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# Probability, Probable Cause, and the Law of Unintended Consequences

Lawrence Rosenthal



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# CHAPMAN UNIVERSITY SCHOOL OF LAW



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*PROBABILITY, PROBABLE CAUSE, AND  
THE LAW OF UNINTENDED CONSEQUENCES*

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# Texas Law Review

## *See Also*

### Probability, Probable Cause, and the Law of Unintended Consequences

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;<sup>1</sup> 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.<sup>2</sup> 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,"<sup>3</sup> in other words, probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."<sup>4</sup> 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.<sup>5</sup> 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

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\* 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 criminal activity is afoot,<sup>6</sup> and a frisk incident to such a stop is considered reasonable when an officer reasonably suspects that the subject may be armed or otherwise dangerous.<sup>7</sup> This reasonable-suspicion standard, in turn, “falls considerably short of satisfying a preponderance of the evidence standard”<sup>8</sup> and “accepts the risk that officers may stop innocent people.”<sup>9</sup> Thus, the national data suggests, to my eye, something more like a fifty percent hit rate for warrantless searches based on probable cause—where it ought to be.<sup>10</sup>

Professor Minzner suggests that the high hit rates for warrants reflects the costs of obtaining warrants, citing data relating to federal wiretaps.<sup>11</sup> This data may be misleading; wire taps generate unusually large costs because of the resources that are necessarily devoted to monitoring the taps, transcribing the recordings, and pursuing investigative leads generated by the taps. The typical warrant involves far more modest costs—probably just the opportunity costs involved in spending the time to conduct an investigation sufficient to establish probable cause, preparing and presenting the warrant application, and executing the warrant. Conversely, we should not be surprised that warrantless searches produce lower hit rates—when it comes to warrantless searches, the officer often has to make a split-second decision about whether to detain a suspect and conduct a search or let the suspect go on his way, without the luxury of a far more complete investigation that can precede the decision to seek a warrant. Even so, the eighty-percent figure indicates that even the modest costs associated with most warrants 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 modest costs of seeking a warrant overdeter the police, we might fear much greater overdeterrence if the hit rate of every officer were scrutinized. If Professor Minzner is right that police departments will be

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. Long*, 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 Minzner acknowledges, the Maryland data he cites discloses a hit rate exceeding fifty percent, Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 700 tbl. 14 (2002), yet that study also improperly assumes that all searches were based on probable cause without an adequate demonstration that reasonable-suspicion searches are excluded from the data set. *Id.* at 673. The San Antonio study Professor Minzner cites appears to be similarly flawed; it required officers to classify searches as either “consensual, incident to arrest, inventory, and probable cause,” JOHN C. LAMBERTH, SAN ANTONIO RACIAL PROFILING DATA ANALYSIS STUDY: FINAL REPORT FOR THE SAN ANTONIO POLICE DEPARTMENT 42 (2003), creating the possibility that officers reported reasonable suspicion as probable cause searches. Professor Minzner does not tell us enough 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> 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

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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 Amendment permits the police to fight crime as aggressively as possible within constitutional constraints. There is, accordingly, no virtue—constitutional or otherwise—in hit rates of eighty percent or higher. Instead, they are a warning sign of the kind of overdeterrence that may stimulate increases in violent crime.

Second, courts need to be sensitive to the law enforcement interests underlying searches. Although Professor Minzner discusses searches on probable cause, his arguments are no less applicable to search and seizure on reasonable suspicion, which most likely dwarf, in volume, searches based on probable cause. For example, New York City Police Department data from 1998 and the first three months of 1999 showed that stop-and-frisks based on reasonable suspicion that the subject was unlawfully carrying a firearm produced one arrest every 15.89 times, 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.<sup>15</sup> Yet, the hit rate for weapons stop-and-frisks should not be especially troubling. The Supreme Court assesses the reasonableness of a stop-and-frisk by balancing the individual's liberty interests against the law enforcement interests underlying a search, and considers officer safety to be an especially weighty interest.<sup>16</sup> For that reason, it is doubtful that the Fourth Amendment should be understood to require an especially high probability before an officer is permitted to perform a brief pat-down of a suspect that he suspects is armed. Indeed, I have argued that the Fourth Amendment's requirement of reasonableness should include an inquiry into not only hit rates, but the extent to which a given law enforcement tactic is shown to be effective in driving down the crime rate.<sup>17</sup> If police officers come to believe that the law will not afford them ample leeway to protect themselves 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 likely to stimulate increases in violent crime.

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

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15. Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance Policing and Crime Rates in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 202 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.