

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

2015

### The Law of Police

Richard H. McAdams

Dharmika Dharmapala

Nuno Garoupa

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Richard H. McAdams, Dharmika Dharmapala & Nuno Garoupa, "The Law of Police," 82 University of Chicago Law Review 135 (2015).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# The Law of Police

Richard H. McAdams<sup>†</sup>, Dhammika Dharmapala<sup>††</sup> & Nuno Garoupa<sup>†††</sup>

*Some Fourth Amendment doctrines distinguish between searches executed by police and others, being more demanding of the former. We explore these distinctions by offering a simple theory for how “police are different,” focusing on self-selection. Those most attracted to the job of policing include those who feel the most intrinsic satisfaction from facilitating the punishment of wrongdoers. Thus, we expect police to have more intensely punitive preferences, on average, than the public or other governmental actors. Some experimental evidence supports this prediction. In turn, stronger punishment preferences logically lower one’s threshold of doubt—the perceived probability of guilt at which one would search or seize a suspect. That police have a lower threshold of doubt plausibly justifies more judicial scrutiny of police searches than of nonpolice searches (as well as more-permissive rules when police perform tasks outside the scope of law enforcement). We also consider and critique Professor Bill Stuntz’s alternative explanation of the relevant doctrine.*

## INTRODUCTION

Are police different? Are law enforcement officials sufficiently different from other governmental actors that legal rules should ever distinguish between the actions of the police and the same actions undertaken by other governmental actors? Or should the law refuse to draw any such distinctions, treating police as identical to other governmental actors in all circumstances? We think it is plausible to say that the law should draw no distinctions whatsoever, as most Fourth Amendment case law indicates. We wish to argue, however, that police *are* importantly different and that this difference should be given some weight in legal analysis. Recognizing this difference will sometimes

---

<sup>†</sup> Bernard D. Meltzer Professor of Law and Aaron Director Research Scholar, The University of Chicago Law School.

<sup>††</sup> Professor of Law, The University of Chicago Law School.

<sup>†††</sup> Professor of Law and H. Ross and Helen Workman Research Scholar, University of Illinois College of Law.

For comments on earlier drafts, the authors collectively thank Professors Aziz Huq, Tracey Meares, Tom Miles, David Alan Sklansky, and the participants at Criminal Procedure in the Spotlight: Theoretical, Constitutional, and Administrative Developments, The University of Chicago Law School (May 30, 2014).

suggest rules that distinguish between governmental actors, as we observe in a few Fourth Amendment cases.

In those cases in which Fourth Amendment doctrine is sensitive to whether the governmental agent performing a search is a police officer, the doctrine demands more justification for police searches than for nonpolice searches. Nothing in the text of the Fourth Amendment, nor anything obvious from its original understanding, explains this distinction.<sup>1</sup> So the best account—if there is one—is likely functional. Professor Bill Stuntz was perhaps the first to offer such a functional theory.<sup>2</sup> He focused attention on the other “nonsearch” regulatory powers that the governmental agent possesses.<sup>3</sup> Stuntz contended that, when nonsearch powers are substantial, citizens will willingly accept—implicitly bargain for—weaker Fourth Amendment rights to forestall other, less desirable forms of regulation.<sup>4</sup> In this Essay, we critique Stuntz’s explanation and offer our own. We do not seek to resolve all the doctrinal issues that arise along the way; we hope to defend only the plausibility of legal rules that demand more of police than of other governmental actors.

Our claims are positive and normative. Our positive claim is that the people who become police officers differ, on average, from the people who become other governmental employees and, more generally, from the public. Various mechanisms might produce this difference, but we explore only one possibility that we believe is important: self-selection. Self-selection for policing might generate differences on any number of dimensions. For simplicity’s sake, we emphasize a single dimension: those who select into the job of policing have more intensely *punitive preferences* than those who select into other government jobs.

Our normative claim begins with this observation: the intensity of one’s punishment preferences logically affects one’s threshold of doubt—the perceived probability of guilt at which one would take action, such as a search or an arrest, against a

---

<sup>1</sup> See US Const Amend IV:

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.

<sup>2</sup> See generally William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan L Rev 553 (1992).

<sup>3</sup> See *id.* at 566.

<sup>4</sup> See *id.* at 555.

suspect. The hypothesis that law-enforcement officers have more intensely punitive preferences than other governmental actors (or the public) implies that the former group will have a lower threshold of doubt for searches and seizures. That lower threshold is one factor weighing in favor of greater scrutiny of police, rendering plausible a doctrinal rule that is more demanding of police searches than of nonpolice searches. Of course, many factors influence the best functional rule for searches and seizures, including simple matters of administrability.<sup>5</sup> Differences in police preferences need not justify a completely different Fourth Amendment regime for police because these differences must be balanced against other factors. We will not conduct the balancing in this Essay; we argue only that police-specific rules are normatively defensible.

We present our claims in three parts. First, we identify some puzzling doctrinal differences between the treatment of police and other governmental searchers. Second, we present our theory of punitive police, which not only explains the doctrinal differences but also solves a related puzzle—why courts distinguish between police work involving law enforcement and other forms of police work. Third, we describe and critique the best alternative account, Stuntz’s implicit-bargain theory.

#### I. FOURTH AMENDMENT DISTINCTIONS BETWEEN POLICE AND OTHER GOVERNMENTAL AGENTS

Fourth Amendment law has sometimes treated police differently than other governmental actors, though more often in the past than the present. The most obvious contemporary examples involve the regulation of public school students and public employees. In *New Jersey v T.L.O.*,<sup>6</sup> the US Supreme Court upheld the search of a teenager’s purse by a public-high-school principal based on “reasonable grounds”<sup>7</sup>—a lower standard of suspicion than the probable cause standard, which would have been needed to justify a police officer’s search of the same purse (a warrant may also have been needed).<sup>8</sup> In two later cases, the Court upheld high school programs that required students to

---

<sup>5</sup> See *Florence v Board of Chosen Freeholders of County of Burlington*, 132 S Ct 1510, 1522 (2012) (“Officers who interact with those suspected of violating the law have an ‘essential interest in readily administrable rules.’”) (citation omitted).

<sup>6</sup> 469 US 325 (1985).

<sup>7</sup> *Id.* at 342.

