, the three-pronged proactive approach to § 14141 advanced in this Article is intended to apply to and to incentivize only large police departments, that is, those with fifty or more sworn law enforcement officers.

To work, a safe harbor mechanism must also have an effective monitoring scheme. Otherwise, police departments may attempt to use superficial reform to secure a safe harbor at low cost. The case for a proactive reform policy, therefore, rests on a key claim: that the costs of suing a department are substantially higher than the costs of inducing and monitoring proactive genuine reform in that department. As discussed later in this Article, there is good reason to believe this is true.

The third prong requires using Justice Department resources to refine and disseminate information about institutional deficiencies that breed police misconduct, remedial measures that will reduce misconduct, and means for effectively implementing those measures. This technical assistance effort would make reform more cost-effective for police departments by lowering the information costs of adopting reform. Together, the worst-first, safe harbor, and technical assistance policies would raise the probability of suit while lowering the costs and increasing the benefits of reform for the worst of the nation's police departments. Because it is more efficient at promoting reform, the § 14141 enforcement strategy advanced here would be superior to existing enforcement efforts, which have failed to maximize the expected costs of a § 14141 suit for police departments.

This proposal responds to existing deficiencies in § 14141 enforcement. Others have responded to such deficiencies by urging legislation to modify § 14141 to allow private citizens as well as the federal government to sue police departments. These critics assume that allowing private suits will result in more suits and that more suits will produce more effective

§ 14141 enforcement, regardless of the Justice Department's efforts. While private suits might add resources, they would also likely promote less effective departmental changes than federal efforts and may interfere with the most efficient governmental enforcement of § 14141. In fact, this Article contends that the three-pronged § 14141 enforcement strategy advocated here is likely to be more effective and efficient and less likely to intrude in local affairs or inhibit innovation than adding private plaintiffs to § 14141 or replacing § 14141 with a regulatory scheme.

WHEN IS POLICE VIOLENCE JUSTIFIED?

102 *Nw. U. L. Rev.* 1119 (2008)

The Supreme Court's Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished. Although lower courts frequently rely on this doctrine in civil and criminal cases alleging excessive force by police officers, the Court's standard is indeterminate and undertheorized, particularly as applied to nondeadly force. After nearly twenty years of silence on the issue, the Supreme Court finally turned again to the constitutionality of police acts of violence last year in *Scott v. Harris*. Yet, rather than improve its confused doctrine, the Court made matters worse. Far from providing a principled account of when police uses of force are justified, it left the law more incomplete and indeterminate than ever.

Criminal law already provides a well-established conceptual structure for deciding when, how, and why one person may justifiably use force against another. It does so in the context of justification defenses—such as self-defense, defense of others, and the public authority defense—each of which differentiates instances of legitimate force from impermissible exercises of violent will. Justification law provides a mechanism for balancing individual interests with our moral obligations to each other: It limits the interests we may

defend, measures our need to respond to attacks, balances the difficulty of responding quickly to threats with the costs of our errors, and incorporates deontic limits on our permissible responses to wrongdoing. Assessing the constitutionality of police uses of force requires balancing precisely the same kinds of considerations. As a result, the law of justification provides a natural and powerful framework for evaluating the force used by law enforcement officers.

In this Article, I argue that the concepts that structure justification defenses can and should be imported, subject to appropriate modifications, into the Fourth Amendment doctrine regulating police violence. Specifically, the law of justification defenses permits individuals to use force to serve particular well-defined interests, such as to protect themselves or others, under specific, carefully delineated conditions, i.e., when that force is necessary to protect against an imminent threat to one of those interests and is proportional to that threat. Analogously, I contend that the Fourth Amendment permits police uses of force only to serve directly the state's distinct interests in (1) facilitating its institutions of criminal law, most commonly by enabling a lawful arrest; (2) protecting public order; and (3) protecting the officer from physical harm. Moreover, even if one of these interests is at stake, a use of force should be considered unreasonable—and therefore unconstitutional under the Fourth Amendment—unless it is a response to an imminent threat to one of these interests, the force reasonably appears necessary in both degree and kind to protect the interest, and the harm the force threatens is not substantially disproportionate to the interest it protects. In this way, the substructure of justification defenses can be used to analyze whether a police use of force is constitutional.

