Rendering the Community, and the Constitution, Incomprehensible Through Police Training

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Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 **Howard L. J.** 5 (2015).

The Supreme Court has increasingly relied upon the concepts of professionalism and police training when regulating police conduct under the Fourth Amendment. For the most part, however, academic interest in how the police are trained to select, encounter, seize, and search individuals on the street has remained anemic. Even the recent scholarship on implicit bias training is primarily oriented towards prescribing rather than reviewing current practices. Nancy Marcus's article is a welcome antidote to this large gap in our legal knowledge.

Police training plays an important role in current Fourth Amendment doctrine. Since the early 1980s, the Supreme Court has engaged in the continuous, albeit intermittent, deregulation of policing. That deregulation consists in replacing external, judicial scrutiny of lots of police activity on the street with the internal review of subordinates by superior officers in each the many hundreds of police departments around the country. The Court's deregulatory jurisprudence, which often centers around attacks on the exclusionary rule and its underlying rationale, reached its apogee in the 2006 case, *Hudson v. Michigan*. In *Hudson*, Justice Scalia, writing for the majority, insisted that:

> we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been wide-ranging reforms in the education, training, and supervision of police officers.…Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline.

Unfortunately, Justice Scalia relied on a single sentence in a single page in a single source for his evidence of training reform. Anyone who has studied—or tried to study—police training knows how disingenuous the Court's statement was: police training is almost as fragmented as policing itself. Marcus's article goes further: she demonstrates just how wrong Justice Scalia was to assume that police training tracks the Fourth Amendment's demands.

Marcus argues that police training substitutes various heuristics for the text of the Fourth Amendment. These heuristics imperfectly track Fourth Amendment doctrine and obscure its rationale. She makes this important argument by focusing on one aspect of police training that has gained wide currency across a number of jurisdictions: the 21-foot rule. That rule holds that "lethal force may, and should, be used when a target is within twenty-one feet of the officer." It states a blanket permission to kill based on one circumstance only: proximity. Treating proximity as an entitlement to shoot fails to track the spirit, rationale, or letter of Fourth Amendment jurisprudence surrounding deadly force.

Marcus also demonstrates how police training materials also ignore what Rachel Harmon has called the "social costs" of policing to the public that is policed. Policing, even in its most benign form, imposes

hardships on the people stopped, searched, and interrogated on the street or in the station house. Police encounters are scary, stressful, time-consuming, and sometimes violent and destructive. Leaving this perspective out of training may increase the sense among police officers that compliance with their directives are costless, and that members of the public who refuse to comply are malicious.

Marcus demonstrates that nationally disseminated police training materials, when they do mention the relevant law, often adopt the officer's perspective in ways that render the civilian's perspective incomprehensible to the police. Indeed, it is worse than that: members of the public, in asserting their rights under the Fourth Amendment, may render themselves liable to be the targets of police violence. The fault lies, Marcus argues, in police training, which systematically under-emphasizes Fourth Amendment rights and over-emphasizes the permission to use force, including deadly force, to effect seizures of recalcitrant civilians.

The 21-foot rule helps explain why. The police are trained to become hyper-defensive when members of the public are within the specified circumference. Police materials that discuss the rule may not mention the Supreme Court guidance that the rule is supposed to summarize. When police materials *do* mention the Court's jurisprudence, they eliminate those parts of it that present the civilian's perspective. Thus, in lieu of training in the constitutional limits on deadly force, the police are more often presented with a simple heuristic: that they are permitted to shoot anyone who appears threatening or challenges them within that danger zone. The problem with policing is thus not a few bad apples, but a structural orientation of the police towards the use of force and to civilian obligations to comply of face that force.

It is worth emphasizing that much of the Court's Fourth Amendment doctrine both permits *and requires* civilians to resist the police if they are to assert their rights. In practice, civilians must attempt to leave, decline consent to search, or refuse to speak, if they are to avoid police intrusions. Ideally, such acts of low-level resistance empower civilians as members of the political community and check police activity. So long as the civilian is not seized by the police, she is often entitled to walk or even (in more limited circumstances) run away from the police—what Marcus calls the "right to flee"—and the police have no right to stop her. For many police officers, Marcus argues, their training makes these types of resistance incomprehensible at the same time as justifying the all-too-casual deployment of deadly force to bring the non-compliant civilian to heel.

In short, Marcus's article reveals that the assumptions animating the Court's deregulatory jurisprudence are fundamentally mistaken. Police training on some fundamental aspects of constitutional doctrine relies on crude but widely used heuristics that supplant the sort of instruction necessary ensure a deep understanding of the Constitution or its requirements. And she persuasively argues that at least one of these heuristics, the 21-foot rule, has a deadly impact on the street.

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