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Mass Suppression: Aggregation and the Fourth Amendment

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MASS SUPPRESSION: AGGREGATION AND THE FOURTH AMENDMENT

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I. INTRODUCTION

Since its incorporation against the states, courts and scholars have conceived of the Fourth Amendment as a federal solution to the local problem of overzealous policing. Recent news highlights the failure of this solution; local police seem just as dysfunctional and brutal as ever.[1] The state of Fourth Amendment jurisprudence confirms this failure, for it is inconsistent, rife with exceptions, and the Supreme Court has whittled away the exclusionary rule, the only practical redress available for most Fourth Amendment violations. Accordingly, many scholars have criticized the Supreme Court and advocated for significant changes in its Fourth Amendment jurisprudence.[2] How such change could come about is unclear, particularly given the number of long-settled cases that would have to be reversed.[3] This Article takes a different tack, arguing that the key to more effective regulation of police practices requires no change to Fourth Amendment doctrine. Rather, local criminal courts could dramatically improve regulation of police search and seizure practices with a series of wholly local procedural changes.

A big part of the reason why the Fourth Amendment is ineffective at regulating police is because of the awkward fit between the exclusionary rule's broad regulatory purpose and the procedural context—individual criminal cases—within which

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[1] *See, e.g.*, J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, at A1; Jack Healey, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES, Nov. 26, 2014, at A24.

[2] There are countless law review articles that fit this mold. For just a few recent examples see, for example, Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 22–23 (2011) (contending that the Court should abandon "transubstantive" approach and adopt a new framework that considers underlying crime's severity in determining Fourth Amendment reasonableness); Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 630 (2014) (suggesting that the Court should revise the doctrine to streamline the reasonableness analysis); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1511–14 (2010) (arguing that the Court should abandon "the expectations of privacy" that society supports as "reasonable" in favor of a more pragmatic framework).

[3] For example, Justice Sotomayor has identified entire swaths of Fourth Amendment jurisprudence that she would revisit. *See* Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

exclusion is sought. The Supreme Court has amplified that tension by creating a highly atomistic Fourth Amendment standing rule.

The Fourth Amendment exclusionary rule requires suppression of any evidence that an illegal search or seizure produces.[4] The Court has explicitly declared that Fourth Amendment exclusion is not supposed to remedy any harm done unto the defendant. Rather, its only purpose is to deter the police from engaging in future unconstitutional conduct.[5] This is "regulatory" in the sense that its animating concern is with restraining "law enforcement [ ] in a fashion that keeps [the public] collectively secure . . . ."[6] Ironically, the Court has relied on this regulatory notion of exclusion to limit exclusion's availability in individual cases, most recently in *Utah v. Strieff*.[7] In *Strieff*, the Court denied exclusion where police discovered an outstanding arrest warrant for a suspect after having unconstitutionally seized him.[8] The Court however, noted that had the unconstitutional stop been "part of [ ] systemic or recurrent police misconduct," then exclusion might have been warranted.[9]

The benefit that a defendant derives from exclusion is supposed to serve only as an incentive to litigate.[10] The exclusion-seeking criminal defendant is like a representative plaintiff in a class action or a private attorney general.[11] That criminal defendants play this role is important because Fourth Amendment violations

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[4] *See* Wong Sun v. United States, 371 U.S. 471, 484–85 (1963) (establishing this rule).

[5] United States v. Leon, 468 U.S. 897, 906 (1984) ("[T]he Fourth Amendment 'has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.' " (quoting Stone v. Powell, 42 U.S. 465 (1976))); *accord* Davis v. United States, 131 S. Ct. 2419, 2426 (2011); Hudson v. Michigan, 547 U.S. 586, 595 (2006); United States v. Calandra, 414 U.S. 338, 347 (1974).

[6] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

[7] 136 S. Ct. 2056, 2060 (2016).

[8] *Id.* at 2062–63 (applying the attenuation doctrine).

[9] *Id.* at 2063.

[10] *See Calandra*, 414 U.S. at 348 (describing the benefit a criminal defendant would derive from application of the exclusionary rule).

[11] *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 267 (1988) (citing Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 12 (1964)).

will often become apparent only after an arrest has occurred. That is typically when police first memorialize their account of the arrest in an incident report. The Fourth Amendment does not require that the police be correct in their prediction that a search or seizure will yield evidence of a crime. It only requires that police have possessed probable cause or reasonable suspicion—that is, sufficient information to think that finding evidence of a crime was likely.[12] Whether an officer had the requisite quantum of information is assessed from the officer's perspective.[13] The Fourth Amendment does not oblige officers to explain their reasons to those who were incorrectly searched or seized, but never arrested or charged.[14]

There is, of course, value in deterring all future Fourth Amendment violations. But from a regulatory view, deterring pervasive and systematic misconduct affecting large swaths of the community should be most urgent.[15] The more opportunities there were for criminal defendants to challenge police practices, the more likely that at least some of the challenges would be representative of "systemic or recurrent police misconduct" in the jurisdiction.[16] But the Supreme Court has substantially limited those opportunities.

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[12] *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1967) (describing appropriate circumstances for search or seizure).

[13] *See* Whren v. United States, 517 U.S. 806, 814–15 (1996) (noting that "restoration" may be a central aim and benefit of the exclusionary rule).

[14] *See* I.N.S. v. Delgado, 466 U.S. 210, 215 (1984) ("[T]he Court has been cautious in defining the limits imposed by the Fourth Amendment on encounters between the police and citizens."). Eric Miller has recently argued that forcing officers to "articulate the reasons for following, stopping, [or] questioning" a civilian *to* that civilian are critical to enabling her "ability to exercise autonomous choices during" any encounter with the officer. Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 336–37.

[15] The limited empirical evidence that exists suggests that exclusion likely does not deter police effectively. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 373–90 (providing a summary of the limited empirical literature). This has led other commentators to suggest that the exclusionary rule serves purposes other than deterrence, such as a restitution. *See* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 284–85 (1998) (noting that "restoration" may be a central aim and benefit of the exclusionary rule).

[16] *See* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

The Supreme Court's highly individualized standing requirement throttles effective police regulation by limiting suppression motions' frequency and thus decreasing the likelihood of motions that are representative of systemic or recurrent police misconduct. The Court has limited standing to raise Fourth Amendment claims to only those criminal defendants whose individual property or liberty interests were actually violated.[17] This is supposed to limit the number of defendants who receive the boon of suppression.[18] But that is hard to reconcile with exclusion's regulatory purpose of deterring police officers from violating unnamed individuals' rights in the future.

The tension between exclusion's regulatory purpose and the individualized standing requirements is a longstanding and deeply entrenched feature of Fourth Amendment jurisprudence.[19] It is tied to an even deeper structural problem: suppression is litigated in individual criminal cases, making it difficult to ascertain how representative any particular challenged search or seizure is of "systemic or recurrent police misconduct."[20] The Supreme Court is unlikely to offer any practical solution for this structural problem, but state and local courts might.

State and local criminal courts are well positioned to regulate police search and seizure practices without any change in Fourth Amendment jurisprudence. Here and throughout, "criminal court" refers to the three principal actors that drive criminal adjudication: judges, prosecutors, and public defenders. Criminal courts' greatest regulatory strength lies in their access to a broad range of information regarding police practices within a jurisdiction. Public defenders in particular, have unique access to both police and suspect accounts of police conduct. Ironically, this

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[17] *See* Rakas v. Illinois, 439 U.S. 128, 134 (1978) ("[I]t is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.").

[18] *See* United States v. Salvucci, 448 U.S. 83, 95 (1980) (characterizing automatic standing as a "windfall" for defendants whose Fourth Amendment rights have not been violated and agreeing that an actual violation in necessary).

[19] *See* Donald L. Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 261 (1983) (noting the inconsistency in the theoretical reasoning underlying the exclusionary rule and the standing requirement).

[20] *Strieff*, 136 S. Ct. at 2063.

regulatory strength is tied to the fact that criminal courts are high-volume, "mass justice" institutions.[21] While mass justice's dysfunctions have been much criticized,[22] it may actually create unique opportunities for police regulation. High case volume ensures that a steady stream of information about police practices flows into criminal courts. In addition, dismissing cases, particularly less serious ones, is a low-cost proposition for judges in mass justice courts.

This is not to say that criminal courts currently do a good job of regulating police search and seizure practices. They do not. But contrary to longstanding criticism of the exclusionary rule, the main dilemma for criminal courts is likely not hesitation about letting the guilty go free "because the constable has blundered."[23]

Informational bottlenecks and the absence of a procedural mechanism for systematically challenging police practices sap criminal courts' regulatory potential. Criminal courts do not systematically collect, retain, or analyze the information available to them about police misconduct in the manner that effective regulation requires. The pressures created by crowded criminal court dockets mean that prosecutors, defenders, and judges are usually preoccupied with quickly disposing of individual cases.[24] Most convictions are the product of plea bargaining.[25] Fourth Amendment violations are just one among many factors that determine the price of the "deal" that might resolve any given

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[21] *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 246 (1979) (noting that some criminal courts have a "high volume of cases requir[ing] a high-speed mass production of justice").

[22] *See, e.g., id.* at 3 ("These courts are chaotic and confusing . . . and they seem to make arbitrary decisions . . . ."); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) ("Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases . . . ."); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal* Courts, 45 U.C. DAVIS L. REV. 277, 306 (2011) ("[T]he volume of misdemeanor cases . . . may create an obsession for speedy dispositions, regardless of the fairness of the result." (quoting Arger Singer v. Hamlin, 407 U.S. 25, 34–35 (1972))).

[23] *See* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

[24] *See* FEELEY, *supra* note 21, at 246–47 (noting that because courts have a high volume of cases, they shuffle defendants through as quickly as possible).

[25] *See* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 234 (2006) (noting that "over 90 percent of convictions are by guilty plea" in the United States).

case.[26] In such a system, even an egregious Fourth Amendment violation will not likely lead to officer discipline. Rather, it will more likely lead to a steeper sentencing discount for a specific defendant.[27]

This Article proposes a set of local reforms that would improve criminal courts' ability to identify and correct widespread police violations of the Fourth Amendment. First, criminal courts should systematically record and analyze information about police search and seizure practices over time. Second, procedural rules should permit aggregation of different defendants' Fourth Amendment suppression claims when they evidence patterns of police misconduct. These reforms contemplate a more active role for public defender agencies in challenging police misconduct. Not only are defenders responsible for initiating suppression motions, but they also have access to the richest repository of information regarding police search and seizure practices: their clients' stories.

Section II below describes the deep tension between the regulatory and atomistic views of the Fourth Amendment. The Supreme Court has entrenched this tension to the detriment of effective police regulation. Section III argues that state and local criminal courts are well positioned to advance police regulation, but are prevented from doing so by informational bottlenecks and other design defects. Section IV proposes reforms that will improve criminal courts' regulatory efficacy.

II. REGULATION VERSUS ATOMISM

Scholars have long called for the Supreme Court to resolve the tension between the regulatory and atomistic views of the Fourth Amendment.[28] The former holds that the Fourth Amendment

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[26] *See* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 78 (2009) (discussing other factors that may go into pricing a plea bargain).

[27] *See* Matthew C. Ford, Comment, *The Fourth Amendment Hearing: Prompt Judicial Review of All Fourth Amendment Warrantless Conduct for an Imprisoned Defendant*, 55 CATH. U. L. REV. 473, 504 (2006) (noting that the pre-suppression hearing period is the most likely time for plea agreements to be offered).

[28] *See, e.g.*, Amsterdam, *supra* note 6 (analyzing whether the Fourth Amendment should follow the atomistic or regulatory view); Doernberg, *supra* note 19, at 262 (suggesting the dichotomy can be remedied by courts consistently viewing the Fourth Amendment as protecting "collective as well as individual rights").

should regulate police agencies for the collective good while the latter holds that the Fourth Amendment should create a judicial remedy for aggrieved individuals.[29] As described below, Amsterdam argued for the regulatory view.[30] The Supreme Court did not accept his argument. Nor did it reject it. Rather, the Court schizophrenically embraced both the regulatory and atomistic views.

One can see the tension between the regulatory and atomistic views in the conflicting relationship between the Fourth Amendment exclusionary rule and standing rules. The Court has made clear that the exclusionary rule is exclusively regulatory. It is supposed to deter future Fourth Amendment violations, not to remedy harms caused by past violations.[31] Exclusion is for the benefit of all those in the community who might be subject to future unconstitutional searches.[32] This is to cast the defendant who moves for suppression as private attorney general. Because defendants represent third-party interests, one might think that any defendant would be allowed to move for suppression of any evidence that was unconstitutionally obtained. This would maximize the opportunities for the third parties' interests to be realized.[33] But the Court has held the opposite.[34] Fourth Amendment "standing" is atomistic, allowing only those defendants who personally suffered a Fourth Amendment injury to move for suppression.[35]

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[29] *See* Doernberg, *supra* note 19, at 261 (noting that sometimes the Court invokes the Fourth Amendment as a benefit to society through deterrence but at other times as a right "held only by individuals, not by society at large").

[30] *See infra* Section II.A.

[31] *See* United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrence effect, rather than a personal constitutional right of the party aggrieved.").

[32] *See id.* at 347.

[33] This view, however, might also support denying exclusion in cases where the constitutional violation was nonrecurring or idiosyncratic. *See* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016) (noting that the attenuation doctrine "favor[s] exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant").