<sup>8</sup> See *id.* at 342–43.

submit to random drug testing in order to participate in extracurricular activities, even though it would violate the Fourth Amendment for police to administer such tests.<sup>9</sup>

When the government is an employer, as when it operates a public hospital, its searches of employee spaces—for example, enclosed offices, individual desks, and lockers—are governed by the Fourth Amendment.<sup>10</sup> Nonetheless, the Court has applied a lower standard to governmental searches of employees' private spaces than the warrant-and-probable-cause standard that it would ordinarily require for police searches.<sup>11</sup> For example, the Court upheld Federal Railroad Administration (FRA) regulations that required railroads to test their employees for drugs and alcohol after certain safety incidents.<sup>12</sup> Though the Court would ordinarily require individualized suspicion and a warrant for such intrusions, it did not impose such a requirement for searches performed pursuant to the FRA regulations.<sup>13</sup>

In these cases, the Court typically uses the terminology of “special needs” to justify its decision.<sup>14</sup> “Special” does *not* refer to

---

<sup>9</sup> See *Board of Education v Earls*, 536 US 822, 826, 830 (2002) (holding that the school district did not violate the Fourth Amendment by requiring students to consent to random drug testing in order to participate in any extracurricular activity); *Vernonia School District 47J v Acton*, 515 US 646, 650, 664–65 (1995) (holding that the school district did not violate the Fourth Amendment by requiring student athletes to submit to random drug testing). There are other ways to read these cases—emphasizing the context of schools, for instance—but we note that the *Earls* Court relied on the fact that “the test results are not turned over to any law enforcement authority,” thus creating an affinity with other cases in this discussion. *Earls*, 536 US at 833.

<sup>10</sup> See *O'Connor v Ortega*, 480 US 709, 715–17 (1987) (O'Connor) (plurality).

<sup>11</sup> See *id.* at 725–26 (holding that public employers are subject to a reasonableness standard under the Fourth Amendment regarding the inception and scope of work-related searches of private spaces). See also *City of Ontario, California v Quon*, 560 US 746, 760–61 (2010) (explaining that a workplace's “special needs” justify an exception to the general rule that warrantless searches are per se unreasonable under the Fourth Amendment); *National Treasury Employees Union v Von Raab*, 489 US 656, 678–79 (1989) (“Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment.”). One can read these cases as instead drawing a line based on the purpose of the search—to facilitate law enforcement or workplace efficiency—which happens to correlate with the identity of the governmental agent. See *Ortega*, 480 US at 724. We address the purpose distinction below. See Part II.C.

<sup>12</sup> *Skinner v Railway Labor Executives' Association*, 489 US 602, 608, 633 (1989).

<sup>13</sup> See *id.* at 624 (“In limited circumstances . . . a search may be reasonable despite the absence of [individualized] suspicion. We believe this is true of the intrusions in question here.”).

<sup>14</sup> See, for example, *id.* at 620 (“The Government's interest in regulating the conduct of railroad employees to ensure safety . . . presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause

an especially powerful need. When the Court allows a principal to search a student's purse, it is not because the need to enforce school rules against tobacco use, for instance, is more important than the need to enforce criminal laws. For drug tests of students or employees, the social interest is the same regardless of who administers the tests: teachers, bureaucratic supervisors, or police officers. The same is true if the search aims to find stolen property—the interest is identical whether the police or some other governmental agent conducts the search. In each of these cases, the innocent party's privacy interest against governmental intrusion is also equally strong. Thus, it is puzzling that the Court distinguishes the levels of justification required for these searches.

Beyond current doctrine, there are interesting historical examples. In the since-overruled case of *Frank v Maryland*,<sup>15</sup> the Supreme Court upheld warrantless administrative searches of homes “as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law.”<sup>16</sup> Notably, the governmental agent conducting the search was a city health inspector, not a police officer.<sup>17</sup>

Consider also a recently abandoned distinction in the law of the exclusionary rule. The Supreme Court first recognized the “good faith” exception thirty years ago in *United States v Leon*.<sup>18</sup> In *Leon*, police officers relied on a warrant that a court later declared invalid for want of probable cause.<sup>19</sup> Subject to some conditions, the Court ruled that the exclusionary rule was inappropriate in this case because the police relied on the magistrate's assessment of probable cause.<sup>20</sup> The Court noted that “the exclusionary rule is designed to deter *police misconduct* rather than to punish the errors of judges and magistrates,” and that there was “no evidence suggesting that judges and magistrates are

---

requirements.”) (quotation marks omitted); *Griffin v Wisconsin*, 483 US 868, 876 (1987) (mentioning the “special needs” of Wisconsin's probation system); *Ortega*, 480 US at 725 (referencing the “special needs” of the workplace); *T.L.O.*, 469 US at 332 n 2 (discussing the “special needs” of the school system).

<sup>15</sup> 359 US 360 (1959), overruled by *Camara v Municipal Court of San Francisco*, 387 US 523, 528 (1967). See also *See v City of Seattle*, 387 US 541, 546 (1967) (holding that code-enforcement inspections of commercial structures without a warrant violate the Fourth Amendment).

<sup>16</sup> *Frank*, 359 US at 367.

<sup>17</sup> *Id* at 361.

<sup>18</sup> 468 US 897 (1984).

<sup>19</sup> *Id* at 902–03.

<sup>20</sup> *Id* at 905, 919–21.

inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.”<sup>21</sup> The implication is that such evidence does exist for police. The Court later distinguished police from legislators, rejecting the exclusion of evidence in *Illinois v Krull*,<sup>22</sup> in which the police relied on a state statute that authorized their search, even though a court had subsequently held the statute unconstitutional under the Fourth Amendment.<sup>23</sup>

After *Krull*, the good faith exception appeared to depend on whether police were the ultimate source of the governmental error that produced the Fourth Amendment violation.<sup>24</sup> *Arizona v Evans*<sup>25</sup> seemed to confirm this view. In that case, the Court refused to apply the exclusionary rule when police relied on a database that erroneously indicated the existence of an arrest warrant.<sup>26</sup> A clerk made the error—possibly in the sheriff’s office, but probably in the court’s office.<sup>27</sup> Chief Justice William Rehnquist extended *Leon* to these facts, reasoning: “Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of *court employees*.”<sup>28</sup> In Justice Sandra Day O’Connor’s concurring opinion, which was joined by Justices Stephen Breyer and David Souter, she said that the majority opinion “[p]rudently . . . limit[ed] itself to the question whether a *court employee*’s departure from such established procedures is the kind of error to which the exclusionary rule should apply.”<sup>29</sup>

Thus, for many years, the good faith exception bypassed the exclusionary rule when legislative or judicial personnel, including clerical staff, were ultimately responsible for the Fourth Amendment violation, but not—as conventionally understood—when police personnel, including clerical staff, were ultimately responsible. The line between clerks working for police and

---

<sup>21</sup> Id at 916 (emphasis added). See also *Massachusetts v Sheppard*, 468 US 981, 990–91 (1984).

<sup>22</sup> 480 US 340 (1987).

<sup>23</sup> Id at 351, 353.

<sup>24</sup> See id at 350 (discussing the Court’s reasoning in *Leon* and stating that “[p]enalizing the officer for [another governmental branch’s] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations”) (quotation marks omitted).

<sup>25</sup> 514 US 1 (1995).

<sup>26</sup> Id at 3–4.

<sup>27</sup> Id at 5.

<sup>28</sup> Id at 16 (emphasis added).

