

## TAKING WARRANTS SERIOUSLY

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**ABSTRACT**—Courts and commentators are increasingly concerned about police misconduct—searches and seizures that fail to comply with Fourth Amendment protections. Current doctrine attempts to deter such misconduct with the threat of excluding unlawfully seized evidence. The remedy of exclusion is weak, however, in large part because judges only see cases in which the defendant obviously is guilty. Despite years of proposals, the alternative of money damages is largely unavailable. The problem is exacerbated because Fourth Amendment law is notoriously uncertain. The combination of these three factors results in ineffective deterrence of Fourth Amendment violations. We propose to replace the failed deterrence model with a stringent *ex ante* warrant requirement. We make a novel case for warrants based on findings from the social sciences. The Court, rather than continuously weakening the warrant requirement, should reverse course and set warrants as the centerpiece of the Fourth Amendment.

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INTRODUCTION

In theory and practice both, the two most contentious issues in search and seizure law today involve the questions of the proper remedy for Fourth Amendment violations and of whether police officials must obtain warrants before engaging in conduct covered by the Fourth Amendment.<sup>1</sup> In recent years, the Supreme Court has handed down major decisions on each. The first issue reflects perennial dissatisfaction with the exclusionary rule, as well as stasis regarding any satisfactory alternative. As to the second, what was once a “warrant requirement” is now a rule so laden with exceptions

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<sup>1</sup> On remedies, compare Daniel M. Harris, *Back to Basics: An Examination of the Exclusionary Rule in Light of Common Sense and the Supreme Court’s Original Search and Seizure Jurisprudence*, 37 ARK. L. REV. 646, 648–52 (1983), arguing that the Court went too far in adopting the exclusionary rule, with Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 123–26 (2003), defending the exclusionary rule and pointing to its salutary effect on police practices. As to the warrant requirements, compare Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 800–11 (1994), arguing that the warrant-preference model should be replaced with reasonableness analysis, with Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471–72 (1985), arguing for a return to a stricter warrant requirement, and Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 854 (1994), supporting the warrant preference as a “triumph of rules over standards.”

that it best resembles a piece of Swiss cheese, a state of affairs increasingly accepted as the new normal. What seems to have occurred to almost no one is that the solution to the first problem is to shift direction entirely on the second.<sup>2</sup>

There is no gainsaying animosity toward the exclusionary rule. There have always been critics of the notion that simply because the police obtain information in violation of the Fourth Amendment, the proper remedy is to exclude that evidence from a criminal trial, sometimes with the effect of dismissing charges altogether.<sup>3</sup> Even so, the degree of hostility in recent Supreme Court decisions toward this longstanding rule has been quite breathtaking. In the 2011 decision in *Davis v. United States*, a 6–3 majority used language strongly suggesting that exclusion will move from being the usual remedy in Fourth Amendment cases to one employed only as a “last resort” when the “deterrence benefits of suppression . . . outweigh its heavy costs.”<sup>4</sup> Yet what cannot be denied is that no alternative to exclusion has attracted sufficient support to see it implemented. Indeed, that very same Term, in *Ashcroft v. al-Kidd*, the Justices held 8–0 that the Attorney General had immunity from monetary damages for the pretextual detention of Abdullah al-Kidd under the material witness statute, one of many decisions immunizing officials for Fourth Amendment violations.<sup>5</sup> There is a longstanding debate about whether money damages would be a better remedy than exclusion, given the latter’s costs, but in truth, any remedy for Fourth Amendment violations seems to be slipping away.

On the issue of warrants, matters are only slightly more complicated. In *Katz v. United States*, the Supreme Court declared unequivocally what had long been understood: that searches without warrants were “*per se*

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<sup>2</sup> There are a host of articles that argue for strengthening the warrant requirement or limiting warrant exceptions. See sources cited *infra* note 152. But these articles do not treat warrants effectively as remedies. William J. Stuntz’s wonderful *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991), is the primary piece that perceives the relationship between warrants and remedies. His, however, is largely a positive account of why (and in what form) we would retain a warrant requirement given certain remedial failings of the exclusionary rule and monetary damages. He does not present anything like the normative argument here. Other authors see the connection between warrants and remedies, though rarely do they recommend turning to warrants in the face of remedial failure. See, e.g., Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2294–98 (1998) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)) (linking warrants and remedies to the common goal of deterring Fourth Amendment violations); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 296–98 (1984) (pointing out that the warrant requirement fulfills the same purpose as a remedy).

<sup>3</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 661–62 (1961) (Black, J., concurring) (arguing that the Fourth Amendment does not require exclusion); *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (arguing against an exclusionary remedy).

<sup>4</sup> 131 S. Ct. 2419, 2427 (2011).

<sup>5</sup> 131 S. Ct. 2074, 2084–85 (2011).

unreasonable.”<sup>6</sup> *Katz* backed this up by invoking the specter of exclusion whenever a warrant was not obtained.<sup>7</sup> Yet, as a matter of simple empirics, the vast majority of police actions covered by the Fourth Amendment occur without warrants. And doctrinally, this is somehow just fine. It often appears from reading the cases that each failure to obtain a warrant merely begets a new exception to the warrant requirement. In yet another 2011 decision, *Kentucky v. King*, only Justice Ginsburg dissented from the Court’s decision that the exigency exception to the warrant requirement applies even if *the police have created the exigency themselves* by knocking and announcing their presence rather than simply obtaining a warrant when possible.<sup>8</sup> *Katz* notwithstanding, the Justices do not seem to care about warrants, and for that matter, not many others do either. Some commentators rue the passing of a firm warrant requirement, and many note the incoherence of the body of law that replaces it, but in Fourth Amendment quarters warrants are a relic of a bygone age.<sup>9</sup>

Part of the reason for the collapse of the warrant requirement is the apparent collapse of its intellectual underpinnings. Over the last few years, a theory first advanced by Telford Taylor, and then given great publicity by Akhil Amar, has been gaining primacy on the Court.<sup>10</sup> Relying on history, that theory pries the two enigmatic clauses of the Fourth Amendment apart, rather than reading them holistically as the *Katz* Court did. The Fourth Amendment reads:

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>11</sup>

The historical argument gaining ground is that warrants, rather than being protections for individual liberty, were threats to it. At common law, if officials intruded into one’s affairs, one could bring a trespass suit. But if an official had obtained a warrant, immunity resulted. Under this reading,

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<sup>6</sup> 389 U.S. 347, 357 (1967).

<sup>7</sup> *See id.* at 356–57.

<sup>8</sup> 131 S. Ct. 1849, 1858 (2011); *see id.* at 1864 (Ginsburg, J., dissenting).

<sup>9</sup> The latter point is clear by looking at the dates of the scholarly articles arguing for a taut warrant requirement. *See, e.g.,* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 502, 520 (1991) (criticizing the Court’s attack on the warrant requirement); Bradley, *supra* note 1, at 1468–70 (discussing a lack of clarity in Fourth Amendment jurisprudence); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 29–37 (1991) (proposing replacing the many warrant exceptions with a limited exigence-based model).

<sup>10</sup> *See* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969); Amar, *supra* note 1; *see also* *Virginia v. Moore*, 553 U.S. 164, 170 (2008) (citing Amar’s *Fourth Amendment First Principles*, *supra* note 1).

<sup>11</sup> U.S. CONST. amend. IV.

the purpose of the second clause was only to prohibit “general warrants” that conferred too much immunity upon police officials. If police obtain a warrant that has this immunizing effect, then the warrant must meet the strict requirements of the Warrant Clause. Generally, however, warrants are not required by the Fourth Amendment, and police searches and seizures are governed only by the admonition in the first clause that they be “reasonable.”<sup>12</sup> This theory, however, rests on shaky historical and practical grounds.<sup>13</sup> Nonetheless, it is ascendant in Supreme Court decisions. Whether this is the cause of a vanishing warrant requirement or simply a convenient doctrinal excuse to dispense with it is difficult to say.

This Article argues that the best answer to dissatisfaction on the question of Fourth Amendment remedies may well be to reverse course on the warrant requirement. The general preference in the law is for ex post remedies. William Stuntz emphasized this preference in a now-classic exploration of why we have a warrant requirement in the first place.<sup>14</sup> Ex post remedies save litigation costs and are tailored to realities rather than possibilities. Most important, in theory, ex post remedies will achieve through deterrence the same avoidance of constitutional violations as will ex ante measures such as an injunction or a warrant. Deterrence has long been the Supreme Court’s central justification for the exclusionary rule. But for the reasons made apparent in Part I’s summary of the debate over Fourth Amendment remedies, an ex post regime—relying on the remedies of exclusion and money damages—has enjoyed only limited success in deterring police conduct that violates the Fourth Amendment.

To achieve adherence to Fourth Amendment norms, this Article proposes that we return to taking the warrant requirement seriously. As Part II explains, in many areas of the law, if ex post remedies fail, the law turns to ex ante alternatives, such as licensing or even incapacitation. A warrant is just such an ex ante alternative, and Part II argues that it can enhance compliance with constitutional mandates for two particular reasons. The first—and the more traditional argument from law and economics—is that if there is a clear warrant requirement, then police officers will conform their behavior to the demands of the magistrates who must issue those warrants. There are perennial concerns that magistrates are “rubber

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<sup>12</sup> See TAYLOR, *supra* note 10, at 21; Amar, *supra* note 1, at 772–80.

<sup>13</sup> For examples of the Court accepting all or part of this reasoning, see, e.g., *Samson v. California*, 547 U.S. 843, 852 (2006) (finding suspicionless searches of parolees reasonable), and *Wyoming v. Houghton*, 526 U.S. 295, 306–07 (1999) (holding that warrantless search for contraband was reasonable). For criticism of the Taylor–Amar thesis, see, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 571–90 (1999) (arguing that history does not support the reasonableness framework), and Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 228–29 (1993) (arguing that the warrant requirement better serves the Fourth Amendment’s purpose). One of us (Friedman) is writing a book on the Fourth Amendment that, among other things, challenges Justice Scalia’s version of the Taylor–Amar thesis.

<sup>14</sup> See Stuntz, *supra* note 2, at 887–88.

stamps,” granting warrants without serious scrutiny. We respond to those concerns in a variety of ways, including insisting that police officers not be allowed to shop for magistrates they believe will favor them. Judge shopping is almost universally deplored, and there is no reason it is so willingly tolerated in this area. Facing scrutiny from a magistrate is almost certainly calculated to avoid some searches that would not meet Fourth Amendment requisites.

But even if magistrates do not exercise the scrutiny they should, there is a second reason that requiring warrants may enhance police compliance with the Fourth Amendment. Although some police officers no doubt wish to take action with no regard for constitutional and legal requirements, others will care more but still suffer from the ordinary failings of human beings. Police officials, like most people under pressure, can act in ways that seem initially reasonable but may, upon the reflection that takes place when they are forced to articulate their reasons, no longer seem so. Without regard to the quality of magistrates, a real warrant requirement will force some police officials to stop and think, and to articulate their reasons for intruding into someone’s liberty, thereby avoiding unreasonable intrusions in the first place. Literature from the social sciences offers support for this latter rationale in favor of warrants. There is evidence that a proposal like ours would have a real effect. Pittsburgh, operating under a consent decree, put in place a rigid reporting scheme for police searches. In response, the number of searches taking place dropped fairly dramatically, while the crime rates seem not to have changed in any meaningful way.

Note that a return to warrants would not displace *ex post* remedies; it would only refocus the function they serve. *Ex post* remedies fail at present because the standards of police conduct are extremely uncertain. Moreover, judges, faced with a case where it is clear the search target possessed contraband or evidence, are understandably reluctant to see evidence excluded. This “*ex post* bias” is one of the chief aspects undermining the exclusionary rule as deterrent. As Part III explains, under a revitalized warrant regime, courts will be called upon to enforce a much brighter line: the warrant requirement itself. The very clarity of that line not only will recalibrate the effectiveness of *ex post* remedies; it often will reduce the need for them altogether because police, knowing that a violation of the bright-line warrant requirement will bring *ex post* relief, will hesitate to act without warrants. Indeed, knowing they must seek permission *ex ante*, they will not request warrants that will not be granted. In a sense, a firm warrant requirement makes the Fourth Amendment self-enforcing: its clear enforcement *ex post* will serve to deter Fourth Amendment violations *ex ante* by optimizing police conduct.

The proposal here is a clear and simple one. Warrants should be required any time obtaining a warrant is feasible or, in other words, any time exigent circumstances are not present. Feasibility and exigency are both functions of technology, which operates in today’s world to favor

warrants. Police officials often benefit from advances in technology in their fight against crime, prominent examples being GPS location tracking and closed circuit television cameras (CCTV). But technology can also serve the interests the Fourth Amendment was designed to protect. For too long we have lived with a caricature of the warrant process: a detective pounding out a warrant request in triplicate on a battered Smith Corona, assuredly a time-consuming task almost impossible to meet in the fast-paced arena of police work. We do not live in that world, however, and have not for some time. In some instances, states have cut out the middleman, stationing judges on the scene at DUI checkpoints to issue warrants immediately if a suspect refuses a breathalyzer.<sup>15</sup> If a magistrate is not on hand, technology can often fill the gap; telephonic warrants are increasingly commonplace.<sup>16</sup> Recent amendments to the Federal Rules of Criminal Procedure enhance the ability to use electronic communications throughout the warrant application and return process.<sup>17</sup> Police in Florida are using Skype to gain authorization to draw blood from drunk-driving suspects.<sup>18</sup> In short, today's technology makes obtaining permission from an official remote from the heat of the decision fast and easy.

Given technological advances, it may even be possible to obtain the benefits described here without warrants so long as *ex ante* reason-giving by police officers is required. Recall the second benefit of the warrant requirement: that an officer may reach a different conclusion about the efficacy and propriety of searching if forced to articulate reasons for doing so in advance of searching. Although the proposal here focuses on warrants

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<sup>15</sup> See Ken Thomas, *Gov't Urges 'No Refusal' Policy on Drunken Driving*, NBCNEWS.COM (Dec. 13, 2010, 3:44 PM), [http://www.msnbc.msn.com/id/40646098/ns/us\\_news-crime\\_and\\_courts/t/govt-urges-no-refusal-policy-drunken-driving/](http://www.msnbc.msn.com/id/40646098/ns/us_news-crime_and_courts/t/govt-urges-no-refusal-policy-drunken-driving/).

<sup>16</sup> The literature on the use of technology to obtain warrants is blossoming. See, e.g., Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvent Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 296–99 (1996) (arguing that technology makes it easier to obtain warrants); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1246–50 (2002) (discussing benefits of telephonic warrants); Slobogin, *supra* note 9, at 32–33 (discussing increasing use of telephonic warrants).

<sup>17</sup> See FED. R. CRIM. P. 4(d) (amending Rule 4 to allow a magistrate to issue a warrant “based on information communicated by telephone or other reliable electronic means”). Other amendments to Rule 4.1 provide that a magistrate may file a duplicate copy received electronically as the original and for the transfer and modification of warrants via electronic communication. See FED. R. CRIM. P. 4.1(b); see also FED. R. CRIM. P. 4.1(b)(4) (providing that issuance of a warrant based on information received by “reliable electronic means” can serve as an original); FED. R. CRIM. P. 4.1(c) (providing that absent bad faith, evidence from such a warrant may not be challenged based on the manner of issuance). For a summary of changes to the rules, see Letter from Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S. to Chief Justice John G. Roberts (Dec. 16, 2010), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme\\_Court\\_2011/Summary\\_of\\_Amendments.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme_Court_2011/Summary_of_Amendments.pdf).

<sup>18</sup> See Sarah Lundy, *Officers Connect to Judges with Skype*, ORLANDO SENTINEL, Mar. 29, 2011, at B2; see also Stuntz, *supra* note 2, at 908 (proposing adoption of telephonic warrant procedures).

and the independent judgment of magistrates, to the extent that obtaining ex ante warrants is too difficult or costly, similar benefits may be achieved simply by having police make a record of what they are doing and why, before it happens. Officers can achieve this with voice dictation before they act, along with video recording of their actions. Video of this sort increasingly is being used in policing.<sup>19</sup> It would be even simpler to have officers wear microphones so that they could narrate why they are acting immediately before they do so. Not only would this achieve some of the advantages of reporting and self-reflection, it also would provide a record to defense counsel to test police explanations against what ultimately occurs or is found in a search. William Stuntz has explained how this sort of ex ante record keeping could go a long way to avoid police perjury.<sup>20</sup>

Taking warrants seriously in our technological age will require warrants in many circumstances in which they are not obtained at present. For example, as a matter of long tradition—driven by exigency and the difficulty of obtaining warrants—arrests have largely fallen outside the warrant requirement.<sup>21</sup> Yet why should that be? The seizure of a person is one of the most invasive and coercive acts of the government. With technology readily available, arrests should not be made without a warrant—that is, the second opinion of a magistrate. And with that requirement, searches incident to a lawful arrest themselves effectively will be warranted. Similarly, although automobile stops will occur without warrants in most cases because of exigency, searching stopped vehicles should require warrants. Anytime a warrant can be obtained, it should be obtained.

The same is true of administrative searches. In *Camara v. Municipal Court*, the Supreme Court extended the notion of what constitutes a warrantable search to cover administrative and regulatory searches.<sup>22</sup> Since then, the requirement of such administrative warrants to assure regularity seems to have fallen by the wayside.<sup>23</sup> But in these administrative contexts, such as police roadblocks, the use of warrants should be reinvigorated. Many commentators have made the case that in a properly considered regime, virtually all the warrant exceptions but exigency could be dispensed with. This still will leave many areas of policing unencumbered by a warrant requirement. Current “stop and frisk” practices provide an example,

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<sup>19</sup> See Erica Goode, *Video, a New Tool for the Police, Poses New Legal Issues, Too*, N.Y. TIMES, Oct. 12, 2011, at A14.

<sup>20</sup> See Stuntz, *supra* note 2, at 917.

<sup>21</sup> See *Payton v. New York*, 445 U.S. 573, 587 (1980) (distinguishing warrantless arrests from warrantless searches).

<sup>22</sup> 387 U.S. 523, 532 (1967).

<sup>23</sup> See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004) (excepting information-seeking highway checkpoints from the warrant requirement); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 454–55 (1990) (excepting drunk-driving checkpoints).



though we think that there, too, greater supervision might be apt. But within its plausible domain, warrants, taken seriously, will make a difference.

Indeed, it is useful to disaggregate the term “warrant” to highlight the various ways in which we might take “warrants” seriously. First, traditional warrants, issued by magistrates and based on cause, should be required whenever police seek to conduct an investigative search and no exigency is present. Second, police forces should be required to obtain administrative *Camara* warrants from judicial officers before initiating programmatic or regulatory searches. Finally, even when exigent circumstances are present—such as those that generate an auto stop or a stop and frisk—police should be required to utilize technology to obtain video and audio recording of police actions and their justifications, so that it is possible to use *ex post* review to determine whether those actions were in fact “warranted.”

Finally, Part IV addresses the costs of this call for wider use of warrants. It no doubt is true that actually requiring warrants (instead of just claiming to do so rhetorically) will create a need to obtain many more warrants. Can this be done, and is it worth it? Part IV first makes the case that police officials are acting in violation of the Fourth Amendment at a frequency that justifies legal reform, or at least serious consideration of reform, if we are to take the constitutional mandate seriously. It then suggests that the number of additional warrants is not as great as it might seem, in part because under the warrant model, police will be deterred from even requesting warrants in many cases in which they presently search. Moreover, it is possible to expand our notion of a “magistrate” to make it easier to provide staffing for the greater number of warrants. Indeed, increasing the number of magistrates and regularizing their function would well enhance the efficacy of the warrant process. Part IV explains that given present technology, the warrant requirement can be met—and indeed, could be expanded into areas of policing presently immune from warrants. And even if obtaining warrants is costly or impossible, technology can and should be used to obtain records of why police act as they do and what precisely has occurred. The analysis in Part IV is suggestive, based on the very limited data that is available. Yet, despite these limitations, it is, to the best of our knowledge, the most comprehensive account to date of the costs and benefits of warrants.

If we are to take warrants seriously, one additional change in the law is required, that dealing with the question of consent. It is already apparent in today’s world that one of the chief ways police officers avoid warrants is to obtain “consent” to search persons and places, particularly vehicles.<sup>24</sup>

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<sup>24</sup> See Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 235 (2007) (“Next to the pervasive automobile exception to the warrant requirement, consent is probably the leading justification offered for warrantless searches, and consent is unquestionably the leading rationale for searches undertaken without particularized probable cause or reasonable suspicion.”).

Consent is placed in scare quotes in the preceding sentence because virtually no one believes these searches are the product of a voluntary choice, which is what the doctrine presently requires.<sup>25</sup> We offer data further supportive of the notion that “consent” searches are not voluntary. In light of the ability of coerced consent to undermine a warrant scheme, it too must be eliminated. One solution would be banning consent searches altogether, though it is not necessary to go that far. Rather, consent could be disallowed absent ex ante proof that evidence is likely to be found. Or, given the available technology, consent could be premised on the magistrate informing the target that consent must be totally voluntary. One suspects that under these circumstances, the requests for consent searches would go way down, and again, there is some data to support this conclusion.

We do not purport to make a conclusive case for warrants. Such a case would require a detailed comparison between the costs and benefits of a real warrants system and the costs and benefits of all plausible alternatives, including the current system (with any plausible fixes). Try as one might, the absence of adequate data precludes such a comparison. Yet, we hope to demonstrate that there is a problem, and that a return to warrants—a solution that is arguably entirely in line with the proper understanding of the Fourth Amendment—deserves thoughtful consideration.