[34] *See, e.g.*, *Calandra*, 414 U.S. at 348.

[35] Rakas v. Illinois, 439 U.S. 128, 134 (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (quoting Alderman v. United States, 394 U.S. 165, 174 (1969))).

The Court's understanding of the underlying Fourth Amendment right also reflects the tension between regulation and atomism. The Court's jurisprudence is almost entirely preoccupied with the police's perspective of police-civilian encounters.[36] The Amendment creates an individual "procedural right," but the process it requires largely entails no pre-deprivation opportunity for individuals to challenge the State's action.[37]

A. THE TENSION BETWEEN REGULATION AND ATOMISM

Forty years ago, in his seminal Holmes Lectures on the Fourth Amendment, Anthony Amsterdam distinguished between the "regulatory" and "atomistic" views of the Fourth Amendment.[38] In advocating for the former, he described it as "requiring [the] government to order its law enforcement procedures in a fashion that keeps us collectively secure," not just protecting individual citizens' "atomistic spheres of interest."[39] The Fourth Amendment refers to "[t]he right *of the people* to be secure," not to the right of persons.[40] Amsterdam argued that these words should be read to require broad, *a priori* regulation of police departments.[41] In contrast, an atomistic Fourth Amendment is just a constitutional tort by which an aggrieved individual can challenge the specific police conduct that harmed her.[42] Any regulatory effect would be incidental to the vindication of individual's specific claim.[43] Amsterdam worried that individual challenges would be

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[36] *See, e.g.*, *Strieff*, 136 S. Ct. at 2063 (discussing third attenuation doctrine factor focusing on purpose or flagrance of police misconduct); *Calandra*, 414 U.S. at 348, 352 (refusing to extend the exclusionary rule because it would minimally deter police misconduct).

[37] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30–31 (1967) (holding that a search without even a prior explanation to be reasonable under the Fourth Amendment).

[38] *See* Amsterdam, *supra* note 6, at 367 ("My second question is whether the amendment should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct.").

[39] *Id.*

[40] U.S. CONST. amend. IV (emphasis added).

[41] *See* Amsterdam, *supra* note 6, at 372 ("I shall suggest later in these lecturers that the fourth amendment may require the police to promulgate and observe written rules governing certain aspects of their activities.").

[42] *See id.* at 432 (describing the narrowness of the atomistic view).

[43] *See id.* at 371.

unpredictably episodic and put too little pressure on police to internalize Fourth Amendment values.[44]

Amsterdam argued that the Fourth Amendment should require police departments to create detailed conduct rules for individual officers.[45] By this view, courts' role would be to guarantee that departments created fair rules and enforced them. Other scholars echoed Amsterdam's argument for departmental rule making.[46] Little has come of those calls and discussion of the regulatory view has waned correspondingly. Lost with it though, was Amsterdam's powerful insight that effective police regulation will not materialize as an incident of episodic, individual litigation. In the generation since Amsterdam's lectures, the Court has carried out a broadside attack on the exclusionary rule.[47] Put on the defensive, progressive commentators have perhaps been reluctant to echo or build upon Amsterdam's critique for fear of further weakening or losing the exclusionary rule altogether.[48]

Even though the Supreme Court never accepted Amsterdam's robust regulatory view of the Fourth Amendment, it has not embraced a robust atomistic view either.[49] It has taken from both

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[44] *See id.* at 369. In a provocative and thoughtful piece of revisionism, Eric Miller has recently argued that the Warren Court's criminal procedure revolution was animated by a version of what Amsterdam would have called the "regulatory view." Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 26, 41–43, 47 (2010). Through this lens, Miller examines seminal Warren Court cases and criticizes the subsequent Burger Court for having relied upon a rights-driven atomism to advance its conservative agenda. *Id.* at 76.

[45] Amsterdam, *supra* note 6, at 423–29. Amsterdam contended that such rulemaking and its enforcement should be the primary subject of constitutional review as opposed to the conduct of individual officers. *Id.* at 429.

[46] *See, e.g.*, KENNETH CULP DAVIS, POLICE DISCRETION 100, 101, 106, 113–20 (1975); GEORGE BERKLEY, THE DEMOCRATIC POLICEMAN 29, 135–36 (1969) (arguing for internal rules with public comment); *see also* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990, at 6–7 (1993) (summarizing early research); Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 65–70 (1976) (same).

[47] *See infra* notes 69–83 and accompanying text.

[48] *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 848 (1994) ("Despite its many flaws, the exclusionary rule is . . . the best we can realistically do."); *see also* Amsterdam, *supra* note 6, at 433 ("Unless and until a far better system of restraints is devised . . . the exclusionary sanction is the only way to honor [the Fourth Amendment's] command.").

[49] Many commentators have argued in favor of a more robust civil remedy, damages or otherwise. *See, e.g.*, Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO

frameworks to produce an internally inconsistent jurisprudence that does little to compensate aggrieved individuals or deter police violations.

B. THE EXCLUSIONARY RULE IS REGULATORY

The Supreme Court has repeatedly stated that exclusion serves only one end: deterring police officers from committing future Fourth Amendment violations.[50] Individual criminal defendants receive exclusion's direct benefit. But that benefit is just an incentive to litigate, not a remedy for the privacy or liberty harm suffered by the defendant.[51] The criminal defendant is simply a vehicle for ensuring that unnamed community members' rights are not violated in the future. The Court has never given full throated expression to the defendant's representative role nor has it ever provided more than a schematic account of how exclusion is supposed to achieve actual deterrence. This is likely because the Court reluctantly backed into its regulatory justification for exclusion, incidental to its incorporation against the states. This underscores the extent to which an individual criminal case is a poor procedural vehicle for achieving broad deterrence.[52]

Exclusion was not conceived as a regulatory tool. Originally, it was a constitutional analogue for the traditional, common-law remedy of restitution. The analogy made sense given property

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ST. J. CRIM. L. 571, 590–91 (2013) (constitutional small claims court); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 22–23 (2001) (discussing a combination of the exclusionary rule with damages in some type of hybrid model); L. Timothy Perrin et al., *An Invitation to Dialogue: Exploring the Pepperdine Proposal to Move Beyond the Exclusionary Rule*, 26 PEPP. L. REV. 789, 802–04 (1999) (proposing an administrative remedy); Slobogin, *supra* note 15, at 420–22 (discussing tort and administrative remedies).

[50] Davis v. United States, 131 S. Ct. 2419, 2426 (2011); United States v. Calandra, 414 U.S. 338, 347 (1974).

[51] The Court has not explicitly spelled this out, but it is the clear implication of its characterization of exclusion as a "windfall" for the defendant that is designed to deter future police misconduct. *Davis*, 131 S. Ct. at 2434 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).

[52] *See* Hudson v. Michigan, 547 U.S. 586, 598 (2006) (noting factors such as settlement that keep cases out of court).

rights' centrality to early Fourth Amendment jurisprudence.[53] For example, in *Boyd v. United States*, an early and canonical Fourth Amendment case, the Supreme Court simply assumed that the Fourth Amendment required exclusion as a kind of disgorgement of ill-gotten gains.[54] In subsequent pre-incorporation cases, the Court made *Boyd*'s understanding of the exclusionary remedy explicit.[55] The analogy between exclusion and common law remedies also made sense given that before the advent of qualified immunity doctrines, aggrieved individuals would typically bring tort claims against individual officers seeking damages for wrongful searches or seizures.[56] The Fourth Amendment was more a shield for the constable than a sword for the defendant—if the former complied with constitutional requirements, he would have a defense against claims of trespass or wrongful arrest by the latter.[57]

The Fourth Amendment's and exclusionary rule's incorporation against the states in *Wolf v. Colorado* and *Mapp v. Ohio* respectively set the stage for the modern, regulatory understanding of exclusion. Incorporation expanded the kinds of state and local law enforcement subject to the Fourth Amendment and correspondingly drew the Court into new federalism

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[53] *See* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 591–92 (1996) ("The Court emphasized the central role payed by property law concepts in Fourth Amendment analysis . . . .").

[54] 116 U.S. 616, 638 (1886). The Court's solicitousness was particularly pronounced with regard to personal papers. *See id.* at 627–28 (discussing property rights in personal papers); *see also* Cloud, *supra* note 53, at 591 ("[T]he importance of property rights increases if the property consists of personal papers that express a persons thoughts in written form.").

[55] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390–92 (1920) (reversing a judgment for contempt due to an unconstitutional search and seizure of the company's books); Weeks v. United States, 232 U.S. 383, 386, 398–99 (1914) (reversing a conviction for the unlawful use of mail due to an unconstitutional seizure of letters). It was just a modest inferential step from there to all ill-gotten property used to obtain a conviction; *see* Gouled v. United States, 255 U.S. 298, 309 (1921) (affirming that the exclusionary rule applies to all unlawfully obtained evidence); Cloud, *supra* note 53, at 591 (describing the development of the exclusionary rule).

[56] *See* Thomas Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 625–26 (1999).

[57] *See* Cloud, *supra* note 53 (describing the test created by the *Gouled* Court).

thickets.[58] Cast as judge-made regulation, exclusion could be denied when these dynamics made it awkward to undo a state law conviction on the basis of a Fourth Amendment violation.

Wolf incorporated the Fourth Amendment against the states in 1949, but declined to do the same with regard to the exclusionary remedy.[59] The *Wolf* Court characterized the exclusionary rule as merely the product of "judicial implication" rather than an "explicit requirement[ ] of the Fourth Amendment."[60] Even though the *Mapp* Court incorporated the exclusionary rule against the states,[61] the *Wolf* Court's characterization of the rule as extra-constitutional survived.[62] The *Mapp* Court offered a few policy rationales for extending the exclusionary rule to the states, including deterring future police misconduct.[63]

Incorporation suddenly drew a broad range of police conduct within constitutional purview.[64] This in turn eroded the erstwhile intuitive analogy between exclusion and the traditional, common law remedy of restitution.[65] Criminal law enforcement is (and

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[58] *See* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132 (2012) (suggesting that federal courts were increasingly called into action).

[59] Wolf v. Colorado, 338 U.S. 25, 27–28 (1949). Incorporation of the exclusionary rule would not occur for another eleven years. *See* Mapp v. Ohio, 367 U.S. 643, 645 (1960) ("[The Fourth Amendment] is enforceable against [the states] by the same sanction of exclusion as is used against the Federal Government.").

[60] *Wolf*, 338 U.S. at 28. By this view, the exclusionary rule was imposed upon federal courts as an evidentiary rule per the Supreme Court's supervisory power, not per the Constitution. Elkins v. United States, 364 U.S. 206, 216 (1960).

[61] *Mapp*, 367 U.S. at 655–56. The *Mapp* Court invoked earlier pre-incorporation precedents, suggesting that the Fourth Amendment itself compelled application of the exclusionary rule to the states. Justice Black, in concurrence, questioned this analytic assumption given the absence of any suggested remedy in the Fourth Amendment's text. *See id.* at 661 (Black, J., concurring) ("[T]he Fourth Amendment does not itself contain any provision expressly precluding the use of [improperly obtained] evidence . . . .").

[62] *See Davis*, 131 S. Ct. at 2419, 2426 (describing exclusion as prudential and noting the Fourth Amendment says nothing about suppressing evidence).

[63] *Mapp*, 367 U.S. at 648, 659–60. The other two rationales, preventing judicial integrity from being undermined by the implicit sanction of government law breaking (by admitting its fruits) and avoiding conflicts between federal and state courts, were sparingly invoked before disappearing altogether. *Id.* at 659–60.

[64] *See* Kian, *supra* note 58, at 163 (discussing incorporation and the Supreme Court response).

[65] The Court has repeatedly noted that Constitution does not require exclusion; it is a judicially-created regulatory device that the Court is only obliged to apply when, in its view,

always has been) primarily the work of state and local government.[66] Virtually all interpersonal violence, street crime, and vehicle-related offenses, amongst others, are investigated by state and local authorities. Following incorporation, policing's gritty heartland became subject to the Fourth Amendment. Here, unconstitutional searches and seizures were less likely to yield personal papers than an expired driver's license or a half-smoked marijuana cigarette.[67]

The Fourth Amendment's broader application also led defendants to invoke it in more varied procedural settings—for example, grand jury proceedings,[68] probation revocations,[69] and habeas corpus.[70] Each new procedural context promised new federal interference with state and local criminal justice—interference that an increasingly conservative Supreme Court resisted. The Court mediated these tensions by advancing a regulatory, deterrence-based account of the exclusionary rule.

The Burger and Rehnquist Courts elided *Wolf*'s language suggesting that the Fourth Amendment itself does not require exclusion with *Mapp*'s deterrence rationale to cast exclusion as a judge-made regulatory device.[71] In *Calandra*, the Court stated that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim, [but rather] to deter—to compel respect for the constitutional guaranty" in the future.[72]

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deterrence is a likely result. *See Davis*, 131 S. Ct. at 2427; United States v. Leon, 468 U.S. 897, 906 (1984).

[66] *See* RONALD ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 9–19 (3d ed. 2011) (displaying various statistics related to the criminal justice system).