<sup>29</sup> *Evans*, 514 US at 16 (O’Connor concurring) (emphasis added).

clerks working for courts is obviously a thin one, but if there is a distinction between police and other governmental agents, some employees will inevitably be difficult to classify. One might distinguish field officers from other law enforcement employees, but some justices thought that it was useful to draw a sharp line between all police employees and all other governmental employees.<sup>30</sup>

More recently, the Supreme Court has turned sharply against the exclusionary rule in a series of cases,<sup>31</sup> one of which abandoned the police/nonpolice distinction. The facts in *Herring v United States*<sup>32</sup> were similar to those in *Evans*, except that the database error in the former—erroneously indicating that an arrest warrant existed—was clearly the result of a mistake by police clerical personnel.<sup>33</sup> Two of the four dissenters, Justices Breyer and Souter, emphasized the importance of maintaining the distinction between police errors and nonpolice errors.<sup>34</sup> The majority articulated a much narrower, more exceptional role for the exclusionary rule.<sup>35</sup>

Nonetheless, the longevity of the distinction and the doctrines previously reviewed—*Frank's* abandoned rule about administrative searches of homes and the extant rules about searches in schools and government workplaces—together raise the question whether the law should ever distinguish between police and other governmental actors.

---

<sup>30</sup> See id at 14–15 (majority).

<sup>31</sup> See, for example, *Davis v United States*, 131 S Ct 2419, 2423–24 (2011) (holding that the exclusionary rule does not apply to evidence obtained during a search conducted in reasonable reliance on binding appellate precedent, even when the precedent is later overruled); *Hudson v Michigan*, 547 US 586, 594 (2006) (holding that the exclusionary rule does not apply to evidence obtained in violation of the knock-and-announce rule, because the rule is not intended to protect a suspect's interest in keeping evidence from the government).

<sup>32</sup> 555 US 135 (2009).

<sup>33</sup> Id at 138.

<sup>34</sup> See id at 158–59 (Breyer dissenting).

<sup>35</sup> See id at 147–48 (majority) (“[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements . . . the criminal should not ‘go free because the constable has blundered.’”) (citation omitted).

## II. AN EXPLANATION: PUNITIVE POLICE

Should the Fourth Amendment sometimes treat police differently than other governmental actors? Our reason for answering in the affirmative is simple: police are different. The courts sometimes find this difference sufficiently important to craft different legal rules for police searches and nonpolice searches.

### A. Self-Selection Yields Punitive Police

Why are police different? One type of answer (raised by participants at the symposium) involves incentives external to police officers. Political officials or police management exert pressure on patrol officers, possibly through implicit quotas for arrests or stops.<sup>36</sup> We do not pursue this line of analysis. External incentives do not obviously explain how police differ from nonpolice actors, who are also subject to external incentives and political pressures.<sup>37</sup> Even if the external incentives motivating police are, in many cases, more intense than those facing other governmental agents, the incentives explanation strikes us as incomplete. It has worked well for New York City during the past two decades, as well as for a few other times and places, but for many decades in many American cities, there was no CompStat and no strong top-down pressure to achieve some number of stops and arrests per week.<sup>38</sup> We think that the police/nonpolice distinction matters across time periods and jurisdictions, so we look elsewhere for a more general explanation.

Another external factor is organizational culture, through which individual officers are socialized into the profession and

---

<sup>36</sup> See Al Baker and Liz Robbins, *A Quota by Any Other Name*, NY Times City Room Blog (NY Times, Jan 13, 2011), archived at <http://perma.cc/7DTY-H3KA> (describing the NYPD's de facto use of quotas despite their illegality); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum L Rev 1655, 1695 n 187 (2010) (collecting examples of reported quota use).

<sup>37</sup> For instance, teachers are evaluated in part by their students' standardized-test results, which may pressure teachers to use searches to rid the school of drugs and other distractions. Governmental employers also face budgetary pressures to rid themselves of subpar employees. See generally Christine Sgarlata Chung, *Government Budgets as the Hunger Games: The Brutal Competition for State and Local Government Resources Given Municipal Securities Debt, Pension and OBEP Obligations, and Taxpayer Needs*, 33 Rev Bank & Fin L 663 (2014).

<sup>38</sup> See generally Nathaniel Bronstein, Note, *Police Management and Quotas: Governance in the CompStat Era*, 48 Colum J L & Soc Probs (forthcoming 2015), archived at <http://perma.cc/499B-2BLV> (discussing police-department activity quotas and their negative effects, using the NYPD as an example).

into the norms of their particular police force or station house.<sup>39</sup> Although promising, we do not pursue this line of analysis. One reason is that organizational culture influences all governmental employees, so this proposition just raises the difficult question of why police culture differs from nonpolice culture.<sup>40</sup> In the end, we believe that our internal explanation based on self-selection is complementary to any organizational explanation.

Our theory of self-selection focuses on the characteristics of the individuals who become police officers. Although individuals must qualify for the job, they must also apply for it. Thus, they *self-select* by seeking one job rather than another.<sup>41</sup> Given two job opportunities with similar material benefits, people select into the job with greater intrinsic benefits.<sup>42</sup> What is intrinsically satisfying for one person may be intrinsically neutral or even costly to another. As a result, individuals attracted to policing are different from people attracted to government jobs like social worker, librarian, or environmental engineer.<sup>43</sup>

One might imagine that any number of individual characteristics could cause some people to value the job of policing more than the average person and to select into it accordingly. Plausible candidates might include those with an appetite for risk, those who value order and authority, or those who like to work outside. For simplicity's sake, we emphasize a single characteristic: a heightened preference for punishing. An interesting experimental literature documents the unsurprising fact that human beings have a preference for punishing

---

<sup>39</sup> See James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* 140, 157 (Harvard 3d ed 1969); Elizabeth Reuss-Ianni, *Two Cultures of Policing: Street Cops and Management Cops* 1–16, 121–26 (1983); John Van Maanen, *Observations on the Making of Policemen*, 32 *Hum Org* 407, 408 (1973).

<sup>40</sup> In addition, organizational culture should produce greater homogeneity over time within a police force or station house, but it does not obviously predict the direction of that influence. It would seem that culture could make police *more* observant than other governmental actors of Fourth Amendment rights.

<sup>41</sup> A variety of intrinsic preferences may influence self-selection across occupations. For a broad model, see generally Canice Prendergast, *The Motivation and Bias of Bureaucrats*, 97 *Am Econ Rev* 180 (2007). For a model of punitive policing, see generally Dhammika Dharmapala, Nuno M. Garoupa, and Richard H. McAdams, *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure* (Illinois Public Law Research Paper No 13-47, June 2013), archived at <http://perma.cc/LV7D-99E7>.

<sup>42</sup> See Dharmapala, Garoupa, and McAdams, *Punitive Police?* at \*24–25 (cited in note 41).

