

3-1-2017

Pricing the Fourth Amendment

Miriam H. Baer

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#), and the [Fourth Amendment Commons](#)

Repository Citation

Miriam H. Baer, *Pricing the Fourth Amendment*, 58 Wm. & Mary L. Rev. 1103 (2017),
<https://scholarship.law.wm.edu/wmlr/vol58/iss4/2>

Copyright c 2017 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

William & Mary Law Review

VOLUME 58

No. 4, 2017

PRICING THE FOURTH AMENDMENT

MIRIAM H. BAER*

ABSTRACT

Critics have long decried the Fourth Amendment's lack of an adequate remedy to secure its compliance. Neither the exclusionary rule nor the threat of civil liability deters police misconduct, leaving scholars to cast about for alternative measures. The emphasis on penalties, however, overlooks a different problem: detection. Because of policing's fast-paced nature, even so-called "flagrant" Fourth

* Professor of Law, Brooklyn Law School; J.D. 1996, Harvard Law School; A.B. 1993, Princeton University; Assistant United States Attorney, Southern District of New York 1999-2004. For beneficial conversations and feedback, many thanks to Jennifer Arlen, Rachel Barkow, Jeff Bellin, Stephanos Bibas, Rick Bierschbach, Josh Blank, Barry Friedman, Brian Galle, Rachel Harmon, Orin Kerr, Adam Kolber, Kay Levine, Jonathan Masur, John Rappaport, Daphna Renan, Dan Richman, Nelson Tebbe, and Jenia Iontcheva Turner, as well as participants in the American Law and Economics Association's 2016 Annual Meeting, the Hoffinger Colloquium at NYU School of Law, the Criminal Justice Ethics Schmooze at Fordham Law School, the Rationing Criminal Justice panel at the Law and Society Association's Annual Meeting, and the Brooklyn Law School Summer Workshop. Special thanks to James Jacobs and NYU School of Law's Center for Research in Crime and Justice, who hosted me as a fellow from 2014-2015, and to Dean Nicholas Allard and Brooklyn Law School, whose summer research stipend supported the writing of this project.

Amendment violations trigger insufficient liability due to low probabilities of detection.

This Article addresses this problem by drawing on the Pigouvian tax literature. The Pigouvian tax—sometimes referred to as a “corrective tax”—is a pricing instrument imposed by regulators in an amount equal to the expected harm manufacturers or individuals impose on others. Like strict liability, the tax forces an actor to internalize the costs of her activity.

How well might a Pigouvian tax scheme curtail Fourth Amendment violations—particularly intentional ones? How much better off would society be, if, in addition to the remedial systems already in place, it devised an additional system, informed by the vast literature on corrective taxes and pricing?

This Article seeks to answer these questions by imagining a scheme that charges local police departments an annual fee reflecting (a) their annual volume of search activity; (b) the risk that such activity includes and conceals purposeful misconduct; and (c) the harm arising out of such misconduct. The Article further analyzes the various challenges likely to arise in both the design and implementation of such a scheme. A pricing approach is no panacea for all that ails the Fourth Amendment, but it is a potent tool that policymakers would be foolish to ignore.

TABLE OF CONTENTS

INTRODUCTION	1106
I. THE FOURTH AMENDMENT'S DETECTION PROBLEM.	1110
<i>A. Standard Criticisms: Too Narrow, Too Weak</i>	1111
<i>B. The Less Discussed Problem: Detection</i>	1115
<i>C. Detection's Implications</i>	1120
II. THE TURN TO PRICING	1124
<i>A. Taxation's Advantages</i>	1125
1. <i>Information</i>	1127
2. <i>Timing</i>	1128
3. <i>Detection</i>	1130
<i>B. Taxation's Disadvantages</i>	1130
1. <i>Politics</i>	1131
2. <i>Variance</i>	1131
3. <i>Enforcement</i>	1132
<i>C. A Pigouvian Fourth Amendment?</i>	1133
III. PRICING THE FOURTH AMENDMENT: THE PROPOSAL	1137
<i>A. The Proposal</i>	1137
<i>B. Design Challenge I: Scope</i>	1141
1. <i>Type of Violation and Culpability</i>	1142
2. <i>Policing Activities</i>	1143
3. <i>Law Enforcement Agencies and Law Enforcement</i> <i>Officials</i>	1144
<i>C. Design Challenge II: Specialization</i>	1146
<i>D. The Scheme's Benefits</i>	1150
IV. PRICING THE FOURTH AMENDMENT: CHALLENGES	1153
<i>A. Authority to Price</i>	1154
1. <i>The Remedial Rule</i>	1154
2. <i>The Priority Rule</i>	1157
<i>B. Enforcement</i>	1160
<i>C. Indifference</i>	1161
<i>D. Distributive Concerns</i>	1163
<i>E. Expressive Effects</i>	1165
CONCLUSION	1168

INTRODUCTION

The Fourth Amendment promotes a venerable array of rights,¹ but the remedies that purport to protect them leave much to be desired.² The exclusionary rule applies to too little police misconduct, and even then, only to that which occurs within the context of a criminal case.³ For constitutional tort claims arising under 42 U.S.C. § 1983, qualified immunity doctrines shield individual police officers from liability.⁴ Parsimonious theories of group liability render municipalities and police departments insufficiently unaccountable,⁵ and citywide indemnification programs ensure that individual police officers rarely, if ever, personally pay for their misconduct.⁶

Throughout the past decade, partially in response to tragedies involving fatal and excessive uses of force,⁷ policing reform has

1. The Fourth Amendment States,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. See, e.g., Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 633 (2011) (examining the exclusionary rule's perverse effects); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 822 (2013) (criticizing the exclusionary rule's "lack of analytical rigor"); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365 (concluding that the exclusionary rule "is significantly flawed as a deterrent device").

3. See *infra* Part I.A.

4. See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250 (2013) (critiquing the "existing law of qualified immunity" as "complicated, unstable, and overprotective of government officers").

5. See, e.g., Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1506 (1999); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1067 (2010) (finding that even successful lawsuits often fail to alter decision-making within police departments).

6. See generally Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 937 (2014) (concluding that officers across the country are "virtually always indemnified").

7. See, e.g., Peter Hermann & Lynh Bui, *Man Died of Spinal Injury After Being Arrested by Baltimore Police*, WASH. POST (Apr. 20, 2015), https://www.washingtonpost.com/local/crime/man-died-of-spinal-injury-after-being-arrested-by-baltimore-police/2015/04/20/93014bba-e76f-11e4-9a6a-c1ab95a0600b_story.html [https://perma.cc/VPM6-LXRT]; Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds*,

gathered increasing support.⁸ Change, most everyone seems to agree, is needed, as demonstrated by President Obama's much heralded assembly of his Task Force on 21st Century Policing.⁹ Scholars have argued for a bolder and more effective exclusionary rule;¹⁰ urged courts to reinvigorate the Fourth Amendment's warrant requirement;¹¹ and advocated the adoption of technological,¹² statutory,¹³ and administrative tools¹⁴ to more effectively regulate

WASH. POST (Nov. 26, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/> [<https://perma.cc/W66G-S692>]; Abby Ohlheiser et al., *N.Y. Grand Jury Declines to Indict Officer in Death of Eric Garner, Igniting Protests*, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/politics/2014/12/03/8dc55084-7b2b-11e4-84d4-7c896b90abdc_story.html [<https://perma.cc/C2P2-XUZJ>].

8. See, e.g., Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. (forthcoming 2017), <https://papers.ssrn.com/abstract=2754759> [<https://perma.cc/BR22-YLJK>].

9. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/QYD3-4JT2>]. Concededly, the 2016 election of Donald Trump to the presidency may well curtail the federal government's participation in nationwide police reform. Nevertheless, politicians and judges across state and federal jurisdictions have strong incentives to erect reforms, particularly where consent decrees and similar agreements are already in place. See, e.g., John Byrne, *Emanuel Says Police Reforms to Continue Under Trump*, CHI. TRIB. (Nov. 22, 2016, 6:24 PM), <http://www.chicagotribune.com/news/local/politics/ct-rahm-trump-met-20161122-story.html> [<https://perma.cc/63NY-U4J8>]; Steve Miletich, *After 4 Years of Seattle Police Reform, Could Trump Let It All Die?*, SEATTLE TIMES (Nov. 21, 2016, 6:23 AM), <http://www.seattletimes.com/seattle-news/politics/seattle-police-reform-locked-down-or-could-trump-let-it-all-die/> [<https://perma.cc/7B3P-5B2Y>].

10. See, e.g., Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1890 (2014) (reorienting the exclusionary rule as a due process right rather than a deterrence remedy).

11. See generally Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1613 (2012); David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 433 (2016).

12. MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 10 (2014), <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> [<https://perma.cc/CNV2-SLUT>].

13. See Samuel Estreicher & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949, 951-53 (2010) (setting forth a statute that would eliminate the exclusionary rule for police departments that adopt internal compliance measures); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 383-84 (2011) (proposing statutory limitations on federal spending for police departments that fail to implement adequate internal controls).

14. See, e.g., Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 245 (2015) (arguing for state

the police.¹⁵ Although the mechanisms differ, the goals converge on transforming the American police force into a more professionalized, internally reflective, and community-based problem-solving institution.¹⁶

This Article proposes a different, albeit complementary, approach: a corrective tax designed to “price” Fourth Amendment activity in order to curtail intentional Fourth Amendment violations.¹⁷ How much better off would society be, if, in addition to the remedial systems already in place, it devised an additional system informed by the vast literature on corrective taxes and pricing? Moreover, how well might this regime complement other reforms?

Imagine some federal agency tabulated and charged local police departments an annual fee reflecting (a) the *volume* of search activity undertaken by police officers in a given year; (b) the *risks* that this activity included purposeful violations of the Fourth Amendment; and (c) the *harm* created by these violations.¹⁸ Would such a regime internalize Fourth Amendment violations more effectively than our current highly decentralized, litigation-based system?¹⁹ Would state and local governments alter their policing

investigations of local lethal force cases); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3237 (2014) (arguing for enhanced oversight by federal government via 42 U.S.C. § 14141).

15. See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 *MICH. L. REV.* 761, 762 (2012).

16. This effort is not new. For a discussion of the policing styles and philosophies that have emerged over the past half century, see Nick Tilley, *Modern Approaches to Policing: Community, Problem-Oriented and Intelligence-Led*, in *HANDBOOK OF POLICING* 373, 375, 379, 383 (Tim Newburn ed., 2d ed. 2008); see also Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 *ANN. REV. L. & SOC. SCI.* 335, 339 (2014) (tracing emergence and convergence of hot-spot policing and broken-windows approaches); Christopher Stone & Jeremy Travis, *Toward a New Professionalism in Policing*, 13 *J. INST. JUST. & INT'L STUD.* 11, 14 (2013) (describing community and problem-solving oriented policing).

17. This proposal's primary target—intentional constitutional violations—admittedly is only a subset of the harms caused by bad policing. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 *N.Y.U. L. REV.* 870, 872 (2015) (criticizing federal enforcement programs that fail to take into account the costs of “interference with individual interests in autonomy, privacy, bodily integrity, and property” that even constitutional searches create).

18. Thus, the scheme would set taxes to equal the expected harm associated with an unconstitutional search or seizure. See Louis Kaplow & Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 *AM. L. & ECON. REV.* 1, 7 (2002) (arguing that when actual harm is unknown, corrective taxes “should equal the *expected* harm”).

19. In economics, an externality is a harm that one party's activity imposes on another.

priorities, redesigning them in a way to de-emphasize potentially unconstitutional searches? And finally, would a pricing regime render policing's costs more transparent and amenable to democratic deliberation?

The argument for a Fourth Amendment pricing regime rests on two propositions. First, it is far easier to observe a police officer's search or seizure of "persons, houses, papers, and effects,"²⁰ than it is to prove that the search or seizure violated the Fourth Amendment.²¹ Notwithstanding the emergence of dashboard and body cameras, policing remains a high-paced, decentralized activity wherein misconduct remains difficult to detect.²² Accordingly, so long as officers avoid notable misbehavior or excessive violence, many illegal searches and seizures will remain undetected.²³

The second proposition is that different search activities pose varying levels of risk. The stop-and-frisk presents a different set of risks from the search incident to arrest, which in turn differs greatly from search supported by search warrants, and so forth.²⁴ One of the aims of this Article is to consider how well a pricing scheme can leverage these distinctions and move police officers from the riskiest category of policing towards less risky behavior.

After delineating the program's design and implementation challenges, this Article concludes with a mixed but positive outlook. Pricing is no panacea, but it improves our current remedial system by layering an ex ante regulatory program onto the ex post litigation

See ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* 183 (Transaction Publishers 2002) (1952) (explaining problems that arise out of positive and negative externalities). This Article conceptualizes an illegal Fourth Amendment search as an externality imposed on citizens by the police. For similar approaches, see Aziz Z. Huq, *Agency Slack and the Design of Criminal Justice Institutions*, in *THE ROUTLEDGE HANDBOOK OF CRIMINAL JUSTICE ETHICS* 238, 240, (Jonathan Jacobs & Jonathan Jackson eds., 2017) (analyzing police misconduct through the lenses of institutional design and principal-agent theory); Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 871 (2015) (proposing a forfeiture-related rule that "requir[es] police departments to internalize the externalities they impose on non-consenting parties").

20. U.S. CONST. amend. IV.

21. See *infra* Part I.B.

22. Ironically, these are the very characteristics that have inspired the Supreme Court's deference. See Garrett & Stoughton, *supra* note 8 (manuscript at 1-3) (citing and critiquing the Supreme Court's deference rhetoric).

23. See Brown, *supra* note 5, at 1510; see also Slobogin, *supra* note 2, at 374-75.

24. See Garrett & Stoughton, *supra* note 8 (manuscript at 4).

remedies most scholars deem insufficient.²⁵ In addition, it centralizes and improves data collection,²⁶ while leaving ample room for local experimentation.²⁷ It does not constrain specific police practices. Nor does it dictate a particular policing philosophy or style. Rather, it compels police chiefs and politicians to recognize the costs associated with their policies and practices.²⁸

The discussion below proceeds as follows: Part I introduces the Fourth Amendment's detection problem and its implications for deterrence. Part II explores the Pigouvian tax literature and considers the tax's conceptual drawbacks and benefits as applied to Fourth Amendment violations.²⁹ Part III fleshes out a proposal for a Fourth Amendment pricing regime and, after analyzing several design choices, revisits the discussion of benefits with more specificity. Part IV anticipates likely objections and suggests several solutions. The Article then concludes.

I. THE FOURTH AMENDMENT'S DETECTION PROBLEM

Over the past half century, commentators have steadfastly documented shortfalls in the protection of Fourth Amendment rights.³⁰

25. This Article thus draws on some of the lessons set forth in previous discussions comparing the exclusionary rule to tort liability. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786 (1994) (arguing that the Framers intended a civil damages regime); L. Timothy Perrin et al., *An Invitation to Dialogue: Exploring the Pepperdine Proposal to Move Beyond the Exclusionary Rule*, 26 PEPP. L. REV. 789, 804 (1999); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49-50 (analyzing the relative merits of the exclusionary rule and tort liability); Slobogin, *supra* note 2, at 390-91 (supporting "judicially administered damages regime" in place of the exclusionary rule).

26. *See* Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1122 (2013).

27. For more on experimentalism and tailored government solutions, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (1998).

28. The proposal thus incorporates Professor Tracey Meares's insight that Fourth Amendment violations stem from "programmatic" choices and not some aggregation of individual "incidents." Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162 (2015).

29. *See* PIGOU, *supra* note 19, at 192-95 (describing "bounties and taxes" that the state may use to correct "divergences" in the net social and private products of any unit of investment).

30. *See, e.g.*, Garrett & Staughton, *supra* note 8 (manuscript at 1-4). For a notable partial defense of Fourth Amendment doctrine on economic grounds, see generally Orin S. Kerr, *An*

The two pillars of Fourth Amendment remedial law receive the bulk of the criticism, with the exclusionary rule too narrow and § 1983 liability too weak.³¹ Alternate remedial measures, be they internal discipline or criminal prosecutions, are spotty and unreliable; no serious scholar contends they adequately deter Fourth Amendment-related misconduct.³² Accordingly, one routinely encounters a familiar argument for interpretive doctrinal relief.³³ If the Supreme Court would reverse course and make the exclusionary rule and civil liability stronger with more reliable penalties, police misconduct would (at last) recede.

This Part aims to correct the misimpression that the Fourth Amendment's sole problem is a weak penalty. After surveying conventional critiques,³⁴ this Part will address a much less discussed problem, the difficulty in detecting Fourth Amendment violations,³⁵ and will explain why low detection rates are uniquely problematic for securing Fourth Amendment compliance.³⁶

A. *Standard Criticisms: Too Narrow, Too Weak*

The exclusionary rule is narrow in several senses of the word: it applies in only some courtroom settings, protects only some victims,

Economic Understanding of Search and Seizure Law, 164 U. PA. L. REV. 591 (2016).

31. See, e.g., Rushin, *supra* note 14, at 3199-200; Slobogin, *supra* note 2, at 365, 384-86.

32. Alternative measures include internal police discipline, citizen review boards, and criminal liability for violations of 18 U.S.C. § 242 (2012). For assessments of these remedies, see, for example, Debra Livingston, Commentary, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 654-57 (2004) (cataloging weaknesses in the citizen review process); Rushin, *supra* note 14, at 3202-04 (“[T]he federal government lack[s] the resources to pursue § 242 prosecutions regularly.”). On the rarity of § 242 criminal prosecutions for Fourth Amendment violations, see Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001-2006*, 34 CRIM. JUST. REV. 196, 201, 202 tbl.1 (2009) (conducting a five-year empirical analysis of § 242 prosecutions that yielded 120 cases involving police personnel).

