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## TERRY'S IMPOSSIBILITY

WILLIAM J. STUNTZ\*

Ron Allen and Ross Rosenberg have written a terrific article.<sup>1</sup> It is fascinating, thought-provoking, and all the other things we say about good scholarship. More than that, it is *right*. There is indeed a difference, and a huge one, between what Hayek called “grown” and “made” systems—between systems that evolve from the bottom up and systems ordered from the top down.<sup>2</sup> Law enforcement and the law that regulates it do indeed function best when seen, as they should be, as “grown” rather than “made.” And a great deal of legal theory does indeed treat policing and Fourth Amendment law as “made” systems, as if they were sets of pieces in a jigsaw puzzle box, and all one need do to get the perfect picture is arrange all the pieces just so. Allen and Rosenberg make these points effectively and engagingly, and I have little to add to their article.

What I wish to do instead is to recast Allen and Rosenberg’s argument, apply it to *Terry* doctrine (Allen and Rosenberg talk a good deal about Fourth Amendment doctrine in general, but say little about the law and practice of street stops, which is the chief focus of this symposium), and, I hope, extract a few lessons in the process. The central idea of the recasting and application goes as follows. As Allen and Rosenberg note, most legal theory suffers from a tendency to underestimate the magnitude and importance of error costs. That tendency is a particular problem when it comes to legal regulation of street-level policing, because that kind of legal regulation is especially prone to error. Even if one does not buy the terms of Allen and Rosenberg’s argument—and I do buy them—there is no getting around the central diffi-

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<sup>1</sup> 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 (1998).

<sup>2</sup> This is the central point of the article.

culty of *Terry* and the law it has spawned. Most of what we would like that law to accomplish is impossible; the necessary legal judgments cannot be made with even a decent degree of accuracy. When regulating street policing, we are living in a land of bad choices.

### I. BACKGROUND

It is best to begin by defining the subject a little more precisely. *Terry v. Ohio*<sup>3</sup> states a rule: A police officer may conduct a brief search of a suspect's outer clothing if the officer has reasonable grounds for suspecting that the suspect has a weapon.<sup>4</sup> *Terry* does not define "reasonable suspicion," but it is clearly something less than probable cause.

That rule has spawned a large and important body of law, with three other rules and two doctrinal open spaces playing key roles. The rules are these: (1) Police have "seized" someone if a reasonable person in the suspect's position would not feel free to leave.<sup>5</sup> (2) Police can briefly seize and detain suspects based on reasonable suspicion of past or future crime.<sup>6</sup> (3) The *Terry* standard applies to stops of vehicles as well as pedestrians—meaning both that vehicles can be stopped based on reasonable suspicion of crime<sup>7</sup> (or, of course, based on traffic offenses)<sup>8</sup> and that the police can conduct a cursory search of the vehicle based on reasonable suspicion of the presence of a weapon.<sup>9</sup>

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<sup>3</sup> 392 U.S. 1 (1968).

<sup>4</sup> See *id.* at 27.

<sup>5</sup> This rule (standard, really) is commonly associated with *United States v. Mendenhall*, 446 U.S. 544 (1980). For a more recent application, see *Florida v. Bostick*, 501 U.S. 429, 433-40 (1991).

<sup>6</sup> See *United States v. Hensley*, 469 U.S. 221 (1985) (holding that stops based on suspicion of prior felony are permissible). In *Terry*, the stop was based on suspicion that Terry and his colleagues were about to rob a store. See *Terry*, 392 U.S. at 5-7.

<sup>7</sup> See *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>8</sup> See, e.g., *Florida v. Jimeno*, 500 U.S. 248 (1991).

<sup>9</sup> See *Michigan v. Long*, 463 U.S. 1032, 1045-52 (1983). A fourth rule is as important as the other three if it turns out to be stable; it is still too soon to tell whether that will be so. In *Whren v. United States*, 517 U.S. 806 (1996), the Court appeared to hold that any crime could count for purposes of satisfying Fourth Amendment standards (in *Whren*, probable cause, but the logic would apply to *Terry*'s reasonable suspicion standard), even if the suspected "crime" was one the officer did not care about and the state never enforced. For an excellent discussion of *Whren* and its relationship to other recent cases involving traffic stops, see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271.