[67] The post-incorporation expansion of the Fourth Amendment's applicability occurred in conjunction with shifts in enforcement technology—for example, the use of listening devices. Here too, the analogy between unconstitutional conduct's fruits—an intangible conversation—and personal papers broke down. *See* Katz v. United States, 389 U.S. 347, 353 (1967) ("The Government's activities in electronically listening to and recording the petitioner's words . . . constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

[68] United States v. Calandra, 414 U.S. 338, 342 (1974).

[69] United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975).

[70] Stone v. Powell, 428 U.S. 465, 468–69 (1976).

[71] *See Calandra*, 414 U.S. at 347–48 (describing the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights" through deterrence, "rather than a personal constitutional right of the party aggrieved").

[72] *Id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960) and citing *Mapp*, 367 U.S. at 656).

This then allowed the Court to deny exclusion in cases where a Fourth Amendment right was violated but where rewarding a defendant seemed undesirable.

For example, in *Stone v. Powell*, the Court decided that habeas petitioners could not obtain a new trial even if convicted on the basis of evidence discovered or seized in violation of the Fourth Amendment.[73] The Court concluded "that the overall educative effect of the exclusionary rule would [not] be appreciably diminished" if exclusion were unavailable in habeas corpus.[74] In *Hudson v. Michigan*, the Court refused to provide an exclusionary remedy for the police's unconstitutional failure to heed the "knock-and-announce rule" prior to forcibly entering Hudson's home pursuant to a search warrant.[75] And, in *Herring v. United States*, the Court denied exclusion where a police department's administrative negligence resulted in an unconstitutional stop.[76] Some commentators have worried that cases like *Hudson* and *Herring* foretell exclusion's demise in all search and seizure cases.[77]

In each of these cases, the Court's decision to deny exclusion turned on the empirical judgment—guess, really—that exclusion would not successfully deter future violations of the Constitution. For example, in *Stone v. Powell*, the Court thought it unlikely that the possibility of exclusion in a habeas proceeding, years after an arrest, would add significant marginal deterrent effect to that generated by the possibility of exclusion at trial.[78] *Stone* hinted that even the latter's deterrent effects were questionable.[79] This

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[73] *Stone*, 428 U.S. at 493–94.

[74] *Id.* at 493.

[75] Hudson v. Michigan, 547 U.S. 586, 588 (2006).

[76] 555 U.S. 135, 147–48 (2009). The Court has been careful to specify that exclusion is only for the purpose of deterring police officers, not other officials. *See, e.g.*, *id.* at 142 ("The exclusionary rule was crafted to curb police rather than judicial misconduct . . . ."); United States v. Leon, 468 U.S. 897, 916 (1984) ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.").

[77] *See, e.g.*, Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should it Be?*, 10 OHIO ST. J. CRIM. L. 341, 343 & n.23 (2013) (noting this concern and citing scholarship to that effect).

[78] 428 U.S. at 493–94.

[79] *Id.* at 493.

just invites the question of whether exclusion is ever an effective deterrent.

The Court has not clearly explained the mechanics of how the exclusionary rule deters, but one surmises that it is through pedagogical effect.[80] Presumably, exclusion serves as a conspicuous slap on the wrist, not to punish the errant officer, but to flag the error for other officers to see and learn from.[81]

From this understanding of the exclusionary rule, it follows that the criminal defendant is like a private attorney general or class representative.[82] She seeks exclusion on behalf of everyone in the community who might be subject to similar unconstitutional police conduct in the future. It further follows that exclusion is most urgent in cases where the police violation is representative of widespread and systemic practices indiscriminately impacting the guilty and innocent alike. It is in such cases where a defendant's experience is most representative and where the need for deterrence is greatest.

Criminal defendants will often have difficulty fulfilling the representative role they are implicitly tasked with playing. The Supreme Court's opinion in *Utah v. Strieff* suggests why. In *Strieff*, the Court held that evidence discovered following an unconstitutional stop need not be suppressed if there was an outstanding bench warrant for the defendant.[83] The holding was based in part on the empirical assumption that police officers do not often make unconstitutional stops in order to check for outstanding warrants.[84] The Court hinted that it might have permitted exclusion were there some evidence to the contrary.[85]

Strieff highlights the awkward fit between exclusion's regulatory purpose and individual criminal litigation's atomistic

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[80] *See* Meltzer, *supra* note 11, at 277–78 (positing that some of the Court's discomfort with the exclusionary rule arises from the fact that relief based on general deterrence is unconstitutional).

[81] *See* William Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 910–11 (1991).

[82] *See id.* (suggesting that general deterrence from exclusion turns criminal defendants into private attorneys general).

[83] Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016).

[84] *Id.* at 2063. The assumption was fiercely contested by the dissenters. *See id.* at 2068–69 (Sotomayor, J., dissenting), *id.* at 2037 (Kagan, J., dissenting).

[85] *Id.*

orientation.[86] Individual criminal defendants like in *Strieff* are unlikely to be aware that the constitutional violation they endured was part of a broader pattern. Even if a defendant is aware of such a pattern, making a credible evidentiary showing will be difficult in the typical pre-trial suppression context where there is not broad discovery like that available in civil litigation. Nor are defendants' attorneys typically resourced to conduct such discovery.

One imperfect solution to the evidentiary challenge would be to maximize opportunities for defendants to present Fourth Amendment claims. Even if no one defendant can adequately perform the representative role that exclusion presupposes, collectively they might. As discussed below, the Court has foreclosed that possibility.

C. FOURTH AMENDMENT STANDING IS NARROWLY ATOMISTIC

Fourth Amendment standing is narrowly atomistic and requires that a defendant have sustained actual injury in order to seek suppression.[87] This is to treat exclusion as if it were remedial rather than regulatory. In creating this "standing" principle,[88] the Court has never accounted for the logical inconsistency between exclusion's broad regulatory purpose and a highly individualized standing requirement. Rather, it simply noted that conceiving of standing too broadly would dangerously "enlarge[ ] the class of persons who may invoke" the exclusionary rule.[89] The criminal defendant is an ironic choice to play a representative role. Her incentive to seek evidence's exclusion will be in direct proportion to

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[86] Courts and commentators tend to overlook this point in favor of how the optimal tradeoff should be made between vindicating Fourth Amendment rights and losing convictions. *See* Herring v. United States, 555 U.S. 135, 141–42, 148 (2009) (summarizing cases and quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)); Dripps, *supra* note 49, at 5–8 (characterizing early twentieth century legal scholarship).

[87] *See* Rakas v. Illinois, 439 U.S. 128, 134 (1978).

[88] The Court initially resisted characterizing the injury requirement as a "standing" requirement. *Id.*

[89] *Id.* at 138.

how strongly it suggests guilt. The exclusionary rule incentivizes the least morally worthy to serve as community representatives.[90]

The Court's discomfort with exclusion has created a significant regulatory gap—a gap highlighted by *United States v. Payner*.[91] There, federal agents obtained incriminating evidence against Payner from a third party custodian by deliberately and egregiously violating the custodian's Fourth Amendment rights.[92] The agents lured him away from the apartment he was staying in and then burglarized it, stealing evidence that incriminated Payner—the agents knew that Payner would not have standing to challenge the search.[93]

The Court's standing jurisprudence has amplified the more general difficulty of implementing exclusion's broad regulatory purpose through individual criminal litigation. The procedural context of individual litigation skews the cost-benefit, balancing exercise—regulation's *sine qua non*[94]—that the Court uses to determine whether the exclusionary rule should apply. Courts will rarely have broad, systemic information regarding the prevalence of a practice and its effects on defendants and non-defendants in a particular jurisdiction. But the cost of releasing a guilty defendant, at least in serious cases, will usually seem clear and weighty. For example, in *Strieff*, the Court simply ignored the spotty, but consistent empirical evidence suggesting that police officers make unconstitutional stops to conduct warrant checks.[95]

D. MORE REGULATION THAN RIGHT

Fourth Amendment rights are understood as advancing a regulatory mandate rather than creating a basis for individuals to vindicate liberty and privacy violations. Modern Fourth

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[90] It also undercuts claims of "typicality" and "commonality" which define a class representative's role. FED. R. CIV. P. 23(a).

[91] 447 U.S. 227 (1980).

[92] *Id.* at 730 & n.3 (recounting the district court findings and stating that, for purposes of its opinion, the Court need not question them).

[93] *Id.*

[94] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90–93 (1977) (arguing that collective goals require tradeoffs of benefits and burdens to produce some overall benefit).

[95] *See* Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (criticizing the decision for legitimizing stops made without adequate suspicion).

Amendment jurisprudence imposes restrictions upon the police that protect community interests in privacy, liberty, and dignity.[96] Violations of these interests in any individual case typically go unrecognized because the modern Fourth Amendment creates a "procedural" right.[97] This does not mean that one has a "right to some kind of hearing" as traditionally understood in the procedural due process context.[98] The Fourth Amendment is directed at the police with very little allowance for targets to be heard before a police intrusion occurs.

1. An Anemic Procedural Right. Courts and commentators understand the post-incorporation Fourth Amendment to create a "procedural right."[99] Ironically though, the pre-deprivation process to which an individual is entitled is not one in which she has any right to participate. This is in stark contrast to procedural rights in other constitutional contexts, most notably procedural due process.[100]

The procedural right created by the Fourth Amendment is markedly distinct from ordinary procedural due process's right to "some kind of hearing."[101] The procedural protections that attend such a hearing may vary depending on the deprivation's severity and risk of error.[102] But at a minimum, an individual is supposed to have an opportunity to "present her case" to a neutral decision maker in advance of the deprivation.[103] This ensures evenhandedness and is autonomy enhancing in at least two ways.

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[96] *See* Cloud, *supra* note 53, at 558 (noting how judges have "interpreted the concept of liberty broadly").

[97] *See id.* at 562–63.

[98] *See generally* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1976) (describing the development of the hearing requirement).

[99] *See, e.g.*, Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1918–25 (2014) (explaining the Fourth Amendment as pre-trial procedure). This is in contrast to how the Fourth Amendment was conceived in the later nineteenth and early twentieth centuries. *See* discussion, *supra* Section I.B (examining pre-incorporation cases).

[100] *See* Friendly, *supra* note 98, at 1273, 1294 (describing increase in pre-deprivation hearings as required by due process).

[101] *Id.*

[102] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("[T]he specific dictates of due process generally require[ ] consideration of . . . the risk of an erroneous deprivation . . . .").

[103] *See* Thomas D. Rowe, Jr., *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 848 ("[F]airness seems to require some measure of equality in [parties'] ability to present their cases.").

First, it promotes individuals' dignity by acknowledging their standing as rights-bearing members of a democratic community.[104] They are permitted to challenge government conduct that will harm them. Second and related, a hearing promotes transparency. Even if the challenge is unsuccessful, a hearing ensures that there is record of the reasons for the government's action. Forcing the government to formally recite those reasons may persuade the citizen challenging the government's conduct that it is legitimate. Even if not, the government's recitation creates a record for others and thereby helps prevent arbitrariness.

In contrast, the autonomy-enhancing and transparency effects of the Fourth Amendment procedural right are much more limited. This is true even of searches and seizures based on warrants, which are the gold standard of Fourth Amendment procedural protection.[105] When police seek a warrant to carry out a search or seizure, they do so in an *ex parte* proceeding.[106] Commentators have observed that the *ex parte* proceeding tends to encourage "rubber stamping" of warrant applications.[107] In the absence of a contested proceeding, magistrates will routinely approve warrant applications without the kind of "detached scrutiny" that the *Katz* Court expected of a "neutral magistrate."[108] An individual may not even learn the specific objects police seek, let alone the reason for the search in advance of it occurring. Police are not obliged to produce a copy of the search warrant in advance of conducting a search.[109] These are precisely the kinds of information that an individual would learn of and might challenge in a pre-deprivation hearing.[110]

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[104] *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 88 (2011) (discussing courts as democratic institutions that reflect the dignity of "juridical person[s]").

[105] In *Katz v. United States*, the Court held that a warrantless search or seizure is *per se* unreasonable. 389 U.S. 347, 357 (1967) (citing a long line of precedent).

[106] FED. R. CRIM. P. 41 (containing no requirement that the party be present).

[107] Silas J. Wasserstein & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO L.J. 19, 34 (1988).

[108] *Katz*, 389 U.S. at 356.

[109] *See* Groh v. Ramirez, 540 U.S. 551, 562 n.5 (2004) (interpreting the Fourth Amendment and FED. R. CRIM. P. 1).

[110] There are a number of obvious, pragmatic reasons why the Fourth Amendment does not permit "some kind of hearing" in advance of an intrusion. It could compromise law

Most searches and seizures are not subject to even the modest form of *ex ante* review that the warrant application process requires. Despite the warrant requirement's conceptual salience in modern Fourth Amendment jurisprudence, most searches and seizures are conducted without one.[111] The Court has crafted a long list of exceptions to the warrant and probable cause requirements.[112] The exceptions do impose *ex ante* limits upon the police. For example, many exceptions require that the police have formed probable cause or reasonable suspicion in advance of the search or seizure.[113] Some exceptions require a specific triggering event, such as an arrest.[114]

When a search is carried out pursuant to an exception, the only legal process to challenge the search is well after it occurs. Individuals do not have a constitutional right to a statement of justification for a search or seizure in the field. The Court has not held that officers are obliged to provide an explanation to the target of a search prior to conducting a warrantless search.[115] Citizens, particularly those innocent of any crime, who are searched or seized will surely wonder why they were targeted.[116] But, officers may constitutionally walk away from such encounters without offering any explanation.