33. For an illustrative example, see generally Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1208-09 (2012) (criticizing the Roberts Court for increasingly confining the exclusionary rule to instances of culpable or deliberate police misconduct); Re, *supra* note 10, at 1890 (advocating a broader “due process” interpretation of the exclusionary rule by using the Fourth Amendment and the Due Process Clauses together).

34. See *infra* Part I.A.

35. See *infra* Part I.B.

36. See *infra* Part I.C.

and punishes only some violations.³⁷ The rule applies at trial only to evidence submitted during the prosecution's case in chief.³⁸ It does not protect victims illegally searched but subsequently uncharged.³⁹ Nor does it apply in immigration proceedings⁴⁰ or at sentencing.⁴¹ The rule excludes only that evidence that is not too "attenuated" from the violation that led to its discovery.⁴² And it rescues only those defendants whose personal Fourth Amendment rights have been violated, and not those who have suffered no personal injury.⁴³

Most importantly, in a number of instances, the rule leaves untouched contraband obtained as a result of "reasonable" mistake or simple negligence.⁴⁴ Under such circumstances, prosecutors can

37. See Rushin, *supra* note 14, at 3199-200. The Fourth Amendment's shortcomings are oft rehearsed. For a recent recitation of its many doctrinal drawbacks, see *id.* at 3195-204 (arguing that the exclusionary rule and civil liability have proven inadequate).

38. See, e.g., *Harris v. New York*, 401 U.S. 222, 225 (1971); *Walder v. United States*, 347 U.S. 62, 65 (1954).

39. Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1323 (2000); Slobogin, *supra* note 2, at 374-75.

40. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984).

41. See *United States v. Sanders*, 743 F.3d 471, 475 (7th Cir. 2014) (rejecting "egregious violation" exception to rule that the exclusionary rule does not apply at sentencing); *United States v. Acosta*, 303 F.3d 78, 84 (1st Cir. 2002) ("[T]en other circuits have ruled that in most circumstances, the Fourth Amendment exclusionary rule does not bar the introduction of suppressed evidence during sentencing proceedings.").

42. *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016); *Hudson v. Michigan*, 547 U.S. 586, 592-93 (2006); *Wong Sun v. United States*, 371 U.S. 471, 487, 491 (1963).

43. See *Rakas v. Illinois*, 439 U.S. 128, 134, 138 (1978) (affirming "personal" nature of Fourth Amendment rights); *Alderman v. United States*, 394 U.S. 165, 174 (1969) (holding that Fourth Amendment rights "may not be vicariously asserted").

44. "[W]hen the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful or when their conduct involves only simple, 'isolated' negligence the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" *Davis v. United States*, 564 U.S. 229, 238 (2011) (first quoting *United States v. Leon*, 468 U.S. 897, 909 (1984); then quoting *Herring v. United States*, 555 U.S. 135, 137 (2009); and then quoting *Leon*, 468 U.S. at 919, 908 n.6). Collectively, these cases comprise the Court's Fourth Amendment fault doctrine. See generally Kinports, *supra* note 2, at 830. After *Herring* was first decided, some scholars wondered whether the Fourth Amendment's fault doctrine would be limited to instances in which someone other than the arresting police officer made a negligent error. See, e.g., Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 463-65 (2009) (setting forth broader and narrower interpretations of *Herring*); Kay L. Levine et al., *Evidence Laundering in a Post-Herring World*, 106 J. CRIM. L. & CRIMINOLOGY (forthcoming 2017) (manuscript at 10) (analyzing *Herring's* attenuation doctrine as one that separates the mistake from the "primary investigating officer").

The Supreme Court's latest foray in this area, however, *Strieff*, 136 S. Ct. at 2063, rejects

introduce evidence at trial obtained during stops or arrests that never should have occurred⁴⁵ and arising out of a police officer's factual errors and "reasonable" misunderstanding of substantive state law.⁴⁶

Civil redress under 42 U.S.C. § 1983 is no more generous.⁴⁷ Section 1983, and its federal analogue, *Bivens*,⁴⁸ create private rights of action against state and federal officers who, while acting under color of law, deprive individuals of their constitutional rights.⁴⁹ Nevertheless, individual officers—be they city, state, or federal employees—enjoy qualified immunity, meaning they cannot be sued unless their conduct violates "clearly established"⁵⁰ law that a reasonable officer would have understood.⁵¹ Immunity applies regard-

the view that fault must reside in someone other than the arresting officer. In *Strieff*, the Court declined to apply the exclusionary rule to evidence obtained as a result of an illegal investigatory stop because the defendant was subject to an outstanding arrest warrant. *Id.* Relying on the attenuation doctrine, the *Strieff* majority concluded that the arrest warrant separately "compelled" the search and that the officer's factually unsupported stop "was at most negligent." *Id.*

45. See *Strieff*, 136 S. Ct. at 2063 (permitting evidence obtained through a "negligent" stop); *Herring*, 555 U.S. at 137-38, 144 (permitting evidence obtained as of a result of a mistaken arrest).

46. *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (holding a search not unreasonable under Fourth Amendment when based on an officer's reasonable mistake of state law). *Heien* is not an exclusionary rule case, as the Court found the underlying search constitutional despite the officer's (reasonable) mistake. *Id.* Evidence also is not excluded when an officer reasonably relies on binding appellate precedent existing at the time of the search, but which the Supreme Court later overturns. *Davis*, 564 U.S. at 232, 239-40.

47. "Under existing qualified immunity doctrine, officers do not internalize the costs of their Fourth Amendment violations—much less the cost of their investigative steps—because they are held liable only where the violation is obvious and the officer is 'plainly incompetent.'" Kerr, *supra* note 30, at 635 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

48. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (establishing private cause of action for violations of constitutional rights by federal agents acting under color of law).

49. For a discussion of § 1983's practical limitations, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 467-68, 476 (2004); Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 759 (2004) (observing "high doctrinal barriers" to securing relief).

50. Law is clearly established when "existing precedent" has "placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

51. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (stating that qualified immunity shields conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))). For criticisms, see generally Brown, *supra* note 5, at 1504-06 (arguing

less of whether the officer's mistake is one of law, fact, or application of law to fact.⁵² When the underlying legal issue is objectively open to debate, immunity protects the officer's offending actions from suit,⁵³ even when he subjectively harbors ill will.⁵⁴

Officers who behave so badly that they lose qualified immunity still enjoy the benefits of indemnification.⁵⁵ Thus, the costs of § 1983 fall primarily on taxpayers.⁵⁶ To add fuel to the fire, cities have affirmatively weakened § 1983's feedback loop, reaching settlements that purposely omit admissions of wrongdoing and extract confidentiality agreements from victims, thereby obviating any fear of public backlash.⁵⁷

Most scholars look upon the foregoing with dismay⁵⁸ and argue either for a revamped approach to the exclusionary rule or the Fourth Amendment itself,⁵⁹ or for regulatory reforms that address

that immunity doctrines leave constitutional victims without adequate remedies); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89-90 (1999) (criticizing shortcomings in § 1983 doctrine).

52. *Pearson*, 555 U.S. at 231.

53. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014).

54. As a result, Professor John Jeffries argues, courts focus unduly on existing precedent and not the egregiousness of official behavior. Jeffries, *supra* note 4, at 262-64.

55. *See, e.g., Schwartz, supra* note 6, at 939-40, 942-43 (demonstrating ways in which police are insulated from constitutional tort judgments).

56. A city's payouts can in fact be substantial. *See, e.g.,* Carol A. Archbold, *Risk Management in Policing*, in 8 ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 4494, 4495 (Gerben Bruinsma & David Weisburd eds., 2014); *see also* JOHN C. LIU, CITY OF NEW YORK OFFICE OF THE COMPTROLLER CLAIMS REPORT FISCAL YEARS 2009 & 2010, at 1-3, 34-35, 44-51 (2011), http://comptroller.nyc.gov/wp-content/uploads/documents/2011_Claims_Report.pdf [<https://perma.cc/Q7Y5-JELH>] (tracking millions of dollars worth of payouts in New York City).

57. "Unfortunately, the parties (with the puzzling cooperation of the judge and the media when lawsuits are filed) often keep the details of tort claims hidden." Miller & Wright, *supra* note 49, at 759-60.

58. Orin Kerr's most recent analysis of Fourth Amendment jurisprudence, although still critical of certain doctrines and assumptions, is notable for its use of economic and cost-benefit analysis to explain and justify a number of the Court's Fourth Amendment decisions. *See generally* Kerr, *supra* note 30.

59. "The Court ... has so softened the 'probable cause' requirement ... and so narrowed the thrust of the exclusionary rule that nowadays the criminal only 'goes free' if and when the constable has blundered badly." Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 133 (2003) (referencing Judge Cardozo's famous critique of the rule in *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), wherein he questioned why "[t]he criminal is to go free because the constable has blundered"); *see also* Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 3 (2012) (concluding that the exclusionary rule "is not dead but has been significantly limited" by recent

policing problems more broadly. As I explain below, a different problem undermines the exclusionary rule's efficacy, which is the difficulty of detecting even the so-called flagrant violation of Fourth Amendment rights.

B. The Less Discussed Problem: Detection

Despite its well-documented weaknesses, Fourth Amendment doctrine *does* mandate relief for a specific type of violation. The Court explicitly approves exclusion when police officers purposefully violate Fourth Amendment rights.⁶⁰ In fact, the Court views exclusion as most valuable⁶¹ when police misconduct is “flagrant.”⁶² Thus, at least in theory, the flagrant and intentional Fourth Amendment violation triggers a robust remedial response: exclusion of useful evidence from the prosecution's case in chief. Additionally, if the intentional violation is so “beyond the pale” that no reasonable officer would have committed it, the conduct also prompts tort liability under 42 U.S.C. § 1983,⁶³ potential criminal liability under 18 U.S.C. § 242,⁶⁴ and municipal liability, if the violation arises out of official policy or custom.⁶⁵

Supreme Court decisions).

60. See *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016); *Herring v. United States*, 555 U.S. 135, 143-44 (2009).

61. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

62. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965), cited with approval in *Herring*, 555 U.S. at 143.

63. *United States v. Sanders*, 743 F.3d 471, 474 (7th Cir. 2014) (“When a violation of the fourth amendment really *is* beyond the pale, the offending officers will be liable in damages.”).

64. To be prosecuted under this provision, the officer, while acting under color of law, must act with a conscious purpose to deprive an individual of his federal or constitutional rights. *Screws v. United States*, 325 U.S. 91, 107-08 (1945) (referencing 18 U.S.C. § 52, the predecessor to § 242). On the difficulties of prosecuting a case under this provision, see I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 849 (2008).

65. Although state police departments are not “persons” under § 1983, under *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), municipalities can be sued for constitutional violations arising out of the municipality's policy, custom, or “deliberate indifference.” *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) (defining “custom”); *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989) (articulating “deliberate indifference” theory); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-81 (1986) (explaining when an official action constitutes “policy”). Section 1983 stops short of exposing municipalities to punitive damages, no matter how egregious their behavior. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

It is not surprising that the Court would be most worried about purposeful violations. Purposeful misconduct, particularly when replicated, threatens important rule-of-law values.⁶⁶ The notion of a police force run amok undermines our collective sense of security in our “persons, houses, papers, and effects.”⁶⁷ Recognizing this threat, the Court has approved a series of punishments for purposeful violations of statutory law and the Constitution.⁶⁸

But to punish a violation, one must first detect it.⁶⁹ Deterrence theory tells us that intentional misconduct is, on balance, more difficult to detect than harms arising out of genuine mistakes or simple negligence.⁷⁰ Willful wrongdoers maintain greater incentive and opportunity to conceal their misconduct than accidental actors.⁷¹ The person who chooses to harm someone takes greater pains to cover his tracks.

Consider the characteristics commonly ascribed to policing. Interactions between officers and citizens produce, in Professor Scott Sundby’s words, “a multitude of ‘Fourth Amendment moments’ ranging from the routine (pulling over cars for traffic

66. Amar, *supra* note 25, at 809 (“Rule-of-law values ... teach us to be especially wary of searches and seizures that allow too much arbitrariness and ad hocery, unbounded by public, visible rules promulgated in advance by legislatures and executive agencies.”); *see also* Note, *Toward a General Good Faith Exception*, 127 HARV. L. REV. 773, 784-85 (2013) (describing outrageous behavior of officers that drove Supreme Court’s decisions in its “foundational” exclusionary rule cases and concluding that purposive violations rightfully trigger more concern than accidental violations).

67. U.S. CONST. amend. IV; *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (“The Fourth Amendment is a restraint on Executive power.”).

68. *See supra* notes 61-65 and accompanying text.

69. The issue I raise here—of police officers who conceal intentional violations of established search and seizure law—differs from the government’s programmatic concealment of technology-driven surveillance techniques. *See, e.g.*, Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 722-27 (2014). These concerns, although concededly substantial, are beyond the scope of this proposal.

70. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1223 (1985) (“[O]ne who plans a murder in advance will also take steps to escape detection afterward.”); *see also* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 706 (1997) (describing intentional wrongdoing as “uniquely difficult to detect because it is deliberately hidden”).

71. *See* Posner, *supra* note 70, at 1203 (comparing accidents with intentional behavior). *See generally* Arun S. Malik, *Avoidance, Screening and Optimum Enforcement*, 21 RAND J. ECONOMICS 341 (1990) (earliest formal account of avoidance); Jacob Nussim & Avraham D. Tabbach, *Deterrence and Avoidance*, 29 INT’L REV. L. & ECON. 314 (2009) (modeling costs of avoidance); Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331 (2006) (describing the avoidance phenomenon).

violations) to the unexpected (spotting suspicious behavior while walking a beat).⁷² These so-called moments—taking place quickly in thoroughfares with citizens passing by—can occur fully or partially outside the public’s view.⁷³ Such circumstances remain difficult to analyze with certainty, even with the aid of audio or video recordings.⁷⁴

Empirical evidence validates these concerns. Scholars who have interviewed and surveyed police departments have long reported incomplete and sometimes weak adherence to Fourth Amendment rules.⁷⁵ Even the most serious violators can hide in plain sight. A well-regarded observational study of a medium-size police department in the Midwest (Middleberg) concluded that at least 30 percent of the suspects searched during a three-month period were unjustifiably searched in violation of the Fourth Amendment.⁷⁶

72. Scott E. Sundby, *Mapp v. Ohio’s Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255, 259 (2010).

73. Livingston, *supra* note 32, at 656 (citing difficulties that inhere in resolving complaints that “involve one-on-one confrontations between an officer and a citizen”); Greg Pogarsky & Alex R. Piquero, *Studying the Reach of Deterrence: Can Deterrence Theory Help Explain Police Misconduct?*, 32 J. CRIM. JUST. 371, 371-372 (2004) (observing that police officers exercise “broad discretion under little direct supervision”).

74. On the usage of body cameras to resolve competing narratives, see WHITE, *supra* note 12, at 23-24. For an account of the ways in which one’s cultural viewpoint affects one’s interpretation of videotaped events, see Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (reporting results of a study in which survey participants were asked questions regarding a police chase of a suspect).

75. Perrin et al., *supra* note 25, at 795-99 (citing evidence from a survey measuring police officers’ attitudes toward the exclusionary rule). Scholars often invoke the historical surge in “drossy” cases—cases in which the arresting officer contended that the contraband was conveniently dropped or abandoned—in the years following the Supreme Court’s adoption of the exclusionary rule for state officers. See Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2203-04 (2015) (summarizing Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596-97); see also Capers, *supra* note 64, at 868-70 (citing earlier and additional sources); David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 160 n.53 (2009) (citing the Mollen Commission’s 1994 report on corruption within the NYPD, which included perjury regarding search and seizure cases). For skepticism regarding the pervasiveness of testilying and similar “Fourth Amendment fraud,” see Kevin R. Reitz, *Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061, 1062-64 (1996) (questioning inferences from limited studies). Reitz’s discussion predates Gould and Mastrofski’s study discussed in the text and *infra* notes 76-81.

76. Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 331 (2004) (“Thirty percent of the 115 suspects in our sample were searched unconstitutionally.”). From this sample and

The bulk of Middleberg's violations were concentrated among just a few officers, none of whom "appeared to be angry, cynical, or the composite of a disillusioned officer with an axe to grind."⁷⁷ Instead, "all were well regarded by their peers and supervisors and expressed a desire to establish strong bonds with neighborhood residents."⁷⁸ This desire to bond with residents was not just cheap talk: the officer responsible for the most illegal searches was also one of the most "low-key officers" that the researchers observed, and "frequently made small jokes with the suspects he searched, made small talk, and was always very polite."⁷⁹

The Middleberg study underscores the difficulty in detecting Fourth Amendment violations, even by a police force's internal investigations unit. The red flags we commonly associate with police misconduct—lack of respect, anger, and low morale—had little correlation with the violations observed in Middleberg.⁸⁰ Instead, the "low-key" officer who was chatty and polite with his targets instigated the largest number of violations.⁸¹

The study also suggests the limitations of social media and technology in monitoring and recording police movements.⁸² No doubt, Facebook and other Internet-related tools can quickly and efficiently alert officials to dangerous instances of brutality, as can dashboard and body cameras.⁸³ The Department of Justice enthusiastically endorsed these devices in 2015, and their popularity is

Middleberg's typical staffing levels, the authors estimate 12,000-14,000 unconstitutional searches occur per year. *Id.* For an extended discussion of the researchers' methodology, see *id.* at 324-30.

77. *Id.* at 345. Seven officers were responsible for 70 percent of the illegal searches. *Id.* at 344.

78. *Id.* at 345.

79. *Id.* Even if several of these violations were, by themselves, "negligent" and not purposeful, as a whole even the Court would likely characterize them as "recurrent negligence." *Cf.* *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (observing that "there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct").