The two key open spaces involve the meaning of the first of those three rules—the definition of “seizure”—and the content of the reasonable suspicion standard, which appears in the other two. The truth is that ordinary people never feel free to terminate a conversation with a police officer; if the “seizure” standard means what it says, every street encounter between a police officer and a citizen is subject to *Terry*’s reasonable suspicion standard. That obviously is not the case.<sup>10</sup> But what the standard *does* mean is far from clear; the likelihood is that it means different things in different places, according to different judges’ intuitions about the proper level of police coercion in street encounters. Similarly, reasonable suspicion has never received a solid definition. (Perhaps it can’t.) Courts have a fair amount of room to maneuver; the standard seems to vary depending on the judges’ sense of how intrusive or coercive the relevant police behavior is, and how serious or threatening the suspected crime is. As this brief description suggests, *Terry* doctrine seems to represent a serious attempt to regulate street-level policing, to forbid bad police encounters while permitting good ones. Those unfamiliar with Fourth Amendment history might suppose that the law has always done this, but in fact *Terry* and the huge caselaw it has spawned are a new thing, a clear departure from the Fourth Amendment’s past. Before the late 1960s, policing on the street was basically unregulated. Effective remedies for police misconduct didn’t exist until the middle of this century, when large numbers of states began to adopt an across-the-board exclusionary rule, a norm that became universal with *Mapp v. Ohio*<sup>11</sup> in 1961. Even then, loitering and vagrancy laws were sufficiently broad to give the police authority to stop or arrest almost anyone, or at least anyone they were plausibly interested in stopping or arresting.<sup>12</sup> Probable cause was no obstacle, because it was so easily established. Not until the latter half of the

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<sup>10</sup> For a typical example of the gap between the nominal standard and the real one, see *Bostick*, 501 U.S. at 431.

<sup>11</sup> 367 U.S. 643 (1961). On the rush of state adoptions of the exclusionary rule, see *Elkins v. United States*, 364 U.S. 206, 224-32 (1960) (surveying state rules on the subject over a roughly fifty-year period).

<sup>12</sup> For the classic treatment of the use and abuse of old-style vagrancy and loitering law, see Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956); see also William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960) (emphasizing the connection between vagrancy law and the arrest power).

1960s, when those loitering and vagrancy laws started to fall to vagueness challenges,<sup>13</sup> did ordinary police-citizen encounters on the street become a serious Fourth Amendment issue.<sup>14</sup> *Terry* represents the first time the legal system really faced the question of how to rein in street policing, how to use legal tools to make the police behave reasonably on the ground.

Assessing how well the system has answered that question is a complicated task. A good place to begin is by understanding the difficulty of the job the system undertook when, thirty years ago, Earl Warren explained why Officer McFadden's frisk of Terry's jacket was reasonable.

## II. THE DIFFICULTY OF POLICING STREET POLICING

A great deal of legal theory aims at two goals: (1) Determining what is optimal behavior by one or another set of regulated actors; and (2) figuring out what set of legal rules will create the incentive for those regulated actors to behave optimally. Those are sensible goals if, but only if, the judgments they require are ones the relevant legal institutions—here, the courts—can feasibly make. But courts cannot determine, certainly not in any way reducible to a legal formula, what is optimal (or reasonable, or fair, the choice of terms does not matter) police behavior on the street. Even if they could do that, courts lack the tools to give police officers the right incentives.

### A. *Liability Rules*

Consider the enterprise of defining what is, and isn't, proper police behavior. The key to that enterprise is some rough comparative assessment of the costs and benefits of different police tactics. Right away, one must engage in some serious simplification in order even to begin thinking about the problem. Street-level policing has large, complicated, and poorly understood social effects. Aggressive police tactics may send the signal that

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<sup>13</sup> See, e.g., *Alegata v. Commonwealth*, 231 N.E. 2d 201 (Mass. 1967) (holding a statute defining vagrant as one who is idle, without visible means of support, and has lived without lawful employment, void for vagueness); *Seattle v. Drew*, 423 P.2d 522 (Wash. 1967) (holding a statute prohibiting loitering abroad unconstitutionally vague as it failed to provide ascertainable standards of guilt).

