

OUT-OF-CONTROL POLICING

Are judges to blame?

BY LEE H. ROSENTHAL

“UNWARRANTED.” Few words mean as many things to hard-working judges. “Unwarranted” can mean that an action is “unauthorized,” as in “not permitted” or affirmatively “forbidden.” It can mean that an action is “unjustified,” as in inadequately or not explained. Or it can be a polite way of saying that an action is just plain dumb. Which takes us to Barry Friedman’s important book about policing, *Unwarranted: Policing Without Permission*. The book raises a lot of questions. But here’s the good news. The book also gives some concrete and clear answers to those questions and lays out a better framework going forward. And it is fun to read. Did you get that? A book on policing that is so well and clearly written that it is enjoyable to read. Our friends in the academy will forgive a judge for finding it hard to believe that this book came from an academic. It is that approachable, that practical, and that relevant to what judges do.

Friedman clearly means to emphasize “unwarranted” in the sense of “unauthorized,” as in police searches or seizures done without the express advance permission of a judge’s order based on probable cause. But he also means to ask us whether the various police actions he describes, usually by recounting actual events ranging from the merely stupid to the tragic, are affirmatively prohibited, not merely unauthorized; unexplained, badly explained, or even hidden; or so ineffective as to be, well, stupid. *Unwarranted* was not written just for judges. Far from it. It’s meant for judges, to be sure, but also for all types and levels of legislators and law-enforcement policymakers. It is also meant for anyone involved in or affected by law enforcement. That, as the book makes clear, is everyone.

Friedman has specific and trenchant criticisms of judges’ failures to help control “unwarranted” police actions. He’s blunt, but he backs up his criticisms

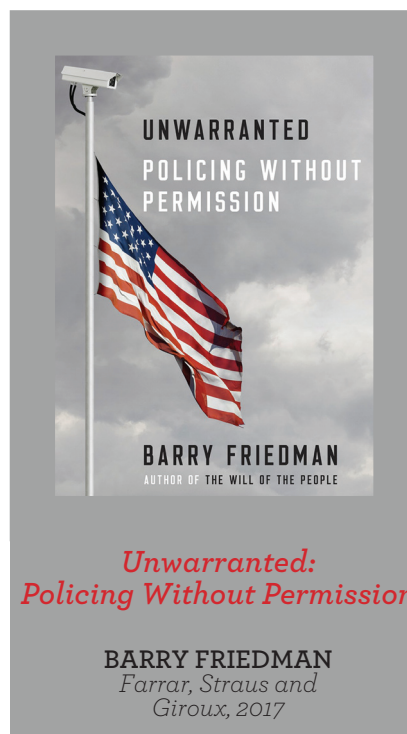
with case law, data, and argument. The judiciary, he says, has done a “perfectly appalling job of one of the chief tasks we have given them: protecting our basic liberties. . . .” (p. xiii.) The “judiciary should be ashamed,” because when “[c]onfronted with situations in which the police have done the most inappropriate and untoward things, too many judges simply cannot bring themselves to call foul.” (p. xiv.) Fortunately, Friedman also has specific ideas on how judges can clarify and simplify the legal issues to be decided, can decide hard cases more accu-

rately and sensibly and without repeatedly making bad law even worse, and can become forces for positive change.

The book is the product of a practical scholar’s decades spent studying policing, the Constitution, and the courts, and how they intersect and interact. The Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at New York University Law School, Friedman is a recognized authority on constitutional law, policing, criminal procedure, and the federal courts. He is the founding director of NYU Law’s Policing Project and the reporter for the American Law Institute’s *Principles of Law: Policing*. He publishes regularly in the nation’s leading academic journals and in the popular press.

In *Unwarranted*, Friedman lays out a path to revise our framework for thinking about the two universal questions of policing. Those questions arise from the government’s monopoly on the use of force and surveillance for law enforcement. What force, and what surveillance, are “warranted,” and when? What amounts of force, what invasions of privacy, are permitted, are properly authorized and explained, and are efficacious and wise? He uses the revised frameworks to examine the twin questions in the context of modern policing’s focus on technology and terrorism. In the process, he unpacks a series of answers to the two questions. These answers are important to the work we all know we need to do. But we have collectively shirked the work because it is difficult, it can be unpopular, it lacks a natural constituency, and that all adds up to a lack of political and judicial will.

