Rights and Discretion in Criminal Procedure's "War on Terror"

John T. Parry*

I. INTRODUCTION

The premise of this essay is that the modern administrative state's need for discretion and flexibility and its tendency to govern through emergency have a discernable impact on the structure of criminal procedure doctrine in the United States. The current War on Terror that fully emerged after September 11, 2001 increases the desire for discretion and flexibility and influences the course of doctrine, but it has not changed doctrine in any fundamental way.[1]

Building on that premise, my goal is to explore how the development of criminal procedure doctrines over the last three decades or so reflects and assists a way of governing a state and its citizens, a process that responds to but also transcends particular events such as the War on Drugs or the War on Terror. The scope and tone of this exploration draws on the work of a great many people: Carol Steiker on the preventive state;[2] Bill Stuntz on privacy, policing, and criminal justice;[3] Jonathan Simon on governing through crime;[4] Markus Dubber on the police power in its broader senses;[5] and a host of people writing in what might loosely be called governmentality studies.[6] In the approach to criminal procedure

---

* Professor of Law, Lewis & Clark Law School. I am grateful for the comments of Joshua Dressler and Alan Michaels, and for the comments and questions I received when I presented earlier versions of this essay at the 2008 AALS Annual Meeting in New York, and the Second Global Conference on Evil, Law and the State in Salzburg.

[1] For the argument in favor of this premise, see John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765 (2007).

[2] Carol Steiker, *The Limits of the Preventive State*, 88 J. CRIM. LAW & CRIMINOLOGY 771 (1998).

[3] *E.g.*, William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure* [hereinafter Stuntz, *Privacy's Problem*], 93 MICH. L. REV. 1016 (1995).

[4] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR IN CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

[5] MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005); *see also* THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE (Markus D. Dubber & Mariana Valverde eds., 2006).

[6] *E.g.*, Nikolas Rose, Pat O'Malley & Mariana Valverde, *Governmentality*, 2 ANN. REV. L. & SOC. SCI. 83 (2006). The term derives from a lecture by Michel Foucault published under the title "Governmentality" in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87 (Graham Burchell et al. eds., 1991). A more accurate version appears in MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978 [hereinafter FOUCAULT, SECURITY]

doctrine that I sketch, flexible but meaningful rights are integrated into flexible but professional police practices, with the goal of allowing careful calibration by private individuals and government officials of the various interests that are at play in a modern, liberal, administrative state. At this stage, my effort is primarily descriptive; I do not develop a full justification or criticism of the doctrinal direction that I discern, and attaining the distance necessary for such an assessment is likely to be difficult.

This essay begins the exploration of these themes by focusing on two pairs of Fourth Amendment cases. The first case in each pair was decided before September 11, 2001, and the second was decided after that date. The first pair—*Tennessee v. Garner*[7] and *Scott v. Harris*[8]—concerns the law of excessive force, while the second pair—*Florida v. Bostick*[9] and *United States v. Drayton*[10]—examines consent to search in the context of bus sweeps. Both pairs exhibit a combination of change and continuity in criminal procedure doctrine under the influence of the War on Terror, ongoing concerns about national security, and general anxiety about public order.[11] In particular, concerns about terrorism give a sharper edge to the analysis in the later opinions and may provoke statements from the Justices that go further or are more revealing than they otherwise would have been. But in all four cases (except, to some extent, *Tennessee v. Garner*) the clear focus is on using the idea of reasonableness to expand police discretion.[12]

Even more, the relationship between the police and citizens in these cases emerges as a central site for the articulation of how ideas about state power, freedom, and rights operate in practice, such that police power and discretion help constitute citizenship, and the assertion of rights gives shape to discretion and

---

87 (Graham Burchell trans., 2007).

[7] 471 U.S. 1 (1985).

[8] 127 S. Ct. 1769 (2007).

[9] 501 U.S. 429 (1991).

[10] 536 U.S. 194 (2002).

[11] Other pairings are possible, such as the dog sniff cases (United States v. Place, 462 U.S. 696 (1983), and Illinois v. Caballes, 543 U.S. 405 (2005)), and the road block cases (Indianapolis v. Edmond, 531 U.S. 32 (2000), and Illinois v. Lidster, 540 U.S. 419 (2004)), but I do not think they would change my general conclusions.