#### I. ILLUSORY DETERRENCE

The most prominent justification of the ex post remedies for violations of the Fourth Amendment is deterrence, but two other rationales have also been offered. First, remedies are sometimes deemed compensatory, as they return the injured party as much as possible to the state in which she rested before the violation.<sup>26</sup> Second, the specific remedy of the exclusionary rule is said to preserve judicial integrity: although law enforcement may have violated the Constitution, courts avoid complicity by declining to admit any

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<sup>25</sup> Many commentators doubt that the Court’s consent jurisprudence actually comports with a satisfying conception of voluntariness or meaningful freedom to decide. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 46–48 (1996) (Stevens, J., dissenting) (noting that most people do not feel free to walk away from police officers); Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (“The idea that [the *Drayton*] defendants acted voluntarily is at once absurd, meaningless, and irrelevant under traditional Fourth Amendment jurisprudence.”); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 216, 221 (2001) (accusing the Supreme Court of ignoring questions of what voluntariness means when discussing consent); Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 77 (2007) (calling consent a “myth” of voluntariness).

<sup>26</sup> *See, e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986); *Owen v. City of Independence*, 445 U.S. 622, 652–53 (1980) (discussing the compensatory rationale for damages in constitutional torts); *cf.* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1225–26 (pointing to a compensatory rationale for damages).

evidence so seized.<sup>27</sup> The current Court, however, has settled firmly on the notion that money damages, and particularly exclusion, serve as a deterrent to future violations.<sup>28</sup>

This Part explains that the ex post deterrence model has failed in practice for two reasons. The first reason is that Fourth Amendment standards are too vague. Put simply, the rules governing police are so unclear and malleable that their deterrence effect is minimal. Although in some classic economic models uncertain standards actually are thought to create greater deterrence, that is not the case when standards are radically uncertain.<sup>29</sup> This is particularly true when there is little or no sanction to back them up. This is the second problem: existing sanctions are ineffective. Under the current regime, neither monetary damages nor exclusion effectively deters Fourth Amendment violations.<sup>30</sup> Exclusion in particular fails because of ex post bias. The cases courts typically see are ones in which the suspect has been caught red-handed with evidence, and, in those situations, courts have a difficult time throwing the evidence out. This creates a vicious circle in which violation of the Fourth Amendment serves to create further justifications for avoiding its requirements, which serves only to make the law even more uncertain, which in turn makes it easier to refuse to exclude evidence.

#### A. Vague Standards

It is widely acknowledged that the law governing police conduct is extremely unclear.<sup>31</sup> The gradual evisceration of the warrant requirement is

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<sup>27</sup> See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (“[T]here is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free.” (citations and internal quotation marks omitted)); see also Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 130 (1992) (“The exclusionary rule gives the impression that the court system is as clean as clean can be.”).

<sup>28</sup> See *Herring v. United States*, 555 U.S. 135, 141 (2009) (“Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.”); *United States v. Peltier*, 422 U.S. 531, 539 (1975) (basing the decision to exclude evidence in part on its likely deterrent effect); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54 (“[D]eterrence is the *raison d’être* of the rule.”).

<sup>29</sup> See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 987 (1984) (discussing effects of uncertainty on choices between levels of care); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 285–86 (1986) (discussing effect of uncertainty on legal rules).

<sup>30</sup> See *infra* Part I.B–I.C.

<sup>31</sup> See Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1517 (2007) (discussing police discretion and vague standards); see also William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 345 (1991) (discussing the vague standards in the law governing police conduct); Rudovsky, *supra* note 26, at 1223–24 (discussing the combination of vague standards and the good faith exception to municipal liability); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1028 & n.50, 1074–77 (1995) (discussing vagueness in criminal procedure as it relates to discretion).

one cause of Fourth Amendment uncertainty. In theory, the rule is that police must obtain warrants before searching,<sup>32</sup> but in reality, the exceptions to the warrant requirement have eaten up the rule. Of course, a rule with exceptions still can provide sufficient certainty to permit deterrence. But while commentators agree that the warrant rule is fraught with exceptions, they cannot even agree on how many exceptions exist or on what their contours are.<sup>33</sup> If experts in the field cannot agree on what the law is requiring warrants, it is asking a lot of police officers to have a better sense. The contours of what constitute the exceptions also are very muddy. For example, the Supreme Court's decisions on what constitutes the scope of a lawful search incident to a lawful arrest cycle repeatedly over time.<sup>34</sup>

Much of what stands outside the warrant requirement and its exceptions also fails to provide guidance to police officers and police departments. Increasingly, the Supreme Court relies on tests of general "reasonableness."<sup>35</sup> A reasonableness test in theory also could generate certain enough results as to achieve deterrence; this has no doubt been the case in some areas of tort law.<sup>36</sup> In the criminal procedure context, however, experience with the reasonableness test inspires less confidence. Take for example the recent third-party consent case of *Georgia v. Randolph*. The deciding vote in the case was cast by Justice Breyer, who concluded that consent was invalid based on his personal ex post evaluation of four factual factors.<sup>37</sup> One wonders how any police officer is supposed to apply that ruling in the future. Another example is the law governing when roadblocks are acceptable. The two leading cases are *City of Indianapolis v. Edmond*<sup>38</sup> and *Illinois v. Lidster*.<sup>39</sup> It is difficult to reconcile these precedents, and

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<sup>32</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . .” (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

<sup>33</sup> See, e.g., Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 375 & n.39 (enumerating exceptions and arguing that the exceptions have turned the Fourth Amendment into “swiss cheese”). Compare Bradley, *supra* note 1, at 1473–74 (finding over twenty exceptions to the warrant requirement), with Bookspan, *supra* note 9, at 501–02 (counting fifteen exceptions).

<sup>34</sup> See *Chimel v. California*, 395 U.S. 752, 754–61 (1969) (reviewing the scope of the search incident to a lawful arrest exception from *Weeks v. United States*, 232 U.S. 383 (1914), onward, and returning to a narrower construction).

<sup>35</sup> See *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (looking first to the common law and then reasonableness to assess whether governmental action violates the Fourth Amendment).

<sup>36</sup> Cf. *United States v. Carroll Towing Co.*, 159 F.2d 169, 174 (2d Cir. 1947) (implementing reasonableness using a cost–benefit calculus, which is thought to facilitate deterrence).

<sup>37</sup> See *Georgia v. Randolph*, 547 U.S. 103, 125–27 (2006) (Breyer, J., concurring) (finding the search unconstitutional because it was targeted at evidence, the party was present and objected, there was no apparent danger of evidence destruction, and the officers could have sought a warrant).

<sup>38</sup> 531 U.S. 32, 44 (2000) (requiring a warrant because the checkpoint had a “crime control” purpose).

<sup>39</sup> 540 U.S. 419, 423 (2004) (excepting a checkpoint with an informational purpose).

police cannot be expected to do so on their own without the assistance of courts.

To make matters worse, Fourth Amendment issues are litigated relentlessly so that the law is constantly in flux. This is the bane of criminal procedure professors, who must adjust their syllabus in significant ways each year. Hardly a Supreme Court Term passes without some major pronouncement, each of which generates activity in the lower courts. There is very little stability.

There is nothing intrinsic in Fourth Amendment law that requires it to be unclear.<sup>40</sup> Indeed, courts in a variety of jurisdictions have suggested bright-line rules that might clarify matters. But, especially when those rules might seem to disadvantage police, the Supreme Court swats them down in favor of multi-factored reasonableness tests. Two examples are *Ohio v. Robinette*, rejecting the Ohio Supreme Court's holding that police officers must tell motorists they are free to go before obtaining consent, and *Florida v. Bostick*, rejecting the Florida Supreme Court's view that asking consent of passengers stuck on a bus was invalid.<sup>41</sup> The response of the Supreme Court in both cases was to adopt totality-of-the-circumstances tests.

The vagueness of Fourth Amendment law stands as a major obstacle to effective deterrence. A simple example helps bring the point home: Assume that the Fourth Amendment standard can be located on an interval between zero and ten, where zero represents a very lenient constitutional standard and ten a very strict one. If the law clearly stated a precise standard of five, and punished police officers that failed to meet the standard, then police officers would meet it.

Of course, providing a perfectly clear standard often is unrealistic. The effect of uncertainty depends on the extent of uncertainty. While models and theory suggest that in some areas moderate uncertainty can result in greater deterrence, great uncertainty, which plagues Fourth Amendment law, leads to inadequate deterrence. Suppose, initially, that there is moderate uncertainty, such that the police view the legal standard as being somewhere between four and six. If the sanction for failing to meet the standard is substantial, police officers will take excessive care, at the six level, to make sure they are not found to be in violation of the Fourth Amendment.

But, as we have seen, Fourth Amendment jurisprudence is plagued by great, not moderate, uncertainty. Now assume that the police view the legal standard as being somewhere between one and nine. Faced with such great uncertainty, eliminating any chance of violating the Fourth Amendment

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<sup>40</sup> The remedy of ex post exclusion, however, does push systematically towards greater uncertainty. See *infra* Part I.B.1 (describing ex post bias).

<sup>41</sup> See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (supplanting the Ohio Supreme Court's bright-line rule with an examination of the totality of the circumstances); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (remanding the case for examination of the totality of the circumstances).

would require police to adopt an excessive degree of care at the nine level—a level of care that would severely impede the police officer’s ability to carry out her job. Especially when faced with weak sanctions, rather than adopt this excessive care level, police will choose an inadequate care level.<sup>42</sup>

To be more precise, assume that the uncertainty surrounding the level-five standard follows a uniform distribution. Under moderate uncertainty, the court is equally likely to set the standard anywhere between four and six. If police increase their care level by one unit—say, from four to five—this reduces the chances of being found to be in violation by 50 percentage points, from 100% to 50%. Under high uncertainty, the court is equally likely to set the standard anywhere between one and nine. In that circumstance, if officers increase the care level by one unit—again from four to five—this reduces the chances of being found to be in violation by only 12.5 percentage points, from 37.5% to 50%. While a 50 percentage point reduction may be large enough to justify the cost of this extra unit of care, a 12.5 percentage point reduction might not.

Of course, even in the face of moderate uncertainty, deterrence will fail if there are not effective sanctions to assure it. As the next sections show, those sanctions have failed. Indeed, as the final section of this Part notes, there is a downward spiral here: sanctions fail because courts do not have the stomach for suppressing evidence of crime, but that failure to do so creates yet more uncertainty in the law, making deterrence even more of an ephemera.

### B. *Ineffective Sanctions I: The Exclusionary Rule*

To say that the exclusionary rule is a failure is to risk hyperbole and understatement at the same time. As its defenders would point out, there is not much available as a remedy for Fourth Amendment violations but exclusion, and its regular use in courts throughout the country undoubtedly provides some assurance of police compliance with basic constitutional mandates. That said, its critics deride it volubly and even its defenders readily acknowledge its manifold failings.

1. *Ex Post Bias*.—In general, ex post remedies are preferable to some sort of enforcement ex ante. Ex post remedies eliminate the need for judicial review in every case. Only those in which something goes awry will require litigation.<sup>43</sup>

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<sup>42</sup> See sources cited *supra* note 29. The line between moderate uncertainty, which leads to overdeterrence, and extreme uncertainty, which results in underdeterrence, is not a clear one. So how do we know that, in the Fourth Amendment context, the line has been crossed? The answer harkens back to the broad recognition that deterrence is not working well in this area. The failure of deterrence, we argue, suggests that the degree of uncertainty is extreme and that sanctions are ineffective.

<sup>43</sup> See Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271, 271–72 (1984) (describing the relative efficiency of ex post remedies as compared to ex ante

When it comes to the Fourth Amendment, however, the *ex post* nature of the remedy inserts a profound bias, one that is the chief basis for the failure of the exclusionary rule. Simply stated, the problem is this: in light of the exclusionary rule, the vast majority of cases to which the judiciary is exposed involves people who have been caught red-handed violating the law.<sup>44</sup> This *post hoc* bias has done more to undermine the utility of exclusion—and indeed the Fourth Amendment generally—than any other quality of the exclusionary rule.

Begin with the obvious: it is asking a lot of judges to regularly let bad types go free simply “because the constable has blundered.”<sup>45</sup> As commentators delight in pointing out, the exclusionary rule rubs our faces in the costs of the Fourth Amendment.<sup>46</sup> Although some judges demonstrate the courage of the law’s convictions, many, many do not—and this cannot come as too great a surprise.

Even if judges, acting on their own, could be expected on a regular basis to turn criminals back onto the streets because of the way evidence has been obtained, no community is going to stand by quietly and allow this to happen. There are famous cases, such as when, during the presidential election campaign of 1996, Judge Harold Baer Jr. brought the wrath of President Bill Clinton and his opponent Bob Dole down on his head for daring to suppress a trunk full of cocaine and heroin.<sup>47</sup> But the phenomenon is both familiar and expected.

The *ex post* nature of exclusion has the deeper effect of skewing the law itself. This happens for two reasons. First, for the most part courts only consider police conduct in cases in which that conduct paid off.<sup>48</sup> If courts only see the positive results of a form of policing they are asked to evaluate, it is easy to see why judges would give that policing their stamp of

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liability); Stuntz, *supra* note 2, at 886–88 (explaining that *ex ante* review is rare because of the high cost relative to *ex post* remedies).

<sup>44</sup> See Amar, *supra* note 1, at 796 (“The criminal defendant . . . is often unrepresentative of the larger class of law-abiding citizens, and his interests regularly conflict with theirs.”); Slobogin, *supra* note 33, at 403 (“[U]nder the exclusionary regime, the Fourth Amendment is virtually always associated with a criminal; only people who have been found in possession of evidence of a crime seek exclusion.”).

<sup>45</sup> *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

<sup>46</sup> See, e.g., Amar, *supra* note 1, at 799 (“The exclusionary rule renders the Fourth Amendment contemptible in the eyes of judges and citizens. Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.”).

<sup>47</sup> See *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996); see also Alison Mitchell, *Clinton Defends His Criticism of a New York Judge’s Ruling*, N.Y. TIMES, Apr. 3, 1996, at A12 (discussing President Clinton and Senator Dole’s criticism of Judge Baer’s decision to suppress evidence).

<sup>48</sup> By definition exclusion implies that there is some evidence to exclude. We are not the first commentators to note the effect this might have on the law. See, e.g., Amar, *supra* note 1, at 799; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 736 (1970) (pointing out that exclusion can only benefit the guilty).

approval. Second, given the bad types at issue, judges are inexorably pushed to put the law's imprimatur on what the cops have done, even if they would have balked *ex ante*. This means not only admitting illegally obtained evidence but also often twisting the law to justify admission.<sup>49</sup> Anyone who reads Fourth Amendment cases is familiar with this phenomenon, which serves to leave the doctrine governing police conduct highly malleable and uncertain.

Indeed, there is every reason to believe that Fourth Amendment law at present is suboptimal. The chief regulators of police practices at present are courts. Yet, those courts base their decisionmaking on a biased sample. Police practices are judged only in cases in which they proved successful. If judges also regularly saw false positives—illegal searches that uncovered no evidence of criminal conduct—they would be quicker to condemn those very same police practices. As Part IV makes clear, there is data to support the notion that the sample of cases courts view daily is wildly biased.

2. *The Problem of Testilying.*—The problems associated with *ex post* exclusion are exacerbated by the documented problem of false police testimony. Police understandably hate to see evidence excluded once they have caught someone with it. Under Fourth Amendment law, it is not uncommon that some shading of the facts might move a search from the bad to the good column. So, cops shade. No one is sure how much of it goes on, but evidence and anecdote suggest a fair amount.<sup>50</sup> The problem is so acute it even has a clever name: testilying.<sup>51</sup>

No doubt as part of the *ex post* bias, courts tacitly countenance the lying. Exclusion hearings often turn on whether to believe the version of events supplied by the defendant or that supplied by the police.<sup>52</sup> Given the payoff of exclusion, defendants have an incentive to lie. Cops simply see

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<sup>49</sup> See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003) (“The hydraulic effect, as Chief Judge John M. Walker, Jr. has sometimes called it, or the slippery slope, means that courts keep expanding what is deemed a *reasonable* search or seizure.” (footnote omitted)).

<sup>50</sup> Rare are the cases where evidence is available to definitively prove the police are lying. However, commentators have uncovered evidence in a variety of forms. See Orfield, *supra* note 27 (quantifying lying by police in the Chicago courts); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 5–12 (2010) (categorizing and summarizing the available evidence).

<sup>51</sup> CITY OF NEW YORK, COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMMISSION REPORT 36 (1994), available at [http://www.parc.info/client\\_files/Special Reports/4 - Mollen Commission - NYPD.pdf](http://www.parc.info/client_files/Special Reports/4 - Mollen Commission - NYPD.pdf) (“Several officers also told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: ‘testilying.’”); see also Oaks, *supra* note 48, at 739–40 (“[O]fficers will ‘twist’ the facts in order to prevent suppression of evidence and release of persons whom they know to be guilty. . . . [T]he policeman is ‘programmed to respond so as to legalize an arrest.’”).

<sup>52</sup> See Calabresi, *supra* note 49, at 113 (“But again, the question of fact as to whether the police are lying, or whether the evidence was properly obtained, is often close. If it is a close question and a judge finds that the police did not tell the truth, then—given the exclusionary rule—a murderer or rapist will be released. As a result, when in doubt a judge will say, ‘Maybe they are telling the truth.’”).



what they do as fighting fire with fire, and judges naturally are inclined to choose the blue over black and white stripes in a factual dispute.

3. *Indirect v. Direct Sanctions.*—Finally, exclusion fails as both a direct and indirect sanction—a distinction that will be useful to bear in mind. Direct sanctions are those imposed on the person whose behavior we wish to alter, the primary actor.<sup>53</sup> Indirect sanctions are imposed on someone else, in the hope that that person can control the behavior of the primary actor.<sup>54</sup> A helpful analogy is vicarious liability of employers. The idea is that such liability motivates the employer to better control the behavior of its employees.<sup>55</sup>

Exclusion is primarily an indirect sanction—an ineffective indirect sanction. The issue is straightforward: the ostensible purpose of the exclusionary rule is to deter police misconduct, but the mechanism is a lost conviction. The evidence and the literature suggest that convictions are low on the list of things police are rewarded or punished for.<sup>56</sup> Police care about arrests, not convictions.<sup>57</sup> And they care about crime rates because when these go up, the police hear about it.<sup>58</sup> Both are likely enhanced by Fourth Amendment violations. Violations generate more arrests. And aggressive policing is thought by some to lower crime rates.<sup>59</sup>

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<sup>53</sup> See generally Daryl J. Levinson, *Aimster and Optimal Targeting*, 120 HARV. L. REV. 1148, 1150–51 (2007) (providing background on the difference between direct and indirect sanctions).

<sup>54</sup> See Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1346 (1982) (describing indirect and direct sanctioning regimes); see also Levinson, *supra* note 53, at 1151 (describing the conditions necessary for indirect liability to be efficient).

<sup>55</sup> See generally Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984) (describing the incentives created by indirect sanctions like vicarious liability). See also Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (Alon Harel & Keith N. Hylton eds., 2012).

<sup>56</sup> See JONATHAN RUBINSTEIN, *CITY POLICE* 45 (1973) (describing how statistics are calculated before final disposition, making the arrest more important to internal performance reviews than the outcome); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 150 (4th ed. 2011) (explaining the importance of clearance rates in internal performance reviews); Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 33 (1980) (noting the importance of arrest records in determining promotions); Slobogin, *supra* note 33, at 378 (noting that arresting officers bear little responsibility for prosecutorial outcomes).

<sup>57</sup> See Calabresi, *supra* note 49, at 117 (“[E]xcluding evidence fails to affect the ‘cowboy’ cop very much. The cowboy has gathered the evidence, arrested the criminals, and received all the publicity: ‘I’ve caught the perps. I did my job . . . .’”); *infra* notes 195–203 and accompanying text.

<sup>58</sup> See Slobogin, *supra* note 33, at 378.

<sup>59</sup> See generally Jack R. Greene & Ralph B. Taylor, *Community-Based Policing and Foot Patrol: Issues of Theory and Evaluation*, in COMMUNITY POLICING: RHETORIC OR REALITY 195, 197 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (discussing uncertainties in the results of empirical studies on community policing); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis Of Criminal Procedure*, 86 GEO. L.J. 1153, 1164 (1998) (arguing that community policing deserves some of the

One might think that prosecutors, who bear the costs of exclusion, would see that police were trained to avoid violations in the first place or would insist that some mix of incentives and discipline were put in place to assure police compliance. That is how an indirect sanction should work, and to some extent, perhaps it does. But police and prosecutors often behave as though they work for different entities, rather than being the obvious assembly line from street to prison that they are.<sup>60</sup> It is easy to see the advantages of this behavior—prosecutors in particular can benefit by denying knowledge of what police are doing—and courts are altogether too willing to buy the story of separation. Moreover, prosecutors may lack a sufficient reason to bring pressure. Exclusion is a relatively rare event.<sup>61</sup> Prosecutors do stand to pay a substantial price when evidence is excluded in big cases, and there is some indication that in those cases, the rules are followed, proving that deterrence need not be a chimera.<sup>62</sup> In the vast run of police conduct, however, the more violations, the more offenders brought to the prosecutor, the more charges to bring against those offenders.<sup>63</sup> All of this is good in the world of prosecution.