Friedman has a clear idea of what needs to be done. We need to bring the democratic governance that we insist on in so many other aspects of our lives to the regulation of policing. The problem of “policing without permission,” he states at



the beginning of the book, is out-of-control policing caused by the failure of the executive, legislative, and judicial branches at all levels to provide clear advance “guidance to policing agencies as to what they are to do (or refrain from doing).” (p. 16.) We have detailed regulations that provide clear advance rules for many areas of our lives. As Friedman points out, Florida has an administrative code that specifies in detail the classifications for different kinds of tangerines. California has a code of regulation for barbers and barbers’ colleges, and precise rules for the sites of newspaper-dispensing machines in roadside rest areas. “So ask yourself,” he challenges us, “which is more important: regulating vaginal and anal searches of citizens by the side of the road, or specifying the size of newsstands and classifying Sunburst Tangerines?” (p. 16.) The question answers itself.

The goal of “[d]emocratic policing is the idea that the people should take responsibility for policing, as they do for the rest of their government, and that policing agencies should be responsive to the people’s will. . . . [W]hat democratic policing requires, at bottom, is that rules are in place before policing officials take action, that the public has an opportunity to participate in the formulation of those rules, and that the rules are available for all to see.” (p. 27.)

Why is this important? “Really protecting our liberty — our security from overreaching by the government — means having rules in place that guide (and, yes, limit) government, so that it does not react badly, or overreact, when things are going wrong.” (p. 25.) Having rules in advance is essential not only to security and liberty, but also to efficacy, by which Friedman means that policing is done in an effective and efficient way “. . . most calculated to keep us safe and secure while intruding into our liberty no more than necessary.” (p. 26.)

So how did we get to this state of largely unregulated, out-of-control policing? Friedman takes us to the early days of policing, starting with the American Revolution and the 18th century law-enforcement model of a “loose collection of

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sheriffs, constables, and night watchmen,” who “often lacked the most basic tools to do their job. . . .” (p. 35.) Urban police forces came from a mid-1800 spike in perceived civic disorder, but these early forces were only loosely modeled on Sir Robert Peel’s London “bobbies.” The American version of the urban police force was made up of “ill-paid” men “given a uniform, club, handcuffs, and a whistle, and sent out to patrol for crime.” (p. 36.) The temptations to corruption were large and the incentives to resist small. Things became so bad that, finally, a group of “do-good New York citizens appalled by sprawling vice” pressed for an investigation that uncovered a “level of violence and graft that was breathtaking.” (p. 37.) Incompetence and brutality were compounded by widespread electoral fraud facilitated by the police, who were beholden to New York City’s infamous Tammany Hall political machine. The solution was to separate the police from the politicians by creating a professional, autonomous, quasi-military, civil-service-protected, bureaucratic police force. But this independence, a laudable reform in some ways, is one reason that we are reluctant and unaccustomed to govern or restrain the police. It is, Friedman explains, “one of the reasons we don’t have democratic policing.” (p. 38.)

Then came the 1960s, when “it all went south.” In the chaotic times after Martin Luther King’s assassination, the 1968 Democratic Convention in Chicago, the Viet Nam War protests, and campus unrest, “the facade of professional policing crumbled.” (p. 41.) A rise in crime rates and violent protests and demonstrations sparked fear; overzealous police responses sparked revulsion. One attempt at reform that lasted only a short time was an experiment in “community policing” intended to “restore a lack of trust brought about by police misconduct.” (p. 41.) That experiment folded in the face of skepti-

cism about whether it was so amorphous and so all-encompassing as to include everything, including a lot that had little to do with policing. Community policing also had a bleaker side called “order maintenance policing,” (p. 44.) which tried to avoid the disorder-breeding-disorder syndrome by cracking down on nuisance-type offenders, like turnstile jumpers and squeegee men, and by frequently using stops-and-frisks. (p. 44.) The lack of trust between the police and the policed remained and even worsened.

Two more sets of events increased the seemingly inconsistent lack of trust in the police, and the increased reliance on the police. One set was the events of Sept. 11, 2001. Those events led to the focus on trying to predict and deter potential terrorists in advance, to prevent them from acting in the first place. That focus led to a proliferation of new policing agencies and increases in intrusions, surveillance, and secrecy. The depth and breadth of the policing-agency sprawl was fueled by the exponential growth in new technologies that could collect and search information on a scale unimaginable a few short years ago. The fear of terrorism led some to shrug in resignation at the seemingly inevitable loss of privacy and liberty in the interests of security and safety.

The second set of events is best seen in the series of sad headlines that appear with each fatally violent encounter between police and members of the public, often minorities. Both civilian and police deaths have attracted headlines and passionate responses.