80. Gould & Mastrofski, *supra* note 76, at 345.

81. *Id.*

82. On the emergence of these tools, see Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 393 (2016).

83. The recording of the officer who shot and killed an unarmed man in North Carolina aided in his subsequent arrest and termination. See Frances Robles & Alan Blinder, *Seeing Path to Justice in Video of Shooting on Bystander's Phone*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/us/cellphone-video-of-michael-slager-shooting-walter-scott-is-seen-as-a-path-to-justice.html> [<https://perma.cc/GKQ4-VMFP>].

bound to increase as they become cheaper and more powerful.⁸⁴ It is important to note their limitations, however. There still exists a wide gulf between police brutality and the ambiguous conduct that often masks an unconstitutional search or seizure.⁸⁵ Cameras may be adept in documenting the former, but it is far from clear how well they can identify the latter.⁸⁶

More importantly, most cities lack the ability to record *every* interaction between officers and citizens, much less review all of those interactions for evidence of wrongdoing.⁸⁷ In addition, cameras may not capture everything police see and perceive.⁸⁸ For that reason, police officers might reasonably argue that a recorded depiction of a search falls short of depicting the “full picture” that led an officer to cross the threshold of either reasonable suspicion or probable cause.⁸⁹

Notwithstanding the foregoing, recording devices are valuable in regard to the pricing proposal described in this Article. Despite their limitations, body and dashboard cameras can aid regulators in determining and verifying search *volume*. With the aid of sampling techniques, recording devices can aid regulators in determining whether a police department’s self-reported frisks, automobile searches, and so-forth reflect some version of reality or represent pure fabrications. For a pricing regime premised in part on self-reported police data, this contribution is immeasurable.⁹⁰

84. Press Release, Dep’t of Justice, Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), <http://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law> [https://perma.cc/K4AL-PAM2].

85. On the drawbacks of body and dashboard cameras, see Howard M. Wasserman, Commentary, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 840 (2015); Sarah Lustbader, *The Real Problem with Police Video*, N.Y. TIMES (Dec. 2, 2015), <http://www.nytimes.com/2015/12/02/opinion/the-real-problem-with-police-video.html> [https://perma.cc/8Q8R-EG5H].

86. See, e.g., WHITE, *supra* note 12, at 20-22.

87. See, e.g., *id.* at 33-34.

88. See, e.g., *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1813 (2015).

89. By contrast, even the grainiest of recordings will document an officer’s beating or gratuitous shooting of an unarmed suspect.

90. On the enforcement and data-related challenges of implementing a corrective tax regime for Fourth Amendment violations, see *infra* Part IV.B.

C. Detection's Implications

The preceding Section explained why intentional Fourth Amendment violations are difficult to detect. Low detection rates reduce the probability of punishment, which in turn impairs deterrence.⁹¹

Under the standard model set forth by Gary Becker, individuals are deterred from wrongdoing when the costs of wrongdoing outweigh the benefits.⁹² Costs comprise the probability of punishment multiplied by the expected sanction.⁹³ Although one might reasonably equate these two variables (or perhaps prefer extremely high monetary sanctions),⁹⁴ contemporary deterrence theorists now recognize the necessity for less than maximal sanctions.⁹⁵

91. Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443, 1448 (“The deterrence of wrongful police conduct would likely be underproduced if ... a significant amount of wrongful behavior went undetected or if that substantial underdetection were not remedied by penalties that substantially exceeded the officer’s gain.”).

92. Becker is traditionally cited as the first economist to formally model the criminal’s net expected benefits and costs. See Posner, *supra* note 25, at 54 n.17 (crediting Becker with the “classic modern statement” of the economic model of deterrence). Under Becker’s model, a criminal’s expected costs are the product of the sanction prescribed by law and the probability of detection and punishment. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176-78 (1968). The rational criminal abandons a crime when the activity’s net expected costs exceed their benefits. *Id.* at 177. Thus, a regulator should set the sanction to equal the social harm divided by the probability of punishment. For an illustration of Becker’s formula, see Posner, *supra* note 25, at 54 n.17 (“[I]f the probability of apprehending some offender were .1, and the cost of the offense \$1,000, the optimum fine would be \$10,000. Since the chance of its being imposed would be only one in ten, the prospective offender would face an expected punishment cost of \$1,000, just equal to the cost of the offense to the victim.”). Becker’s model draws on Beccaria and Bentham. Becker, *supra*, at 209; see also CESARE MARCHESI DI BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 19-21 (Richard Bellamy ed., Richard Brian Davis et al. trans., Cambridge Univ. Press 1995) (1764); JEREMY BENTHAM, THE THEORY OF LEGISLATION 200-01 (Richard Hildreth trans., N.M. Tripathi Private Ltd. 1975) (1802).

93. Becker’s model analyzes criminal misconduct but can be applied with some modifications to the study of intentional police misconduct. For literature analogizing police misconduct to criminal behavior, see Armacost, *supra* note 49, at 464-65; and Rushin, *supra* note 14, at 1355.

94. Economists presume that fines, as distinct from imprisonment, impose no social cost but simply transfer wealth from one person (the wrongdoer) to the state. See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 509 (2004) (explaining baseline preference for fines over imprisonment).

95. The probability of punishment is “the product of a series of [several] conditional probabilities,” which include the probability of apprehension (often expressed as the probability of “detection”), the likelihood of being charged and convicted, and the likelihood

Low-probability, high-sanction regimes suffer several well-documented drawbacks.⁹⁶ First, when the sanction is a fine, individuals lacking the means to pay are underdeterred.⁹⁷ Second, high-sanction schemes undermine “marginal” deterrence, the phenomenon whereby criminals choose less harmful conduct because it carries a lesser sanction.⁹⁸ To posit an extreme example, if the law punished all Fourth Amendment violations with capital punishment, police officers would be perversely incentivized to kill their victims.⁹⁹ Third, high-sanction, low-probability schemes generate more errors among offenders, particularly when probability of detection is unknown or uncertain.¹⁰⁰ And finally, high-sanction schemes falter because they increase the likelihood of delay—an offender will fight an extremely high sanction in court rather than accede to it—and because individuals experience less disutility from penalties slated to occur in the future.¹⁰¹

Given the foregoing, it should come as no surprise that criminologists routinely observe that a slight increase in the probability of

of receiving certain penalties. Daniel S. Nagin et al., *Deterrence, Criminal Opportunities, and Police*, 53 CRIMINOLOGY 74, 75 (2015). Studies demonstrate the strongest correlation between the probability of apprehension and deterrence. *See id.* (citing Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 199 (2013)) (concluding that detection is the most reliable deterrent).

96. Were these drawbacks not present, one would almost always choose the high-sanction scheme because it requires little investment in enforcement. This is particularly the case where the sanction is nonmonetary (for example, imprisonment) and requires a substantial investment by the state. *See, e.g.*, Becker, *supra* note 92, at 207 (discussing fines).

97. “If the assets of parties are low relative to the magnitude of the sanction necessary to deter, then deterrence will tend to be insufficient if only monetary sanctions are employed.” SHAVELL, *supra* note 94, at 510. Many of these points are discussed extensively in A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 403, 412 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

98. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970) (widely credited with coining the “marginal deterrence” concept and term).

99. For further discussion of this concept, as well as its interaction with total deterrence, see Posner, *supra* note 70, at 1207-08.

100. *See* Lucian Arye Bebchuk & Louis Kaplow, *Optimal Sanctions when Individuals Are Imperfectly Informed About the Probability of Apprehension*, 21 J. LEGAL STUD. 365, 369 (1992).

101. On time lags and their effects on sanctions, see Yair Listokin, Essay, *Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 AM. CRIM. L. REV. 115, 116 (2007). For more on discounts, myopia, and the manner by which prisoners adjust to imprisonment (thereby lessening the sanction’s effect), see A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 3-6, 10-11 (1999).

detection creates a far greater deterrent effect than a corresponding increase in the sanction.¹⁰² If the state wishes to deter police misconduct, it needs to worry about detection, and as we have already seen, a decent number of intentional search and seizure violations are likely to go undetected.¹⁰³

An additional complication is the fact that Fourth Amendment violations occur within police departments.¹⁰⁴ Depending on how laws are designed, organizations can either hamper or improve deterrence. On one hand, organizations can promote wrongdoing with their policies and shield individuals from punishment through various procedures.¹⁰⁵ Alternatively, when properly incentivized, organizations can aid in educating and monitoring their members and disciplining the few residual rogues.¹⁰⁶

If there exist liability rules that incentivize police forces to optimally police themselves, society has yet to identify them. A number of scholars have argued for improving law enforcement's internal compliance efforts,¹⁰⁷ and recent scholarship suggests some positive movement in this direction.¹⁰⁸ Many police forces already screen candidates, conduct training sessions, and employ mechanisms designed to monitor and discipline bad behavior.¹⁰⁹ But these

102. For a helpful overview of perceptual deterrence literature, see Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 *CRIME & JUST.* 1, 5-7, 12, 15, 19 (1998). For analysis (and criticism) of the earlier studies linking certainty with deterrence, see Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues*, 4 *JUST. Q.* 173, 179-81 (1987) (arguing that earlier survey responses may reflect offenders' realization, upon being punished, that certainty of punishment was high).

103. See *supra* notes 77-81 and accompanying text.

104. See, e.g., Armacost, *supra* note 49, at 464-65.

105. "Wrongdoing within firms has two chief distinguishing characteristics for the legal system: firms causally affect the incidence of wrongdoing ex ante, and they contribute to or detract from the effectiveness of detection and sanctioning ex post." Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 *STAN. L. REV.* 1613, 1623 (2007) (encapsulating enforcement challenges that inhere in punishing wrongdoing that arises within for-profit corporations).

106. See *id.* at 1625.

107. See *supra* notes 12-13.

108. John Rappaport, *How Private Insurers Regulate Public Police*, 130 *HARV. L. REV.* (forthcoming 2017) (manuscript at 2-3, 5), <https://ssrn.com/abstract=2733783> [<https://perma.cc/KVR3-8E35>].

109. See, e.g., Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 *ST. LOUIS U. PUB. L. REV.* 33, 35 (2012) (citing training and monitoring programs). Police forces can also obtain third party accreditation for their internal training and disciplinary

activities are a far cry from actively sussing out suspicionless frisks and disciplining officers for fabricated traffic violations.¹¹⁰

To properly observe Fourth Amendment-related misconduct, a city would need to direct significant resources towards covert stings and unannounced audits of search and seizure activity.¹¹¹ Not only would these efforts cost money, but they would potentially increase the jurisdiction's acquittal rate, assuming city authorities disclosed their findings publicly. Moreover, they would likely draw backlash from, among others, citizens and police unions.¹¹² None of this is to deny the growth of department-level compliance efforts. But given the well-documented upfront costs associated with implementing strong internal controls, we should not be surprised if police departments allocate relatively modest resources to the oversight of Fourth Amendment searches and seizures.¹¹³

Finally, Fourth Amendment remedial law falters on account of its lack of "sanction multipliers."¹¹⁴ Ordinarily, a legal regime can partially offset low detection rates by increasing the sanction vari-

processes. The Commission on Accreditation for Law Enforcement Agencies provides accreditation and training services for law enforcement organizations. *See The Commission*, CALEA, <http://www.calea.org/content/commission> [<https://perma.cc/2HSZ-YG4Z>]. For discussion and criticism of accreditation, see William M. Doerner & William G. Doerner, *Police Accreditation and Clearance Rates*, 35 POLICING 6, 18 (2012) (finding no correlation between accreditation and rate at which policing organizations solve crimes); Kimberly A. McCabe & Robin G. Fajardo, *Law Enforcement Accreditation: A National Comparison of Accredited vs. Nonaccredited Agencies*, 29 J. CRIM. JUST. 127, 130 (2001) (finding relatively few differences).

110. On the factors that undermine internal discipline and compliance, see Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 547 (2015) (describing "strident opposition" unions have raised in response to citizen review boards); Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATHOLIC U. L. REV. 373, 390 n.101 (2010) (discussing cultural norms); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2212 (2014) ("Even when discipline is imposed, the grievance procedures in collective bargaining agreements can frustrate or undermine the disciplinary measures."). Police-friendly laws further weaken the state's ability to discipline and reform internal police units. Harmon, *supra* note 15, at 799-800.

111. *See* Armacost, *supra* note 49, at 497-98; Simmons, *supra* note 110, at 389.

112. *See* Stoughton, *supra* note 110, at 2216.

113. *See generally* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491 (2003) (describing "cosmetic compliance" programs initiated by corporations that only superficially monitor and discipline employees for violations of law).

114. On the utility and application of multipliers generally, see Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH L. REV. 2185 (1999).

able.¹¹⁵ So, for example, a court or legislature might impose a \$1000 sanction for a particular wrong whose harm is valued at \$100 and whose probability of detection is just 10 percent.¹¹⁶ Multipliers such as these, however, have no application in the Fourth Amendment context.

Consider the inherent difficulty in applying a multiplier to a sanction such as exclusion. There exists no principled method by which courts can exclude *more* evidence than was tainted by an officer's violation.¹¹⁷ Unlike money, which can be reduced or inflated with remarkable precision, in-kind sanctions such as the exclusionary rule are binary and rigid.¹¹⁸ Exclusion does not permit calibration or manipulation, and its "value" is difficult to judge from case to case.¹¹⁹

Multipliers are similarly unavailable in the § 1983 context, albeit for different reasons. Individual officer defendants are likely judgment proof, and municipalities enjoy the protections afforded by *City of Newport v. Fact Concerts, Inc.*, in which the Supreme Court held that § 1983 stopped short of authorizing punitive damages against a municipality no matter how outrageous its conduct.¹²⁰

In sum, the tools available to either cure or offset low detection rates are unavailable in the Fourth Amendment context. If the only available remedy is an ex post remedy premised on detection, it is sure to fail.

II. THE TURN TO PRICING

As Part I argues, the Fourth Amendment suffers from a detection problem, and low probabilities of detection suppress deterrence. "[I]f ex post remedies fail," Professors Bar-Gill and Friedman tell us, "the

115. Professors Polinsky and Shavell have articulated this model for torts: for the "injurer [who] has a chance of escaping liability" the proper sanction "is the harm caused multiplied by the reciprocal of the probability of being found liable." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998).

116. *Cf.* Posner, *supra* note 25, at 54 n.17.

117. The exclusionary rule "can do no more than deprive a government of the value of the excluded evidence." Harmon, *supra* note 109, at 40.

118. *See id.*

119. *See Re*, *supra* note 10, at 1894-902.

120. 453 U.S. 247, 271 (1981).

law turns to ex ante alternatives.”¹²¹ For many Fourth Amendment scholars, this invariably translates into a prescription for a more robust warrant requirement¹²² or greater administrative constraints on search and seizure policies.¹²³

Part II explores a different regulatory approach, known as corrective or Pigouvian taxation. Scholars have long debated whether Pigouvian price instruments can reduce externalities and improve social welfare.¹²⁴ Corrective tax regimes are popular with economists but rare in practice.¹²⁵ This may either be attributable to political factors, as Professors Jonathan Masur and Eric Posner contend,¹²⁶ or due to inherent design flaws. For the sake of clarity, the discussion below first catalogues the corrective tax scheme’s theoretical advantages and drawbacks, before considering the scheme’s suitability in the Fourth Amendment context.

A. Taxation’s Advantages

Law and economics scholars have long recognized the differences between ex post regimes that punish and those that merely price socially undesirable behavior.¹²⁷ Pricing regimes tell regulated actors to pay for the social harms their activity causes, whereas

121. Bar-Gill & Friedman, *supra* note 11, at 1613; *see also* Brian Galle, *In Praise of Ex Ante Regulation*, 68 VAND. L. REV. 1715, 1719-21 (2015) (analyzing advantages and drawbacks of ex ante regulation compared to ex post tort liability).

122. Bar-Gill & Friedman, *supra* note 11, at 1613-14. For a recent law-and-economics critique of the presumption that warrants impose costs on law enforcement officers, see Tonja Jacobi & Jonah Kind, *Criminal Innovation and the Warrant Requirement: Reconsidering the Rights-Police Efficiency Trade-Off*, 56 WM. & MARY L. REV. 759, 791-807 (2015).

123. Christopher Slobogin, *Policing as Administration*, 196 U. PA. L. REV. 91, 95-97 (2016).

124. *See, e.g.*, Jonathan S. Masur & Eric A. Posner, *Towards a Pigouvian State*, 164 U. PA. L. REV. 93, 100-04 (2015).

125. “It would be an understatement to say that economists endorse Pigouvian taxes over command-and-control regulation.” *Id.* at 96.

126. *Id.*

127. *See, e.g.*, John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194-200 (1991); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524-25 (1984) (explaining that “[a] sanction is a detriment imposed for doing what is forbidden” whereas “a price is payment of money which is required in order to do what is permitted” (emphasis omitted)). Concededly, the demarcation between price and sanction is not always so clear. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 925-27, 930 (2010) (exploring tort law’s moral content).

punishments announce which behavior is forbidden and morally wrongful.¹²⁸ Modern regulation sometimes mixes the two modalities, sometimes to its detriment.¹²⁹

A government authority can impose prices before or after any harm has occurred.¹³⁰ Prices in turn may be purely monetary, or imposed in-kind through nonmonetary requirements such as filling out extensive paperwork associated with complicated licenses.¹³¹

The tax strategy is often referred to as a corrective or Pigouvian tax, in honor of Arthur C. Pigou, a British economist who first described the need for taxes and subsidies to alter the behavior of producers whose “private” costs paled in comparison to their activities’ “social” costs.¹³² Pigou’s work is frequently cited as the progenitor of externality-driven regulation.¹³³ When a producer imposes externalities on third parties through his activity, a government entity can respond by placing direct constraints on that activity (so-called command-and-control regulation), demanding that the producer take certain precautions prior to or contemporaneous with that activity (a fault-based rule), or impose taxes on the producer that reflect the expected harm generated by such activity.¹³⁴

128. Cooter, *supra* note 127, at 1524-25.

129. See, e.g., Alex Raskolnikov, *Irredeemably Inefficient Acts: A Threat to Markets, Firms, and the Fisc*, 102 GEO. L.J. 1133, 1136-39 (2014). Sharon Davies has concluded that the exclusionary rule bears characteristics of pricing and punishment and suffers as a result. See Davies, *supra* note 39, at 1279, 1336-37.