For most searches and seizures, the individual's first formal opportunity to learn of its legal basis will come during litigation. For those against whom no incriminating evidence is discovered, litigation costs will likely discourage civil suit.[117] Practically speaking, this means that criminal defendants will typically be the

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enforcement efficacy if officers were obliged to give advanced notice (and a right to be heard) to individuals it hoped to search or seize.

111 *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) (enumerating a litany of exceptions).

112 *Id.*

113 *See, e.g., id.* at 579–80 (1991) (allowing the police to search an automobile when they have probable cause); Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (noting that the exigencies of a circumstance can allow the police to proceed without a warrant).

114 *See* Chimel v. California, 395 U.S. 752, 763 (1969) (providing for a constitutional search incident to an arrest).

115 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30–31 (1967) (holding that a search without such an explanation to be reasonable under the First Amendment).

116 *See* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1491 (1996) (illustrating targeting harm).

117 *See infra* Section III.E.

only rights bearers with both the incentives and information needed to pursue Fourth Amendment challenges.

2. The Fourth Amendment Focuses on Police Perspective. Fourth Amendment jurisprudence is largely preoccupied with enforcement agents' perspective.[118] This is true even where the formal legal standard turns on the civilian's perspective. Not only has the Court deemphasized citizens' injury at the hands of police, it has weighed the police interest in administrability—creating Fourth Amendment principles that are easy for the police to understand and apply—more heavily than it has the privacy and liberty interests that the Fourth Amendment is supposed to protect.[119]

While *Katz v. United States* suggested that citizens' subjective views should play a role in determining whether a Fourth Amendment "search" has occurred, in practice they play virtually no role. *Katz* emphasized that the "Fourth Amendment protects people . . . ."[120] Justice Harlan understood this to mean that an individual's subjective expectations of privacy were germane to determining whether a "search" had occurred.[121] This prong was much criticized and has little bearing on whether police conduct constituted a "search."[122] Instead, courts have focused on *Katz*'s second prong, which asks whether the expectation of privacy that the police allegedly violated was a "reasonable one."[123] Over time, the Court has used this standard to narrowly construe the kinds of law enforcement conduct that constitute a "search"—and correspondingly to narrowly construe when the Fourth Amendment's restrictions apply to such conduct at all.

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[118] *See* Whren v. United States, 517 U.S. 806, 814–15 (noting that a police officer's subjective intent is assessed).

[119] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 347–50 (2001) (discussing administrability concerns).

[120] Katz v. United States, 389 U.S. 347, 353 (1967).

[121] *Id.* at 361 (Harlan, J., concurring).

[122] *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(c) (5th ed. 2012) (surveying the Court's discussion of whether an actual, subjective expectation of privacy is required for finding that a Fourth Amendment search has occurred).

[123] *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see also* LAFAVE, *supra* note 122 (stating that courts give little attention to *Katz*'s first factor and focus on the reasonableness of privacy expectations).

The Court has, under the rubric of "knowing exposure,"[124] decided that an entire range of privacy expectations that most people likely embrace are not, in fact, "reasonable."[125] The Court has, for example, limited the circumstances in which individuals enjoy conversational privacy. To the extent that one divulges sensitive information to another—who later turns out to have been a government informant—such "knowing exposure" means that no "search" occurred.[126] In *United States v. White*, the Court was less concerned about evaluating such intrusions from the search target's perspective, concentrating instead upon wired informants' efficacy in accumulating evidence of guilt.[127] The Court has also concluded that no "search" occurs for Fourth Amendment purposes when law enforcement rifles through an individual's trash,[128] or culls through her bank deposit slips.[129]

Ironically, even where Fourth Amendment doctrine expressly calls for consideration of a target's perspective, it is the police perspective that holds greatest sway. For example, the questions of whether a "seizure" or "consent search" occurred ostensibly require the civilian to have behaved volitionally. The legal test for a "seizure" asks whether the target felt "free to leave,"[130] meaning "to disregard the police and go about his business."[131] Similarly,

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[124] *See Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *see also* California v. Ciraolo, 476 U.S. 207, 213 (1986) (applying the rule set forth by the *Katz* majority).

[125] *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 740–42 (1993) (contrasting survey participants' rankings of intrusiveness in search and seizure scenarios with the Court's holdings regarding the extent to which investigative actions implicate privacy interests).

[126] United States v. White, 401 U.S. 745, 752 (1971).

[127] *Id.* at 753.

[128] California v. Greenwood, 486 U.S. 35, 40 (1988).

[129] *See* United States v. Miller, 425 U.S. 435, 442–43 (1976) (perceiving no legitimate expectation of privacy in bank deposit slips).

[130] *See* United States v. Drayton, 536 U.S. 194, 201–02 (2002) (asserting that a person is not seized if a reasonable person would feel free to terminate the encounter).

[131] California v. Hodari D., 499 U.S. 621, 628 (1991) (citing Michigan v. Chesternut, 486 U.S. 567, 573 (1988)).

the legal test for a "consent search" asks whether the target's expression of consent was voluntary.[132]

In practice, the Court has defined volition in both contexts to permit police conduct that many would find coercive.[133] For example, when seeking consent, the police are not obliged to inform a target that she has the right to refuse to interact with the police.[134] The Court has also stated that just because the police carry firearms and badges does not bear on the question of whether citizens feel compelled to cooperate with them, even in tightly enclosed space.[135] For example, in *United States v. Drayton*, three weapon-clad narcotics officers boarded the bus, displayed their badges, and blocked the exit path.[136] One officer stood at the bus's rear and another at the front, while the third moved down the aisle from the rear of the bus asking passengers to identify any bags stowed overhead.[137] Coming upon passengers Drayton and Brown, the officer, from twelve inches to eighteen inches away, identified himself and asked for permission to search their bags.[138] Taking the police officers' perspective, the majority reasoned that the police officers did not behave nearly as coercively as they could have.[139] The dissent took a different tack, paying attention to how the officers' conduct would have made most people in the defendants' position feel.[140]

If the Court's approach to consent is insensitive to a search targets' perspective, the so-called "third party" consent doctrine is entirely deaf to it. Third-party doctrine permits the police to conduct a search based upon the consent of an individual that the

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[132] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) ("[The Government] has the burden of proving that the consent was, in fact, freely and voluntarily given." (quoting Bumper v. North Carolina, 391 U.S. 543, 548 (1968)).

[133] *See* Slobogin & Schumacher, *supra* note 125, at 740–42 (discussing scenarios).

[134] *See* Ohio v. Robinette, 519 U.S. 33, 35 (1996) (holding that the Fourth Amendment does not require "that a lawfully seized defendant be advised that he is 'free to go' before his consent to search will be recognized as voluntary").

[135] *Id.* at 203–04 ("The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure." (citing Florida v. Bostick, 501 U.S. 429, 439–40 (1991))).

[136] *Id.* at 197–98.

[137] *Id.*

[138] *Id.* at 198–99.

[139] *Id.* at 204.

[140] *Id.* at 209–12 (Souter, J., dissenting).

police reasonably believe to have authority to permit such a search—even if she actually does not.[141] In *Illinois v. Rodriguez*, the complaining witness gave officers access to the defendant's apartment in which there were narcotics and related paraphernalia.[142] The police did not inquire as to whether the witness had actual authority to permit entry, but they discovered that she did not after arresting Rodriguez.[143] The Court nonetheless held the search was valid because the officers reasonably believed the complainant to have authority to allow entry to the apartment.[144]

The Court has even been willing to explicitly credit the police's bureaucratic interest in administrability—that is, police officers' ability to quickly make sense of rules in the field—where a civilian experienced "gratuitous humiliation."[145] In *Atwater v. City of Lago Vista*, the Court held that even an officer's obviously unnecessary and foolish choice to arrest does not violate the Fourth Amendment if supported by probable cause.[146] In *Atwater*, a police officer arrested a woman in front of her children for a seatbelt violation and forbade her from dropping her frightened children off with a nearby friend.[147] There was probable cause for the stop, but Atwater argued that the officer behaved unreasonably when he arrested her for that minor offense.[148] While the Court agreed that the arrest intruded upon Atwater's constitutional interests and demonstrated "extremely poor judgment," it found no constitutional violation because the arrest was based on probable cause.[149] On the government's side of the scale was police officers'

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[141] *See* Illinois v. Rodriguez, 497 U.S. 177, 179 (1990) (addressing the issue of whether a warrantless entry and search under the third-party doctrine is valid).

[142] *Id.* at 180.

[143] *Id.*

[144] *Id.* at 188–89 (remanding for fact-finding).

[145] Atwater v. City of Lago Vista, 532 U.S. 318, 346–47 (2001).

[146] *See id.* at 354 (noting that the existence of probable cause satisfied the constitutional requirements).

[147] *Id.* at 323–24.

[148] *See id.* at 347–48 (summarizing Atwater's claim that the Fourth Amendment forbade the officer's actions).

[149] *See id.* at 347–54.

need for clarity in the field.[150] Permitting arrest based on probable cause satisfies that requirement even if gratuitously humiliating citizens is sometimes the cost.[151]

E. OBJECTIONS THAT PROVE THE RULE

There are two objections one might level against the preceding arguments. First, an aggrieved individual can make a civil claim under the Fourth Amendment and obtain damages or some other remedy.[152] While that may appear to undercut the argument above, the availability of civil relief is more theoretical than real.

Civil litigation's high transaction costs are the most profound limitation upon civil remedies' availability. Most Fourth Amendment violations entail an unhappy, but relatively brief interaction with law enforcement.[153] An unconstitutional pat down might last as little as a few minutes. Those few minutes may cause significant dignitary harm, but that harm will not easily translate into monetary loss. That amount will rarely exceed litigation's steep costs—attorney fees, court costs, the opportunity costs of time spent on the endeavor, etc.—discounted by the chances of success on the merits. Thus, civil Fourth Amendment cases often challenge law enforcement conduct that resulted in serious injury or death. There, the harm more readily translates into the kind of monetary loss that justifies litigation's transaction costs.

A plaintiff intent on litigating must overcome significant legal hurdles to obtain relief:[154] for example, qualified immunity, municipal liability, and Article III standing. In order to obtain a

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[150] *See id.* at 348 ("The trouble with [the distinction requested by Atwater] is that an officer on the street might not be able to tell.").

[151] *Id.* at 347–48.

[152] *See* 42 U.S.C. § 1983 (2012) ("[D]amages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials."); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[153] *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 432 (noting that some Fourth Amendment violations' brief nature makes them difficult to qualify in financial terms).

[154] *See* Teressa E. Ravenell, *Blame it on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 154–55 (2011) (discussing the development of the qualified immunity defense and strict causation requirements); *see also* Hassan v. City of New York, 804 F.3d 277, 289 (3d Cir. 2015) (discussing Article III standing and injury in fact requirements).

civil judgment against an individual officer, a Fourth Amendment plaintiff must demonstrate that the officer disregarded a "clearly established" constitutional right.[155] Against a municipal entity like a police department, a plaintiff must demonstrate that the defendant specifically authorized the violation or was deliberately indifferent to training its personnel not to commit such violations.[156] Both qualified immunity and municipal liability require plaintiffs to demonstrate that the defendant had a granular understanding of the relevant law—making an already difficult task more so.[157] In addition, for those who seek to enjoin an unconstitutional police practice, only those who can demonstrate that they will be subject to the same practice in the future have Article III standing. In *City of Los Angeles v. Lyons*, the Supreme Court held that Lyon lacked standing to challenge the L.A.P.D.'s use of chokeholds because he could only show that he had been subject to the practice in the past, not that he would be in the future.[158]

A second more theoretical objection is that other constitutional rights could be called "regulatory" just as readily as the Fourth Amendment can. "Individual rights" in constitutional law simply describe individual interests that are violable for very good reason. Richard Pildes has convincingly argued that in constitutional adjudication, "balancing" is really just a metaphor for the qualitative exercise of deciding whether "the justifications for government action are permissible ones."[159] For example, answering whether Arizona's English-only law violated public employees' First Amendment rights was not just a matter of

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[155] *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("[T]he contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.").

[156] *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690 (1978) (stating that suit may be brought against local governing bodies where the alleged unconstitutional action implements an officially adopted policy).

[157] *See, e.g.*, Barbara Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 589 (1998) ("By contrast, in constitutional damages actions qualified immunity dictates that ignorance of the law—at least reasonable ignorance—will quite often be excused.").

[158] 461 U.S. 95, 105–06 (1983) (discussing the likelihood that Lyons would suffer harm in the future as part of his ability to establish an actual controversy).

[159] Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 735 (1998).

balancing the government's interest in efficiency against public employees' expressive and autonomy interests.[160] It demanded a qualitative choice between "competing conceptions of a particular common good: the official public culture of the State, as expressed through its language commitments."[161] Fourth Amendment jurisprudence fits Pilde's mold, but only when invoked in sweeping challenges of government power. For example, recent challenges of the National Security Agency's cell phone data collection scheme require more than just balancing government's quantifiable interest in identifying terrorist threats against the plaintiffs' quantifiable interests in keeping their call logs private.[162] The case raises irreducibly qualitative questions about competing conceptions of the relationship between privacy and anonymity in crowds.[163] But in the main, Fourth Amendment litigation does not generally raise questions with this sort of normative sweep.[164]

Unlike most other constitutional adjudication, Fourth Amendment jurisprudence is a source of granular "conduct" rules for low-level enforcement agents.[165] The Supreme Court's Fourth Amendment opinions detail what these bureaucrats may and may not do in unusually fine detail—for example, can an officer arrest for a trifling offense,[166] may she search the cabin of a vehicle immediately following arrest,[167] how long must she wait before forcibly entering a home pursuant to a warrant after having

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[160] *See id.* ("Generalized collection gives rise to individualized searches in interwoven datasets, unsettling an important distinction between individualized and suspicionless searches.").