[12] Reasonableness is, of course, the touchstone of Fourth Amendment doctrine as a matter of text, particularly for official conduct that does not require a warrant, but it has also become the template for interpreting constitutional rights in relationship to governmental power. *See* Anderson v. Creighton, 483 U.S. 635, 643–44 (1987) ("The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable...."); Parry, *supra* note 1, at 800–02 (discussing the move from rights as rules to rights as the product of a balancing test). For extensive discussions of this dynamic, see Morgan Cloud, *A Liberal House Divided: How the Supreme Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33 (2005); Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989).

police power.[13] Further, by making decisions about their interactions with the police—decisions such as whether to flee or whether to consent to a search—people exercise political power within a model of governance that "instrumentalize[s] and shape[s] various forms of freedom and choice."[14]

II. REASONABLE FORCE AND CONSENT BEFORE AND AFTER SEPTEMBER 11

A. The Excessive Force Cases: Garner *and* Harris

In *Tennessee v. Garner*,[15] the Supreme Court held, first, that apprehension of a fleeing felon through deadly force is a Fourth Amendment seizure and, second, that deadly force may not be used on an unarmed fleeing felon—in this case a burglar—unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[16] The Court reached this conclusion through the familiar balancing of individual and governmental interests.[17] Importantly, in assessing the government's interests, the Court relied on police professionalism, evidenced in this case by the adoption of policies in many jurisdictions to restrain the use of deadly force, as well as on FBI classification of burglary as a property crime rather than a crime of violence, and statistics about the relatively rare association between violence and burglary.[18] Professionalism, classification, and statistical analysis are, of course, basic tools of the modern administrative state.

Two terms ago, in *Scott v. Harris*,[19] the Court considered the use of potentially deadly force—in this case, deliberately running into the suspect's car during a high-speed chase—to stop a person who initially committed only a traffic offense. Although the Court noted that a speeding car poses a larger threat than an unarmed felon fleeing on foot, it refused to distinguish *Garner* on that ground alone.[20] Instead, the Court appears to have changed excessive force doctrine by treating *Garner* not as a case that created a rule for deadly force cases but instead as "simply an application of the Fourth Amendment's reasonableness test" to a particular set of facts.[21] Thus, "[w]hether or not Scott's actions constituted

---

[13] *Cf.* Mitchell Dean, *Powers of Life and Death Beyond Governmentality*, 6 CULTURAL VALUES 119, 120 (2002) ("[I]t is a mistake to conflate the liberal theory or conception of the state with modalities of the liberal government of the state").

[14] MITCHELL DEAN, GOVERNING SOCIETIES: POLITICAL PERSPECTIVES ON DOMESTIC AND INTERNATIONAL RULE 100 (2007).

[15] 471 U.S. 1 (1985).

[16] *Id.* at 3.

[17] *Id.* at 8.

[18] *Id.* at 10–11, 21.

[19] 127 S. Ct. 1769 (2007).

[20] *Id.* at 1777.

[21] *Id.*

application of 'deadly force,' all that matters is whether Scott's actions were reasonable."[22]

To determine reasonableness, the Court used the same balancing test of individual and government interests. To assess the balance, the Court made two important assertions. First:

> We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high speed flight that ultimately produced the choice between two evils that Scott confronted . . . . By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent.[23]

Second, in response to Harris's argument that the police could simply have stopped chasing him, the Court responded, "[w]e think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not."[24] Indeed, "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[25]

The Court held, in short, that law enforcement officials are entitled to engage in conduct that threatens a person's life if that conduct is reasonable. Among the circumstances in which potentially deadly force will be reasonable is when the victim is himself a wrongdoer who poses a threat to innocents. Further, the leeway that officials have to respond in such situations—that is, the range of conduct that courts will declare constitutionally reasonable—increases in response not only to the number of people at risk but also to the relative guilt and innocence of the wrongdoer and those at risk. Finally, the Court expressly linked its analysis to "the choice between two evils," which is the language of the necessity defense, in which otherwise illegal conduct is justified if it will avoid a greater harm.[26] That is to say, Officer Scott's conduct was consistent with the Constitution, in part because it was necessary. Necessity in this context is not simply a defense. Rather, the idea of necessity in a case like *Scott* uses notions of emergency or extremity to create or insulate state power and declare it reasonable, where it would be unauthorized and unreasonable in normal circumstances. Any analysis

---

[22] *Id.* at 1778.