Of course, police officers and civilians are not similarly situated: Officers act with state authority, they are often not permitted to retreat, and they are trained and expected to use force. These differences affect how the concepts of imminence, necessity, and proportionality that comprise the justification standard should be applied to police uses of force, and these differences are not incidental. Instead, they reveal

the deep dual structure of policing. Police officers use force as an authorized form of state coercion, but they do so in tense and often emotionally charged interpersonal encounters. An officer using force to arrest a subject is neither entirely a neutral actor, detached and disinterested, charged with carrying out the will of the state, nor entirely an individual acting in the heat of the moment, vulnerable and in harm's way, perhaps vengeful and afraid. Strangely but inevitably, he is both.

It is this combination of state authority and human agency that distinguishes police violence from other forms of state coercion and from other forms of justified force by individuals. Because police uses of force are both determined and imposed by persons who are under threat, these acts are unlike punishment, the paradigmatic form of state coercion, which is detached, impersonal, and institutionally enacted. Yet, because police officers are empowered and trained by the state, prepared for violence, and denied the choice of retreat, their uses of force are also unlike self-defense, the paradigmatic form of justified individual violence. Neither purely of the state nor of the individual, police violence has remained confusing and dangerously unclear to juries, judges, and the public precisely because of its dual character. Although the factual contexts in which police uses of force arise make incidents of force inevitably complex and difficult to assess, understanding the unique character of police violence clarifies its proper scope and limits.

Like jurists, scholars have overlooked the specific blend of state authority and individual agency inherent in police violence. Instead, disciplinary norms have led scholars either to explore justifications for state coercion entirely abstracted from policing or to focus exclusively on the cause and prevention of police misconduct without considering the normative grounds that justify and limit the state's use of force through police officers. Thus, when contemporary political philosophers consider state coercion, they usually do so in the context of punishment. As a consequence, they consider state-applied force without recognizing the significance of the actors who implement that force or the special conditions of policing as a form of state coercion. Social scientists, by con-

trast, have acknowledged the actors, emphasizing the psychological, sociological, and organizational factors that influence police violence. Yet they have failed to recognize policing as a distinctive state enterprise arising out of the state's responsibility to protect freedom by creating order. They have therefore neglected to offer accounts of why and when police uses of force are legitimate. Criminal procedure scholars have largely focused on a set of police activities—searches, seizures of property, interrogations, and techniques of community policing—other than the use of force. Even when legal scholars have addressed excessive police violence, they have considered the topic from an entirely pragmatic perspective, focusing, for example, on why existing avenues of criminal and civil litigation are inadequate tools for redressing and curbing police misconduct, or why existing case law on the constitutionality of excessive force is inadequate to address the problem of police interaction with the mentally ill. By contrast, this Article describes the limits of the state's use of force by police officers and the officers' role in carrying out state commands. Moreover, it demonstrates that that relationship can be captured doctrinally by the analogy to justification defenses: The state's legitimate but limited authority is reflected in the interests that justify the use of force, and the intersubjective and situational nature of individual police uses of force is captured by applying concepts of imminence, necessity, and proportionality to uses of force that serve legitimate state interests.

