

Policing the Police

A Talk with Professor Rachel Harmon

- Power of police and regulating policing
 - Police power authority
 - Police officers have immense authority to enforce order and with that, comes the potential to impose harm. They can effect arrests, take property, and stop and detain people.
 - Police regulation from the following sources:
 - Constitution
 - Courts
 - Federal, states, and local laws
 - Ordinances and administrative rules
 - Constitutional limits on police power
 - Stems mainly from the Fourth and Fifth Amendments
 - Fourth Amendment (on search and seizure and use of force), in part:
 - *The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated, and no warrants shall issue, but upon **probable cause**.*
 - Fifth Amendment (on interrogation), in part:
 - *No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.*
 - *Miranda v. Arizona*, 384 U.S. 436 (1966)
 - Established Miranda right requirement, right to remain silent and to speak to an attorney
 - Challenge of regulating police
 - Web of case law, local, state, and fed regs
 - Tailoring the laws to achieve its ends while minimizing harm
 - How to handle problems in policing
 - Prosecute individual bad actors vs.
 - Evaluate the system of policing, reform institutions
- Use of force
 - Non-lethal force
 - Use of non-lethal force, not involving weapons, typically is considered *de minimis* force.
 - Police department policies generally outline what is considered *de minimis* force.
 - The less force is involved, the more resistant courts are to reevaluating the officer's conduct.
 - Lethal force

- The Court invalidated Houston ordinary making it unlawful “to assault, strike or in manner oppose, molest, abuse or interrupt any policeman in execution of his duty,” finding that it addressed largely speech than the conduct. The Court noted that some speech, like “fighting words” could be prohibited but even then, police officers are expected to exercise a higher degree of restraint than the average person.
 - Fighting words: *Chaplinsky v. New Hampshire* (1942)²
 - *Chaplinsky* was convicted of violating a New Hampshire law that criminalized saying “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name,” among other things.
 - The Court upheld the conviction. Noted that there were certain limited types of speech that are outside First Amendment protections, including “lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.”
- Contempt of cop arrests and arrests for interference
 - Contempt of cop or retaliatory arrests include arrests for disorderly conduct, obstructing a police officer, disturbing the peace, refusing to obey, etc.
 - Accountability for retaliatory arrests
 - *Nieves v. Bartlett* (2019)³
 - *Bartlett* sued officers under 42 U.S.C. § 1938, claiming in part that his arrest was a retaliatory. The officers claimed that *Bartlett* was arrested for interference and physical confrontation with one of the officers.
 - The Court ruled in favor of the officers, finding probable cause for arrest. The Court noted that for retaliatory arrest claims, the plaintiff must show that the arrest was objectively unreasonable, unsupported by probable cause.
 - The Court also cited *U.S. v. Armstrong*⁴ in noting that the probable cause standard still applies unless the defendant can show that other similarly situated individual who engaged in the same sort of protected speech were not arrested.
- Videotaping police

² 315 U.S. 568

³ 587 U.S. ___, https://www.supremecourt.gov/opinions/18pdf/17-1174_m5o1.pdf.

⁴ 517 U. S. 456, 465 (1996)

- Various federal appellate courts have recognized the right to record the police.
 - See, e.g., *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).
 - See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017)
- Under what circumstances might that right be limited?
 - May be subject to reasonable time, place, and manner restrictions.
 - When filming interferes with police work
 - When it places officers in danger
 - Limited to when police officers are carrying out their official duties in public spaces.
- Federal police regulation
 - Reforms achievable through executive actions
 - Transparency in federal law enforcement agencies
 - Officer accountability
 - Promote data collection
 - Federal multiagency taskforce participation
 - Surveillance tech responsible use
 - National standards for data collection and reporting
 - Review pending grants and programming