<sup>14</sup> See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 559-60 & nn.28-29 (1992), and sources cited therein.

the police are in control of the streets, and hence that the streets are safe for ordinary citizens. That signal could in turn have enormous social benefits; the perception that the streets are safe could lead to greater law-abiding street traffic, which in turn would lead to the *reality* of safer streets.<sup>15</sup> Or, such tactics may send the signal that young men of the wrong race or ethnicity are automatic targets for the police, and hence that the police are a hostile presence in the community. *That* signal could have large social costs: If the police and, through them, the criminal justice system, come to be seen as illegitimate, the norms of law-abiding behavior could unravel, with the streets becoming less safe, not more so.<sup>16</sup> More plausibly, such tactics may send a mix of these two signals, with the mix varying depending on local circumstances.

These kinds of benefits and costs can easily dwarf the effects of a given kind of police behavior on particular suspects. Indeed, one might well think that these diffuse social signals ought to be what street-level policing is *about*. But there is no workable mechanism by which a court can determine what mix of signals a given kind of policing in a given neighborhood sends. The difficulty is one that cuts to the heart of legal regulation in this area: The social effects of particular kinds of police behavior are likely to be heavily dependent on context—on the community's culture, on its past relationship to the local police, on the culture of the police force, on its racial makeup, on the character of local politics, . . . I could go on, but you get the point. Courts cannot measure or evaluate these things, and yet these things determine whether different types of street-level policing are good or bad—whether they impose large costs on the community, and whether, if they do, they nevertheless create substantial benefits. Moreover, even if courts could measure these political and social variables, the logical consequence would be a law of street-level policing that varied from neighborhood to neighborhood. That would send its own negative signals.

So let us simplify things. Assume, for the sake of argument,

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<sup>15</sup> This is the essence of the famous "broken windows" argument. See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. For a more detailed elaboration of the thesis, see GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* (1996).

<sup>16</sup> This may be what our society has experienced with drug enforcement over the past decade. See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. (forthcoming Nov. 1998).

that there is only one set of costs worth worrying about: The injuries suffered by individual victims of unreasonable police stops and frisks.

There are at least four distinct harms that those victims might suffer. The first is a harm to the victim's privacy—the injury suffered if some agent of the state rummages around in the victim's briefcase, or examines the contents of his jacket pockets. The second is what Sherry Colb nicely labels "targeting harm,"<sup>17</sup> the injury suffered by one who is singled out by the police and publicly treated like a criminal suspect. Third is the injury that flows from discrimination, the harm a black suspect feels when he believes he is treated the way he is treated because he is black. Fourth is the harm that flows from police violence, the physical injury and associated fear of physical injury that attends the improper police use of force. Of course, the list is really more complicated than that, because victims do not suffer one of these injuries to the exclusion of the others; rather, a mix of these various injuries occurs in every case of police misconduct on the street.

Even without that last complication, every one of these common harms creates an unsolvable problem for the legal system. The first two—harm to privacy and targeting harm—are both purely subjective and often absent. The contents of my briefcase and jacket pockets are neither personal nor interesting (well, interesting to me, but not to anyone else), and it doesn't bother me if a police officer cares to know what they are. I am far from the only person who feels this way, yet many others feel very differently. The same is true of Colb's targeting harm: For some, the experience of being stopped is a humiliating trauma; for others, it is no big deal. And though there are some objectively verifiable markers one might use (one could presume that police examination of diaries caused some significant injury), those markers do not solve most cases (most briefcases don't have diaries in them).

This is a disabling problem for any damages regime, for such regimes require measurement of the victim's injury, and these injuries cannot accurately be measured. (To my mind, this is one of the great underrated arguments for an exclusionary rule.)