[23] *Id.*

[24] *Id.* at 1778–79.

[25] *Id.* at 1779.

[26] For discussion of the necessity defense, see John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397 (1999).

that uses necessity to assess the constitutionality of official conduct should raise eyebrows, and that is particularly true during a war on terror.[27]

A comparison of *Garner* and *Scott* plainly reveals change. The rule barring deadly force against unarmed fleeing felons may no longer be a rule. At least for now, the Court insists on treating each deadly-force fact pattern in the same manner as other excessive force claims—as requiring a distinct application of the reasonableness test—which suggests that deadly force claims have collapsed back into general excessive force review.[28] Similarly, *Scott* is more concerned than *Garner* to safeguard or increase police discretion.

A focus on the doctrinal rule, however, masks the significant continuities between the cases. Reasonableness remains the test, together with the balancing of state and governmental interests. In other words, the structure of Fourth Amendment excessive force doctrine remains the same. The Court's solicitude for police professionalism, evident in *Garner*, also persists. In *Scott*, for example, the Court suggested that the decision to hit Harris's car was not *ad hoc*, but rather came in the course of considering whether to use something called the Precision Intervention Technique maneuver.[29] And three Terms ago, in *Hudson v. Michigan*,[30] the Court refused to apply the exclusionary rule to violations of the knock-and-announce rule, in part because the professionalism of police departments leads them to take constitutional rights seriously and to instruct officers in appropriate rules of conduct.

B. The Bus Sweep Cases: Bostick *and* Drayton

In *Florida v. Bostick*,[31] the Court rejected a defendant's claim that he did not voluntarily consent to have his luggage searched when police officers boarded a bus on which he was riding. The Court recognized that Bostick did not feel free to leave the bus during the stop, but that fact alone did not mean he had been seized by the police—which would have made his interaction with them nonconsensual as a matter of law.[32] Rather, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the

---

[27] For a corollary in the context of due process constraints on interrogation, see Chavez v. Martinez, 538 U.S. 760, 775 (2003) (opinion of Thomas, J.) (noting due process prohibits conduct that "shocks the conscience," which usually means conduct "intended to injure" and "'unjustifiable by any government interest,'" and suggesting the need to obtain "key evidence" is a sufficient government interest to justify otherwise conscience-shocking behavior) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)). For the suggestion that using necessity analysis to enhance government power is perilous, see Christopher L. Blakesley, *Terrorism, Law, and Our Constitution*, 60 U. COLO. L. REV. 471, 507–12 (1989).

[28] *See* Saucier v. Katz, 533 U.S. 194 (2001); Graham v. Connor, 490 U.S. 386 (1989).

[29] Scott v. Harris, 127 S.Ct. 1769, 1773 (2007).

[30] 547 U.S. 586, 598–99 (2006).

[31] 501 U.S. 429 (1991).

[32] *Id.* at 435–36.

encounter."[33] Of course, that inquiry turns on "all the circumstances surrounding the encounter."[34]

When Bostick argued that his consent could not have been voluntary because no reasonable person in his situation—someone carrying cocaine in his luggage—would consent to a search, the Court responded that "the 'reasonable person' test presupposes an innocent person."[35] Finally, the Court stressed that "a bus passenger's decision to cooperate with law enforcement officers authorizes the police to conduct a search without first obtaining a warrant only if the cooperation is voluntary. 'Consent' that is the product of official intimidation or harassment is not consent at all."[36]

In *United States v. Drayton*,[37] a 2002 decision involving a bus sweep in which police did not inform people of their right not to consent to a search, the Court used the same general analysis. But, as in *Scott v. Harris*, the Court took particular care to stress that "for the most part *per se* rules are inappropriate in the Fourth Amendment context."[38] What the Court meant was that requiring a police officer to inform a person of his right to refuse consent would be an impermissible per se rule. Rather than support a rule, the failure to provide this information is just "'one factor to be taken into account.'"[39]

In the course of rejecting a clear rule and upholding the sweep, the Court stressed the "cooperative" nature of the interaction between police and passengers: "There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice."[40] The fact that the police officer was armed and in uniform would not alarm the normal citizen because "[o]fficers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort."[41] The same is true for guns. Because people know that police are usually armed, "[t]he presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[42]

---

[33] *Id.* at 436.