### C. *Ineffective Sanctions II: Money Damages*

The exclusionary rule is widely reviled. As the foregoing suggests, whether one is for or against more vigorous protection of Fourth Amendment rights, it is easy to see why the contempt exists. So, why does the exclusionary rule linger on as the primary means of vindicating those rights? Because, all claims to the contrary notwithstanding, it most likely is the best thing going.

The failings of the exclusionary rule have led a host of commentators to call for money damages as the remedy for Fourth Amendment

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credit for declining crime rates during the 1990s); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 573–75 (1997) (summarizing the arguments linking community policing to crime rates); Mary Ann Wycoff, *The Benefits of Community Policing: Evidence and Conjecture*, in COMMUNITY POLICING, *supra*, at 103, 107–11 (finding a reduction in fear and improved relations between police and community members).

<sup>60</sup> See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 755 (2003) (discussing the separation of police and prosecutors into a “coordinate mode of organization” in America (quoting MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 44 (1986))).

<sup>61</sup> See Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 596 (describing low success rates for motions to suppress).

<sup>62</sup> See Orfield, *supra* note 27, at 116–18 (noting that officers tend to follow the rules in important “heater” cases because they know the stakes are so high, but that the opposite is true for minor crimes, such as possession).

<sup>63</sup> See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879 & nn.42–43 (2009) (discussing overcharging and the plea bargaining process).

violations.<sup>64</sup> The chief virtue of such a remedy, commentators argue, is that it is tailored to the victim and the violation.<sup>65</sup> Whereas the exclusionary rule appears to reward only the guilty, with money damages those who are blameless can recover.<sup>66</sup> And careful calibration supposedly will achieve just the right level of deterrence.<sup>67</sup>

Yet, money damages in theory are very different from money damages in practice. In the real world, the monetary remedy imagined by these commentators is a fantasy. Nothing like it exists, or is likely to, and even if it did, it is unclear it would achieve what is suggested for it.

*1. Direct Damages and Indirect Damages.*—Who will pay the money damages? This preliminary question will influence the efficacy of the damages remedy and thus its potential role in the enforcement of the Fourth Amendment. The basic distinction, as before, is between damages as a direct sanction and damages as an indirect sanction.<sup>68</sup> As a direct sanction, damages are imposed on the police officer whose behavior we aim to control. As an indirect sanction, damages are imposed at a higher level on the police department or on the local government. These damages are not felt directly by the police officer and can affect the officer's behavior only if they spur the mayor or police chief to instill an effective disciplinary system.

Many believe that direct damages in policing cases are a myth, and in truth, the number of cases in which police officers end up paying damages from their own pockets appears to be exceedingly small.<sup>69</sup> But this does not necessarily imply that direct damages are a myth. It could be that direct damages effectively deter the extreme, bad faith violations for which they are doctrinally available, and, for this reason, cases in which such damages

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<sup>64</sup> See, e.g., Amar, *supra* note 1, at 798 (arguing that money damages are preferable to exclusion); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 979–80 (1983); Posner, *supra* note 28, at 55–56 (arguing that damages are a more efficient remedy than exclusion).

<sup>65</sup> See Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 639 (1982) (arguing that damages can be calibrated according to the circumstances of the case); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443, 1473 (arguing that damages can be determined based on the type of violation).

<sup>66</sup> This is not actually the case. If the function of the exclusionary rule is deterrence, then the police also would be deterred from intruding into the lives of those who do not possess evidence of criminality and who are not in fact criminals. Still, the exclusionary rule appears, at first glance, to only benefit criminals.

<sup>67</sup> See *supra* notes 64–65 and accompanying text.

<sup>68</sup> See *supra* notes 53–55 and accompanying text.

<sup>69</sup> See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 & n.16 (1998) (describing personal interviews with police officers who could not recall an instance in which an officer was not indemnified); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 353 (2000) (noting the “near-universal” practice of indemnifying officers).

are awarded are so rare. It is unnecessary to resolve this question definitively; for the sake of expositional completeness, we explain why direct damages, even when or if they are doctrinally available, are likely to be ineffective.

Both direct and indirect damages suffer from serious, albeit different, problems, as explained below. But there is a preliminary problem that they both share—the assessment problem.

2. *What Are the Damages?*—Any system of optimal deterrence requires assessing accurately the monetary value of the damages incurred by Fourth Amendment violations. Right off the bat, however, this is going to be a challenge. The law successfully monetizes things like property damage; it is not as good at monetizing psychic injury. While pain and suffering damages and damages for emotional distress are available in theory, recovery is subject to strict limitations, and even when these limitations are overcome, the amount of damages awarded is unlikely to fully compensate for the harm done.<sup>70</sup>

In most Fourth Amendment cases psychic injury is a major—if not *the* major—component of harm. Although property damage can occur when police engage in searches or seizures without probable cause—perhaps even great damage—for the most part, the psychological injury easily outweighs the property damage. It is undoubtedly difficult for most people even to comprehend the trauma of having police officials burst into one’s home or of having one’s liberty taken away by being seized, searched, cuffed, and shoved into the back of a police car. Victims describe the utter helplessness, the feeling of freedom being taken away, the inability to trust cops thereafter.<sup>71</sup> Money is entirely incommensurable to these sorts of injuries, making them extremely difficult to price.

Moreover, as explained by Daryl Levinson:

Recovery is not permitted for the inherent value of constitutional rights, their value as public goods, the “expressive harms” inflicted by constitutional violations, the moral costs of breaching deontological prohibitions, third-party

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<sup>70</sup> See Oaks, *supra* note 48, at 718 (discussing the inability of money damages to account for the injury suffered by search victims); Stuntz, *supra* note 2, at 900–01 (describing the injury in illegal search cases as “complicated and almost wholly subjective” and notoriously difficult to value); see also Dillon v. Legg, 441 P.2d 912, 919–21 (Cal. 1968) (imposing strict requirements to limit the scope of potential liability for purely emotional harms); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 170 (1992) (discussing the strict limitations on recovery for emotional harm in tort law).

<sup>71</sup> See, e.g., McCabe v. Mais, 580 F. Supp. 2d 815, 832 (N.D. Iowa 2008) (“I was humiliated, and I felt violated. I felt as though I had lost control of my own body. I couldn’t imagine many things that would be worse . . .”), *aff’d in part, rev’d in part sub nom.* McCabe v. Parker, 608 F.3d 1068 (8th Cir. 2010); Wright v. United States, 963 F. Supp. 7, 18 (D.D.C. 1997) (“In this case, both Michelle and Justo Cruz testified that they suffered from recurrent nightmares for several weeks; and Justo Cruz described how, for a while, he was constantly nervous and easily startled by loud noises.”).

harms . . . or any of the other conceivable harms to society that may occur when government violates constitutional rights.<sup>72</sup>

The valuation problem prevents money damages from achieving optimal deterrence. The problem is fundamental, not limited to the current damages regime. As Levinson rightly concludes: “[I]t is virtually impossible to imagine an alternative damages measure that could non-arbitrarily convert these types of intangible harms into dollars.”<sup>73</sup>

### 3. *Legal Barriers.*

*a. General.*—Assuming one could price such injuries, they also have to be recoverable as a matter of law. Scholars often argue that it would make more sense to rely on money damages as though they are available. But they are not; moving to a regime of money damages rather than exclusion would require significant legal reform from the judiciary and the legislative branches and perhaps even a constitutional amendment. Unless these legal barriers are altered, recovery of damages sufficient to achieve the tailored deterrence commentators laud is simply elusive.

At present, the law governing torts does not allow for or severely restricts recovery for many of the very damages that are most important in these cases, specifically the psychic injury and the injury from trumping an inherently valuable constitutional right, described above.<sup>74</sup> The law could be amended to impose statutory damages, but this has not happened.<sup>75</sup> Moreover, even if statutory damages were adopted, other legal barriers would prevent money damages from effectively deterring illegal searches.

*b. Direct sanctions.*—Even if tort law generally allowed for recovery, the immunities inherent in litigation over *constitutional* torts utterly defeat recovery in most cases.<sup>76</sup> Suing the police proves very difficult because individual officials are cloaked with “good faith” immunity, and liability attaches only for violations of “clearly established” law.<sup>77</sup> Yet the law in this area is extremely muddy, providing cover even for

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<sup>72</sup> Levinson, *supra* note 69, at 372 (footnotes omitted).

<sup>73</sup> *Id.*

<sup>74</sup> See *supra* notes 70–71 and accompanying text.

<sup>75</sup> See Steiker, *supra* note 1, at 848–50 (noting the substantial statutory reforms necessary to make a damages scheme workable). Any statutory reform would also need to consider practical problems as well. See Stuntz, *supra* note 2, at 910 (discussing the “insoluble problems” with a damages scheme).

<sup>76</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1749–53 (1991) (discussing the heightened requirements to defeat qualified immunity in *Bivens* actions after *Harlow v. Fitzgerald*); see also Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 679–80 (1987) (presenting empirical evidence on the low rate of success for plaintiffs in constitutional tort actions).

<sup>77</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

the most egregious seeming of violations. For example, the Supreme Court recently unanimously condemned strip-searching adolescent students by police and school officials (who in this case were looking for nonprescription painkillers) but denied damages because the law on this was not clear.<sup>78</sup> As John Jeffries has pointed out, even in the absence of immunity, recovering direct damages for constitutional torts that require proof of unreasonableness is extremely difficult.<sup>79</sup>

By most accounts, police officers never, or very rarely, pay any damages from their own pockets. To the extent this is true, the prospect of direct damages is vanishingly slim and does not contribute to deterrence. The primary reason for this is indemnity. Good evidence on actual practice regarding indemnity is remarkably difficult to come by, but those involved with the issue seem confident that police commonly are indemnified for constitutional torts that occur while on the job.<sup>80</sup> On the other hand, there may well be a class of extreme, bad faith violations for which direct damages are a real possibility; there is some evidence in case law suggestive of this.<sup>81</sup> That such cases, and such direct damages, are rarely observed may simply suggest that, in this restricted domain, direct damages are an effective deterrent.

*c. Indirect sanctions.*—Many people advocate money damages actions against governments to enforce the Fourth Amendment,<sup>82</sup> but the legal obstacles here are even more acute than for suing individual cops. Municipalities enjoy no good faith immunity, but they cannot be sued for money damages unless one can prove that the conduct engaged in by

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<sup>78</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).

<sup>79</sup> See Jeffries, *supra* note 69, at 70 (1998) (explaining that vagaries in constitutional doctrine make it inherently difficult to prove police action was unreasonable); see also John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 862 (2010) (describing the many potentially exculpatory considerations in the reasonableness inquiry).

<sup>80</sup> At a minimum, indemnity is common. Most scholars would consider this to be an understatement. See Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 587–88 (2000) (describing firsthand experience suing New York City police officers, who were always indemnified); Jeffries, *supra* note 69, at 50 (describing interviews with officers who could not recall an instance in which officers were not indemnified); Levinson, *supra* note 69, at 353 (describing indemnity as “near-universal”); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810 n.158, 811 (1979) (failing to find a single instance in which a Connecticut officer was not indemnified). Nevertheless, the evidence is somewhat sparse and some do disagree. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 86, 229–30 nn.23–28 (1983) (arguing that indemnity is far from certain).

<sup>81</sup> Many state and municipal indemnification statutes exempt intentional or willful misconduct. See, e.g., N.Y. GEN. MUN. LAW § 50-k (McKinney 2007); N.Y. PUB. OFF. LAW § 17(2)(a) (McKinney 2008 & Supp. 2012); Ruiz v. Herrera, 745 F. Supp. 940 (S.D.N.Y. 1990); Karas v. Snell, 142 N.E.2d 46 (Ill. 1957); Bearden v. City of Boulder City, 507 P.2d 1034 (Nev. 1973).

<sup>82</sup> See *supra* notes 64–65 and accompanying text.

officials was municipal “policy.”<sup>83</sup> The law on what constitutes a policy is byzantine and does not line up at all with common intuition. “Policy” is made only when the individual or entity at the top of the hierarchy makes it so.<sup>84</sup> Yet, much of what police do that is considered impermissible is tacit or difficult to trace to the top. A large minority on the Supreme Court has argued for years these rules require change, but to no avail.<sup>85</sup>

Suing states makes suing municipalities look like child’s play. Under the Eleventh Amendment of the United States Constitution, as interpreted by the Supreme Court, states simply cannot be sued for money damages for constitutional violations.<sup>86</sup> The exception is if (1) the violation is of one’s Fourteenth Amendment rights and (2) Congress has explicitly authorized such suit.<sup>87</sup> The first criterion is met here, but the Supreme Court has held that 42 U.S.C. § 1983—the civil rights provision—does not constitute such authorization, and more direct authorization from Congress has not been forthcoming, nor is it likely to be.<sup>88</sup>

#### 4. *Practical Problems.*

*a. General.*—It is not just the law that poses difficulty; these legal barriers compound with some practical problems in suing over police violations. Litigation is expensive and time-consuming. Yet, to achieve its deterrent effect, litigation over Fourth Amendment violations must occur regularly enough to be a plausible threat and to develop the law necessary to provide rules for police officials. Especially in light of the legal obstacles just discussed, that is unlikely. But practical obstacles turn unlikely into ephemeral.

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<sup>83</sup> See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (requiring the violation to be caused by a municipal policy); *Owen v. City of Independence*, 445 U.S. 622, 633 (1980) (elaborating on *Monell*’s policy requirement).

<sup>84</sup> See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (“Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority . . .” (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986))); *Pembaur*, 475 U.S. at 483.

<sup>85</sup> See *Praprotnik*, 485 U.S. at 132 (Brennan, J., concurring) (arguing that the majority’s test of municipal policy is “unduly narrow and unrealistic”); see also *McMillian v. Monroe Cnty.*, 520 U.S. 781, 802 (1997) (5–4 decision) (Ginsburg, J., dissenting) (arguing that the Court’s test is overly rigid and difficult to satisfy); *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 433–36 (1997) (5–4 decision) (Breyer J., dissenting) (arguing that post-*Monell* decisions on municipal liability should be revisited).

<sup>86</sup> *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (“For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States ‘was not contemplated . . .’” (quoting *Hans*, 134 U.S. at 15)).

<sup>87</sup> See *Quern v. Jordan*, 440 U.S. 332, 342 (1979) (holding that a clear showing of congressional purpose is necessary to override sovereign immunity under Section Five of the Fourteenth Amendment).

<sup>88</sup> *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 66–67 (1989); see also *Edelman v. Jordan*, 415 U.S. 651, 675–76 (1974) (“But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State’s Eleventh Amendment immunity . . .”).

It is not easy to find plaintiffs with the wherewithal to sue. This includes the financial means to pursue litigation, but it is much more than that. As anyone who has ever had anything to do with litigation knows, it is time-consuming and emotionally draining. All the more so when one sues the police, for there is undoubtedly a stigma in suing police officials, who most citizens assume are doing what is appropriate.<sup>89</sup> Perhaps that is why these suits are rare today. Some of the most successful have been class actions over racial profiling, often with named plaintiffs who themselves are people of some prominence.<sup>90</sup>

In theory, the monetary challenges of litigation can be met with funding mechanisms that make it attractive for lawyers to front the costs, but here, theory and reality tend to diverge. There are such funding mechanisms, most notably contingent fees and fee-shifting rules like the attorney's fees provisions of 42 U.S.C. § 1983.<sup>91</sup> Still, suing police is unlikely to be attractive to most attorneys who must make a living handling a variety of cases, including those that require the honest testimony of police.

Finally, sympathetic juries also are going to be difficult to come by. People tend to believe the police.<sup>92</sup> This is unquestionably going to be the case if the "guilty" bring suit and it is their word against officers.

*b. "Empty pockets".*—Another practical problem is that of empty pockets. For money damages to work as a direct deterrent, the police officer must be held liable. If suits are against police officials, even if good faith immunity is overcome, the defendant must be able to pay the

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<sup>89</sup> See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 787 (1970) (discussing fear of suing the police); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 62 (1994) (discussing public preconceptions of police behavior); Posner, *supra* note 28, at 62 (noting that fear of reprisal may deter individuals from bringing tort claims for Fourth Amendment violations).

<sup>90</sup> See, e.g., *Md. State Conference of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560 (D. Md. 1999) (class action alleging racial profiling in highway stops in which the lead plaintiff was the President of the Maryland ACLU); Press Release, ACLU, Landmark Settlement Reached with Maryland State Police In "Driving While Black" Case (Apr. 2, 2008), available at <http://www.aclu.org/racial-justice/landmark-settlement-reached-maryland-state-police-driving-while-black-case>.

<sup>91</sup> See 42 U.S.C. § 1988(b) (2006) (providing for fee shifting in Section 1983 suits); see also Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 790 (2011) (reviewing fee-shifting and contingency mechanisms); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 745 (1988) (testing incentives created by contingency and fee-shifting provisions).

<sup>92</sup> See Maclin, *supra* note 89, at 62 (pointing out that juries tend to sympathize with the police (quoting Donald Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 629 (1990))); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 738 (1998) ("It is commonly recognized that juries will believe law enforcement officials before relying on a plaintiff's account.").



judgment. When it comes to large monetary awards, however, many police officer defendants may well be judgment-proof.<sup>93</sup>

*c. Ineffectiveness of institutional sanctions to achieve deterrence.*—The quick answer to the problem of empty pockets involves suits against entities rather than officials or indemnification of the latter by the former. But this solution, too, has its difficulties.<sup>94</sup> Even when damages are imposed on police departments or cities, these damages are often not very high in relation to their budgets.<sup>95</sup> Recent scholarship suggests police departments typically remain blissfully and intentionally unaware of damages paid in litigation over police conduct.<sup>96</sup> If this is the case, then there is no reason to expect deterrence or institutional change that will lead to deterrence.

Rather, damage awards effectively are paid by taxpayers, who might be quite happy to finance the tough-on-crime policy.<sup>97</sup> As Daryl Levinson has so vividly explained, theorists who favor money damages against government entities seem to assume these entities will behave like a firm, mechanically internalizing both costs and benefits.<sup>98</sup> And, specifically, that it will work to instill a system of disciplinary sanctions to deter violations that cost the entity money.<sup>99</sup> Yet, in the literature there is confusion as to whether this is the case, and in reality it probably is not.<sup>100</sup>

Although it is difficult to know for sure, it appears that at best, governments internalize benefits far better than costs, suggesting that government liability will not necessarily diminish the number of Fourth Amendment violations. This is because governments can simply decide to incur those costs in order to obtain the desired public good: social order.<sup>101</sup>

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<sup>93</sup> See S. Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986) (discussing the skewed incentives created by judgment-proof defendants); see also Rudovsky, *supra* note 26, at 1229 (pointing out that officers generally have few assets and that, in egregious cases, states refuse to indemnify, making the defendant judgment proof and leaving plaintiffs uncompensated).

<sup>94</sup> See Heffernan and Lovely, *supra* note 31, at 324–25 (arguing that indirect sanctions tend to underdeter the police); Levinson, *supra* note 53, at 1150–51 (describing the difficulties in making indirect sanctions effective).

<sup>95</sup> See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1033 (2010) (pointing out that lawsuits put minimal financial pressure on police departments). Often the damages do not come out of the police department budget at all, further reducing their deterrent effect. See also Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 781–82 (2004) (noting that damages are typically paid by the municipality).

<sup>96</sup> See, e.g., Schwartz, *supra* note 95, at 1041–53.

<sup>97</sup> See SCHUCK, *supra* note 80, at 125.

<sup>98</sup> Levinson, *supra* note 69, at 357.

<sup>99</sup> *Id.* at 350.

<sup>100</sup> See *id.* at 367–72; Schwartz, *supra* note 95, at 1066–67 (discussing the lack of connection between trial outcomes and disciplinary sanctions).

<sup>101</sup> See Heffernan & Lovely, *supra* note 31, at 363 (describing sanctions as a cost of business for police departments); Levinson, *supra* note 69, at 368.

If voters are comfortable with this trade, then taxes will be raised to fund the constitutional violations. Such majoritarian control over constitutional protections defies the very meaning of those protections.

Worse yet, the costs and benefits of policing do not fall evenly across society, causing very serious distributional effects. Again, predicting these precisely can be difficult. Perhaps well-to-do merchants will happily fund the cost of violating the rights of urban youth whose street activities threaten their economic prosperity. Or, it may be that residents of minority communities themselves prefer violating the rights of others in the community for sake of social order.<sup>102</sup> This, at any rate, is the premise of “community policing,” though data suggest that in fact community members are less content than they are theorized to be. In any event, New York’s stopping and frisking of hundreds of thousands of people, disproportionately minorities, with little to show in the way of arrests or evidence, exemplifies the problem.<sup>103</sup>

#### *D. Ineffective Sanctions III: Other Alternatives*

From time to time, commentators frustrated by both exclusion and monetary damages in civil litigation have suggested alternatives. Yet, none of these are very practicable either.

Police departments typically have internal affairs bureaus that deal with police misconduct. But these sorts of investigations often are reserved for the most serious of violations: allegations of excessive force or corruption.<sup>104</sup> There is no evidence in the literature that internal affairs

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<sup>102</sup> See Levinson, *supra* note 69, at 367–72; Maclin, *supra* note 89, at 31 (describing a public opinion poll that says, “62 percent of those questioned said they would be willing to give up ‘a few of the freedoms we have in this country’ to significantly reduce illegal drug use” (quoting Richard Morin, *Many in Poll Say Bush Plan Is Not Stringent Enough: Mandatory Drug Tests, Searches Backed*, WASH. POST, Sept. 8, 1989, at A1)); Steiker, *supra* note 1, at 850 (arguing that “average” citizens are most affected by crime and therefore most likely to approve of police “overreaching”).