Given these events, finding better answers to the twin questions of force and surveillance, answers not mired in legal doctrines formulated before policing and its technology tools fundamentally changed, has taken on a new urgency. Friedman wryly observes that when he first began to write the book in 2012, no one cared much ▶

about policing. (p. 325.) There was little public discussion. Today, in 2017, it is the frequent stuff of headlines, newscasts, and public outcries, if not debates. Events have given the work a spotlight and a momentum that may be cause for optimism.

But before we get carried away, Friedman reminds us how badly we have failed in the past. We don't have an encouraging track record. The shift from reactive policing — finding and punishing those who have committed crimes — to predictive policing to prevent the crimes, has in turn shifted the emphasis to surveillance and information-gathering. But neither reactive policing nor predictive policing has been adequately regulated or made accountable. We have not made meaningful steps to achieve the proper amount of transparency and the right mix of guidance and autonomy.

So who's to blame? First up: "legislatures that won't legislate." (p. 51.) Why don't our democratically elected representatives enact statutes or ordinances or regulations that go beyond broad and unhelpful directives to go out and enforce the law? Why don't legislatures enact rules that would help by "telling police officers and agents how to exercise their incredibly broad discretion," while recognizing that wide discretion is both "important and

And what about the police themselves? Why don't they follow the common model of executive agency rule-making, by publishing for public comment rules to govern policy choices? Friedman explains that while most police forces do have some internal rules, they are enacted without public input or awareness. And these internal rules are "haphazard" in covering many of the most important and difficult areas, such as the use of informants, consent searches, SWAT teams, or drones. (p. 66.) It's not mainly because drafting rules would impose a difficult burden on the many small police forces among the 15,000-plus forces around the country. Some police forces have rules on different subjects that can be used as models, tailored to the specific place. Repeated reinvention of the wheel is not required. What is required is effective, consistent pressure or incentives to enact rules that the public has a role in shaping, to address the most intrusive and harmful uses of force and surveillance for and by law enforcement. That's what has been, and still is, lacking.

Finally, and most at fault, are the "courts that can't judge." (p. 73.) He's talking about us. What makes us so bad at something so important? First, we have a role that is inherently limited. We decide after the fact whether a partic-

ular set of facts and acts is consistent with the Constitution. But even within this limited role, we get a resounding D minus. D at best. The best evidence of judicial deficiency? The decisions we've reached and the results we've allowed to stand and reoccur. Friedman describes how the direction of court decisions since the 1970s has been to leave the police free to do what they did and want to do.

and the police "got the bad guy." Judges do not see the many cases in which violations of the exclusionary rule occurred and proved ineffective. (p. 82.) The effect of this "biased sample" is that judges often allow what the police did in order to avoid releasing a guilty defendant. This in effect permits the police to keep using the same tactic in subsequent cases, without any information about whether the tactic even works in the vast majority of cases. The result is to remove the exclusionary rule as a meaningful limit to police action.

What about money damages against police forces? No prettier story. Judicial distaste for punishing police is expressed through the immunity doctrines, which are applied to avoid holding police liable. For example, cases abound in which judges refuse to find police officers liable for money damages because there was not a decision dealing with virtually the exact same facts from an appellate court in the same jurisdiction providing fair notice. (p. 85.)

The case law also has developed to dilute the search-warrant and probable-cause requirements. Judges don't insist on search warrants even when they could be obtained. (pp. 117–138.) Friedman exposes significant concerns about the Supreme Court's movement away from requiring warrants and probable cause as bad history, bad law, and really bad policy. (pp. 125–139; 147–154.) We judges have forgiven police failures to get warrants and we've forgiven the absence of probable cause by substituting a "reasonableness" standard. (p. 149; *Terry v. Ohio*, 392 U.S. 1 (1968)). You may disagree with how Friedman reads the case law, but you should hear him out.

Now, to a happier side of the street. There are solutions to be had, solutions that can help judges. Briefly, here are some.

First, we've been thinking about searches and seizures in ways that have obscured the purpose of the warrant and probable-cause requirements and have both complicated and diluted their application. Back to first and basic principles. Cause is nothing more than a good reason before the intrusion of a search or a seizure. Probable cause provides the reason for a

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unavoidable" to policing? (p. 60.) First, the police are powerful and effective lobbyists for resisting regulation. Their "close cousins, prosecutors," (p. 61.) lend them great support. Their shared goal is to let the police do their jobs with less regulation and more power. Second, the people most adversely affected by policing are often minorities, less affluent, and usually less capable of effective counter-lobbying. And finally, the most powerful political pressure comes from the voting public's fear of becoming a crime victim, not a policing victim. The result: Elected officials and legislators don't have incentives to supervise the police. To the contrary.