130. See, e.g., Galle, *supra* note 121, at 1718 (explaining that payment of a tax occurs “while the conduct is happening” whereas the payment of a tort award occurs “long after”).

131. See Sarah E. Light, *NEPA’s Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 TUL. L. REV. 511, 513-14 (2013). For a discussion of the ways in which certain federal agencies quantify paperwork burdens (often in aggregate amounts), see Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279, 280 (2015).

132. PIGOU, *supra* note 19, at 192.

133. Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 142 (2014) (“Many trace the concept of externalities to the economist Arthur Pigou.”). Pigou’s argument for regulation was partially rebutted by Coase. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-16, 40 (1960) (setting forth the theorem that the initial allocation of rights may not matter when transaction costs are low enough that parties can strike a bargain for property’s most efficient use). For a contemporary comparison, see David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 394-95 (2014) (comparing Pigouvian and Coasian approaches to problems such as fracking).

134. See generally SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 128-29 (1992) (separating regulation into three forms: command-and-control; standards-based; and incentive-based). For more recent applications, see Brian Galle, *Tax, Command ... or Nudge?: Evaluating the New Regulation*,

The corrective tax improves social welfare by forcing regulated actors to internalize harms they impose on third parties. Its advantages over other forms of regulation (most notably command-and-control) include information, timing, and detection.

1. Information

The traditional argument advanced in favor of the Pigouvian tax is that it requires less information of the regulator than command-and-control regulation.¹³⁵ If a regulator desires to cap quantities of a certain product or demand precautions at efficient levels, she has to estimate both the costs *and* benefits of the underlying activity, as well as the expected costs and benefits of any mandated precaution.¹³⁶ When the regulator measures or misestimates any of these variables, the resulting activity level is inefficient (too much or too little).¹³⁷ By the same token, when precaution costs vary significantly among producers, the rule will produce inefficient results among producers, since it may overcharge some and undercharge others.¹³⁸

In contrast, the Pigouvian tax requires the regulator to divine solely the activity's social costs.¹³⁹ Once the tax is assessed, private actors can then decide for themselves how much activity to undertake and whether to adopt certain precautions. So long as the tax internalizes the "social costs" these actors impose on others, they

92 TEX. L. REV. 837, 843-53 (2014) (mapping options across several dimensions).

135. See, e.g., Kaplow & Shavell, *supra* note 18, at 1-2; Masur & Posner, *supra* note 124, at 95; Steven Shavell, *Liability for Accidents*, in 1 HANDBOOK OF LAW AND ECONOMICS, *supra* note 97, at 139, 176. Several scholars dispute this claim. See, e.g., Martin L. Weitzman, *Prices vs. Quantities*, 41 REV. ECON. STUD. 477, 478-80 (1974) (arguing that iterative regulatory process erodes the tax regime's informational advantage); John V.C. Nye, *The Pigou Problem*, REG., Summer 2008, at 32, 32 (contending that taxes that measure externalities but fail to consider "all regulations and [private] transfers affecting equilibrium" will fail to produce optimal results); Jacob Nussim, Information Costs of Externality Control Instruments 2, 7-8 (Dec. 9, 2013) (unpublished manuscript), <http://papers.ssrn.com/abstract=2395152> [<https://perma.cc/42X2-3WSY>] (contending that information differences disappear once the regulator takes into account the possibility of the victim's ability to mitigate harm).

136. Masur & Posner, *supra* note 124, at 95.

137. See *id.*

138. See Galle, *supra* note 121, at 1725-27.

139. Masur & Posner, *supra* note 124, at 95.

presumably will make efficient decisions and improve welfare.¹⁴⁰ Accordingly, as Steven Shavell has observed, the Pigouvian tax behaves largely like an ex ante version of strict liability.¹⁴¹

2. *Timing*

Traditional liability schemes impose costs on regulated actors not only after the occurrence of some harm, but also after it has been identified and proven.¹⁴² Accordingly, a significant period of time extends between the moment an actor engages in harmful activity and the moment he pays for it.¹⁴³

Delay is problematic for several reasons. It reduces the probability of punishment, as witnesses' memories recede and documents disappear.¹⁴⁴ Second, because payment is slated for the future, managers can conclude (quite rationally) that their firms will be judgment proof in future periods or that they themselves will no longer work for the firm when bills ultimately come due.¹⁴⁵ Finally, delay exacerbates the well-known tendency to overemphasize near-term costs and benefits.¹⁴⁶ If an individual is particularly myopic, even a modest enforcement delay is likely to play an important role in undermining near-term compliance with legal rules and standards.¹⁴⁷

Pigouvian taxation alleviates these problems. Because the tax arises contemporaneously with an activity and not at some distant point in the future, it compels an earlier payment, thereby averting

140. Kaplow & Shavell, *supra* note 18, at 2 (“[Corrective taxes] harness firms’ information about control costs, making possible a result in which the level of externality is optimal (or more nearly so).”).

141. Steven Shavell, *A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation*, 42 J. LEGAL STUD. 275, 300 (2013) (declaring the Pigouvian tax the “ex ante cousin” of strict liability).

142. *See, e.g.*, Galle, *supra* note 121, at 1718.

143. *See id.*

144. *Cf.* Shavell, *supra* note 141, at 297-98 (conceding ex ante regulation’s advantages when there exist difficulties in proving causation).

145. *See* Galle, *supra* note 121, at 1743-48 (addressing liquidity problems and issues caused by managerial agency costs).

146. *See id.* at 1734-38 (describing this myopia and similar problems).

147. For a discussion of this problem in the corporate context, see Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 104-06 (2014).

the cognitive biases described above.¹⁴⁸ Earlier timing also preserves accountability: the manager who predicts she will be working somewhere else in Periods 2 or 3 when tort liability finally sinks in, knows that she will still be working at the firm in Period 1, when the regulator assesses a tax.¹⁴⁹ As a result, she takes greater care either to avoid the tax or to price it into her firm's activities, thereby reducing intertemporal agency costs.¹⁵⁰

Finally, because the tax applies at an earlier period and reflects only the probability that harm will occur (which presumably is far less than certain), it exacts a less onerous fee than the compensatory judgment eventually recovered under a tort regime.¹⁵¹ As a result, the firm that might have been effectively judgment proof to a much larger tort judgment is able to pay a more modest annual tax.¹⁵² Relatedly, the conversion of a large and contingent tort judgment into a more modest and certain annual fee may also reduce costs associated with risk aversion.¹⁵³ To that end, the tax functions very much like an insurance premium.¹⁵⁴ Boundedly

148. Galle, *supra* note 121, at 1759.

149. See Baer, *supra* note 147, at 117.

150. Agency costs arise when an agent fails to adhere to the wishes of her principal, on whose behalf she has promised to act. *Id.* at 118-19. Intertemporal agency costs arise when the costs and benefits of an agent's behavior fall in different periods, allowing her to avoid the feedback loop that might otherwise exist once the principal became aware of the agent's bad behavior. *Id.* at 117-20.

151. Steven Shavell, *Corrective Taxation Versus Liability*, 101 AM. ECON. REV. 273, 273 & n.3 (2011) (agreeing that the judgment proof problem "is less serious for taxation than for liability").

152. See *id.*

153. To the extent individuals respond more rationally to small, certain payments than they do to large, contingent ones, the former is preferable. See Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887, 890 (1999) (ascribing the difference between a low and certain fine and a high and uncertain fine as a "deadweight loss to society" when actors are risk averse).

154. See Galle, *supra* note 121, at 1739 (explaining that "compulsory insurance ... transforms ex post liability into ex ante costs").

There are, it should be pointed out, significant differences between a tax and an insurance premium. The tax is set by a public regulator and reflects risk of harm, whereas the insurance premium is set by the insurance market and reflects, among other things, the risk that an insurer will be forced to pay for the costs associated with a lawsuit. For more on insurance and policing, see generally Rappaport, *supra* note 108. For a rigorous description of the activities liability insurance underwriters undertake in order to manage and reduce risk among their insureds, see Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. Rev. 1412, 1418 (2013) (describing "five main tools that almost all insurers use to one degree or another" to control risk).

rational actors who would otherwise ignore or delay a response to a very large but contingent tort judgment respond more readily to a smaller and more predictable annual tax.

3. *Detection*

Liability regimes for difficult-to-detect behavior either must rely upon high sanctions to offset low detection rates (with all of its trade-offs), or otherwise invest in expensive enforcement efforts.¹⁵⁵ If both of these strategies are unavailable, an ex post liability scheme loses its credibility and actors defy the rules they find costly.¹⁵⁶

Corrective taxes sidestep the detection problem. When activity (as opposed to harm) can be relatively easily observed and attributed to a given producer, an activity-based tax will be preferable to an ex post liability scheme.¹⁵⁷

In sum, the corrective tax presents a number of theoretical regulatory benefits. It requires less information than command-and-control regulation, avoids the delay associated with certain types of litigation, and overcomes low detection rates. With all these advantages to its name, one might indeed agree with Professors Masur and Posner that it is underused. Then again, one must first grapple with its drawbacks.

B. *Taxation's Disadvantages*

Pigouvian schemes are not always optimal. In fact, according to some scholars, only the rare confluence of circumstances renders them viable, which is why they are so rare. Their most noted disadvantages include politics, variance, and enforcement.

155. *See supra* Part I.C.

156. Some people may comply because of social norms or their belief in the legitimacy of the underlying system that produced the rules. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167-68, 174-76 (1991); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 26-27 (2006).

157. *See* Victor Fleischer, Essay, *Curb Your Enthusiasm for Pigovian Taxes*, 68 VAND. L. REV. 1673, 1691 (2015) ("Tax instruments are easiest to use to achieve social policy goals when policymakers can readily observe the relationship between the activity causing the harm and the amount of harm caused.").

1. *Politics*

All regulatory schemes attract political opponents, but Pigouvian schemes tend to draw sustained fire from both sides of the political aisle.¹⁵⁸ Professors Masur and Posner speculate that the Pigouvian approach loses politicians on the right because it is perceived as a government tax,¹⁵⁹ and repels those on the left because it conveys the message that regulated entities can do whatever they wish so long as they pay the requisite fee.¹⁶⁰ As a result, the Pigouvian scheme rarely attracts the support sufficient to ensure its enactment, implementation, or enforcement.

2. *Variance*

According to Professor Fleischer, the Pigouvian scheme's greatest challenge is variance.¹⁶¹ Indeed, as Fleischer tells it, variance—and not political or administrative resistance—explains the scheme's scarcity.¹⁶²

A tax that optimally internalizes harm requires regulators to estimate an activity's average social cost and then charge actors a fee for each marginal unit of activity or production.¹⁶³ If a unit of carbon causes \$100 worth of harm, each producer will be charged \$100, multiplied by the number of units produced. Producers will presumably then incorporate social costs into their decision whether to produce more carbon, thereby improving social welfare.¹⁶⁴

As Fleischer observes, the Pigouvian calculation is quite feasible when each unit triggers the same amount of harm regardless of the producer in question.¹⁶⁵ Many activities, however, fail to follow the carbon example. According to Fleischer, variance poses an even

158. See Masur & Posner, *supra* note 124, at 98-99.

159. *Id.* at 99.

160. *Id.*

161. "The problem is that when marginal social cost varies, average cost does not equal marginal cost, and Pigovian taxes may not lead to an optimal allocation of economic resources." Fleischer, *supra* note 157, at 1676-77.

162. See *id.* at 1676-78.

163. See *id.* at 1675, 1679.

164. See *id.* at 1702-03.

165. See *id.* at 1691-92; see also Galle, *supra* note 121, at 1729 (observing that "the damage done by a ton of carbon is roughly the same whoever emits it").

greater problem when a small number of producers are responsible for causing the most damage; for these bad actors, the scheme is almost certain to underprice.¹⁶⁶

Regulators can overcome the variance problem by placing actors into relevant risk categories and assigning different fees to each category.¹⁶⁷ Fleischer approvingly cites congestion pricing as an example of such an approach.¹⁶⁸ Since trucks cause more pollution than cars, the regulator can assess the truck driver a higher fee than the automobile driver.¹⁶⁹ Beyond this example, scholars disagree on how well this categorization strategy can revive Pigouvian tax schemes. Whereas Fleischer expresses skepticism, Professor Brian Galle argues that the creation of just a few categories can reduce variance to workable levels.¹⁷⁰ Galle and Fleischer concur, however, that for the categories to work they must reflect characteristics that are relevant and easy to observe.¹⁷¹ They also agree that the creation and designation of firms into different categories increases the Pigouvian scheme's administrative and design costs.¹⁷²

3. *Enforcement*

A final drawback for Pigouvian schemes (and all *ex ante* regulation) is enforcement. Aside from designing the scheme, the regulator must expend resources collecting and enforcing the assessed tax.¹⁷³ Although enforcement may be fairly simple in some circumstances,

166. Fleischer, *supra* note 157, at 1680 (“[W]here a few bad actors cause most of the harm, a uniform excise tax set at the rate of average social cost per individual is not likely to be effective. It will under-deter the bad actors, and over-deter those who cause little or no harm.” (footnote omitted)).

167. *See id.*

168. *See id.*

169. *See id.* *But see* Galle, *supra* note 121, at 1729.

170. *Compare* Fleischer, *supra* note 157, at 1680 (citing difficulties in sorting actors into workable categories), *with* Galle, *supra* note 121, at 1734 (suggesting greater reason for optimism that regulators can craft just a few workable categories).

171. *See* Fleischer, *supra* note 157, at 1680; Galle, *supra* note 121, at 1734.

172. *See* Fleischer, *supra* note 157, at 1680 (conceding that categorization “improves the effectiveness of the tax instrument but ... creates greater administrative costs in designing, administering and enforcing the tax”); Galle, *supra* note 121, at 1734.

173. *See* Shavell, *supra* note 141, at 277 (“Under the negligence rule ... the cost of evaluating compliance is experienced only with the probability that harm occurs. Consequently, the negligence rule clearly involves lower expected enforcement costs than regulation.”).

it can grow costly in others, particularly when the taxable activity is itself difficult to verify or observe. Accordingly, the scheme's collection and enforcement-related costs may render it more expensive than an ex post tort liability regime, whose enforcement costs arise only after an actual harm occurs and is detected.¹⁷⁴

C. A Pigouvian Fourth Amendment?

From the preceding discussion, we can take stock of the Pigouvian scheme's advantages and disadvantages. The scheme requires less information than certain types of regulation¹⁷⁵ and circumvents the detection issues that plague litigation-based remedies.¹⁷⁶ It accelerates the actor's payment of money for certain behavior, thereby mitigating cognitive bias and reversing the actor's rational calculation that he will either be judgment proof or somewhere else when costs finally hit.¹⁷⁷ On the other hand, the scheme can be difficult to design and costly to enforce.¹⁷⁸ It is prone to error and sends counterproductive messages.¹⁷⁹ When it is framed as a "tax," it becomes politically unpopular,¹⁸⁰ and (presumably) when administered by the federal government, it inspires distrust among at least some percentage of the public.

How do these advantages and drawbacks play out in the Fourth Amendment context? The Fourth Amendment provides an interesting, if somewhat unusual, opportunity to debate corrective taxation. To begin with, scholars already widely regard the Fourth Amendment's ex post liability options as insufficient.¹⁸¹ Accordingly, *some* regulatory alternative is necessary.¹⁸²

174. *Id.* at 275-76. Nevertheless, Shavell concedes that, in some instances, liability schemes fail to fully capture harmful activity, thereby necessitating ex ante regulation. *Id.* at 298-99.

175. *See supra* Part II.A.1.

176. *See supra* Part II.A.3.

177. *See supra* Part II.A.2.

178. *See supra* Part II.B.3.

179. *See supra* Part II.B.2.

180. *See supra* Part II.B.1.

181. *See, e.g.,* Bar-Gill & Friedman, *supra* note 11, at 1613; *see also supra* Part I.A.

182. *Cf. Huq, supra* note 19, at 249-50 (comparing ex post and ex ante rules as a means of constraining law enforcement officers); Charles D. Kolstad et al., *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888, 889 (1990) (contending that ex post and ex ante approaches can complement each other).

There are, of course, many types of regulation, so we should inquire how the corrective tax (or “fee”) fares in relation to other types of regulation, such as direct constraints on police officers and their departments. The emerging “democratic policing” literature favors a world in which citizens, either directly or through the application of an administrative law framework, constrain police discretion and power.¹⁸³ How does the tax perform in comparison to these local variations of command-and-control regulation?

Consider the case of warrants. A number of scholars have argued for the expansion of the warrant requirement.¹⁸⁴ Not only is this expansion obligated by the Fourth Amendment’s text,¹⁸⁵ they say, but it is also the innovation best poised to improve police behavior.¹⁸⁶ Because a warrant is costly¹⁸⁷—that is, it requires time and effort for a police officer to acquire it—it reduces the likelihood that police will undertake frivolous or patently illegal searches.¹⁸⁸ Accordingly, proponents say, a warrant rule that drastically forecloses the number and variety of warrantless searches also improves police efficiency.¹⁸⁹ The police conduct fewer searches, but the searches that remain are more often successful.¹⁹⁰ Thus, the argument for a beefed-up warrant requirement can be viewed as an effort to replace a faltering ex post *sanction* (the exclusionary rule) with a putatively more efficient ex ante obligation.