<sup>43</sup> See Prendergast, 97 *Am Econ Rev* at 191–92 (cited in note 41) (contrasting the typical characteristics of police officers and social workers).

transgressors—individuals who behave unfairly or wrongly.<sup>44</sup> Humans are willing to incur costs to make sure that punishment occurs. Economists call the preference one for “altruistic punishment,” because individuals exhibit a willingness to punish transgressors even when doing so creates no possible gain for the individual other than satisfying the revealed preference for punishment.<sup>45</sup> (In the experiments, punishment is allowed at the end of the experiment, when it is too late to prospectively influence experimental behavior.)<sup>46</sup> Indeed, people are willing to incur these costs even when they are not a victim of the transgression.<sup>47</sup>

The job of policing offers an unusual set of opportunities to punish a suspect, either directly or indirectly. Obviously, the police have the opportunity to *cause* punishment. A successful police investigation or arrest may eventually produce a conviction and a criminal sentence. Moreover, the pretrial criminal processes that the arrest triggers—booking, detention, and required court appearances—are commonly experienced as punitive.<sup>48</sup> But there is no reason to think that the human preference for punishment is limited to sanctions formally imposed by the state. In an important sense, the police themselves frequently *inflict* punishment when they manhandle a suspect during a stop or arrest, seize or destroy valuable property, or verbally humiliate a suspect in public. In sum, police can indirectly cause or directly inflict punishment with a frequency and intensity that few other

---

<sup>44</sup> See, for example, Ernst Fehr and Urs Fischbacher, *Human Altruism—Proximate Patterns and Evolutionary Origins*, 27 *Analyse & Kritik* (Analyze & Critique) 6, 8 (2005) (“The ultimatum game . . . nicely illustrates that a sizeable number of people from a wide variety of cultures . . . are willing to hurt others to . . . punish unfair behaviour.”). Experiments confirm this result even when the potential punisher is not himself a victim of the wrongdoing. See generally Ernst Fehr and Urs Fischbacher, *Third-Party Punishment and Social Norms*, 25 *Evol & Hum Behav* 63 (2004); Joseph Henrich, et al, *Costly Punishment across Human Societies*, 312 *Science* 1767 (2006). See also Dominique J.-F. de Quervain, et al, *The Neural Basis of Altruistic Punishment*, 305 *Science* 1254, 1258 (2004) (reporting that neural images of subjects undergoing a punishment experiment reveal that the effective punishment of norm violators activates a reward center in the brain).

<sup>45</sup> See, for example, Quervain, 305 *Science* at 1258 (cited in note 44) (explaining the neural basis behind the preference for altruistic punishment).

<sup>46</sup> See, for example, Fehr and Fischbacher, 25 *Evol & Hum Behav* at 66–67 (cited in note 44).

<sup>47</sup> See id at 85.

<sup>48</sup> For a thorough analysis of how the criminal process is really part of the punishment, see Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* 199–243 (Russell Sage 1992).

occupations can match (perhaps only prison guards; we do not here explore the doctrinal implications outside police).

By contrast, alternative government jobs such as librarian, social worker, environmental engineer, accountant, clerk, agricultural consultant, or firefighter offer far fewer occasions for punishment. A teacher can verbally chastise and sanction a student, of course, but cannot roughly tackle and handcuff the student, initiate the process of booking and confinement to jail or prison, or engage in the same verbal abuse that some police officers routinely dole out.

For the individual who gains utility from punishing transgressors, the punitive opportunities of policing are a job benefit, effectively equivalent to receiving a higher wage. If a number of jobs pay the same wage, but one offers more punishment opportunities than all the others, that job will attract people with punishment preferences. Let us reasonably assume, as the experimental evidence implies, that there is heterogeneity in the distribution of punishment preferences.<sup>49</sup> We can then state the point in relative terms. Even if most people have some degree of punishment preference, the stronger one's punishment preference (that is, the more punitive one is), the more utility one expects to receive from being a police officer and the more attracted one is to the job. Those with the most intense punishment preferences will be willing to take a policing job even if its nominal pay is lower than other available jobs. As a consequence, police officers will, on average, have stronger punishment preferences than the typical citizen and (most importantly for explaining the doctrinal puzzle) other governmental workers.<sup>50</sup>

None of these claims is absolute. We acknowledge that some people with average punishment preferences will still find the policing job attractive, and punitive preferences are sufficiently common that we expect to find them, to some degree, among every type of governmental worker. The claim is simply one of overlapping bell curves: the mean or median police officer is

---

<sup>49</sup> See, for example, Fehr and Fischbacher, 27 *Analyse & Kritik* (*Analyse & Critique*) at 26 (cited in note 44).

<sup>50</sup> We also make the standard assumption that (punitive) preferences are not directly observable, so the public cannot prevent self-selection. Even if preferences were observable, however, citizens might prefer punitive police, despite the costs, because such police will work for a lower salary (given intrinsic satisfaction from the job) and shirk less (given that intrinsic satisfaction depends on performing the job sufficiently to cause punishment). See Dharmapala, Garoupa, and McAdams, *Punitive Police?* at \*3–4 (cited in note 41).

more punitive than the mean or median public school teacher, social worker, building inspector, or other governmental agent. We are most emphatically *not* saying that a preference for punishment is the only factor that matters to one who becomes a police officer. Undoubtedly, many factors influence the decision. We mentioned above the preferences for risk and for working outside, and we could easily add more (level of education, occupation of family members, desire to serve the community, the local unemployment rate, and so forth).<sup>51</sup> All these factors can influence the decision to become a police officer *along with* the intensity of one's punitive preferences. It is not as if the fact that police prefer risk more than other governmental workers means that police cannot also be more punitive. Indeed, some of the alternative accounts that one could give—for example, that individuals drawn to policing are more likely to be physically aggressive or have authoritarian personalities<sup>52</sup>—would entirely support and reinforce the point that we are making.

In the end, our positive claim about police is an empirical conjecture. However, it is reassuring that two very recent punishment experiments found some direct support for the proposition that police are more punitive.<sup>53</sup> In one, researchers used a unique subject pool that included eighty-seven French police commissioners and individuals who had recently passed the competitive national exam and were on their way to becoming

---

<sup>51</sup> Like most economic analysts, we are skeptical of self-reported motivations, especially when the most popular answer—"opportunity to help people in the community"—is obviously self-serving. See, for example, Anthony J. Raganella and Michael D. White, *Race, Gender, and Motivation for Becoming a Police Officer: Implications for Building a Representative Police Department*, 32 J Crim Just 501, 506 (2004) (reporting that the average intensity for this motivation was 2.61 out of 3, where 3 means "very influential"). Nonetheless, "to fight crime" is the fifth-ranked self-reported motivation (2.33 out of 3). *Id.* The separate motive "to enforce the laws of society" is self-reportedly of moderate importance (2.02 out of 3). *Id.*

<sup>52</sup> See David Alan Sklansky, *Police and Democracy*, 103 Mich L Rev 1699, 1733 & n 194 (2005) (acknowledging the belief that "the psychology of the police was shaped not just by occupational role . . . but also by a cluster of dispositions that officers brought with them to the job," such as the "view [of] violence as legitimate" and "a preoccupation with maintaining self-respect [and] proving one's masculinity") (citations omitted).