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The book carefully explicates the case law that diluted the exclusionary rule prohibiting the use of illegally obtained evidence in trial; judges often and understandably dislike the rule because they see only instances in which the tactics worked

particular search and ensures that an officer is not arbitrarily or discriminatorily singling someone out. A warrant ensures that the officer's judgment as to cause is not biased. A warrant is nothing more than getting approval from, after giving good reasons to, a neutral third party, a judge. These are commonsense ways of thinking about words that get tossed around with little thought about what they in fact mean and why they are important.

Friedman continues this commonsense and simpler approach by dividing searches into two categories, *suspicion-based* and *suspicion-less*. The first kind of search occurs when the police believe that a particular person, known or unknown, is about to or has committed a specific crime, and the police are trying to learn the facts needed to put the perpetrator away. That kind of search is largely reactive. When the police search in reaction to information that makes them suspect a person of a particular crime, the Fourth Amendment tells us what is needed: probable cause and a warrant. Here, technology is on the side of requiring warrants more often, because electronic transmission of information has made it much easier and faster for police officers in the field to get a warrant.

When, as is increasingly the case, the search is *suspicion-less*, a different set of protections kick in. We've been subjected to suspicion-less searches if we've gone through an airport recently, or been stopped at a roadblock or checkpoint. These searches are intended to prevent criminal activity from occurring in the first place, by making it harder for terrorists to endanger airplanes, or for human or drug smugglers to carry or deliver their contraband. These searches also require protections and rules to ensure that they are not arbitrary or discriminatory. What are those protections? A suspicion-less search must be governed by rules that make it universal (think TSA screening) or truly random (think of the times you've been subjected to a more intensive TSA search because the random-selection buzzer buzzed for you). These two categories are a helpful way of thinking about the Fourth Amendment. The framework

may help make deciding cases both more predictable and more accurate.

Friedman brings this framework to the vexing problem of racial profiling in stops, searches, and seizures. He does not take an aggressive or hardline position that the Constitution prohibits singling out groups for more frequent searches or seizures. He does insist, persuasively, that the Constitution requires courts to require that the groups singled out in this fashion deserve that treatment. This in turn requires courts to require the government to produce evidence that the problem it is addressing is pervasive in that group, as opposed to others. That has not been a part of the judiciary's analysis of profiling issues. Instead, the analysis has been unsatisfactory and complicated, and difficult to apply. Again, you may not be persuaded, but the arguments deserve consideration.

The last section of the book applies these frameworks, this back-to-first-principles approach, to modern policing and its focus on preventing terrorist acts. The focus here is on technology, on surveillance, on huge government databases, and on privacy intrusions. There is a wealth of information about the "new" technologies that are out there and what they've done, and hints about what artificial-intelligence innovations might bring us in the near and far futures. Friedman takes on the profound disconnect between the modern internet information age and the doctrine that disclosing information to a third party waives any privacy right in that information. When all our information — all of it — is stored in a cloud that is not ours, the third-party waiver doctrine becomes nonsensical. But there it stands.

Here, too, Friedman sets out the beginnings of possible solutions. When the government collects data in bulk in a suspicion-less search, that is fine, as long as it is authorized in advance by law and everyone's data is collected in a nondiscriminatory way. If the government accesses specific data it has collected because of a suspicion that a particular crime has been or is about to be committed, that requires probable cause and a warrant. Again, a clar-

ifying approach that sounds like it could work better than the approaches we use now.

In addition to bringing a clearer and cleaner framework to how judges can analyze the constitutionality of police approaches to stops, searches, surveillance, and seizures, there is one more thing judges can do. Courts can ask, in every case, whether a particular police action was authorized by an existing rule. If the answer is yes, courts must move to the constitutional question. But courts usually skip this first step. If there is only a broad grant of authority, Friedman urges courts to ask if that is enough to cover what the police did. If invasive new technologies are involved, like drones, that were simply not in existence when a broad grant of legislative authority was drafted, courts can plausibly require the government to get that specific legislative authorization before allowing the police action. In this fashion, courts at least invite, and at best insist on, specific legislative authorization for intrusive police actions. To make this work, Friedman pleads with judges to narrowly construe existing legislative authority if it does not speak clearly and directly to the type of police action at issue. By taking this approach, courts can facilitate what Friedman believes is critical: bringing democratic governance to policing.

This book cannot, and does not, do justice to much of what judges must deal with. There's relatively little on the use of force as opposed to searches and surveillance. The run-of-the-mill cases many of us handle are the swearing-match excessive-force claims, often brought by unrepresented plaintiffs. Friedman doesn't offer much here. But he does offer a lot that all of us — judges, lawyers, and all people living in this country — need to think about more, and better. At bottom, not reading this book is unwarranted. ♦



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