In Part I of this Article, I describe the constitutional landscape governing police uses of force, including the Court's recent foray into the substantive standard for the use of force in *Scott v. Harris*. I argue that the Supreme Court's few opinions fail to answer basic questions of why, when, and how much force officers can use, while at the same time permitting, if not encouraging, the use of irrelevant and prejudicial considerations in evaluating whether an officer acted reasonably. While the Court has declared some uses or degrees of force within bounds or beyond the pale, it has failed to provide a principled basis for determining when police uses of force are reasonable under the Fourth Amendment. This has

had the effect of stunting the development of the law in the lower federal courts: While the intuition of federal judges usually leads to results that seem reasonable and are consistent with the Court's doctrine, the reasoning in these cases is ad hoc, often inconsistent, and sometimes ill-considered. Because the doctrine on police violence is underdeveloped, the outcomes of future cases are largely unpredictable, even by the Supreme Court's own measure. This unpredictability turns out to be of enormous consequence to federal civil rights litigation. Under the doctrine of qualified immunity, officers are not civilly liable under federal civil rights law for using excessive force unless the unlawfulness of their conduct is apparent from prior case law. Since current Fourth Amendment doctrine is often too indeterminate to permit officers to determine the lawfulness of a particular use of force ex ante from past Supreme Court and lower federal opinions, qualified immunity plays an overly expansive role in determining the outcome of excessive force litigation. Thus, the indeterminate nature of the Court's doctrine leads many unconstitutional uses of force to go uncompensated and undeterred.

Parts II and III provide an alternative to the Court's failed doctrine that is analogous to the law of justification defenses. In order to establish a justification defense, there must be an interest weighty enough to justify the risk of harm created by the use of police force. [...] I argue that while the interests protected by justification defenses are helpful to consider, they are insufficiently tailored to policing as a form of state coercion to provide an account of the limits of police uses of force. More importantly, I argue that the traditional retributive and utilitarian justifications for punishment—the paradigmatic form of state coercion—also fail to provide an adequate justification for state force exercised through the police. Instead, I argue that only two state interests justify police uses of force: the implementation of the adjudicative processes of criminal law and the preservation of public order.

In addition to these primary interests, however, the state has a derivative interest in using force to protect police offi-

cers so that the officers may serve the state's interests in effectuating the adjudicative process and maintaining public order. Thus, rather than protect its citizens' freedom by demanding that officers contract away any legal right to defend themselves while acting in the line of duty, states should and do permit officers to use force to defend themselves as well as the state's interests. The state's derivative interest, however, is not without limits. Not only is the force used to protect officer safety subject to deontic constraints—which reflect the moral rights of officers and suspects alike—but the scope of the state's interest in protecting officers depends on social conditions, including the societal costs of police uses of force. In considering the justifications for state violence in light of the social and institutional constraints, the analysis in Part II is methodologically sympathetic to recent criminal procedure and constitutional law scholarship that has considered the effect of contextual interests and incentives on the legal regulation of government officials. I conclude that the legitimate exercise of force by police officers must assist the institutions of criminal justice, preserve public order, or protect an officer. Any other use of force is simply illegitimate.

In Part III, I argue that the concepts of imminence, necessity, and proportionality that make up justification defenses in criminal law provide a coherent conceptual framework and a set of practical legal principles for assessing the constitutionality of police uses of force against citizens under the Fourth Amendment. While the law of justification defenses provides the starting point for such a standard, that law must be adjusted in crucial ways to accommodate both the state's interests and the unique character of police power.

No legal standard can eliminate the difficulty of analyzing and making judgments about the complex interactions out of which excessive force claims arise. Nor can any legal framework make Fourth Amendment law fully determinate and predictable. Nevertheless, this Article supplies a more theoretically grounded and doctrinally rigorous framework for determining when police uses of force are justified, one that reflects the dual nature of policing and permits lower

federal courts to develop the law in a principled fashion over time. It also provides a reasoned basis for explaining and evaluating the intuitions underlying both federal court decisions and general public opinions about excessive police violence. Only by taking seriously the role of the state *and* the limitations of human actors can we come to a sound constitutional assessment of police uses of force—an assessment which promises more reasoned, predictable, consistent, and just results in civil and criminal cases.

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