[161] *Id.* at 743 (discussing Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995)).

[162] *See* Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1042 (2016) ("Programmatic surveillance is not limited to the intelligence space.").

[163] *See id.* ("Generalized collection gives rise to individualized searches in interwoven datasets, unsettling an important distinction between individualized and suspicionless searches.").

[164] *See id.* at 1041.

[165] Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996).

[166] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 324 (2001) (upholding an arrest for failure to wear a seatbelt).

[167] *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 351 (2009) (holding that a search while an arrestee was handcuffed in a police car was unreasonable because of a lack of proximity to the vehicle).

knocked and announced her presence,[168] and so on. These cases are regulatory in a gritty, quotidian way, not in the grand normative sense Pildes describes.

III. LOCAL CRIMINAL COURTS AS POLICE REGULATORS

The opportunity to build a robust, expressly regulatory Fourth Amendment jurisprudence has long passed. The Court's ambivalent jurisprudence consists of more than a generation's worth of legal accretions. The remainder of this paper thus shifts focus from that jurisprudential edifice to state and local criminal courts. It is there that the vast majority of Fourth Amendment claims are litigated.[169] And those institutions have a regulatory capacity that is only partially dependent on Fourth Amendment jurisprudence. The discussion below develops this descriptive point and is followed in Section IV by a proposal to more fully exploit local courts' regulatory potential.

Local criminal courts' greatest regulatory strength lies in their pervasiveness and unique access to information regarding law enforcement practices. Ironically, this strength is tied to the fact that they are high-volume, mass justice institutions. While mass justice's dysfunctions have been much criticized, it may create opportunities for effective police regulation.

While criminal courts are the best of the available regulatory options, they are far from perfect. Contrary to most legal commentary, this is not on account of judges' reluctance to "allow[ ] the guilty to go free."[170] Rather, it is because criminal courts take an atomistic approach to Fourth Amendment litigation in the face of an avalanche of cases. This inevitably creates informational bottlenecks that prevent criminal courts from constructing an intelligible let alone representative portrait of policing practices in the jurisdiction.

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[168] *See, e.g.*, United States v. Banks, 540 U.S. 31, 33 (2003) (upholding a search after waiting fifteen to twenty seconds).

[169] William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1863 (2016).

[170] Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 657 (2011) ("Judges are reluctant to free, or be seen to free, seemingly guilty defendants . . . .").

A. CRIMINAL COURTS' REGULATORY ADVANTAGES

Criminal courts' most compelling advantage is simply that they exist. Judges, prosecutors, and defenders are ubiquitous features of state and local government, with many jurisdictions providing public defense through dedicated bureaucracies. In most urban and suburban jurisdictions, these criminal courts process a high volume of cases.[171] Legal scholars have criticized the deficiencies of the so-called plea-bargain-driven "mass justice" that results.[172] Because a mass justice court is more akin to a case disposal bureaucracy than to a purveyor of individualized justice, there are serious questions about the accuracy and fairness of the convictions generated.[173] But ironically, high caseload may be an advantage for regulating the police.

Two features of mass justice criminal courts suggest untapped regulatory potential. First, they have access to a broad range of information about police practices and, second, the cost of dismissing any given case is relatively low. All three criminal court actors, but particularly public defenders, receive a steady stream of information about police conduct within the jurisdiction. Even though they tend not to systematically record that information, they will often develop informal, collective wisdom about police officers and practices within the jurisdiction. The discussion below explains why this is true for each criminal court actor.

Defenders. Public defenders generally view the police through an oppositional lens and have access to a rich reservoir of information regarding officer practices—namely, their clients' stories. Like prosecutors, defenders will have access to investigating officers' written and, on occasion, verbal account of a search or seizure. Over time, a group of public defenders is likely

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[171] *See* ALLEN ET AL., *supra* note 66, at 13–15 (providing statistics).

[172] *See, e.g.*, FEELEY, *supra* note 21, at 145 ("[P]lea bargaining is usually considered crucial in accounting for sentence disparity; yet the reduction of charges does not appear to be a significant factor . . . .").

[173] *See* Roberts, *supra* note 22, at 306 (discussing the potential for an obsession with speed at the expense of fairness in misdemeanor cases (quoting Argersinger v. Hamlin, 407 U.S. 25, 34–35 (1972))).

to develop collective insights into police practices in the jurisdiction.

For defenders, as with other criminal court actors, the information regarding police practices will most immediately pertain to police officers' criminal law enforcement activity. But not all searches or seizures result in a criminal case. Many if not most likely do not.[174] The individuals subjected to such searches and seizures may leave the encounter without explanation as to why they were searched or seized and have no formal opportunity to obtain such an explanation.[175]

Depending upon the offense charged and circumstances of arrest, a defendant's experience may be representative of broader community experience with the police. For example, if a charged client arrested for a narcotics violation following a "stop and frisk" reported that officers routinely stopped him and others in her neighborhood for no obvious reason, a defender could reasonably conclude that police regularly seize and search innocent residents in that neighborhood without constitutional justification.[176]

Prosecutors. In serious felony cases, prosecutors may review a proposed search or seizure in advance of a warrant application being filed. More often though, prosecutors will review the police account of any search or seizure that generates a criminal case *post hoc*. Where suppression litigation is likely, a prosecutor will likely discuss the account in some detail with the officer in advance of the hearing. Over time, prosecutors will likely develop a good sense of what a thorough and credible incident report looks like and the kind of testimony that inspires judicial confidence in the constitutionality of a search or seizure. Prosecutors may even develop a sense of specific officers being particularly trustworthy and others not.

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[174] Much of what patrol officers do in the field is not motivated by or designed to achieve crime control. *See* DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY 14 (2000) (tracing a study that found patrol officers spend less than fifteen percent of their time fighting crime while on duty); *see also* EDWARD CONLON, BLUE BLOOD 158 (2004) ("On patrol, [officers] dealt with the fluid whole of peoples' lives" and not just "criminals.").

[175] *See supra* Section II.E (discussing the difficulties in relying on civil courts).

[176] These practices have been described at length in both popular and scholarly media. For a summary, see *Floyd v. City of New York*, 813 F. Supp. 2d 417, 422–37 (S.D.N.Y. 2011).

Because their interests are generally aligned, prosecutors will tend to view the police sympathetically.[177] Prosecutors rely on police to generate defendants and the information used to convict them.[178] Correspondingly police rely upon prosecutors to obtain convictions in the criminal cases they refer.[179] This symbiotic dynamic creates a complex working relationship.[180] Prosecutors are in routine contact with officers, have access to their work protocols, and are sensitive to their occupation's rigors. This, in combination with prosecutors' gatekeeping functions, means that they will have some leverage to influence police search and seizure practices. The leverage is likely greater in serious cases as opposed to low-level ones where officers will generally be more interested in making arrests than securing convictions.[181]

Judges. Judges will have the most limited information regarding police practices because of their dependence upon defenders to raise search and seizure issues. Nonetheless, over time, criminal court judges will confront many suppression motions and hear testimony from many police officers. In addition, many criminal court judges will have served as prosecutors prior to becoming judges.[182] Like prosecutors and defenders, criminal court judges will develop intuitions regarding the quality of police work and police officers.

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[177] *See* Craig Mackey, Hudson v. Michigan *and the Ongoing Struggle for Accountability in Law Enforcement Institutions*, 6 ALB. GOV'T L. REV. 606, 622 (2013) ("[The] close working relationship often creates a conflict of interest: prosecutors who have developed strong personal and professional relationships with local law enforcement officials have a substantial incentive to look the other way . . . .").

[178] This is true in reverse-proportion to the offense's severity. *See* Natapoff, *supra* note 22, at 1337–38 (describing dynamic for low-level offenses).

[179] *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) ("If agents want criminal charges to be pursued against the target of an investigation, they will have to convince a prosecutor to take the case.").

[180] *See id.* at 757–92 (describing the dynamic relationship between agents and prosecutors in the federal system).

[181] *See* Slobogin, *supra* note 15, at 378 n.49 ("[T]he police goal at the time of the arrest will usually be the arrest. At some later point . . . the goal may become securing a conviction."); *see also* STEVE BOGIRA, COURTROOM 302, at 41 (2005) (describing how police officers only care about getting "credit for . . . [an] arrest" when it is not a violent offense).

[182] *See* Brian A. Sutherland, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2212 (2006) (stating that twenty-six of seventy-six judges selected in a sample were former prosecutors).

The standard and frequently rehashed criticism of the exclusionary rule overstates judges' reluctance to dismiss cases.[183] This criticism suggests that the prospect of excluding evidence induces judges to "look the other way" if the consequence of doing otherwise is that a guilty defendant goes free.[184] That bias, in turn, undermines defendants' ability to vindicate constitutional injuries for two reasons. The bias leads judges to credit police duplicity, even when relatively clear that they are "testilying."[185] Alternatively, it might lead judges to narrowly construe the right.[186] The more egregious the crime charged and the more probative the evidence, the truer this criticism will be.[187]

But much of the docket in state and local criminal courts involves relatively marginal misconduct.[188] And, the volume of

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[183] *See, e.g.*, Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003) (arguing that, when faced with a clearly guilty defendant, judges will do whatever they can "to protect the fundamental right *and* still keep the defendant in jail"); Dripps, *supra* note 49, at 22 ("[P]ractical enforcement of [the exclusionary rule] requires some recognition of the natural human reluctance to free serious criminals."); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 963 (1983) (detailing the risks present for a judge who allows a guilty defendant to go free by way of the exclusionary rule).

[184] *See* Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1044 (1996) (explaining that the core motivation for law enforcement officers committing perjury is "a desire to see the guilt brought to 'justice' "); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1312–13 (1994) (acknowledging that police perjury is often committed with knowledge that judges will "wink" at apparent perjury "in order to admit incriminating evidence").

[185] *See, e.g.*, Dripps, *supra* note 49, at 20–22 (arguing for remedial reform in light of judicial bias); Slobogin, *supra* note 184, at 1045–47 (detailing anecdotal and statistical evidence of judicial refusal to address clear police perjury).

[186] *See* Calabresi, *supra* note 183, at 112–13 (describing how the "hydraulic effect" can lead to courts expanding what is deemed a reasonable search or seizure); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036–37 (1975) ("The courts have avoided applying the exclusionary rule [when] the consequences of so doing would offend their own sense of proportionality or reach beyond their view of what the public would tolerate."); *see also* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 921–22 (1991) (arguing that the Fourth Amendment's warrant preference reflects a judicial awareness that trial judges will be biased against granting exclusion after police have discovered incriminating evidence).

[187] *See* BOGIRA, *supra* note 181, at 183 (recounting Judge Daniel Locallo's belief that "people think judges are handcuffing cops" by enforcing the exclusionary rule, especially in high-stakes cases with solid evidence).

[188] *See id.* at 25 (describing one particular docket as "a sea of drug cases . . . with islets" of more serious violent crimes); Natapoff, *supra* note 22, at 1320–21 (characterizing the volume and nature of misdemeanor cases).

such cases will likely make entire categories of cases seem fungible.[189] Judges in mass justice courts dismiss or otherwise dispose of cases for all sorts of reasons less significant than a Fourth Amendment violation.[190]

This is not to say that local criminal courts are effective Fourth Amendment regulators. They typically fail for reasons identified next.

B. INFORMATIONAL BOTTLENECKS AND REGULATORY FAILURE

While streams of data about police practices pool in criminal courts, courts do not record or assemble that data so as to make police practices visible. Prosecutors and defenders are preoccupied with maximizing their clients' advantage in the conviction market that plea bargaining creates. Judges are preoccupied with expeditiously disposing of those cases. These institutional incentives create informational bottlenecks regarding police practices. As a result, criminal courts do not generally evaluate Fourth Amendment violations in the context of a broad portrait of law enforcement practices in the jurisdiction. The following discussion explains why this is true by criminal court actor.

Prosecutors. Prosecutors' incentive to expeditiously obtain convictions drives plea bargaining.[191] In the resulting "conviction market," Fourth Amendment violations are simply one factor among many affecting the market rate for conviction. Rarely are Fourth Amendment violations actually brought to judges' attention in suppression motions. This would not be terribly worrisome if prosecutors took it upon themselves to monitor and

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[189] *See* BOGIRA, *supra* note 181, at 25.

[190] *See* PHILIPPE BOURGOIS & JEFF SCHONBERG, RIGHTEOUS DOPEFIEND 253 (2009) (describing how a San Francisco judge dismissed charges and sent defendants to treatment to clear his docket); BOGIRA, *supra* note 181, at 39–41 (describing how judges and prosecutors do not view many crimes as serious and will eagerly dispose of them to clear docket).