The Pigouvian tax literature illuminates several weaknesses in this “warrants are better” argument.¹⁹¹ To the extent an extremely

183. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1834 (2015). Other scholars have imagined ways to improve public voice in policing. See, e.g., Simonson, *supra* note 82, at 394-95.

184. See, e.g., Bar-Gill & Friedman, *supra* note 11, at 1616-17; Gray, *supra* note 11, at 433.

185. See Gray, *supra* note 11, at 433.

186. Bar-Gill & Friedman, *supra* note 11, at 1636 (“[A] warrant requirement would improve the quality of police decisionmaking.”).

187. Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 926 (2009) (“Searches pursuant to a warrant are more expensive for law enforcement than those without warrants.”).

188. See *id.* at 927.

189. See *id.* at 927-28.

190. See *id.*

191. In their recent article, Tonja Jacobi and Jonah Kind also demonstrate the problems underlying the assumption that warrants uniformly impose costs on police officers. See Jacobi & Kind, *supra* note 122, at 767-68. Although warrantless searches are often cheaper, “because criminals can innovate, the assumption of greater law-enforcement efficiency” for warrantless searches does not always hold true. *Id.* at 767.

strong warrant requirement severely reduces the number of warrantless searches, it shares the same problems as more traditional forms of command-and-control regulation. That is, for a regulator to eliminate or reduce the number and category of warrantless searches in a manner that improves social welfare, the regulator must know not only their marginal costs, but also their marginal *benefits*.¹⁹² Moreover, within a given state or large city, an idealized regulator must perform this feat for multiple police departments, whose cost-benefit equations may well differ.¹⁹³

The same analysis arises with regard to policing precautions. When the legislature adopts, in the name of improved efficiency, a law or series of laws demanding precautionary measures, its judgment reflects a determination not just of marginal costs, but also of marginal benefits.¹⁹⁴ Getting the measurement right for just one police department is difficult. Performing the same feat for *many* departments at the same time is nearly impossible, as each department maintains a unique equilibrium point.¹⁹⁵

Corrective taxes, by contrast, require the regulator to deal only with the cost side of the equation.¹⁹⁶ The Pigouvian regulator need not consider benefits of a certain type of warrantless search; rather, she need only consider its violation-related risks and costs. The point is not to say there is no benefit to be gained from such activity. Rather, the tax regime presumes that the individual actor—or in this case, individual police department—can best determine what

192. See *supra* Part II.A.1.

193. The judiciary—the institution most likely to be tasked with setting the contours of any warrant requirement—is the institution least equipped to measure these distinctions, much less apply them across different police settings. Cf. Jacobi & Kind, *supra* note 122, at 810-11.

194. This discussion presumes that the legislature seeks to improve police efficiency. If the driving force behind precautions is due process or dignity, the same arguments clearly do not apply.

195. Concededly, some politicians would adopt police restrictions regardless of cost. That is, they might say, “We should disallow warrantless searches because they are invariably biased and morally wrong.” Regulation that is wholly divorced from costs or benefits, however, is bound to trigger political pushback. As a result, scholars often tout their proposals’ efficiency benefits alongside their rights-protecting qualities. See, e.g., Bar-Gill & Friedman, *supra* note 11, at 1636; Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1493, 1500 (arguing that Fourth Amendment obligations such as the “probable cause” doctrine improve policing’s overall accuracy and effectiveness).

196. See *supra* notes 139-41 and accompanying text.

those benefits are and whether to engage in the underlying activity.¹⁹⁷

Thus, the Pigouvian approach explicitly recognizes and encourages differences in policing. Moreover, it mediates the tension between universal, nationalized rules (which may not work very well for certain police departments), and more decentralized, local solutions (which may be undermined or diluted by special interest groups and local pressures). At its very best, the Pigouvian scheme enables an objective, insulated regulator to impose a single menu of fees on a variety of participating police departments. The decision to set taxes at a particular rate still resides with a relatively insulated federal agency official, as compared with a local police chief or state legislator, who may be reticent to criticize or harm his own police department.¹⁹⁸ At the same time, the taxation approach permits a fair amount of discretion for the local police department and its citizens to decide how to respond to a given tax.

Notwithstanding the foregoing, the Fourth Amendment context also highlights corrective taxation's drawbacks. Variance, for example, is clearly a problem.¹⁹⁹ If City A's frisks are, on balance, significantly less prone to constitutional violation than City B's frisks, it makes no sense to charge both cities the same fee per frisk. Nevertheless, it may be possible to overcome these problems by devising categories of risk, assuming regulators can identify and credibly observe the characteristics that distinguish police departments.²⁰⁰

In sum, a Fourth Amendment corrective tax scheme appears promising, but the devil lies in the details. Can a regulator devise a schedule of fees that accurately prices the risk and harm associated with Fourth Amendment violations? I address this question at length in Parts III and IV.

197. See *supra* note 140 and accompanying text.

198. To be sure, the regulator's calculation of risk and harm should be transparent and subject to notice-and-comment rulemaking. Still, one would expect the regulator to be less prone to the populist and special interest pressures that pervade local-level politics. Cf. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1924-25 (2001).

199. See *supra* Part II.B.2.

200. See Fleischer, *supra* note 157, at 1680.

III: PRICING THE FOURTH AMENDMENT: THE PROPOSAL

This Part develops the proposal for a Fourth Amendment pricing instrument. Section A lays out the proposal and walks the reader through its basic components. Sections B and C address several questions regarding the implementation of the regime, notably the program's optimal scope and level of specialization. Finally, Section D analyzes several of the scheme's particular benefits.

A. The Proposal

Consider for a moment the types of searches a typical city police department engages in over the course of a year. The department's police officers obtain and execute search warrants; seek the consent of individuals to search their property and persons; stop and search automobiles thought to contain contraband or evidence of criminal activity; stop and frisk individuals for whom there is reasonable suspicion to think "criminal activity is afoot"²⁰¹ and who are thought to be "armed and dangerous";²⁰² and search individuals (and sometimes cars)²⁰³ incident to arrest.²⁰⁴

Imagine further a federal agency (Agency) that is responsible for devising and publishing a schedule of fees for each of the search activities described above. The fees reflect the following: (a) the risk that a particular search conceals a purposeful violation by one or more of a police department's officers; and (b) the harm caused by such violations.²⁰⁵ Assume further that fees can be adjusted somewhat to take into account a city's size, as one would expect the police overseeing a very large city to engage in far more search activity than the police who patrol a midsized town.²⁰⁶

201. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

202. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

203. *See, e.g., Arizona v. Gant*, 556 U.S. 332, 351 (2009).

204. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235 (1973).

205. I explore more fully in Part III.B whether the tax should reflect solely purposeful violations of the Fourth Amendment, or all violations, regardless of the officer's mens rea.

206. Thus, one might devise an adjustment in the tax that accounted for population. Whether and how one might go about creating this adjustment lies outside the scope of this Article. *Cf. Howell E. Jackson, Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 *YALE J. ON REG.* 253, 270 (2007) (deriving "regulatory

For cities of roughly the same population, the initial fee calculation is fairly straightforward: the volume of search activity, multiplied by the risk that each intrusion involves intentional violations of law. The fee could either be linear, or it could be progressive, to reflect precipitous jumps in risk. For example, a regulator might conclude that as soon as a city's stop and frisks exceed a certain amount, the risk of unconstitutional behavior rises very quickly.²⁰⁷ Accordingly, we might construct a schedule that charges the 50,000th search a much higher per-unit fee than the 5000th search.

As the foregoing discussion indicates, the police department's baseline fee is a product of both the volume and varieties of search activity its officers undertake. If the department wishes to reduce this baseline fee, it can either perform fewer searches overall or shift its portfolio of searches from one type of search category to a less risky search category.

Like strict liability itself, this Pigouvian approach transparently presumes a correlation between volume and police misconduct.²⁰⁸ All things being equal, a city that performs 500,000 frisks in a given period creates more risk than one that performs just 100,000.²⁰⁹ New York City's experience with its stop-question-frisk program (SQF) in the wake of the *Floyd* litigation supports this intuition.²¹⁰ The litigation's aim was to reduce unconstitutional behavior, and the New York City Police Department (NYPD) has reduced its annual frisks by the hundreds of thousands.²¹¹ If one believes

intensity" figure by, among other things, calculating "regulatory personnel as a percentage of total population").

207. Again, the actual tipping point may vary depending on the size and population of the city.

208. To the extent other factors matter, I take them up in Part III.C.

209. Cf. Huq, *supra* note 19, at 243 (suggesting that police errors increase with "the scale of criminal justice institutions").

210. *Floyd v. City of New York* resulted in a federal finding that the NYPD had engaged in a pattern and practice of violating the Fourth Amendment as well as the Equal Protection Clause of the Fourteenth Amendment. 302 F.R.D. 69, 77 (S.D.N.Y.) (describing years of litigation and length of trial), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014). For further discussion of this litigation, see Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 54-55 (2015); and Meares, *supra* note 28, at 159-60.

211. See Meares, *supra* note 28, at 160. This is certainly true in terms of absolute numbers.

volume played a big role in perpetrating risk and harm, the reduction in volume is salutary.

In addition to recognizing the correlation between volume and risk, the Pigouvian approach recognizes distinctions in different types of search activity. Fourth Amendment doctrine bluntly divides the world between warrantless activity and searches blessed in advance by an impartial magistrate.²¹² Such a division is (arguably) justified by the Fourth Amendment's language,²¹³ but there exists no independent reason for treating different types of warrantless searches as equivalents for purposes of *ex ante* taxation.

Under ideal conditions, a regulator would create a schedule that lists the various categories of searches and ranks them according to their vulnerability to police misconduct. Based on this ordinal ranking (which one might commit to upon receiving feedback through a notice-and-comment process), the regulator could then devise a fee schedule, charging a higher price for the riskier categories and a lower price for the less risky ones. Table A below provides an intentionally simplistic version of that fee schedule.

Table A

Type of Search/Seizure	Cost Per Unit of Activity
Stop-and-Frisk	\$5.00
Abandonment/Consent	\$4.00
Search Incident to Arrest	\$3.00
Automobile search	\$2.00
Warrant	\$0.00

Notably, Table A assigns the stop-and-frisk a value of five dollars per unit of activity and assigns the search warrant no cost whatsoever. These are purely arbitrary values, provided only as examples. Perhaps the most difficult challenge for the regulator would be her calculation of absolute values for each category, which should reflect the risk inherent in the activity as well as the average (monetary) harm reflected by a single violation.

212. See U.S. CONST. amend. IV.

213. See *id.*

Now imagine the above fee schedule were enacted and published, and updated as necessary in response to new information. Every year, participating police departments would file with the Agency an accounting of their annual searches in specified categories (for example, 250 search warrants, 100,000 stop-and-frisks, etc.). Based on this information, the Agency would then tabulate the police department's annual fee, and would also publish this information, enabling the public to track Fourth Amendment performance over time and across cities.

So, for two different cities of roughly the same population, the base calculation might look something like the following:

Table B

City A

Type of Search/Seizure	Cost Per Unit of Activity	Number of Units	Cost
Stop-and-Frisk	\$5.00	1000	\$5000
Abandonment/Consent	\$4.00	500	\$2000
Search Incident to Arrest	\$3.00	2000	\$6000
Automobile Search	\$2.00	1000	\$2000
Warrant	\$0.00	500	0
Total		5000	\$15,000

City B

Type of Search/Seizure	Cost Per Unit of Activity	Number of Units	Cost
Stop-and-Frisk	\$5.00	500	\$2500
Abandonment/Consent	\$4.00	500	\$2000
Search Incident to Arrest	\$3.00	2500	\$7500
Automobile Search	\$2.00	500	\$1000
Warrant	\$0.00	1000	0
Total		5000	\$13,000

As Table B demonstrates, a properly designed tax scheme might induce a police department to alter its "search portfolio" while otherwise keeping its overall volume constant. As demonstrated in Table B above, the police forces in Cities A and B engage in the

same total amount of “search activity,” but City *A*’s activity is geared more towards stop-and-frisks, whereas City *B* invests greater time and effort in obtaining warrants. Because it imposes less risk, City *B*’s police department is rewarded with a smaller fee than City *A*’s.²¹⁴ That being said, if City *B* eventually determines its portfolio inadequately deters criminal activity, it can always shift back to a portfolio similar to City *A*. If it does so, however, it will have to justify the additional risk (and cost) to its citizens.

B. Design Challenge I: Scope

The preceding Section laid out the core components of a corrective Fourth Amendment tax scheme. To recap:

- (1) Participating police departments would tabulate and report prescribed search activities;
- (2) Regulators would estimate the risk and costs of Fourth Amendment violations associated with such search activity; and
- (3) Regulators would charge police departments fees reflecting expected harm, and release such information to the general public.

Beyond these core components, regulators would confront an array of design questions, among them the program’s optimal scope and the extent to which factors other than volume ought to matter. The present Section addresses the program’s scope; the following Section takes up its optimal degree of specialization.

Scope-related concerns occupy several dimensions. One can imagine questions regarding the type of activity, the sovereign, and the type of government officials whose activities would be subject to such a scheme.

Several principles guide these inquiries. Foremost among them is the trade-off between the breadth and efficiency of administrative programs. Comprehensive regimes cover more people and activity

214. Another way to think of it is this: the federal agency, by charging a lesser or negligible fee for warrants, effectively compensates the local police force for the additional time its officers must spend preparing and securing warrants.

but also increase the regime's complexity and administrative costs. More importantly, they also increase the likelihood of variance.²¹⁵

With these concerns in mind, consider the following scope-related issues.

1. *Type of Violation and Culpability*

Tracking the Supreme Court's recent jurisprudence, a regulator might limit the scheme to purposeful or knowing violations of the Fourth Amendment.²¹⁶ Under this restriction, Fourth Amendment activity fees would reflect the likelihood that officers purposely or knowingly violate well-known rules of constitutional procedure. The scheme would not take into account unintentional violations caused by bureaucratic mistakes or changes in law.

Why construct the tax so narrowly? First, because officers who willfully ignore the Supreme Court's constitutional pronouncements pose the greatest threat to the criminal justice system's underlying legitimacy.²¹⁷ Willful transgressions of constitutional law, particularly when accompanied by perjury or the filing of fraudulent affidavits,²¹⁸ present a greater threat to our polity than the clerical employee who fails to double-check an arrest database,²¹⁹ or the officer who conducts a search according to extant precedent overturned while the case is on appeal.²²⁰

Narrowing the tax scheme to culpable behavior also helpfully untethers it from changes in Fourth Amendment doctrine. Regula-

215. *See supra* Part II.B.2.

216. *See supra* notes 66-68 and accompanying text.

217. This has been the Supreme Court's argument for not applying exclusion. *See Davis v. United States*, 564 U.S. 229, 240 (2011) ("The officers ... did not violate Davis' Fourth Amendment rights deliberately, recklessly, or with gross negligence.... Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case."); *Herring v. United States*, 555 U.S. 135, 147-48 (2009) ("[W]hen police mistakes are the result of negligence ... rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'" (quoting *United States v. Leon*, 468 U.S. 897, 907-08 (1984))).

One can disagree with the Court's decision regarding exclusion but still hew to a culpability requirement—at least as an initial matter—for a proposed regulatory scheme.

218. On the accompaniment of perjury and false affidavits with Fourth Amendment violations, see *Armacost*, *supra* note 49, at 468.

219. *See Herring*, 555 U.S. at 136-37.

220. *See Davis*, 564 U.S. at 231-32.

tors need not worry about violations that occur in the shadow of new legal developments, which in any event would be exceedingly difficult to price. To put it another way, when law is uncertain and subject to change, it may be easier to analyze the risk of intentional misconduct than it is to analyze the risk of accidental violations of law.

2. Policing Activities

A related question is which “activities” should be included in the scheme. Should the scheme assess a fee for every type of policing imaginable (for example, traffic tickets), or should it limit itself to several of the most identifiable types of policing? One need not answer this question definitively, but several points are clear. The regime ought to cover the major categories of search activity that are most frequent, that are known for masking behavior, and that are distinct enough from each other that the scheme avoids double counting.

For example, it seems quite likely that the regime would cover the “stop-and-frisk,” which has become both a mainstay of modern policing and a source of great criticism.²²¹ One would also expect the regime to cover automobile searches, so-called consent searches, and seizures of property pursuant to “plain view” or abandonment.²²² Searches undertaken incident to arrest might also be included, since that doctrine fuels a large portion of the searches that officers perform.²²³ And one would expect the regime to address searches based on warrants, even if the regime declared such searches “free” of charge.²²⁴

221. See, e.g., *Floyd v. City of New York*, 302 F.R.D. 69, 77 (S.D.N.Y.), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014); see also Fagan & Geller, *supra* note 210, at 53-55.

222. See *supra* notes 201-04 and accompanying text.

223. Cf. Richard G. Schott, *The Supreme Court Reexamines Search Incident to Lawful Arrest*, FBI L. ENFORCEMENT BULL., July 2009, at 22, <http://www.aele.org/losleb2009-07.pdf> [<https://perma.cc/LAQ3-CPVE>].

224. Given the time it takes to secure a warrant, one might blanch at the claim that it is “free.” Cf. Light, *supra* note 131, at 514 (explaining ways in which a paperwork requirement can constitute a quasi-tax).