<sup>53</sup> See generally David L. Dickinson, David Maslet, and Marie Claire Villeval, *Norm Enforcement in Social Dilemmas: An Experiment with Police Commissioners* (GATE Working Paper 1416, May 2014), archived at <http://perma.cc/D242-9MGJ>; Guido Friebel, Michael Kosfeld, and Gerd Thielmann, *Sorting of Motivated Agents: Evidence from Applicants to the German Police*, Goethe University Frankfurt mimeo (2013) (on file with authors).

commissioners.<sup>54</sup> Police and other subjects participated in the standard experimental games for testing preferences to punish socially bad behavior (when punishment is costly and without strategic benefit).<sup>55</sup> The researchers found that “police subjects . . . enforce norms with punishment significantly more than non-police subjects.”<sup>56</sup> The other study achieved similar results with German high school students who had applied for jobs as police officers.<sup>57</sup>

### B. Punitive Police Search and Seize Excessively

That police have elevated punitive preferences is highly consequential in a way that may not be immediately obvious: the preference plausibly affects the appropriate threshold of doubt for acting on one’s suspicions. To take a familiar example, there are four possible outcomes at trial: convict the guilty, convict the innocent, acquit the guilty, and acquit the innocent. Weighing the benefit of the correct results and the costs of the incorrect results affects the probability threshold that one should use for conviction. For example, if convicting the innocent is thought to be much worse than acquitting the guilty, when

---

<sup>54</sup> See Dickinson, Masclet, and Villeval, *Norm Enforcement in Social Dilemmas* at \*11 (cited in note 53).

<sup>55</sup> See id at \*6.

<sup>56</sup> Id at \*20. In a condition that permitted *rewards* but not punishment, the study also found that police subjects were more likely to reward nonviolators (when rewards were also costly and without strategic benefit). Id at \*20–21. The gap between police and other subjects was larger, however, for punishment than rewards. Id at \*20 (showing that subjects are more willing to punish group members when the sanction institution is implemented exogenously, while an endogenous reward institution marginally increases the likelihood of rewarding group members). Also, when subjects were given the opportunity to vote for a punishment or reward mechanism—rather than have the experimenter impose one—a larger proportion of police voted for punishment than did other subjects. Id at \*21–22 (“[P]olice subjects exhibit a higher preference for sanctions compared to others.”). While the results regarding rewards are interesting, we view the punishment finding as most relevant, given that law enforcement is generally structured as a punishment system. The French results could be attributable either to self-selection or police training. In a second study, Friebe, Kosfeld, and Theilmann addressed this concern by using German high school students who had applied to join the police forces but had undergone no police training as the “police” subjects. Friebe, Kosfeld, and Theilmann, *Sorting of Motivated Agents* at \*28–29 (cited in note 53). Compared to nonapplicant high school students, the police-applicants were willing to incur greater costs to punish, suggesting that self-selection plays a major role in the punitive preferences of police. See id at \*39.

<sup>57</sup> See generally Friebe, Kosfeld, and Theilmann, *Sorting of Motivated Agents* (cited in note 53). See also note 56.

the weights of the correct outcomes are equal, one can logically derive a higher threshold of certainty for convicting.

To illustrate, suppose that *A* values the correct outcomes—convicting the guilty and acquitting the innocent—at zero (merely for convenience of exposition), while valuing a wrongful conviction at  $-10$  and a wrongful acquittal at  $-1$ . If *A* focuses only on these costs, it would take a guilt probability of at least 91 percent before her expected returns from convicting exceeded those from acquitting.<sup>58</sup> On the other hand, if *B* values wrongful acquittals at  $-5$  instead of  $-1$  and all other values remain equal, *B* should convict if the probability of guilt is merely 67 percent or higher. The same logic applies to determining the probability threshold for a search or seizure. For a mere search, the probability threshold should be lower, but it still depends on the value that one attaches to each of four possible outcomes: searching the guilty, searching the innocent, not searching the guilty, and not searching the innocent.

Consider the effect of punitive preferences. If two people are identical in all respects except punishment preferences, the person with a more intense punishment preference accrues a higher benefit from convicting the guilty and a higher cost from acquitting the guilty (while attaching the same benefit and cost to the other two outcomes). In the above example, we can explain the difference between *A* and *B* by saying that *B* has stronger punishment preferences, represented by the higher cost attached to acquitting the guilty. As a result, *B* rationally prefers a lower threshold of doubt—the probability of guilt at which *B* convicts, searches, or seizes.

Now we can offer a simple explanation of the doctrinal distinction between police and other governmental actors. Even if many factors influence the decision to become a police officer, police are likely more punitive than other governmental actors or the public, and therefore they likely have lower thresholds of doubt for searches and seizures. Thus, police require more judicial monitoring and scrutiny than other governmental actors.

---

<sup>58</sup> For instance, if she were only 80 percent certain of guilt, then the results of conviction are an 80 percent chance of convicting the guilty (valued at 0) and a 20 percent chance of convicting the innocent (valued at  $-10$ ), for an expectation of  $-2$ . Compare this with the expected results of acquitting: a 20 percent chance of a rightful acquittal (worth 0) and an 80 percent chance of a wrongful acquittal (worth  $-1$ ), for an expectation of  $-0.8$ . The latter is higher than the former, so *A* should acquit.

One might object that judges, who select into a profession that sentences convicted criminals, will be just as punitive as police, in which case the pessimist would deny that judicial review offers meaningful scrutiny. First, even if judges were equally punitive on average, some would still be less punitive than some police, and it would still make policy sense to *permit* judges to monitor and discipline police. Under this assumption, judicial monitoring would be insufficient to restrain police to the level that the citizenry desires, but such monitoring would still be better than nothing. Second, judges are unlikely to be as punitive as police. Elections tend to weed out judges who are more punitive than the public, while judicial appointments carry such prestige (and the job involves so much more than criminal sentencing) that the least-punitive lawyers are just as likely to pursue and accept the opportunity. Moreover, judges may perceive themselves as playing a weaker causal role in punishment, diminishing the intrinsic utility of punishing. Police legally choose whether to make an arrest<sup>59</sup> and detectives can, by expertise and effort, resolve cases that would otherwise go unsolved. Judges, on the other hand, are obligated to sentence a convict and rarely produce an otherwise-unobtainable sentence, especially when bound by plea bargains or the Sentencing Guidelines.

In short, after balancing other considerations, judicial rules may sensibly scrutinize police behavior more strenuously than the same behavior by other governmental officials.