[191] *See* Natapoff, *supra* note 22, at 1338 ("In felony cases, prosecutors often charge as many offenses as the police's evidence will support, and then rely on the plea bargaining process to screen out weak charges.").

enforce police officers' compliance with the Fourth Amendment. Most prosecutors are unlikely to do so.[192]

It is in those cases most revealing of police search and seizure practices that prosecutors will be most inclined to convict summarily. In most urban and suburban jurisdictions, it will be enforcement against low-level, garden-variety street and traffic crimes that are most broadly representative of police search and seizure tactics. The bulk of police-civilian encounters are of this sort.[193] Accordingly, most cases in criminal courts and tend to involve these kinds of street-level enforcement.

Scholarship and intuition suggest that for state misdemeanors and low-level felonies—the bulk of most criminal courts' dockets—docket clearing is a driving imperative.[194] Prosecutors will aim to expeditiously dispose of those cases within the bureaucratic constraints that their office and the court creates.[195] That imperative will tend to incentivize a conviction-maximizing orientation.[196] Prosecutors will not individually investigate misdemeanors and low-level felonies, but instead rely upon the police's account of the incident to make an initial offer for a plea.[197] The tendency to maximize convictions is likely amplified by the overrepresentation of junior prosecutors among those handling

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[192] *See, e.g.*, Barnett, *supra* note 183, at 967 (applying cognitive dissonance theory and institutional analysis to show how "even the most conscientious prosecutor" is likely to defend illicit policing procedures).

[193] *See* Natapoff, *supra* note 22, at 1320–21.

[194] *See* BOGIRA, *supra* note 181, at 72–74; FEELEY, *supra* note 21, at 271–72 (detailing incentives for judges, prosecutors, and defense attorneys to process minor cases quickly); Natapoff, *supra* note 22, at 1328 ("Defense attorneys . . . lack time and resources to . . . litigate cases while judges pressure defendants into pleading guilty . . . to clear crowded dockets.").

[195] *See supra* note 194.

[196] *But see* Richman, *supra* note 179, at 758–59 (evaluating the effect of prosecutors' cooperation with agencies). Recent scholarship has sought to complicate the portrait of prosecutors as rote conviction maximizers. *See id.* There are a range of values that might impel any given prosecutor's behavior—variation flows from seniority, type of case, and office culture, among other factors. *See* Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1175–76 (2012) (discussing various factors).

[197] *See* Natapoff, *supra* note 22, at 1328, 1338 (describing the prosecutorial practice of relying only on police allegations and descriptions in charging and later backing off during plea negotiations).

misdemeanors and low-level felonies. Such attorneys tend to view their roles in more intensely adversarial terms.[198]

Plea bargaining's centrality to disposing of cases means that any possible Fourth Amendment violation will become just another "market factor" determining the price of conviction in a particular case. Plea bargaining creates a market-like system for obtaining convictions.[199] Well over ninety percent of convictions in the United States are obtained by plea.[200] Among plea bargaining's chief functions is to ease criminal court actors' workloads. It relieves prosecutors and defenders from having to conduct the kind of factual investigation that trial requires and, of course, the burden of conducting the trial itself.[201] This means that many criminal convictions—particularly those for less serious offenses—occur without any serious fact finding apart from that done by the police following arrest.[202] While the Constitution requires that pleas be supported by a "factual basis," that is readily supplied by a defendant's admission of guilt or a prosecutor's recitation of facts that would be adduced at trial.[203] Defendants are often readily willing to admit guilt in order to avoid the "trial penalty"—the harsher sentence that convicted defendants will typically face for having forced the prosecutor and judge to conduct a trial.[204]

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[198] *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1508 (2010) ("Prosecutors . . . are partisans . . . having strong incentives to maximize convictions and aggregate sentences."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 550 (2001) (identifying prosecutors' love of being in the courtroom as motivation). *But see* Richman, *supra* note 179, at 758–59 (noting the incentives confronting prosecutors are not as straightforward as this and may be impossible to identify precisely). Of course, Richman's treatment concerned federal prosecutors whose caseload is thinner and who work in a more highly-resourced environment.

[199] *See* BOGIRA, *supra* note 181, at 34–35 (offering a narrative depiction of one such market's inner workings); Covey, *supra* note 26, at 79–80, 79 n.22 (detailing how this market achieves a "mutually beneficial plea price").

[200] *See* ALLEN ET AL., *supra* note 66, at 1165 (citing data from 2006–2007).

[201] *See id.* (noting that because of limited resources, appointed defense counsel cannot afford to go to trial in most cases).

[202] *See id.* (observing that the detailed examination inherent in a trial does not occur in the vast majority of criminal cases).

[203] *See* BOGIRA, *supra* note 181, at 335.

[204] *See, e.g.*, Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1408–09 (2004) (noting sentencing practice).

Different criminal courts will have different "market rates" for cases.[205] The "basic rate" will turn heavily upon the specific charges a prosecutor elects to file.[206] How attorneys agree upon a final price for conviction in any particular case is complex and reflects how elaborate market socialization can be for criminal court actors.[207] Base rates are adjusted up or down depending upon a defendant's criminal history, unique case facts, and any other facts that would make the case a difficult (or easy) one in which to obtain a conviction.[208]

A simple example illustrates how a Fourth Amendment violation might influence the price of conviction. First, consider an egregious Fourth Amendment violation—"egregious" meaning one in which the facts are undisputed and the law obviously violated—that yields narcotics evidence without which conviction would be impossible. The Fourth Amendment violation will drive the likelihood of obtaining a conviction to zero. Because a suppression motion would almost certainly result in the suppression of evidence necessary for conviction, a prosecutor may simply dismiss the case at the onset. Now consider the same egregious violation, but where there is a plausible but uncertain claim that "inevitable discovery" would permit the narcotics' admission.[209] A suppression motion might result in exclusion, but not inevitably. A rational prosecutor's plea discount will reflect a probabilistic judgment based on that likelihood. In general, the more compelling the evidence, the less willing the prosecutor will be to offer a significant sentencing discount or other inducement to plead.[210]

That Fourth Amendment violations are reduced to bargaining chips in determining conviction rates has two significant consequences. First, in most state and local courts, it means that

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[205] *See* ALLEN ET AL., *supra* note 66, at 1198 (describing the practice of "pricing" crimes in the resolution of criminal cases); Covey, *supra* note 26, at 79 n.22 (discussing market resolutions).

[206] FEELEY, *supra* note 21, at 160.

[207] *See id.* (describing the complexity of the rate setting process). The discussion here necessarily simplifies the dynamic intended to illustrate core processes and incentives.

[208] *Cf.* BOGIRA, *supra* note 181, at 34–35, 334–35 (describing the variability in one particular court).

[209] *See e.g.*, *Strieff*, 136 S. Ct. at 2056 (describing the "inevitable discovery" doctrine).

[210] *See* Covey, *supra* note 26, at 78 (noting that the leniency of a plea deal will largely depend on the strength of the evidence).

judges will have infrequent opportunity to review Fourth Amendment violations. It follows that there will be little paper record memorializing allegations of Fourth Amendment violations. Lower-level criminal courts frequently rule orally on suppression motions and, even where briefs have been filed by the parties, they will, bureaucratically speaking, disappear once a case is closed.

Second, prosecutors are most immediately positioned to regulate police search and seizure conduct. The Supreme Court has entrenched the assumption that the judicial act of exclusion incentivizes future police compliance with the Fourth Amendment.[211] But criminal court judges will not have regular occasion to exclude evidence, which leaves prosecutors to educate the police regarding constitutional principles. That is a task that most prosecutors will likely resist performing. Prosecutors depend upon police officers to bring them viable cases and serve as witnesses. Prosecutors are consequently inclined to view the police favorably.[212] Absent criminal misconduct on the police's part, there is little to suggest that prosecutors themselves view police regulation as part of their job.[213] Even if all this were otherwise, prosecutors do not have access to the richest source of information regarding police search and seizure practices. Public defenders do.

Public Defenders. Of all criminal court actors, public defenders have greatest access to information regarding police search and seizure practices. Defenders have unique access to those directly affected by police practices. There is however, little incentive for defenders to systematically record or assemble that information to construct a portrait of police search and seizure practices in a jurisdiction over time. As with prosecutors, this is because defenders tend to view their purpose in terms of expeditiously resolving individual cases.[214]

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[211] *See supra* Section II.A.

[212] *See* Barnett, *supra* note 183, at 967 (describing how prosecutors' views of police change over time).

[213] *See generally* Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591 (2014) (arguing for an expansion of the prosecutor's role in Fourth Amendment exclusion).

[214] *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2421, 2428 (1996) (noting that "public defenders

Prosecutors' knowledge of a search or seizure will typically be limited to the officer's account. In contrast, public defenders will have access to both the police and client perspectives of a search or seizure. The client's version of an encounter is more likely to suggest that a constitutional violation occurred. This will be most true in cases where the violation turns upon a question of fact—for example, did the defendant consent to a search, was her conduct sufficiently suspicious to generate individualized suspicion, and so on. While defendants will likely have an incentive to remember a search or seizure in self-serving ways, the same is true for police officers.

Over time many public defenders likely develop an intuitive capacity for assessing a client's veracity based upon experience. For example, there will be accounts of police practices that different clients repeat over time—for example, the narcotics unit frequently conducts suspicionless pat-downs or patrol officers in a particular precinct frequently abuse minority suspects. When aggregated for an entire office over time, those data may translate into a collective wisdom regarding police search and seizure practices in a jurisdiction.

Because defenders have access to such information regarding police practices, they are well-positioned to identify defendants whose claims exemplify "systemic or recurrent police misconduct."[215] As discussed in Section II above, exclusion is not intended as compensatory—it is strictly a deterrent that is supposed to inure to the benefit of those who reside in the jurisdiction. Criminal defendants represent the interests of those myriad others. A defender who took this model seriously would make special effort to litigate Fourth Amendment claims that were representative of the most grievous threats to community security. Some illegal searches and seizures may obviously present themselves as having broad impact upon others—guilty and innocent alike—who live in the jurisdiction. For example, if some significant number of clients arrested for offenses in street encounters report that police regularly stop minority youth

typically resist any effort to characterize their role as institutionalized rather than individualized").

[215] Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

without reason, public defenders might reasonably infer that police officers are aggressively using illegal stop and frisk tactics in particular neighborhoods.[216] In most jurisdictions, the incentives confronting public defenders do not encourage them to assemble information regarding systemic and recurring Fourth Amendment violations.

As with prosecutors, public defenders are preoccupied with achieving optimal results in individual cases.[217] Ethical norms oblige public defenders to zealously represent individual clients—this means working aggressively to avoid conviction or, where that is unlikely, to minimize any criminal sentence to which the client may be subject.[218] Being a repeat player in a mass justice setting complicates this goal.[219] The zealousness and quality of representation in any given case may turn on the defenders' other cases. For example, the number of cases she has open at once may tax a defender's ability to zealously represent any given client. In addition, a defender's willingness to undertake a strategic choice in any given case will reflect her interest in maintaining the legitimacy necessary to achieve positive outcomes in future unrelated cases before that judge.[220] Kim Taylor-Thompson has aptly described how this dynamic can both compromise individual representation and create opportunities for achieving collective goods for those accused of crimes.[221] Taylor-Thompson however, notes that most defender agencies and individual defenders do not view their roles in terms of the latter possibility.[222]

Because a Fourth Amendment violation's value is realized in relation to the possibility of conviction, defenders will use Fourth

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[216] *See* Al Baker, *New York Police Release Data Showing Rise in Number of Stops on Streets*, N.Y. TIMES, May 13, 2012, at A19 (finding that while young black and Hispanic men made up 4.7% of the city's population, those between the ages of fourteen and twenty-four accounted for 41.6% of stops in 2011).

[217] *See* Taylor-Thompson, *supra* note 214, at 2421.

[218] *See id.* at 2428 (describing the willingness of defenders to "assert inconsistent positions on the same issue from one client to the next" in order to maximize effective representation).

[219] *See id.* at 2435, 2445, 2450 (describing ethical dilemmas created by repeat player status).

[220] *See id.* at 2445–46.

[221] *See id.* at. 2451 ("What typically motivates defenders to assume an institutional stance is the realization that individualized opposition will be ineffective.").

[222] *See id.* at 2419 (noting that, for defenders, "the client or the issue dictates the course of action").

Amendment violations as bargaining chips, just as they would any other fact that makes conviction more costly.[223] Within the market logic of criminal courts, the more likely a Fourth Amendment claim is to succeed and the more germane the evidence that would be suppressed, the more costly a conviction becomes for the state. Cases are litigated where the market fails to produce an agreed outcome.[224]

Such market failures likely bear little or no relation to how representative an alleged Fourth Amendment violation is of systemic patterns of police misconduct in the jurisdiction.[225] For example, if a case is likely to go to trial for whatever reason, defenders may have an incentive to litigate even a weak Fourth Amendment claim. Doing so might allow the defender to get a "preview" of the state's case-in-chief or police witnesses' manner on the stand. Alternatively, it might simply be that there is little to lose by moving for suppression in a case that will be going to trial.

The preoccupation with individual cases means that once a particular Fourth Amendment violation has been exploited for its value in a particular case, there will be little reason to retain information regarding the violation for future use. Over time defenders may individually and collectively develop intuitions about the kinds of violations that are most common, but they will lack concrete data to test or demonstrate those intuitions.