<sup>103</sup> See CIVIL RIGHTS BUREAU, OFFICE OF THE ATT’Y GEN. OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK 111 (1999) [hereinafter NYPD STOP & FRISK REPORT] (summarizing the stop and frisk practices in New York City and showing that only one out of every nine stops led to an arrest).

<sup>104</sup> See Paul Crotty, Speech, *The Corporation Counsel’s View of Independent Oversight of the Police Department*, 40 N.Y.L. SCH. L. REV. 23, 31 (1995) (describing the hundreds of internal affairs bureau agents focused on corruption); Annette Gordon-Reed, *Watching the Protectors: Independent Oversight of Municipal Law Enforcement Agencies*, 40 N.Y.L. SCH. L. REV. 87, 88–90 (1995) (describing New York City’s focus on corruption within the police department); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 30–35 (2003) (describing modern early-intervention systems that focus on use-of-force reporting and implementation of use-of-force policies); see also Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 504–05 (2004) (discussing the systemic flaws that make most internal affairs bureaus ineffective).

departments are searching for or addressing systemic violations of Fourth Amendment rights.<sup>105</sup>

Similarly ineffective are “remedies” that involve external policing of the police. Citizen review boards have had their moment in the sun, but studies question their efficacy.<sup>106</sup> In any event, they too tend to work in cases of police brutality and play almost no role in Fourth Amendment violations with less evident physical effects.<sup>107</sup>

A favorite in scholarly theory is administrative damages, yet the fact that this remedy remains largely theoretical is telling.<sup>108</sup> It would be possible to construct an administrative system that awards damages for police official violations. Not only has no municipality or state jumped to do so, but even if there were such remedies, they still would suffer from some of the problems identified with civil litigation, the most serious being the way governments internalize the costs of damages paid for policing.<sup>109</sup>

### E. *The Downward Spiral*

There is empirical evidence to suggest that despite its warts, many, including police officials, believe the exclusionary rule is by far the preferable vehicle for enforcing Fourth Amendment rights.<sup>110</sup> They praise

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<sup>105</sup> See Schwartz, *supra* note 95, at 1066 (presenting data showing that almost 90% of sheriffs’ departments do not proactively gather information on lawsuits or engage in meaningful analysis).

<sup>106</sup> For a history of civilian review boards, see SAMUEL WALKER, *CITIZEN REVIEW RESOURCE MANUAL* (1995). For a criticism of review boards, see N.Y. CIVIL LIBERTIES UNION FOUND., *CIVILIAN REVIEW OF POLICING: A CASE STUDY REPORT 9–13* (1993) (observing that a range of impediments have weakened civilian-oversight agencies); see also SKOLNICK, *supra* note 56, at 227; Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2–3 (2009).

<sup>107</sup> See David Brereton, *Evaluating the Performance of External Oversight Bodies*, in *CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY AND HUMAN RIGHTS* 105, 111–12 (Andrew J. Goldsmith & Colleen Lewis eds., 2000) (discussing results that show civilian review boards do not perform better than their internal counterparts); see also Liqun Cao & Bu Huang, *Determinants of Citizen Complaints Against Police Abuse of Power*, 28 J. CRIM. JUST. 203, 210 (2000) (pointing to implementation problems with civilian review boards); cf. Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 594 (1997) (discussing the history of civilian review and its focus on violence).

<sup>108</sup> See, e.g., Samuel Estreicher & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949, 951–53 (2010); Perrin et al., *supra* note 92. But see Laurie L. Levenson, *Administrative Replacements: How Much Can They Do?*, 26 PEPP. L. REV. 879, 880–885 (1999) (describing the practical obstacles to any administrative remedy).

<sup>109</sup> See *supra* notes 94–103 and accompanying text.

<sup>110</sup> See Orfield, *supra* note 27, at 125–26 (discussing survey responses from police officers supporting the rule); Perrin et al., *supra* note 92, at 732 (noting survey data that shows police officers favor exclusion by comparison to other remedies); see also Kamisar, *supra* note 1, at 137–38 (summarizing studies that show police prefer exclusion to other remedies).

the rule's educative effect and believe it sends a message.<sup>111</sup> Nonetheless, as we have seen, the exclusionary rule's warts are large and ungainly.

The biggest wart on the exclusionary rule drives ineffective sanctions and uncertain law into a vicious downward spiral. While the law could be made clearer, there is hydraulic pressure against this given the biased sample of cases that courts see.<sup>112</sup> Cases come to court. The cops have evidence in hand that the defendant is guilty. The court strains to approve what the cops have done. Exceptions are created to rules. If the rules were clear in the first instance (and sometimes they actually were!), exceptions muddy them. Later cases come to court, now with muddier rules and equally guilty bad guys. Exceptions to exceptions, and soon neither courts nor cops have any clear idea of what cops were not supposed to be doing. The result is that the rules cops play by become murkier and murkier, making it easier and easier to approve of what cops have done, making the rules murkier and murkier. None of this is calculated to improve deterrence.

## II. THE WARRANT MODEL

If police officers cannot be deterred effectively from making bad decisions about the reasonableness of a search or seizure, then we may want to consider taking the decision out of the police officer's hands. Section A explains that this is what occurs in other areas of the law when deterrence fails. We should replace the police officer's discretion with the magistrate's, requiring that police seek a warrant before they search or seize. Although requiring warrants is hardly novel, much of section B is an entirely unique justification rooted in literature from the social sciences for the oft-stated but seldom-enforced warrant requirement. As section B points out, traditional insistence on a "neutral and detached" magistrate makes sense from the perspective of incentives. But section B also relies on literature from the social sciences to establish that firmer insistence on a warrant requirement would improve the quality of police decisionmaking whether or not magistrates are diligent. Finally, section C demonstrates how the warrant model solves the vague standards and ineffective remedies problems that undermine the current deterrence model. The standard defining when a warrant is required will be clearer than existing law governing police conduct, and this clarity will enhance the efficacy of the remedies used to enforce the warrant requirement.

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<sup>111</sup> See Loewenthal, *supra* note 56, at 30–40; Orfield, *supra* note 27, at 80–82 (discussing educational impact of exclusion on the police).

<sup>112</sup> See Calabresi, *supra* note 49, at 113 (explaining that judges feel pressure to justify admitting damning evidence, leading to precedents that gradually complicate the law).

### A. When Deterrence Fails

What does the law do when deterrence fails? Looking beyond the Fourth Amendment, we find several cases where the law has searched for and found alternatives to failed deterrence. These alternatives require asking permission before the action is taken.

Consider licensing requirements. You cannot drive a car without first obtaining a driver's license. You cannot practice medicine without first obtaining a medical license. Drivers and doctors must ask for permission before engaging in their respective activities. Why? Because deterrence alone has proved insufficient in these cases. First, there is a concern about ineffective sanctions. An unqualified driver or doctor might cause substantial harm, including serious bodily injury or death. Many drivers and doctors will not have the financial resources to pay for the harm that they cause. The inability to pay sufficiently high damages reduces the deterrent effect.<sup>113</sup> Vague standards also play a role. What constitutes medical malpractice or unsafe driving? While certain undesirable behaviors are prohibited by clear rules—think of speeding or running a red light—the boundaries of reasonable driving and reasonable medical treatment are vague. When ineffective sanctions and vague standards limit deterrence's reach, the law supplements it by requiring *ex ante* permission, such as licensing.

Other related examples include building permits and zoning variances and preclearance of new drugs by the FDA. In fact, these examples more closely resemble the warrant requirement because they require advance clearance for particular incidents of conduct rather than for broad activities like driving or practicing medicine.<sup>114</sup> Again, concern about vague standards and, especially, ineffective sanctions may justify the resort to preclearance in these cases. An unsafe drug can have disastrous side effects. As explained above, monetizing bodily harm or even loss of life is difficult, and thus legal remedies often undercompensate. Moreover, with potentially huge magnitudes of harm, the possibility that wrongdoers will be judgment proof provides cause for concern. Drug makers might not be able to pay the amount of damages required for effective deterrence.<sup>115</sup> Poorly constructed buildings similarly can cause large magnitudes of harm—harm that is difficult to quantify and, when quantified, difficult for some developers to

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<sup>113</sup> See Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984) (discussing the judgment-proof problem). Both drivers and doctors must obtain insurance, but insurance, while guaranteeing compensation for victims, cannot fully solve the deterrence problem. See generally STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

<sup>114</sup> See Stuntz, *supra* note 2, at 886–87.

<sup>115</sup> Some pharmaceutical companies have used the bankruptcy code as a shield against massive class actions. For instance, Dow Corning entered Chapter 11 in the face of billions of dollars in potential liability. See Barnaby J. Feder, *Dow Corning in Bankruptcy over Lawsuits*, N.Y. TIMES, May 16, 1995, at A1.

pay. Even if the construction project only jeopardizes the character and aesthetics of a neighborhood, available sanctions can be ineffective: damages might be ineffective because such harm is difficult to quantify, and courts would be reluctant to go beyond damages and to order demolition.<sup>116</sup>

Finally, the choice between deterrence and permission resembles the choice between ex post litigation and ex ante regulation. In the ex post litigation model, the threat of being sued deters unreasonable behavior, forcing the actor to make the socially desirable decision.<sup>117</sup> For example, a potential injurer weighs the benefit of action against the associated costs in terms of expected liability for harm caused by the action. The decision whether to act and how much to invest in precaution is left to the potential injurer. The ex ante regulation model places less trust in the actor. Many decisions are thus made by the regulator: what type of action is allowed and when, what precautions must be implemented, etc.<sup>118</sup> Again, the actor's discretion is restricted because the law is unable to effectively influence the actor's decisions through deterrence.

### B. *The Benefits of Warrants*

In the Fourth Amendment context as well, preclearance via warrants can succeed where ex post, remedy-based deterrence has failed. First, advance permission will work because magistrates are likely to make better decisions than police officers. This argument is fairly traditional and, as a matter of incentives, obviously correct. Second, we make the novel argument, grounded in the social science literature, that a serious warrant requirement will work by inducing police officers themselves to make better decisions.

1. *From Police to Magistrates.*—The basic version of the advance permission model assumes that the official granting permission will make a better decision than the individual seeking it. In the Fourth Amendment context, the assumption is that magistrates will make better decisions than police officers. As Justice Jackson explained in *Johnson v. United States*:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.<sup>119</sup>

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<sup>116</sup> See Stuntz, *supra* note 2, at 901–02 (discussing challenges to accurately calculating damages).

<sup>117</sup> See *id.* at 887–88.

<sup>118</sup> See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 93 (2004) (discussing the role of “direct regulation”).

<sup>119</sup> 333 U.S. 10, 13–14 (1948).

Justice Jackson's intuition regarding the benefits of magistrates seems correct. Magistrates can be expected to make better decisions because they face a different incentive structure. Police incentives are skewed toward catching criminals and less geared towards protecting the constitutional rights of suspects.<sup>120</sup> Magistrates are not subject to such biased incentives. Magistrates are motivated by the threat of reversal by an appellate court.<sup>121</sup> Appellate review of the magistrate's warrant-granting or warrant-denying decision helps align a magistrate's incentives with the social optimum.

There is a pervasive concern in the literature and in court decisions with the "rubber stamp" magistrate.<sup>122</sup> This concern takes two forms. The first is about biased magistrates—magistrates that are not "neutral and detached," but exhibit a pro-police bias. Court decisions focus on this concern.<sup>123</sup> The second is about laziness rather than bias. It is about the magistrate who exercises no scrutiny, or very limited scrutiny, of the warrant application.<sup>124</sup> The first concern eliminates the benefit of moving the locus of discretion from the police officer to the magistrate, while the second undermines the very idea of advance permission.

Although magistrates undoubtedly can be biased, lazy, or both, the concern about "rubber stamp" magistrates may be overstated. To begin, one hopes that rare is the magistrate who exercises no scrutiny and who signs absolutely anything. This is important for the discussion that follows. And

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<sup>120</sup> See Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1140 & n.120 (1981) (arguing that police officers' incentives are skewed toward engaging in illegal activity).

<sup>121</sup> See *Arizona v. Evans*, 514 U.S. 1, 11 (1995) (noting that exclusion is not directed at magistrates because they are not "inclined" to ignore the Fourth Amendment); *United States v. Leon*, 468 U.S. 897, 917 (1984) (discussing differences between motivations of magistrates and police officers). Of course, this can be complicated by how magistrates are appointed. Some, for example, may be judges who stand for election. If so, how they respond to warrant requests may depend, for example, on whether they feel more beholden to the defense bar or prosecutors. This is part of the reason we insist on random assignment.

<sup>122</sup> Since *Leon*, there has been a plethora of scholarship focused on rubber stamp magistrates. See, e.g., RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 94–102 (1985); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1199–1201 (1987).

<sup>123</sup> The first time the term "rubber stamp" actually appears in the Court's opinions in reference to magistrates is in *Aguilar v. Texas*, in which it immediately follows the quote from *Johnson*. 378 U.S. 108, 111 (1964). The concept comes up again in *Lo-Ji Sales, Inc. v. New York* in the context of a town justice who took part in the search, essentially becoming "an adjunct law enforcement officer." 442 U.S. 319, 326–27 (1979). Finally, *Leon* uses the term in a similar fashion to describe a magistrate who does not scrutinize the evidence but rather acts as if he were a police officer. See 468 U.S. at 914–15.

<sup>124</sup> Commentators note both concerns. See, e.g., Goldstein, *supra* note 122, at 1199–1200 (using the term "rubber-stamp magistrates" to refer not only to magistrates who are not neutral but also to magistrates who fail to scrutinize affidavits and who merely accept their conclusions); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34 & n.63 (1988) (using the term "rubber stamp" to refer not only to magistrates who are not "neutral and detached" but also to magistrates who subject the warrant application to only "perfunctory review").

even if this were the case, appellate review provides some control.<sup>125</sup> In practice, magistrate quality likely is continuously distributed rather than binary. Poor quality magistrates exercise limited scrutiny but still would deny completely baseless or illegal warrant applications.

Moreover, evidence of high, even very high, approval rates of warrant applications tells us very little about the quality of magistrates' decisionmaking. Such evidence frequently is offered in support of the notion of a rubber stamp or insufficiently attentive magistrate.<sup>126</sup> True, high approval rates will be observed when the magistrate exercises no meaningful scrutiny of warrant applications. But high approval rates may also be observed when magistrates carefully scrutinize warrant applications. The reason for this is that police officers, cognizant of the fact that their warrant applications will be scrutinized carefully, will not bother filing weak applications.<sup>127</sup> Thus, one might observe the same warrant approval rate from the toughest and least tough of magistrates. Which brings us to our most important point: the effects of warrants on police decisionmaking.

Before moving there, however, one point must be emphasized. In jurisdictions in which there is more than one magistrate, there is no excuse for having a system of warrant authorization that is anything other than random. The literature discusses police seeking out favorable magistrates.<sup>128</sup> When it comes to judge-shopping as opposed to forum-shopping, however, courts are quite critical. Lawyers have been disbarred and criminal convictions overturned because of judge-shopping.<sup>129</sup> The reasons for this

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<sup>125</sup> *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (“In order to ensure that such an abdication of the magistrate’s duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.”).

<sup>126</sup> See, e.g., VAN DUIZEND ET AL., *supra* note 122; Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 421 (1986). This sort of criticism is frequently leveled at the special court that issues warrants under the Foreign Intelligence Surveillance Act (FISA). See Note, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 HARV. L. REV. 2200, 2205–06 (2008) (citing evidence that the FISA court rejected just five applications through 2006). But that court only receives applications from a special office within the Department of Justice, and the available evidence suggests that the office is extremely careful in what it brings to the court in the first place. See STEWART A. BAKER, *SKATING ON STILTS: WHY WE AREN’T STOPPING TOMORROW’S TERRORISM* 45–47 (2010).

<sup>127</sup> Political scientists call this effect “anticipated reaction” or “rational anticipation.” See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 29 (1994) (discussing strategic interactions between coordinate branches of government); see also TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 145 (1999) (discussing the Court’s consideration of anticipated reactions in its decisionmaking).

<sup>128</sup> Some commentators have attempted to document this phenomenon, but the data is limited. See, e.g., VAN DUIZEND ET AL., *supra* note 122, at 102; Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221 (2000) (describing results of a study of warrant applications in San Diego).

<sup>129</sup> See Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 299 (1996) (“Courts consistently treat judge-shopping as an impermissible form of



are easy to understand: allowing such conduct is inimical to the rule of law. It is difficult to imagine, therefore, why police should get to pick their magistrate when seeking a warrant. (Indeed, if officers are allowed to shop for magistrates, it might be possible to ferret out true rubber stamps on the basis of the number of warrant applications a magistrate receives.)<sup>130</sup>

2. *Improved Police Decisionmaking.*—The warrants-as-deterrents model can work by replacing the police officer’s discretion with the magistrate’s discretion, as explained above. But requiring advance permission can also work by inducing better decisionmaking by the police officer. That is the central insight of this section. This happens in two ways.

First, and most obviously, a police officer anticipating scrutiny by a magistrate typically will not bother to request warrants that are not going to be granted. Recognizing that she needs the magistrate’s approval, the police officer will try to predict and mimic the magistrate’s decisionmaking process, requesting only warrants that the magistrate would grant. In other words, the police officer will be forced to internalize the magistrate’s neutrality and better-aligned incentives.<sup>131</sup> This will work all the better to the extent magistrate-shopping is eliminated and magistrate selection is randomized.

Second, asking permission forces the police officer to stop and think in order to articulate reasons for the search that could convince the magistrate. (In most cases, there will not be any actual convincing. The officer will realize that a search or seizure is difficult to justify and will avoid bringing the case to the magistrate in the first place.) As Lon Fuller noted over fifty years ago, “[W]hen men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward

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shopping for justice.”). Sanctions for lawyers found to be judge-shopping vary. *See, e.g., Lane v. City of Emeryville*, No. 93-16646, 1995 U.S. App. LEXIS 11629 (9th Cir. Mar. 17, 1995) (attorney sanctioned under Fed. R. Civ. P. 11 for scheme involving dismissing and refiling complaints to procure a more favorable judge); *Standing Comm. on Discipline v. Yagman*, 856 F. Supp. 1384, 1393 (C.D. Cal. 1994) (attorney suspended, fined, and ordered to perform twenty-five hours of pro bono work for filing five identical complaints in hopes of choosing a favorable judge), *rev’d*, 55 F.3d 1430 (9th Cir. 1995). The random assignment process used in most federal courts serves, in part, to prevent this sort of judge-shopping. *See United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992) (“This case was assigned to me through the blind, random draw selection process utilized in all cases by this court. That procedure . . . prevents judge shopping by any party, thereby enhancing public confidence in the assignment process.”).

<sup>130</sup> In some cases, police officers may apply for a warrant even when they expect the application to be denied to shift blame to the magistrate if the suspect commits a crime that could have been avoided by the search or seizure. We abstract from this possibility.

<sup>131</sup> *Cf.* Philip E. Tetlock, Linda Skitka & Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 638 (1989) (finding that decisionmakers conform to the ideological orientation of those to whom they are accountable).

goodness . . . .”<sup>132</sup> Sometimes we are inclined to act impetuously, believing that what we are about to do makes great sense. But on reflection, impetuous ideas often appear ill-advised. Nothing can make this as clear as having to explain to a third party why we are going to act as we will. In essence, compelled consideration and the anticipation of giving reasons can lead to self-censorship. It causes the police officer to act in accord with considered preferences, rather than impetuous ones. Thus, even without regard to the magistrate’s preferences, the requirement of asking permission can still lead to better outcomes.

Research in the social sciences confirms the benefits of articulating reasons. The following subsections review that literature. We then address the question of whether the process of seeking a magistrate’s approval actually is likely to induce police officers to reach better decisions, either by forcing them to articulate reasons or by leading them to consider what the magistrate will do. Finally, we explain why the current deterrence model, in which police officers are also subject to scrutiny, albeit *ex post* scrutiny by judges rather than *ex ante* scrutiny by magistrates, does not have a similarly positive effect on police decisionmaking.

*a. The benefits of articulating reasons: debiasing.*—Police decisionmaking in the Fourth Amendment context is by nature typically biased. Police officers focus on the potential crime-fighting benefits of the search or seizure and naturally are less attentive to the costs imposed on the individuals who are subjected to the search or seizure.<sup>133</sup> Can this bias be overcome? Social science research suggests that it can.

Research in cognitive psychology has identified numerous biases that distort decisionmaking.<sup>134</sup> After identifying these biases, a natural question has been whether and how the biases can be neutralized or minimized. The answer is that forcing decisionmakers to consider arguments that run counter to their initial, biased beliefs may help reduce the bias and produce better decisions. For example, Linda Babcock, George Loewenstein, and Samuel Issacharoff have shown that forcing litigants to articulate arguments in favor of the opposing party reduces self-serving bias and increases the likelihood of pretrial settlement.<sup>135</sup>

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<sup>132</sup> Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

<sup>133</sup> See Cass, *supra* note 120, at 1140; Barry Loveday, *Managing Crime: Police Use of Crime Data as an Indicator of Effectiveness*, 28 INT’L J. SOC. L. 215, 216 (2000).

<sup>134</sup> See generally, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (discussing various forms of cognitive bias, including insensitivity to sample size and predictability).