### C. Explaining a Related Doctrinal Puzzle

The punitive-police theory explains another doctrinal puzzle: Fourth Amendment law is more deferential to police when they engage in activities with a primary purpose *other than* criminal-law enforcement. For example, if police want to enter a home without consent to find evidence of a crime and face an exigent circumstance like the imminent destruction of evidence (which excuses a warrant), then they need probable cause to believe that the home contains such evidence.<sup>60</sup> But if police want to enter a home because they suspect that someone is in immediate need of medical care or rescue from danger, then they need

---

<sup>59</sup> See Wilson, *Varieties of Police Behavior* at 6–7 (cited in note 39); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *Yale L J* 543, 552–54 (1960).

<sup>60</sup> See *Kentucky v King*, 131 S Ct 1849, 1856–57 (2011).

only meet a lower standard of a “reasonable basis” for the belief.<sup>61</sup> The latter activity is known as “community caretaking.”<sup>62</sup>

We see this distinction again in the roadblock cases. If the primary purpose of a roadblock is “ordinary law enforcement,”<sup>63</sup> such as the detection of narcotics (and assuming that there is no exigency such as an escaped prisoner), the Fourth Amendment forbids the roadblock because it inevitably seizes motorists absent “individualized” suspicion.<sup>64</sup> Yet if the primary purpose is one other than ordinary law enforcement, such as removing drunk drivers from the road, then the Court is willing to engage in a balancing test, under which it has upheld some such checkpoints.<sup>65</sup> Removing drunk drivers from the road may seem like law enforcement (because it terminates ongoing crimes), but the point is that the removal of drunk drivers generates immediate protection for the public independent of (and in the absence of) any arrest or prosecution. As long as the primary—even if not the exclusive—purpose is the benefit that accrues without arrest or prosecution, it is not the “ordinary interest” in crime control.<sup>66</sup>

It is a puzzle why courts would want to draw this line. It seems inexplicable from an efficiency perspective, because ordinary law enforcement needs may be more important than some special needs.<sup>67</sup> But our punitive-police theory explains the distinction in two ways. First, police officers engaged in community-caretaking activities will not anticipate a significant likelihood of arrest or punishment. Thus, their threshold

<sup>61</sup> See *Brigham City v Stuart*, 547 US 398, 406 (2006).

<sup>62</sup> See *Cady v Dombrowski*, 413 US 433, 441 (1973) (“Local police officers . . . engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”).

<sup>63</sup> But see *Illinois v Lidster*, 540 US 419, 427–28 (2004) (limiting the ordinary-law-enforcement rule in the context of a roadblock aimed at gathering information about a criminal suspect at large rather than targeting the occupants of stopped vehicles).

<sup>64</sup> *City of Indianapolis v Edmond*, 531 US 32, 41–42 (2000) (“We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”).

<sup>65</sup> See, for example, *Michigan Department of State Police v Sitz*, 496 US 444, 455 (1990).

<sup>66</sup> A third example is the inventory-search exception, which allows police to search the contents of a car that they have lawfully impounded without a warrant. *Florida v Wells*, 495 US 1, 4 (1990) (“[T]he allowance of the exercise of judgment based on concerns related to the purpose of an inventory search does not violate the Fourth Amendment.”). The Court has emphasized that the purpose of such a search is not to find evidence of a crime, but to have a list of valuables left in the car in case a property dispute arises when the car is returned to its owner. See id at 9–10 & n 2 (Brennan concurring).

<sup>67</sup> See Part I.

probability for entering a house will not usually be affected (that is, lowered) by the prospect of inflicting punishment. Accordingly, even if police are punitive, there is less divergence of preferences between the police and the public regarding the probability required to act for the purpose of community service—for example, to enter a house when it appears that someone is in dire need of medical care. Our theory of punishment preferences supports the observation of then-Professor Debra Livingston in this context: “[T]he potential for overzealousness is often reduced when police serve community caretaking, as opposed to law enforcement ends.”<sup>68</sup>

Second, if police are punitive, then they will not shirk as much as conventional economic models predict<sup>69</sup> *when executing the punitive parts of the job*. Those parts of the job generate intrinsic satisfaction. But especially punitive police will shirk just as much as less-punitive police at the nonpunitive parts of the job—such as community caretaking and roadblocks—which improve safety without netting arrests. Indeed, because nonpunitive tasks represent an opportunity cost—diverting time from punishment—punishment-preferring police will shirk *more* when engaged in these tasks than punishment-neutral police. If this is the case, then courts will create better incentives by demanding less justification for the activity that punitive police will underperform. Imposing a higher standard for punishment activities than for other activities will raise the external costs to the police for punishment work and lower the relative costs of nonpunitive work, offsetting the tendency of punitive police to overdo the former and underperform the latter.

### III. A CRITIQUE OF THE ALTERNATIVE: STUNTZ’S IMPLICIT-BARGAIN THEORY

The incomparable Professor Stuntz was perhaps the first to focus scholarly attention on the distinction between police and other governmental agents within Fourth Amendment

---

<sup>68</sup> Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U Chi Legal F 261, 265, 274 (advocating “a reasonableness approach in assessing police intrusions that are predominantly in service of community caretaking goals”).

<sup>69</sup> For one such model, see Robert Cooter and Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 NYU L Rev 1045, 1054–59 (1991).

jurisprudence.<sup>70</sup> We offer a critique of his theory because we regard it as the best alternative to our own.

Stuntz drew specific attention to the types of power *other than a search* that governmental officials may be able to exercise over individuals. If the “nonsearch” authority is broad, then the Fourth Amendment limitation on searching may prompt the governmental official to shift to a different power—one not limited by the Fourth Amendment—quite possibly to the detriment of the targeted individuals.<sup>71</sup> If the state finds it too difficult to search probationers or parolees, it can send them to or leave them in prison.<sup>72</sup> If the school principal cannot search suspected students, he can discipline and suspend them merely on the basis of his suspicion, limited only by the minimalist standards of due process.<sup>73</sup> Stuntz understood the cases, therefore, as recognizing an implicit bargain: when the governmental agent has broad authority, the citizen gives up strong Fourth Amendment rights in exchange for the government not exercising other powers to circumvent those rights.<sup>74</sup> As Stuntz put it, when governmental agents have broad powers over Fourth Amendment beneficiaries, “*both the government and the beneficiaries of Fourth Amendment protection would probably prefer that the protection be minimized: if it could not search, the government would do something else, and the something else is often worse than the search.*”<sup>75</sup>

This explanation “applies mostly to cases outside of criminal law enforcement,”<sup>76</sup> such that the theory explains the doctrinal puzzles that the prior sections of this Essay address. But Stuntz emphasized that his theory “*does not justify a sharp legal divide between police and non-police searches.*”<sup>77</sup> For example, as an exceptional case that his theory explains, Stuntz defended *New*

---

<sup>70</sup> See generally Stuntz, 44 Stan L Rev 553 (cited in note 2).