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<sup>17</sup> Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1456 (1996).

But the problem goes beyond damages calculation; it exists even in a regime that uses the suppression of evidence as the primary remedy for street-level police illegality. Whatever remedy the system uses, it must be able to generate liability rules that tell the police what conduct they can and can't engage in. Those liability rules necessarily depend on the harms that different sorts of police conduct cause. It makes no sense for Fourth Amendment law to regulate police encounters of a kind that cause no harm (save the "harm" of catching criminals). If we do not know what harms are serious and what harms are not—or, more precisely, what behaviors cause serious harm and what behaviors don't—we are unlikely to do a good job of crafting rules designed to minimize serious harms. Were it otherwise, the contemporary law of workplace sexual harassment would be both clearer and more successful. It isn't, because it can't be. Law designed to protect the privacy interest in jacket pockets and the autonomy interest in not feeling targeted is basically no different.

The third injury, discrimination, suffers from a different problem. To be sure, the pain suffered by victims of police discrimination is subjective in the same way that harm to privacy and targeting harm are subjective. But with discrimination, we *do* have objective markers, facts that separate cases where the injury is likely to be present from cases where it isn't. We can compare how police treat white suspects and black ones, or we can find out the percentages of white and black drivers whose vehicles are stopped. Information of that sort is hard to come by, but not impossible, as the growing number of news stories about "driving while black" attest.<sup>18</sup> And information of that sort would allow courts to do a decent job of identifying cases in which suspects felt the harm that flows from discrimination.

Unfortunately, felt harm does not necessarily correlate with police misconduct. Blacks in a given jurisdiction may be stopped much more often than whites, and that disproportion may give rise to anger and upset among those blacks who are stopped, yet that jurisdiction's police may be behaving quite properly. Crime rates are not constant across population groups; if the racial breakdown of suspects tracks the racial breakdown of criminals, the police will stop many more people in some groups than in

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<sup>18</sup> See Sklansky, *supra* note 9, at 312-13 & nn.196-97, and sources cited therein.



others.<sup>19</sup> That much explains why even the most enlightened, community-sensitive police force will engage in tactics that have a racially disparate impact, and the disparities can be quite large. Once one acknowledges that point, it becomes nearly impossible for courts to distinguish racist police harassment from good, color-blind police work. Indeed, the difficulty is greater still. Historically, police racism often took the form of underenforcement—of ignoring black crime because so much of it was visited on black victims.<sup>20</sup> The police forces with the *smallest* racial disproportion in street stops actually may be the most racist police forces.<sup>21</sup> Given these cross-currents, reliably separating bad discrimination from good law enforcement (remember that good law enforcement is likely to produce racially disparate outcomes) is probably beyond courts' ability.

The centrality of drugs makes this problem still worse. Drug markets are not the same everywhere; one tends to find street markets in poor urban neighborhoods, and more discreet means of distribution in more upscale areas. In late twentieth-century America, poor urban neighborhoods are both disproportionately black and heavily segregated. It is much easier for the police to catch buyers and sellers in street markets than in the kind of drug markets that function more discreetly in more middle-class, and whiter, neighborhoods. Street markets also

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<sup>19</sup> For a good discussion of the large gap between black and white crime rates, see MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 49-80 (1995).

<sup>20</sup> We do not have good arrest data from the Jim Crow South, but we do have a fair amount of data about prison demographics, and the racial breakdown of prisoners probably correlates fairly well with the racial breakdown of arrestees. Consider this statistic: South Carolina in 1950 had a population that was nearly 40% black, see U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 36 (1953), and its black population was surely considerably poorer than its white population, meaning that the level of black crime was surely higher than the level of white crime. Yet more than two-thirds of the state's imprisoned felons were white. See FEDERAL BUREAU OF PRISONS, *NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS* 55 (1954). The obvious explanation is that South Carolina's law enforcement apparatus did not much care about crime confined to black neighborhoods, which is where most crimes committed by blacks would have taken place.