<sup>135</sup> See Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913 (1997). Considering counterarguments has been shown to reduce the hindsight bias and the overconfidence bias. See Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 134, at 422, 427–31 (discussing hindsight bias); Asher Koriat, Sarah Lichtenstein & Baruch Fischhoff, *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.:

A related literature on the effects of accountability bolsters these findings. The accountability studies show that when a decisionmaker is accountable for her decisions, namely when she must explain and justify her decisions to a third party, the decision tends to be more rational and less biased.<sup>136</sup> Work on deliberation, while less on point and less certain, provides similar insight.<sup>137</sup>

The debiasing and accountability literatures suggest that police decisionmaking can be improved if accountable police officers are forced to consider counterarguments and to think about the harm caused by their actions. The warrant requirement effects such debiasing. A police officer who expects to have a search request scrutinized by a magistrate will likely think through the magistrate's potential objections when deciding whether to request a warrant.

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HUM. LEARNING & MEMORY 107, 113–14 (1980) (discussing overconfidence bias). This is not to say that considering counterarguments always reduces all forms of bias. *See, e.g.*, Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 313, 313–23 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002) (asking subjects to consider risk factors related to negative outcomes and suggesting reasons that negative outcomes that might occur do not reduce the optimism bias).

<sup>136</sup> *See* Jennifer S. Lerner & Philip E. Tetlock, *Accountability and Social Cognition*, in 1 ENCYCLOPEDIA OF HUMAN BEHAVIOR 1, 1–10 (1994) (explaining that accountability reduces overconfidence and the fundamental attribution bias); Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCHOL. Q. 285, 290–91 (1983) (finding that accountable decisionmakers were less vulnerable to belief perseverance—the primacy effect—and were more willing to consider new evidence that challenged their initial beliefs). *But see* Tetlock et al., *supra* note 131, at 638 (finding that decisionmakers who are committed to a certain position focus on justifying their prior position).

<sup>137</sup> The deliberation literature argues that deliberation reduces bias and irrationality, thus leading to better outcomes. Because deliberation requires individuals to convince each other, it filters out bias, prejudice, and irrational motivations. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DEMOCRACY 87, 95 (David Estlund ed., 2002); *id.* at 91, 94 (arguing that, when deliberation requires justifying a decision to others who have different perspectives, it is likely to require appeals to the common good, leading to a preference for the socially desirable outcome); *see also* Thomas Christiano, *The Significance of Public Deliberation*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 243, 247 (James Bohman & William Rehg eds., 1997) (arguing that the process of discussion and debate can be expected to “root out policies based on unsubstantiated prejudices,” resulting in better decisions); James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects* 11, 20 (July 2, 2003) (unpublished manuscript), *available at* <http://www.polmeth.wustl.edu/media/Paper/druck03.pdf> (positing and empirically confirming that deliberation helps individuals overcome framing effects). In other words, deliberation promotes rationality because only reasonable arguments will be effective in deliberation. *See* Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 504 (2008) (“In mutual justification, deliberators present their arguments in terms that are accessible to the relevant audience, and respond to reasonable arguments presented by opponents.”). In a sense, the warrant requirement mimics forced deliberation. The deliberation might actually occur, as in cases in which the magistrate can question the officer. *See infra* Part III. Or the deliberation may take place only in the officer's head, anticipating the magistrate's reaction.

*b. The benefits of articulating reasons: deliberative thinking.*—Another strand in the psychology literature, which dovetails with that above, distinguishes between two modes of decisionmaking: affective and deliberative.<sup>138</sup> The affective system is driven by emotion and prone to bias. When the deliberative system is engaged, a person is more likely to make better rational decisions.<sup>139</sup> In the Fourth Amendment context, the concern is that the police officers' search and seizure decisions are excessively affective and insufficiently deliberative, compromising the quality of these decisions. To the extent that forced articulation of reasons triggers the deliberative system, the warrant requirement will improve police decisionmaking.

Accountability theory provides reason to believe that the warrant requirement will indeed trigger the deliberative system. Accountability theory posits that when a decisionmaker is accountable for her decisions, namely when the decisionmaker must explain and justify her decisions to a third party, she will try harder to make the right decision.<sup>140</sup> Accountability works to improve decisionmaking by motivating the decisionmaker to devote more cognitive resources to decisions for which she will be held accountable.<sup>141</sup> Moreover, accountability has been found to induce “judgments that are more nuanced, less extreme, and less susceptible to incidental emotion.”<sup>142</sup>

The basic insight from the social science literature is rather straightforward. It was nicely captured by Fredrick Schauer, working outside these literatures: “[I]t might be supposed that particular decisions *are* often, empirically, the result of decisionmaker partiality, and that an artificial constraint of giving reasons, and therefore of generality, is designed to counteract this tendency.”<sup>143</sup> Schauer adds:

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<sup>138</sup> See George Loewenstein & Ted O'Donoghue, *Animal Spirits: Affective and Deliberative Processes in Economic Behavior* (Cornell Univ. Ctr. for Analytic Econ., Working Paper No. 04-14, 2004), available at <http://www.arts.cornell.edu/econ/CAE/04-14.pdf>. Some papers propose a similar model using different terminology: “hot” for affective states and “cold” or “cool” for deliberative states. See, e.g., Janet Metcalfe & Walter Mischel, *A Hot/Cool-System Analysis of Delay of Gratification: Dynamics of Willpower*, 106 PSYCHOL. REV. 3 (1999); B. Douglas Bernheim & Antonio Rangel, *Addiction and Cue-Conditioned Cognitive Processes 2* (Nat'l Bureau of Econ. Research, Working Paper No. 9329, 2002), available at <http://www.najecon.org/naj/cache/66615600000000052.pdf>.

<sup>139</sup> See Christiano, *supra* note 137, at 247.

<sup>140</sup> Importantly, the emphasis is on explaining and justifying, not on any explicit or implicit awards or sanctions for better or worse decisions.

<sup>141</sup> See Lerner & Tetlock, *supra* note 136, at 3–4; see also Neal P. Mero & Stephan J. Motowidlo, *Effects of Rater Accountability on the Accuracy and the Favorability of Performance Ratings*, 80 J. APPLIED PSYCHOL. 517, 523 (1995) (finding that subjects who were asked to rate the work of others produced more accurate ratings when held accountable).

<sup>142</sup> Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563, 564 (1998).

<sup>143</sup> Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 653 (1995).

[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies. Under some circumstances, the very time required to give reasons may reduce excess haste and thus produce better decisions. A reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.<sup>144</sup>

The warrant requirement is, in large part, a requirement to give reasons in the warrant application. This requirement may be equally important, perhaps more important, than the actual review by the magistrate. We review some evidence in Part IV suggesting this is the case. Moreover, by inducing meaningful reason-giving by the police, the warrant requirement improves the magistrate's decisionmaking process.

*c. Will warrants really improve police decision-making?—*Social science theory and empirical results confirm the value of compelled reflection and consideration. The permission model accomplishes this task. Still, the extent to which the permission model will succeed is a function of three variables: (1) the magistrate from whom permission must be sought, (2) the police officer's objective function, and (3) the police officer's innate abilities and personality.

Addressing the first of these, skeptics might return to the argument about the rubber stamp magistrate, claiming that if an officer knows he need only obtain a warrant from "Magistrate Easy," who will sign anything, then asking permission will have no effect. The officer will simply align his application with Easy's undemanding preferences. As we have seen, however, most magistrates are not rubber stamps in the strong, zero-scrutiny sense.<sup>145</sup> Police officers generally face the possibility of a magistrate who will not blindly endorse any warrant application.

Uncertainty plays an important role in keeping the police honest. For any specific magistrate, the officer may be uncertain about the magistrate's threshold for granting warrants, although of course over time the officer will gain a better sense of this threshold. More important, in jurisdictions with multiple magistrates—some stricter and some less so—the police officer should not know in advance which magistrate will receive her warrant application. Ergo, our unequivocal call for randomization. From the police officer's perspective, these two types of uncertainty have the same

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<sup>144</sup> *Id.* at 657–58 (footnotes omitted); see also Lisa Bortolotti, *The Epistemic Benefits of Reason Giving*, 19 *THEORY & PSYCHOL.* 624, 638 (2009) (“[I]t is instrumental to creating connections between those attitudes and other attitudes subjects have, either allowing subjects to develop a coherent narrative or highlighting a clash that can give rise to the revision of their new or prior attitudes.”).

<sup>145</sup> See *supra* notes 124–27 and accompanying text.

effect—they create uncertainty about the warrant threshold and thus provide incentive to refrain from submitting weak warrant applications.<sup>146</sup>

Moreover, even in the unlikely event the officer knows in advance he is always seeking approval from Magistrate Easy, there are still reasons to believe a serious warrant requirement will cause greater reflection. Generic reasons offered in support of the warrant, such as “suspect may be in possession of narcotics,” are insufficient as a matter of doctrine.<sup>147</sup> The warrant application must include facts that are specific to the case at hand.<sup>148</sup> Finally, *ex post* review of warrant-granting decisions will induce meaningful articulation of reasons in the warrant application. *Ex post* review supports the integrity of the warrant application (1) by deterring rubber stamp magistrates and (2) by deterring police perjury in the warrant application (as elaborated below).

The police officers’ own characteristics also will bear upon the success of the warrant model. Some officers will be impetuous by nature, others more careful and thoughtful.<sup>149</sup> The warrant requirement will have more of an impact on the former than the latter because the thoughtful officer will be more deliberative by nature. Similarly, some officers will operate with single-minded zeal to enforce the law; others will be inclined to balance such zeal with respect for constitutional requirements. Obviously, a warrant requirement involving reason-giving will have more of an impact on the former than the latter. But even for the impetuous officer, reason-giving is likely to reduce the number of searches.

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<sup>146</sup> For example, assume that the strength of a warrant application lies between zero and ten, and assume that the applicable threshold lies somewhere between two and eight. In other words, the police officer faces a distribution of thresholds between two and eight but does not know which one will be applied to her warrant application. What will the police officer do? At the least, she will not submit an application below the threshold of two and will aim for a higher threshold that will increase the likelihood of the warrant being granted. How low the officer will go (how close to two) depends on the cost to the officer of submitting a warrant application, including any cost to the officer from a rejected application. If this cost is low, the officer will submit applications that are closer to the minimal threshold (closer to two). If this cost is high, the officer will submit only strong warrant applications. In fact, if the cost of submitting an application is substantial, overdeterrence may result, with officers forgoing justified warrant applications (and justified searches and seizures). *Cf.* Tetlock, Skitka & Boettger, *supra* note 131, at 638 (explaining that, when unable to anticipate the views of those to whom they are accountable, decisionmakers “engage in preemptive self-criticism in which they tr[y] to anticipate the various objections that potential critics could raise”).

<sup>147</sup> See NYPD STOP & FRISK REPORT, *supra* note 103, at 164 (finding that, in over 15% of the cases, the reasons given for a frisk—a lower level of intrusion than a full-blown search—were insufficient to establish reasonable suspicion).

<sup>148</sup> See *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (requiring affidavits to provide a magistrate with a “substantial basis” to issue a warrant); *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (setting standards for affidavits in warrant applications).

<sup>149</sup> See Calabresi, *supra* note 49, at 117 (referring to the most impetuous officers as “cowboy” cops).

*d. Ex ante vs. ex post.*—Doesn't the current availability of ex post review achieve the same benefits as an ex ante warrant requirement? Under the current deterrence model, the decisions of officers are still subject to review—ex post review by a judge in a suppression hearing. Wouldn't the prospect of such review similarly induce police officers to make better decisions and search only when the search meets constitutional standards?

The answer is “no” or at least “not as much.” The reason why harkens back to the shortcomings of the current deterrence model as detailed in Part I and specifically to the problem of ineffective remedies. Weak remedies prevent the current system from inducing compliance by police officers. In particular, the ex post bias plays a key role in undermining the dominant exclusion remedy. It results in judges adjusting their standards to police conduct rather than vice versa. This problem is avoided in the ex ante warrant model. Moreover, while in the current deterrence model judicial review comes after the fact, if it ever comes, in the warrant model officers cannot search without first obtaining a warrant. They must therefore take the prospect of magistrate review more seriously.

### III. WARRANTS AND EX POST REMEDIES

Requiring warrants has a final benefit, which is that it actually enhances existing sanctions in ways that help achieve deterrence. Police officers still must be deterred from flouting the warrant requirement. But the shift is from a deterrence model that targets the actual search decision to a deterrence model that targets the decision to seek a warrant. This shift provides a relatively bright-line rule that can allow ex post sanctions to work.<sup>150</sup>

As explained in Part I above, the existing deterrence model faces two main obstacles: vague standards and ineffective sanctions. A serious ex ante warrant requirement addresses these obstacles. First and foremost, it offers a clearer standard and thus reduces the vagueness problem.<sup>151</sup> Second, because the efficacy of the sanctions is inversely related to the vagueness of the standard, the clearer standard also reduces the ineffective sanctions problem. Third, an ex ante warrant requirement even helps with the problem of testilying. These points are developed below.

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<sup>150</sup> The comparison between the permission model and the existing deterrence model resembles the comparison between ex ante regulation and ex post liability. *See* Shavell, *supra* note 43, at 271. An implicit assumption in the literature on regulation versus liability is that actors adhere to the regulation. In many cases, compliance with the ex ante regulation—the warrant requirement in the Fourth Amendment context—is not guaranteed and, in fact, requires the threat of ex post liability.

<sup>151</sup> In theory, standards applied under the current system could be also clarified. But, as explained above, the ex post bias powerfully pushes towards greater vagueness.

*A. A Clearer Standard*

To the extent the existing deterrence model fails because of the uncertainty of Fourth Amendment doctrine—and it often does—the warrant model provides a much clearer benchmark for evaluating officer conduct. Indeed, given the frequency with which “reasonableness” is employed at present, moving to a warrant model is akin to replacing an extremely vague and malleable standard with a sharp rule. All searches will require warrants unless exigency prevents it. Moreover, even as to exigency, the officer’s first task would be to stabilize the situation and then seek permission for further intrusion. Many commentators have suggested simplifying the law in just this way.<sup>152</sup>

With a clearer standard, deterrence will work better. To see this, recall the example comparing moderate uncertainty to extreme uncertainty.<sup>153</sup> Under moderate uncertainty, a court was equally likely to set the standard anywhere between four and six, such that increasing the care level by one unit reduced the chances of a police officer being found to be in violation by 50 percentage points. Under high uncertainty, a court was equally likely to set the standard anywhere between one and nine, such that increasing the care level by one unit reduced the chances of a police officer being found to be in violation by 12.5 percentage points.

Now introduce remedies. Specifically, consider a strong remedy of 400 and a weak remedy of 100. The benefit to the police officer from taking an extra unit of care is equal to the sanction multiplied by the reduction in the probability that the officer will be found in violation. With 2 levels of uncertainty—moderate and high—and 2 sanction levels—100 and 400—there are 4 benefit levels, as depicted in Table 1.

TABLE 1: MARGINAL BENEFIT OF CARE —FOUR CASES

|                                      | <b>Weak Remedy<br/>100</b> | <b>Strong Remedy<br/>400</b> |
|--------------------------------------|----------------------------|------------------------------|
| Moderate Uncertainty<br>0.5 decrease | b=50                       | b=200                        |
| High Uncertainty<br>0.125 decrease   | b=12.5                     | b=50                         |

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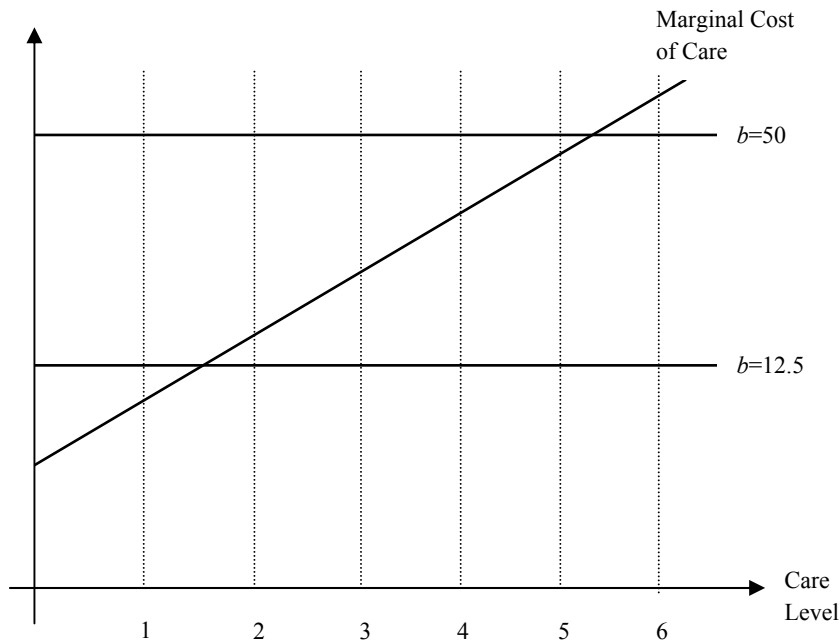
<sup>152</sup> See, e.g., Bookspan, *supra* note 9 (suggesting a presumptively unreasonable standard to create a more consistent search and seizure doctrine); Bradley, *supra* note 1 (advocating for an easily obtainable warrant for police guidance); Slobogin, *supra* note 9 (arguing that only the exigency and proportionality principles should govern search and seizure regulation).

<sup>153</sup> See *supra* Part I.A.



The officer will invest in care as long as the marginal benefit from an extra unit of care exceeds the marginal cost of that extra unit of care.<sup>154</sup> Assume that investment in care exhibits increasing marginal costs, as depicted in Figure 1 below.

FIGURE 1: MARGINAL BENEFIT AND COST OF CARE



Starting with the obvious, with strong remedies and a standard that is only moderately uncertain, substantial, even excessive, deterrence is obtained. The benefit from an extra unit of care ( $b=200$ ) is beyond the range of benefits in Figure 1. This high marginal benefit clearly exceeds the marginal cost of care for all six care levels depicted in the figure and for several additional care levels beyond the figure's range. Strong remedies generate substantial deterrence, even with a high level of uncertainty. The marginal benefit of fifty exceeds the marginal cost of care for the first five units of care.

But, as we have seen, Fourth Amendment remedies are not strong. With weak remedies and a highly uncertain standard, the care level will be low. Specifically, with weak remedies and high uncertainty the benefit from an extra unit of care is only 12.5. This marginal benefit exceeds the

<sup>154</sup> We assume throughout that the police officer is sufficiently rational to make these straightforward cost-benefit comparisons.

marginal cost of care only for the first unit of care. Reducing the degree of uncertainty—from high to moderate—fixes the problem. Even with weak remedies, a standard that is only moderately uncertain creates a benefit of fifty from an extra unit of care. This marginal benefit exceeds the marginal cost of care for the first five units of care.

### *B. More Effective Sanctions*

Moving to a strict *ex ante* warrant model also will enhance the effectiveness of *ex post* sanctions. The sanctions that will deter police officers from violating the warrant requirement are the same sanctions used in the current deterrence model: indirect sanctions—exclusion and, to some extent, damages imposed on the police department or the city—and direct damages imposed on police officers, to the extent that these exist. As explained in Part I above, these sanctions, at present, are weak.

Figure 1 demonstrates the symbiotic nature of standards and remedies. Even if remedies are themselves weak, simply clarifying the standard can make them effective. But as it happens—and perhaps it is no accident—there are legal and structural reasons why addressing the vagueness of the standard will actually strengthen the effectiveness of the remedies.

First, consider direct sanctions against the officer. At present, officers are shielded from liability by the rules governing official immunity; there is no liability except in the case of a violation of a clearly established rule.<sup>155</sup> Given the vagueness and uncertainty surrounding existing Fourth Amendment standards, it does not take much doctrinal analysis to see why police officers often escape liability. Now suppose, however, those officers must get warrants except in carefully delineated exceptions. Yes, there will be litigation surrounding some issues, such as what is a search and what circumstances constitute exigency. But these are the right discussions to have, and in many cases will not arise at all. Rather, in the vast run of cases the question will be only: was a warrant obtained? When officers fail to get warrants, monetary liability is a real possibility, even against officers if they are not shielded from bad faith violations of the law.

Note that the very same logic applies, although to a lesser extent, to the indirect sanction of exclusion. There is a good faith exception to the exclusionary rule. Indeed, the Supreme Court's most recent cases casting doubt on the viability of exclusion have occurred in good faith cases.<sup>156</sup> But when officers fail to obtain warrants now, violating a clear requirement, good faith claims will be less plausible. By making the standard clear, the legal rule allows the previously ineffective sanctions to kick in.

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<sup>155</sup> See *supra* notes 76–79 and accompanying text.

<sup>156</sup> See *Herring v. United States*, 555 U.S. 135, 144 (2009) (holding that good faith recordkeeping errors do not trigger the exclusionary rule); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (holding that good faith clerical errors by the county clerk do not trigger the exclusionary rule).

There is even reason to suppose the same might be true of institutional liability. Recall that municipalities are only liable at present for “policy” decisions. These decisions must come from a policy maker.<sup>157</sup> But if the police in jurisdiction *X* are not obtaining warrants on a regular basis, it is going to be much easier for litigants to raise the claim that this sort of instruction must be coming from the top.

### C. *Deterring Police Perjury*

Finally, the *ex ante* warrant model helps address the problem of police perjury. The magistrate’s decision is based on the facts described in the warrant application. By distorting these facts, the police officer can manipulate the magistrate and secure a warrant that would not be granted under the true facts of the case. Obviously, such perjury undercuts the permission model, reducing the benefits from shifting discretion to magistrates and interfering with the attempt to improve decisionmaking by the police. For the permission model to work, police perjury must be deterred.