<sup>71</sup> See *id.* at 569 (“[T]he alternatives to searching may well be both likely and, from the point of view of the people whom the Fourth Amendment seeks to protect, worse.”).

<sup>72</sup> See *id.* at 580–81 (describing this option but noting financial limitations on its viability).

<sup>73</sup> See *id.* at 573–74. See also *Goss v Lopez*, 419 US 565, 581 (1975) (holding that students facing temporary suspension have interests that qualify for Due Process Clause protection, including notice of the charges, an explanation of incriminating evidence, and an opportunity to be heard).

<sup>74</sup> See Stuntz, 44 Stan L Rev at 590 (cited in note 2).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (emphasis added).

*York v Burger*,<sup>78</sup> which upheld a *police* search of a junkyard for stolen cars—*evidence of crime*—without a warrant but in compliance with a statute that authorized certain warrantless searches of businesses.<sup>79</sup> Stuntz argued that the police power of state governments to regulate business is so extensive that, if the courts required warrants, the government could respond, as a substitute, with extensive regulation giving it access to the same information in an even more burdensome manner.<sup>80</sup> In sum: “*The key is not who is doing the searching, but how the government is likely to react to restrictions on its ability to search.*”<sup>81</sup>

Stuntz’s theory is typically ingenious, but we offer reasons to reject it. Consider, first, the context in which the government’s nonsearch regulation occurs *after* the moment at which its desired search would have occurred. For example, in the school context, Stuntz imagined that the principal disciplines the suspected student after the time at which the principal or teacher would have instead searched the student had strong Fourth Amendment rights not stood in the way.

If the nonsearch regulation is *ex post* in this sense, our first objection is that Stuntz ignored the possibility of an antiretaliation doctrine. Even if due process protection generally leaves principals with wide latitude to suspend and otherwise discipline students suspected of wrongdoing, courts might have protected strong Fourth Amendment rights by forbidding principals from using their disciplinary powers for the purpose of *retaliating against* students who refused to consent to searches. Other areas of law facing the problem of retaliation have created such a doctrine, rather than simply conceding defeat and weakening rights so as to avoid retaliation.<sup>82</sup>

---

<sup>78</sup> 482 US 691 (1987).

<sup>79</sup> *Id.* at 693, 716.

<sup>80</sup> See Stuntz, 44 *Stan L Rev* at 584 (cited in note 2).

<sup>81</sup> *Id.* at 590 (emphasis added). Stuntz noted one exception to this analysis: when “the government targets whole classes of people,” as with categorical drug testing. *Id.* In these cases, “[t]he large number of people involved makes strategic responses by the government unlikely,” so the judicial protection of substantial Fourth Amendment rights is not likely to be circumvented. *Id.*

<sup>82</sup> For instance, First Amendment rights are so protected. See generally Matthew M. Killen, Note, *Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases*, 81 *Notre Dame L Rev* 1629 (2006). Many other antiretaliation rules protect statutory rights. See, for example, Andrew Kenny, Comment, *The Meaning of “Because” in Employment Discrimination Law: Causation in Title VII Retaliation Cases after Gross*, 78 *U Chi L Rev* 1031, 1031 (2011) (explaining that Title VII of the Civil

Second, individuals cannot actually be made worse off by strong Fourth Amendment rights (in this *ex post* context) because they can waive their rights by consenting to a search.<sup>83</sup> In discussing school searches, Stuntz considered but rejected the significance of consent. He suggested that, if the principal or teacher is free to treat the refusal to grant consent as an admission of guilt, then the innocent will feel compelled to consent to the search, thereby gaining nothing from strong Fourth Amendment rights.<sup>84</sup>

This conclusion, however, does not follow. Even if innocent students *usually* prefer to allow a search, there are instances in which they would prefer punishment. A loss of privacy that might embarrass adults is even more likely to humiliate teenagers, especially when the search might occur in view of other students who would discover some reason to bully the individual searched. A student would presumably not violate school rules by carrying in his or her backpack an authorized prescription medication that reveals a physical or mental condition, a book on pregnancy or LGBTQ sexuality, a pamphlet from an abortion clinic, or something as seemingly innocuous as an inhaler, tampon, or athletic supporter. A student could rationally prefer detention or suspension to the public revelation of the contents of his or her private containers. Indeed, such a preference might be common.<sup>85</sup>

The problem with Stuntz's theory is that there is one collective bargain. One has to guess at what most students want, and one must impose on students with minority preferences the outcome preferred by the majority. By contrast, with strong-but-waivable rights, one need not guess, and those with minority preferences can get the outcome that they prefer (refusing the search and accepting the sanction), while those with majority preferences get their way as well (allowing the search and avoiding the nonsearch sanction).

---

Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 "prohibit retaliation against an employee 'because' the employee opposed a discriminatory practice").

<sup>83</sup> See *Schneekloth v Bustamonte*, 412 US 218, 219 (1973) (stating that it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent") (citations omitted).

<sup>84</sup> See Stuntz, 44 Stan L Rev at 566 (cited in note 2).

<sup>85</sup> See *Safford Unified School District No 1 v Redding*, 557 US 364, 375 (2009) (recognizing the humiliating effect of a search, especially considering young people's "adolescent vulnerability").

Now consider a different context, in which the government responds to strong Fourth Amendment rights by some form of nonsearch regulation *before* the moment at which the government's desired search would have occurred. If businesses have strong Fourth Amendment rights, the government could respond with industry-wide regulations—for example, recordkeeping or reporting mandates or bans on privacy fences. These *ex ante* regulations will apply to all firms, not just those that, in a particular case, refuse to consent. So, in this scenario, the above objections do not apply: the government is not retaliating against the assertion of Fourth Amendment rights, and the individual firm cannot avoid the regulation by consenting to a particular search.

We offer two new objections to the implicit-bargain theory in this context. First, one should worry that the argument proves too much. If the implicit-bargain analysis applies to a heavily regulated industry, then why not to a heavily regulated *neighborhood*? Consistent with Stuntz's later work,<sup>86</sup> the police do have broad powers. They are free to flood the streets and sidewalks of a particular neighborhood with patrol officers and police dogs<sup>87</sup> to energetically monitor for the most trivial of crimes, to pay informants and run undercover operations, to install security cameras<sup>88</sup> and operate roadblocks (with a primary purpose other than ordinary law enforcement),<sup>89</sup> to ask repeatedly for consent searches,<sup>90</sup> and to stop-and-frisk "suspicious" individuals.<sup>91</sup> Perhaps a resident would regard aggressive policing of her

---

<sup>86</sup> See, for example, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv L Rev 780, 790–91 (2006) (explaining how "the *absence* of constitutional regulation plays a central role" in the context of police discretion) (emphasis omitted); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 505, 539 (2001) (noting that police benefit from broader criminal-liability rules and providing the example of the Fourth Amendment—under which, if the operative word "crime" includes enough behavior, the police can stop or arrest whomever they wish). But see Stuntz, 44 Stan L Rev at 589–90 (cited in note 2) ("Police officers have limited substantive authority over the suspects they try to catch.").