<sup>21</sup> Again, prison statistics from the early 1950s are suggestive. In the South as a whole (defined as the former Confederacy) in 1950, 25% of the population was black, and 44% of incarcerated felons were black. The high level of race discrimination in the South plainly kept that disproportion *down*—in the Northeast at the same time, 5% of the population but 29% of incarcerated felons were black. See sources cited *supra* note 20.

seem to cause more collateral social injury. Put these points together, and you have a recipe for racially disparate enforcement of the drug laws. Yet the racial disparity arises naturally, without any racial animus, and it is very hard to see how the legal system can combat it by the way it regulates street policing. (Even assuming it *should* be combated—a view I hold, but one that is quite contestable.)<sup>22</sup>

Finally, consider the fourth harm to victims of police misconduct on the street—physical injury, and the fear associated with it. Here, at last, there is no subjectivity. The law deals with physical harm all the time, and does so reasonably well, precisely because it is so often verifiable. Of course, fear is subjective, but it is entirely plausible to credit claims of emotional distress when they are coupled with personal injury—as, again, the law regularly does in other settings.

In those other settings, though, physical harm is strongly correlated with misbehavior by the one who caused it. Certainly that is so where the injurer intended to bring about the harm. In some settings—think of police interrogation—the same holds true for the police. But it is not true on the street. One of the sad truths about policing that makes legal regulation maddeningly difficult is that violence is sometimes—not “very rarely,” or “almost never,” but sometimes—necessary. Police officers must bring those they stop or arrest under control. They also must protect themselves. Sometimes they must use force in order to accomplish those tasks.

That truth gives rise to two questions: When, and how much? If the law is to do a good job regulating low-level police violence on the street, it must be able to provide answers. Thus far, it has not done so. The most glaring omission from *Terry* doctrine is any working standard governing when a police officer may strike a suspect. It is reasonable to wonder whether that absence is something more than an oversight, whether courts are simply incapable of taking adequate account of the many factors that go into sound decisionmaking about the use of force. Certainly the reported cases on excessive force do not allay this concern; one cannot read them without sensing how hard is the struggle to articulate a legal standard that has bite without

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<sup>22</sup> The argument in this paragraph is developed in more detail in Stuntz, *supra* note 16.

disabling police self-protection. Good officers and good departments behave differently than bad ones, but courts seem unable to craft a workable legal formula to capture the difference. That is why the law of excessive force is so evanescent, and so tolerant.

Any working system of legal regulation must be able to separate the cases where harm exists from the cases where it doesn't. At least where the harm is to privacy, or to the interest in avoiding being singled out, street-level Fourth Amendment law cannot do that. Any working rule structure must be able to distinguish between the conduct it wishes to tolerate and the conduct it wishes to stamp out—and to define the distinction, at least somewhat, so that actors can adjust their behavior accordingly. With respect to police discrimination on the street, that is beyond courts' capacity. The same is probably true for the kind of police violence that sometimes attends street stops.

### *B. Remedies*

The enterprise of making sensible law for street-level policing is, in short, very hard. Enforcing that law may be even harder. Consider the two primary tools courts use to rein in bad police behavior: exclusion of illegally seized evidence, and damages for the victim of the misbehavior, assessed either against the individual officer or against the government that employs him.

The problem with the exclusionary rule in this setting is simple. Even those who defend the rule must acknowledge its most basic limit: It cannot reach police behavior that is disconnected from evidence gathering or criminal prosecutions. If a police officer pats down my outer clothing in the hope of finding drugs or illegal weapons *that will lead to a criminal prosecution*, the presence of the exclusionary rule will cause the officer to think twice about whether he is obeying the law. If, on the other hand, the officer pats me down with no intention of prosecuting or even arresting me, but solely in order to seize the drugs or weapons I may have (or simply to harass me), the exclusionary rule will not matter to him. And if the officer is subduing a violent suspect, the exclusionary rule plays no part in the decision to use force (or how much force to use), since in this context the use of force produces no evidence, and hence provides nothing to suppress.