As described in Part I above, the problem of police perjury, or testilying, is a real one. In fact, this problem is a significant reason for the failure of the current deterrence model, alongside the vague standards and ineffective remedies problems. But replacing one type of police perjury in the current deterrence model with another type of police perjury in the *ex ante* warrant model would hardly be an improvement. The warrant model holds promise only if it can more effectively deal with its brand of police perjury.

Requiring warrants can aid in preventing police perjury. William Stuntz made this basic point in a classic article.<sup>158</sup> As Stuntz explained, in the current deterrence model, and particularly with the exclusionary rule as the primary remedy, police officers have a unique ability to commit perjury.<sup>159</sup> The police can and do lie because of two related features of the current deterrence model. First, because the Fourth Amendment is enforced through *ex post* suppression hearings, pitting the police officer against a guilty defendant, there exists a “credibility gap,” as Stuntz puts it, which enables the officer to strain the truth.<sup>160</sup> Again, borrowing from Stuntz: “[A] natural and fair skepticism about defendants’ honesty creates the potential for a good deal of *dishonesty* by the police.”<sup>161</sup> Second, the timing of the suppression hearing, after all the facts are known, is conducive to police

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<sup>157</sup> See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (citing *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986)).

<sup>158</sup> See Stuntz, *supra* note 2.

<sup>159</sup> See *id.* at 914.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 915; see also *id.* (“This risk of police perjury is unavoidable in an exclusionary rule system, since that system enforces the fourth amendment in disputes between officers and criminals.”).

perjury. It is easier to lie without getting caught when all objectively provable facts are known and the lie can be tailored to avoid conflicts with these provable facts.<sup>162</sup> Stuntz concludes that the problem is structurally inherent in the current deterrence model when enforced by the exclusionary rule. A structural problem requires a structural solution. This solution, Stuntz argues, lies in the warrant requirement.<sup>163</sup>

The warrant requirement addresses the two problems that arise from the ex post nature of the suppression hearing. By replacing the ex post suppression hearing with an ex ante warrant hearing, the permission model eliminates the pro-police bias. The officer no longer confronts a guilty defendant. The individual against whom the warrant is to be issued may well be innocent. A judge in a suppression hearing may tacitly permit lying when the lie enables her to convict a guilty defendant.<sup>164</sup> A magistrate in a warrant hearing will more closely scrutinize the police officer's story to protect the potentially innocent subject of the requested warrant. Moreover, the ex ante timing of the warrant hearing makes lying objectively more difficult. As Stuntz eloquently puts it, the ex ante nature of the warrant hearing "makes perjury somewhat harder, since the officer cannot so easily manufacture details consistent with a story he does not yet know."<sup>165</sup>

These arguments do not alleviate all concerns about police perjury. They suggest, however, that an ex ante warrant model is structurally more resistant to and deterrent of police perjury. This resistance constitutes another advantage of the ex ante warrant model as compared to the current deterrence model.

#### IV. IMPLEMENTING WARRANTS

Relying on warrants to the extent advocated here is a shift from existing law. Although the Supreme Court continues to pay lip service to the warrant requirement—albeit less and less vigorously—in practice, that requirement is more honored in the breach. By this juncture, the merits of a strict ex ante warrant model should be apparent. Nonetheless, there are no doubt questions about whether such a requirement is really necessary, what it would look like in practice, and whether adopting it is even feasible. This Part addresses those sorts of detail-driven, practical questions.

##### *A. Reducing Unconstitutional Conduct*

The chief reason to move to a strict ex ante warrant model is to avoid unconstitutional violations of liberty. But is this really a problem? Theory suggests yes, but is there any evidence?

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<sup>162</sup> *See id.*

<sup>163</sup> *See id.* at 915–16.

<sup>164</sup> *See supra* notes 50–52 and accompanying text.

<sup>165</sup> Stuntz, *supra* note 2, at 915.

As it happens, there *is* evidence that police search individuals at higher rates than the Constitution permits. If this evidence holds up to scrutiny, and if the constitutional mandate is to be taken seriously, then assuming one buys the foregoing argument that warrants may be more effective than the current remedial scheme, it is worth considering a switch.

Police recordkeeping practices and secrecy make it difficult to obtain information about the searches that occur, let alone whether those searches were fruitful. To put the problem simply, data on searches and warrants are scarce. As others have observed, police officials have a remarkable penchant for secrecy, making it almost impossible to obtain information about the most basic aspects of policing.<sup>166</sup> There is no good source for how many searches occur each year in the United States or even in most jurisdictions. In part, this may be because the definition of what constitutes a search is itself a bit fuzzy.<sup>167</sup> But failure to keep records or reveal them is the more likely the reason. And perhaps this is understandable: the warrant requirement is still embedded in law, so data on unwarranted searches might involve some admission of culpability.

Still, there is evidence that unconstitutional searches take place, some of which would be deterred by a warrant requirement taken seriously and some of which might not (but which are still telling of police malfeasance). Gould and Mastrofski report on results of a study they conducted of first-hand observation of police officers on the beat. They found that some 30% of police searches were unconstitutional.<sup>168</sup> Their estimating technique was conservative, favoring the officers.<sup>169</sup> More to the point, it is impossible to read the narratives of what police officers did in “Middleburg” and believe the police would have called a magistrate to ask permission to do much of it.<sup>170</sup>

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<sup>166</sup> See, e.g., Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 316 (2004) (“Most of the [search] research has been limited to secondary, indirect data sources, making it difficult to ascertain the true scope of the problem.”); Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 146 (2008) (“[T]he data released in [the consent decree] jurisdictions is extremely raw and difficult to work with . . . [.] tends to be quite shallow . . . [.] [and] the bulk of the raw data is never released . . . .”); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO. N.U. L. REV. 1, 20 (2001) (“[L]aw enforcement agencies do not maintain any records that would provide information on the numbers of traffic stops that turn into criminal investigations. . . . [T]hey do not have any data upon which to determine the frequency of . . . the routine traffic stop turned consent search.”).

<sup>167</sup> See, e.g., *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001) (defining what is an impermissible search of a home as resting on technology that is “not in general public use”); *Florida v. Riley*, 488 U.S. 445, 453 (1989) (O’Connor, J., concurring) (resting definition of search on regular conduct of people).

<sup>168</sup> Gould & Mastrofski, *supra* note 166, at 331.

<sup>169</sup> *Id.* at 330 (“[W]hen the reliability of a source was in question, or the law was in flux, we erred on the side of the officers and coded searches as constitutional.”).

<sup>170</sup> In one case, four police officers lacking reasonable suspicion surrounded a black male in his late twenties who was riding a bike. The officers, while interrogating the man about potential drug

The data we have from New York's stop and frisk practices suggest similar overzealousness on behalf of police officials. The Supreme Court deems stop and frisks less intrusive than full-blown searches and seizures, and requires a lesser degree of cause—reasonable cause or articulable suspicion rather than probable cause.<sup>171</sup> Given the circumstances under which they occur, stop and frisks are likely to fall outside the warrant requirement. Still, they are indicative of police conduct. Based on the reports of police themselves, an audit of stop and frisks found that 15.4% of the stops failed to meet constitutional standards of reasonable suspicion, and another 23.5% of the stops had insufficient information for constitutional assessment.<sup>172</sup> Thus, fully 39% of the stops were unjustified by legal standards. The percentage of stops that did not articulate reasonable suspicion was even higher for minority groups.<sup>173</sup>

Another source of skepticism about police conduct are the “hit rates” from certain search and seizure policies. To be clear, it is important not to conflate hit rates alone with efficacy. Just as it is wrong to suggest magistrates are rubber stamps just because they grant most warrant requests, it may be that searches with low hit rates are efficacious nonetheless and that in fact the practice itself deters misconduct. Thus, for example, drug interdiction efforts on interstate buses may serve to keep drugs off those buses.

Hit rates nonetheless are indicative. Even if efficacious, the Constitution still prohibits searches and seizures without sufficient cause, and low hit rates do suggest the level of cause was not sufficiently high. (Moreover, for what it is worth, by most empirical measures, all the searching and seizing for drugs has done virtually nothing to stop the constant flow of drugs into and through the country.)<sup>174</sup>

While police departments track results of searches even more rarely than they track searches themselves, the evidence from racial profiling and auto stops suggests that police search far more often than constitutional standards permit. For example, the Constitution permits searching whenever there is probable cause to do so. Probable cause does not require that police be certain. In fact, it probably does not require they be right even

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possession, searched his knapsack without consent. When nothing was uncovered, the police then performed a full-body cavity search. *See id.* at 350–51.

<sup>171</sup> *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>172</sup> NYPD STOP & FRISK REPORT, *supra* note 103, at xiii–xiv.

<sup>173</sup> Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 482 (2000).

<sup>174</sup> Data on illicit drug flow is hard to collect for obvious reasons. However, it can be estimated from total seizures and arrests. For seizures, see U.S. DEP'T OF JUSTICE NAT'L DRUG INTELLIGENCE CTR., *National Drug Threat Assessment* (2010), available at <http://www.justice.gov/archive/ndic/pubs38/38661/38661p.pdf>. Arrests for drug offenses have also remained fairly constant since 2002. *See Stats & Facts*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/statistics.html#arrests> (last visited Apr. 11, 2012).

half the time.<sup>175</sup> But whatever the threshold for probable cause, it appears that often the threshold is not met.

The data on traffic stop searches indicates that police find evidence in only about 10% to 20% of the total traffic searches.<sup>176</sup> And these numbers are likely overestimates, as police have every incentive to record searches that result in hits and much less incentive to record unfruitful searches.<sup>177</sup> These sorts of numbers seem plainly below the constitutional probable cause standard.<sup>178</sup>

Bus search data is even more revealing of constitutional violations. Police officers regularly walk onto interstate buses and invite individuals to

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<sup>175</sup> See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citing *Brinegar v. United States*, 338 U.S. 160 (1949), and refusing to quantify probable cause as a percentage); *Brinegar*, 338 U.S. at 174 (defining probable cause as a reasonable belief that varies with the circumstances).

<sup>176</sup> See GARY CORDNER ET AL., *VEHICLE STOPS IN SAN DIEGO: 2001*, at 31 (2002), available at <http://www.sandiego.gov/police/pdf/stoprpt.pdf> (finding a 13.3% average hit rate and only an 8.7% average drug hit rate in San Diego traffic stops). Combined Illinois data from 2009 and 2010 indicate a 21% hit rate in consent searches that resulted from traffic stops. ALEXANDER WEISS & DENNIS P. ROSENBAUM, *ILLINOIS TRAFFIC STOPS STATISTICS ACT 2010 ANNUAL REPORT: EXECUTIVE SUMMARY 10* (2011), available at [http://www.dot.il.gov/travelstats/2010\\_ITSS\\_Executive\\_Summary.pdf](http://www.dot.il.gov/travelstats/2010_ITSS_Executive_Summary.pdf); ALEXANDER WEISS & DENNIS P. ROSENBAUM, *ILLINOIS TRAFFIC STOPS STATISTICS STUDY: 2009 ANNUAL REPORT 14* (2010), available at [http://www.dot.state.il.us/travelstats/ITSS\\_2009\\_Annual\\_Report.pdf](http://www.dot.state.il.us/travelstats/ITSS_2009_Annual_Report.pdf); see also INST. ON RACE & POVERTY, *MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 22* (2003), available at [http://www.irpumn.org/uls/resources/projects/aggregate\\_report\\_92303.pdf](http://www.irpumn.org/uls/resources/projects/aggregate_report_92303.pdf) (finding 17.1% hit rate); Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter 170* (Oct. 1999) (unpublished Ph.D. dissertation, Rutgers University) (on file with Northwestern University Law Review) (finding a 12.9% hit rate from consent searches in his data set). Averaged data for 2006 through 2008 from Los Angeles, however, indicate a 50.35% hit rate in city traffic stops. *Arrest, Discipline, Use of Force, Field Data Capture, and Audit Statistics Reports*, L.A. POLICE DEP'T, [http://www.lapdonline.org/special\\_assistant\\_for\\_constitutional\\_policing/content\\_basic\\_view/9016](http://www.lapdonline.org/special_assistant_for_constitutional_policing/content_basic_view/9016) (last visited May 21, 2012) (containing 2006 and 2007 reports); *Special Assistant for Constitutional Policing*, L.A. POLICE DEP'T, [http://www.lapdonline.org/special\\_assistant\\_for\\_constitutional\\_policing](http://www.lapdonline.org/special_assistant_for_constitutional_policing) (last visited May 21, 2012) (containing 2007 and 2008 reports). The LAPD data is clearly questionable on this measure as they include finding the vehicle as a hit. See Kupferberg, *supra* note 166, at 151 (“In the ‘If Search Was Conducted, What Was Discovered’ category, why was the subcategory ‘Nothing’ from the 2002 report dropped in 2007, replaced by the nonsensical ‘Vehicle’ category (if one is searching a car, that is presumably a common finding)?”). If one accounts for the odd reporting by removing all of the “vehicle” hits and recalculating a new LAPD hit rate, then the jurisdiction affirms, rather than contradicts, the others. Between 2006 and 2008, the LAPD discovered items in an average of 14.6% of the vehicles that they searched once one excludes the vehicle itself being “discovered.”

<sup>177</sup> The San Diego consultants, while stopping short of suggesting intentional bias, hint at such problems when they note that “[o]f particular concern, it would appear from the data that non-compliance in completing stop forms was a bigger problem in more ethnically-diverse and less-affluent divisions, possibly skewing the data.” CORDNER ET AL., *supra* note 176, at 2; see also Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 659 (2002) (stating evidence that the Maryland road data was falsified by collecting officers).

<sup>178</sup> See 2 WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.2(e) (4th ed. 2004 & Supp. 2011–2012) (discussing the “fair probability” standard).

“consent” to searches.<sup>179</sup> Consent is in scare quotes for reasons we come to shortly—it is difficult to believe that what occurs is true consent, and few are the commentators who argue otherwise. But for present purposes, what is important is the staggering shortfall between the enormous burden these searches impose and their fruitfulness. One officer said that he boarded about one hundred buses in a year, but of the thousands of bus passengers subjected to delay and intrusion, only seven were arrested.<sup>180</sup> Not only is this far below the probable cause standard discussed above, but there is also reason to believe that the legal standard rises when police are not investigating a specific crime but are simply looking for evidence of criminality.<sup>181</sup>

As a final example, albeit one under a lower standard, the hit rates from New York’s stop and frisk program do not inspire confidence in current search practices. Originally, it took nine stops in the New York stop and frisk program to produce one arrest, and the ratio was a bit higher for minorities.<sup>182</sup> The more recent evidence is that only between 4% and 6% of stops result in arrests,<sup>183</sup> and, in some neighborhoods, the stop-to-arrest rate is 3% or less.<sup>184</sup> There may be other reasons why police do not arrest besides a lack of cause, but the hit rates on evidence found in stops and frisks do not seem to meet the constitutional standard. Under Supreme Court precedent, the primary reason justifying frisking a suspect is public safety, such as a search for weapons. Yet, it appears that New York police found weapons in only 0.75% of the frisks they have conducted.<sup>185</sup> As the Center for Constitutional Rights notes in its aggregate data, 97.6% of stops resulted in confiscating neither weapons nor contraband.<sup>186</sup> Even with regard to contraband—largely drugs—the hit rates were between 1% and 2%.<sup>187</sup> Yet, under governing law, stopping is only permissible if there is

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<sup>179</sup> See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 153–54 (describing consensual encounters, such as those that occur on Greyhound buses, as “an important law enforcement tool”).

<sup>180</sup> *United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990).

<sup>181</sup> See generally 4 LAFAVE, *supra* note 178, § 9.5 (explaining the heightened requirement in the absence of a specific crime).

<sup>182</sup> See NYPD STOP & FRISK REPORT, *supra* note 103, at viii (covering a fifteen-month period in 1998 and 1999).

<sup>183</sup> CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS 5 (2009), available at [http://ccrjustice.org/files/reports/Report\\_CCR\\_NYPD\\_Stop\\_and\\_Frisk.pdf](http://ccrjustice.org/files/reports/Report_CCR_NYPD_Stop_and_Frisk.pdf).

<sup>184</sup> Matthew Block, Ford Fessenden & Janet Roberts, *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES (July 11, 2010), <http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html>.

<sup>185</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 183, at 11–12.

<sup>186</sup> *Id.* at 13.

<sup>187</sup> *Id.* at 11–13.



reasonable belief of criminality, and frisking only if an officer reasonably believes she is dealing with an armed or dangerous suspect.<sup>188</sup>

While the preceding evidence on searches raises serious concerns, data on the relatively small number of searches with warrants suggests that warrants work. Though warrants are rarely sought by law enforcement officials, extant data suggests that almost 90% of searches conducted pursuant to a search warrant turn up some contraband.<sup>189</sup> To some extent, this finding is not surprising given that officers have a greater incentive to go through the warrant process when there is a good chance that evidence will be found. Following a similar logic, the success rate might fall if warrants are sought more frequently. But a larger point nonetheless remains: a granted warrant request suggests evidence will be found, something that is hardly the case in most unwarranted searches.

The evidence suggests that police acting alone are more zealous than the Constitution permits. This should not be surprising; as established above, the police are mission-oriented and deterrence is not working very well. In Gould and Mastrofski's discussion of "Middleburg," for example, they make clear that the government had decided on aggressive policing to curtail drugs.<sup>190</sup> Aggressive in this instance crossed over to unconstitutional, at least in certain cases. The degree of unconstitutional conduct only serves to emphasize the value of an insistence on warrants.

### B. *The Domain of Warrants*

But when should warrants be required? Searches and seizures—actions that threaten Fourth Amendment rights—come in numerous shapes and sizes. Not all of these police actions are currently subject to the warrant requirement. Perhaps the realm of the warrant model should be expanded. On the other hand, if imposing a warrant requirement across the board is deemed too costly, there may be room for tailoring. This section considers some possibilities regarding the domain of the warrant requirement.

*I. What's Not In?.*—The most important limitation to the warrant requirement is exigency. Warrants will be required when circumstances allow but not required when they do not. It is this threshold that keeps much policing outside the warrant model and likely will even if it is strengthened.

Two obvious examples are auto stops and the practice of stop and frisk. Regarding auto stops, it is true that police report when they stop automobiles, either just before or after the fact—a point we will discuss further shortly. Still, this notification does not allow time for prior approval.

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<sup>188</sup> Terry v. Ohio, 392 U.S. 1, 30 (1968).

<sup>189</sup> See VAN DUIZEND ET AL., *supra* note 122, at 40.

<sup>190</sup> Gould & Mastrofski, *supra* note 166, at 336 (suggesting a relationship between the aggressive departmental tone towards drug enforcement, the community policing policy, and an "officer's inclination to search suspects unconstitutionally").

It is not anticipated this will change under the warrant model. The same is true of on-the-street sudden encounters, and even the frisk that follows is premised on the notion of necessary quick action.<sup>191</sup>

Still, as noted above, technology does serve to limit the exigency exception. Consider simply the time differential between police going back to headquarters, preparing a warrant application, and then bringing it to a magistrate, as opposed to phoning in for a warrant. In this considerable time saved, many fewer searches will be excused from permission because of exigency.

2. *Arrests.*—For the very reason that exigency precludes permission regarding many street encounters, it may be time to rethink the rules of arrest. Arrest for a felony or for breach of the peace—other than in the home or dwelling of another person—requires no warrant.<sup>192</sup> This was the rule at common law and remains the rule now.<sup>193</sup> But the reason for the rule rested in large part in exigency. Felonies were serious crimes, and one accused could be expected to flee the jurisdiction.<sup>194</sup> Breaches of the peace required immediate intervention. However, for the same reasons that technology makes obtaining a warrant easier and quicker, it is at least worth considering whether obtaining the views of a neutral magistrate as to probable cause prior to arrest also makes sense.

It is the high social cost of an unconstitutional arrest that motivates proposing to extend the warrant requirement to the arrest domain. Arrests are frequent: The Los Angeles Police Department (LAPD) arrested about 157,000 people in 2006,<sup>195</sup> while New York City arrests over 300,000 people per year.<sup>196</sup> The FBI estimates that 13.7 million people were arrested nationwide in 2002.<sup>197</sup> Being taken into custody is arguably of much greater severity than searches currently covered by the warrant requirement—it likely is beyond the actual experience or adequate imagination of most reading this Article.

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<sup>191</sup> *Terry*, 392 U.S. at 28 (discussing “the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so”).

<sup>192</sup> See *Payton v. New York*, 445 U.S. 573, 592 (1980).

<sup>193</sup> See Amar, *supra* note 1, at 764; Davies, *supra* note 13, at 627–28.

<sup>194</sup> In fact, at common law, most felonies were punishable by death. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*98; see also *Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (citing Blackstone for the proposition that all felonies were punishable by death at common law).

<sup>195</sup> INFORMATION TECH. DIV., L.A. POLICE DEP’T, WEEKLY CRIME & ARREST COMPARISON REPORT FOR THE 4 WEEKS ENDING - DECEMBER 16, 2006 (2006), available at [http://www.lapdonline.org/home/pdf\\_view/23946](http://www.lapdonline.org/home/pdf_view/23946).

<sup>196</sup> NYS DIV. OF CRIMINAL JUSTICE SERVS., DISPOSITIONS OF ADULT ARRESTS (2011).