<sup>87</sup> See *Ligon v City of New York*, 736 F3d 118, 150 (2d Cir 2013) (discussing the "hot-spot policing" phenomenon, in which police make use of data to identify and focus resources on crime-prone areas).

<sup>88</sup> For an analysis of the phenomenon of police video surveillance, see generally Olivia J. Greer, Note, *No Cause of Action: Video Surveillance in New York City*, 18 Mich Telecomm & Tech L Rev 589 (2012).

<sup>89</sup> See *Edmond*, 531 US at 47–48.

<sup>90</sup> See Megan Annitto, *Consent Searches of Minors*, 38 NYU Rev L & Soc Change 1, 28 (2014) (discussing cases in which officers misrepresented their ability to get a warrant and "asked for consent repeatedly" after the individuals had refused).

<sup>91</sup> See *Terry v Ohio*, 392 US 1, 10 (1968).

neighborhood in this manner—partially constrained by strong Fourth Amendment rights—as worse than less-aggressive policing partially constrained by only weak Fourth Amendment rights. Implicit-bargain theory seems to justify a fairly radical abandonment of basic requirements like probable cause for arrest or a warrant to search a home on the ground that strong Fourth Amendment rights trigger an aggressive police response.

As a second objection in this *ex ante* context, implicit-bargain theory requires, contrary to fact, that citizens actually receive something in return for surrendering a higher level of Fourth Amendment protection. To make the point, let us translate the implicit-bargain theory into a rank ordering of outcomes. As translated here, Stuntz proposed that most individuals rank the possibilities in this order:

1. *Strong* Fourth Amendment rights and *minimal* nonsearch regulation.
2. *Weak* Fourth Amendment rights and *minimal* nonsearch regulation.
3. *Strong* Fourth Amendment rights and *intensive* nonsearch regulation.<sup>92</sup>

Stuntz's claim is that the first option is politically infeasible in many cases because courts will not seriously scrutinize most nonsearch regulation (for example, the principal suspending the suspected student, the government firing the suspected employee, or the government heavily regulating an entire industry).<sup>93</sup> If political reality removes the first option, then we can give the citizens only their second-best outcome. Stuntz then argued that citizens rank as second-best the outcome of weak Fourth Amendment rights combined with minimal nonsearch regulation.<sup>94</sup>

Once we rank the options explicitly, however, we see that this analysis omits a logical fourth possibility:

4. *Weak* Fourth Amendment rights and *intensive* nonsearch regulation.

Stuntz assumed that courts will not impede governmental actors from engaging in certain kinds of nonsearch regulation, in

---

<sup>92</sup> See Stuntz, 44 *Stan L Rev* at 561–62 (cited in note 2) (explaining the balancing of options that takes place and laying out how the government and innocent suspects would bargain for various formulations of search rules).

<sup>93</sup> See *id.* at 575–76, 584.

<sup>94</sup> See *id.* at 576.

which case there is nothing to prevent the government from accepting the benefit of weak Fourth Amendment rights *and also* engaging in intensive nonsearch regulation. This would mean that, at least on some occasions, option 2 is, like option 1, politically infeasible. If the government is going to engage in intensive nonsearch regulation in any event, only options 3 and 4 are politically feasible. Given that option 4 is, for citizens, the worst of both worlds, citizens prefer the option with strong Fourth Amendment rights (option 3). For those cases in which the government would prefer option 4, we need a doctrinal mechanism for enforcing the bargain—that is, for threatening to reinstate strong Fourth Amendment rights if the government engages in intrusive nonsearch regulation. Yet there is no hint of such a doctrinal wrinkle in the case law.

As a concrete example, consider administrative searches of regulated businesses. Stuntz defended *Burger*, in which the Court upheld a warrantless police search of a junkyard as authorized by a statute that required junkyards to make certain business records available for police inspection during business hours.<sup>95</sup> Justice William Brennan dissented, arguing that prior precedent that relaxed the Fourth Amendment's standard for searches of "pervasively regulated industries" did not apply here because New York (unlike other states) had not pervasively regulated the business of junkyards.<sup>96</sup> Stuntz responded to this argument by claiming that the facts that Brennan pointed to—namely, that pervasive regulation did not exist—are exactly why *Burger* was rightly decided. Stuntz reasoned: "The key is not whether the business *is* pervasively regulated, but whether it *would* be, or would be to a greater degree, if authority to search were restricted. If so, the targets of the searches would probably prefer less Fourth Amendment protection to more."<sup>97</sup> On this view, the doctrinal formula is "somewhat misstated," because it should emphasize not the *existence* of regulation but the *potential* for regulation.<sup>98</sup>

---

<sup>95</sup> *Burger*, 482 US at 703–04. See also note 78 and accompanying text.

<sup>96</sup> *Burger*, 482 US at 720–21 (Brennan dissenting).

<sup>97</sup> Stuntz, 44 Stan L Rev at 584 (cited in note 2). Note that Stuntz disregarded the Court's stated concern with the diminished expectations of privacy for a regulated business, probably because that explanation is so obviously circular. (If the court did not allow circumvention of the ordinary Fourth Amendment standards, the expectations would reemerge.) See *id.* at 582–83. We ignore this point as well.

<sup>98</sup> *Id.* at 584.

Yet *Burger* reveals the depth of the enforcement problem for the implicit-bargain theory. For the theory implies not only that the potential of regulation is key, but also that the actuality of intensive regulation should work in exactly the *opposite* direction than it does. If the industry is already pervasively regulated, the Court should be enforcing strong Fourth Amendment rights; otherwise, with pervasive regulation, relaxing Fourth Amendment rights produces not only no gain for the citizen but also the worst possible outcome—ceding the government maximum power in both search and nonsearch regulation. Not only should, as Stuntz says, the focus be on whether there is an unexecuted threat of pervasive regulation,<sup>99</sup> but this should also be the *only* situation in which courts relax Fourth Amendment rights. Once the government executes the threat by intensively regulating the industry, courts should reinstate the higher Fourth Amendment standards. Yet we observe nothing of the sort.

In sum, in both the *ex ante* and *ex post* context, we think that there are decisive objections to the implicit-bargain theory.

#### CONCLUSION

Police are different. Because of self-selection into the job of policing, they are likely to have stronger punishment preferences than other governmental agents. This characteristic provides a sound functional basis for allowing legal doctrines, on occasion, to distinguish between police and other governmental agents, demanding more justification when the police conduct a search. At the same time, the higher Fourth Amendment standard is necessary for police only when they are pursuing punitive ends by enforcing criminal law, not for other types of police work.

---

<sup>99</sup> See note 97 and accompanying text.