[34] *Id.* at 437.

[35] *Id.* at 438 (citing Florida v. Royer, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting)).

[36] *Id.*

[37] 536 U.S. 194 (2002).

[38] *Id.* at 201. In *Bostick*, the Court rejected the "per se rule" adopted by the lower court but did not go out of its way to stress that such rules are undesirable; it simply determined that a fact-specific reasonableness test provided a better method for resolving the case. *See Bostick*, 501 U.S. at 435–37.

[39] *Drayton*, 536 U.S. at 206 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)).

[40] *Id.* at 204.

[41] *Id.*

[42] *Id.* at 205.

Remember, too, that *Bostick* held that the reasonable person test "presupposes a reasonable innocent person."[43] The final part of the *Drayton* opinion picked up on *Bostick*'s discussion of cooperation, voluntariness, and consent in the course of describing what a reasonable innocent person would think when confronted by armed and uniformed police officers: "[B]us passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."[44] Indeed, the Court stressed that,

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.[45]

In many ways, *Drayton* is a case of continuity. The Court again rejected per se rules in favor of assessing all the circumstances. And, after *Drayton*, it remains the case—indeed it is more clear—that, as Bill Stuntz has observed, "if the officer puts his command in the form of a question, consent is deemed voluntary and the evidence comes in."[46]

But *Drayton* also marks changes in tone and, more importantly, substance. In tone, like *Scott*, it raises the intensity of the Court's insistence on balancing, perhaps again to increase police discretion. Substantively, the Court did not simply echo *Bostick*'s doctrinal discussion of voluntariness and consent. Instead, it advanced a theory of consent to explain the doctrinal result. Consent has "weight and dignity," but it derives from a relationship with lawfully exercised authority, such that the act of consenting is almost a responsibility, and police are entitled to rely on it. Further, the mere fact of interaction between citizen and police by itself "dispels" inferences of coercion and reinforces the rule of law. This reinforcement takes place under circumstances in which the pressure to exercise one's rights by consent instead of by refusal is enormous,[47] which suggests that the Court's

---

[43] *Bostick*, 501 U.S. at 438.

[44] *Drayton*, 536 U.S. at 205.

[45] *Id.* at 207.

[46] Stuntz, *Privacy's Problem*, *supra* note 3, at 1064. *See also* Margaret L. Raymond, *The Right to Refuse and the Duty to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1583, 1584 (2007) (suggesting *Drayton* is one of a line of cases that "defines rules that place the responsibility to protect rights on the defendants themselves" and "applies those rules so that the loss of rights is understood as the product of defendant-centered decisions like consent, compliance, or voluntary cooperation rather than police conduct").

[47] *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153.

conception of the rule of law—at least in the context of citizen-police encounters—relies on waivers of rights that will be deemed consensual.[48]

To close off this part of my discussion, I think it likely that that the tonal change in *Drayton* and the Court's theory of consent as cooperation with law enforcement, which in turn produces the rule of law, reflect a post 9/11 anxiety about security and proper citizenship.[49] Yet even here, continuity remains, for although these anxieties may have been heightened by the September 11 attacks, they were not created by them. To the contrary, security and proper citizenship are core concerns of modern liberal states, as the next section discusses.

III. ADMINISTRATIVE RIGHTS

The excessive force and bus sweep cases exhibit changes in tone and substance. But those changes build on prior cases; they are not dramatic departures. Even *Scott*, which rejected *Garner*'s suggestion of a special set of rules for deadly force, took care to claim consistency with *Garner* and to highlight those aspects of the earlier case that stressed balancing in the service of reasonableness.[50] In the more recent cases, the Court has come down heavily in favor of doctrinal flexibility, but it had been doing the same thing in many cases well before September 11.