Judges. Criminal court judges cannot effectively regulate the police because they have few opportunities to review Fourth Amendment claims and little contextual information for the claims they do review. For these reasons, judges' suppression orders will likely have little expressive force vis-à-vis police officers. All of this is contrary to the Supreme Court's assumption that suppression motions will raise a representative sample of

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223 *See* BOGIRA, *supra* note 181, at 34–35, 334–35 (discussing this concept).

224 *See* Covey, *supra* note 26, at 81 ("[I]f either party believe[s] that the bargain [is] not beneficial, it could simply decline it and go to a trial.").

225 *See* BOGIRA, *supra* note 181, at 82 (describing plea negotiations where the defendant who believed in his innocence did not factor in his constitutional rights).

constitutional violations and that individual officers will internalize judges' suppression rulings.[226]

The plea-driven conviction market chokes off the flow of Fourth Amendment claims to criminal court judges.[227] On the rare occasion when they are called upon to decide a Fourth Amendment matter, it will be without the benefit of broad contextual information regarding search and seizure practices within the jurisdiction.[228] Defenders will not typically have records of such. This is likely to work to the prosecutor's and police's advantage. Evaluating a Fourth Amendment claim in isolation likely makes it easier for judges to credit police officer testimony. Judges may credit officers (perhaps even subconsciously) on account of their status as agents of the state.[229] In addition, police officers will often have experience serving as witnesses.[230] In the absence of contextual information about police practices, it will be difficult for judges to recognize "testilying" or to confidently reject it even when they intuit that an officer is not being forthright.[231]

Even when a judge orders suppression based on a Fourth Amendment violation, that ruling is unlikely to have profound deterrence effects for two reasons. First, criminal court judges' constitutional pronouncements will lack expressive force vis-à-vis police officers. Fourth Amendment violations bear on the price of conviction in particular cases; this is of far more consequence to prosecutors and defenders than to police officers who typically view their jobs in terms of obtaining arrests, not convictions.[232]

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[226] *See* Davis v. United States, 131 S. Ct. 2419, 2434 (2011) (holding that when police "conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply").

[227] *See supra* notes 189–213 and accompanying text. *But see* FED. R. CRIM. P. 11(a)(2) (permitting conditional plea with government's consent).

[228] *See* Taylor-Thompson, *supra* note 214, at 2428 (discussing defender offices' attempts to focus on their individual clients).

[229] *See* Cloud, *supra* note 184, at 1323–24 ("Judges simply do not like to call other government officials liars—especially those who appear regularly in court.").

[230] *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 32 (2010) ("[J]udges do not want to tarnish or ruin the careers of police officers, who may be 'good people,' 'hard working' and frequent witnesses in the judge's courtroom.").

[231] *See* Slobogin, *supra* note 184, at 1038 (hypothesizing theories behind the perjury in the O.J. Simpson trial).

[232] *See* Slobogin, *supra* note 15, at 378 (noting that "police chiefs" are usually sympathetic to their officers so long as they "meet their arrest quotas"); *see also* BOGIRA, *supra* note 181,

The claims that do generate litigation may not be representative of the most "egregious" or widespread types of constitutional violations that occur within the jurisdiction.[233] Even if they are, judges are unlikely to readily appreciate that fact because, again, they are without access to contextual information regarding police practices in the jurisdiction. This likely makes a Fourth Amendment suppression order seem like an idiosyncratic development in a particular case—a litigation anomaly as opposed to a regulatory directive.

Second and related, it is unclear that in the mine-run of cases, officers are apprised of suppression rulings. The few empirical studies on the subject conclude that Fourth Amendment rulings do not percolate down to officers.[234] Often this may be because no one communicates the ruling's content to police officers. The officers involved in the search may not wait to hear the court's ruling.[235] Even if they do, they may not accurately transmit its content to other officers. Prosecutors may hesitate to do so for reasons identified above.[236] However transmission occurs between criminal courts and police, one must assume that much will be lost with each layer of police bureaucracy through which the information would travel before it actually reached officers' ears.[237]

C. OTHER REGULATORY OPTIONS

Despite criminal courts' limitations, they are better positioned to regulate police than other institutions. For the average, would-be plaintiff, civil litigation is a daunting prospect.[238] Private litigation affords the opportunity to bring challenges to widespread practices that violate the Fourth Amendment, but the steep transaction costs make this a rarity. When such a case is brought,

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at 41 (articulating that "arresting officers" do not really care about the plea bargain so long as they "get credit for . . . the arrest").

233 Slobogin, *supra* note 15, at 378.

234 *See id.* at 373–94 (noting that under a "Behavioral Theory" and a "Legitimacy-Compliance Theory," the exclusionary rule is ineffective when it comes to officer conduct).

235 *See* BOGIRA, *supra* note 181, at 41.

236 *See supra* notes 178–80 and accompanying text.

237 *See* PETER H. SCHUCK, SUING GOVERNMENT 5, 10 (1983) (explaining how "[t]ransmission through bureaucratic strata" can reduce the clarity of a message).

238 *See supra* notes 152–58 and discussion.

civil discovery mechanisms have the potential to generate considerable information regarding police practices past and present.[239] And if the court ultimately finds a Fourth Amendment violation, the expressive and political force of the ruling will be greater than a suppression ruling in an individual criminal case.[240] But such cases are rare and limited in terms of subject matter, temporality, and geographic scope.[241]

The existence of a public plaintiff solves some of these problems. A model is found in 42 U.S.C. § 14141. It authorizes the Department of Justice to obtain injunctions against police departments that have engaged in a "pattern or practice" of constitutional violations.[242] Unlike private litigants, the DOJ is able to collect broad information regarding a department's unconstitutional practices in advance of filing suit. Section 14141 also permits courts considerable latitude in tailoring relief and monitoring future compliance.[243] Consent decrees obtained pursuant to Section 14141 have required departments to better train officers, collect and analyze data regarding misconduct, improve citizen complaint mechanisms, and so on.[244]

In practice however, Section 14141 has proven to be a limited tool for effecting police regulation. It is resource intensive and requires political will in the DOJ. Its willingness to litigate not only shifts with the political tide,[245] but is subject to competing priorities and resource constraints even when the tide favors bringing Section 14141 cases.[246] Accordingly, the DOJ has prosecuted relatively few departments under Section 14141.[247]

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[239] *See* Floyd v. City of New York, 813 F. Supp. 2d 417, 422–37 (S.D.N.Y 2011) (describing instances of improper searches and seizures by police on innocent people without proper justification).

[240] *See infra* Section IV.B.

[241] *See* Myers, *supra* note 49, at 590 (explaining the limited scope of Fourth Amendment claims).

[242] 42 U.S.C. § 14141(a) (2012).

[243] 42 U.S.C. § 14141(b) (2012) (permitting "appropriate equitable and declaratory relief to eliminate the pattern of practice").

[244] Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 19 (2009) (describing reforms demanded by the Justice Department).

[245] *See* Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES, Feb. 28, 2017, at A1.

[246] Harmon, *supra* note 244, at 21–22.

[247] *Id.* at 20.

Without significant capacity building, that will remain true even when there is political will to use Section 14141.[248]

Internal police departmental regulation also has more theoretical than practical appeal. A number of prominent scholars in the 1970s, including Anthony Amsterdam, argued that police departments should promulgate regulations following public comment, much like administrative agencies.[249] The analogy between an administrative agency and a police department, however, is imperfect.[250] Ronald Allen noted that police departments do not have the kind of technocratic expertise or limited mandate that administrative agencies do.[251] His cynicism has largely been vindicated.[252] While police departments have endeavored to create more rules regarding exceptional issues such as use of force, that has not been true more globally regarding search and seizure practices.[253] Early scholars underestimated the extent to which meaningful police rulemaking would require a wholesale remaking of police departments. Such change has not occurred.

Civilian review is another species of internal regulation. It too has failed to live up to advocates' hopes. Civilian review boards

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[248] Rachel Harmon's partial solution to this problem is that the DOJ teach by example, selecting the worst offenders for Section 14141 prosecution and allowing a safe harbor to those departments that voluntarily comply with certain best practices. *Id.* at 25–26, 37–38.

[249] *See* DAVIS, *supra* note 46, at 100, 106, 113–20 (discussing the importance of having the "right procedure for developing the rules"); Amsterdam, *supra* note 6, at 423–28 (arguing in favor of increased police department regulations); *see also* WALKER, *supra* note 46, at 154 (arguing for better departmental control over individual officers); BERKLEY, *supra* note 46, at 135–36 (arguing for internal rules with public comment).

[250] *See* Allen, *supra* note 46, at 97 ("[T]he police perform a very different function from that of a regulatory agency.").

[251] *See id.*

[252] Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 504–08 (1990) (discussing how courts have not incentivized police departments to issue regulations).

[253] Although most large metropolitan police departments now have policy manuals, those manuals tend to focus on narrow personnel issues and not on enforcement priority or protocol as the early scholars had hoped. *See* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS 180–83 (1996); *see also* Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 176–79 (2010) (discussing internal police regulation of undercover operations).

rarely have direct authority to sanction officers.[254] Instead they usually play only a quasi-independent, advisory role to department decision makers to recommend negative personnel action.[255] In a few jurisdictions, civilian review boards are truly independent.[256] Even these boards, however, have not been terribly successful because of resource constraints, inability to directly sanction officers, or political co-optation by the police department.[257]

IV. MASS SUPPRESSION AND OTHER PROCEDURAL TOOLS

Scholarship is rife with proposals for sweeping reforms of Fourth Amendment doctrine and for building entirely new institutions.[258] This Section takes a different tack, exploring how smaller, institutional design changes could eliminate the impediments Section III.B identifies and thereby improve criminal courts' regulatory efficacy.

First, embracing a private attorney general model of exclusion is consistent with taking a "community oriented defense" approach to public defense. Defender agencies should keep close track of both clients' and non-clients' experiences with the police and use that information to affect police practices. Changing evidentiary and procedural rules could help create incentives for defenders to do this.

A. COMMUNITY DEFENDERS

Defender agencies should embrace the private attorney general theory of Fourth Amendment suppression. That approach is consistent with the "community-oriented defense" model that some

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[254] *See* 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, 11 (2009) (describing different models of civilian review).

[255] *See id.* at 12–20 (explaining the varying roles of civilians in police department oversight bodies).

[256] *See id.* at 17–18 (describing civilian review boards in San Francisco and Los Angeles).

[257] *See id.* at 17, 22, 44.

[258] The normative project here engages police regulation as a "grown order" as opposed to a "made" one. *See* Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1152–53 (1998) (explaining the differences between "grown order" and "made" systems).

defender agencies have already embraced.[259] Community-oriented defenders use their leverage as repeat players in the criminal courts to achieve collective benefits for clients and their communities.[260] These benefits are sometimes realized within the criminal courts themselves—for example, challenging widespread judicial practices that impact many clients—or the broader political process.[261]

Community-oriented defense could ease the tension between the Fourth Amendment's broad regulatory thrust and the individualistic bent of criminal cases. Despite the Supreme Court's having posited the criminal defendant as a class representative or private attorney general,[262] the incentives that individual defenders and defendants face in criminal courts often cut directly against playing that role.[263] Embracing a community-oriented ethos requires that defenders imagine their advocacy obligations beyond just obtaining favorable results in individual cases. They should identify and challenge systematic practices that harm their clients and the communities of which they are a part. What in particular this would entail will vary from one jurisdiction to another. Some possibilities follow.

Systematically tracking Fourth Amendment violations is a minimum requirement for community-oriented defenders. As described, substantial information flows into defender agencies regarding police search and seizure practices.[264] There will often be collective wisdom amongst defenders about how and when police tend to violate the Fourth Amendment. Such wisdom, however, will be unevenly distributed across the agency and the

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[259] *See* Robin Steinberg, *Heeding* Gideon's *Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 984 (2013) (listing characteristics of "community-oriented defense" and citing the Bronx Defenders as an example); Kim Taylor-Thomson, *Taking it to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 180–81 (2004) (describing a project by the Seattle Defenders Association).

[260] Taylor-Thomson, *supra* note 259, at 159–60.

[261] *See id.* at 160 (describing how these officers at times influence legislation).

[262] *See* Maltzer, *supra* note 11, at 277–78 (noting that Chief Justice Burger characterized criminal defendants who exclude evidence using the Fourth Amendment as "private attorneys general").

[263] *See, e.g.*, Taylor-Thompson, *supra* note 214, at 2428 (discussing defenders' attempts to approach cases as individual matters).

[264] *See* Section III.B.

data upon which it is based will be buried in closed case files. This makes it difficult—if not impossible—to marshal concrete evidence regarding a pattern of unconstitutional behavior. Recording and maintaining such data regarding Fourth Amendment violations could help solve these problems. This might involve no more than filling out fields in an office-wide database for all cases in which a Fourth Amendment violation allegedly occurred. The fields might include the time/date/location of the incident, investigating officers' names, client's name, criminal charges, a brief description of the violation, and so on.

A community-oriented defender need not be limited to recording and maintaining information from clients. Search and seizure practices may affect clients and non-clients alike. It is precisely those sorts of practices that deterrence-focused regulation should be most concerned with.[265] A community-oriented agency might solicit information from non-clients by, for example, fielding and recording their reports of police abuses. Collecting information from non-clients would contribute to a more comprehensive understanding of police practices in the jurisdiction. It would also help cultivate an image of the public defender as an advocate for the entire community. Having an advocate's ear, even if briefly, might in and of itself be therapeutic for aggrieved individuals.