All of which leads to a critically important characteristic of street-level policing: A lot of it is not about gathering evidence or prosecuting offenders, but about keeping order, or raising the costs to gangs of congregating, or confiscating weapons to get them off the street. The law can threaten to suppress evidence if the police do any of those things badly or unfairly, but the threat can have no power.

This is not to say that the exclusionary rule doesn't matter. On the contrary, in some settings it matters very much: Sometimes police officers initiate street encounters hoping to make an arrest that will generate a prosecution. It is only to say that the exclusionary rule matters to some police-citizen encounters, but not to others.

Which in turn may make the exclusionary rule's effect on street-level policing perverse. The rule means that police-citizen encounters on the street are held to a higher standard when the encounters lead to criminal prosecution than when they don't. (When there is no criminal prosecution, the exclusionary rule is never triggered; thus, there is basically no legal standard at all.) Thus, the police have a greater incentive to behave properly when dealing with people who might be serious criminals, the sort of people the police would like to see locked up, than when dealing with more ordinary, less dangerous folk. *They* can be treated however the police wish. This seems at least strange, and at most backward. And the exclusionary rule may actually alter the way police distribute street stops. By raising the cost (more precisely, reducing the benefit) of stops that are likeliest to produce evidence of serious crime while leaving other stops unaffected, the exclusionary rule gives the police some incentive at the margin to change the mix of persons stopped. The rule makes it somewhat harder for the police to catch drug dealers and send them to prison. It leaves the ability to stop other people, people whom the police do not care about sending to prison, unregulated. One likely consequence is fewer stops in the first category, and more stops in the second.<sup>23</sup> That hardly sounds

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<sup>23</sup> I am assuming a constant level of police activity, so that less of one kind of encounter means more of others. That assumption is not clearly correct, though it is plausible. When a given tactic becomes more expensive because of legal chance, the likeliest police response is a combination of three things: (1) less frequent use of the now-more-expensive tactic, (2) more leisure (i.e., substituting nothing for the street encounters that used to happen but are now too expensive) and (3) more frequent use of some other tactic. There is no telling what the mix of (2) and (3) will be in any

like an advance for distributive justice.

The exclusionary rule has many virtues, and it may be, on balance, the least bad remedy available for Fourth Amendment violations.<sup>24</sup> But "least bad" is the right way to put it, especially in this setting. Suppressing evidence may work reasonably well when the law is regulating a class of behavior that is almost always aimed at producing arrests and convictions. Police rarely search houses save to find suspects whom they wish to arrest and see charged, to find evidence that will lead to conviction, or both. Consequently, the exclusionary rule may create fairly good incentives for the police to obey the law when they search people's homes. But when the class of behavior is more complex, when it sometimes is tied to criminal charges but sometimes isn't, the exclusionary rule generates problems. It leaves some behavior unregulated. The unregulated behavior tends to involve citizens who are not serious criminals, or not criminals at all—that is a large part of why the police do not wish to see them arrested and prosecuted. And the rule may actually encourage the police to engage in *more* of those unregulated encounters, because it makes those encounters relatively cheaper.

Perhaps, then, we need to shift remedies. If street-level policing is not primarily about catching and prosecuting offenders, and if the exclusionary rule works well only for police activities

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particular case. Thus, it is possible that raising the cost of some stops will simply reduce the incidence of those stops and leave the incidence of others unchanged. But the police have some incentives to engage in the enterprise of street policing, and those incentives presumably continue to operate when the price of some tactics goes up. It seems reasonable to suppose, then, that some substituting goes on—that when some police-citizen encounters become more expensive, the police engage in others.

That does not mean that the exclusionary rule prompts the police to leave suspected drug dealers alone and instead target innocents. I know of no reason to believe police officers behave that way. It does not mean that the exclusionary rule prompts the police, at the margin, to ignore the prospect of arrest and conviction, and seek instead to pursue other goals—get drugs and guns off the street, maintain order, and so on. Pursuit of those other goals, in the absence of any concern with justifying arrests or facilitating convictions, means more stops of innocent citizens, both because the police are less likely to be concerned with satisfying reasonable suspicion or probable cause standards when they will not be held to those standards by a court, and because the goals themselves do not require that the police stop only criminals.