This flexibility has been particularly apparent in cases denying rights-claims by individuals, but that also has been true for quite a while. Rules, by contrast, continue to emerge when they favor police discretion. Thus, the Court said in *Atwater v. City of Lago Vista* that "[c]ourts attempting to strike a reasonable Fourth Amendment balance . . . [will] credit the government's side with an essential interest in readily administrable rules."[51] And in *Scott*, one passage of the

---

[48] *Drayton*'s conception of the rule of law has interesting implications for the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The rule of law may require criminal suspects to be informed of their rights, but under *Drayton* it likely also depends upon the fact that the vast majority of suspects (78% according to one study) waive their rights, often under circumstances that are likely to be more coercive than a bus search. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653–54 (1996).

[49] *See Drayton*, 536 U.S. at 208 (Souter, J., dissenting) (noting that "[a]nyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand," but insisting bus travel does not face the same risks). For similar observations in the context of dog sniffs, see *Illinois v. Caballes*, 543 U.S. 405, 417 n.7 (Souter, J., dissenting), 423–25 (Ginsburg, J., dissenting) (2005).

[50] In effect, Justice Scalia's majority opinion did not interpret *Garner* at its most specific level. Instead, he dealt with *Garner* at a higher level of generality, at the level of that case's statements about reasonableness review, *see Garner*, 471 U.S. at 7–8, rather than its specific statements about the use of deadly force, *see id.* at 11–12; *see also* Scott v. Harris, 127 S. Ct. 1769, 1777 (2007). *Compare* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.) (insisting on the need "to adopt the most specific tradition as the point of reference" in substantive due process cases "if arbitrary decisionmaking is to be avoided").

[51] 532 U.S. 318, 347 (2001). "Often enough," according to the *Atwater* Court, "the Fourth

majority opinion managed to describe the result of the reasonableness balancing test as a "rule."[52] Doctrinal flexibility, in short, may be less a goal in itself than it is a tool for achieving the more significant goal of police discretion.

Even more, in the excessive force cases the Court has placed greater emphasis on the flexibility to take actions based on ideas of emergency and necessity, even in cases that are more about public order (such as traffic regulation) than about core criminal behavior. With the bus search cases, the relationship between consent and rights has blossomed into a theory about the rule of law, and a practice of disciplining citizens in the proper exercise of rights in confined but public spaces—spaces that now seem always to have the potential to become disordered or even to become sites of emergency.

To the extent these cases are representative, they can be seen as evidence of an erosion of civil liberties and an increase in governmental power, with the uncertainties of reasonableness review heightening the problem. Put more theoretically, one might say with Giorgio Agamben that "the rationalities of 'public order' and 'security' in which the police have to decide on a case by case basis define an area of indistinction between violence and right" that serves the interests of sovereign power and supports the production of a political identity based on what Agamben calls bare or naked life.[53]

But I think there is more to the picture. In both sets of cases, we also see evidence of a development in criminal procedure doctrine away from what may once have been a structure of juridical rights established by social contract to control the sovereign, towards becoming a law of discretion, perhaps even a law of administration or regulation. Rather than trumps against government action, rights are factors considered in the formation of policing policy and the execution of that policy.

I want to stress that the idea of criminal procedure rights being integrated into the administrative state does not mean that they are disregarded. Individual rights remain important, and they are taken seriously, but not always in an adversarial way. Under the model of administration or expertise, we should not simply think of rights, particularly criminal procedure rights, as being in tension with police activity. Instead, we need to consider far more seriously the extent to which the two work together, in the sense that both the consideration of rights by officials and the exercise (or not) by individuals of rights serve the goals of policing. And those goals, in turn, should be seen in both the narrow and the broader senses of "policing"—not just enforcement of criminal law, but the creation of order at all

---

Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Id.*

[52] *Scott*, 127 S. Ct. at 1779.

