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Probability, Probable Cause, and the Law of Unintended Consequences

Lawrence Rosenthal

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Lawrence Rosenthal*

I am only too happy to see Max Minzner argue for incorporating the success rates for search and seizure into the Fourth Amendment calculus. This is a cause that I took up some time ago;[1] I am glad for the company. Still, the law of unintended consequences operates all too frequently when it comes to social policy. We should think a bit about what this may mean for Professor Minzner's proposal.

As Professor Minzner notes, the available empirical evidence indicates that the rate at which evidence is recovered on the execution of a search warrant is high, exceeding eighty percent.[2] This suggests that officers are, if anything, too conservative in seeking warrants. After all, probable cause is something more like a fifty percent chance that a search will bear fruit. The Supreme Court defines probable cause as "a fair probability that contraband or evidence of a crime will be found,"[3] in other words, probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[4] Conversely, Professor Minzner probably underestimates the hit rate for warrantless searches. The national hit-rate data he cites, for example, appears to include all searches, not only searches based on probable cause.[5] The Fourth Amendment, however, permits searches on less than probable cause; a forcible stop and brief detention is considered constitutionally permissible when the officer reasonably suspects

* Professor of Law, Chapman University School of Law.

1. Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641, 670–80 (2005).

2. Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEXAS L. REV. 913, 913 (2009).

3. Illinois v. Gates, 462 U.S. 213, 238 (1983).

4. *Id.* at 244 n.13.

5. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 7 (2007) *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf.

that cri minal activity is afoot, [6] and a frisk incide nt to such a stop is considered re asonable whe n an officer reasonably suspects that t he subject may be arm ed or otherwise dangerous.[7] This reasonable-suspicion standard, in turn, "falls considerabl y short of satisfy ing a preponderance of the evidence sta ndard"[8] and "accepts the r isk that officers may stop innocent people."[9] Thus, the national data suggests, to m y eye, something more like a fifty percent hit rate for warr antless searches ba sed on probable caus e—where it ought to be.[10]

Professor Mi nzner suggest s that the high hit rates for warr ants r eflects the costs of obtaining warrants, citi ng data relatin g to federal wiretaps.[11] This data may be m isleading; wire taps generate unusuall y l arge costs because of the resources t hat are neces sarily devoted to m onitoring the taps, transcribing the recordings, and pursuin g investigative leads generated by the taps. The typ ical warrant involves far more modest costs—probably just the opportunity costs involved in spendin g the time to conduct an i nvestigation sufficient to establish probable cause, preparing and presenting the warran t application, and executing the warrant. Conversely , we should not be surprised that warrantless searches prod uce lower hit rates—when it com es to warrantless sear ches, the officer often has to m ake a split-second decision about whether to detain a suspect a nd conduct a sear ch or let the suspect go on his wa y, without the l uxury of a far m ore complete investigation that can precede the decision to s eek a wa rrant. Even so, t he eighty-percent figure indicates that even the m odest costs a ssociated with m ost warr ants probably overdeter the police; if all meritorious warrant applications were presented to a judge, the hit rate for warrants should be closer to even.

If the rather m odest costs of seeking a warrant overdeter the police, we might fear much greater o verdeterrence if the hit r ate of every officer were scrutinized. If Professor Minzner is right that police depart ments will b e

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6. *E.g.*, Florida v. J.L., 529 U.S. 266, 269–74 (2000); Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000); United States v. Sokolow, 490 U.S. 1, 7–8 (1989).

7. *E.g.*, Minnesota v. Dickerson, 508 U.S. 366, 374 (1993); Michigan v. Lo ng, 463 U.S. 1032, 1046–50 (1983).

8. United States v. Arvizu, 534 U.S. 266, 274 (2002) (citation omitted).

9. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

10. As Professor M inzner acknowle dges, the Maryland data he cite s discloses a h it rate exceeding fifty percent, Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 M ICH. L. REV. 651, 700 tbl. 14 (2002), yet that study also improperly assu mes that a ll searches were based on probable cause without an adequate demonstration th at reasonable-suspicion s earches are excluded from the data set. *Id.* at 673. The San Antonio stud y Professor Minzner cites appears to be simi larly f lawed; it require d officers to classify searches as either "consensual, incide nt to arrest, inventory, and probable cau se," JOHN C. LAMBERTH, SAN ANTONIO RACIAL PROFILING DATA ANALYSIS STUDY: FINAL REPORT FOR THE SAN ANTONIO POLICE DEPARTMENT 42 (2003), creating the pos sibility that offic ers reported reasonable suspicion as probable c ause searches. Professor Minzner does not tell us e nough about the Florida data in his possession to enable an assessment.