<sup>24</sup> This is not the place to rehearse the exclusionary rule debate. I have elsewhere tried to examine the basic arguments on both sides, arguing that the issue is a closer one than the partisans on either side admit. See William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997).

that *are* primarily about catching and prosecuting offenders, then the law should find other remedial tools, other means of getting the police to take Fourth Amendment standards on the street seriously.

The obvious alternative is some form of damages or fines. Make the police officer pay when he violates the law, or at least make his employer pay. That approach has an obvious virtue: It does not bestow the largest benefits on the worst actors, as does the exclusionary rule. It has a second, less obvious virtue: It does not skew police incentives when dealing with a universe that includes both criminals and non-criminals. Given these advantages (and there are others), it is hardly surprising that the possibility of broader damages liability has long been a common argument for doing away with the exclusionary rule.

But damages have vices too, including one that has not received nearly enough attention in the literature on this subject. Consider who pays when an officer is held liable for an illegal search or seizure. Nominally, the liability is the officer's, but in practice it is his employer's; indemnification is very much the norm in these cases.<sup>25</sup> Most arguments for expanded damages liability would carry this tendency further, and impose liability on the appropriate government entity directly. The theory is simple and attractive. General Motors must pay for the torts its employees commit while on the job; that makes General Motors internalize the cost of its employees' misbehavior, which in turn pushes General Motors to do a better job of hiring and supervising its employees. The same will be true of police departments and the cities that pay for them.

But cities are not like General Motors, and paying for policing is not like making cars. Businesses sell products and services to people who benefit from those products and services, and the beneficiaries pay. Businesses that supply *private* policing—the biggest growth industry in the world of law enforcement—are like that. City police forces are not. They tend to devote their attention not to where the paying customers are, but to where the street crime is. Street crime tends to be concentrated in poor neighborhoods, meaning that both criminals and victims tend to inhabit those neighborhoods (street crime is overwhelm-

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<sup>25</sup> See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50-51 & n.16 (1998).

ingly local). So that is where police are concentrated, where the greatest number of police man-hours are spent.

Poor neighborhoods thus receive a disproportionate share of police protection—disproportionate relative to their share of the population, though not relative to their share of serious crime. But that police protection is paid for out of general tax revenues, and the taxes come primarily from *other* neighborhoods, where property values and sales receipts are higher. (The large majority of police work for local governments, not state or national ones.) Policing in most American cities is thus redistributive: Its beneficiaries are poorer than its payors.

This fact has very large implications for the law. Broad damages liability for police misconduct on the street would raise the cost of providing police services in poor neighborhoods; it would raise the risk that any given nonconsensual police-citizen encounter would lead to a payout from the city treasury. The added cost will not be paid by the residents of those neighborhoods; it will be paid by people in other, wealthier, less crime-ridden places. When the taxes rise high enough, those people can always move out of the jurisdiction. Wise local governments are loath to push that particular envelope. The obvious alternative is to scale back the level of policing those governments provide to poor neighborhoods, to keep the cost of policing down.

So broadening damages liability makes policing more expensive, and when anything becomes more expensive the natural tendency is to have less of it. The tendency is likely to be greater for a service that helps some people but is paid for by others. It is likely to be still greater if the people who pay have an easy exit from the system, if they can keep their jobs, move to the suburbs, and thereby avoid paying to keep other people's streets safe.

The conclusion is fairly depressing. The exclusionary rule cannot reach a great deal of street-level police conduct, and it creates some incentive for the police to shift more attention toward the category it cannot reach. That means somewhat less police searching of serious offenders, and somewhat more police harassment of innocents. Damages, meanwhile, make street-level policing more expensive; the likely result is less policing, at least in those neighborhoods that cannot foot the bill themselves. Both results are perverse.

## III. CONCLUSION

Though the preceding argument is necessarily sketchy, it should be clear enough by now why legal regulation in this area is so hard. Courts cannot know the things they need to know in order to do a good job of defining liability rules. Even if they could, the remedies at courts' disposal cause as many problems as they solve.