[53] Giorgio Agamben, *Sovereign Police*, *in* MEANS WITHOUT END: NOTES ON POLITICS 103, 104 (Vincenzo Binetti & Cesare Casarino trans., 2000); *see also* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., 1998).

levels of society, and even the production of freedom in some sense. And here we return to the war on terror, because the goal of the police power as a tool of governing is to manage community welfare by balancing respect for individual autonomy with the security of the larger group. As Peter Ramsay notes, "[t]his conflict of paradigms is a pervasive feature of a wide spectrum of contemporary politics from smoking bans to the domestic aspects of the 'War on Terror.'"[54]

Seen in this way, the idea of citizenship cannot take the form of autonomous individuals acting in a pre-existing private realm that ordinarily remains at arms-length from the coercive apparatus of the state. Ramsay suggests that "citizenship supplies the immediate environment of the modern criminal law," such that legal doctrines relating to potentially criminal conduct must develop "in a way consistent with what the wider political culture regards as the proper relationship between state and citizen, and between citizens."[55] I would go further. Citizenship is neither pre-existing nor static. Rather, what it means to be a citizen depends upon the practice of governing, on the interactions between people and government. As a status, citizenship is dynamic, and just as criminal law and procedure doctrine develops in relation to conceptions of citizenship, the idea of citizenship develops in relation to practices of governance.

Indeed, criminal procedure rights may be an instance of what some writers call "governing through freedom."[56] That is to say, the rights that are thought to mark spaces of liberty are part of the structure of governance and are not in tension with it. The goal of governing is not to create or preserve liberty for its own sake but rather to manage the state, so that rights are tools for achieving that goal. This idea is most clear in *Drayton*, with its stress on the role of consent in mediating the relationship between the exercise of rights and the exercise of police discretion. But, it also comes through in *Scott*, where the Court emphasized Harris's personal responsibility—that is, his status as an autonomous and individual political subject making choices about his interactions with government officials.[57] Importantly, *Scott* is a case in which we see the limits of governing through freedom in the context of criminal law. Where people do not make good choices, where they show themselves incapable of using their freedom to advance the interests of

---

[54] Peter Ramsay, *The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State*, 69 MOD. L. REV. 29, 55 (2006); *see also* FOUCAULT, SECURITY, *supra* note 6, at 338–41.

[55] Ramsay, *supra* note 54, at 39–40.

[56] DEAN, *supra* note 14, at 100–01; NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 72 (1999); Robert van Krieken, *Crime, Government and Civilization: Rethinking Elias in Criminology* 4–5 (Sydney eScholarship Repository 2006), *available at* http://ses.library.usyd.edu.au/handle/2123/916.

[57] *Scott*, 127 S. Ct. at 1778; *see also id.* at 1775 (characterizing police as "forced" by Harris's behavior "to engage in the same hazardous maneuvers just to keep up").

governance, then the traditional tools of sovereign authority—such as physically violent action—remain available.[58]

IV. CONCLUSION

Although law professors frequently criticize the results of the Supreme Court's recent criminal procedure cases, I want to suggest that we need to think more carefully about the relationship between criminal procedure rights and techniques of governing, and that only when we have done so will we be in a position to critique that dynamic.

Perhaps we should resist criticizing the results of cases like *Drayton* and *Scott* on the ground that they increase the power of the state at the expense of individual rights. Such criticisms assume simple trade-offs between rights and state power. That is not the case, however, if rights are integrated in a meaningful way into the process of governing, to achieve a calibrated assessment of all the relevant state interests and advance the goal of a well-ordered, safe, and prosperous society—one in which individuals typically will enjoy large spaces of freedom, even if that freedom is contingent in significant ways. Or, if that prospect sounds distressing, perhaps we should cease criticizing the Court for getting the balance of interests wrong, and instead ask: is rational balancing of interests possible at all?; what turns on the belief that it is?; and what alternatives are available?

At that point, we might be in a better position to assess the normative spin of governing through freedom in the context of criminal procedure.

---

[58] *See* DEAN, *supra* note 14, at 103–04; Barry Hindess, *Politics as Government: Michel Foucault's Analysis of Political Reason*, 30 ALTERNATIVES 389, 403–04 (2005).