Broad-based information regarding search and seizure practices might improve suppression outcomes in some individual cases. A demonstrable pattern of violations makes it more plausible that such a violation occurred in a particular case. For reasons described above though, we should expect that this would simply "improve the deals" offered to clients subject to such practices.[266] Passing up an attractive plea deal in an individual case in order to litigate a suppression motion for some greater public benefit raises thorny ethical dilemmas.

A community-oriented defender might rely on various non-litigation strategies to change police practices. Armed with concrete evidence of a pattern of unconstitutional behavior,

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[265] *See* Utah v. Strieff, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting) (describing the broad powers police officers would have to stop and detain any member of the community if the Fourth Amendment did not prohibit such conduct).

[266] *See supra* notes 199–208 and accompanying text (discussing the market for pleas).

defenders might directly appeal to the police department to reign in particular officers or institute department-wide policies. Alternatively, the agency might engage in legislative advocacy at the state and local levels. Indirect advocacy could also be a useful tool for effecting police reform. Media campaigns about police practices that routinely affect non-clients, for example, might raise public awareness that, over time, achieves political effects.[267]

In theory, defenders could pursue civil litigation. In practice though, this will be impractical for most agencies. The time and resources required for a civil case are often quite different from those required in a criminal case. The former would require litigating against individual officers or the police department and may entail litigating in federal court. While imaginable that a defender agency could, with additional public support, engage in civil litigation, such additional resources would likely be unavailing in most places. It is more readily imaginable that, with some modest procedural adaptations in criminal courts, defenders could litigate Fourth Amendment issues in a manner better calibrated to influencing future police behavior than suppression motions currently are.

B. COURTS

Procedural reforms in criminal courts might enable Fourth Amendment challenges that embody a private attorney general ethos and promote the criminal courts' regulatory efficacy. Permitting the aggregation of Fourth Amendment claims that relate to patterns of police abuse and relaxing evidentiary rules to permit the introduction of past police misconduct are examples. Such reforms would improve the flow of information regarding constitutional violations to judges, and help generate rulings that have more expressive force than episodic, one-off suppression orders do.

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[267] For example, the N.Y.P.D.'s aggressive stop and frisk practices ultimately came to an end as a result of popular protest and political action by the mayor. *See* Benjamin Mueller & J. David Goodman, *New York to Settle Suit on Policing in Public Housing*, N.Y. TIMES, Jan. 8, 2015, at A17.

Aggregation would create a mechanism for community-oriented defenders to challenge pattern violations of the Fourth Amendment. Because the goal would be to enable broad challenges of police practices rather than just achieving efficiency gains, "pattern" should be understood broadly. Judges are accustomed to consolidating civil and criminal cases that raise common questions of law and fact for efficiency purposes.[268] While moored in notions of joinder, the proposal here is both narrower and broader than traditional joinder. Criminal courts would only consolidate for the purposes of Fourth Amendment litigation, not on the merits. But the proposal here would not be limited to cases where there is a common question of law or a single factual transaction.

Fourth Amendment aggregation should be permitted where a broad range of factors suggests a pattern of unconstitutional conduct. Those factors might include officer or departmental division, geography, or victims' demographic profile. If police have engaged in a pattern of different Fourth Amendment violations over time against a particular target or group of targets, judges should also permit aggregation—for example, if the police regularly subject minority youth to suspicionless searches in particular neighborhoods. Similarly, if an officer or group of officers have engaged in a pattern of unconstitutional behavior, such claims may warrant aggregation. Consider the hypothetical officer who routinely conducts full-blown searches during *Terry* stops, misreports that individuals consented to search when they did not, and uses gratuitous force when effecting arrests. Because such an officer represents a particularly serious regulatory exigency, procedural rules should be designed to make it easier to identify and challenge such an officer's conduct.

Aggregation would also channel more information regarding police practices to criminal court judges and help contextualize any particular violation within a broader pattern of police conduct. This is in stark contrast to the status quo in which Fourth Amendment issues are contextualized by little more than the

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[268] The civil rule contemplates aggregation of "hearings," but the criminal rule does not. FED. R. CRIM. P. 8; FED. R. CIV. P. 42(a).

criminal case against a particular defendant. Evaluated in isolation, an officer's conduct in any particular case may not seem particularly egregious. Where the violation turns upon a contested fact, a judge may be inclined to credit the officer's version.[269] That willingness would likely diminish if a judge were presented with a record of comparable violations.

Another way of creating a fuller context for criminal court judges would be to permit defenders to introduce evidence of past Fourth Amendment violations. This would serve some of the same informational benefits as aggregation. Little is required in the way of procedural innovation here—just relaxing of evidentiary rules, which often occurs in suppression motions.[270] The difficulty would be in securing cooperation from defendants whose cases were no longer active. Other than their principled opposition to unlawful police practices (which should not be underestimated), prior defendants would have little material incentive to participate in a suppression motion in an unrelated case. Simply locating former defendants and securing their presence for a proceeding unrelated to them may be difficult.[271] And the problem of deterrence would remain: any order to suppress would still be a one-off order. Aggregation might help with this problem.

Aggregation would amplify the Fourth Amendment's deterrent effect on police by drawing and holding the spotlight upon challenged police practices. Such a proceeding is likely to be more drawn out than the typical suppression motion. It is also likely to require more in the way of police and civilian testimony. As a result, it is likely to draw more interest from both the police and the public. A judge in an aggregated proceeding is also likely to render a more elaborately reasoned and forceful opinion than she would in an individual case. To the extent that a judge decides against the police in such a proceeding, it will be more difficult for the police department or individual officers to overlook it.

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[269] *See supra* notes 184–85 and accompanying text.

[270] *See* Elizabeth Phillips Marsh, *Does Evidence Law Matter In Criminal Suppression Hearings?*, 25 LOY. L.A. L. REV. 987, 994, 999–1000 (1992) (citing examples of when the rules of evidence do not apply).

[271] *See* FEELEY, *supra* note 21, at 224 (noting the regularity with which defendants failed to appear in their own cases).

Aggregation would, in other words, generate more pressure for the police to operationalize Fourth Amendment rulings than a run-of-the-mill suppression order does.

The value of aggregation does not turn on the availability of a specific remedy. In some cases, just the fact of aggregation might succeed in getting the police department's and officers' attention—for example, where the Fourth Amendment violations were particularly egregious and had already drawn significant community or political attention.[272] An aggregated proceeding might also serve an important signaling function to other criminal court actors in subsequent cases. Returning to the hypothetical officer who regularly commits different kinds of Fourth Amendment violations, subsequent to an aggregated proceeding, all criminal court actors in the jurisdiction are likely to view her searches and arrests with greater scrutiny.

To the extent that suppression is the remedy that criminal courts typically provide for Fourth Amendment violations, the same should hold true in an aggregated proceeding. Doing so would provide defendants an incentive to serve as private attorney generals. Aggregation would be most effective if there were a procedural mechanism for preserving and re-opening old Fourth Amendment claims that arose in cases where there was a conviction. Such a mechanism would be helpful for two reasons. First, because criminal cases' timing is largely in the State's hands, Fourth Amendment issues must be litigated on a schedule not of defendants' making. This will work against aggregation because clusters of cases demonstrating a pattern of behavior will not often be pending simultaneously.

Second, a string of Fourth Amendment violations constituting a "pattern" may not manifest at a fixed temporal moment. Returning to the hypothetical, problem officer from above, it would likely take more than the life of a single criminal case for a defender agency to amass evidence of a pattern. Assuming that the officer is assigned to patrol, it would take time to generate

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[272] *See, e.g.*, John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, N.Y. TIMES, June 18, 2012, at A15 (explaining that the New York City mayor planned to amend the stop-and-frisk policy in response to the escalating protests from the community).

arrests and not all of them would be prosecuted.[273] Nor would it likely be true that each of those arrests involved a Fourth Amendment violation. It could take months' if not years' worth of cases before one could demonstrate a pattern. For those arrested by the officer and prosecuted in the interim, many of their cases will have settled by plea without any Fourth Amendment litigation.[274]

Permitting a defendant to re-open and litigate old Fourth Amendment claims would be novel. Provided that doing so is not foreclosed by law, courts may have latitude to create a provision for reopening cases under whatever authority they enjoy to craft local rules. And while this would be novel, it is not wholly without precedent. Most jurisdictions permit "conditional pleas" that allow defendants to challenge procedural deficiencies—like Fourth Amendment violations—but to plead guilty on the merits.[275] Such a rule might be expanded to permit defendants' un-litigated constitutional claims to be aggregated following conviction in a pattern challenge. Should the challenge be successful and result in a finding that critical evidence should have been excluded, the conviction should be reversed and remanded. Where the conviction is still supported by substantial evidence following a successful aggregated suppression motion, the absence of "prejudice" to the convicted defendant would warrant allowing the conviction to stand.[276]

The proposal here raises many practical questions and wholesale adoption is likely to be implausible in many if not most jurisdictions. But to the extent that state laws authorize exclusion in criminal proceedings and criminal courts have some latitude to

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[273] *See* BARLOW & BARLOW, *supra* note 174, at 14 (noting that the author made two arrests his first year as a deputy sheriff); CONLON, *supra* note 174, at 155 (explaining that on some "beats" a month or two could pass without making an arrest).

[274] *See* Turner, *supra* note 25 (noting that "over 90 percent of convictions are guilty pleas" in the United States).

[275] *See* Marjorie Whalen, *"A Pious Fraud": The Prohibition of Conditional Guilty Pleas in Rhode Island*, 17 ROGER WILLIAMS U. L. REV. 480, 487 (2012) (listing nine states that forbid conditional guilty pleas).

[276] *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682 (1985) (stating that a prosecutor's failure to disclose evidence is a constitutional violation only if it is reasonably probable that it would have yielded a different result); Chapman v. California, 386 U.S. 18, 22 (1967) (presenting constitutional violations reviewed for harmless error on appeal).

create procedural rules for themselves, motivated courts could experiment with aggregation schemes as appropriate for local circumstances. Of course, aggregated suppression does not exhaust the possibilities that might be available to local criminal courts to implement a private attorney general model of Fourth Amendment litigation.

State legislatures could authorize courts to provide all manner of redress for Fourth Amendment violations under state law cognates. The broader the range of remedies available, the more coercive leverage a judge would have to deter future violations. The power to enjoin would be uniquely consistent with the Fourth Amendment's regulatory mandate. Where a criminal court judge is unsatisfied that exclusion will have the desired deterrence effect, she might directly order that police desist from engaging in a particular practice. Damages awards, as past commentators have noted,[277] might also stand a better chance at getting the police's attention. But this is to tread already trodden ground. State legislatures have not been particularly quick to create broad avenues of redress for systemic police abuses. There is little reason to think that will change anytime soon. So, in the meantime, we do better to focus on what criminal courts might accomplish absent legislative action.

C. PROSECUTORS

While prosecutors have a role in improving the efficacy of Fourth Amendment regulation, they are unlikely to drive reform. Rather, their primary role would be to resist the impulse to subvert the kind of reforms suggested here. For example, prosecutors could require that defendants waive the right to aggregate any Fourth Amendment claim they might have as a condition of a plea bargain. Prosecutors could also dismiss aggregated cases that seemed likely to succeed. That would be particularly enervating if done in a case where obtaining

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[277] *See* Dripps, *supra* note 49, at 22–23 (discussing a combination of the exclusionary rule with damages in some type of hybrid model).

aggregation was particularly resource intensive.[278] One would hope that prosecutors' ethical scruples would prevent them from behaving in such a manner.[279] Where criminal court judges were inclined to permit aggregation and take police regulation seriously, that would likely go far in discouraging prosecutorial obstruction.

V. CONCLUSION

The tension between regulation and atomism is an enduring feature of modern Fourth Amendment jurisprudence. Individual criminal cases do not present an optimal vehicle for achieving exclusion's regulatory ends. The Court has amplified this problem by limiting standing to only those criminal defendants who have endured an actual Fourth Amendment injury. This has limited lower courts' ability to effectively regulate police search and seizure practices. As a practical matter, there is no immediate doctrinal, constitutional solution to this problem. That reality however, does not exhaust state and local criminal courts' potential to actualize a private attorney general model of exclusion and better regulate police practices.

In jurisdictions where the public defender embraces a community defender model, systematic record keeping of all possible Fourth Amendment violations reported by clients could be a significant step towards effectively regulating the police. Where local judges are receptive, there is the possibility that some criminal defendants could serve as class representatives or private attorneys general in the manner contemplated by the Fourth Amendment exclusionary rule. This could occur by virtue of wholly local changes in procedural and evidentiary rules and without the investment of substantial additional resources.

There are many places in the United States where there will simply be no political or regulatory will to enact the reforms proposed here. But in those jurisdictions where the will exists, the Supreme Court's conservatism need not be a barrier to effective

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[278] *See supra* note 271 and accompanying text (discussing the difficulty arising from getting individual defendants to their own trials).

[279] *See* Gold, *supra* note 213, at 1655 (noting that "existing ethical standards provide that prosecutors . . . should ensure that defendants are afforded fair process").

constitutional regulation of police search and seizure practices. Such jurisdictions could be a model for the rest of the country.