3. Law Enforcement Agencies and Law Enforcement Officials

To which governments and/or government officials should such a program extend? One might prefer the broadest program possible, given that federal officials often collaborate with state and local police forces on matters of joint interest, such as narcotics trafficking and terrorism.²²⁵ Otherwise, one might find oneself with the very “silver platter” problems (whereby one police officer hands the tainted evidence to another “on a silver platter”) that prompted the Supreme Court to expand the exclusionary rule in decisions such as *Elkins v. United States* and *Mapp v. Ohio*.²²⁶

Silver platter problems rightfully trigger concern, but there exist a host of good reasons to limit the program to local or municipal police departments of some minimum size. First, the larger and more dissimilar the pool of regulated entities, the more intractable the variance problem. It is one thing to analyze Fourth Amendment risks posed by metropolitan and local police departments.²²⁷ It is quite another to compare those departments to a rural sheriff’s office, an investigatory division of the state Attorney General, or a

225. See, e.g., Harmon, *supra* note 17, at 887-88; Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374, 1396 (2008) (highlighting the “[t]he extent to which federal enforcement authority has been leveraged or outsourced through task forces, deputization, or other formal or informal mechanisms of collaboration with the local police”). Federal-local collaboration has a long history. In *Elkins v. United States*, the Supreme Court praised the “entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity.” 364 U.S. 206, 211 (1960). For further historical context, see generally Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS (2000).

226. *Mapp v. Ohio*, 367 U.S. 643, 653 (1961) (extending the exclusionary rule to state courts); *Elkins*, 364 U.S. at 208 & n.2, 223 (quoting *Lustig v. United States*, 338 U.S. 74, 79 (1949), as the source of the “silver platter” label, and prohibiting the introduction of fruit of a state officer’s illegal search in federal court). Silver platter problems endure in various forms. See generally David Gray et al., *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 16-18 (2012); Wayne A. Logan, Essay, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293, 309, 328-29 (2013).

227. For research and reporting purposes, the FBI already groups police departments into metropolitan and nonmetropolitan departments of certain sizes. See U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, *Area Definitions*, in UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2013 (2014), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/area-definitions/areadefinitions_final.pdf [<https://perma.cc/F55V-FLZF>].

federal law enforcement agency.²²⁸ Accordingly, a regulator would be well advised to exclude smaller and more esoteric law enforcement agencies.²²⁹

A related question is whether the program should cover searches solely by police officers.²³⁰ State and local officials as varied as hospital workers,²³¹ principals,²³² teachers,²³³ and assessors²³⁴ perform searches and seizures. Should we tax their Fourth Amendment activity as well?

Here again, the narrow approach outperforms the broader one. Police officers differ profoundly from other government officials.²³⁵ Police departments routinely assess their officers' productivity to assess eligibility for promotion and other work-related benefits.²³⁶ As

228. The expansion of the program to federal personnel also complicates the program's constitutional analysis. A corrective tax program aimed at state and municipal police agencies invokes federalism concerns. *See* discussion *supra* Part III.A. As applied to federal enforcement agencies, the program arguably triggers separation-of-power concerns insofar as the "tax" effectively reduces the funds allocated to a given agency throughout the congressional budgeting process. Accordingly, for the sake of simplicity, and for the reasons described in the text, I assume the program would apply only to municipal and county police departments that meet some minimum size requirement.

229. The FBI already maintains a database collecting all known law enforcement agencies, their relative sizes, and the populations they serve. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2011, at tbl.70 (2012), https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table_70_full-time_law_enforcement_employees_by_region_and_geographic_division_by_population_group_number_and_rate_per_1000_inhabitants_2011.xls [<https://perma.cc/TRH7-QQCF>].

230. For a national definition of "law enforcement officer," as used by the FBI, see U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, *Police Employees, in* UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2011 (2012), <https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/police-employee-data> [<https://perma.cc/4CTW-X4TK>].

231. *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001) (holding that a state hospital's staff members "are government actors, subject to the strictures of the Fourth Amendment ... [and] the urine tests conducted by those staff members were indisputably searches within the meaning of the Fourth Amendment").

232. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (applying the Fourth Amendment to a vice principal's search of a student's purse).

233. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995) (analyzing a school's drug testing policy under the Fourth Amendment).

234. *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) (extending the Fourth Amendment to a health inspector's administrative search).

235. *See, e.g.*, Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 12-13 (2016) (observing differences in approaches).

236. "[N]othing in the NYPD's policy prevents a supervisor from continually demanding more activity from an officer to 'maximize employee performance.'" Nathaniel Bronstein, *Police Management and Quotas: Governance in the CompStat Era*, 48 COLUM. J.L. & SOC.

a result, police officers experience unique pressures to boost their search volume, even in jurisdictions that formally prohibit minimum search quotas.²³⁷ High school principals may worry about their students' test scores, but it is doubtful they worry about the number of locker searches their teachers perform in a given year.²³⁸ Accordingly, one would expect a regulator to limit the regime to police officers.

C. Design Challenge II: Specialization

The second and more difficult design challenge is the regime's degree of specialization. Assuming it taxes searches by type and volume, to what extent should it take into account a particular police department's specific characteristics?

As a procedural matter, one could certainly imagine a scheme that initially assesses a police department on the basis of its volume and types of searches and then adjusts that baseline fee, upwards or downwards, on the basis of certain department-specific characteristics. To a degree, this would mimic the United States Sentencing Guidelines, which supply a baseline offense level for an offense and

PROBS. 543, 563 (2015) (quoting Operations Order No. 52 from Police Comm'r, N.Y.C. Police Dep't, Police Officer Performance Objectives (Oct. 17, 2011)) (describing the police department's emphasis on police activity as a means of measuring performance); *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 633 n.53 (2014).

237. *See* Bronstein, *supra* note 236, at 563-64 (arguing that supervisors employ pressure without resorting to formal quotas). For instances in which supervisors have ignored antiquota laws, *see* David Clark, "Stop and Frisk" Under *Floyd v. City of New York: The Difficulty of Proving a Fourteenth Amendment Violation*, 25 GEO. MASON U. C.R.L.J. 341, 356 (2015) ("[P]laintiffs' three undercover officers ... revealed pressure from their superiors to stop individuals and increase their 'activity' with little concern for constitutionality shown. This evidence came mainly in the form of superiors reprimanding officers for not meeting their quotas for stops." (footnote omitted)). *See generally* *Floyd v. City of New York*, 283 F.R.D. 153, 164-66 (S.D.N.Y. 2012) (detailing the centralized use of performance standards and quotas within the NYPD).

238. Police officers present additional risks insofar as they derive intrinsic pleasure from punishing others. Professors McAdams, Dharmapala, and Garoupa hypothesize that police officers "self-select" into their occupation in part because they have "more intensely *punitive preferences* than those who select into other government jobs." Richard H. McAdams, Dharmika Dharmapala & Numo Garoupa, *The Law of Police*, 82 U. CHI. L. REV. 135, 136, 148 (2015) (concluding that police officers "require more judicial monitoring and scrutiny than other governmental actors").

then permit adjustments up or down based in part on the offender's specific characteristics.²³⁹

Thus, the regime could build upon its initial volume-based assessments by taking into account specific organizational factors known to affect misconduct risk. Just how many factors the scheme incorporates is an important sticking point. If it completely ignores organizational traits such as culture, internal policing, and compliance, the scheme loses substantial political support, because it treats well-run police departments exactly like dysfunctional ones. On the other hand, if it incorporates too many factors, it risks its own destruction, because each factor increases the scheme's administrative complexity and risk of error. To borrow the tort terminology, it moves the scheme from one that mimics strict liability to one that operates far more like negligence. Not only is a "care" oriented tax more difficult to administer, but it may also be more prone to error. We like to think that internal training programs reduce Fourth Amendment violations, but it may well be the case that "care" matters far less than we presume when search volume surpasses a certain threshold.

As one considers the debate over search volumes and internal compliance, one cannot help but consider another factor: race. Surely, a connection between race and unconstitutional policing exists,²⁴⁰ but how a regulator would take "race" into account as a function of determining unconstitutional risk is a question whose treatment lies largely beyond the confines of this Article.²⁴¹ Nevertheless, one cannot help but think that a recurring set of characteristics—the department's size, the presence or absence of certain training programs, its structure and prior violation history, and,

239. See generally U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. B (U.S. SENTENCING COMM'N 2015).

240. See, e.g., *Floyd v. City of New York*, 302 F.R.D. 69, 99 (S.D.N.Y.) (summarizing an earlier decision holding that New York City "had a policy of conducting race-based, suspicionless stops-and-frisks that violated the Fourth and Fourteenth Amendments"), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014).

241. For example, if a black person is far more likely to be frisked in *all* major metropolitan areas, even when holding all other factors equal, we might conclude that such a racial tax persists throughout most American cities. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 158-59 (1997).

finally, its racial representation in regard to the citizens it serves—denote greater or lesser risk.²⁴²

How might a regulator incorporate these characteristics in an objective and rigorous manner? Certainly, she could distinguish large police departments from much smaller ones, charging the large ones an extra fee to reflect the oversight challenges inherent in large organizations. She could also take the police department's hiring and racial diversity (or lack thereof) into account, particularly as it relates to the diversity of the local jurisdiction's citizens.²⁴³ But the regulator would need to proceed cautiously: a diversity proxy that reliably reflects the likelihood of illegal searches performs a great service; however, a proxy that becomes a rule for its own sake may unmoor the tax scheme from its stated goal of reducing Fourth Amendment violations.²⁴⁴

Many police departments will argue that despite the department's racial makeup, or how many searches it conducts, the department's tax should be reduced on account of its high investment in compliance and training. Scholars have, for some time now, praised the implementation of compliance programs in organizational settings, including law enforcement agencies.²⁴⁵ "Compliance" ordinarily refers to a mix of activities, including training, monitoring, internal discipline, and reporting to outside authorities.²⁴⁶ Police depart-

242. See *supra* note 170 and accompanying text.

243. Assuming she amassed the requisite data, she might also take into account additional proxies, such as the educational backgrounds of those who conduct searches and seizures. See, e.g., Jason Rydberg & William Terrill, *The Effect of Higher Education on Police Behavior*, 13 POLICE Q. 92, 110 (2010) (finding a reduction in the use of force among college-educated officers, but not in searches and seizures or arrest rates).

244. See Fleischer, *supra* note 157, at 1680 (noting that more specific tax schemes tend to fail "when observing the characteristics that drive variation in social cost is intrusive or in conflict with other norms").

245. See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010) (advocating a compliance approach for prosecutors' offices); Estreicher & Weick, *supra* note 13, at 951-53 (proposing elimination of the exclusionary rule in jurisdictions that adopt strong compliance programs within police departments); Simmons, *supra* note 13, at 383-84.

246. GEOFFREY PARSONS MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 2-4 (2014).

ments that host strong compliance departments theoretically should be less prone to illegal behavior.²⁴⁷ So why not reduce their tax?²⁴⁸

The problem with this compliance discount is that not all compliance efforts are effective, much less undertaken in good faith. Some programs are cosmetic,²⁴⁹ while others falter due to unforeseen weaknesses and countervailing norms.²⁵⁰ Police unions and police-protective employment laws invariably weaken even the most good-faith compliance efforts.²⁵¹ And internal disciplinary units may already be overwhelmed with their responsibility for monitoring and disciplining a wide swathe of misconduct, much of it unrelated to search and seizure law.²⁵²

In sum, although organizational factors matter, it is unclear how much they matter in predicting Fourth Amendment violation risk. At the end of the day, the department's volume and portfolio of searches might be more predictive of risk than the number of training programs it conducts or the intensity of its internal discipline. For the very reasons scholars prefer strict liability over negligence schemes,²⁵³ a regulator might choose to focus primarily on search volume and type and ignore all other factors, except those that can be most easily observed and verified.

247. For the discussion of the Middleberg study and its implications, see *supra* notes 76-81 and accompanying text.

248. The modest discount suggested here differs substantially from Estreicher and Weick's proposal to disable the exclusionary rule for all police departments that have an effective compliance program certified with the Department of Justice. See Estreicher & Weick, *supra* note 13, at 952.

249. See Krawiec, *supra* note 113, at 491-92; see also Baer, *supra* note 147, at 153-54 (discussing difficulties companies are likely to encounter in validating compliance efforts).

250. "[E]ven if an organization has adopted elaborate rules and policies designed to ensure legal compliance and ethical behavior, those pronouncements will be ineffective if other norms and incentives promote contrary conduct." Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 941-42 (2007).

251. See Harmon, *supra* note 15, at 799.

252. See Bar-Gill & Friedman, *supra* note 11, at 1634-35; see also Robert J. Kane & Michael D. White, *Bad Cops: A Study of Career-Ending Misconduct Among New York City Police Officers*, 8 CRIMINOLOGY & PUB. POL'Y 737, 745 (2009) (examining multiple varieties of violations that caused New York City police officers to lose their jobs).

253. See, e.g., Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 24 (1980).

D. The Scheme's Benefits

Let us assume that a regulator constructs a scheme that tracks the concept laid out in Section A, limits the program's scope as described in Section B, and incorporates several of the organizational factors discussed in Section C. Would the scheme capture all or a substantial portion of the benefits we associate with Pigouvian taxation schemes?²⁵⁴

The tax regime's strongest benefit is that it overcomes the detection problem analyzed in Part I.²⁵⁵ Courts will still hold suppression hearings, and defense attorneys will still bring § 1983 suits for outrageous behavior. But deterrence is no longer tied to a litigator's ability to demonstrate in court a purposeful violation of Fourth Amendment rights. Instead, regulators charge fees according to more observable behavior, such as search volume and type.²⁵⁶

The tax regime is further beneficial insofar as it allows for experimentation and flexibility. The regulator who sets the fees can consider certain organizational factors (such as the relevance of a police force's amount of schooling)²⁵⁷ as the data supporting them becomes more robust. Indeed, one of the benefits of a scheme like this is that it would likely spur researchers to study and identify the factors that most reliably affect Fourth Amendment compliance.

The tax regime also performs a kind of risk-spreading function.²⁵⁸ It reinstates some semblance of the sanction citizens would indirectly pay were traditional Fourth Amendment remedies more robust.²⁵⁹ (I say "semblance" because exclusion exacts an in-kind penalty whereas the tax is monetary.) If unconstitutional Fourth

254. For the discussion of the Pigouvian scheme's abstract benefits, see *supra* Part II.

255. See *supra* Part I.C.

256. See *supra* Part I.A.

257. See, e.g., Rydberg & Terrill, *supra* note 243, at 110 (finding that college education decreases likelihood of unlawful force but "higher education does not affect whether a search [or arrest] will take place in a police-suspect encounter").

258. To some degree, the corrective tax outlined here functions like insurance, in that it transforms an "ex post liability into ex ante costs." Galle, *supra* note 121, at 1739 (analyzing behavioral effects of mandatory insurance regimes). On the other hand, the insurance frame is inapt insofar as the tax scheme purports to charge the department for its officers' purposeful misconduct. Cf. Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1043 (2008) (arguing for a "compliance insurance" product that would insure corporations' vicarious liability risk, even though state laws prohibit insurance of intentional violations).

259. See *supra* note 25 and accompanying text.

Amendment activity is most often concentrated in poor or racial minority communities,²⁶⁰ the tax scheme partially reverses the well-documented “racial tax” by spreading policing costs across the entire polity.²⁶¹ Granted, none of this, in and of itself, eliminates racially biased policing²⁶² or the stigma it generates.²⁶³ Nevertheless, the imposition of a yearly fee forces citizens, who have heretofore not been subject to that tax, to at least recognize the police-related costs that a fraction of the city’s residents experience on a daily basis.

In the same vein, the scheme’s timing is a notable improvement over the traditional remedies, whose penalties often arise long after the conduct in question has taken place.²⁶⁴ Rational policymakers can ignore the potential risks associated with aggressive policing when its associated costs come due, if at all, sometime in the distant future.²⁶⁵

For a concrete demonstration of this problem, one need only perform a Google search for “ClaimStat,” the clever, if relatively obscure, website that is the brainchild of Scott Stringer, the elected

260. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (finding that New York City had adopted a policy of “indirect racial profiling,” which “resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause”); Meares, *supra* note 28, at 175 (observing that the “burden falls disproportionately on racial minorities”).

261. KENNEDY, *supra* note 241, at 159.

262. The relationship between the Fourth Amendment and racial profiling is complex. On one hand, the police officer’s “[s]ubjective intentions” are irrelevant to probable cause considerations. *Whren v. United States*, 517 U.S. 806, 813 (1996). Accordingly, where probable cause is present, the racially biased search violates the Fourteenth Amendment’s Equal Protection Clause, but not the Fourth. *Id.* At the same time, racial profiling might cause a police officer to engage in a completely unwarranted search (for example, a stop-and-frisk based solely on race), in which case the illegal frisk violates *both* the Fourth and Fourteenth Amendments. For more on the interaction between these two amendments and racial profiling, see Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1535-48 (2014); Meares, *supra* note 28, at 170-71. This Article focuses on Fourth Amendment violations; a regulator could adapt it to include equal protection claims under the Fourteenth Amendment where illegal searches are intertwined with racially biased policing.

263. See, e.g., I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 2-3 (2011) (arguing that disparate treatment and “perception of disparate treatment” collectively rob victims of their rights of equal citizenship).

264. See Galle, *supra* note 121, at 1735.

265. *Id.* at 1735-36 (discussing reasons why various actors may rationally discount the future consequences of their actions).

Comptroller of New York City.²⁶⁶ ClaimStat purports to inform its audience how much New York City pays annually to settle tort claims lodged against various city agencies, transparently pitting the NYPD against its (apparently) more cost-conscious city agency counterparts.²⁶⁷ Although commendable, ClaimStat suffers several shortcomings, the most important of which is timing: the City's total payout for civil rights violations in any given year relates back to conduct that occurred long ago.²⁶⁸ Thus, at least where policing is concerned, ClaimStat arguably criticizes today's public officials for yesterday's policies.