<sup>197</sup> SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 344 (Kathleen Maguire ed., 2003), available at <http://www.albany.edu/sourcebook/pdf/section4.pdf>. The following note accompanies the arrest table: “These data were compiled by the Federal Bureau of Investigation through the Uniform Crime Reporting (UCR) Program.” *Id.*

There is evidence that arrest rates are increasing, while the “productivity” of these arrests is decreasing. Low felony prosecutions in Atlanta, which reportedly include some extremely suspect charges, are placed on a “rocket docket” where the dismissal rate is more than four in ten.<sup>198</sup> Nationwide, about one-fourth of such cases are dismissed.<sup>199</sup> Analyzing New York City arrest data, Jeffrey Fagan and Garth Davies note that the New York Police Department’s (NYPD) “order-maintenance policing” policy increased the number of citizen searches and arrests.<sup>200</sup> But the policy also led to “a sharp decline in [those arrests’] quality and sustainability in court.”<sup>201</sup> Many of the “declined prosecutions” originated in minority neighborhoods.<sup>202</sup> “Overall, more than 140,000 cases completed in 1998 ended in dismissals, an increase of 60% compared with 1993.”<sup>203</sup> Of course, there are many reasons for dismissal, and there is no clear data on how many arrestees are released because of a lack of probable cause. Nonetheless, it does not make sense to require police to obtain prior approval before seizing marijuana, but not a person.

All of this is somewhat complicated by the Supreme Court’s decision in *Gerstein v. Pugh*<sup>204</sup> and the practice that has risen up around it. In *Gerstein*, the Supreme Court reaffirmed that arrest warrants were generally unnecessary but required that probable cause hearings occur “promptly” after being taken into custody.<sup>205</sup> As the Court explained:

Maximum protection of individual rights could be assured by requiring a magistrate’s review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.<sup>206</sup>

Although the raising of the exigency threshold suggests that a pre-arrest warrant requirement might not be “an intolerable handicap” for the police in many cases, there is a question of whether it would now replace

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<sup>198</sup> Steve Visser, *Dismissal Rate Raises Questions About Process*, ATLANTA J.–CONST., Feb. 28, 2011, at B1 (noting an arrestee who was charged after “visiting a West Lake shade tree mechanic about a car he had fixed up for resale. Atlanta narcotics officers raided the house as [the arrestee] was leaving. They found 54 hits of cocaine hidden in its ceiling.”).

<sup>199</sup> *See id.*

<sup>200</sup> Fagan & Davies, *supra* note 173, at 462.

<sup>201</sup> *Id.* at 476.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> 420 U.S. 103 (1975).

<sup>205</sup> *Id.* at 117–19, 125; *see also* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (“[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.”).

<sup>206</sup> *Gerstein*, 420 U.S. at 113 (citations omitted).

the probable cause hearing mandated by *Gerstein*. Such hearings have become a part of the regular practice of criminal law.

As a formal matter, *Gerstein* itself suggests there is nothing constitutionally required about a post-arrest probable cause hearing. When confronted with whether appointment of counsel was necessary, the Court stated:

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.<sup>207</sup>

To the extent this is the case, extending the warrant requirement to all arrests, or at least to all nonexigent ones (and by the time someone is cuffed in the police car, exigency has typically lapsed), may result in a net *savings* of time.

However, there are reasons to believe that something akin to the courtroom probable cause hearing might still take place. First, there are other tasks often accomplished simultaneously, be they arraignment or a bail hearing. Second, liberty is precious, and people should not be incarcerated even one day absent probable cause. As the *Gerstein* Court recognized, the probable cause standard is a far ways short of actual guilt.<sup>208</sup> Lacking even probable cause, custody is intolerable.

3. *Administrative Searches*.—Some searches occur not because there is evidence of criminality but to deter it or avoid other harms. These are administrative or regulatory searches, and their *sine qua non* is that they need not be based on particular suspicion.<sup>209</sup> But the Supreme Court made clear in *Camara v. Municipal Court* that warrants for administrative searches were available despite a somewhat awkward fit with the language of the Fourth Amendment.<sup>210</sup>

The merit of warrants for administrative searches is that they could be used to ensure the randomness or universality of such searches (randomness and universality almost assuredly do not exist at present). This is a topic too

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<sup>207</sup> *Id.* at 120 (footnote omitted).

<sup>208</sup> *See id.* at 121.

<sup>209</sup> *See* *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (emphasizing the “lack [of] individualized suspicion” in “information-seeking . . . stops”); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–44 (2000) (distinguishing programmatic checkpoints, where individualized suspicion is not required, from searches aimed at “ordinary criminal wrongdoing”).

<sup>210</sup> 387 U.S. 523, 535 (1967).

large for present purposes.<sup>211</sup> But there are notable instances in which supposedly random policing seems distinctly nonrandom to observers.<sup>212</sup> Judicial supervision through administrative warrants could address this problem, but it is not being so used at present.

4. *Consent.*—Finally, it is necessary to tackle the issue of consent. Consent is an “exception” to the warrant requirement in the sense that, if there is consent for a search, then, in effect, there has been no search at all. Searches require violation of a legitimate expectation of privacy, and, with consent, no legitimate expectation of privacy can be violated.<sup>213</sup>

If only practice bore any relation to reality. It is now but the thinnest of fictions that consent has anything to do with voluntarily acceding to police intrusions into one’s privacy. Scores of commentators, and even some Supreme Court Justices, have recognized that “consent” has nothing to do with voluntariness of any sort.<sup>214</sup> Long ago, the Supreme Court held that giving consent to search does not require being told that consent can be withheld.<sup>215</sup> Since then, the Court has blessed as “consent” numerous tactics that are hard to stomach as such, like the bus searches and requests to search during traffic stops.<sup>216</sup> As one victim of such a search said in a deposition when asked why he understood a request to get out of the car as a demand, “[I]f a policeman is to ask me something or tell me something, that’s an order.”<sup>217</sup> For many people, this is the reality.<sup>218</sup> Nor is it clear the

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<sup>211</sup> It has been receiving recent attention. *See, e.g.*, Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 *LAW & CONTEMP. PROBS.* 69, 73 (2010) (arguing that searches based on a statistical probability of guilt are more likely to be perceived as Fourth Amendment violations than are searches based on concrete individualized suspicion, even when the probabilities of guilt are, in fact, equal); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 *U. CHI. L. REV.* 809 (2011) (arguing that randomization can satisfy the principles of the Fourth Amendment).

<sup>212</sup> *See* Stipulation and Order of Settlement and Discontinuance, *Sultan v. Kelly*, No. 09 CV 00698, 2009 WL 4959352 (E.D.N.Y. June 29, 2009) (settling a claim that the NYPD’s subway search program uses racial profiling).

<sup>213</sup> *See* *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967) (noting that there would be no reasonable expectation of privacy if consent was given); *Davis v. United States*, 328 U.S. 582, 593–94 (1946) (finding that voluntary consent exempted search from Fourth Amendment requirements).

<sup>214</sup> *See supra* note 25 (discussing the much-decried Court jurisprudence on consent searches).

<sup>215</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 231 (1973) (holding that it would be “thoroughly impractical to impose” a per se warning requirement and require subjects to know that they had the right to refuse to a consent search).

<sup>216</sup> *See* *United States v. Drayton*, 536 U.S. 194, 206–08 (2002) (upholding a bus interdiction search and holding that a reasonable person would feel free to terminate the police encounter when asked for consent during bus sweeps); *Florida v. Bostick*, 501 U.S. 429, 437, 439–40 (1991) (upholding search that occurred during a bus interdiction effort by suggesting that no seizure took place before consent was requested). There is good reason to question the apparently empirical conclusion by the Court that reasonable people would feel free to terminate the encounter.

<sup>217</sup> Deposition of Charles B. Carter at 24, *Carter v. Md. State Police*, No. 03-C-96-000156 (Baltimore Cnty. Cir. Ct. Aug. 1, 1996) (on file with Northwestern University Law Review)

Supreme Court would want it any different: cooperation with police authorities is generally desirable.

The difficulty is that “consent” threatens to undermine the warrant requirement. Increasingly, police are relying on “consent” (yes, the continued use of scare quotes is entirely deliberate) to obtain access to places they otherwise could not go and in circumstances when there is no lawful cause to go there anyway. If the Supreme Court’s empirical understanding of when people truly provide consent is as wrong as most believe, then police can simply coerce their way into searching without a warrant simply by dint of authority.

The truth is that people consent so often that it undermines both the meaningfulness of the consent and the believability that the police are really respecting the doctrine. Some of the traffic studies find that between 85% and 90% of drivers consent to searches of their vehicle.<sup>219</sup> In one six-month period, the LAPD asked 16,228 drivers for consent to search their vehicles; 16,225 said yes, while 3 said no. In the same period, 99.9% of pedestrians stopped consented to searches when asked.<sup>220</sup> As Justice Stevens eloquently stated (albeit in dissent), “Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.”<sup>221</sup>

The tension between the warrant requirement and the consent exception becomes even clearer when it is recognized that both are about ex ante permission. The warrant requirement is a requirement to obtain permission from a magistrate to search. The consent exception implies that permission from the individual who is to be searched is a valid substitute. As shown above, the individual who is to be searched is often not in a position to offer genuine consent to permit the search. Hence, permission must be obtained from the magistrate. The warrant requirement can thus be viewed as a response to the failure of consent.

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(subsequently settled); *see also Evidence Mounts that Police Target Minorities Excessively*, USA TODAY, June 3, 1999, at 14A (discussing *Carter* case and settlement).

<sup>218</sup> See David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 73 (2009) (conducting a survey of random citizens revealing that people would not feel free to end their police encounters, even in circumstances where the Supreme Court asserts that they may); Nadler, *supra* note 179, at 155–56 (discussing evidence that individuals do not feel free to refuse consent during bus searches).

<sup>219</sup> See WEISS & ROSENBAUM, *supra* note 176, at 12 (showing an average of 84.8% of drivers consent when asked in two studies); Lichtenberg, *supra* note 176, at 199 (finding 89.3% of drivers consent when asked).

<sup>220</sup> L.A. POLICE DEP’T, ARREST, DISCIPLINE, USE OF FORCE, FIELD DATA CAPTURE & AUDIT STATISTICS & THE CITY STATUS REPORT COVERING PERIOD OF JAN. 1, 2006–JUNE 30, 2006, at 8 (2006), available at [http://www.lapdonline.org/home/pdf\\_view/33233](http://www.lapdonline.org/home/pdf_view/33233).

<sup>221</sup> *Ohio v. Robinette*, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting).

What is to be done is more complicated, but there are several options suggested by commentators. Some insist on the police informing people they do not need to consent.<sup>222</sup> Though if experience with the *Miranda* warnings is instructive here, such information will prove meaningless.<sup>223</sup> Police have learned to “condition” subjects to hear the command and disregard it as irrelevant information.<sup>224</sup> Other commentators have suggested that the police require consent in writing, along with information that it need not be forthcoming.<sup>225</sup> In the one jurisdiction that has experimented with this option (by judicial consent decree), the number of searches dropped notably, which might suggest it is an effective option.<sup>226</sup>

A third possibility is to simply use magistrates and available technology to obtain consent. In situations in which the police lack sufficient cause to obtain a warrant or conduct any intrusion, they can call in the consent request like a warrant. It is easy enough for a magistrate on the line to inform a person they need not consent and to ensure the person wishes to do so. One suspects that the number of such requests will be vanishingly small, and the number granted even smaller, an indication itself that what has been called “consent” is not true consent. But if consent is requested and forthcoming under the suggested regime, then *ex post* disputes about whether it was voluntary should themselves be vanishingly rare.

### C. How Many More Warrants?

As this review of the domain suggests, taking the warrant requirement seriously will require a lot more warrants. The question therefore is how many more warrants will be required, followed, no doubt, by whether accomplishing this is even possible.

Determining how many more warrants will be required under the permission model is difficult. A first-cut estimate would take the total number of searches currently conducted each year and subtract the number

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<sup>222</sup> See, e.g., Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 466 (2004) (arguing that informing subjects of their right to refuse “can’t hurt” (quoting Stephen Fraidin & Jon D. Hanson, *Toward Unlocking Lockups*, 103 YALE L.J. 1739, 1745 (1994))); Robert H. Whorf, “Coercive Ambiguity” in the Routine Traffic Stop Turned Consent Search, 30 SUFFOLK U. L. REV. 379, 410 (1997) (suggesting that being informed that one is free to go should be a firm rule in consent search settings).

<sup>223</sup> See Lichtenberg, *supra* note 176, at 234 (discussing the similarities between empirical research showing the minute effect of verbal consent warnings and the research surrounding *Miranda*’s insubstantial effect on rates of confession).

<sup>224</sup> See *id.* at 260–63 (describing police tactics used to generate consent).

<sup>225</sup> See David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 364 (2001) (“All consent requests should be recorded, and all consents should be in writing and signed by the driver, passenger, or pedestrian who was stopped.”).

<sup>226</sup> See *infra* notes 255–60 and accompanying text.

of warrants that currently are being obtained. This estimate would then need to be adjusted upward for any new areas in which warrants would be required (such as arrests). And then adjusted downward to account for the self-screening effect of the warrant requirement, such as police officers' not asking for warrants that will not be granted.

*1. A First-Cut Estimate.*—Even a first-cut estimate proves to be elusive. To put the problem simply, in light of police secrecy and defects in recordkeeping, data on searches and warrants is scarce. Nonetheless, there are sources from which one can extrapolate, reaching some rough (and very wide-ranging) estimates. Most illuminating are the few jurisdictions that make large sets of automobile data available. Typically, the impetus for this data collection is concern over racial profiling, which leads to judicial or legislative mandates.<sup>227</sup> There also is data from the Department of Justice, which conducts occasional national surveys measuring citizens' contacts with police officers.<sup>228</sup> In addition to a few academic studies, data on arrests rounds out the oeuvre, although, as explained above, arrests may or may not come within the domain of an enhanced warrant requirement.

In estimating the total number of searches, we start with traffic-stop searches, where data is most readily available. The traffic monitoring and consent decree studies show tens of thousands of traffic-stop searches occurring in major American cities. For example, the LAPD conducted an average of 71,540 traffic-stop searches per year, or about 0.0188 per capita, between 2006 and 2008; the San Diego Police Department conducted 15,356 searches, or about 0.0126 searches per capita, in 2001; and in Minneapolis, 10,277 searches, or 0.0276 per capita, were performed in 2002.<sup>229</sup> Extrapolating from the local traffic-stop data, fully recognizing the difficulties that such extrapolation might involve, we cautiously estimate that each year about three million searches take place in the United States during routine traffic stops.<sup>230</sup>

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<sup>227</sup> See, e.g., Kupferberg, *supra* note 166, at 132 (noting that concern over racial profiling “led to numerous consent decrees designed to prevent racial profiling by police”).

<sup>228</sup> See, e.g., MATTHEW R. DUROSE, ERICA L. SMITH & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf>.

<sup>229</sup> Data on the number of searches conducted is taken from consent decree reports available at INST. ON RACE & POVERTY, *supra* note 176, at 4 (discussing Minneapolis); L.A. POLICE DEP'T, *supra* note 176; U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-41, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 50 (2000), available at <http://www.gao.gov/new.items/gg00041.pdf> (discussing the San Diego Police Department). Population figures, used in the per-capita searches calculations, are taken from the Census website. See generally *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/> (last visited May 21, 2012).

<sup>230</sup> The extrapolation technique used is the following: For each one of the three jurisdictions—LA, San Diego, and Minneapolis—we took the average number of searches when there were multiple years of data, divided this number by the population in the jurisdiction to obtain per-capita search rates, and then multiplied by the total U.S. population. A total U.S. population figure of 309 million was taken from



Estimating the number of searches outside of the traffic-stop context—pedestrian searches and searches conducted in homes or other structures—is more difficult. The best that can be done with available data involves rough, indirect estimation of the total number of searches. The best data available is from the LAPD, which is the only jurisdiction subject to a consent decree that mandated non-vehicle-stop search data collection.<sup>231</sup> In the LAPD data, auto-stop searches comprised 35% of total searches.<sup>232</sup> If traffic-stop searches represent a similar ratio in other jurisdictions, and we utilize our

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U.S. CENSUS BUREAU, *supra* note 229. An alternative extrapolation technique, based on the number of sworn police officers, rather than on population figures, yielded similar results. Data on the number of sworn officers in each of the three jurisdictions and aggregate U.S. figures was taken from the Uniform Crime Reports' Law Enforcement Personnel section. FED. BUREAU OF INVESTIGATION, *Full-Time Law Enforcement Employees by State, 2009*, CRIME IN THE UNITED STATES 2009 (Sept. 2010), [http://www2.fbi.gov/ucr/cius2009/data/table\\_77.html](http://www2.fbi.gov/ucr/cius2009/data/table_77.html) (last visited June 3, 2012). A third approach for obtaining total U.S. search figures is based on available estimates. Specifically, we found several estimates of the total number of traffic stops in the U.S., ranging from 43 million to 58 million. We also found several estimates of traffic-stop search rates from several jurisdictions ranging from 4.3% to 6.8%. Multiplying the total number of traffic stops in the U.S. (more precisely, the mid-point of the 43-million to 58-million range) by the search rate (more precisely, by the midpoint of the 4.3% to 6.8% range), yields an estimate of 2.55 million traffic stop related searches per year in the United States. For estimates of the total number of traffic stops in the U.S., see CORDNER ET AL., *supra* note 176, at 24 (suggesting 57 million stops annually between 2000 and 2001); INST. ON RACE & POVERTY, *supra* note 176, at 11–12 (suggesting 46.5 million stops in 2002); L.A. POLICE DEP'T, *supra* note 176 (combined studies for three years suggesting 48 million stops annually between 2006 and 2008); MD. STATISTICAL ANALYSIS CTR., GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, EIGHTH REPORT TO THE STATE OF MARYLAND UNDER TR 25-113, at 8 (2010), *available at* <http://www.goccp.maryland.gov/msac/documents/TSDReport2010.pdf>; MD. STATISTICAL ANALYSIS CTR., GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, SEVENTH REPORT TO THE STATE OF MARYLAND UNDER TR 25-113, at 4 (2009), *available at* <http://www.goccp.maryland.gov/msac/documents/TSDReport2009.pdf> (suggesting, with the 2010 Maryland report, *supra*, that there were 43 million stops annually between 2008 and 2009); WEISS & ROSENBAUM, *supra* note 176 (two studies suggesting 58.3 million stops annually between 2009 and 2010). *But see* DUROSE, SMITH & LANGAN, *supra* note 228, at 1 (suggesting there were 29.4 million stops in 2005); Illya D. Lichtenberg & Alisa Smith, *How Dangerous Are Routine Police–Citizen Traffic Stops?*, 29 J. CRIM. JUST. 419, 423 (2001) (providing estimates of 60, 120, or 160 million traffic stops per year). For search-rate estimates, see CORDNER ET AL., *supra* note 176, at 16 (finding that an average of 6.75% of San Diego traffic stops resulted in a search between 2000 and 2001); DUROSE, SMITH & LANGAN, *supra* note 228, at 1 (finding that 5% of traffic stops nationwide resulted in a search in 2005); MD. STATISTICAL ANALYSIS CTR., *supra*, at 9 (finding that an average of 3% of Maryland traffic stops resulted in a search between 2008 and 2009). *But see* INST. ON RACE & POVERTY, *supra* note 176, at 10, 19, 22 (indicating that 9.33% of Minnesota traffic stops resulted in a search in 2002); L.A. POLICE DEP'T, *supra* note 176 (indicating that an average of 12.06% of Los Angeles traffic stops resulted in a search between 2006 and 2008).

<sup>231</sup> See Consent Decree, *United States v. City of Los Angeles*, No. CV 00-11769 (C.D. Cal. June 19, 2001), *available at* [http://court.cacd.uscourts.gov/CACD/RecentPubOp.nsf/ecc65f191f28f59b8825728f005ddf4e/1105cebf2219a6a288256b48007a04c1/\\$FILE/cv00-11769.pdf](http://court.cacd.uscourts.gov/CACD/RecentPubOp.nsf/ecc65f191f28f59b8825728f005ddf4e/1105cebf2219a6a288256b48007a04c1/$FILE/cv00-11769.pdf).

<sup>232</sup> See, e.g., L.A. POLICE DEP'T, ARREST, DISCIPLINE, USE OF FORCE, FIELD DATA CAPTURE, AUDIT STATISTICS, AND NEW DIRECTIVES/POLICIES: COVERING PERIOD OF JULY 1, 2008–DECEMBER 31, 2008, at 4, 6 (2009), *available at* <http://www.lapdonline.org/assets/pdf/FinalConsentDecreeRptJulyDecember2008.pdf> (showing that there were about 97,000 searches in a half-year period, 34,000 of which resulted from auto stops).

estimate of three million searches during traffic stops, then the total number of searches conducted in the United States each year needs to be increased to approximately 8.6 million (3 million divided by 0.35 equals 8.6 million).

Then there are the things not included in this estimate, which would raise it. Most prominently, arrests would more than double the number. These figures also do not include federal searches. Finally, none of the bus interdiction numbers are included here, if they are in fact deemed searches.