It does not follow that *Terry* doctrine is a complete failure, nor that courts should simply abandon the field and leave street policing to the police. Indeed, *Terry* may have had more good consequences than bad, though it surely has had some bad ones. And one can grant everything I have said and still conclude that courts have a significant part to play in keeping street policing in line.

The part is, however, a modest one. If reasonableness means here what it means in, say, tort theory—if the law's job is to define and enforce norms of proper or efficient behavior—the law is destined to fail. That means *Terry's* ambition, or at least the ambition most law professors have for *Terry*, is bound to fail. For that ambition is nothing less than to use the courts to balance the competing interests at stake in street policing, to keep "good" policing legal and make "bad" policing illegal. It is an impossible target. Unsurprisingly, the law has missed it.

One could easily have a different target, and a great many *Terry* cases do suggest a different target. Indeed, *Terry* itself does so: Portions of Warren's opinion are famously attentive to the limits of judicial power.<sup>26</sup> The law might seek not to separate good police-citizen encounters from bad ones, but to separate egregious encounters from the rest. On this reading of reasonableness, "reasonable" means something closer to "plausible" than to "right." That is a target courts can probably hit. Judges cannot feasibly define and enforce standards of good police behavior on the street. But judges probably can punish the worst police behavior on the street. That enterprise is, as Allen and Rosenberg's argument suggests, a good deal less satisfying to theorists, and to some judges, than the more ambitious enterprise of shaping the basic norms of street policing. But the less satisfying enterprise is likely to be productive; the more ambi-

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<sup>26</sup> See *Terry v. Ohio*, 392 U.S. 1, 13-15 (1968) (emphasizing the exclusionary rule's limited reach).



tious one is not.

That more ambitious enterprise can and should go forward; it should just go forward outside the court system. Policing strategies are a huge political issue these days, as other cities try to replicate New York's success at bringing street crime down. (It is widely, though not necessarily correctly, assumed that New York's crime drop has a great deal to do with New York's policing strategies.)<sup>27</sup> The number and importance of privately paid police is exploding, a development that will surely shape the allocation and funding of *public* police services in coming years. City governments and police forces themselves are experimenting with citizen review boards and other sorts of administrative mechanisms for identifying and sanctioning police misbehavior, a development Debra Livingston rightly emphasizes in her work on the regulation of policing.<sup>28</sup> These are the forces—local politics, market forces, administrative innovation—that are likely to play the largest roles in shaping street-level policing in the near future. To those whose attention is focused on courts, that sounds like bad news, but the opposite is true. Courts are much less flexible, less attuned to cultural and political forces, than politicians or markets. And courts are less good at experimenting than local administrative bodies; among other things, *stare decisis* makes it hard to abandon failed experiments. Finally, all these non-judicial forces have a virtue that courts do not: None of them is prone to an excess of theory.

In this setting, that *is* a virtue. If Allen and Rosenberg's thesis is right anywhere in criminal procedure, it is right about *Terry* doctrine. The temptation of people in my business, and probably of people in the business of judging as well, is to think of ways the law can fix things, ways it can better protect important interests, or better fine-tune police officers' incentives to do good things and avoid doing bad ones. In this setting, we can go forward with that enterprise only by isolating one or two variables and pretending the rest don't exist. Suppose privacy protection is the sole aim of *Terry* doctrine—or is it preventing discrimination? Suppose the police are always motivated by a

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<sup>27</sup> For a good discussion of the factors that might have contributed to New York's crime drop, see Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1998).

<sup>28</sup> See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

desire to find evidence that can be used in criminal prosecution—or are they always indifferent to evidence gathering? If we start by acknowledging even a large fraction of the forces at work in street policing—and, equally important, a large fraction of the limits on judging—the enterprise must quickly change. It turns out that in *Terry's* sphere, there is much greater potential for the law, for courts, to make things worse than to make things better. Perhaps *that* should be the focus of legal theory. Maybe, like physicians, we ought to begin with the one goal we have a good prospect of reaching: First, do no harm.