The proposed tax scheme avoids ClaimStat's weaknesses by closing the temporal gap between policing policy and the payment of its violation-related costs. Instead of waiting for harm to surface, the tax scheme assesses each participating police department a fee in the same year that police chiefs and other managers articulate their search policy.²⁶⁹ Thus, citizens are better able to comprehend the link between policing policy and its attendant costs. Moreover, insofar as the program releases information for all participating police departments, it empowers interested citizen groups. It allows them to compare cities and track their locality's annual fees over time.

Accordingly, the scheme enables a police department and its citizens to engage in a more informed—and more public—type of negotiated risk management.²⁷⁰ Risk assessment is hardly a new concept;²⁷¹ federal enforcers often demand risk-oriented reforms

266. OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMSTAT: PROTECTING CITIZENS AND SAVING TAXPAYER DOLLARS (2015), <http://comptroller.nyc.gov/reports/claimstat> [<https://perma.cc/WL3V-3NZ7>].

267. *See id.*

268. *See id.*

269. For a discussion on how Piguovian taxation alleviates temporal enforcement issues, see *supra* Part II.A.2.

270. ClaimStat also places itself in that category, although, for the reasons I argue in the text, it is doubtful how well a program can manage risk when the claims at issue are temporally divorced from the decisions that generate them. For more on ClaimStat, see OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMSTAT: PROTECTING CITIZENS AND SAVING TAXPAYER DOLLARS 1 (2014), <http://comptroller.nyc.gov/wp-content/uploads/2014/07/ClaimStat.pdf> [<https://perma.cc/AC5X-KDYC>] (criticizing New York's reluctance to embrace "data-driven risk-management techniques").

271. *See* Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 172-73 (2012).

from local departments as a condition of settlement.²⁷² The tax regime proposed in this Article not only implements and encourages risk management on a much grander scale, but also invites its citizens' participation.²⁷³

At the same time, while universalizing the focus on risk, the scheme intentionally preserves flexibility among police departments.²⁷⁴ Although the program can be used to flag (and, when appropriate, criticize) emerging trends, it stops short of directly telling police departments what to do.

Finally, by leaving intact the police department's discretion to shape its policing policy (provided its citizens are willing and able to pay the requisite tax), the program bears some of the "localism" attributes that scholars have approvingly cited in studies of cooperative federal-local regimes.²⁷⁵ The scheme universalizes and nationalizes data collection and fees, but leaves communities with final decision-making authority over their police department's volume and portfolio of searches, leaving § 1983 and the exclusionary rule as important backstops. To borrow the Supreme Court's terminology, the local unit maintains its discretion to set policing policy while the federal tax program forces it to "pay its way."²⁷⁶

IV. PRICING THE FOURTH AMENDMENT: CHALLENGES

The preceding Part constructed a preliminary Fourth Amendment pricing regime, describing its mechanics and tentatively resolving

272. For example, following investigations conducted pursuant to 42 U.S.C. § 14141 (2012), eight metropolitan police departments implemented early intervention systems to track and respond to evidence of police misconduct. See Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1381-82 (2015).

273. See *infra* Part IV.C.

274. See *supra* Part II.C.

275. See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1012-13 (2007) (citing increased participation, communal identity, and bounded experimentalism as benefits of federal-local relationships). On the strength of localist sentiment in law enforcement circles, see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 807-06 (1999) (observing those "deep-seated political norms" that cause federal legislators to respect "locally based law enforcement" systems).

276. Cf. *Davis v. United States*, 564 U.S. 229, 238 (2011) (identifying those instances in which the exclusionary rule is able to "pay its way" (quoting *United States v. Leon*, 468 U.S. 897, 919, 908 n.6 (1984))).

some of its most pressing design questions such as its optimal scope and degree of specialization. The Part concluded by analyzing some of the regime's likely benefits, such as its timing and internalization of risk.

In this Part, I explore the pricing regime's most pressing challenges, which deserve discussion but which nevertheless can be accommodated. Objections most likely to arise include the following: (a) the federal government's authority to administer the regime; (b) enforcement shortfalls; (c) police department indifference to the tax; (d) perverse distributive effects on poorer cities; and (e) undesirable expressive effects.

A. Authority to Price

The federal government's authority to implement a pricing regime is the most foundational of the scheme's challenges. Without this authority, the scheme becomes all but impossible, at least at the federal level.²⁷⁷ Fortunately, the federal government can rely on two theories. The first is what one might call a remedial rule and the second, a priority rule.

1. The Remedial Rule

The federal government's authority to encourage or compel participation in a pricing regime is informed by the complex literature on

277. Presumably, a state government could "tax" its localities in the manner outlined in Part III. The federal approach is preferable, however, on both political and practical grounds. First, the federal agency executing a tax scheme is less likely to capitulate to political pressure to reduce a particular city's Fourth Amendment tax. See Rushin, *supra* note 14, at 3213-15 (describing the federal government's recent renewed interest in structural police reforms). Second, local police agencies already enjoy a relationship with federal law enforcement agencies through a number of federal programs designed to fund local policing initiatives. See William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, 15 CRIME & JUST. 231, 289-91 (1992) (describing earlier federal funding programs). Accordingly, the federal government is a more natural fit for a pricing scheme than the state, which engages in little policing of its own (compared to local jurisdictions) and spends far more of its money on incarceration than local police forces. See Harmon, *supra* note 17, at 947-54; John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567, 1594 n.72 (2015) (explaining that "slightly less than ninety percent of all policing is paid for by local governments").

criminal federalism.²⁷⁸ The Tenth Amendment reserves to the states the powers not expressly delegated to the federal government by the Constitution.²⁷⁹ Of these state-reserved powers, policing—particularly the policing of local street crime—is indubitably a member.²⁸⁰ To complicate the matter further, the federal government may not “commandeer” state or local officials to enact or enforce federal programs.²⁸¹

Notwithstanding the above limitations, Section 5 of the Fourteenth Amendment specifically empowers the federal government to enact legislation to “enforce” the Fourteenth Amendment’s substantive guarantees, including the Due Process Clause that incorporates the Fourth Amendment.²⁸² Although the power to “enforce” does not include the power to define substantive law, it encompasses preventative measures, provided those measures are designed to remedy and “correct” constitutional violations, and employ means that are “congruent” with their constitutional ends.²⁸³

Reasonable people might conclude that Section 5 does not permit a statute mandating universal participation in a Fourth Amendment tax scheme.²⁸⁴ Nevertheless, the Department of Justice *should*

278. See generally Geller & Morris, *supra* note 277, at 246; Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 382-407 (2006) (detailing the history of the federal government’s involvement with local law enforcement).

279. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

280. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (describing “punishing street crime” as one of the “vital functions of modern government” performed by states); see also Richman, *supra* note 278, at 377 (“It has long been a truism that, in our federal system, episodic violent crime (street crime) is the province of state and local authorities.”).

281. “Congress cannot compel the States to enact or enforce a federal regulatory program.... The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” Printz v. United States, 521 U.S. 898, 935 (1997) (citing New York v. United States, 505 U.S. 144 (1992)). Thus, “the anticommandeering doctrines protect both state and local governments.” Mathew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 72 n.6.

282. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

283. “While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.” City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (striking down Religious Freedom Restoration Act (RFRA) as exceeding congressional power under Section 5).

284. I have spoken primarily of “local” or municipal police departments because the state

be able to demand participation from police departments whose officers have engaged in a “pattern and practice” of unconstitutional conduct warranting intervention under § 14141 of the federal code.²⁸⁵ The federal government can already demand structural reform under the aegis of § 14141’s settlement process; the Department of Justice’s settlements already require affected departments to hire outside monitors and operate internal risk management systems.²⁸⁶ It would not be too much of a stretch to append an additional condition regarding a police department’s participation in a corrective Fourth Amendment tax program.

There are practical limitations to this case-by-case approach. First, the Department of Justice can complete no more than a fairly small number of § 14141 investigations per year.²⁸⁷ Moreover, some cities might resist participation in a full-blown pricing scheme, choosing instead to call the federal government’s bluff and force it to trial.²⁸⁸ And finally, this case-by-case approach is subject to political whim. Under one presidential administration, DOJ officials may aggressively open investigations and demand department-wide concessions and changes; under another administration, officials may decide to proceed more carefully, or only under the most unusual of circumstances.

engages in relatively little policing on its own, with the exception of certain regulatory or extremely complex matters. *See generally* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011) (analyzing how states divide criminal enforcement responsibilities between state and local authorities).

285. Whether 42 U.S.C. § 14141 (2012) enables such a demand or whether Congress would have to amend the statute to expressly include the scheme is another matter. *See, e.g.*, Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 106-07 (2012) (explaining that § 14141 authorized the Department of Justice to investigate and sue police departments but not to compel reform); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J.C.R. & SOC. JUST. 25, 48 (2011) (“Pursuant to its ‘pattern or practice’ authority under 42 U.S.C. § 14141, the DOJ has required several police departments nationwide, including the Los Angeles Police Department and the District of Columbia Metropolitan Police Department, to reform their policies and practices.”).

286. *See* Rushin, *supra* note 272, at 1378, 1381, 1388; *see also* Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 144-45 (2008); Simmons, *supra* note 110, at 392-98.

287. Rushin, *supra* note 14, at 3192-93.

288. *See, e.g.*, Matt Apuzzo, *Department of Justice Sues Ferguson, Which Reversed Course on Agreement*, N.Y. TIMES (Feb. 10, 2016), <http://www.nytimes.com/2016/02/11/us/politics/justice-department-sues-ferguson-over-police-deal.html> [<https://perma.cc/AM56-99GA>].

Were Congress to use its statutory authority to promulgate a much broader program (for example, one that applied to all local policing organizations of a certain size), such legislation would almost certainly be challenged as exceeding Section 5's grant of power. Unless the federal government first established evidence of pervasive Fourth Amendment violations throughout the United States, cities would rightly challenge the "remedial" label attached to any such legislation.²⁸⁹ In response, the scheme's defenders might contend that unlike other legislation struck down under Section 5,²⁹⁰ the pricing scheme does not prohibit local activity but merely prices it. Perhaps these arguments would prevail, but it is undeniable that relying solely on Section 5 would leave any pricing program highly vulnerable to constitutional attack.

2. *The Priority Rule*

Happily, Congress could successfully look elsewhere for support. Under the Spending Clause, Congress can place conditions on the funds it disburses to local and state authorities.²⁹¹ For decades, the federal government has disbursed billions of dollars directly to local police departments through a mix of block grants and funding programs, which already influence local- and state-level policing priorities.²⁹² Currently, programs such as the Community Oriented Policing Service (COPS) and the Byrne program place fairly few conditions on local police forces,²⁹³ although they do require recipients to document their use of the funds.²⁹⁴

289. Sadly, this might not be so difficult a task if one takes seriously the findings of government reports, watchdog groups, and researchers. *See supra* Part I.B.

290. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) ("[RFRA] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

291. U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have power ... [to] provide for the common Defence and general Welfare of the United States.").

292. For historical accounts, see Geller & Morris, *supra* note 277, at 289-91; Richman, *supra* note 278, at 382-400.

293. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-521, COMMUNITY POLICING HIRING GRANTS: GRANT APPLICATION AND MONITORING PROCESSES COULD BE IMPROVED TO FURTHER ENSURE GRANTEE ADVANCE COMMUNITY POLICING (2013) ("Since its 1994 inception, the U.S. Department of Justice's (DOJ) COPS Office has awarded roughly \$14 billion in grants to support the advancement of community policing."). For more on COPS and Byrne grant funding, see generally Harmon, *supra* note 17; and Richman, *supra* note 278.

294. The Department of Justice COPS Office maintains a compliance unit that audits

Could Congress condition *all* law enforcement funding on participation in a pricing regime? Presumably not, since a condition of that magnitude might well be seen as crossing the line between influence (which is constitutional) and compulsion (which is not). In *NFIB v. Sebelius*, the Supreme Court struck down a provision of the Affordable Care Act (ACA) that would have stripped states of 90 percent of their existing Medicaid funding had they decided to forego participation in ACA health care exchanges.²⁹⁵ Focusing on the plurality opinion authored by the Chief Justice, Professor Samuel Bagenstos concluded that pressure morphs into illegal compulsion “[w]here Congress takes a (1) very large (2) preexisting conditional spending program, and (3) tells the state that if it wants to continue participating in the program, it must also agree to participate in an entirely separate and distinct program.”²⁹⁶

In light of the foregoing, consider a modest carrot that Congress might pitch toward metropolitan police departments: join our Fourth Amendment tax program and we grant you priority status whenever you seek funding for certain enforcement-related programs.²⁹⁷ Unlike a universal mandate, a priority rule—one which grants police departments priority in competing for future funding for certain, but not all law enforcement grants—presumably does not violate *NFIB*’s plurality opinion. The tax simply represents a realignment of federal law enforcement funding priorities: police departments willing to collect information and pay the requisite tax receive priority for competitive law enforcement grants, while those institutions reluctant to do so fall to the back of the line.²⁹⁸

grant-receiving police forces. See U.S. DEP’T JUST., COMMUNITY ORIENTED POLICING SERVICES, <http://www.cops.usdoj.gov/> [<https://perma.cc/B9T2-LKQC>]; see also U.S. DEP’T OF JUSTICE, CMTY. ORIENTED POLICING SERVS., GRANT MONITORING STANDARDS AND GUIDELINES FOR ALL COPS GRANTS AND COOPERATIVE AGREEMENTS 3-4 (2014).

295. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012).

296. Samuel R. Bagenstos, *Viva Conditional Federal Spending!*, 37 HARV. J.L. & PUB. POL’Y 93, 95 (2014); see also Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 594-95 (2013) (revising tripartite test set forth by Bagenstos as “sequential” test).

297. To avoid a recursive problem (whereby the funding reverses the incentives created by the tax), the funding carrot would relate to policing needs that are generally unrelated to searches and seizures (for example, priority funding for community programs, improved technology, and victim outreach).

298. Cf. *Reno v. Condon*, 528 U.S. 141, 150-51 (2000) (“That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with

Thus, one could imagine a pricing regime that relied jointly on both the Spending Clause and Fourteenth Amendment's Section 5 to secure participation in a pricing regime.²⁹⁹ The priority rule would encourage participation from departments seeking access to additional funding and the goodwill that might accrue from voluntarily joining the tax program. The remedial rule would require participation as a condition of settling "pattern and practice" lawsuits filed pursuant to § 14141. With these two instruments, the Department of Justice could assemble a viable mix of participants.³⁰⁰

There may be additional constitutional bases upon which the federal government could ground a corrective tax program, such as the Necessary and Proper Clause³⁰¹ and the Taxing Power.³⁰² For now, it is sufficient to conclude that the government *could*, with appropriate framing and attention to detail, construct a program that would withstand constitutional challenge, if it so desired.

federal standards regulating that activity is a commonplace that presents no constitutional defect." (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988))).

299. For examples of other federal regimes relying on more than one constitutional justification, see Pasachoff, *supra* note 296, at 631-33, which traces the IDEA power to both Section 5 and the Spending Clause.

300. I recognize that problems would arise out of mixing the "priority" police departments with the "remedial" ones. The overriding goal, however, would be to assemble a viable pool; once a regulator did that, he or she could subdivide the pool and treat voluntary and Section 5 participants differently in terms of pricing. *See supra* Part III.B.

301. U.S. CONST. art. I, § 8, cl. 18. On the use of the Necessary and Proper Clause to justify federal legislation "to see to it that taxpayer dollars ... are in fact spent for the general welfare, and not frittered away in graft," see *Sabri v. United States*, 541 U.S. 600, 605 (2004), in which the Court upheld a federal statute criminalizing provision of bribes to state or local officials whose agencies receive in excess of \$10,000 in federal funding.

302. U.S. CONST. art. I, § 8, cl. 1 (granting Congress the authority "To lay and collect Taxes"). For the most recent recitation of Congress's authority to "lay and collect Taxes," see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594-600 (2012). *Sebelius* involved the taxation of private individuals who refused to purchase health insurance. *Id.* at 2600. Insofar as the program envisioned here taxes police departments, it arguably triggers intergovernmental tax immunity questions that fall beyond the scope of the Article. At first glance, however, the regime envisioned here appears to fall outside its ambit. *See, e.g.*, *South Carolina v. Baker*, 485 U.S. 505, 526 (1988) (stating that increased administrative costs do not transform obligation into "taxes" for purposes of intergovernmental tax immunity); *see also* David M. Richardson, *Federal Income Taxation of States*, 19 STETSON L. REV. 411, 416-51 (1990) (analyzing the history and development of the doctrine of intergovernmental tax immunity).

B. Enforcement

In order to tax a participating police department's search activity, the regulator must receive from the department an accurate accounting of the number and types of searches its officers performed over a given period. How can we be so sure that participating departments will provide truthful and accurate information?

Underdetection plagues all Fourth Amendment enforcement efforts.³⁰³ The proposed pricing regime is less prone to the detection problems described at the beginning of this Article, but it is not fully immune to them. Fortunately, emerging technologies may aid in the scheme's enforcement. Body and dashboard cameras can serve an important documentation and reporting function when used correctly.³⁰⁴ Further, they can aid federal officials in ensuring that local police departments adhere to extant, and hopefully more common, reporting requirements.³⁰⁵

That being said, errors will occur even among those acting in good faith. The line between search categories is often blurry. Honest police officers will invariably experience difficulty distinguishing one type of search from another. Nevertheless the greater concern lies with less-than-honest police officers, who might systematically underreport the number of searches and seizures they perform in order to minimize their department's tax.

Although underreporting reduces the regime's effectiveness, it need not erode its utility completely. First, the federal government could periodically audit the search data provided by participating police departments, imposing stiff penalties on departments that submitted materially false information.³⁰⁶ Dashboard and body cameras should significantly aid in this endeavor, as they would enable federal officials to use sampling methods to follow up on

303. See, e.g., Minzner, *supra* note 187, at 937-39 (acknowledging complications caused by police data manipulation).

304. Wasserman, *supra* note 85, at 832-33 (describing widespread approval of body and dashboard cameras from "every stakeholder" affected by policing).