11. Minzner, *supra* note 2, at 926.

sensitive to the risk of exclusion of evidence or civil liability arising from officers with low hit rates, officers with low hit rates, in turn, should fear adverse consequences for their careers. Officers with low hit rates might, for example, become inviting targets for civil litigation, and although they might often be indemnified for awards of compensatory damages, they could face personal liability for punitive damages or compensatory awards premised on a finding of bad faith.[12]

In these circumstances, the risk of overdeterrence becomes quite real. Professor Minzner worries that officers might respond by providing false information about their hit rates and contrives some answers for this problem.[13] In my view, however, he does not adequately address the possibility of overdeterrence—less successful officers will simply refrain from conducting searches except when the likelihood of success is extraordinarily high, such as when contraband is observed in plain view. To be sure, such officers will also have relatively low numbers of searches, but it will be difficult for police departments to discipline officers who can credibly claim to be exercising prudent caution for constitutional rights—especially when most officers enjoy generous civil-service and collective-bargaining protections from supervisory discipline. Thus, overdeterrence can be an enormous unintended consequence of Professor Minzner's proposal.

Overdeterrence is something that should cause us great concern. I have elsewhere argued that the available empirical evidence—such as the enormous crime drops that aggressive stop-and-frisk tactics produced in New York City—powerfully suggests that one of the most efficacious strategies for fighting violent crime is to increase the rate at which officers conduct searches of individuals in high-crime areas.[14] If so, there is a serious risk that Professor Minzner's regime will produce substantially higher crime rates—a risk of which he appears to be unaware.

Is the threat of overdeterrence a fatal objection to Professor Minzner's project? I think not; the benefits of this proposal argue strongly for its adoption. Still, if the proposal were to be adopted, we must consider the problem of overdeterrence. Two admonitions come to mind. First, courts should be sensitive to concerns that just as hit rates should not go too low, they should not be too high either. A legal regime that insists on ever higher hit rates will lead to ever greater overdeterrence. Hit rates around fifty percent for searches requiring probable cause are about right. If they get much higher, that is a good indication that overdeterrence has become a real

12. For a survey of the law governing indemnification of public employees, see Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 812–13 (2007).

13. Minzner, *supra* note 2, at 937–39.

14. Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 20–37 (2009).

problem. After all, the Fourth Am endment permits the police to fight crim e as aggressively as possible within c onstitutional constraints. There i s, accordingly, no virtue—constitutional or otherwise—in hit rates of eighty percent or higher. Instead, they are a warning sign of th e kind of overdeterrence that may stimulate increases in violent crime.

Second, courts need to b e sensitive to the law enforcement interests underlying searches. Alt hough Professor Minzner discusses searches on probable cause, his argu ments are no less applicable to search and seizure on reasonable suspicion, which most likely dwarf, in volume, se arches based on probable cause. For exa mple, New York City Police Dep artment data from 1998 and the first three months of 1999 showed that stop-and-frisks based on reasonable suspicion that the subject was unlawf ully carry ing a fir earm produced one arr est every 15.89 tim es, while the stop-to-arrest ratios for stops based on suspicion of violent, property, and drug crimes were 5.94, 7.61, and 5.22, respectively.[15] Yet, the hit rate for weapons stop-and-frisks should not be especi ally troubli ng. The Supreme Court assesses the reasonableness of a stop-and-frisk by balancing the individua l's liberty interests agai nst the law enforcem ent interests underly ing a search, and considers off icer safety to be an e specially weighty interest.[16] For that reason, it is doubtful that the Fourth Am endment should be un derstood to require an especially high probabilit y before an officer is perm itted to perform a bri ef pat-down of a suspect t hat he suspec ts is ar med. Indeed, I have argued that the Fourth A mendment's requirement of reaso nableness should includ e an inq uiry into not only hit rates, b ut the extent t o which a given law enforcem ent tactic is shown to be effective in drivin g down the crime rate.[17] If police officers co me to believe that t he law will n ot afford them am ple leeway to pr otect them selves in high- crime areas, they will simply stay in their patrol cars, outside of harm's way. That is an incentive structure that, once again, is all too lik ely to stim ulate incre ases in violent crime.

Professor Mi nzner's article is a w elcome contribution to the policing debate. Even so, let us not forget about the law of unintended consequences.

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15. Jeffrey Fagan & G arth Davies, *Policing Guns: Order Maintenance Policing and Crime Rates in New York*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 20 2 tbl.9.1 (Bernard E. Harcourt ed., 2003).

16. Terry v. Ohio, 392 U.S. 1, 20–27 (1968).

17. Rosenthal, *supra* note 1, at 676–79.