Of all these millions of searches, how many were conducted with a warrant? The little data that exists affirms the suspicion that warrants are the exception rather than the norm. Two studies from the 1980s suggest that warrants were rarely obtained. One study found that “the overwhelming majority of criminal investigations are conducted without recourse to a search warrant” and that few law enforcement officers sought warrants.<sup>233</sup> Another study looking at six jurisdictions, with a combined population of almost four million, found that only 2,115 search warrants were issued in a six-month period.<sup>234</sup> A more recent study from 2004, observing police searches as they occurred, stated that “not a single search in the sample of 115 was conducted by warrant.”<sup>235</sup> According to the most recent data, from 2011, the NYPD obtains only about 5,000 search warrants per year.<sup>236</sup> Extrapolating from this figure, fewer than 100,000 search warrants are obtained nationwide in a given year.<sup>237</sup>

Comparing the 100,000 warrants to the 8.6 million searches—or over 20 million if arrests are included—an awful lot more warrants would be required. Although this looks to be a big number, determining whether it is requires consideration of a number of factors. First, as noted above, the estimate for the total number of searches—the 8.6 million estimate—is only a first-cut estimate. Second, as with the question of arrests, there is room to adjust the domain.

More importantly, it is necessary to determine what mitigates the size of the raw number. As we first explain, self-screening by the police can be expected to reduce substantially the number of total searches and thus the total number of additional warrants. Second, there is room to question the magnitude of the increased burden of warrants.

2. *Self-Screening.*—If police officials must obtain warrants before searching and seizing, there is a likelihood that they will not search or seize

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<sup>233</sup> VAN DUIZEN ET AL., *supra* note 122, at 17.

<sup>234</sup> Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and “Lost Cases:” The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1051 (1991).

<sup>235</sup> Gould & Mastrofski, *supra* note 166, at 334.

<sup>236</sup> N.Y.C. POLICE DEP’T, INTELLIGENCE DIV., SAFETNET MONTHLY TOTALS 2008 (2011) (on file with author).

<sup>237</sup> The extrapolation takes the figure of 5,000 warrants, divides it by the New York City population, and then multiplies by the total U.S. population.

in the first place. This might occur because magistrates deny the warrants. But in equilibrium, in a well-operating system, the police will realize a warrant is not forthcoming and will not ask. This theoretical prediction from Part II finds support in the data.

Comparing two jurisdictions in which traffic-stop data exists, there is evidence that a stringent *ex ante* warrant model can have a strong self-screening effect. While the total search rate in L.A. was 0.053 per capita, in Pittsburgh it was only 0.006 per capita.<sup>238</sup> Why does the LAPD search almost ten times as often? One possible answer is that the Pittsburgh consent decree imposed a near-warrant level requirement on searches and seizures. Pittsburgh police officers were required to record every search and seizure in elaborate detail, including the location, basis of the search, type of search conducted (warrantless, consent, etc.), demographic information about the search subject, and a description of what was searched.<sup>239</sup> Subjects could only consent to searches after signing an officer's written form explaining their right to refuse.<sup>240</sup>

Pittsburgh's decree monitors understood the impact of the consent decree, writing, "[S]upervisors and officers told us that officers were hesitant to conduct searches and to use force since the consent decree was signed. Of course, care in conducting searches and in the use of force was one of the goals of the decree."<sup>241</sup> Our comparative data affirm these assessments: Pittsburgh's policing reforms resulted in fewer searches, as compared to other jurisdictions. Pittsburgh was performing about half as many total (auto and pedestrian) searches per capita than other jurisdictions were conducting per capita in the traffic-stop setting alone.<sup>242</sup> What Part II

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<sup>238</sup> See L.A. POLICE DEP'T, *supra* note 176 (L.A. figures); PUB. MGMT. RES., CITY OF PITTSBURGH AUDITOR'S QUARTERLY REPORTS (1997–2002), available at [http://www.parc.info/consent\\_decrees\\_-\\_memoranda\\_of\\_agreement\\_-\\_monitor\\_reports.shtml](http://www.parc.info/consent_decrees_-_memoranda_of_agreement_-_monitor_reports.shtml) (Pittsburgh figures). Per-capita rates were calculated by dividing the number of searches by the population in the jurisdiction. Population figures were taken from U.S. CENSUS BUREAU, *supra* note 229.

<sup>239</sup> ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE 17–18 (2002), available at <http://www.vera.org/download?file=239/Pittsburgh%2Bconsent%2Bdecree.pdf>. The contrast between Pittsburgh and the norm is best seen when one contrasts the strictness of the Pittsburgh search policy with the general police practice of opportunistic searching. See VAN DUIZEND ET AL., *supra* note 122, at 68 (discussing tactics used by police to avoid warrants and searches via "consent" or as searches incident to arrest).

<sup>240</sup> DAVIS ET AL., *supra* note 239, at 18.

<sup>241</sup> *Id.* at 51.

<sup>242</sup> This is shown by comparing the total search rate in Pittsburgh—0.006 per capita—with the traffic-stop search rates reported earlier in the section. See *supra* text accompanying note 239. The Pittsburgh figure represents total searches performed by city officers during the time period. See DAVIS ET AL., *supra* note 239, at 17:

As a result of the decree, the Pittsburgh Bureau of Police created the Field Contact/Search/Seizure Report. This report, which has multiple uses, goes beyond the requirements of the consent decree in some respects. In addition to capturing information about all searches (strip searches, warrantless searches, consent searches, etc.), it captures information regarding the seizure of any property resulting from a search and field interviews of persons stopped by the police.

suggests in theory seems to be borne out in practice: requiring officers to make a *written* justification makes a massive empirical difference. When the justification needs to be submitted to a magistrate, the difference might be even greater.

Although there may be reason to doubt the sharp difference between Los Angeles and Pittsburgh, if this difference is at all correct, then excluding arrests, the number of additional warrants required would be one-tenth, or roughly one million warrants. The two cities may be extremes on a continuum. Los Angeles officials may search more often than in most places. Pittsburgh officers may not have recorded all of their searches. Still, the data suggest a sharp decrease from our original estimate in the number of warrants needed under the permission model.

It also is interesting to note that despite the decrease in searches, police performance in Pittsburgh did not substantially deteriorate during the consent decree. Police morale was unaffected and crime rates, including homicides, either stayed the same or continued to steadily decrease.<sup>243</sup> Officer activity on traffic-related matters remained relatively unchanged, and while felony clearance rates initially decreased, the rates bounced back to pre-decree levels towards the end of the decree.<sup>244</sup> There is insufficient evidence to assess whether the Pittsburgh consent decree resulted in an overall increase or decrease in social welfare. But clearly the criminal justice system did not collapse or even suffer in any notable way.

The Pittsburgh experience suggests that even if the warrant requirement were not adopted, there is good reason to require police officers to keep a record of when and why they are searching.<sup>245</sup> At least some of the benefits of warrants apparently occur even without a magistrate.<sup>246</sup> So long as the time exists to make a record, the advantages are considerable: police think before they act, aware that their actions are subject to ex post scrutiny, or simply consider more carefully what they are doing. And this recordkeeping provides a record against which to compare ex post testimony.

3. *Why the Costs of Warrants Are Not as They Appear.*—Even after self-screening, a stringent ex ante warrant model would entail an increase in the number of warrants. What is the burden imposed by these additional

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Additionally, the Pittsburgh consent decree monitor believes that the reported Pittsburgh figures represent all of the searches by the department during the decree and noted departmental disciplinary mechanisms that were pursued after rare instances of noncompliance were observed by his team. See Telephone Interview with Dr. Jim Ginger, Consent Decree Monitor and CEO, Pub. Mgmt. Res. (Sept. 23, 2011).

<sup>243</sup> See DAVIS ET AL., *supra* note 239, at 53–55.

<sup>244</sup> See *id.* at 53–56. Our conversations with the Pittsburgh consent decree monitor also confirmed this general trend. Telephone Interview with Dr. Jim Ginger, *supra* note 242.

<sup>245</sup> See *supra* Part IV.B.3.

<sup>246</sup> See *supra* Part II.

warrants? Although it is difficult to operationalize this quantitatively, there are a number of points that suggest the burden may not be nearly as great—in gross or net—as one might believe is the case. To the contrary, there are a number of cost savings to be had.

In assessing the costs of requiring many additional warrants, it is necessary to differentiate between costs borne by the police and costs borne by the judicial system (including judges and lawyers). The judicial system will incur greater *ex ante* costs but fewer *ex post* costs. And the burden on the police can be lessened from current practice in ways that seem to make sense.

*a. The judicial system.*

(1) *Trading ex ante warrant efforts for ex post suppression efforts.*—The chief point is that although the judicial system will incur greater costs in considering all of the additional warrant applications, there will be a concomitant savings with regard to post-search exclusion hearings. Under current practice, any defendant can seek to exclude evidence by filing a suppression motion. The exact number of suppression motions filed in the United States is difficult to figure, though multiple scholars have estimated that suppression motions are filed in about 10% of criminal cases.<sup>247</sup> There are approximately 21 million criminal cases in the United States each year.<sup>248</sup> This is a considerable number of suppression motions. And it does not take much imagination to recognize that suppression motions consume a great deal more time of the bench and bar than do consideration of warrant requests.<sup>249</sup>

If the warrant requirement is taken seriously, then the number of exclusion hearings likely will decrease, and those that occur will be

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<sup>247</sup> See Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 228 (“It appears from Table 1 that motions to suppress occur in about 10.2% of all cases, but this is slightly inflated because multiple motions are made in some cases. . . . These motions actually affect about 9.7% of all cases.”); Uchida & Bynum, *supra* note 234, at 1052 (finding that 13% of search warrants are contested by defendants via motions to suppress).

<sup>248</sup> ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 20 (2010), available at <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx>.

<sup>249</sup> Simply comparing the percent of search warrant cases that have suppression motions filed to cases without warrants may lead to spurious conclusions. See, e.g., Steven Duke, Dialogue, *Making Leon Worse*, 95 YALE L.J. 1405, 1409 (1986) (“The 5% suppression rate for warrant searches in the NCSC study, therefore, was about five times as great as suppressions in felony cases in general, most of which involved warrantless searches.”). Given how rarely warrants actually are sought in the law enforcement context, see *supra* text accompanying notes 21–23, it stands to follow that police are likely to seek them in only the most important cases, see VAN DUIZEND ET AL., *supra* note 122, at 82 (noting that officers tend to get warrants in cases where they want “just to be safe” before conducting the search). But if officers only seek warrants in big cases with big numbers, then those cases are also likely to be the most heavily litigated and the most likely to have suppression motions filed by aggressive defense counsel.

simplified. The current rule is that judges review police searches effectively *de novo*—generally not formally deferring to police factual assertions or fact-finding and certainly not as to legal conclusions—while magistrate decisions to issue a warrant are reviewed deferentially.<sup>250</sup> Indeed, even if a warrant turns out to be faulty, evidence will be admitted under the “good faith” exception if the police officer did not misrepresent herself in the affidavit or if the affidavit is not so lacking that no reasonable police officer would have believed it was sufficient.<sup>251</sup> (The latter standard is the law’s safeguard against “rubber stamp” magistrates who conduct no review.)

It makes sense that if a warrant is obtained, the standards applied by the Supreme Court regarding the good faith exception will govern most exclusion hearings. So long as police officers obtain a warrant, any evidence uncovered will be admitted at the criminal trial unless the defendant can prove either that the officer lied in obtaining the warrant or that no reasonable police officer could have believed the warrant application was sufficient to establish the requisite level of cause.<sup>252</sup> Besides this high bar, suppression motions will be filed only when warrants are not obtained. As a practical matter, this will involve litigation of essentially three issues: whether the police conduct constituted a “search” within the meaning of the Fourth Amendment; whether exigency excused the failure to obtain a warrant; and perhaps whether a search was properly within the scope of a lawful arrest.

While the cost of *ex post* hearings will go down, the number of *ex ante* warrant requests obviously will go up.<sup>253</sup> But warrant proceedings equally obviously are far simpler affairs than suppression hearings. The former typically are *ex parte*, there is no briefing, and as we detail below, there are ways to make them more efficient yet.

(2) *Rethinking magistrates.*—It also is possible that the extra magistrate time necessary to adopt a strict *ex ante* warrant requirement can be met in less expensive ways. The number of warrant applications required could swamp existing judicial capacity. The Fourth Amendment, however, does not require anything other than that magistrates be “neutral and detached.” Formally at least, they need not even be lawyers.<sup>254</sup> There

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<sup>250</sup> See *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (granting “great deference” to a magistrate’s determination of probable cause (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969))).

<sup>251</sup> See *United States v. Leon*, 468 U.S. 897, 922–24 (1984).

<sup>252</sup> We bracket here the question of whether probable cause is required for all warrants.

<sup>253</sup> The increase in the number of warrant applications will be tempered by police self-screening. See *supra* Part IV.C.2.

<sup>254</sup> Historically warrants were issued by justices of the peace, low-ranking judicial officers. See Davies, *supra* note 13, at 623–24. Today a similar function is filled by magistrates. See 28 U.S.C. § 636(b)–(c) (2006) (vesting magistrates with the power of judicial officers); A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627, 1643–44 (1995) (characterizing magistrates as adjunct judicial officers).

are many models of adopting judicial personnel to the cause of dispute resolution short of adding more judges. There are special masters, arbitrators, and the like, and there are of course the many administrative law judges.<sup>255</sup> In practice, all that is required are individuals trained in Fourth Amendment law with enough independence to meet constitutional commands. American governance calls upon scores of administrative officials to ensure reliable process on matters far more trivial than the substantial violation of person or place involved in police searches and seizures. Surely it can do the same in this critical area, if in fact more magistrates are needed.

Indeed, there may be real advantages to moving toward an “administrative magistrate” model. Many aspects of the American criminal justice system are over-politicized in not necessarily helpful ways.<sup>256</sup> While some aspects of policing properly are under political control, the very fact of a judicial warrant requirement suggests this is one that should not be. Yet, many judges stand for election, and there is evidence that judicial preferences on warrants vary, perhaps more than the law would prefer. Well-trained administrative magistrates might actually achieve greater uniformity with regard to what justifies warrants.

*b. Police warrant practice.*—Undoubtedly, the bulk of the burden will fall on police officials, who must seek warrants in far more cases. Even here, however, there are savings to be achieved. In truth, current warrant practice almost certainly is too onerous, and the advantages of modern technology have not been fully realized.

It is easy when thinking of warrant practice to picture the detective of another era, sitting behind a wooden desk, banging out a warrant on a battered typewriter, the bottle of Wite-Out close at hand. While this is surely the image from a bygone era, there still may be some truth to the implicit burden. Warrant procedures are often highly formalized and involve a substantial amount of paperwork. Complaints about this from police and government officials are common.<sup>257</sup>

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<sup>255</sup> See Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 677–84 (2002) (discussing the various types of judicial adjuncts and their role in dispute resolution).

<sup>256</sup> See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1287 (2005) (discussing “tough on crime” politics and pressure to increase sentences); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (discussing the relationship between “tough on crime” politics and increased criminal prohibitions and harsher sentences).

<sup>257</sup> For a levelheaded, though somewhat dated, compilation of police complaints about the warrant process, see VAN DUIZEND ET AL., *supra* note 122, at 82–87, 92, 108–11. Commonly noted are that different judges apply unpredictably different standards to warrant applications, that judges or prosecutors are too often unavailable when the warrant needs to be reviewed, and that there is insufficient clerical help to prepare after-hours warrants. *Id.* at 79–80, 108–10. In an off-the-record

Warrant practice should not be so onerous. If we want police officials to get warrants—and it should seem apparent at this juncture that we do—then the process should be simplified so that warrants can be obtained efficiently. The chief goals of the warrant application process are to determine that the cause standard is met and to obtain a clear description of the place or person to be searched and what will be searched for.

Technology should make obtaining warrants far, far easier. There is no reason to have everything documented on paper if it can be recorded on audio or video. Jurisdictions already are experimenting with these systems. Officers in Palm Bay, Florida, are using Skype to call in warrants for blood alcohol testing.<sup>258</sup> The Federal Rules of Criminal Procedure recently were amended to make clearer the ready availability and acceptability of electronic technology.<sup>259</sup>

Of course, there is a flipside to this technology, which is that it also makes getting warrants easier and more rapid, bearing upon the concept of exigency. In formal terms, exigency is defined as requiring action before a warrant can be obtained.<sup>260</sup> But the ready availability of technology can raise the exigency threshold. Whereas obtaining a warrant once meant several hours traveling back to the station to prepare a warrant application, delivering it to the proper authorities, and waiting, now all of what is essential may be accomplished in an electronic conversation taking a matter of minutes.

Indeed, one of the real merits of technology is that warrant applications do not need to be static hard-copy documents but can be dynamic exchanges between a magistrate and a police official. Magistrates can ask about missing information, question an officer's priors, suggest an alternative hypothesis, and quiet doubts—as well as give direction about the scope of the search.<sup>261</sup> All the benefits that the literature in Part II discussed can be obtained and enhanced by ready two-way conversation.

There may well be instances in which more formal procedures are desired. Wiretap applications, national security applications, or major investigations may require paper documentation and a more elaborate

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conversation with one of the authors, NYPD personnel similarly mentioned the burdens of obtaining warrants.

<sup>258</sup> See *supra* note 18 and accompanying text.

<sup>259</sup> See *supra* note 17 and accompanying text.

<sup>260</sup> See *Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir 1970) (en banc) (“Terms like ‘exigent circumstances’ . . . are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant, and that it is only in the light of those circumstances and that need that the warrantless search meets the ultimate test of avoiding condemnation under the Fourth Amendment as ‘unreasonable.’”); see also *Welsh v. Wisconsin*, 466 U.S. 740, 751–52 (1984) (citing *Dorman* as “a leading federal case defining exigent circumstances”).

<sup>261</sup> See VAN DUIZEND ET AL., *supra* note 122, at 94–102 (outlining survey results showing different judicial views on how the warrant review should be conducted, how much the use of confidential informants by the police should be questioned, and what generally leads to rejected warrants).



approval mechanism. The point, however, is that none of this is necessary to meet the requisites of the Fourth Amendment, and, to the extent it chills the warrant process and causes police officials to act on their own, it may be undesirable.

From a human resources perspective on both the police and judicial sides, it is worth considering that a practice already exists that is not far from the warrant model. When police officers make traffic stops, they already regularly call in to notify headquarters of what they are doing and then to run license, registration, and warrant checks. Indeed, today they typically do far more than that, including checking the criminal records of those stopped—not only drivers but passengers in some instances—walking around cars with drug dogs, and attempting to obtain “consent” to search. These computer checks are now a routine part of the traffic stop process.<sup>262</sup> With an estimated 50 million traffic stops in the United States per year, it seems reasonable to assume that the current system has demonstrated it can handle about 50 million of these checks and headquarters calls annually.<sup>263</sup> And though what is required for warrant processing is undoubtedly more complex, more discretionary, and more time-consuming, the differences should not be overstated.<sup>264</sup> For many run-of-the-mill searches, police would do just what they do for traffic stops: call in and explain what they are about to do and why.

4. *Dispensing With Warrants?: Ex Ante Simultaneous Recordkeeping.*—Indeed, it is this last point that brings up an alternative possibility to warrants altogether. Warrants are still preferred because they require the independent judgment of a magistrate. But should aspects of a stringent ex ante warrant requirement prove too costly—and in situations where exigency makes obtaining a warrant impossible—the Pittsburgh experiment suggests a readily available alternative that might be nearly as effective.

Put simply, technology should be used to require police officers to make their own ex ante (or nearly contemporaneous) record of what they are doing and why. Police forces’ use of video technology is increasing. It not only permits observation of police conduct but can also be used to stave

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<sup>262</sup> See Wayne R. LaFare, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874–86 (2004) (outlining types of record and warrant checks that courts have permitted to take place during traffic stops and the amount of time those checks can take).

<sup>263</sup> See *supra* note 229 and accompanying text (discussing traffic-stop estimates).

<sup>264</sup> Other scholars note that the routine versions of these checks almost always take a few minutes. Stopping officers also often conduct warrant queries, which can take anywhere from “a few minutes to ten minutes to thirty minutes.” LaFare, *supra* note 262, at 1877 (footnotes omitted). Warrant review by a magistrate, on the other hand, generally takes about three minutes. See VAN DUIZEND ET AL., *supra* note 122, at 26. While requiring warrants in the traffic-stop context would undoubtedly require streamlining some common elements for preparation and utilizing available technology for presentation, actual review of the warrant would take less time than some of the computer checks currently used.

off claims against officers and police forces.<sup>265</sup> Yet, this very same technology, supplemented by police officers' audio dictation, could be used to create an ex ante record of why police are going to conduct searches and arrests.

It would be a simple matter for police to record the reasons for actions they are about to take, while video would confirm the accuracy of the underlying factual predicate. Most of this audio and video would never be scrutinized, but it would be available to defense counsel in cases in which there was some doubt about the sufficiency of police reasons for action. And, as with the warrant process, the existence of this record would undoubtedly lead to a certain amount of police self-screening.

#### CONCLUSION

The edifice of constitutional search and seizure is premised on deterrence, yet the deterrence model does not work. In other areas of the law, when ex post deterrence fails, the law turns to ex ante alternatives. The same should be true in the Fourth Amendment context. We should return to a model in which officers seek ex ante permission—warrants—before searching and seizing, whenever practicable. Theory and evidence from social science suggest we will get better and more constitutional decisions this way; available data confirms the benefits. True, this model imposes the need to process many more warrant requests. But there is reason to believe the capacity exists or easily could be added. And data from Pittsburgh suggest that if warrants were too onerous, even a requirement of officers recording the basis for searches before proceeding would obtain many of the benefits of warrants as deterrents.

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<sup>265</sup> See Goode, *supra* note 19.