305. Bar-Gill & Friedman, *supra* note 11, at 1614 (arguing for improved reporting of police searches); Kupferberg, *supra* note 286, at 163 (proposing a permanent reporting requirement for police departments subject to consent decrees).

306. U.S. DEP'T OF JUSTICE, CMTY. ORIENTED POLICING SERVS., *supra* note 294, at 4-5 (noting that the federal government already audits police departments that received funds under COPS).

department-level reports.³⁰⁷ Court records and citizen complaints can also serve as a useful check, since a department's number of searches incident to arrest ought not to be dwarfed by the number of defendants arraigned on filed charges.³⁰⁸ Finally, in some instances, the pricing regime might require or accept verification from an independent auditor, although this final requirement would be far too expensive for all but the largest of police departments.³⁰⁹

None of this is to deny the obvious: in the face of political and economic pressure, some police would indubitably undercount their Fourth Amendment activity. But it is far easier to drum up an *excuse* for a search or seizure than it is to hide it altogether. After all, police officers usually benefit from demonstrations of productivity.³¹⁰ Thus, a number of countervailing incentives would soften the officer's predisposition to undercount search activity. Paired with the right mix of auditing and punishment for misreporting, the regime could eventually become a relatively reliable measure of search-related risk.

C. Indifference

The pricing approach presumes that participating police forces respond to corrective taxation by adjusting their behavior in a positive manner. At its best, it motivates politicians and police chiefs to confirm and debate their search policies with interested citizen groups and reform those policies and practices that are excessively risky. Moreover, because it enables interested citizens to notice worrisome trends (for example, an increasing tax reflecting an increase in risky search activity), it promotes the kind of proactive deliberative approach that reformers find desirable.³¹¹

But what if politicians and police chiefs are indifferent to the tax? What if, for example, political units simply raise taxes to pay the

307. See generally *Developments in the Law—Policing*, *supra* note 88, at 1794-817 (exploring the utilization of body cameras by police).

308. See *supra* note 39 and accompanying text.

309. See generally Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1 (2012) (describing benefits of third-party verification regimes).

310. See *supra* note 237 and accompanying text.

311. Cf. Simmons, *supra* note 110, at 391 (criticizing traditional litigation-based remedies because “they offer little hope in spurring systemic change because they fail to emphasize proactive problem-solving”).

extra fee and almost all citizens pay without complaint? This is the indifference challenge that scholars already have identified in the civil rights context.³¹² Governments, according to Professor Daryl Levinson's classic treatment on this topic, are not private actors and therefore do not respond to financial penalties as their private counterparts.³¹³ Accordingly, politicians and police chiefs respond primarily to political incentives, not financial ones.³¹⁴

Levinson's theory of indifference is borne out by Professor Joanna Schwartz's study of police departments' responses to civil rights litigation.³¹⁵ Although police departments *can* under certain conditions, learn from civil rights challenges,³¹⁶ in many instances they fail to do so. As a result, civil lawsuits fail to curb police misconduct; citizens pay their costs, but political leaders rarely have to worry about them.³¹⁷

Would a Pigouvian tax overcome the indifference problem? Several of its characteristics suggest cause for optimism. First, as noted earlier, both exclusion and § 1983 litigation suffer timing and transparency deficits; awards are difficult to ascertain and are often imposed months or years after a violation has occurred.³¹⁸ As a result, they create an accountability problem, because today's § 1983 judgment may well reflect yesterday's policing mistakes.³¹⁹

By contrast, the tax scheme tells citizens just how efficiently the police have allocated their search capital *this year*.³²⁰ Under a fully transparent tax scheme, the public can compare City A's search costs with City B's search costs, and it can also compare this year's costs with last year's. Sophisticated observers can study upward or

312. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 356-57 (2000) (articulating the general argument that government does not behave like a private actor); see also Schwartz, *supra* note 6, at 1028 (detailing ways in which information produced by civil rights lawsuits fails to alter decision-making within police departments).

313. Levinson, *supra* note 312, at 346.

314. *Id.* at 357.

315. Schwartz, *supra* note 6, at 1027-28.

316. "When Departments have policies to gather and analyze information from lawsuits—and overcome barriers to implementation—these policies can have a tangible effect on decisionmaking." *Id.* at 1068.

317. See *id.* at 1032-33.

318. See discussion *supra* Part I.A.

319. See *supra* Part I.A.; see also *supra* notes 268-69 and accompanying text.

320. See *supra* Part III.A.

downward trends, track sudden changes, and even attempt to measure corresponding effects on crime.

Moreover, insofar as one designates it a *fee*, the proposed scheme has the potential to motivate local officials who are afraid of appearing overly wasteful.³²¹ In other words, the fee scheme highlights and renders more salient a police department's inefficient search activity.³²² Few politicians would prefer to be known as wasteful or inefficient. As noted earlier, New York City's ClaimStat program has yet to attain notoriety among New Yorkers because the public lacks any way of knowing who is to blame for a given lawsuit.³²³ A blunt yearly fee, easily comparable with other cities and with previous years, is far more likely to provoke interest among politicians and the citizens who elect them.

D. Distributive Concerns

At the other end of the spectrum, critics might worry that the pricing approach harms poverty-stricken cities by placing additional pressure on already strapped enforcement budgets. As Professor Randall Kennedy has argued, underenforcement visits substantial and lasting harm on poor communities.³²⁴

The actual effect of the pricing regime on police budgets is admittedly ambiguous. Poorer cities could reduce their fees by substituting cheaper searches for more expensive ones and by eliminating wholly unnecessary searches, as New York did in the aftermath of the district court's *Floyd* ruling.³²⁵ Still, for its remaining searches, the city would need to pay its fee.³²⁶ Thus the concern: to what extent would the proposed pricing regime disproportionately harm the poor?

There are several ways in which a pricing regime could destabilize vulnerable communities. A resource-challenged police department might respond to a Fourth Amendment pricing regime by (a)

321. Then again, the characterization of the payment as a fee or tax may well limit its political feasibility. *See supra* notes 158-60 and accompanying text.

322. *See supra* Part III.A.

323. *See supra* note 268 and accompanying text.

324. KENNEDY, *supra* note 241, at 163.

325. *See* Meares, *supra* note 28, at 160 (discussing the decline of stops initiated by the NYPD following the ruling in *Floyd*).

326. *See supra* Part III.A.

reducing the size of its police force or firing support staff, thereby inducing crime and unemployment; (b) reducing its search activity in a manner that causes more crime; (c) drawing resources from nonpolicing community programs (after-school sport leagues or family counseling initiatives); or (d) “self-financing” by more frequently fining citizens for minor transgressions.³²⁷

A regulator could address this problem in several ways. First, as economists have long recognized, she could offer the police department a *subsidy* to reduce its searches in the same way she taxed other cities for the risk they imposed on others.³²⁸ That is, if City A imposes \$50,000 worth of expected harm on its citizens, the regulator could offer to pay City A \$50,000 to reduce the number and type of searches its officers performed.³²⁹ The reasons for avoiding subsidies in for-profit markets (namely, that the presence of a subsidy will draw too many producers into the market and encourage an activity’s overproduction in anticipation of a payout)³³⁰ are not particularly apt in this context.

Second, even if she decided to forego the subsidy route, a regulator could still put in place a number of provisions to cushion a tax’s negative effect on poor communities. Fees could be capped at some percentage of the jurisdiction’s tax revenue.³³¹ Regulators might waive, reduce, or permit delayed payments for those municipalities enduring a temporary or unexpected hardship (for example, Hurricane Katrina in New Orleans). And finally, states might take

327. See Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2114 (2007); Eric Blumenson & Eva Nilsson, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 41 (1998) (coining the term “self-financing” with regard to police departments that aggressively engage in forfeiture and other money-making enforcement activities); *Developments in the Law—Policing*, *supra* note 88, at 1723 (critiquing ways in which municipalities employ fines and similar measures to “extract revenue from the poor”).

328. On the economic equivalence of taxes and subsidy, see Galle, *supra* note 134, at 851. But see Brian Galle, *The Tragedy of the Carrots: Economics and Politics in the Choice of Price Instruments*, 64 STAN. L. REV. 797, 801 (2012) (pointing out the numerous ways in which “carrots” can distort decision-making, despite their superficial similarities to sticks).

329. Notice, a federal regulator would still have to ensure City A actually reduced its searches in regard to its subsidy.

330. See, e.g., Marcelo Ostria, *How U.S. Agricultural Subsidies Harm the Environment, Taxpayers and the Poor*, NAT’L. CTR. POL’Y ANALYSIS (Aug. 7, 2013), <http://www.ncpa.org/pub/ib126> [<https://perma.cc/QJA8-7LA9>] (discussing the overproduction of agricultural products due to subsidies).

331. I thank Josh Blank for his suggestion on this point.

up some of the slack by replacing the municipality's lost funds, although this is admittedly fanciful.

It is worth noting that the tax regime is not the only reform that costs money or potentially redounds to the detriment of a city's poorest citizens. Were § 1983 suits more prevalent and successful,³³² cities would have to spend more money on litigation and judgments, which would leave fewer resources for the poor. Were police departments to engage in more stringent self-policing and monitoring,³³³ such activities could strain or increase enforcement budgets, which could again draw from resources earmarked for the poor. Were immunity protections for police officers narrower,³³⁴ police unions would indubitably negotiate for higher salaries, also hurting the poor. And finally, were the exclusionary rule imposed substantially more often,³³⁵ either (a) more criminals would be released due to insufficient evidence at trial, or (b) cities would at least experience an increase in litigation costs since defense attorneys would more often pursue suppression hearings before recommending guilty pleas.³³⁶ In sum, *every* effective method for responding to Fourth Amendment violations could potentially harm the city's poorest and most vulnerable citizens. This is not a problem specific to the Fourth Amendment, but rather, a problem with poverty and how cities fund their obligations.³³⁷

E. Expressive Effects

Scholars have long adhered to the notion that the Fourth Amendment performs an important expressive function.³³⁸ Regardless

332. See *supra* Part I.A.

333. See *supra* Part I.C.

334. See *supra* Part I.A.

335. See *supra* Part I.A.

336. See Hugo M. Mialon & Sue H. Mialon, *The Effects of the Fourth Amendment: An Economic Analysis*, 24 J.L. ECON. & ORG. 22, 23 (2008) (reasoning that "a stronger exclusionary rule increases crime"). *But see* Kerr, *supra* note 30, at 634 (questioning as highly unrealistic several of the Mialons' assumptions).

337. Lee Anne Fennell and Richard McAdams allude to this problem (and the political failures that fail to address it) in Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1055 (2016) (observing that "[p]olitical failure,' no less than 'market failure,' can thwart efforts at welfare maximization").

338. On expressive effects generally, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); see also Dan M. Kahan, *Social Influence, Social*

of its actual deterrent effect, the exclusionary rule promotes rule-of-law values³³⁹ and reassures citizens that our interests in privacy, security, and dignity matter.³⁴⁰ The suppression hearing educates and shames police officers who engage in morally contemptible behavior.³⁴¹ For all these reasons, scholars are reluctant to part with these institutions, even when they fail to achieve optimal results. Whatever the exclusionary rule's actual deterrent effect, its message still matters.

Given the foregoing, one can foresee several expressive issues for a Fourth Amendment pricing regime. Some might conclude that the proposed regime conveys the notion that Fourth Amendment violations are permissible so long as the police force pays the requisite price. This fear would be understandable were the regime proposed as a substitute for traditional remedies. In his dissenting opinion in *Bivens*, Justice Burger advanced an expanded small claims-type remedy in lieu of exclusion,³⁴² which drew similar complaints.³⁴³ Justice Burger's proposal, however, held out the small-claims remedy solely as a substitute.³⁴⁴ The regime described here³⁴⁵ is intended as a supplement, much like § 1983. It does not eliminate the exclusionary rule's shaming function; rather, it exists alongside it.³⁴⁶

Meaning, and Deterrence, 83 VA. L. REV. 349, 390-91 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951-52 (1995). For applications in the Fourth Amendment context, see, for example, Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 433 (2013) (observing that law's content and implementation "send messages about who counts as equal members of the political community and what fundamental moral principles define that community").

339. See generally Jenia Iontcheva Turner, *The Exclusionary Rule as a Symbol of the Rule of Law*, 67 SMU L. REV. 821 (2014) (discussing exclusionary rule's relationship to rule-of-law values in current and emerging democracies).

340. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966).

341. See Sundby, *supra* note 72, at 260.

342. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting).

343. Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 261 (1961) ("Imposing liability on government units ... will not deter the state from engaging in unconstitutional practices. It may be very attractive for state officials, acting according to a calculus of police values, to violate now and pay later.").

344. See *Bivens*, 403 U.S. at 421 (Burger, C.J., dissenting).

345. See *supra* Part III.A.

346. See *supra* Part III.A.

If an officer's flagrantly illegal frisk should be captured on a dashboard camera, for example, the evidence he recovers from that search will still be subject to exclusion,³⁴⁷ if City A's policymakers deliberately ignore a pattern of illegal conduct, they may well subject City A to § 1983 liability.³⁴⁸ And finally, if the Department of Justice should collect evidence of repeated instances of illegal and unconstitutional behavior by City A's police force, it should still seek appropriate relief via 42 U.S.C. § 14141.³⁴⁹ Thus, the proposed tax regime does not allow a city to pay in advance for its officers' future Fourth Amendment violations; rather, it imposes upon their taxpayers an *additional* obligation, a fee representing the risk that violations are occurring, but that otherwise would remain undetected and unpunished.³⁵⁰

Opponents might also fear that the regime commodifies Fourth Amendment rights. Some rights, critics say, simply cannot be balanced against any cost or benefit;³⁵¹ to commodify or subject them to cost-benefit analysis dilutes their social meaning.³⁵² Accordingly, for Fourth Amendment traditionalists, the discussion of taxes and annual fees in the same breath as privacy rights understandably leaves a foul aftertaste.³⁵³

Two responses come to mind. First, the term "unreasonable" as it appears in the Fourth Amendment already presupposes a series of trade-offs.³⁵⁴ *Herring* and its progeny further direct courts to engage in a second round of cost-benefit analysis at the remedial stage.³⁵⁵

347. See *supra* notes 66-69 and accompanying text.

348. See *supra* note 65.

349. See *supra* note 285.

350. See *supra* Part III.A.

351. "[I]f the law wrongly treats something ... as a commodity, social norms may be affected in a troublesome way." Sunstein, *supra* note 338, at 2026. Anticommodification arguments often arise in regard to taboo trades and reproduction. See *id.* at 2038 (employing a social norms framework to explain resistance to commodification); see also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 (1987); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 84-85 (1997). For application of these concepts to procedural rights, see Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 2006 n.297 (2005), and replies, see generally Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 91-92 (2011).

352. Sunstein, *supra* note 338, at 2037-38 (describing social meaning and commodification).

353. See Meares, *supra* note 28, at 160 (observing argument that taking police effectiveness into account "would result in the flagrant disregard of individual rights").

354. See Posner, *supra* note 25, at 74-75.

355. See, e.g., *Herring v. United States*, 555 U.S. 135, 145-46 (2009).

Trade-offs pervade modern Fourth Amendment doctrinal law whether we like it or not.

Moreover, there exists a significant difference between a court's *ex post* analysis of unconstitutional behavior and the executive branch's proactive efforts to balance and internalize risk.³⁵⁶ If recent scholarship is any guide, the use of a cost-benefit balancing in articulating police policy is not only permissible, but also consistent with the ends of preserving Fourth Amendment rights.³⁵⁷

CONCLUSION

This Article proposes a well-known tool, albeit one that has yet to take its rightful place within the Fourth Amendment regulatory toolbox: the Pigouvian tax. Professors Masur and Posner have urged scholars and policymakers to recognize the corrective tax's potential across a number of regulatory contexts.³⁵⁸ This Article makes the case for considering the Fourth Amendment as one of them.

The pricing approach is far from perfect,³⁵⁹ but it offers benefits currently unavailable under our bifurcated regime of exclusion and constitutional tort liability. It strikes a reasonable balance between federal intervention and local decision-making, and between mandatory rules and tailored solutions. It empowers public participation and creates the type of healthy feedback loop that renders criminal law enforcement more responsive to the public interest.³⁶⁰ It answers Professor Tracey Meares's call to conceptualize searches and seizures as the product of policy-level decision-making and not isolated "incidents."³⁶¹ And finally, it leverages—and at least partially corrects—local policing's relationship with the federal fisc. If the federal government has been flooding local police departments

356. These are "second-order" questions. See John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 205, 211 (2015) (exploring second-order regulation and noting that although constitutional law dictates certain rights and remedies, "any number of safeguards may suffice to protect a single constitutional value").

357. See, e.g., Friedman & Ponomarenko, *supra* note 183, at 1850; Reinert, *supra* note 195, at 1504-06.

358. See generally Masur & Posner, *supra* note 124.

359. See *supra* Part II.B.

360. See, e.g., Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 6 (2012).

361. Meares, *supra* note 28, at 162.

with too much money, a Fourth Amendment pricing regime offers federal regulators a principled mechanism through which to gradually roll back some of its largesse.

No doubt, remedies such as the exclusionary rule play an important role in communicating important values.³⁶² Nevertheless, our traditional Fourth Amendment remedies leave many gaps in oversight, in part because run-of-the-mill constitutional violations are so difficult to detect. The pricing approach is useful precisely because of its capacity to fill these gaps. A corrective pricing program cannot possibly solve all of our policing problems, but it can play a key role in alleviating some of them. That alone merits its serious consideration.

³⁶². See *supra* notes 341-44 and accompanying text.